



UNIVERSITÀ
DEGLI STUDI
DI PADOVA



Università degli Studi di Padova

Human Rights Center 'Antonio Papisca.'

INTERNATIONAL JOINT PH. D. PROGRAMME IN HUMAN RIGHTS, SOCIETY, AND MULTI-LEVEL GOVERNANCE

37th CYCLE.

**DOING JUSTICE FOR PEACE.
VICTIMS' RIGHTS AND *MEMORIAL JUSTICE* IN THE COLOMBIAN TRANSITIONAL PROCESS**

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*A las memorias de las víctimas, cuyos valiosos testimonios y
procesos de resistencia hicieron posible esta investigación.*

A mis familias, la que me crio y la que elegí.

A la divina comedia, por ponerme de pie.

Abstract

In November 2016, Colombia signed a Final Peace Agreement (FPA) that redefined the international standards for alternative penalties. The FPA became a global reference of agreed settlements to armed conflicts and one of the most victim-centered peace agreements ever negotiated. It foresees *Restorative Sanctions*, which combine restorative and retributive approaches to justice and result from a dialogical process involving victims and perpetrators.

Memory is at the core of the first *Restorative Sanctions* proposals. This is ground-breaking because, in previous transitional processes, memory was framed as a complement, an alternative, or a means to achieve justice but never as a form of punishment resulting from the judicial procedure.

Throughout its five chapters, this interdisciplinary research—which combines legal, social, and political approaches—contributes to understanding how the *Restorative Sanctions* comply with the international commitments regarding individual criminal responsibility (Chapter 1); which is the domestic framework of the FPA and the *Restorative Sanctions* (Chapter 2); how should victims participate in designing the sanctions (Chapter 3); how they participated in practice (Chapter 4); why memory won such prominence, and what kind of memory should emerge from the judicial procedures to serve peace and justice (Chapter 5).

Based on qualitative techniques (observing, reading, and questioning) and a grounded theory methodology, this thesis addresses the following question: What lessons can be extracted from this case about the relationship between memory and justice?

By contrasting the theoretical frameworks with their practical unfolding, the thesis contributes to the debate regarding victims' rights and the role of memory in transitional justice. It concludes by listing lessons learned and recommendations for future transitional processes.

Keywords: *Transitional Justice, Memory, Victims' Rights, International Criminal Law, Restorative Sanctions, Peacebuilding, Memorial Justice, Colombia, Armed Conflict.*

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INTRODUCTION

This PhD research analyses the process that designed the *Restorative Sanctions*¹ proposed in the first three Resolutions of Conclusions² unveiled by the Colombian Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP) to understand the relationship between two pillars of Transitional Justice (TJ): memory and justice. As victims' participation is the touchstone of the restorative process, a better comprehension of their involvement is fundamental to grasping the practical unfolding of the peace process.

The *Restorative Sanctions* are one of the greatest innovations of the Final Peace Agreement (FPA) signed in November 2016 between the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC-EP). The peace talks that led to the Agreement are considered 'a global reference for negotiated solutions to armed conflicts' (Nylander, Sandberg, and Tvedt 2018: 8) because they innovatively and successfully identified political solutions to apparently intractable conflicts (Herbolzheimer 2016).

Experts affirm that the FPA 'is almost certainly the most victim-centred comprehensive peace agreement ever negotiated' (Quinn and Joshi 2019, 208). A fundamental pillar for such a statement is the Integral System of Truth, Justice, Reparations, and Guarantees of Non-Repetition (from now on, *The Integral System*), which 'is a mixed transitional justice system' (Olasolo and Ramirez-Mendoza 2017, 1013), that combines the establishment of the JEP with a Truth Commission (*Comisión para el Esclarecimiento de la Verdad*, CEV) and a Special Unit to Find Persons Considered Disappeared (*Unidad de Búsqueda de Personas dadas por Desaparecidas*, UBDP).

Although interinstitutional coordination exists between them, they have different goals and tasks. The JEP deals with the justice component in terms of individual criminal responsibility. Its objective is to sanction individuals responsible for massive human rights violations. *Restorative Sanctions* in this regard should punish perpetrators and contribute to repairing the damages caused by the armed conflict (JEP 2020a).

This type of sanctioning is ground-breaking because 'the compatibility of the restorative sentences with international standards has never been examined in the past' (Levy, 2021). *Restorative Sanctions* play a crucial role since a legitimate transition from war to peace must be grounded on an adequate balance between achieving peace and the ethical and legal imperatives of upholding victims' rights (Uprimny, Sánchez, and Sánchez 2014, 15).

¹ The original name is *Sanciones Propias*. As its literal translation does not reflect its significance, this text uses the name *Restorative Sanctions* to better express its meaning.

² A full description of a Resolution of Conclusions will be offered below.

However, since the signing of the Agreement, *Restorative Sanctions* have faced several challenges affecting their implementation: the national political context, economic challenges, legal debates, and practical issues have obstructed their unfolding. Barely at the end of 2022, the JEP released the first three Resolutions of Conclusions proposing specific sanctioning projects for perpetrators of the former FARC-EP (Resolution of Conclusions 02 of 2022) and of the National Army (Resolution of Conclusions 01 of 2022; Resolution of Conclusions 03 of 2022). A Resolution of Conclusions is a document that finishes the first investigation phase at the Acknowledgment Chamber of the JEP. After a dialogical process between perpetrators and victims (Cote-Barco 2020), the Resolution determines if the perpetrators prosecuted have fulfilled the requirements determined to benefit from the *Restorative Sanctions*. It also presents its findings to a further instance of the JEP, the Tribunal for Peace, which should evaluate the proposed sanctioning projects.

In the three Resolutions, memory plays a fundamental role. Eleven out of the fifteen restorative projects proposed are initiatives that aim to *do* memory about what happened, offering chances to dignify the victims and restituting the presence of disappeared persons. For example, victims³, in one instance, proposed *Historical Memory and Symbolic Reparation* as a criterion for determining the sanctions' content. In practical terms, *Restorative Sanctions* should enhance the public visibility of the committed crimes, of their causes, of perpetrators, with the final goal of re-dignifying the good name of the victims, as well as preserving their life story for posterity (Resolution of Conclusions 01 of 2022: para. 708). Such prominence for memory is a watershed because previous experiences considered it an alternative, a complement, or a means to achieve justice rather than a direct consequence of an ordinary criminal trial. In the Colombian process, memory is proposed as a constitutive element of the punishment issued by the JEP.

Although releasing these sanctioning projects was a huge step, there are still uncertainties regarding how the actual sanctions will unfold, how the verification process will take place, and how these initiatives will be financed. Despite the challenges, 'what is at stake is the possibility of imagining and practising different ways of dealing with the consequences of crimes' (Sandoval,

³ These victims belong to macro-case 003. The JEP has 11 macro-cases designed to answer the macro patterns of criminality. They have the duty to punish the most severe and emblematic crimes that occurred during the armed conflict and also answer to territorial criteria: Case 001 deals with kidnappings committed by FARC-EP; case 002 refers to human rights violations occurred in Tumaco, Ricaurte and Barbacoas, municipalities that belong to the Department Nariño; case 003 is about illegal murderers and disappearances committed by State agents, case 004 prioritises the Urabá region; case 005 investigates crimes committed in the north of Cauca and the south of Valle del Cauca; case 006 is about the extermination of the Political Party *Unión Patriótica*; case 007 judges forced recruitment and use of children and adolescents in the armed conflict; case 008 investigates non-amnestible crimes committed by the public force and the army in collaboration with paramilitaries; case 009 is about crimes committed against ethnic peoples and territories; case 10 punishes non-amnestible crimes committed by FARC-EP, and macro-case 11 is about sexual violence.

Martínez-Carrillo, and Cruz-Rodríguez 2022: 495). Even if the Resolutions of Conclusions do not impose definitive sanctions, studying these projects offers an outstanding opportunity to pin the JEP's rationale. Indeed, they represent the outcome of the first phase of the judicial investigation and constitute the basis for future developments.

Against this backdrop, this PhD research answers the following question: What lessons can be learned from the Colombian case about the relationship between memory and justice?

1. Literature Review ⁴

The FPA has been widely studied due to its contributions to peacebuilding and TJ. However, its practical implications for memory and justice remain understudied. The FPA's main academic discussions revolved around three topics: The compatibility of the Agreement with the International Commitments regarding Human Rights and Individual Criminal Responsibility, the international community's role in the peace process, and evaluations of its implementation. Although some academic papers have discussed the role of victims' memory in the FPA and its relevance for the post-agreement scenario, memory's relationship with justice in the framework of the *Restorative Sanctions* continues to be an unexplored field.

1. 1. The compatibility of the Colombian Agreement with International Standards.

The unfolding of International Criminal Law and the establishment of the International Criminal Court (ICC)⁵ strengthened the commitments of States in terms of individual criminal responsibility. While in the late 1980s and the early 1990s, peace processes could offer blank amnesties for the perpetrators of massive human rights violations, current peace agreements should respect minimum standards of justice (Uprimny, Sánchez and Sánchez 2014: 63; de Currea-Lugo 2021: 106).

This turn of events transformed the dynamics for negotiating peace. Under these circumstances, after four years of formal conversations in *La Habana* (Cuba), in 2016, Colombia signed the FPA. This is the first peace process in the world conducted entirely under the scrutiny of the ICC (Arévalo and Höker 2018: 54). To balance justice and peace, 'the Colombian Constitution upholds the idea that the duty to investigate must be weighed against other specific duties and depends on the specific context' (Sánchez-León 2016a: 174). To conciliate the tension between the duty to prosecute, investigate, and punish and other duties and values (equally essential) such as peace, truth, and victims' rights, the Agreement foresaw *The Integral System*.

⁴ A previous version of the literature review was published in a book edited by the Human Rights Centre 'Antonio Párisca' and the Padova University Press (Gutiérrez-Rodríguez, 2023a). Apart from that document are used in this section.

However, it was unclear if this system respected international standards regarding individual criminal responsibility. As Colombia ratified the Rome Statute in 2002⁶, and the ICC opened a preliminary examination in 2004, the possibility of the ICC moving forward to a formal investigation was a place of academic disclosure (Rincón-Romero 2015; Sánchez-León 2016a; Urueña 2017; Aksenova 2018; OTP 2018; Torres, Ardila, and Suarez 2019). Moreover, as Colombia is also part of the Inter-American System of Human Rights⁷, academic papers examined the Agreement's compatibility with the Inter-American Convention on Human Rights — IACHR (Acosta-López 2016; Seils 2015, 3).

In these debates, the Colombian Constitutional Court played a crucial role. Its decisions were subject of interest for constitutional scholarship that analyzed the rulings that enabled the talks (Ambos 2013; Bernal-Pulido 2014; Ambos and Steiner 2015) and the constitutional shields that protected the Accord after it was reached (Pérez-Medina 2018; Botero-Bernal and Cajas-Sarria 2021; Gutiérrez-Rodríguez 2023c).

Finally, texts discussed the legal status of the FPA and the constitutional consequences of declaring it a Special Agreement under the terms of common Article 3 of the Geneva Conventions of 1949 and its formal presentation to the United Nations Security Council — UNSC (Betancur, 2016; Rojas, 2018).

1. 2. Role of the International Community in the Peace Conversations and its Subsequent Implementation.

Beyond the ICC and the Inter-American system, the international community's role, more in general, has been a topic of reflection due to its crucial contribution to the peace conversations. By actively engaging in the preliminary confidential talks, the international community's involvement settled the conditions for the formal conversations that started in 2012 (Nylander, Sandberg, and Tvedt 2018).

According to Herbolzheimer (2016), the peace conversations had external support but were driven directly by the parties (i.e. Colombian Government and FARC-EP). Four countries were asked to participate formally: Cuba and Norway as *guarantor countries* and Venezuela and Chile as *accompanying countries*. Among other things, the guarantor countries contributed to building trust, offered logistics, and helped solve problems during crises. Moreover, the involvement of

⁵ Unlike its predecessors, the ICC emerged from the consensus of the international community on the creation of an international, independent, and permanent body for the eventual prosecution of those responsible for serious international crimes (Mora, Santiago and Betancourt 2019, 106).

⁶ Colombia was in the radar of the ICC from 1998, when former president Andrés Pastrana signed the Rome Statute. 'Pastrana, who had initiated other peace talks with members of the FARC, believed that the ratification of the Statute could act as deterrent for guerrillas and promote a commitment to the peace process' (Aksenova 2018, 259-260).

international actors such as the observers of the Organization of American States (OAS), special envoys from the European Union (EU) and the United Nations (UN), and experts from many regions that contributed with their technical advising.

The international community's involvement was also relevant during the implementation phase that obviously heavily relied on local political dynamics. In 2018, when the Agreement's implementation was in its initial stages, Iván Duque won the presidential election. He came from a political sector openly opposed to the FPA and affirmed that it would suffer changes during his term (Ustyanowski, 2018). By vetoing some articles of the law that created the JEP, he delayed its establishment for two years and jeopardized its implementation. In response to these efforts to slow down the process, the international community constantly reminded Duque's historical responsibility to implement the FPA fully (Piccone 2019).

Such involvement was agreed upon in *La Habana* by consensus. The FPA foresaw concrete international mechanisms to monitor and verify its implementation.⁸ On this matter, the UNSC 'had to strike a delicate balance between protecting an agreement and respecting Colombia's sovereignty' (Brubaker 2020, 53).

The Inter-American Human Rights System (IACHR 2020) and the EU also supported the implementation of the peace agreement (Amaya-Panche 2021, 5). They called on the State to increase its efforts to implement it fully. After the FPA's signature, the EU bolstered its implementation support via a Trust Fund and a special envoy to monitor and give visibility to this peacebuilding process (Ioannides 2019, 53).

The challenges for the implementation and the consequences of the identified lack of political will to fully implement the FPA will be explored in more detail in the next section. Nonetheless, a preliminary conclusion is that 'the trend in the implementation process would be more precarious without the support [and pressure] of the international community' (Estrada 2021, 300).

1. 3. The Agreement's Implementation

The stage after the FPA's signature was initially called the post-conflict scenario. However, as previous experiences suggest, armed conflicts do not necessarily finish after the signing of agreements, even during the conversation phase, 'these discussions have led some people to suggest the use of the term "post-agreement" instead' (Herbolzheimer 2016, 6).

⁷ On this matter, the Inter-American Commission on Human Rights (2021) published a compendium with the standards in terms of justice, truth, reparation and guarantees of no repetition.

⁸ The United Nations Mission of Verification in Colombia was established on 25 January of 2016, with the specific goal of 'verifying the laying down of arms and, as part of the tripartite mechanism, a definitive bilateral ceasefire and cessation of hostilities following the signing of the peace accord' (Brubaker 2020, 57). However, its mandate was extended. As it was thought to be a brief mission, the parties requested a special condition of not naming it with an acronym, something usual for longstanding missions.

The Colombian armed conflict is one of the oldest and most complex in the world. As the FARC-EP was the guerrilla with the most significant presence in the territory, their abandonment of weapons represented a huge milestone in terms of peacebuilding. Nonetheless, it did not mean an effective transition to peace. Many armed actors, such as paramilitary groups, FARC dissidents (who did not avail themselves of the Agreement and rejected it from the beginning), FARC re-offenders (who initially participated in the process, signed the Agreement, and went back to arms), and the National Liberation Army guerrilla (ELN), still challenge the State. The transformation of the armed conflict is a direct consequence of the ‘lack of readiness on the part of State agencies to fill the security vacuum as FARC units demobilized in 2017’ (Piccone 2019, 7). Other armed groups started new violent processes to win or consolidate control over the left territories.

Based on these circumstances, the International Committee of the Red Cross (2022) identified six internal armed conflicts, including confrontations between the State and guerrillas, the State and paramilitary forces, paramilitaries and guerrillas, and guerrillas and guerrillas. The control of drug trafficking corridors is one of their significant engines. Despite the complexities, it is argued that the current situation is not comparable to the one before the FPA’s signature because FARC-EP dissidents and re-offenders are independent groups with no presence at the national level. Unsurprisingly, the current conflict is less intense and focused on particular regions (Observatorio de Derechos Humanos, Conflictividades y Paz, 2021: 37)

Linked with the previous subsection, it is interesting to acknowledge the official establishment of the Barometer Initiative of the KROC Institute for International Peace Studies of the University of Notre Dame to monitor and verify the Peace Agreement’s implementation.⁹ Their fifth report remarks that five years after the signing of the FPA, it is possible to discern three patterns: first, the commitments that were urgent to consolidate the end of the conflict with FARC-EP—which means the abandonment of weapons and the displacement of former combatants from their zones of domain— ‘were completed rapidly, without prejudice to some issues regarding security guarantees that are still pending’ (KROC 2021, 8). Second, obligations to tackle the problem of illicit drugs and the *Integral System* that was designed to attend to the victims’ rights¹⁰ are ‘advancing and, if they continue at the same pace, should be completed on schedule’ (KROC 2021, 8). On the contrary, commitments in terms of the Integral Rural Reform¹¹ ‘reported minimal progress at the current implementation stage’ (KROC 2021, 8). The same situation applies to the State pledges to guarantee political participation.¹²

⁹ Section 6.3.2. of the Final Agreement.

¹⁰ Points 4 and 5 of the Final Agreement.

¹¹ Point 1 of the Final Agreement. It was designed to face one of the main causes of the armed conflicts: the concentration of land and the inequality of the countryside. See *infra* Chapter 2, Section 4.

¹² Point 2 of the Final Agreement.

More in general, regarding the FPA's implementation it should be noted that 'the levels of violence in Colombia have decreased since the peace agreement was signed. However, violence against social leaders and demobilized ex-combatants and communities has increased significantly' (Amaya-Panche 2021, 1). The security of the former *guerrilleros* is a matter of enormous gravity, and there have been severe threats to the productive initiatives of the signers of peace, increasing the difficulties for their reintegration into society (United Nations Verification Mission in Colombia 2022).

According to Currea-Lugo, 'the central problem of implementation is that its outcome depends, for many reasons, on touching part of the power structure and transforming Colombian political and institutional culture' (2021, 115). Moreover, the difficulties in fulfilling the commitments are also linked to financial challenges. The work of Rodríguez and Martínez argues that 'the fiscal structure of the Colombian State was not adapted to the needs arising from the Final Peace Agreement' (2022, 13).

Furthermore, the justice component faces many challenges as well, mainly regarding victims' participation in the definition of the *Restorative Sanctions* that the JEP must impose. So far, the guidelines of the JEP do not explain in detail the link between the restorative initiatives, the damage caused, and the victims who are consulted in the process for determining the sanctions. Because of these ambiguities, 'it may be the case that *respondents*¹³ carry out reparation activities in places where their victims do not reside, or in regions where they have not committed any acts of victimization' (Sandoval et al. 2022, 24).

In addition to these queries, the work of Vargas and others (2021) shows claims from victims who have participated in formulating the JEP's sanctions. As many of them are still in conditions of economic vulnerability,¹⁴ the issue of reparations to solve their material situation appears as a need of victims that might not be met because the JEP prioritizes collective reparations over individual ones. Most importantly, it has no competence to restitute or adjudicate land.

Although many victims value their participation in the JEP's public hearings, there are concerns about the methodology used to develop the versions offered by *respondents*: some victims argue that the JEP has limited capacity to deeply investigate matters that are interesting for them and their communities, and above all 'they observe that *respondents* do not contribute sufficiently to the truth in these spaces' (Vargas et al. 2021, 5).

Other two areas which were initially positively addressed by the FPA, such as the gender focus and the ethnic approach, equally suffer in terms of implementation because 'achievements [...]

¹³ Translation of the Spanish word 'comparecientes', a soft way found by the JEP to name the perpetrators.

¹⁴ Which in many cases was a structural factor to suffer the victimizing event.

continue to be marginal in respect to the peace objectives and the enactment of victims' rights' (Gómez and Montealegre 2021, 457).

1.4. Victims' Memory in the Final Peace Agreement

Academic literature paid attention to the role of memory in the FPA. However, these articles were written and published before the JEP unveiled the first Resolutions of Conclusions. As the sanctioning projects are so recent, texts analyzing them are practically non-existent.

Most of the academic production focused on the importance of historical memory for the post-agreement (García and Marín 2017; Gonzalez and Sánchez 2018; Delgado 2018); the significance of truth as a pillar of TJ that influences guarantees of Non-Repetition (Palou-Loverdos 2018; Sandoval and Cárdenas 2020; Bermúdez 2022); and the different Colombian initiatives to institutionalize historical memory involving victims (Riaño and Uribe 2016; Sánchez 2018; Wills 2022).

The processes analyzed by these authors are of pivotal importance in establishing the historical memory of the country, which in turn is crucial for the disputes before FPA's transitional institutions. While Sandoval and Cárdenas (2020) briefly reflect on the judicial dimension of memory and the relevance of the JEP for comprehensive TJ, the role of memory in the *Restorative Sanctions* remains a promising gap.

1.5. The Gap in the Literature

The Colombian peace process with FARC-EP and the transitional justice established to guarantee the transition of the former guerrilla was an object of study for many analysts. Due to all its complexities and innovations, Christine Bell affirmed that independently of its implementation, 'reaching a final accord as Colombia did, whatever happened thereafter, remains a significant achievement' (Bell 2016, 166).

The Colombian transition was the center of legal, political, and scholarly debates that paid attention to three main topics: the compatibility of the Final Agreement with the established standards in terms of individual criminal responsibility; the role of the international community in the peace process —during the phase of negotiations and afterwards in the post-agreement stage—; and the FPA's evaluation and monitoring.

Even if there are considerable challenges to implementing the FPA, 'Colombia has broken the false dichotomy between peace and justice. There is no peace without human rights and there are no human rights without peace' (Herbolzheimer 2016, 5). In this regard, the Colombian Constitutional Court was fundamental because its rulings integrated TJ into the Constitution, following a

proportional way of balancing obligations to build peace with the binding duty to investigate, prosecute, and punish.

Notwithstanding the FPA's enormous literature 'in relation to victims' participation, many questions remain as to how to ensure that they take centre stage' (Sandoval et al. 2022, 496). Therefore, the participation of victims in the process of designing *Restorative Sanctions* that strongly refer to memory is a promising gap that will allow a more profound comprehension of their unfolding.

Before unveiling the first three Resolutions of Conclusions, it was impossible to study the structure of the *Restorative Sanctions* and its relation with memory. Analyzing the role of memory and the victim's participation in the first *Restorative Sanctions* proposals addresses a crucial gap regarding the legitimacy of the peace process and its international implications. As there were not yet any sanction projects that linked memory with the punishment of perpetrators, the analyses of victims' memory in the FPA focused on its relationship with the pillar of Truth and Non-Repetition, overseeing its relationship with Justice.

2. Theoretical Framework

The theoretical framework relies on five pillars: Memory, Transitional Justice, Restorative Justice, Retributive Justice, and —as a desired outcome— Transformative Justice. Each of these approaches is closely related to the others and are transversal to the peace process.

Regarding the first pillar, whether *individual*, *common*, *collective*, or *official*, memory is porous, multiple, and always unfinished; it relates to human actions that bring subjectivities, emotions, communications, interests, narratives, social conditions, and power relationships into play (Gutiérrez-Rodríguez 2020b). While an individual memory refers to personal remembrances of an event, a *common memory* 'aggregates the memories of all those people who remember a certain episode which each of them experienced individually' (Margalit 2004: 51) In contrast, a *shared memory* refers to reminiscences that touch us regardless of whether they happened to us (Margalit 2004: 52). A *shared memory* can also be a *collective memory*, a 'representation of the past, which demarcates the boundaries between social groups, and at the same time, represents the fabrics from which social (thus, political) identity is woven' (Moskovičević 2022: 23). These representations might have opposed readings of what happened. Moreover, even if society agrees on the facts, there might be different versions regarding who is responsible for those facts, the legitimacy of the motives behind the events, or the needed actions to overcome them; for instance, if it might be better to remember or to forget and move on.

Memory is a contested field in which different readings of the past influence the present and may determine potential futures. In fact, the struggle for the past is always a struggle for the future because speaking about social memory means speaking about memories (in plural) that are in constant dispute (Jelin 2017). However, memorial struggles do not always have the same intensity, and transitional processes¹⁵ can exacerbate them.

Memories emerging from transitional contexts can be plural and acknowledge differences through peacebuilding and democratic aspirations, or they can impose a Manichean version of the past through a sense of community that excludes those who disagree. Ideally, peacebuilding memories should amplify victims' narratives, acknowledge their pain and advocate for social transformations (Wills 2022). Consequently, this research acknowledges that 'a peace process should ... have various strategies for "dealing with the past", recognizing that future stability may rest on coming to terms with the legacy of conflict' (Strömbom and Bramsen 2022: 1244).

Regarding the second pillar, it should be noted that TJ 'is fully recognized by the rules and standards of contemporary international law' (Salvioli 2020: para. 15). Thus, national authorities determining *Restorative Sanctions* are bound to international standards. In other words, the sanctions imposed by the JEP shall be identified in line with international rules. Moreover, international law qualifies TJ as an exceptional approach to justice framed in the context of a shift toward democracy. Indeed, it emerged as a 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003, 69). According to the former Deputy Prosecutor of the ICC:

The concept of 'transitional justice' embraces a full range of processes that societies employ to deal with the legacy of past human rights abuses and to achieve accountability, justice, and reconciliation. To fulfil these aims, transitional justice systems commonly include four measures: criminal justice, mechanisms for the establishment of the Truth, reparations programs, and guarantees of non-recurrence (OTP 2018, 4).

These words of the former deputy prosecutor of the ICC enshrine a retributive paradigm in line with the third pillar of the theoretical framework, i.e. retributive justice (Curi 2015, 43). From this perspective, *Restorative Sanctions* should not only repair the damages but also be a punishment

¹⁵ According to a former Deputy Prosecutor of the JEP, there is a difference between a transitional process and transitional justice because the latter specifically refers to the judicial formula found during the transitional process, which is broader (Córdoba 2024).

for the crime committed. Accordingly, for Colombia to fulfill its international obligations regarding individual criminal responsibility, it must offer fair retribution for the offenses committed.

Deciding what a fair retribution is in line with international law may appear to be a challenging task. For example, international bodies and specialized courts have set proportional prison sentences as an accepted standard to evaluate the adequacy of punishments for serious crimes and grave human rights violations. However, in transition contexts, judicial responses to mass violence must consider the community's social needs and other pressing interests of that particular historical moment (Mayans and Hola 2020).

In order to do this, it is necessary to establish a dialogue within communities and victims, which is made possible by embracing a restorative paradigm of justice. The latter is the fourth pillar of the theoretical framework because it is included at the core of the FPA. Consequently, this is the first time that institutionalized *Restorative Sanctions* are considered compatible with international standards of individual criminal justice because 'all international criminal tribunals established so far have relied on retributive grounds, where victims' participation and right to redress were minor' (Levy, 2021).

In a nutshell, to determine a sanction under the retributive paradigm three questions must be answered: What law was broken? Who broke that law? What should be the punishment for breaking it? On the other hand, restorative justice asks: who was harmed? What harm was caused? and how is it possible to repair or restore the harm done? (Zehr and Gohar 2015). Despite their differences, both paradigms share a common ground. They recognize that perpetrating a crime causes an imbalance in society; re-establishing the broken balance is a mandate; the perpetrator is a moral agent responsible for their actions; there must be proportionality between the triggering event and the penalty; consequently, the offender has some obligations. Based on these commonalities, the FPA designed the *Restorative Sanctions* mixing restorative and retributive justice. The bridge between the two is the victims, whose participation is mandatory but whose opinion is not binding, i.e., victims have a voice without veto (Sentence C-080 of 2018, Colombian Constitutional Court).

Restorative Sanctions shall have the form of Works, Actions, and Activities with Restorative Content (*Trabajos, Obras y Acciones con Contenido Restaurador-Reparador* — TOAR). However, they are very different from general social projects. The former features mandatory victims' participation in designing sanctions, while the latter does not. Indeed, 'the restorative nature of these sanctions depends [...] on how victims and affected communities perceive them. Only meaningful participation can respond better to victims' needs, contributing in this way to a greater sense of ownership over the TJ process.' (Mayans and Holá 2023, 20). In other words, the victims' participation in designing the sanctions is the touchstone of the whole restorative process.

The last pillar of the theoretical framework is Transformative Justice because ‘the law that regulates the JEP states that [...] the reparations will not be limited to returning victims to the situations they were in before the armed conflict; rather, they should aim at structural change’ (Huneeus and Rueda Sáiz 2021, 224). In that sense, restoring the damages goes beyond returning to the preexisting situation (something that usually is impossible after killings and situations that can not be rolled back). According to Uprimny (2009), re-establishing the initial situation is feasible in well-functioning societies, while, in contexts like Colombia, doing so might place people in states of vulnerability and eventually lead to new victimizations. Justice should create opportunities in order to promote a better future thus transforming the reality that placed the victims in their initial conditions of vulnerability (Uprimny 2009, 638).

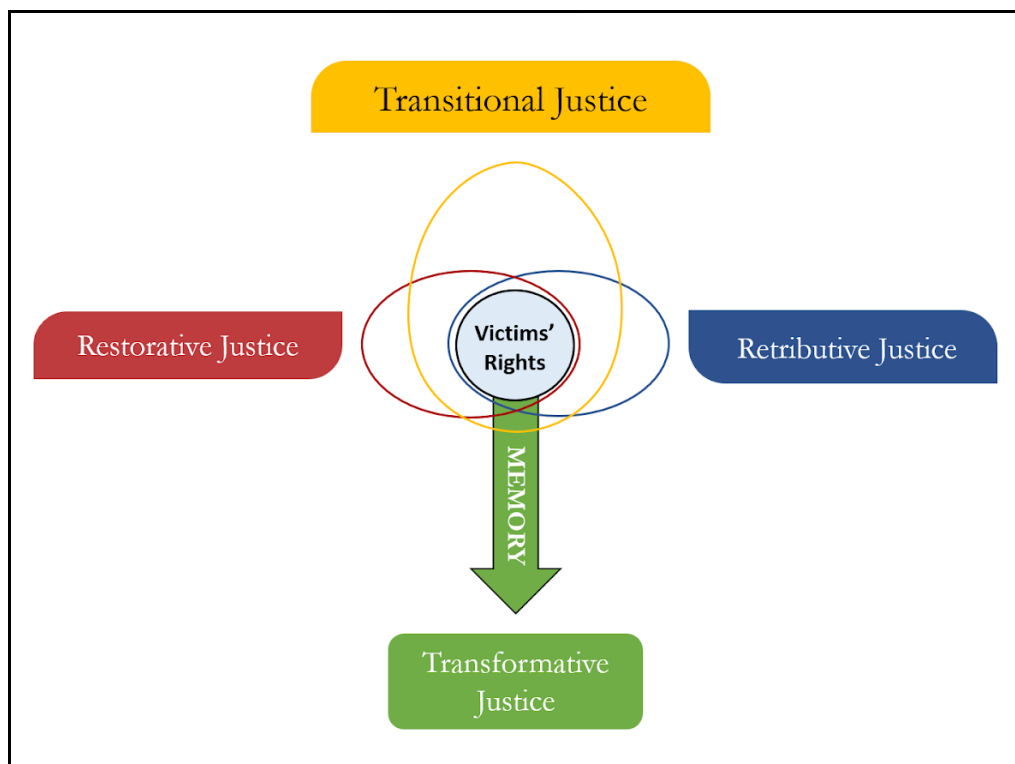


Image 1. Visual representation of the theoretical framework. Own elaboration.

To sum up, the theoretical framework is based on five pillars: memory, transitional justice, retributive justice, restorative justice, and transformative justice. Each pillar is necessary to achieve the objective of the *Restorative Sanctions*, which is restoring the links that were broken in the development of the armed conflict and modifying the structural conditions that originated it.

3. Research Design and Research Questions

The research conducts a qualitative analysis of the *Restorative Sanctions* proposed in the first three Resolutions of Conclusions. The investigation will pay particular attention to the victims' participation in the process, an essential element of transitional justice and a fundamental pillar of the FPA.

The study will provide insights that contrast the initial theoretical design of the sanctioning regime with the practical challenges faced by the peace process during its implementation. As the FPA implies an interaction between international and domestic law, the research will be based on a multilevel¹⁶ and interdisciplinary perspective integrating judicial, social, and political approaches.¹⁷

This thesis' main research question aims to identify lessons that can be learned from this case on the relationship between two pillars of TJ: memory and justice. In order to answer this question, two subsets of specific inquiries were identified. The first set deals with theoretical issues, while the second analyzes their implementation in practice. The following questions comprise the theoretical subset:

- a. How do the *Restorative Sanctions* comply with the international commitments regarding individual criminal responsibility?
- b. What is the Constitutional framework of FPA and its *Restorative Sanctions*?
- c. What are victims' rights, and how should they participate in designing the *Restorative Sanctions*?

The following questions integrate the second subset:

- d. How did victims participate in designing the first proposed *Restorative Sanctions*?
- e. Why and how has memory obtained such relevance in the proposed *Restorative Sanctions*?
- f. What kind of memory should be produced by the *Restorative Sanctions* to serve justice?

¹⁶ The multilevel approach recognizes that current governance systems have authority's dispersion among local, regional, national, and supra-national powers (Daniell and Kay 2017: 4). As explained above in Section 1.2, the international community played an essential role in the peace talks that led to the FPA and, subsequently, in monitoring and supporting its implementation. Regarding the justice model, applying positive complementarity, the ICC was a key actor (see Chapter 1). This multilevel approach is also evident from the constitutional point of view through concepts such as the constitutionality block (see below Section 2.3. in Chapter 2) and the conventionality review that the Court did to integrate the FPA into domestic law (see Chapter 2).

¹⁷ The thesis is interdisciplinary because it answers a complex question that cannot be satisfactorily addressed using a singular method or approach (Klein 1990). Accordingly, it does not search for single-factor explanations (Graff 2016: 797). Moreover, this interdisciplinary character is in line with the doctoral program <https://unipd-centrodirittiumani.it/en/attivita/International-Joint-PhD-Programme-Human-Rights-Society-and-Multi-level-Governance-Cycles-31-37/1405>.

- g. How does the memory proposed in the *Restorative Sanctions* interact with the judicial and constitutional frameworks?

The subset division between theoretical and practical issues is reflected in the thesis structure. While the first three Chapters address the former, the last three focus on the latter. Accordingly, the first Chapter explores the international dimension of the FPA. As mentioned above in Section 1.2., the international community was highly involved in the peace process, both in the conversations and the implementation stage of the FPA. In that sense, determining international justice standards is fundamental to understanding the victims' rights. It will allow an analysis of the complementarity of the *Restorative Sanctions* with international law and, subsequently, provide insights regarding the legitimacy of the process from an international perspective.

The second Chapter tackles the domestic dimension of the FPA and the constitutional framework of the *Restorative Sanctions*. The Chapter will show how the Colombian Constitution dialogued with international law and incorporated the FPA in a way that respects the State's duty to prosecute and punish massive human rights violations with the obligation to guarantee a peaceful order.

The third Chapter determines the significance of victims in transitional justice and the role they should play in the *Restorative Sanctions*' design according to the findings of the first two chapters of the thesis. These three chapters tackle the first subset of specific inquiries. The subsequent chapters delve into the questions from the second subset, focusing on the implementation analysis, i.e., what happened in reality.

Consequently, the fourth Chapter describes how victims effectively participated in designing the proposed *Restorative Sanctions* in Colombia. Based on both official reports on victims' participation and semi-structured personal interviews, the Chapter analyzes victims' participation, their main achievements, and the most relevant challenges they encountered. It will also examine the interaction between the victims and the JEP, tackling, on the one hand, the former's approach to the court (based on their claims and statements before both the JEP and in the public debate) and, on the other hand, the latter's reactions *vis a vis* victims' expectations.

Based on this prominent role of memory in *Restorative Sanctions*, the fifth Chapter assesses its compatibility with international criminal law standards. In other words, the Chapter appraises memory's capacity to achieve the 'objectives of retribution, rehabilitation, restoration and deterrence,' identified by the ICC's Office of the Prosecutor (2018: para. 142). Furthermore, chapter 5 describes how the memorialization proposed in the first three Resolutions of Conclusions interacts with the constitutional framework and, more precisely with victims' constitutionally protected rights, such as the right to (i) transparency of the selection and prioritization process; (ii) a

serious, impartial, and effective investigation, completed within a reasonable time and with their participation; (iii) the existence of an appeal to challenge the decision on the selection and prioritization of their case; (iv) specialized counsel; (v) to the truth; (vi) to full reparation and; (vii) to know where the remains of their relatives are located (Sentence C-579 of 2013, para. 9.9.1).

Finally, based on the previous findings, Chapter six will present a list of recommendations and the lessons learned regarding the relationship between memory and justice, as pillars of TJ. It will expose the findings regarding the kind of memory that should be produced by *Restorative Sanctions* to serve justice. Only meaningful victims' participation can build a polyphonic (Mastromarino 2024) peacebuilding memory that contributes to repairing the damages of the armed conflict and judicially punishing the perpetrators. Three clusters of recommendations integrate the last part of the thesis: The first one regards procedural modifications to increase victims' participation; the second refers to harmonizing rules to avoid a differentiated treatment among victims; and the third one presents recommendations that aim for better involvement of victims in the construction of truth.

4. Methodology

This research is interdisciplinary because it combines legal, social, and political approaches. As mentioned in the literature review, the gap identified is in the implementation of transitional justice. This focus in practice necessarily involves recourse to different disciplines. Moreover, the intrinsically interdisciplinary nature is self-evident in the TJ pillars: Truth, Justice, Reparations, Guarantees of Non-Repetition, and Memory (Salvioli 2019). As power relationships influence the final TJ formula, a political approach is needed. Justice is inherently related to law, but its impacts regarding the other pillars require a social perspective, which must also be included.

Furthermore, since this is quite a recent phenomenon, the identified gap in the literature justifies the necessity of adopting a bottom-up perspective. In a nutshell, instead of verifying how concepts and theories are either confirmed or denied by practice, this research collected data using qualitative techniques in order to critically discuss concepts and theories relevant to transitional justice in general. According to Corbetta (2015), qualitative techniques include reading, observing, and questioning. Regarding the first one, the research gathered information from academic papers, reports of Human Rights Organisations, and judicial documents. Regarding the second, the observation regarded forms and practices of victims' organizations,¹⁸ for example, during meetings

¹⁸ See chapter 4, section 3.

of victims at Bogotá's Center for Memory, Peace and Reconciliation (CMPR), and public interventions of JEP's judges, victims, and experts, as during academic conferences.¹⁹

In relation to the third technique, 22 victims were interviewed and contacted during the phase of observation, mainly at the CMPR. Not all the persons that were approached granted an interview because this is a very sensitive matter, and it is dangerous for their safety as violence continues in the country. Some interviews were anonymous, by choice of the victims. In contrast, others specified that it was crucial to state their names and the ones of their relatives as an exercise of memory. Not all the interviews were individual; in order to be emotionally supported, some preferred to speak in the presence of friends, family and/or other members of the organization they are a part of. Sometimes, this resulted in a dialogue, which might appear to spoil the individual character of the interview. However, methodologically, it contributed to the research because it gave rise to a collective reconstruction of facts and meanings, in line with the definition of collective memory herein adopted.²⁰

Moreover, eleven experts/practitioners were also interviewed. These included two magistrates of the JEP; a former JEP's deputy magistrate (*Magistrado Auxiliar*); advocates representing victims before the JEP; the former director of the Colombian Mission of the United Nations Mine Action Service (UNMAS)²¹ who participated in the design of one of the Restorative Projects proposed in the Resolutions of Conclusions; and the team's leader of the Kroc Institute for International Peace Studies²², in charge of monitoring the implementation of the FPA's point on victims.

Although it might be argued that this is a small sample and therefore not representative, representativeness does not only have to do with quantitative issues. In fact, a small group of testimonies can offer keys to interpreting a phenomenon and represent specific dynamics (Carnovale 2007). Obviously, the testimonies themselves are not enough to build this type of representativeness, and that is why the research is articulated and contrasted with other sources such as scholarly papers, official documents, and human rights reports. Furthermore, considering that this research focuses on the restorative character of *Restorative Sanctions*, although oral sources have limitations related to the veracity of the events, they are crucial to account for the perception of those who suffered the damages (Carnovale 2007: 161).

¹⁹ Such as: Lemaitre, J., Ramelli, A., & Uprimny, R. (2024, April 24). *Intercambio de Aprendizajes*. La verdad de la JEP: Definiciones y Alcances, Bogotá, D.C., Colombia; Castillo, J., Restrepo, N., Vega, L., Córdoba, Á., and Alape, P. (2024, March 21). *Retos de la Justicia Restaurativa*; KROC Institute for International Peace Studies. (2024, April 17 & 18). *International Symposium on the Challenges and Opportunities for the Implementation of Restorative Justice in Colombia*.

²⁰ See *supra* Section 2.

²¹ <https://www.unmas.org/en/programmes/colombia>.

²² <https://peaceaccords.nd.edu/barometer>.

The data gathered using qualitative techniques was then analyzed following a grounded theory approach, according to which the theories are constructed based on the findings. Grounded theory foresees a coding process structured in different cycles that are initial, intermediate, and advanced (Birks and Mills 2023). ‘Codes are labels that assign symbolic meaning to the descriptive or inferential information compiled during a study’ (Miles, Huberman and Saldaña 2020: 62). This operation was conducted in this research using the software for qualitative analysis *Atlas.Ti*.

It should be underlined that during the initial cycle, *in vivo* coding was employed, using memos and notes to highlight the parts that intuitively seemed the most significant. This activity was carried out on the basis of a list of predetermined codes, which were then edited and enhanced later. During the intermediate cycle, the interviews’ transcripts were systematized using *Atlas.Ti* to identify patterns and organize the quotes and ideas shared by victims and experts. Finally, the advanced cycle linked the testimonies to information gathered through observation and reading, which includes relevant scholarship, to the point of theoretical saturation. The latter ‘is the point at which categories are sufficiently developed that no new concepts are introduced through the process of concurrent data generation/collection and analysis’ (Birks and Mills 2023: 176). In the context of this research, theoretical saturation supports the sample’s representativeness.

CHAPTER 1:

THE COMPATIBILITY OF *RESTORATIVE SANCTIONS* WITH INTERNATIONAL CRIMINAL STANDARDS: EXPANDING THE NOTION OF CRIMINAL JUSTICE ²³

This Chapter explores the international dimension of Colombian *Restorative Sanctions*, addressing the standards they should fulfill from an International Criminal Law perspective. To do so, it chronologically analyses the relationship between the country and the ICC, which has been a relevant actor in the peace conversations.

The text focuses on the ICC because it had an active role due to the preliminary examination opened on the Colombian situation from 2004 to 2021. Furthermore, the Colombian situation was the ICC's most extended preliminary examination, influencing the transitional justice outcomes and the OTP's position.

As the Chapter will prove, the *Restorative Sanctions* were influenced by the ICC's concern about not leaving unpunished crimes that occurred in Colombia under its jurisdiction. In its interaction with Colombia, the ICC clarified the limits of alternative penalties in transitional justice scenarios. It expanded its notion of punishment to include restorative measures as a valid form of penalty that respects international criminal standards if some conditions are given.

1.1. Introduction

²³ A previous version of this text was published in the *Journal of International Criminal Justice* of the Oxford University Press, vol 21, no 5 (Gutiérrez-Rodríguez 2023b)

Ending armed conflicts through negotiated transitions raises tensions between justice and peace processes that challenge our understanding of International Criminal Law. Before the early 1990s, analysts used to think it was necessary to choose one or the other when the State's duty to guarantee a peaceful order was put under strain by the duty to investigate, prosecute, and punish perpetrators of massive human rights violations. Under the premise that peace and democracy were more important than punishing the perpetrators, the international community accepted transitions that offered blanket amnesties (Uprimny, Sánchez and Sánchez 2014: 63).

However, the unfolding of international criminal law mechanisms has strengthened States' commitments towards individual criminal responsibility. Nowadays, there is widespread consensus that a legitimate transition should respect minimum standards of justice because 'the need[s] of peace can and should be accommodated with demands of justice' (Krzan 2016: 87). Nonetheless, determining if a transitional process respects such standards remains problematic. Practical and political difficulties challenge that theoretical consensus. In that context, the International Criminal Court (ICC) established through the Rome Statute is of particular relevance because it emerged from the international community's agreement to create an international, independent, and permanent body for the eventual prosecution of those responsible for the most serious international crimes (Mora, Santiago and Betancourt 2019: 106).

Within this framework, the present Chapter analyses the interactions between the ICC and Colombia from 1998, the year in which the country signed the Rome Statute, to 2022 when the ICC engaged in a more robust positive complementarity approach after signing a Cooperation Agreement in 2021 that closed the preliminary examination it had on the country.²⁴ The Cooperation Agreement represents a turning point in a dynamic relationship that enlightens what the ICC considers sufficient to satisfy international standards of justice in transitional contexts. This Chapter offers a chronological reconstruction of events, analyzing the evolution of the OTP's position regarding the question of whether Colombia is genuinely administering justice or if it is necessary for the ICC to open a formal investigation due to the lack of willingness or capacity to prosecute crimes under its competence at the national level. At the ICC, the OTP 'is responsible for determining whether there is a reasonable basis to proceed with an investigation' (OTP 2013: para. 1). The legal instrument for doing so is preliminary examinations, which aim 'to collect all relevant information necessary to reach a fully informed determination' (OTP 2013: para. 1). Relevant to this decision is the principle of complementarity —the ICC as a court of last resort— and the concept of gravity (Williams 1999: 390; Schabas and El Zeidy 2016: 785). Both elements can be

²⁴ Cooperation Agreement between The Office of the Prosecutor of the International Criminal Court and the Government of Colombia, 28 October 2021. Available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf>

found in Article 17 of the ICC Statute, which establishes the framework for determining when a case should be inadmissible before the Court. According to Article 17, the ICC has the competence to investigate a case when it is of sufficient gravity to justify further action by the Court, and either the case is not being investigated or prosecuted by a State that has jurisdiction over it or the State is unwilling or unable *genuinely* to carry out the investigation or prosecution. Consequently, the Court is authorized to act only when the national proceedings are not genuine. (Mayans-Hermida and Holá 2020: 1109). As previous decisions of the ICC have pointed out, a state might have conducted investigations or prosecutions, but such actions should be consistent ‘with an intent to bring the person[s] concerned to justice.’²⁵ meaning that the complementarity assessment evaluates the quality and the motives of national proceedings (Schabas and El Zeidy, 2016). The questions regarding the unwillingness and inability (and its genuineness) of national proceedings only make sense if such proceedings and prosecutions exist.²⁶ If they do not, a condition of ‘inaction on the part of a State having jurisdiction ... renders a case admissible before the Court’²⁷.

In the Colombian situation, the OTP ‘concluded that there [was] a reasonable basis to believe that crimes against humanity and war crimes [had] been committed’ (OTP 2012, para. 152), meaning that the gravity condition was fulfilled.²⁸ However, domestic proceedings were initiated to investigate and prosecute such crimes, particularly against FARC-EP leaders and the ELN (OTP 2018, para. 139). In contrast, there was scarce domestic prosecutorial activity regarding the persons who might bear the greatest responsibility in the military hierarchy (OTP 2018, para. 68). As at least partial activity could be demonstrated (OTP 2021, para. 5), the OTP needed to determine the genuineness of the national proceedings. In doing so, the establishment of the JEP was particularly relevant: The former Deputy Prosecutor explained that how the JEP dealt with the Rome Statute crimes would ‘obviously affect the OTP’s assessment of the admissibility before the ICC’ (OTP 2018, para. 86)

Against this backdrop, this Chapter analyses the evolution of the OTP’s reasoning to determine if a formal investigation was necessary to pursue crimes that occurred in Colombia under the jurisdiction of the ICC. To do so, the Chapter contrasts changes in the political context with the actors’ interpretations of norms and principles, paying particular attention to ICC communications. It also considers the means used by the ICC to pressure the transitional justice outcomes in the

²⁵ Judgment of the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, Gaddafi and Al-Senussi (ICC-01/11-01/11-565 OA 6), Appeals Chamber, 24 July 2014, para. 221.

²⁶ Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Katanga et al. (ICC-01/04-01/07-1497 OA 8), Appeals Chamber, 25 September 2009, para. 78.

²⁷ *Ibid.*, para. 2.

²⁸ ICC’s Statute, Art. 17. (1)(c).

country and the national responses that such influence produced. The Chapter consists of four parts: Section 1.2. recounts the history of Colombia between 1998 and 2012 when the peace negotiations with the FARC-EP started in *La Habana*, Cuba; those precedents are highly relevant to contrast its later course. Section 1.3. details the OTP's concerns regarding the peace conversations. Section 1.4. addresses the meaning of the Cooperation Agreement that closed the preliminary examination in October 2021. Finally, Section 1.5. describes the system of sanctions and the criteria used for case selection that has full support from the ICC.

1.2. Colombia's History with the ICC before the Peace Conversations of *La Habana* (1998–2012)

The pulses between war and peace mark the influence of the ICC in Colombia. In 1998, former President Andrés Pastrana (1998–2002) signed the Rome Statute during a previous peace negotiation with the FARC-EP in the *El Caguán* process. However, there was reluctance to ratify it as it was feared that having an international court pushing for justice measures would limit the State's capacity to offer amnesties.

The ratification only occurred after the negotiations had officially failed (Boffey 2015: 97). It was accompanied by a six-point declaration expressing the conditions under which Colombia adhered to the treaty because 'the Government thought that the jurisdiction of the Court would deter future peace talks' (Sánchez 2016b: 5). The first point of the declaration explicitly stated that 'none of the provisions of the Rome Statute [...] prevent the Colombian state from granting amnesties, reprieves or judicial pardons for political crimes.'²⁹ The second expressly stated that Colombian citizens should have their right to defense fully guaranteed, which includes the right to be assisted by counsel. The third point clarified the term 'otherwise' included in Article 17(3) of the ICC Statute to specify that, to analyze admissibility, 'the determination of the State's ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.'³⁰ Along the same lines, the fourth point of the declaration emphasized that the ICC's competence was exclusively complementary, allowing Colombia to declare 'that none of the provisions of the Rome Statute alters the domestic law.'³¹ The fifth point avails the provision expressed in Article 124 of the ICC Statute, delaying the competence of the ICC regarding war crimes for seven years.³² Finally, the sixth point specifies the diplomatic means to discuss cooperation and assistance requests.

²⁹ United Nations Treaty Collection, 'Chapter XVIII: PENAL MATTERS' 10. Rome Statute of the International Criminal Court', Colombian Declaration, presented 5 August 2002, available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en, para. 1.

³⁰ *Ibid.*, para. 3.

³¹ *Ibid.*, para. 4.

³² *Ibid.*, para. 5.

Such measures (particularly points one and five) were interpreted as a prelude to impunity in a strategic framework to strengthen the Government's negotiating capacity in possible future peace processes (Human Rights Watch 2002). Despite the criticisms, the points expressed in the declaration played a fundamental role in incorporating the Rome Statute into the domestic legal order and determining its relationship with the ICC.

Two years after the Rome Statute's ratification, the OTP led by Luis Moreno-Ocampo opened a preliminary examination, *proprio motu*, to analyze the Colombian situation. This was highly relevant because 'in order to ensure compliance with the Rome Statute, all transitional justice laws established post-2004 were influenced by the consultation with the OTP' (Björkdahl and Warvsten, 2022: 647).

In 2003, former President Álvaro Uribe (2002–2010) started formal conversations to demobilize paramilitary groups. Those negotiations introduced the notion of transitional justice into the Colombian debate (Uprimny, Saffon and Botero 2006). They showed the first effects of the ICC at the national level because 'the OTP was an influential force shaping the deal offered by the Government to the paramilitaries' (Urueña 2017: 107). As leaked communications proved, 'during the negotiations, the prospect of ICC intervention was an acute concern for the paramilitaries' (Urueña 2017: 107-108). The fear of the ICC's scrutiny limited the Government's ability to act during peace negotiations with the paramilitaries, eventually leading to their official disarmament and demobilization (Bocchese 2020: 158). To alleviate the possible ICC intervention, the Government responded with the *Law of Justice and Peace*, which foresaw prison time and answered to the pressure of human rights organizations who strongly opposed a transition without punishment for the paramilitary as it was initially planned through an Alternative Sentencing Bill (Urueña 2017: 108-109).

The *Law of Justice and Peace* established the first steps to institutionalize TJ. For instance, it created the National Commission for Reparation and Reconciliation (*Comisión Nacional de Reparación y Reconciliación*, CNRR), which was responsible for unfolding memory policies to guarantee the right to truth (Zuluaga 2013: 75). To avoid impunity, the *Law of Justice and Peace* created exceptional sanctions of a maximum of eight years and a minimum of five for paramilitaries guilty of grave crimes. Under ordinary conditions, those crimes would have resulted in imprisonment for several decades.

The system was thought of from a maximalist approach, aiming to condemn all the paramilitary who joined the process. However, such a task proved impossible due to material difficulties, and only the most responsible were prosecuted and sanctioned. Nevertheless, the process seemed to be respecting international standards.

Despite the formal demobilization of paramilitaries, their structures were not dismantled. Many groups that had before worked coordinately under the direction of the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC) kept control of their territorial domains. Such groups started to be referred to by the State as Bacrim (which stands for *Bandas Criminales*). They inherited the power of the paramilitary demobilized through the *Law of Justice and Peace*, which is why they are also referred to as neo-paramilitaries or paramilitaries of the third generation (Rodríguez 2017).

In addition to the unresolved paramilitary problem, the ICC became aware of the Colombian military's commission of crimes against humanity in what became known as 'false positives.' Soldiers systematically recruited civilians who were subsequently killed and presented as combat casualties. From a 'body count' perspective, it was a strategy to inflate the numbers to artificially create the impression the State was winning the war (Gutiérrez 2019).

In 2012, at the end of the period studied in this part of the Chapter, the human rights situation and the fact that crimes under ICC jurisdiction continued to be committed were considered sufficient reason not to close the preliminary investigation and to increase the ICC's pressure on the country (OTP 2012) under the leadership of a new Prosecutor: Fatou Bensouda. To sum up, before the commencement of the *La Habana* peace process, with a preliminary examination opened by the ICC, alternative penalties were accepted to deal with the tensions between peace and justice.

However, the concept of alternativity referred to an exceptional/lower period of imprisonment that would be imposed only on those most responsible. This perspective was in line with a relatively widespread consensus according to which:

While there is recognition on the necessity of adopting a broader and holistic approach to sanctioning extraordinary crimes, particularly in transitional justice (TJ) processes, it is generally agreed that criminal sanctions remain essential as a response to the violations of *jus cogens* norms and serious violations of [International Humanitarian Law] and [International Criminal Law], and that imprisonment represents a central element in sanctioning these crimes (Mayans-Hermida and Holá 2020: 1121).

1.3. The Concerns of the ICC Regarding the Peace Process of *La Habana* (2012–2021)

When the peace process with FARC-EP started, Fatou Bensouda 'was under severe pressure to prove that the ICC did not suffer from an "African bias."' To many, Colombia looked like an ideal candidate to expand the ICC's geographical scope.' (Urueña 2017: 116). This situation might explain some actions the OTP took to influence the final outcome of the peace negotiations. In a

very unusual move—which skipped the established diplomatic channels specified in the declaration presented by Colombia to ratify the Rome Statute—the ICC sent direct letters to the President of the Colombian Constitutional Court. In them, Bensouda mentioned two things: first, if Colombia suspended the sentence of imprisonment for those most responsible for serious international crimes, it would violate its ICC obligations. Secondly, the fact that the OTP investigated only those who were most responsible should not be interpreted as a precedent authorizing States to do the same (Uprimny 2013).

These concerns were raised in response to one condition imposed by FARC-EP to negotiate. They ‘entered the Havana Negotiations rejecting imprisonment as a punishment and pushed for a sentencing regime that would not strip them of political agency or limit their ability to participate in Colombian politics’ (Björkdahl and Warvsten, 2022: 649). A vital element in the Government’s acceptance of such a red line was including the national military as subjects that could join the transitional outcomes of the peace process (Björkdahl and Warvsten 2022: 650). In response to outcry from victims’ organizations, the State argued that militaries were relevant actors during the armed conflict, holding information that could contribute to satisfying victims’ right to truth (Gutiérrez 2019: 23). Thus, the peace process allowed perpetrators of massive human rights violations to benefit from a sanctioning regime that excluded imprisonment, opening a debate regarding the role of sentences in the complementarity assessment done by the ICC. While it was clear that pardons and amnesties were unacceptable leniencies, it was necessary to study the adequacy of the restorative penalties that would be imposed at the national level in light of the seriousness of the international crimes committed (Mayans-Hermida and Holá 2020: 1104). By 2015, the OTP’s Deputy Prosecutor, James Stewart, clarified the position of the ICC publicly declaring in an academic conference that: ‘[w]hile the Rome Statute does provide for sentences in ICC proceedings, it does not prescribe the specific type or length of sentences that States should impose for ICC crimes. In sentencing, States have wide discretion’ (OTP 2015: 11).

When the FPA was made public, Fatou Bensouda expressed support for it in a public statement where she ‘note[d], with satisfaction that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute’ (OTP 2016). Although such a statement may suggest that the tensions were over, some details raised concern at the ICC regarding the national implementation of the FPA. By 2018, the Deputy Prosecutor expressed specific doubts regarding the statutory law that would give birth to the JEP: ‘[o]f particular concern were the definition of command responsibility, the definition of “grave” war crimes, and how sentences involving “effective restrictions of freedoms and rights” should be implemented’ (OTP, 2018: para. 89).

1.3.1. The Definition of Command Responsibility

In the *amicus curiae* submitted to the Colombian Constitutional Court, the OTP expressed worries because the Colombian law created a legal space for high-ranking commanders to avoid criminal responsibility (OTP 2017, paras. 12—28).³³ Moreover, the domestic legal definition of command responsibility was too restrictive to meet the international criteria: on the one hand, it avoids the standards of ‘should have known’ and, on the other, it adds conditions of effective control within the area of responsibility assigned to the unit under his command; legal and material capacity to issue, modify and enforce orders; and updatable knowledge to determine if high-ranking officials are responsible.

Regarding that controversy, in 2018, the Constitutional Court determined that the definition offered by JEP’s Statutory Law agreed with the Constitution, arguing that rather than checking if the definition adopted the formula of the Rome Statute —evidently it did not— the relevant issue was analyzing if such an understanding of command responsibility would affect Colombia’s duty to investigate, prosecute and punish. Two arguments grounded its decision: first, according to the Court’s interpretation, the Rome Statute does not require specific liability models for domestic jurisdictions. Secondly, Colombian domestic law includes other modes of liability, such as perpetrator-by-means, coauthorship, instigation, and omission (Ospina and Pappier 2019).

The first indictment sanctioned by the JEP against the military followed and developed the interpretation of the Constitutional Court. It concluded that the controversial definition of command responsibility is ‘an auxiliary criterion of interpretation’ and that under ‘a systematic and teleological interpretation of the norm ... [such provisions] cannot reduce the scope of hierarchical superiors responsibility.’³⁴

1.3.2. The Definition of ‘Grave’ War Crimes

In its *amicus curiae*, the OTP also expressed worries regarding the definition of ‘grave’ war crimes written in Law 1820 of 2016. The Government presented that law to incorporate the FPA into domestic law and defined ‘grave’ war crimes as systematic violations of international humanitarian law. For the OTP, defining as ‘grave’ only those war crimes committed systematically, regardless of their nature or impact, could lead to granting pardons or renunciations to criminal prosecution for those responsible for war crimes that, despite not having been committed systematically, fall under

³³ Regarding the military, the preoccupation of the OTP was bigger due to a legislative proposal, presented by the political party *Centro Democrático*, offering them differentiated treatment in the JEP. The Law Project did not succeed in Congress.

the jurisdiction of the ICC (OTP 2017: para. 33). Following similar reasoning, the Colombian Constitutional Court rejected that definition, specifying that it was unnecessary and erroneous (Sentence C-007 of 01 March 2018: para. 522). Alluding to the Rome Statute, the Colombian Court found that every war crime is a grave violation of international humanitarian law (Tarapués-Sandino, 2019: 226).

1.3.3. Effective Restriction of Freedoms and Rights.

According to the OTP, a penal sanction can take many forms, including non-custodial sentences. The OTP notes that sentences can be effective as long as they serve ‘appropriate objectives of retribution, rehabilitation, restoration and deterrence’ (OTP 2018: para. 142). Moreover, conditions like acknowledging criminal responsibility, demobilization, disarmament, full participation in establishing the truth about serious crimes, and a temporary ban from public affairs can reduce sentences (OTP 2018: para. 147). However, the OTP warns that ‘the suspension of sentences would be manifestly inadequate, as this would [...] allow individuals who bear the greatest responsibility for the commission of the most serious crimes to avoid any real punishment’ (OTP 2018: para. 145). The JEP needs to unfold a rigorous verification of the sentences’ execution to guarantee that the sentencing regime designed by the FPA, which includes effective restrictions of freedoms and rights, responds to the intent of bringing perpetrators to justice (OTP 2018: para. 155).

The Colombian Constitutional Court correctly acknowledged the OTP’s concerns and provided flexible guidance, compatible with Colombian law, on how to interpret the legislation governing the JEP in a way that is respectful of the Rome Statute (OTP 2020: 7). From its first indictment, the JEP recognized its duty to harmoniously use Colombian criminal law, international criminal law, international humanitarian law, and international human rights law; in doing so, as the Colombian Criminal Code does not contain crimes against humanity or war crimes, the JEP opted to apply the Rome Statute directly (Auto 019 of 2021: paras. 667 and 705).

However, questions regarding the practical unfolding of such developments were enough to keep the preliminary examination open. Moreover, in 2021, the ICC started a consultation for building benchmarks to decide whether to close the preliminary examination or proceed to a formal investigation (OTP 2021).

³⁴ Special Jurisdiction for Peace, *Sala de Reconocimiento de Verdad y Responsabilidad* (hereinafter: *Acknowledgment Chamber*), Auto 125 of 2 July 2021, para. 699 (author’s translation).

1.4. From Benchmarking to the Cooperation Agreement (2021–2022)

With its origin in 2004, the Colombian preliminary examination was ‘the longest-running preliminary examination before the ICC’ (OTP 2021, para. 3). After 17 years, there were questions about whether preliminary examinations should have time limits. A relevant element was the ICC’s protracted capacity to exercise its influence because ‘as time passes, the threat of prosecution becomes less credible, and the influence of the OTP increasingly depends on new phases of interaction with domestic authorities’ (Urueña 2017: 123).

An evident change of strategy, which could be easily interpreted as a move by the OTP to ensure the Colombian preliminary examination was taken more seriously, was the benchmarking consultation, the explicit objective of which was ‘to develop a roadmap that will enable it to reach a determination on *whether the time has come* to proceed with investigations or close the preliminary examination’ (OTP 2021: para. 18)³⁵. However, in 2021, the ICC —under the lead of new Prosecutor Karim Khan— and Colombia came up with an innovative answer which allowed the ICC to close the preliminary examination without leaving the country on its faith: the Cooperation Agreement. It committed the Colombian Government to respect the institutions created by the FPA with FARC-EP by ‘(i) safeguarding their established constitutional and legislative framework and structure; (ii) allocating the budget required for their implementation; and (iii) preventing any interference with their functions’ (art. 1). Moreover, the Government committed to (iv) safeguarding the protection and safety of judges, prosecutors and respondents to the various accountability mechanisms and (v) promoting full cooperation and coordination between State entities, particularly between the JEP and the Attorney General’s Office (Cooperation Agreement 2021: art. 1). The first three points —which are separated in the original document— can be analysed in light of the political context: As mentioned in the thesis introduction: Iván Duque, the President who signed the Cooperation Agreement, won the elections representing the peace process detractors; his campaign promises included modifying the FPA and the JEP. Agreeing to protect the transitional institutions is the final reversal of these intentions. The fourth point addresses the delicate situation of ex-guerrilla members who are systematically killed,³⁶ while the last point refers to the conflict of competencies between the JEP and the Attorney General’s Office, whose relationship has been uneasy, repeatedly poisoning a challenge to the implementation of the FPA (Gómez 2022).

³⁵ Emphasis added.

³⁶ Security threats for former guerrilleros were a constant preoccupation in the implementation phase, as Sentence SU020-22 of the Constitutional Court proved. It declared a State of Unconstitutional Things and ordered the state to increase the low level of implementation seen in the components of the Final Agreement related to guaranteeing the security of the peace signers, their families, and those who are members of the new political party created by former FARC-EP.

If those commitments are not respected, the OTP ‘may reconsider its assessment of complementarity in light of any significant change in circumstances, including any measures that might significantly hamper the progress’ (Cooperation Agreement 2021: art. 6). This competence to reconsider the decision is in line with previous ICC jurisprudence, according to which the admissibility of a case ‘depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*.’³⁷ Furthermore, the Cooperation Agreement commits the OTP to offer continued support to Colombia’s accountability efforts and establish a bilateral dialogue to share good practices and lessons learned through closer communication, in particular with the JEP, which is, in its own words: an invaluable laboratory in development, from which it hopes to learn important lessons that can then be replicated in other latitudes of the world (JEP 2021). Despite recognizing that the ICC is a court of last resort that aims to be complementary to domestic jurisdictions, the ICC’s decision to step back was strongly criticized because it could undermine victims’ access to justice in a fragile transitional justice system (Pappier and Evenson 2021).

While complexity seems to be the common element among all reports released by the OTP during Bensouda’s term, the Cooperation Agreement jumps directly to ‘*recognizing... the progress achieved by judicial authorities in accountability, both through ordinary justice and transitional justice systems*’ (Cooperation Agreement 2021: 2). It also *recalls* the process of benchmarking consultation and mentions that the OTP *considered* the stakeholder’s views before making its decision (p. 3). However, there is a noticeable lack of further details regarding the elements considered by the OTP in reaching such a conclusion. Instead, the Cooperation Agreement sustains the decision by ‘*noting the demonstrated ability and willingness of Colombia to date to genuinely administer justice related to crimes under the jurisdiction of the International Criminal Court*’ (p. 3). Not advancing forward to a formal investigation fitted the ICC’s pattern, as ‘the Court is much less likely to initiate investigations in *proprio motu* situations than when there are referrals’ (Bosco 2017: 413).

In that sense, the political context is worth highlighting. The ICC’s decision boosted the legitimacy of the JEP in an extremely difficult context that arose due to the results of the Colombian 2018 presidential elections. As Iván Duque’s political party considered the JEP a tribunal of impunity, in the campaign, the party’s honorary President said that their first challenge was ‘tearing into shreds that damned paper they call the Final Agreement with the FARC’ (Arbeláez 2017). If

³⁷ Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga et al.* (ICC-01/04-01/07-1497 OA 8), Appeals Chamber, 25 September 2009, para. 56.

the implementation of the FPA was problematic before the victory of the process detractors, during that presidential term, the Colombian model of a comprehensive system of truth, justice, reparations, and non-repetition faced daunting tests that were part of a ‘death by a thousand cuts’ tactic (Piccone 2019: 22). National human rights organizations identified a lack of political will to implement the FPA. Some symptoms were evident in the difficulties in financing the peace initiatives (Rodríguez and Martínez 2022). Moreover, significant transformations agreed upon, such as the integral rural reform, the delivery of lands, the approval of the countryside reserve zones, and the strengthening of the rural and ethnic economy, were blocked by the Government (González 2021). However, the political will to tear the FPA to shreds met strong resistance nationally and internationally. As will be discussed in depth in the next Chapter, the Constitutional Court protected the Accord, and Congress’s support for the modifications was insufficient. Additionally, the international community’s active role pressured the executive to respect what was agreed. International bodies like the Inter-American Commission on Human Rights (IHCHR 2020) and the UNSC called Colombia to step up its efforts to implement the Agreement (Brubaker, 2020). Ultimately, the international community’s pressure proved effective because Iván Duque was interested in participating in the international concert. Moreover, at the domestic level, Iván Duque attempted to sabotage the peace process. In contrast, at the international level, he presented achievements of peace, aimed at proving that his mandate was in line with the international commitments acquired by the FPA.

The Cooperation Agreement might be read as an interesting answer to critics stating that ‘international criminal justice has emerged in the peacebuilding discourse and practise as a norm that marginalises “other” normative spaces’ (Lugano, 2021: 447). As the so-called local turn in peacebuilding points out, such marginalization results from a particular — Northern — conception of peace and justice that is mainly liberal and does not acknowledge alternative notions of justice coming from ethnic, domestic, national, or traditional understandings and practices that might be hegemonic at the local level (Mac Ginty and Richmond 2013). In international criminal justice, prison sentences appear to be the accepted standard because they are considered proportionate to the gravity of the crimes committed and the culpability of the perpetrator (Mayans-Hermida and Holá 2020). However, in response to neocolonial perspectives on international criminal justice,³⁸ the Cooperation Agreement and the position of the ICC regarding Colombia’s transition is very relevant: it shows that the ICC could be open to different forms of punishment, which are not necessarily equal to imprisonment and include restorative sentences. Such a precedent represents a

³⁸ For a concrete example on how the ICC was portrayed as a white court, linked to ‘the reemergence of the western domination of Africans’ in the framework a neocolonialist narrative see Lugano (2017: 24). On the consequences of such an understanding of international criminal law, see Cacciatori (2018).

new understanding of punishment and penalties, which are essential in the complementarity assessment, even if they are not primary or exclusive (Mayans-Hermida and Holá 2020: 1129). Exploring how far alternative sentences could be from ordinary penalties was necessary in transitional contexts. In the demobilization of paramilitaries, the settled standard was a custodial sentence ranging from five to eight years. Imprisonment seemed unavoidable to meet international standards and be within the ICC's requirements.

However, the Cooperation Agreement makes clear that the OTP considers that 'leniency or the non-custodial nature of criminal sanctions alone is not indicative of the inability or unwillingness to bring perpetrators to justice' (Mayans-Hermida and Holá, 2023: 3). After the first annual visit of the OTP to Colombia in the era of the Cooperation Agreement, the new Prosecutor is very optimistic. In a public statement, he expressed:

I believe the partnership between my Office and Colombia can reflect a new, dynamic approach to the principle of complementarity at the heart of the Rome Statute. Where genuine and serious efforts are made to deliver justice at the national level, and where innovative approaches show results, my Office will [...] seek to support such efforts, and through dialogue promote the sharing of best practices with other national jurisdictions (OTP, 2022)

Its visit in June 2023 reinforced this conviction and strengthened the cooperation between the JEP and the ICC (OTP, 2023). Moreover, in a press release, Khan expressly mentioned Libya and the Democratic Republic of Congo as places where the JEP model could reproduce its lessons and good practices (JEP 2023).

1.5. The JEP's Sanctioning Regime and Criteria for Building its Macro-Cases

'The OTP's position on the use of restorative sanctions for international crimes as envisaged by the [JEP] appears to have evolved over time.' (Arévalo-Ramírez and Martini 2022: 1006). The Cooperation Agreement expresses full support of the ICC to the JEP. So far, its system of sanctions complies with Colombia's international commitments regarding individual criminal responsibility. That is because 'the Special Jurisdiction was designed to comply with the OTP's position that blanked amnesties, or wholly suspended sentences for crimes under ICC jurisdiction, are not acceptable' (Urueña 2017: 121).

As mentioned in the thesis introduction, the JEP is based on a victim-centered approach, which aligns with a fundamental principle of the FPA. The JEP combines restorative and retributive

justice paradigms. However, as a tribunal designed to achieve peace and restore the bonds broken by the armed conflict, the jurisdiction prioritizes the restorative paradigm. To implement both justice approaches, the Tribunal has the competence to impose three types of sanctions: First, *ordinary sanctions*, ranging from fifteen to twenty years in prison will be imposed on those who appear before the JEP but do not provide the truth or acknowledge responsibility. Secondly, *alternative sanctions*, from five to eight years, contemplate the deprivation of liberty for those who acknowledge truth and responsibility. Thirdly, *Restorative Sanction*, also from five to eight years, but excluding deprivation of liberty. In turn, they contemplate a restriction of liberty. This type of sanction will be imposed on those who acknowledge truth, responsibility, and perform Works, Labours and Actions with Restorative-Reparative content (*Trabajos, Obras y Acciones con contenido Reparador–Restaurador*, TOAR). According to the guidelines published by the JEP, these TOAR must have five elements: effective participation of the victims; address the damages caused by the perpetrators; not harm the rights of victims; contribute to the reconstruction of social ties or to a transformation of society that allows overcoming the conflict; suitable to achieve the reintegration of the perpetrator into society (JEP 2020a: 10).

The JEP is not designed to judge all the violations committed during the war. As the armed conflict yielded more than half a century of human rights violations, it was physically impossible for a particular tribunal to develop complete investigations of every crime over such an extended period. In fact, ‘this transitional tribunal has by far the most ambitious scope of all courts with similar mandates’ (Levy 2021). In response to such challenges, it was tasked with adjudicating the most severe crimes and those individuals most responsible for them. The OTP supported this decision, having stated that ‘other jurisdictions, such as Colombia, in dealing with mass atrocity crimes will have to develop case selection and prioritization criteria that are responsive to their own particular situations’ (OTP, 2018: para. 207). To that effect, the JEP established three types of criteria: subjective, objective, and complementary (JEP 2018).

The subjective criteria consider the impact of the crimes on the victims, paying particular attention to their vulnerability. The JEP prioritizes cases where the victims —among others— belong to sexual minorities, have a particular ethnic origin, live in poverty conditions, have disabilities, or are underage. These criteria also consider the perpetrators’ representativity, paying attention to their decisive participation in the identified patterns of macro criminality, the plans, and the policies associated with crimes.

The objective criteria regard the gravity of the crimes, which requires determining if they occurred on a mass scale, systematically, and violated fundamental rights. Moreover, the objective

criteria consider the magnitude of the victimization in terms of the number of victims, the duration in time of the victimizing events, and their geographical reach.

The complementary criteria refer to the availability of information, meaning that the JEP will be more likely to initiate a case if there is enough information to pursue a legitimate investigation. Such data can come from reports of judicial organizations, State entities, and civil society organizations.³⁹ For the purposes of this Chapter, it is worth noting that the criteria explicitly mention the status of a case in the ICC as a criterion for prioritizing it under the principle of complementarity (JEP 2018: para. 42).

The JEP can also judge civilian third parties who participated actively and voluntarily in the commission of crimes in the context of the armed conflict without belonging to an armed group outside the law or being agents of the State. This category includes persons, for example, responsible for recruiting persons for the ‘false positives’ without taking up arms.

Applying these criteria, the JEP has constantly used international law and ICC jurisprudence to select its cases and determine individual responsibility. For the JEP, the Rome Statute is a mandatory reference, which codifies the custom of International Criminal Law; while the Rome Statute, in general, is not directly applicable in domestic law, it is directly applicable to the JEP (Auto 019 of 2021: para. 707). Based on this premise, the JEP uses the Rome Statute and ICC jurisprudence to analyze conducts that occurred before the establishment of the ICC. ‘Although the Rome Statute can only be used as a legal source for international crimes from 2002 onwards, the conducts described in it were already proscribed in international law’ (Auto 01 of 2023: para. 601).

Although the sanctioning regime was designed by the FPA, regulated by Colombian Law, and declared constitutional by the Court—which resolved several tensions with International Criminal Law in favor of applying international standards—there are significant questions regarding its practical unfolding. As will be discussed in more detail in Chapter 4, there are substantial challenges regarding victims’ participation in designing and applying the *Restorative Sanctions*. The details of the dialogical process that must be unfolded between perpetrators and victims to determine the TOAR is not procedurally established, depending to a large extent on the will of the judges to what extent and by what means victims’ rights to participation are realized (Cote-Barco, 2020: 11). The JEP has not yet clarified how the restrictions of freedom and rights will work. There are no time parameters to measure how the Tribunal will determine the length of the perpetrators’ work in *Restorative Sanctions*. Nonetheless, the Colombian case ultimately pushed a discussion about the adequacy of non-custodial restorative sanctions, and ‘[t]here is no doubt that this unique sanctioning scheme with ambitious goals may be an example, at least in theory, for

future peace agreements and TJ processes in different contexts’ (Mayans-Hermida and Holá, 2023: 20)-

1.6. Concluding Remarks

The ICC’s relationship with Colombia is a story of twists and turns, marked by the alternating willingness to either negotiate or escalate the war. The failure of the first peace talks triggered the competence of the ICC in Colombia, preparing the ground for further developments.

After the *El Caguán* negotiations failed, the ICC also played a relevant role in the negotiations with the paramilitary. The notions of transitional justice introduced in such debates remained a clear antecedent for further unfolding. Although alternative sentences were considered in compliance with international justice standards, the common understanding was that they would not entirely rule out imprisonment. The last set of peace conversations with FARC-EP brought up the issue of the compatibility of non-custodial restorative sentencing with international standards for the first time.

Later, during the peace talks in *La Habana*, the ICC maintained a fundamental role. Colombian transitional justice is currently considered an emblematic process that will set the pace for future ICC interactions in other situations. This is due to continuous communication with the ICC, which consistently expressed its concerns regarding the obligation to punish and prosecute crimes under its competence. Such communication was developed —among other means— through letters, public statements, reports on the Colombian situation, diplomatic conversations, and the opening of a benchmark consultative process. The preliminary examination that the ICC initiated on Colombia was of enormous importance in exercising this pressure. The possibility of moving forward to formal investigation was present throughout the negotiations and in the further implementation stage. That phantom menace continues to exist, albeit in the background, as the Cooperation Agreement states that any change in the circumstances regarding the support to the ongoing transitional justice system could trigger the OTP’s reconsideration of its decision.

The ICC’s pressure led to a transitional justice outcome that made clear that grave crimes such as war crimes and crimes against humanity would not go unpunished. The FPA did so by foreseeing a system of sanctions that considers forms of justice that do not appease only the retributive paradigm. Colombia’s transitional system was not the only one modified by the ICC’s influence. Instead, it is a story of back and forth in which both the ICC and national law in Colombia underwent transformations. In its interactions with Colombia, the OTP’s position showed a significant evolution regarding the standards it considered sufficient to satisfy Colombia’s

³⁹ In some particular cases of missing information, for instance when witnesses are killed or evidence is destroyed, the JEP might prioritize the investigation.

obligations to investigate and prosecute Rome Statute crimes genuinely. Different actors and changing political contexts influenced this evolution. When the negotiation with the paramilitaries took place, it was clear the OTP considered alternative punishments acceptable so long as they nonetheless implied a period of imprisonment. In the peace process with FARC-EP, who openly started the negotiation claiming they would not tolerate even a single day of imprisonment, the ICC's standard was lowered even further. Consequently, the concept of alternative sentences grew to include *Restorative Sanctions* that restrict the liberty of perpetrators but do not involve jail time. The Cooperation Agreement between Colombia and the ICC is the final stitch in this process. It gives legitimacy to the *Restorative Sanctions* and confirms that, when it comes to transitional justice, punishment is not necessarily synonymous with imprisonment.

The decision of the ICC to close the preliminary examination is based on positive complementarity. It reinforces the ICC's role as a court of last resort that should cooperate with domestic authorities to support their efforts to punish and prosecute those most responsible for grave international crimes. Nonetheless, the Cooperation Agreement does not provide an explanation for the paradigm shift from viewing the Colombian scenario as complex to the new Prosecutor's highlighting and recognizing its achievements in the struggle against impunity. In such a landscape, it is not necessary to choose between justice or peace; the line between them is not fine but blurry: it changes with time and results from friction at different levels. 'By examining the Colombian peace process, it becomes clear that the ICC has altered the way in which peace and justice can be constructed in contemporary peacebuilding and TJ processes.' (Björkdahl and Warvsten, 2022: 655).

CHAPTER 2:

PEACE CONSTITUTIONALISM AND LATIN-AMERICAN TRANSFORMATIVE CONSTITUTIONALISM: THE DOMESTIC FRAMEWORK FOR THE *RESTORATIVE SANCTIONS*⁴⁰

While Chapter 1 analyzed the relationship between the Final Peace Agreement and the standards of justice established by international law, this Chapter addresses the domestic dimension of the FPA. It analyzes the role played by constitutional development in the peace process, paying attention both to the normative actions that enabled the talks and to the constitutional shields that protected the Accord after it was reached.

In doing so, the Chapter shows how the Colombian constitution incorporated the FPA and consolidated a jurisprudence line regarding transitional justice that balances the State's duty to prosecute and punish massive human rights violations with the obligation to guarantee a peaceful order. As exposed in the thesis' introduction, *Restorative Sanctions* play a fundamental role in this debate.

The Chapter presents the concepts of *Peace Constitutionalism* and *Latin-American Transformative Constitutionalism*, which, together with a brief presentation of the Colombian historical context, serve as lenses for understanding the decisions made by the constitutional court to confront the tension between constitutionalism and transitional justice in Colombia.

⁴⁰ A previous version of this text was published in the journal *Cuadernos Constitucionales* (Gutiérrez-Rodríguez 2023c).

2.1. Introduction

It is known that ‘developments in transitional justice have [...] played, and will continue to play, a role in changing the content of constitutionalism’ (Pennicino 2018: 62). This Chapter delves into that relationship by examining the constitutional developments produced by transitional justice in Colombia. It reconstructs how the Final Peace Agreement (FPA) was incorporated at the domestic level.

As mentioned in the introduction of the previous Chapter, there seems to be a tension between justice and peace—which is not necessarily a dilemma—where, eventually, one could be sacrificed in the name of the other. To find a balance between both, criminal justice standards may have a certain degree of flexibility if the ultimate purpose of the exceptions is to achieve agreements between parties that have clashed in war. In other words, when it comes to finding negotiated solutions to armed conflicts, it is accepted that standards of justice can be modified—but must not disappear—as a condition for armed groups to lay down their arms and transit toward democracy.

A form in which the tension between justice and peace is expressed regards the relationship between transitional justice and constitutionalism. On the one hand, the transitional measures might claim the establishment of a new constitution or challenge the constituted order through actions and laws that defy fundamental values; on the other hand, a strict application of constitutional principles might spoil the negotiations and perpetuate the armed conflict.

While the previous Chapter analyzed how the FPA interacted with international standards of justice, paying particular attention to the ICC, this Chapter examines in detail the incorporation of the FPA into the Colombian constitutional framework, paying attention to the normative developments that regulated it to safeguard the spirit of the constitution.

Performing such a task requires reflecting on the legal status of peace agreements and the characteristics of Colombian constitutionalism, which responds to regional constitutional dynamics and the historical context of the internal armed conflict. Accordingly, the Chapter is divided as follows: Section 2.2. introduces the notion of *Peace Constitutionalism*, which broadly discusses the lawfulness of peace agreements and their relation with constitutionalism. Section 2.3. approaches the regional dimension through the concept of *Latin-American Transformative Constitutionalism*. Section 2.4. presents the context of the Colombian armed conflict, giving an account of the elements that shape the constitutional development that will be analysed in Section 2.5. Finally, Section 2.6 is dedicated to the conclusions.

2.2. Peace Constitutionalism

Although peace agreements have historically contributed to international law (Lesaffer 2012), their international regulation is still controversial due to the ambiguity of their legal status (Retter, Varga and Weller, 2021). According to Christine Bell (2006), even if peace agreements usually have a legal-looking structure and language —suggesting that the parties negotiating considered them as legal documents— they do not easily fit into clear categories like a treaty, an international agreement, or a constitution.

Moreover, ‘[c]omprehensive accords usually seek a definitive end to violent conflict and cover a wide range of issues beyond security and constitutional issues’ (Mac Ginty et al. 2019: 466). Despite their ambitious goals and broad dimensions, questions regarding the constitutionalization of their outcomes are fundamental. For instance, 19 of the 34 Comprehensive Peace Agreements negotiated between 1989 and 2012 included in the Peace Accord Matrix of the Kroc Institute for International Peace Studies included provisions related to constitutional reform (Joshi et al. 2015). Then, ‘peace agreements are hybrid in a way that goes beyond the nature of their participants: they address both the external position of the state on the international plane and the internal constitutional structure of the state’ (Bell 2006: 391)

Even if the constitutions drafted to build peace through an agreement do not always guarantee enduring peace, ‘the connection between new constitutions and peace is rarely questioned’ (Hay 2014: 147). New constitutions that emerge from an agreement between armed actors face a *vertical dilemma* that ‘pertains the relation between elite and mass politics’ (Jarstad 2008: 23) where ‘[t]hose at the negotiating table may only be armed groups, excluding the voices of non-violent groups and the general population from participation’ (Hay 2014: 151). However, ‘transitional constitutionalism is characterized by an attempt to navigate from a foundational elite pact, to a more normative constitutional order’ (Bell 2017: 14).

International law adds complexity to this relationship between constitutionalism and transitional justice. During the negotiations of the FPA, international law was used by the parties in at least three ways: as a set of rules that imposed limits to peace, as a tool that opened possibilities for the representation of victims and the protection of their rights, and as a guarantee to what was agreed (Alviar-García and Betancur-Restrepo, 2022: 298). Regarding the latter, it is notable that the parties declared the FPA a Special Agreement under the terms of Article Common 3 of the Geneva Conventions of 1949, a ‘highly controversial choice, with no well-defined effects’ (Betancur 2016: 188).

Up to 2020 ‘only a small number of peace agreements explicitly claim legal status, with only one of them — the *2016 Final Peace Agreement (Colombia)* — claiming international legal

status’ (Ozcelik 2020: 14). Nonetheless, long before this peace conversation, ‘the Colombian Constitutional Court indicated that Peace Accords could not be considered treaties since the guerrilla is not a subject of international law’ (Betancur 2016: 189). In the discussion about the legality of peace settlements, ‘constitutions [might be] a vehicle through which to promote and even enforce progressive democratic directions for the transition’ (Bell 2017: 14).

Against this backdrop, Laurie Nathan proposed the term *Post-Conflict Constitution* to understand better the relationship between transitional justice, peace settlements, and constitutionalism. It refers to ‘a new or revised Constitution that is enacted as part of efforts to end a violent intra-State conflict and prevent its recurrence’ (Nathan 2020: 1557). The author used this notion to describe —among others— the Colombian case. However, this Chapter proposes the concept of *peace constitutionalism* instead because ‘violence does not necessarily stop with the signing of a peace agreement’ (Herbolzheimer 2016: 6). As armed conflicts can remain after a revised or new constitution is established, the term *post-conflict* might not be the most accurate. This seems to be the Colombian case, where after signing the FPA, the armed conflict suffered a transformation (ICRC 2022) due to the ‘lack of readiness on the part of State agencies to fill the security vacuum as FARC units demobilized in 2017’ (Piccone 2019: 7).

Peace constitutionalism is used instead of *transitional constitutionalism* because ‘[u]nlike the classical limiting functions of traditional constitutions, transitional constitutionalism functions to manage reform agendas, substitute violent revolutions and facilitate social and political integration’ (Halmai 2018: 378) through a means that usually defies the constitutional canon and could change essential constitutional principles. *Peace constitutionalism* intends a flexible form of constitutionalism that includes transitional measures respecting the spirit of the constitution under a proportional way of balancing constitutional obligations to build peace with the binding duty to investigate, prosecute, and punish the perpetrators bearing the most significant responsibility of gross human rights violations. Under this perspective, the law is not perceived as an obstacle to peace but as a virtuous constraint (Uprimny and Saffon 2008: 183).

Under *peace constitutionalism*, *peace* is not considered a closed or finished idea. It is a multifaceted concept that needs to be generated from a relational perspective (Söderström et al., 2021: 484; Strömbom and Bramsen, 2022: 1246). Thus, *peace constitutionalism* does not replace or overcome armed conflict but attempts to build the conditions for solving it through a dialogue that respects constitutional principles and values.

In such a landscape, a Peace Agreement’s passage to becoming part of a country’s legal framework contributes to a contingent debate in which ‘Constitutional courts can thus play a

valuable role in constitutional transitions, providing the forum for a particular form of constitutional dialogue' (Bernal-Pulido, 2014: 1142).

2.3. Latin-American Transformative Constitutionalism

Since their birth as democratic republics, politics in Latin America have been characterized by what was called *Democratic Caesarism* (Vallenilla, 1991), which means that democratic activity has been marked by profound personalism in which there is no struggle for the triumph of ideas but for the triumph of certain men (García-Calderón 1979: 203). Occasionally, such situations evolved into democratic authoritarianism that (sometimes with majoritarian approval) disrespected constitutional and legal frameworks, which ended up subordinated to the leader's will.

Against this backdrop, Latin American Constitutions have recently tried to create mechanisms to counterweight the executive power (which usually works with the legislative branch). In Colombia, decisions of the Constitutional Court have even incorporated in their rulings the State's obligation to design and implement public policies that improve the exercise of rights.⁴¹ This situation may seem strange because, in principle, public policy design, implementation, and evaluation are tasks that correspond to the executive branch of the public power (not to the judicial one). Through this judicial activism, Colombian constitutionalism has chosen to go beyond this boundary, aiming to commit the executive branch to its constitutional obligations.

Although Colombia represents a particular case, for example, for being the only country in the region with a remaining internal armed conflict, this judicial activism can be considered part of a regional movement: the *Latin-American Transformative Constitutionalism*, which is one of the names⁴² given to the process of constitutional renewal that the region underwent since the 1980s to overcome its repressive regimes and massive violations of human rights. It refers to the wave of democratic transitions that led to new or reformed constitutional texts. Brazil (1988), Colombia (1991), Paraguay (1992), Perú (1993), Ecuador (1998, 2008), Venezuela (1999) and Bolivia (2009) embraced new constitutions, and Argentina (1994) and Mexico (2011) reformed their texts (Von Bogdandy and René Urueña 2020: 409).

⁴¹ Ruling T-025 of 2004 is representative in that sense. It declared the existence of an Unconstitutional State of Affairs (Estado de Cosas Inconstitucional) due to the massive victims that have suffered forced displacement and the fundamental rights that are being violated by this scourge. After identifying that the State has not guaranteed these constitutional rights, the Colombian Constitutional Court concluded that there is institutional incapacity and ordered the design and implementation of action plans and public policies to guarantee the victims' rights. It committed the State to increase the allocation of resources and the institutional capacity to reverse the situation to comply with the constitutional ordinances. In other words, the sentence analysed public policies and, from the perspective of the guarantee of rights, ordered the State to review them.

⁴² It is also known as *New Latin-American Constitutionalism* (Mastromarino 2020; Nuria-Belloso 2015; García-Amado 2009; Uprimny and Sánchez 2013), but recent research questions the novelty of this *new* constitutionalism as it takes elements from archaic constitutionalism in the region (Gargarella 2018).

For those constitutions, practice precedes theory since they result from political processes and are orphaned by legal fathers. These constitutions are a projection of social pluralism because all parts of society participate in their writing, including those that political and legal traditions have left out (Mastromarino 2020).

Although these constitutions have significant differences, a common element is their focus on human rights as a response to countries' violent history. *Latin-American Transformative Constitutionalism* 'highlights the capacity of law to transform societies and emphasizes law's response to problems such as widespread poverty, violence and social exclusion' (Von Bogdandy 2015: 110).

Accordingly, '[m]ost constitutions in the region introduced a generous bill of fundamental rights, including socio[-]economic rights, as well as clauses intended to improve democratic participation, be it direct participation or better representation' (Von Bogdandy and René Urueña 2020: 409). Moreover, 'these new constitutions also "opened" domestic law to international law, in particular to human rights law, through clauses incorporating international law in domestic legal systems' (Von Bogdandy and Urueña 2020: 110). In this regard, the constitutionality block and the conventionality control are particularly relevant. The first one refers to those norms and principles that, without formally appearing in the constitutional text, are used as parameters for the constitutionality control of laws since they have been normatively integrated into the constitution through various means and by mandate of the constitution itself (Arango 2004: 79). Through this figure, the international agreements ratified by Colombia become norms with the same weight as a constitutional mandate. Therefore, a particular relationship is configured with the international community, which impacts its influence in the Final Peace Agreement negotiation period and its subsequent implementation stage. Regarding the second, 'according to [conventionality control] all domestic authorities are under the obligation to determine whether their acts are in conformity with the American Convention [on Human Rights] and the [Inter-American] Court's interpretation of it' (Von Bogdandy 2015: 109).

Those transformative objectives are pursued amid particular circumstances relatively similar in the region: Latin America shares colonial legacies that impact how income is distributed and rights are guaranteed. It is the most unequal region in the world and has the lowest social mobility. Likewise, the region has a robust patriarchal connotation, which affects the rights of women and people with diverse sexual orientations and gender identities. To this is added political instability (which resulted in military coups in the second half of the 20th century that incurred in state terrorism) and high levels of crime and violence (Uprimny and Sanchez, 2013: 37-38).

Precisely due to these material challenges, some critics of this form of constitutionalism consider that the new Latin American constitutions are utopian because they do not speak of reality but include expressions of wishes, dreams, and aspirations without any contact with the real life of the countries where they are applied (Nuria, 2015: 38). In the region ‘[i]f the president had both goodwill and sufficient economic resources, those rights became viable, but if any of these conditions did not exist, those constitutional rights became pure poetry’ (Gargarella 2020: 247).

However, while this context limits the guarantee of rights by posing material difficulties for the effective implementation of constitutional charters, it is also the reason behind the formalization of such rights that, under other circumstances, would not need constitutional enunciation; moreover, they are the result of political struggles from excluded groups that wanted greater participation of the State to improve their living conditions. This form of aspirational constitutionalism influenced Colombian constitutional development and the particular way of *peace constitutionalism* that resulted from its dialogues with transitional justice.

2.4. Colombian Historical Background

There is no consensus about when the Colombian armed conflict started; however, it is relatively clear that violence has persisted because its structural causes have not been addressed: Inequality in the countryside, an absent State, an excluding political system, and violent traditions (*Comisión Histórica del Conflicto y sus Víctimas*, 2015).

Although the moment of origin is controversial, the Truth Commission establishes the National Front (*Frente Nacional*) of 1958 as the watershed between the bipartisan civil war of the fifties and the internal armed conflict that ended up⁴³ with the FPA’s signature (CEV 2022b: 25). The National Front was a pact between the elites of the Conservative and the Liberal Party, the factions engaged in *La Violencia* of the 50s, who agreed to alternate power every four years. In that way, the State was captured by the traditional parties.

According to the CEV’s Final Report, the war that Colombia experienced from that moment was a dispute over political power, democracy, the model of State, land tenure, territorial control and income, quite different from *La Violencia* of the mid-twentieth century, which was a conflict between political parties; the armed conflict started by the National Front is also distinct from the armed conflicts that persist after the signing of the FPA in some territories, whose dynamics are a mixture of political and economic objectives (CEV 2022a: 88).

⁴³ Although violence continued after the FPA’s signature, the current conflict stage is quite different as none of the still active armed actors has the will or the capacity to take power by armed means. These regional conflicts do not have the national dimension of before the 2016 Agreement.

In approximately six decades, Colombia passed through different peace negotiations that challenged and changed the constitution. Indeed, ‘the [peace] process in the 1990s broadened by civil society, culminated in a detailed “peace agreement constitution” of 1991’ (Bell 2016: 166). This is the current constitution and the first one in the country’s history that is not an imposition; it was drafted by representatives of heterogeneous groups ‘to open up the political system and to guarantee the political participation of indigenous peoples, the working class, farmers, and members of guerrilla groups, [...] that demobilized before the election of a Constitutional Assembly’ (Bernal-Pulido 2014: 1145).

The Constitution of 1991 created ‘a powerful Constitutional Court that has played a fundamental role in ‘the rapid and pronounced judicialization of Colombian politics.’ (Hillebrecht, Huneeus and Borda 2018, 317). Indeed, ‘the Colombian Constitutional Court has become one of the most powerful apex courts in the world’ (Landau 2020, 1305) It has played a crucial role as a counterweight to hyper-presidentialism. For instance, despite the president’s high popularity, the Court prohibited the second presidential re-election of Álvaro Uribe in 2010, it has limited attempts to demobilize armed groups that do not respect victims’ rights, and has taken decisions that force the executive branch to unfold public policies to guarantee fundamental rights (Landau 2020).

The process to create this strong Constitutional Court started at a time in which Colombia had more guerrillas than political parties. The late 1980s and early 1990s’ peace processes offered blanked amnesties and pardons to the combatants in exchange for abandoning weapons: the Armed Movement M-19, the Armed Movement Quintin Lame (*Movimiento Armado Quintin Lame*, MAQL), the Revolutionary Workers’ Party (*Partido Revolucionario de los Trabajadores*, PRT), and the People’s Liberation Army (*Ejército Popular de Liberación*, EPL), concreted their peace agreements by participating in the constituent assembly (Camelo-Sandoval 2022: 36). The Constitutional Assembly started a period characterized in the Final Report as *the illusion of a new country and the beginning of a turf war*, which ended with the election of Álvaro Uribe in 2002 (CEV 2022b: 237).

As mentioned in the previous section, for the Constitution of 1991, international obligations are of particular importance because ‘according to the doctrine of the constitutional block adopted in Colombia, certain rules or instruments of international law are accorded constitutional status’ (Ozcelik 2020: 32). Under new rules to negotiate peace, the mid-2000 demobilization of paramilitaries introduced the notion of Transitional Justice into the national debate.

As mentioned in Chapter 1, it made clear that to balance peace and justice, it was necessary to punish the perpetrators, and the formula found designed alternative prison penalties from 5 to 8 years for crimes that, in ordinary conditions, would have led to decades of imprisonment (Uprimny

and Saffon 2008: 172). The demobilization of paramilitaries seemed to set a threshold in terms of the minimum requirements of justice that a transition should fulfill (Seils 2015: 15). However, this understanding was defied by the peace talks that led to the FPA because ‘entering the negotiations, the FARC stated that they could not accept an agreement that would result in FARC members being prosecuted and imprisoned’ (Björkdahl and Warvsten 2022: 647). Nonetheless, this statement did not mean they were unwilling to be accountable for their crimes by alternative means.

After a period of secret talks, the Government of Juan Manuel Santos sanctioned the Legislative Act 01 of 2012, which legally enabled the negotiations. This was a constitutional amendment called *The Legal Framework for Peace*. It framed the negotiations under a transitional justice paradigm and temporarily modified the constitution, habilitating the country to do essentially two things: First, determine criteria of selection and prioritization to investigate, prosecute, and punish only those most responsible for war crimes, genocide, and crimes against humanity; second, suspend the penalties and apply extrajudicial sanctions, alternative penalties, or special modalities of execution and enforcement of the penalty if the perpetrators commit to —among others— abandon weapons and contribute to truth and the reparation of victims (Legislative Act 01 of 2012, art 1).

The law needed to pass constitutionality control to be truly effective, and —not without pressure— the Constitutional Court first decided about it in Sentence C-579 of 2013. Considering the tense situation with the ICC described in Chapter 1, this decision was critical. It was the first in a series of constitutional developments that conditioned the peace talks in *La Habana* and the implementation of the FPA. Even if the government had a strong will to maintain the peace talks and achieve a peace agreement with the FARC-EP, the Constitutional Court had the power to spoil the conversations if it found that the *Legal Framework for Peace* did not comply with the constitution and, via the constitutionality block, with Colombian international obligations.

2.5. Constitutionalism in Action

National context, *Peace Constitutionalism*, and *Latin American Transformative Constitutionalism* deeply influence the constitutional decisions taken to integrate the FPA into Colombian law. An analysis through these three lenses provides an understanding of why ‘[t]he Colombian Constitutional Court is exemplary in [its attempt] to realize social rights despite the absence, by-and-large, of welfare entitlements and a functioning welfare state administration’ (Von Bogdandy 2015: 111).

During the Santos term (2010-2018), the most far-reaching constitutional reforms were those to boost and implement the FPA (Botero-Bernal and Cajas-Sarria 2021: 9). Those reforms

followed the rationale settled in a landmark decision: Sentence C-579 of 2013, which is undoubtedly the cornerstone of the constitutional development that integrated the FPA into domestic law. It is both a point of arrival and departure: Arrival since it consolidates a line of jurisprudence in Colombia regarding the concept and scope of transitional justice (Sánchez and Ibáñez 2014: 149). Departure because it is the first of a series of constitutional rulings that the Colombian Constitutional Court sanctioned in its task of ensuring the supremacy of the Constitution (Ambos 2014: xi).

It might be argued that the concept of landmark decisions is more used in common law systems and could not be accurate for the Colombian case. However, Latin America has a constitutional culture that is ‘based on the Iberian colonization, the influence of the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*, the U.S. Constitution, the Constitution of Cadiz as well as French constitutional and administrative law’ (Von Bogdandy 2015: 114). In the framework of such hybridization and ‘despite the fact that Colombian law has the structure and foundations of a civil law system, since Judgment C-836/2001, the Constitutional Court has followed a doctrine of precedent in constitutional matters’ (Bernal-Pulido 2014: 1155). Given the characteristics and impacts of Sentence C-579 of 2013, it can be considered a landmark decision because it fulfills the following criteria: it has permanent legal force; can answer social dynamics problems; reflects the direction of legal development; and is made for the first time (Indreswari 2021: 1206). Finally, the canonicity of a decision ‘is not only a product of intrinsic merits (how well-reasoned or significant a case is on the grounds of precedent, principle, and rule) and contextual significance, but also subsequent and contingent judicial reception’ (Lim 2014: 525).

Accordingly, Sentence C-579 of 2013 impacted plenty of subsequent constitutional decisions. For instance, its interpretations regarding concepts such as *systematic* or *conditional waiver of criminal prosecution*⁴⁴ were a fundamental reference to ruling C-007 of 2018, which decided on amnesties, pardons, and differential treatment for those responsible for serious crimes. Another example of its subsequent impact is Sentence C-674 of 2017, where the Constitutional Court decided on the constitutionality of the amendments that integrated the finished Peace Agreement into the Constitution. In this decision, the Court reiterated Sentence C-579’s interpretations on the constitutionality of a transitional justice model that concentrates criminal prosecutions on those most responsible for serious crimes, renouncing the investigation of lesser crimes because such an approach contributes to dismantling criminal structures and addresses massive human rights violations in a way that recognizes the limitations of the ordinary justice system. Ruling C-674 of 2017 also reiterated that such a sanctioning regime must be limited by the

⁴⁴ In Spanish: Renuncia condicionada a la persecución penal.

State's duty to protect victims' rights as a fundamental constitutional principle. A last illustration of Sentence C-579's subsequent impact is Sentence C-080 of 2018, where the Court reviewed the constitutionality of the Statutory Law that created the SJP, following the reasoning settled by Sentence C-579 according to which transitional justice seeks to solve the complex tensions between justice and peace.

Moreover, this decision is relevant beyond the Colombian case for analyzing and contextualizing the discussion on the constitutionalization of transitional justice mechanisms, specifically the application of selection and prioritization criteria in prosecuting international crimes (Ambos and Zuluaga 2014: 5). In Sentence C-579 of 2013, the Colombian Constitutional Court decided if the *Legal Framework for Peace* was replacing the constitution by introducing the chance to build selection and prioritization criteria to investigate, prosecute, and punish only those most responsible for severe violations of human rights and international humanitarian law (para. 3). Consequently, it applied the *Constitutional replacement doctrine*, according to which 'the power to amend the Constitution does not include the power to "replace" it: while amendments can update constitutional rules, they cannot "denature" essential elements of the constitution, that is take away or alter their natural qualities or destroy their basic structure' (Bernal-Pulido 2014: 1141).

Exercising this doctrine, the Colombian Constitutional Court accepted the constitutionality of the *Legal Framework for Peace* because it found 'that the essential principles of the constitution were not undermined by the amendment so long as it was proportional to the intended objective of facilitating peace' (Sapiano 2017: 157-158).

Even if Judgment C-579 of 2013 employs broadly the same terms used in the balancing procedure that ruled the paramilitary demobilization of the mid-2000s (Cote-Barco 2014: 225), the judicial reasoning was critiqued because there were no precedents addressing the replacement doctrine using this method, instead, the doctrine was applied using the structure of a syllogism (Cote-Barco and Tarapués Sandino, 2014: 264). In the Landmark decision C-579 of 2013, 'the [Constitutional] Court employed a distinction between rules and principles increasingly recognized in legal theory' (Bernal-Pulido 2014: 1151). If the court considered the State's obligation to guarantee human rights and punish their violations a rule, it would not admit any restriction (Villa-Rosas 2014: 85). Instead, the Constitutional Court held that the state's duty to protect human rights and enforce criminal laws is of lesser relative weight than the objective of achieving a stable and lasting peace (Bernal 2022: 323).

Moreover, in this Sentence, the court considered that investigating and prosecuting only those most responsible is an ideal perspective to avoid the repetition of crimes, dissolve criminal macro-organizations, and reveal patterns of human rights violations (Bernal 2022: 324). For such

reasons, the ruling concludes that incorporating in the constitution a strategy to judge only those holding the most significant responsibility is justified as long as crimes against humanity, genocide, and war crimes are prosecuted (Villa-Rosas 2014: 101). Furthermore, the Sentence determined that the mechanisms of conditional suspension of penalties, extrajudicial sanctions, alternative sentences, and particular modalities of compliance do not imply, by themselves, a substitution of the essential pillars of the constitution as long as they are oriented to satisfy the rights of the victims to truth, justice, reparation, and non-repetition (para 9.8.).

Sentence C-579 limited the *Legal Framework for Peace*, concluding that to fulfill the State's obligation to respect, protect and ensure the rights of victims and society, all victims must have, as a minimum, the following guarantees: (i) transparency of the selection and prioritization process; (ii) a serious, impartial, and effective investigation, completed within a reasonable time and with their participation; (iii) the existence of an appeal to challenge the decision on the selection and prioritization of their case; (iv) specialized counsel; (v) the right to the truth; (vi) the right to full reparation and; (vii) the right to know where the remains of their relatives are located (para. 9.9.1). In doing so, the constitutional court settled the basis for the sanctioning regime by ruling the constitutionality of a transitional system to investigate, prosecute, and punish only those most responsible through alternative penalties oriented to satisfy the victims' rights. Thanks to this constitutional development, victims' participation became a constitutional category that conditions the *Restorative Sanctions*, and victims' rights acquired a higher degree of concreteness.

To sum up, through Sentence C-579 of 2013, 'the Court was able to find a way to both honour the agreement so as to shield the political settlement and future peace negotiations while tweaking it to better protect human rights, so as not to backtrack too far on the constitution's protection of human rights and international law' (Sapiano 2017: 158).

After analyzing the concrete rationale of the landmark decision and the constitutional reasoning to tackle the tension between constitutionalism and transitional justice, the following sections will discuss the impacts of the court's decisions during the peace talks and after they finish.

2.5.1. Impacts of Constitutional Development During the Peace Conversations

According to Enrique Santiago, legal advisor of the FARC-EP during the negotiations, the *Legal Framework for Peace* was controversial in *La Habana* because, although it enabled the talks and invested them with a mantle of constitutional legitimacy, it was interpreted by the FARC-EP as a unilateral act, carried out without consulting them. They argued that, before the talks ended, the state had already established a model of justice limiting the outcomes that should be achieved (Santiago and Uprimny 2019: 169).

The justice model and its details were one of the most challenging points of the negotiation. It even demanded the creation of a legal subcommission, made up of three experts from the government and three from the FARC-EP, who formed what was known as *The Commission of Jurists*, who talked in parallel while other issues were discussed; this commission served to unblock the negotiations (Santiago and Uprimny 2019: 175) and eventually drafted the idea of having the JEP where perpetrators of each side could be judged impartially and with alternative penalties. Moreover, it is worth noting that the Constitutional Court established that crimes against humanity, war crimes, and genocide must be prosecuted (Sentence C-579 of 2013), sending a message of compliance with international standards.

According to Juan Fernando Londoño, who was part of the government negotiation team, the logic of 1991's constitution was not questioned even if the FPA added some elements and modified certain things (Londoño and Romerp, 2019: 104). This discussion was not smooth because FARC-EP claimed the need to summon a national constituent assembly. The government refused that proposal, arguing that the negotiation should be closed in *La Habana*; opening a constituent assembly meant reopening the negotiations after an agreement was reached, a possibility that would carry risks for the democratic establishment. On the counterpart, the FARC-EP argued that ratifying the peace agreement through this figure was necessary to guarantee the profound changes settled in the agreement (Semana 2016).

Eventually, the constituent assembly was not called. Both sides agreed that Colombia was no longer faced with the need to change an authoritarian constitution or a constitution that did not allow democracy or usurped the balance of powers required by the rule of law (Londoño and Romero 2019: 104). Sentence C-579 of 2013 offered a solid boost to sustain that argument.

At the heart of the controversy lay a question: What kind of law should regulate the FPA? The government argued that the applicable law should be national since the guerrillas would be reincorporated into the Colombian state. The FARC-EP did not easily accept this position due to its status as an insurgent group against the Colombian state (which implies not recognizing its legal order). International law standards helped unravel the discussion by providing a common normative framework (Santiago and Uprimny, 2019: 175).

A second ruling that was relevant to the peace conversations is Sentence C-577 of 2014, which delimited the concept of a *political crime*, something fundamental for determining the extent of the extraordinary measures contemplated by transitional justice that enable (or prevent) the political participation of combatants who surrendered their weapons. As mentioned in Chapter 1, Colombia has a provision that grants amnesty for crimes related to political activities. Through decision C-577 of 2014, the Constitutional Court concluded that, rather than replacing the

Constitution, the *Legal Framework for Peace* is essential for developing vital elements regarding political participation (Acosta-López and Londoño-Lázaro, 2015: 85).

Finally, a fast-track mechanism was enabled to incorporate the FPA into Colombian law. It streamlined the process of approving the FPA in Congress. It gave the president special powers that allowed him to issue decrees with the force of law as long as these measures were directly related to the FPA. The fast-track also underwent constitutional review. Through Sentence C-699 of 2016, the Constitutional Court considered that the pursuit of peace as a duty of mandatory compliance justified applying to a transitional regime some procedures that, while different, continue to respect the axial axes of the Constitution (Dimaté and Vernaza, 2017: 3).

2.5.2. Impacts of Constitutional Development after signing the FPA

According to jurists Enrique Santiago and Rodrigo Uprimny, it was hard to think of more significant ways to legally protect the FPA to make its dispositions binding: It was declared a Special Agreement under the terms of common article 3 of the Geneva Convention; the FPA was deposited in the Security Council of the UN and Switzerland; and its most substantive parts were integrated into the Constitution (Santiago and Uprimny 2019: 186-187). Consequently, implementing the FPA obeys more to the political than the legal sphere (which does not mean it escapes the constitutional sphere). This situation was problematic because its full implementation required changing the Colombian power structure, including its political and institutional culture (de Currea 2021: 115).

According to Victoria Sandino, who was part of the FARC-EP delegation in *La Habana*, vital laws for the FPA were not approved by Congress (González and Sandino 2019: 255). One example of these commitments that did not pass was the 16 Special Transitory Peace Circumscriptions (CITREP), designed as special seats in the lower chamber to increase the political participation of the regions most affected by the armed conflict. A reason that explains the difficulties in ratifying the FPA through Congress relates to the disconformities of specific sectors of the population (the ones that voted against the FPA in the plebiscite); as elections approached, the parliamentary majorities needed to approve laws began to be diluted (Cristo et al. 2019: 246).

These difficulties were also transferred to the implementation of what was approved. When Juan Manuel Santos ended his term, 29% of the dispositions agreed upon in the FPA had not been initiated, 37% had minimal implementation, and only 23% had full implementation (Echavarría-Álvarez et al. 2023: 49). Implementing the FPA faced more significant obstacles during the following presidential term because, as mentioned in Section 1.4. of the previous Chapter, the FPA detractors won the elections with a campaign that promised to turn it into shreds.

In these complex circumstances for the FPA, the constitutional development that started with Sentence C-579 of 2013 counterbalanced the presidential will to roll back the peace accord and mitigated the harm. Indeed, Duque's discourse became more moderate over time. In his inaugural speech, he passed from turning the FPA into shreds to making some modifications mainly related to the JEP (Ustyanowski, 2018). The president formally presented a series of objections to the Statutory Law of the JEP that —among other things— sought to allow the executive branch to control who would accede to the special tribunal (*Cancillería de la República de Colombia*, 2019).

In line with Section 2.3. regarding *Latin American Transformative Constitutionalism* and the strength of constitutional courts to counterbalance presidentialism, the Constitutional Court rejected these objections in Auto 282 of 2019. Also relevant is Ruling C-630 of 2017, which confirms that the FPA is binding for the state and not only for the government that signed it. Eventually, the president renounced the will to modify the JEP and signed the Cooperation Agreement with the ICC, which was thoroughly analyzed in the previous Chapter.

Ruling SU020-22 joins this series of constitutional measures to counterweight the presidential promise of rolling back the FPA. This is also a decision that can be considered an example of judicial activism and *Latin American Transformative Constitutionalism* as it declares an Unconstitutional State of Affairs due to the mass murder of peace signatories. The court ordered the state to increase the low implementation level observed in the FPA components related to guaranteeing the security of the peace signatories, their families and the members of the new political party created by the former FARC-EP.

Finally, Sentence SU150 of 2021 is also worth mentioning because the court decided to revive the 16 CITREP that did not pass in Congress. Thanks to this decision, the 2022 parliamentary elections had new voting stations and elected representatives from the regions hardest hit by the armed conflict. Even though these seats had security problems, and some were possibly infiltrated by armed groups or political parties that obstructed the purposes for which they were created, the CITREP are considered a positive and innovative mechanism derived from the peace process to strengthen the political representation of the armed conflict victims (European Union Electoral Observation Mission in Colombia, 2022).

The constitutional development to boost and integrate the FPA into the domestic law that started with Sentence C-579 of 2013 contributed —at least partially— to a new political scenario in the 2022 presidential elections, where all candidates, even the ones belonging to the political party of the FPA detractors, affirmed in their campaigns that they would implement it.

To sum up, the Constitutional Court has played a fundamental role in the peace process. It has issued a series of decisions injecting a discourse of victims' rights to peace and justice. Regarding

transitional justice, it upheld the constitutionality of amendments stating that perpetrators can benefit from special penalties contingent ‘on protections of the rights of victims to both truth and reparations, thus requiring, for example, that combatants make substantial contributions to understanding the truth about the conflict’ (Landau 2020: 1311-1312).

2.6. Concluding Remarks

This Chapter showed how constitutional control of norms, carried out by an impartial and independent constitutional court, can offer normative legitimacy to a transitional justice process (Bernal 2022: 333). Against this backdrop, the constitutional development to avail the peace negotiations, which started with landmark decision C-579 of 2013, had an enormous impact. This ruling came at a very delicate moment regarding the tensions between law and politics that, in this case, reflected the tension between justice and peace.

This decision was a point of arrival that consolidated an approach regarding transitional justice in Colombia. Arguing that its constitution included both the duty to investigate, prosecute, and punish perpetrators of grave crimes and the obligation to build a stable and lasting peace, it applied a proportional method to reason on this conflict among principles.

The Constitutional Court stated that the first obligation should not be considered absolute and should be balanced with the duty to construct peace, finding that a selective system was in line with the constitution and that the *Legal Framework for Peace* did not replace it as long as the suspension of penalties and the alternative punishments were conditioned to the laying down of arms, the acknowledgment of responsibility, the contribution to the clarification of the truth and full reparation of victims, the release of kidnapped persons, and the disengagement of illegally recruited minors held by illegal armed groups.

This precedent served as a starting point for other constitutional decisions that faced challenges related to the tensions that can arise between established constitutionalism and transitional justice. It has been affirmed that ‘constitutional courts should adopt an approach similar to that of the Colombian Constitutional Court, balancing the essential principles of the permanent constitution against principles recognised to belong to the international and transnational legal framework for transitional justice’ (Bernal-Pulido 2014: 1142).

Colombian constitutional development tackled the tension between transitional justice and constitutionalism in a way that also set a precedent regarding the relationship between Colombia and the ICC, which in 2021 closed the preliminary examination on the country since 2004, acknowledging that Colombia was genuinely prosecuting the perpetrators of war crimes and crimes against humanity through their transitional mechanisms.

Rather than an obstacle to peace, the constitutionality control of the *Legal Framework for Peace* was a virtuous constraint for the peace process. Its reasoning will continue to play a fundamental role in future peace processes nationally and internationally in a global context that establishes legal limits to peace settlements that no longer can offer blanked amnesties to armed actors in exchange for abandoning weapons.

By highlighting the law's capacity to transform violence, the court's decisions align with *Latin-American Transformative Constitutionalism*, according to which constitutional values and principles can be flexibly interpreted as long as they fulfil its primary objective of social change. Such a perspective can only be understood if the historical background and the social context are considered. Through the decisions quoted in this Chapter, the Constitutional Court settled the basis for the *Restorative Sanctions* that will be analyzed in depth in the following chapters.

CHAPTER 3:

THE ROLE MEMORY AND VICTIMS SHOULD PLAY IN COLOMBIAN TRANSITIONAL JUSTICE⁴⁵

Chapters 1 and 2 presented the international and domestic frameworks regulating JEP's *Restorative Sanctions*. This Chapter discusses how victims should participate in the Jurisdiction and the ideal role for memory. It is mainly a theoretical text that bases its findings on desk research that discusses academic papers, public communications, reports written by victims, human rights organizations, legislation, and constitutional decisions taken to develop the general premises addressed in the previous chapters.

The Chapter advances from general to specific; its introduction exposes current TJ discussions, which some scholars describe as a field in crisis. Then, it analyses the overall situation for victims in TJ's discourse (Section 3.2.), the meaning of memory, and why it was recently acknowledged as the fifth pillar of TJ (Section 3.3). After these broad approaches, it concentrates on the place for victims and memory in the JEP, paying attention to JEP's most outstanding achievements (Section 3.5) and structural challenges (Section 3.6).

Such initial findings and theoretical postulates will be further compared in the following Chapter, which engages with the fieldwork aiming to contrast theory and practice.

3.1. From Transitional to Transformative Justice: A movement out of the crisis?

Transitional Justice (TJ) is an approach to doing justice in times of transition from oppression or armed conflict (OTP 2020: 3). It aims to address the offenses of the preceding regime and strengthen democracy and the rule of law (Teitel, 2014) through judicial and non-judicial mechanisms that work interconnectedly to develop its five pillars: Truth, Justice, Reparation, Guarantees of Non-Repetition, and Memory (Salvioli 2020: 4). However, despite the general commitment of international actors to it, there is low evidence showing how TJ can achieve in practice macro-objectives like reconciliation, peacebuilding, the rule of law, and democracy; instead, such assumptions are implicit, and there is a scarce reflection on how specific actions can concretely materialize such purposes (Gready and Robins 2020: 286).

At the margin of its extensive developments and having been implemented in multiple countries, some authors point out that TJ is in crisis for achieving less than it promised (Evans, 2022) and disregarding forms of structural violence (Peters 2022: 239). Its long-term impacts are modest because ‘common transitional justice programmes such as trials and truth commissions can give the impression that once these have completed their immediate tasks, the work of justice is over’ (Evans 2018: 283)

Moreover, TJ was criticized for having foundational limitations that restrict its notions of peace and justice to a liberal template that privileges civil and political rights, emphasizing procedural democracy — elections, constitutionalism, and the rule of law— hand in hand with a market-driven economy; this model is critiqued for focusing on the establishment of institutions that do not engage with the welfare of populations and its contextualized needs (Gready and Robins 2014: 341). Following this restricted liberal framework, in practice, TJ has excluded sidelined groups, and there is still not enough reflection on how its mechanisms have deepened or lessened their marginalization (Davidovic 2020: 294).

Transitional justice has been critiqued for being vague and lacking empirically rooted, explicit, and multi-directional theories of change (Gready and Robins 2020: 282). Moreover, it is argued that despite basing its moral legitimacy on profiling victims as the protagonists of the transitional processes (Méndez, 2016), evidence indicates that the State’s demands drive them in practice (Tamayo 2022: 315). Consequently, institutionalized developments of transitional justice

⁴⁵ A previous versión of this Chapter is published in *The International Journal of Human Rights* (Gutiérrez-Rodríguez 2024).

tempt to focus on civil rights, overshadowing social and economic rights violations at the center of victims' needs (Robins 2017: 55-56).

For addressing the consequences instead of the causes, 'the performance and impact of transitional justice mechanisms have been at best ambiguous and at times disappointing' (Gready and Robins 2014: 340). In that sense, transitional justice needs to engage with profound social transformations to achieve its objectives of peacebuilding, democracy, and reconciliation.

This commitment involves the pillar of reparations, often understood as returning victims to the situation before the victimizing event. However, some damages are so severe that they cannot be fully restored (Camargo-García 2019: 812). Moreover, when victims were already vulnerable before the victimizing event, returning them to the previous situation can lead to new victimizations; then, justice should create opportunities to promote a better future and transform the reality that placed them in their initial conditions of vulnerability (Uprimny 2009: 638).

As a possible way to address the current crisis, recent research has analyzed the relationship between transformative justice and transitional justice (Evans 2022). Even if there are no certainties regarding how transformative justice should engage with State institutions, how its holistic and complex agenda can be unfolded in practice, and whether transformative justice should barely reform or entirely replace transitional justice, it seems that transformative justice is an alternative that will better respond to transitional justice goals and critics (Gready 2019: 9). Considering Colombia's notorious violation of fundamental social rights and the enormous and historical persistence of social inequality, transformative justice looks to be a welcome new criterion for long-term peacebuilding (Peters 2022: 240).

3.2. Victims' Participation in Transitional Justice

As mentioned in the previous section, TJ faces a crisis partly related to its top-down unfolding that has marginalized the local perspectives of justice by imposing a model conceived as a technical exercise of institutional engineering focused on establishing pre-defined institutions that should work well regardless of the context (De Greiff 2020: 255).

This is partly due to TJ prestige, which, despite being always contextual, is 'fully recognized by the rules and standards of contemporary international law.' (Salvioli 2020: 4). In the last decades, TJ has been standardized to the point of writing handbooks by profiling experts, usually belonging to the Global North, that propose models designed with little involvement from local communities that satisfy international obligations but hardly address material victims' needs.

Victims' participation is proposed as a possible solution to this problem. Over the last two decades, their involvement became a key topic mainly due to growing attention on victims in

criminal justice systems, the popularity of semi-judicial or non-judicial mechanisms (such as truth commissions), and arguments standing that victims have a deeper understanding of the violence and the political, cultural and economic structures where it happened; accordingly studying their political trajectories and conceiving them as active subjects nourishes the transitional outcome (Evrard, Mejía and Destrooper 2021: 428-429). Accordingly, victims' participation has become a central issue in TJ speech and practice. Some argue that victims can empower and benefit from participation's therapeutic effects. The therapeutic ethos implies that once the truth has been told and its performative role is fulfilled, the victim (like the nation) will heal (Robins 2014: 48).

Nonetheless, *victim* is a contested category. It might not be easily accepted even for people who fit the legal definitions due to the social stigmas regarding passivity and vulnerability. In general terms, being a victim does not respond to a personal decision. A person becomes a victim due to something done by a perpetrator. However, victims' activism has proved that they are subjects with agency who act to be recognized beyond passiveness and suffering (Espinosa 2021: 43).

Victims' participation became both an approach and a principle that changed how policymakers and practitioners conceive TJ; it became a *sine qua non* condition whose absence would affect the realization of all the objectives proclaimed by the TJ (Taylor 2014: 4). Their testimonies are so important in today's world that victims are considered a legitimate *authority* for approaching the truth; however, they cannot be homogenized as a generic, universal and permanent mourner (Espinosa 2021: 32).

A comparative analysis of 35 transitional experiences in 20 different countries argues that when the promotion of victims' involvement comes 'from below' their participation is more robust and effective in the stages of adoption and implementation, meaning implicitly that when victims' participation promotion comes from 'top down' initiatives, it is more limited (Saffon and Tacha 2019).

Despite its virtues, victims' participation is risky. It could harm them if their participation is not meaningful and becomes an empty ritual (Taylor 2014). In practice, victims' public testimonies can be as often therapeutic as they are harmful; once victims disappear from the scene created by the Truth Commission or TJ temporal institutions, their suffering continues (Robins 2017: 48). In this regard, it is essential to remember that victim participation is a process, not an event (UNDP 2020: 24).

Although the TJ discourse finds its legitimacy in profiling victims as the actual protagonists of its processes (Méndez 2016), recent evidence suggests that TJ is more focused on addressing the needs of the State (Tamayo 2022: 314). This approach is criticized for considering victims as passive objects rather than active subjects with agency, organizational capacities, and initiatives. As a result,

institutionalized forms of TJ have been predominantly legalistic, privileging State-directed prosecutions (over victim-based reparations) where economic, social, and cultural rights are usually ignored (Robins 2017: 48).

Participation must be conceived as a dynamic process: while it can potentially challenge patterns of domination, it can also become an instrument through which this domination is maintained (White 1996: 6). While TJ has the potential to change oppression and promote inclusion and profound transformations, its institutionalized versions are criticized for its limited impacts to transform victims' material conditions. Indeed, 'victims are likely to be far more strongly impacted by the social, economic and political circumstances in which they live every day than a remote and short-lived institution' (Robins 2017: 46).

Finally, the analytical frameworks used to evaluate and understand the impact of victims' participation in TJ followed at least three logics that deserve problematization: A bias in favor of formal mechanisms, a tendency to one-dimensional linear thinking where necessarily participation is progressive or regressive without ambiguous situations, and a tendency to think participation as a zero-sum game where more grassroots involvement means less power for top-down structures inevitably (Evrard, Mejía and Destrooper 2021: 433-436).

Even if it might not be clear what victim participation in TJ signifies, we can agree that it is essential for TJ to work. It is necessary both for the design and the execution of TJ initiatives. Victims' rights 'entails more than simply participating; instead, it should give victims a sense of control over the content, process and outcome of TJ mechanisms' (De Waardt and Weber 2019: 212).

3.3. Memory and Transitional Justice

Whether *individual*, *common*, *collective*, or *official*, memory is porous, multiple, and always unfinished; it relates to human actions that bring into play subjectivities, emotions, communications, interests, narratives, social conditions, and power relationships (Gutiérrez-Rodríguez 2020). While an individual memory refers to personal remembrances of an event, a *common memory* 'aggregates the memories of all those people who remember a certain episode which each of them experienced individually' (Margalit 2004: 51). In contrast, a *shared memory* refers to reminiscences that touch us without the need of being personally involved in those particular events, it means remembering things regardless of whether they happened to us or not (Margalit 2004: 52)

A *shared memory* can also be a *collective memory*, which is a 'representation of the past, which demarcates the boundaries between social groups, and at the same time, represents the fabrics from which social (thus, political) identity is woven' (Moskovljević 2022: 23). These

representations are debatable because they can have diametrically opposed readings of what happened. Moreover, even if society agrees on the facts, there might be different versions regarding who is responsible for the facts, the legitimacy of the motives behind those events, or the needed actions to overcome them; for instance, if it might be better to remember or to forget and move on. In any case, the relationship between memory and forgetting is very close because ‘any construction of (collective) memory is always based on the explicit or implicit exclusion of some elements of the past’ (Peters 2021: 66).

To sum up, public memory is a contested terrain in which different senses of the past acquire a political dimension to discuss it from the present and imagine possible futures; for such reason, speaking about social memory means speaking about memories (in plural) that are in constant dispute (Jelin 2017). These memorial struggles do not always have the same intensity, and transitional processes can exacerbate them. Transitional institutions appear as a response to a primary need of victims, who, in order to be able to recount their suffering, need to find a listening place (Pollak, 2006: 21). As one of transitional justice’s pillars is truth, public debates are opened to determine what societies went through. Usually, during transitions, institutions are settled to establish an official version of what happened; its outcome is what was referred to at the beginning of this section as an official memory: an institutional version with an aura of State officiality.

The place for memory in transitional justice is intimately linked to what was discussed in the previous section because the social representation of those memories produced by the transitional institutions depends on the level of victims’ participation. Excluding victims from these processes can lead to a sense of personal failure to contribute to collective memory, and non-inclusion can lead to questioning the decisions made by transitional institutions regarding justice (Hodzic 2010: 124).

When properly unfolded, transitional institutions are an opportunity to deal with the traumatic past, inviting victims to give their testimonies, which are no longer private but shared. For instance, a ‘truth commission claims to deliver both individual and national healing through truth-telling’ (Robins 2017: 57). That is also argued regarding judicial tribunals, whose reconstruction of the past can transform a painful living memory into a *healed* one (Vignola 2017: 37).

In such contexts, the emerging memories can be plural and acknowledge differences through peacebuilding and democratic vocations, or can be homogenizing and seek to impose a Manichean version of the past through a sense of community that excludes those who narrate it differently; for them to be democratic, peacebuilding memories should amplify victims’ narratives, acknowledge their pain and advocate for social transformations (Wills 2022). Peacebuilding memories prevent scenarios of *inter-group competitive victimhood* that impede peacebuilding and contribute to

conflict escalation because some groups argue that they have suffered more than others, recognizing the abuses committed against them but not those committed against the groups they perceive as adversaries (Noor et al. 2012).

As stated in the introduction of this thesis, memory has played a significant role in TJ, at least in three ways: As an alternative, a complement, or a means to achieve justice. ‘In the case of the “pacted” transition of Spain, “transitional justice” is currently sought through the mechanisms of memory rather than of penal procedures’ (Hatzivassiliou, 2022: 296). Together with Chile, where there was ‘no effort to prosecute military officers for human rights violations committed during Pinochet’s seventeen-year dictatorship’ (Grandin 2005: 54-55), these are two representative examples where memory works as an alternative to justice due to political conditions that impede proper trials. For this memory to be authentically related to justice, it must go beyond the literal remembrance of the facts and build an *exemplary memory*: a memory that reflects on the causes that led to the massive violations of human rights and teaches lessons that invite to non-repetition (Todorov 2000: 22).

When criminal prosecutions took place, memory works as a complement to justice as long as there is a remembrance of the trials: a public image of the perpetrators being judged and sanctioned for the crimes committed. In this regard, Eichman’s trial in Jerusalem is a watershed not only for inaugurating *the era of the witness* but because ‘[f]or the first time, a trial explicitly set out to provide a lesson in history’ (Wieviorka 2006: 56). The Greek transition in the mid-1970s is another representative example of a memory that emanates and complements criminal trials. Even if there was a general dissatisfaction because prosecutions were limited only to the leaders of the 1967 military coup and many perpetrators went unpunished, the trials were thought as a way to give the junta leaders an inglorious fade in collective memory (Hatzivassiliou, 2022: 297).

Finally, in transitional contexts, memory can play a role as a means to achieve justice. Although Argentina is an emblematic case of a social memory resulting from the judicial procedures against the military junta in the early 1980s, it is also an example of memory as a tool for future redress. Memory played a role in the service of justice through the Argentinean Truth Commission (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP), which held press conferences with witnesses and survivors of the State terrorism caused by the military dictatorship, offering a new public truth about the facts and raising evidence to justice (Crenzel 2010: 11). Later on, in response to the amnesties granted by Carlos Menem, in the mid-2000s the social struggle for Memory, Truth and Justice started the Trials for the Truth (*Juicios por la Verdad*), where the human rights movement pushed forward a tribunal that aimed to find truth without any immediate judicial consequences due to the political context that inhibited the

establishment of regular judicial tribunals. (Andriotti, 2013). The evidence gathered was used in further trials, many of which are still ongoing at the moment of writing, to judge the perpetrators of crimes against humanity committed more than 40 years ago. This case illustrates how memory can be an instrument to gather information and awareness about human rights violations, hoping to achieve justice in a future where the power relationships change to allow prosecutions.

Whether as an alternative, a complement, or a means, in all cases, the relationship between memory and justice seems to indicate that more memory necessarily produces more democracy. However, such an assumption should be avoided because memory is an involuntary muscle (Portelli 2016: 487). On the contrary, ‘the relationship between memory and democratic transformation is never direct and linear, because sociopolitical processes are always uncertain and open-ended’ (Jelin 2019: 188).

3.4. Victims and Memory in Colombian Transitional Justice

As mentioned above, there is a strong link between memory and justice in all transitional processes. It is argued that ‘[p]ositive work in the area of memory not only helps to build democratic cultures in which human rights are respected but also fulfills the legal obligation of States to guarantee human rights’ (Salvioli 2019, para. 15). However, such contributions are conditional on the meaningful participation of victims.

As mentioned in the thesis introduction, the FPA is a global reference due to the relevance given to victims’ participation, which is significantly higher than in previous transitional processes. They had a place during the talks and in the established transitional mechanisms. This participation contrasts with their absence in the negotiation to demobilize the paramilitaries in 2005 and their scarce inclusion in the National Commission for Reparation and Reconciliation created through Law 975 of 2005 (Uprimny et al. 2006: 92).

The peace conversations with the FARC-EP had plenty of international assistance but were essentially driven by the national parties (Herbolzheimer 2016: 8). There was a commitment to build an internationally supported but locally appropriated process, following the reasoning according to which local ownership is ‘a key prescription for obtaining legitimate and authentic [p]eacebuilding’ (Ljungkvist and Jarstad 2021: 2211).

Accordingly, regional forums with civil society were held to encourage local involvement and gather proposals that could be discussed at the negotiation table. These instances of participation evolved, and eventually, victims traveled to Cuba. Five delegations of 12 persons representing various types of victimization and regions of the country went to *La Habana* to express their

concerns and proposals (Medina and Gonzalez 2019). Taking their demands into account ‘ultimately move towards a peace process in which the design of transitional justice mechanisms may be moulded by a victim-centred approach’ (Brett 2018: 267). Such participation contributed to tackling a typical situation where negotiations between armed actors’ leaderships are usually governed by the interests of the combatants, who do not necessarily respect democratic values or care about the problems of vulnerable groups such as victims and ethnic groups (Uprimny 2013).

Through victims’ participation, the Final Report of the Truth Commission establishes that there is not a single group responsible and that it is only possible to advance in peacebuilding through an *inclusive truth* that recognizes the pain of *all* victims (CEV 2022a: 60). This is because Colombia has built *defensive memories* in which people tend to value or recognize the human rights violations of the group with which they identify and not of those they consider opposing (CEV 2022a: 33).

Even if, as mentioned in Section 3.2. *victim* is not a neutral tag; in the Colombian case, the official acknowledgment of victimhood avails particular rights regarding reparation and participation. Being acknowledged as an accredited victim in the JEP comes with the status of a special intervener in the judicial process. This changes the framework for understanding victimhood and emphasizes the active role they might have in transitional justice.

In Colombia, the FPA opened new spaces for memory practices (Bermúdez 2022: 594). However, at the domestic level, the centrality given to victims precedes the peace agreement and dates to the 2011 *Victims Law* (Law 1448 of 2011). This legal instrument enabled the peace talks by officially acknowledging the armed conflict, previously referred to as a quest against *narco-terrorism*, denying any political dimension to the FARC-EP (Gutiérrez-Rodríguez 2019: 238)

The *Victims Law* constructed broad notions of victimization and established ‘integral reparation programmes, combining individual and collective reparations with land restitution’ (Weber 2018: 89). Consequently, Colombia became ‘the international showcase for integrating lessons learned regarding local meanings of justice and victim participation’ (De Waardt and Weber 2019: 210). Before the *Victims Law*, the State unfolded reparation programs not because it was considered *responsible* before the victims but in *solidarity* with them (Jaramillo-Marín 2019: 9).

In such a domestic context, the widespread adoption of a victims’ rights discourse in Colombia —since the mid-2000s— that focuses on memory, reparations, and reconciliation can be better understood as the result of the convergence of global TJ trends, the universalization of human rights discourses, and pressure on nation States from supranational institutions like the Inter-American Court of Human Rights and the ICC (Riaño-Alcalá and Uribe, 2016: 10).

The *Victims Law* laid the foundations for the JEP’s sanctions. One of its precedents is the notion of transformative reparations, which ‘assumes that reparations should address the structural

causes of conflict' (Weber 2018: 89-90). Indeed, 'the law that regulates the JEP states that [...] the reparations will not be limited to returning victims to the situations they were in before the armed conflict; rather, they should aim at structural change' (Huneus and Rueda 2021: 224).

According to JEP's Judge Ana Manuela Ochoa (2022), even if transformative justice is not explicitly mentioned in the FPA, its preamble states that the transformations achieved through the Agreement must help resolve the structural conditions that generated and perpetuated the armed conflict. Moreover, transformative justice goes hand in hand with the idea of prospective justice explicitly mentioned in the defining principles of the JEP (Law 1957 of 2019, art 4). Finally, according to Judge Ochoa, transformative justice offers an opportunity to overcome some critiques raised against transitional justice for not addressing structural oppression, inequities, or social injustices; according to her, transformative justice seeks to overcome these weaknesses by envisioning a more just future, not simply returning to a precarious past (Ochoa 2022).

Under these broad notions of victims and reparations, material and monetary components of compensations are considered equally important in mitigating violence impacts as the symbolic aspects of it, especially when damages are materially irreparable (Greeley et al., 2020: 167). Moreover, this symbolic relevance acknowledges that 'sustainable social transformation requires changes at the level of institutions but also of culture and of personal dispositions' (De Greiff 2020: 255).

It is argued that memorialization processes can have a protagonist role in achieving the transitional justice goals regarding cultural change and symbolic reparations because it 'is not confined to a single realm of politics but draws people into the political sphere and pervades other seemingly non-political arenas' (Selim 2018: 27).

Regarding justice, victims' place was acknowledged to the point of suggesting that 'impunity needs to be measured by the level of fulfilment of victims' rights' (Herbolzheimer, 2016: 4), which is why the JEP has victims' participation as one of its pillars. They have a protagonistic role in designing the JEP's *Restorative Sanctions*. Having sanctions where perpetrators perform works and actions that contribute to the reparation of the damages caused by the armed conflict crystallizes the founding idea of the JEP as a combination of retributive and restorative justice. In the former, much more liberal, to determine the sanction, three main questions must be answered: What law was disrespected, who broke that law, and how much should that person pay for breaking it? In contrast, restorative justice asks: Who was harmed, what harm was caused, and how can it be repaired? (Zehr and Gohar 2015). Following the purpose for which it was created, the JEP prioritizes restorative justice, which means unfolding a dialogical process that promotes a conversation between victims and perpetrators to reach agreements on forms to repair the damages (JEP 2020a: 5).

To do so, the JEP organizes separate encounters with victims and perpetrators to prepare public hearings of acknowledgment where victims see their perpetrators after rigorous training. In the JEP, victims have a wide margin of participation: They can present reports that guide the court in the establishment of the macro-cases it will investigate; they have the right to participate in public hearings and in the events where perpetrators acknowledge responsibility, contribute to truth and (in some cases) ask public forgiveness; they can also participate in the dialogical process to determine the *Restorative Sanctions* that will be imposed by the Tribunal (JEP 2020b).

The JEP's victim-centered principle makes their participation essential to determine the sanction that perpetrators must execute. In addition to presenting their reports, suggestions, and visions to the JEP by writing means, the victims have hearings where they can present observations on the voluntary statements given by the perpetrators —where they tell the facts specifying what happened, how, and why— through which they express their disagreements or ask questions that seek to nourish the truth constructed through the judicial process. The restorative nature of such sentences and processes depends 'on how victims and affected communities perceive them. Only meaningful participation can respond better to victims' needs, contributing in this way to a greater sense of ownership over the TJ process' (Mayans-Herminda and Holá 2023: 20).

It is worth noting that *Restorative Sanctions* are deeply linked with both the justice component and the reparative pillar of TJ. The JEP is ground-breaking because, historically, reparations appear to be closed spaces for victim participation, where judges and public servants decide what redress an individual or collective deserves (Saffon and Tacha 2019: 101). However, 'reparations are the one mechanism that should be intrinsically victim-centred and such efforts will fail to be reparative if victim needs are not considered' (Robins 2017: 49).

At the moment of writing, the most outstanding achievements of the JEP involve clarifying macro-criminality patterns; these findings combat denialism and establish the responsibility of the different armed actors, including those of the State (Reyes 2023). Just to mention some, the JEP has been able to establish that a *de facto* policy was instituted in the Colombian National Army that allowed the systematic murder of civilians in order to present them as combat casualties with negative consequences for soldiers who opposed participating in such crimes. The JEP has determined that sexual violence was structural and practiced by all armed actors. Also, the Tribunal acknowledges a disproportionate impact against ethnic peoples and recognizes that repairing this damage requires an inter-jurisdictional dialogue with ethnic notions of justice. The JEP found that nature itself was a victim of the armed conflict. Furthermore, the JEP determined that FARC-EP systematically committed kidnappings, degrading the conflict.

Moreover, compared with other judicial processes established in transitional periods where victims participate mainly as witnesses in the criminal procedures (Hodzic 2010), the JEP seems to be the Tribunal that has most applied the principle according to which victims' participation is a process, not an event.

In the Colombian case, victims' memory has to do with their processes of narration and self-recognition (Alzate-Zuluaga 2022: 189). The recovery of memory has allowed victims' organizations at the national level to reconstruct the events related to the violence, but also to give back to the murdered or disappeared people their human and political integrity, their vision of a concrete change in Colombian society (Casafina 2023: 120).

Acknowledging that victims' centrality is a principle at the heart of the Peace Agreement and the core of the JEP, and recognizing the importance that memory has for Colombian victims, as it was stated in the thesis introduction, eleven out of the fifteen projects unveiled by the JEP so far in the three Resolutions of Conclusions are related to punishing the perpetrators with the realisation of memory actions that symbolically restitute the place of victims in society, publicly honor them, and serve recognition and truth-telling about the atrocities committed in order to prevent its repetition in the future.

While in previous processes of transitional justice, memory had a role as a complement, an alternative, or a means to achieve justice in the future, through the JEP, memory plays a role as judicial punishment for those most responsible for massive atrocities. Colombia is opening a new dimension for memory and transitional justice, whose lessons, achievements, and challenges need to be decanted.

3.5. From words to deeds

This chapter has shown the achievements of the Colombian case in relation to memory and victims' participation in the context of the general crisis for the transitional justice field. The Colombian accomplishments are not trivial and represent significant achievements regarding victims' rights. However, participation is not linear; practical challenges can reverse progress, and the desired outcomes might not be achieved (Evrard, Mejía and Destrooper 2021: 434). Structural issues must be addressed to achieve the promised transformations, especially as Colombia unfolds a transformative approach to transitional justice. For such reasons, it is necessary to identify some challenges the country needs to tackle.

Perhaps the highest challenge is the continuation of the armed conflict because 'victims, NGOs and ex-FARC combatants noted the lack of security and the continuation of violence in some

areas of the country, making the implementation of sanctions difficult and putting offenders and communities at risk' (Mayans-Hermida et al., 2023: 209).

A second challenge concerns the *Restorative Sanctions* procedure and the limits for victims' participation. According to Law 1957 of 2019 (art. 141), sanctioning restorative initiatives starts with the perpetrators, who must submit their restorative projects to the JEP's Acknowledgment Chamber. Only if they do not submit a sanctioning project, the JEP can formulate one. Victims may comment on the proposal after the perpetrators have submitted it. However, they cannot veto or propose restorative projects. Moreover, there must be a consultation process with the affected communities, including ethnic groups, when appropriate. If the Acknowledgement Chamber finds that the project meets the requirements regarding restoration and victims' participation, it approves the project and includes it in the Resolution of Conclusions, which is presented to the JEP's Tribunal for Peace, which verifies the correspondence between conduct, perpetrators and sanctions, and may request explanations or adjustments. Victims may also express their observations before the Tribunal for Peace, but it has total autonomy regarding the project. Finally, it issues a sentence including the sanction, establishing the approved project, its modalities, conditions, and mechanisms for verification (Bula-Beleño et al. 2020: 141-143).

Despite victims' participation is the touchstone to determine if a *Restorative Sanction* does actually have a restorative impact, the Constitutional Court decided that although the sanctions must be sensitive to victims' participation, they cannot determine the sanction as the JEP is a criminal tribunal that does not serve communitarian justice (Sentence C-080 of 2018: 292). As millions of victims seek to participate in the JEP, the procedures might be blocked and significantly delayed (Sentence C-080 of 2018: 308). Due to these difficulties and the extreme inequality that limits access to justice even in transitional institutions (Peters 2022: 240), only some victims manage to participate in the dialogic process of the JEP. Moreover, '[t]rials are long and narrowly focused, enabling only a small number of victims to testify for the purpose of proving the guilt of a defendant' (Dragovic-Soso 2016: 297). As the Colombian armed conflict left more than 9 million victims (*Registro Único para las Víctimas*, 2023), such a massive number immediately raised practical difficulties in engaging with such an enormous population.

In that sense, a pioneer study analyzing TJ initiatives in Colombia before the Peace Agreement with the FARC-EP found that 'the way that state officials had shaped participation made victims feel that participation became a tool employed by the State to legitimate the process, rather than creating ownership' (De Waardt and Weber 2019: 220). This might also be a situation occurring with the JEP because victims' organizations that participated in the dialogical process that led to the first Resolution of Conclusions in the macro-case 003 issued a public statement affirming that perpetrators

did not offer full, detailed, and exhaustive truth, as affirmed by the JEP. In the same communication, they claim that some of the projects unveiled do not respect the victim-centered principle that should guide them and, consequently, will adversely affect the desired restoration (MAFAPO et al. 2022).

Furthermore, there is insufficient clarity on how victims should participate in this process. It seems that judges have a wide margin of discretion to adapt the procedures to victims' demands (Cote-Barco 2020: 11). Consequently, some victims' organizations have manifested dissatisfaction with the lack of uniformity in the rules of participation applied by each Magistrate's office, which may result in unjustified differential treatment for them (Echavarría et al. 2022: 42). In a nutshell, judicial and material conditions limit victims' participation, which, although central, is not absolute.

According to JEP's Deputy Magistrate Hugo Escobar, currently, the Tribunal lacks funding to sanction the perpetrators with works and actions involving material reparations, such as constructing schools, roads, and hospitals (Escobar 2023). This situation is problematic because many victims from regions impoverished by the conflict have emphasized the importance of unfolding collective material reparations as part of the *Restorative Sanction*, such as rebuilding infrastructure (Mayans-Hermida et al. 2023: 197).

Although the JEP has not enacted the first *Restorative Sanction* already, it seems that due to the lack of the financial capacity to unfold projects that address the material conditions of victims, JEP's *Restorative Sanctions* will concentrate on the symbolic dimension of reparations. This focus on the unmaterial aspects is particularly relevant when the judged perpetrators belong to the National Armed Forces because JEP's Statutory Law brings them a particular treatment. While perpetrators should commit to the reparation of victims to benefit from the leniency punishment of the Tribunal, the special treatment for the military specifies that their commitment is only to unmaterial reparation (Law 1957 of 2019, arts 52 and 57).

In addition to these queries, research done with victims who participated in formulating the JEP's *Restorative Sanctions* in case 005 warns that many of them are still in conditions of economic vulnerability (which in many cases was a structural factor to suffering the victimizing event in the first place). The issue of reparations to solve their material situation appears as a need of victims that might not be met because the tribunal has no competence to restitute or adjudicate land (Vargas et al. 2021: 7). Moreover, 'current collective reparation programmes, as managed by the Victims Unit, aim primarily to satisfy moral harm by providing symbolic forms of reparation that tend to exclude or do not prioritise access to other services, such as health or sanitation' (Sandoval et al., 2022: 479).

Furthermore, the process deals with structural inequalities. For instance, when victims presented their first reports to the JEP, not all communities were sufficiently organized, and many

lacked the resources, time, and technical knowledge to produce them; this limited the participation to the best-organized communities and regions (Braconnier Moreno 2020: para. 61).

Finally, the actual content of the *Restorative Sanctions* also depends on the attitude of the perpetrators regarding truth-telling, their involvement in restorative actions, and the acknowledgment of damages. ‘Recognition has been a key feature of academic literature devoted to understand the needs and aspirations of victims of conflict’ (Hart and Tamayo 2023: 208). Former combatants and perpetrators can contribute significantly to providing reparations for past harm to victims and communities affected by violence. However, this depends on the willingness and capacity of such groups and individuals and often complements other transitional justice processes rather than being stand-alone initiatives. Even if ambitious State reparations programmes exist, they may struggle to be genuinely transformative if the perpetrators do not have enough involvement and will (McEvoy et al., 2022: 472).

3.6. Concluding Remarks

This Chapter shows how transitional justice is in crisis. Victims’ participation is proposed as a way out of the crisis, allowing more local ownership of TJ outcomes. In response to this crisis, Colombian Transitional Justice appears as a global reference because it is a case that integrates academic recommendations and lessons learned from other transitional processes to such an extent that it can be considered a model of great interest among international policymakers and scholars (Peters 2022: 234).

This is due, among other reasons, to the fact that, comparatively speaking, the role of victims in Colombian transitional justice is substantially more significant than in any previous process. On the occasion of the relationship between memory and justice, Colombia is opening up a new dimension in which memory can be a form of judicial punishment that simultaneously contributes to restoring the damages caused by the armed conflict.

However, the process faces initial challenges. They are related to material difficulties resulting from the large number of victims left by the conflict, the financial limitations of the JEP to unfold *Restorative Sanctions* that address the material needs of victims, structural issues that condition the participation of the most marginalized groups, and public communications from certain victims that participated in the JEP expressing how the tribunal, following its constitutional limits, has not fully addressed all their requests, despite being sensitive to them.

After this desk-based review, the next chapter asks how victims have actually participated in designing the *Restorative Sanctions* proposed in the first three Resolutions of Conclusions, complementing the documental research with testimonies personally taken of JEP’s officials, judges, and victims that participated in the dialogical process.

CHAPTER 4:

VICTIMS' PARTICIPATION IN ACTION

Based on personal interviews, academic scholarship, and reports from organizations that have monitored the implementation of the FPA, this chapter analyzes how victims participated in the JEP and their role in designing the *Restorative Sanctions* proposed in the first Resolutions of Conclusions. The chapter shows how the principle of victims' centrality was applied in practice in the face of technical and procedural constraints. It presents the main achievements of victims' participation and the challenges that have influenced victims' relationship with the JEP. To do so, it highlights what the victims expressed regarding the impact of their participation in the JEP's decisions and their perception of the proposed sanctioning projects.

The chapter argues that, although victims' participation led to significant achievements related to the construction of the truth, the creation of spaces for listening to the victims, and the possibility for them to weave bonds among themselves, the discourse was more generous than the practice. Structural inequalities, organizational processes, and material conditions limit victims' participation. There are still significant challenges for *Restorative Sanctions* to be recognized as projects that respond to the harm caused by the perpetrators.

4.1. Introduction

Before the Law is a story by Franz Kafka in which a man from the countryside waits all his life in front of a door that allows access to law and justice. Although that gate was specially designed for him, the gatekeeper prevented him from entering. One interpretation of this classic tale suggests that establishing institutions is insufficient to guarantee justice due to practical conditions and power relationships; achieving justice becomes a struggle. Kafka's story illustrates the situation of victims before the JEP because the tribunal is discursively designed around them, but in practice, barriers persist.

As stated in the previous chapters, the FPA is one of the most victim-centered peace agreements ever signed. In terms of justice, it allows victims to participate extensively through submitting reports, interventions in public hearings, and requests to clarify the perpetrators' statements. According to the international standards and the Constitutional framework, victims' participation is fundamental to addressing the restorative objectives of the JEP.

However, at least four external factors affect victims' participation in the JEP: the persistence of violence; threats and persecution of former *guerrilleros*; stigmatization and violence against social leaders; and attitudes, actions, or omissions of persons in other branches of government (Torres-Acosta et al. 2022, 11-12). Moreover, issues such as the massiveness of the damage, the large number of victims, and the complexity of the tribunal hinder victims' participation. Indeed, JEP's judge Oscar Parra affirms that 'given the sheer number of crimes and victims, there is a great risk of creating expectations that the [JEP] cannot meet' (Parra-Vera 2022: 156).

Against this backdrop, the following sections will examine victims' relationship with the JEP, paying particular attention to their claims and statements. From a practical point of view, the chapter analyzes what the JEP expects from victims' participation, their main achievements, and the most relevant challenges.

4.2. Victims' relationship with the JEP

Victims' relationship with the JEP and the sanctions it imposes depends directly on the level of participation and the impact of such participation (Valencia-Cortés and Molano-Ayala 2023: 23). If their involvement is not significant, it produces a feeling of dissatisfaction and, in some cases, instrumentalization and re-victimization. According to an advocate who represents victims before the JEP, there is good fluidity when the tribunal materializes the centrality and rights of victims; they respond positively to spaces where they can speak and be heard. However, tensions arise when their participation is superficial, used only to comply with requirements or justify arbitrary decisions taken without prior consultation (Castañeda 2024).

Victims' interactions with the JEP are marked by a tension between the technical and procedural issues and the victims' participation, i.e., between how much victims' should participate and how much such participation might sacrifice, for example, procedural celerity (Vargas 2014). Addressing this conundrum and taking into account the immense number of victims that exist in Colombia, the Constitutional Court, in its Ruling C-080 of 2018, determined that the participation of victims is fundamental but not absolute. As explained in the previous chapters, to the extent that the JEP is not a community justice court but a court that must also respond to the standards of retributive justice respecting celerity and due process, it was recognized that the victims have a voice, but cannot veto the *Restorative Sanctions* decided by the JEP.

Since no fixed limit and no detailed procedure have been established, victims' engagement has become an arena of dispute where they demand more and better spaces for participation. Although spaces for participation exist, some victims and organizations feel they must *fight* for

them and demand the conditions they consider optimal for their involvement (Valencia-Cortés and Molano-Ayala, 2023, 29). According to Manuela Páez-Rojas, an accredited victim in macro-case 001, to participate in the hearings, they had to organize sit-ins and public manifestations (Páez-Rojas 2024). At the same time, the JEP struggles to achieve the best consensus possible, facing financial, temporal, and logistical difficulties (Parra-Vera 2023b; Ramelli 2024).

In this dispute, victims' expectations and claims of participation depend on their political backgrounds and level of organization (Restrepo, 2024). According to JEP's Magistrate Alejandro Ramelli, when there is a higher degree of organization, they have higher demands regarding justice and participation (Ramelli, 2024). Social and victims' organizations have pushed for the opening of new macro-cases,⁴⁶ better spaces, and more meaningful participation (Rojas-Lozano 2024). Thanks to victims' mobilization and organization, they have been accredited within the proceedings and achieved effective participation (Torres-Acosta et al. 2022: 16).

Moreover, there are different ideas about the objective of victims' participation. On the one hand, some affirm that participation should enable victims to tell their stories and recount the harm they have suffered, contributing to truth and JEP's judicial findings (Córdoba, 2024; Ramelli, 2024). This involvement is crucial because 'in many cases, the families of the victims have been forced to become "judicial investigators" of the crimes' (Parra-Vera 2022: 144). On the other hand, for some victims, participation should go beyond repeating their stories because reliving the pain can harm them; for these victims, participation should serve to visualize their resistance and claims (Páez-Rojas 2024; Rojas 2024).

In addition to these disputes over the meaning of participation, there are also disputes over who can participate in the JEP. According to the former president of the Truth Commission, if we give one minute to each victim of the armed conflict, it would take at least 17 years to listen to all of them (Ríos-Monroy 2022). As it is impossible to give effective participation to all victims, the JEP unfolds a prioritization process following the criteria explained in Section 1.5. (Chapter 1). Based on its gravity and representativeness, the tribunal creates universes of crimes and victims that are summoned to participate in the JEP, aiming to open the participation to its maximum extent (Ramelli, 2024). As the JEP follows a macro-criminal scheme, 'the scope of victims' participation is not strictly linked to a singular crime, but to a pattern of macro-victimization' (Parra-Vera 2022: 139).

Victims need to be accredited by the JEP to participate in its procedures. Most of the victims interviewed referred to such recognition as a valuable step in their struggles for truth and justice

⁴⁶ A representative example is macro-case 011, which investigates Gender-based violence, sexual violence, reproductive violence, and other crimes committed because of prejudice based on sexual orientation.

because it means that an official entity acknowledges their suffering and harm.⁴⁷ However, victims who were not selected expressed this as an unfair situation, which changed their perception of the tribunal. For instance, Janeth Rodríguez —widow of the professional soldier Jimer Andrés Vargas Villanueva— and Jacqueline Mosquera —mother of a killed army lieutenant— felt offended by the tribunal because their cases were not selected since paramilitaries killed their relatives and the JEP only investigates crimes committed by the FARC-EP or the security forces.

As mentioned in the last chapter, there are different instances where victims can participate. They can present observations to the free statements of perpetrators, asking for more information and clarifications. As will be deeply analyzed in the following section, one of the most relevant achievements of victims' participation is their contribution to truth and full acknowledgment of responsibility from perpetrators. Another form of participation occurs in the acknowledgment hearings (*Audiencias de Reconocimiento*), where perpetrators and victims meet in a meticulously prepared public event. In these acknowledgment hearings, victims intervene, perpetrators recognize the damages caused by their crimes, and occasionally publicly ask for forgiveness (Parra-Vera 2023a: 4). Once the JEP's Acknowledgment Chamber presents the Resolution of Conclusions to the Tribunal for Peace (*Tribunal para la paz*) —the JEP section determining the definitive *Restorative Sanction*— victims can continue participating.

Victims' participation is substantially different in the acknowledgment hearings and in the presentation of observations. In the latter, all victims from that macro-case can participate; in the former, only the victims selected by the magistracy can do it (Castañeda 2024; Rodríguez-Kekhan 2024). In some cases, this selection has generated disagreements among the victims and their advocates, who feel that the selection did not respond to the criteria of representativeness but to the visibility of the victims in the mass media and the possible public impact of the event (Valencia-Cortés and Molano-Ayala 2023: 38; Castañeda 2024).

Another element that has produced dissatisfaction and disturbed the relationship between the victims and the JEP is the differential treatment among macro-cases due to the lack of standardized criteria (Vargas, 2024). Judges have plenty of discretion regarding how victims should participate (Cote-Barco 2020). As a result, in macro-case 001, victims were not allowed to present their observations orally; in macro-case 003, the victims had the opportunity to present their observations in writing and, afterward, to do it orally if they so wished (Bula-Beleño et al. 2020: 88).

This lack of clarity with the victims in the selection criteria, as well as the absence of a clear explanation regarding why some victims can participate while others cannot, generates a significant level of dissatisfaction (Valencia-Cortés and Molano-Ayala 2023: 38). Such a finding was

⁴⁷ The next sections will discuss in depth the achievements and challenges of such accreditation.

corroborated in the personal interviews, where victims manifested frustration for seeing that others were better treated than them, experiencing *victim stratification*.

In a nutshell, the relationship between victims and the JEP is complex and marked by tensions and challenges. Although the participation of victims is fundamental in the transitional justice process, logistical, temporal, and procedural limitations hinder all victims' full and equitable participation. The accreditation and selection of victims to participate in the procedures have generated satisfaction and frustration, depending on who is included or excluded. The lack of standardized criteria among the different macro-cases and the perception of differential treatment have produced discontent. However, the mobilization and organization of victims have opened spaces for effective participation, contributing to the search for truth and recognition of responsibilities. The balance between victims' participation, procedural speed, and due process remains a central challenge for the JEP in its quest for restorative justice.

4.3. Achievements of Victims' Participation

Mainly based on what experts and victims expressed in the personal interviews, this section presents the most relevant achievements of victims' participation in the JEP: contributing to truth, creating spaces that respect victims' dignity, allowing victims to be heard and recognized, determining the massiveness of the crimes and weaving boundaries among victims.

From these findings, the most relevant achievement undoubtedly relates to the truth because participation is a right of the victims that also plays a role in the dialogic reconstruction of the facts, which occurs by contrasting the information provided by the victims, the perpetrators, and the investigations carried out by the JEP (Valencia-Cortés and Molano-Ayala 2023: 19). Moreover, when victims present observations to the free statements of the perpetrators, participation contributes to the truth, because victims pressure them to increase the information offered in their testimonies. According to Dario Morales —father of Óscar Morales Tejada, a young man killed by the National Army in the framework of the 'false positives'—, the perpetrators may not be telling the whole truth, but even if they are only telling 40% of what they know that is already a huge achievement, because it provides information unknown after so many years in the ordinary justice system (Morales 2024).

The JEP has opened the possibility for victims to exert pressure to call for the truth of many others who do not want to tell it but who have been forced to do so. This pressure is exercised through mass media, their representative advocates, and some magistrates who are very committed to victims' participation (Rojas-Lozano 2024). Although victims feel that the JEP is not providing

the whole truth,⁴⁸ such findings have allowed many of them to find the truth about what happened to their relatives (Rodríguez 2024). Some victims even said this truth contributed to their healing (Monroy 2024; Castillo 2024; Arenas 2024; Anonym Victim 2).

As mentioned in the previous section, the relationship between victims and the JEP is complex. Victims who already had their perpetrators sentenced to prison saw the JEP with distrust, not understanding why it released the people who harmed them (Gutiérrez-Rodríguez 2020b). However, when the JEP guaranteed participation and effectively communicated its scope and methods, these victims could change their minds. According to Jacqueline Castillo —sister of Jaime Castillo, a man killed by the army in the ‘false positives’ and the legal representative of MAFAPO— at the beginning, they were reluctant. However, their position changed after they started working with the JEP in the hope of hearing what happened and why it happened, aiming to know the truth (Castillo 2024). In the words of Blanca Nubia Monroy —mother of Julián Oviedo Monroy, a young man killed by the army in the framework of the ‘false positives’— the JEP *persuaded*⁴⁹ them to participate. They understood that in the ordinary justice system, the convicted went to jail, but victims will never know what happened, what they did to their children, and who was responsible higher up in the military chain of command (Monroy 2024).

Although the JEP searches for macro patterns and explanations, it has also significantly contributed to finding truth in individual cases. According to JEP’s Magistrate Ramelli, that has brought enormous satisfaction to the victims, who, in some cases, had a dignified handover of their relatives’ physical remains. For him, the JEP cannot do everything the ordinary justice has not done in 50 years. However, the tribunal is getting where they never investigated, and victims participating in JEP’s procedures are finding new answers (Ramelli 2024).

Victims participate in the JEP motivated by the need to be heard, express themselves, tell their stories, and have their truth recognized. They also want to ask questions and attend the tribunal, expecting the perpetrators to give some information about what happened to their relatives or what happened to them (Ordoñez 2024). According to JEP’s Magistrate Óscar Parra ‘in several cases, [victims] have asked [by] themselves these questions and the testimony provided sometimes allows the victims to see them in a different light as part of a larger context in which the violence committed is not the sole’ (Parra-Vera 2022: 146).

The second achievement of the JEP relates to how victims participate in judicial proceedings. Although there have been complicated scenarios, and some victims mentioned a feeling of instrumentalization and re-victimization,⁵⁰ the JEP has sought to unfold participative

⁴⁸ See below Section 4.4.

⁴⁹ In the original interview she said: *nos fueron convenciendo*.

⁵⁰ See the following section.

spaces that respect the dignity of the victims and try to prevent second victimizations (Castañeda 2024; Parra-Vera 2023b). Almost all victims who participated both in the ordinary justice system and the JEP mentioned that their treatment improved substantially in the latter. Numerous testimonies from the MAFAPO organization state that in the ordinary justice system, they could not speak, their role was marginal, and they felt constantly mistreated. Such feeling contrasts with their participation in the JEP, where they are heard, can speak, and ask questions (Arenas 2024; Castillo 2024; Garcerá 2024; Anonym Victim 1; Anonym Victim 2). In the words of Jacqueline Castillo, ‘[in the JEP] we have been heard, we have had full spaces where we were able to discuss things that the perpetrators said, and then the lawyers went and asked them, and we could say that we did not agree with this, with that’ (Castillo 2024). Moreover, Blanca Nubia Monroy said that in contrast with the ordinary justice in the JEP, they are treated ‘like queens’ (Monroy 2024). This is something identified by some JEP’s judges, to whom ‘many victims argue they had never been listened to in the ordinary criminal justice system and that only now, through the submission of reports to the [JEP] or observations on voluntary statements, they are beginning to have a voice in these processes’ (Parra-Vera 2022: 141).

The third noteworthy achievement of victims’ participation in the JEP relates precisely to the submission of the reports mentioned above, not only because they represent a crucial input to the judicial investigations and the collective construction of truth but also for what it meant to victims. The Acknowledgment Chamber of the JEP has considered that such submission may be unfolded through symbolic acts that are considered actions of early reparation (*actos de reparación temprana*) that may have reparative effects for the victims without being an entire satisfaction of that right (Bula-Beleño et al. 2020: 128; Parra 2023a: 2). By listening to the victims, the JEP gives them the role of experts who hold significant truth. They are not considered vulnerable or passive. Instead, outstanding value is given to their stories and narratives (Bula-Beleño et al. 2020: 78).

Victims interviewed also identify the significance of these submissions. In the words of Delsa Vanegas —mother of Luis Antonio Cabrera Vanegas, a soldier killed in the framework of the armed conflict—, ‘the first time we submitted a report [...], it was an exceptional event, big and commemorative, we did not think that this was so important for us. It was a big first step for us as families of the security forces. We were able to enter the JEP firmly’ (Vanegas 2024). By submitting their reports, victims had the opportunity to give the information directly to the magistrates of the JEP. This encounter was significant because the JEP was always open to receiving the information, not ignoring what happened, and doing everything possible to clarify the facts while in the Prosecutor’s Office, in ordinary justice, victims were told that what they affirmed did not happen and received re-victimizing words (Lemus 2024). Moreover, to guarantee broader

participation, the JEP has carried out a territorial deployment, opening regional offices and holding hearings in territories far from Colombia's capital. According to magistrate Alejandro Ramelli, this has been well-perceived because they have often been told that this is the first time a court's magistrate has gone to talk to the victims (Ramelli 2024).

Furthermore, victims' participation in the JEP allowed them to understand that such crimes did not happen only to them. As they participated in a tribunal that aims to identify macro-patterns of victimization, many victims got the chance to meet other victims who went through a similar experience. According to María Paula Lemus (2024), an advocate representing victims before the JEP in macro-case 003, this was significant because it allowed victims from different regions to meet with others and identify commonalities in their pain, struggles, and forms of resistance. For her, participating in the JEP contributes to victims' reparation because silenced truths can emerge, and victims can weave bonds that contribute to the reconstruction of the social fabric. Regarding these ties, a victim who preferred to remain anonymous expressed that even if she is not participating in the JEP, its findings are significant because the tribunal helps her friends and partners in the organization (Anonymous Victim 3).

Moreover, as mentioned in the previous section, not all the victims can participate in the JEP because the tribunal does not have the competence to investigate crimes committed by the paramilitary. However, a system of collective accreditation allows those victims to participate in the JEP through their organizations. That is the case described by Aidee Forero (2024) —legal representative of *Fundación Color y Esperanza* (FUNCOES) and mother of soldier David Sebastián Galvis Forero—, to whom having a collective accreditation is significant because some women in the organization were not recognized as victims. Being accredited in the JEP is an essential step in their struggle for public recognition.

Finally, experts identified two achievements, but victims did not mention them: the precautionary measures and the contributions to demanding individual reparations through administrative and judicial channels. Regarding the former, Anderson Vargas (2024) affirmed that this is relevant because, through the precautionary measures, the jurisdiction has managed to materialize its mandate of articulation of all the components of the *Integral System*. Through these decisions, the JEP has responded to victims' requests with measures that —among others— seek to protect cemeteries where the remains of persons reported missing may be found; it has coordinated with different institutions that are carrying out a national search plan; it has called for the protection of social leaders and former guerrillas; it has protected the script of the Museum of Memory (Vargas 2024). Regarding the latter, being recognized by the JEP provides documentary evidence that allows victims to add new inputs in the judicial and administrative processes they are pursuing,

which in some cases have been denied due to lack of evidence. For example, where the documentation affirms that their family member was killed in combat, but in reality, it was a ‘false positive’ (Ramelli 2024).

4.4. Challenges for Victims’ Participation in the JEP

The JEP confirms the experience of other transitional tribunals where victims’ perceptions of criminal proceedings are shaped by at least four elements: their experience of testifying, the treatment of defendants in comparison to how they are treated, their understanding of the legal procedures, and the length of sentences and early releases of convicted offenders (Hodzic 2010: 123). The unfolding of these elements creates particular challenges for victims’ participation in the JEP.

Regarding the first one, i.e. victims’ experience of testifying, it must be said that the JEP has made an effort to ensure that the spaces for victims’ participation respect the principle of action without harm and give victims a leading and respectful place (Parra-Vera 2023a: 6). According to an attorney representing victims before the JEP in macro-case 001, their claims have allowed victims to express themselves orally in the hearings, overcoming the unjustified differential treatment described above (Castañeda 2024). This example proves the court has learned, improved, and established a dialogue so victims can participate in better conditions.

However, despite these improvements, it remains a challenge to know the impact of all the information the JEP has collected through victims’ participation and testifying (Castañeda 2024). Another lawyer who represents victims before the JEP in macro-case 003 agrees. Since, for her, the Resolution of Conclusions did not sufficiently consider the observations presented by the victims, rather than meaningful participation, the JEP unfolds a process of socialization and advising with victims (Lemus 2024). The victims wonder whether their participation in the JEP had a real impact or if they were used to legitimize the process symbolically. They wonder if their contributions influenced the decisions or if these were already taken beforehand, turning their participation into a mere performance (Castañeda 2024).

Although most victims who participated in the JEP’s proceedings acknowledge the court’s achievements and affirm that being part of the JEP has contributed to their healing, most do not agree with the sanctioning projects proposed in the Resolutions of Conclusions (Castillo 2024; Páez 2024; Arenas 2024; Tejada 2024; Monroy 2024; Anonymous Victim 1; Anonymous Victim 2; Méndez-Piñeros 2024; Méndez 2024; Garcerá 2024). Such dissatisfaction is related to how the Resolution was reached; if the procedure is unsatisfactory for the victims, the sanction will not be seen as fair or restorative (Valencia-Cortés and Molano-Ayala 2023: 26).

According to Ana Páez (2024) —member of MAFAPO and mother of Eduardo Garzón Páez, a young man killed by the army in the framework of the ‘false positives’— the JEP has listened to them. However, they do not feel that what they say will be implemented in the final sanctions. This position is shared by all the women belonging to her organization. Frequently, victims feel instrumentalized because they invest time and effort in participating but rarely obtain feedback indicating if their observations were taken into account (Valencia-Cortés and Molano-Ayala 2023: 40).

Furthermore, even if the contributions to truth are the most significant achievement of the JEP, victims have concerns regarding the authenticity of perpetrators’ declarations. According to one interviewed victim, ‘one feels that there is no sincerity in the account they give’ (Paez-Rojas 2024). This concern is related to something that some JEP judges have identified. According to Justice Roberto Vidal, at the beginning of the process, the interventions of the perpetrators in the JEP were characterized by justifying discourses of their actions in the war. Moreover, the perpetrators’ advocates arrived at the JEP with the same legal culture of the ordinary criminal process, where the defendant has the presumption of innocence and will only speak about what can be proven by the Prosecutor (Braconnier-Moreno and Bosqué 2023). According to Judge Parra:

This is shown, for instance, by the tendency to say or answer only what they are asked, limiting themselves to solely the facts. Some have even alluded to the “scripts” they had to follow in the ordinary justice system, in the context of the cover-up strategies that are currently under investigation. Consequently, victims have complained about re-victimization occurring during certain statements. In other voluntary statements, a debate has arisen about how perpetrators perceive the harm suffered by victims and compare it to the pain they themselves have suffered. Some victims have also considered this comparison to be re-victimizing (Parra-Vera 2022: 146).

This contentious process slowly evolved into a more profound acknowledgment in subsequent hearings (Parra-Vera 2023b). In that sense, ‘the victims have discussed the limits to judicial truth, the limitations of judicial processes, and the fact that some perpetrators do not tell the truth they were expecting’ (Parra-Vera 2022: 146). Although most of the victims interviewed acknowledge that the JEP is providing new information, they argue that they are getting only a *half-truth*.⁵¹ Victims feel there is still much to be revealed, as many of those responsible have not yet been called to the JEP or have not been held accountable (Lemus 2024). More specifically, victims in macro-case 003 claim that the militaries have not told the whole truth about who gave the order to kill civilians in order to report them as combat casualties. Although the JEP has determined the responsibility of colonels and generals, victims want to know the truth higher up in the political

⁵¹ *Una verdad a medias.*

chain of command (Monroy 2024; Castillo 2024). In macro-case 001, JEP's Magistrate Julieta Lemaitre argued in an academic conference that the victims' disagreement with the perpetrators' statements is related to the moral dimension of the truth. For the victims, it is not enough if the perpetrators limit themselves to describing the facts without acknowledging what these harms meant to the victims and how this affected their lives (Lemaitre et al. 2024). Moreover, in an academic conference organized by the Kroc Institute for International Peace Studies (2024), JEP's Judge Marcela Giraldo stated that the truth that relatives expect is marked by their emotional ties with the direct victims. They hope to know the last words of their relative, what jokes he/she made in captivity, if he/she cried, and other personal things. However, the perpetrators had a very different relationship with the direct victims, and, to a large extent, they are not able to respond to these demands for emotional and affective truth.

Additionally, due to administrative problems and the lack of a unified system of information, the JEP has requested documentation from victims more than once for the accreditation process (Torres-Acosta et al. 2022: 21). This has been a re-victimizing experience for many of them, not only because they have to go through the same process repeatedly, but also because of the meaning of such documents. In the words of Delsa Vanegas (2024) 'I do not like to see the report that the army gave me. I do not like to see it because it is like reopening that wound; one is trying to lead a normal life, but when you see those papers, all the pain returns.'

Regarding the second element, i.e. the treatment of defendants in comparison to victims' participation, Esperanza Rojas, Manuela Páez-Rojas, and Beatriz Méndez-Piñeros —mother of Weimar Armando Castro Méndez, a young man killed by the army in the framework of the 'false positives'— affirmed that the JEP treats the perpetrators better than the victims. Some of their inconformities affirm that while victims must adjust to strict times of about 20 minutes to declare in the hearings, perpetrators have hours to confess their crimes (Méndez-Piñeros 2024). This situation is understandable since there are many victims and limited time. As the objective of the JEP is to establish criminal responsibility and the facts, the perpetrators must give precise and extended declarations when making their free statements. Moreover, structural inequalities (Peters 2022) affect victims' perception of the JEP. Victims in economic vulnerability must confront perpetrators who arrive at the hearings in better material conditions, with bodyguards and security schemes. At the same time, they feel left to their fate (Méndez-Piñeros 2024). Regarding the security conditions for victims, access to protection measures is complicated due to the requirement of proof of the causal link between the risk and the participation in the JEP, which places an excessive burden of proof on the applicants (Valencia-Cortés and Molano-Ayala 2023: 34). The last issue that deserves attention regarding the second element was expressed by Beatriz Méndez-Piñeros (2024), who

argues that the Special Jurisdiction for Peace is *special* only for the perpetrators. Some victims consider that the JEP, in material terms, benefits the perpetrators more than them since they can go free under the condition of executing some sanction projects with which they disagree.

Regarding the third element, i.e., victims' understanding of legal procedures, it must be said that a lack of comprehension of the JEP's procedures is a barrier to victims' participation (Rojas-Lozano 2024). The JEP has a significant challenge in terms of communication. The information and the transmission of decisions could flow much more effectively (Torres-Acosta et al. 2022, 22). Understanding what the JEP is and what it does is complicated for victims and society because the tribunal uses technical and legal language that is very distant and intricate (Ordoñez 2024). One of the major institutional aspects that affect the participation of victims and the restorative effects of JEP's actions is the institution's complexity, making it difficult for victims to understand how the tribunal works (Valencia-Cortés and Molano-Ayala 2023: 28).

Structural inequalities are also related to this element because such understanding depends on their level of organization. Experts pointed out that people who have historically fought their cases in other transitional instances tend to understand more quickly how the JEP works, as they are more familiar with transitional justice processes (Valencia-Cortés y Molano-Ayala 2023: 32). As not all victims have the resources to develop advocacy strategies for opening cases or submitting reports (Bula-Beleño et al. 2020: 64), those who are banned from these spaces do not acknowledge the legitimacy or the accomplishments of the JEP (Anonymous Victim 3; Anonymous Victim 4; Anonymous Victim 5; Mósquera 2024; Hernández 2024). In the words of Jacqueline Mósquera (2024), 'I have heard nothing but promises and promises, and we remain in the same initial situation.'

Finally, sentence length is strongly connected to victims' dissatisfaction with the sanctioning projects. This is particularly relevant because there is still a strong expectation of punitive justice from the JEP (PNUD 2024: 40). For many, it is still disconcerting that the perpetrators are not imprisoned (Valencia-Cortés y Molano-Ayala 2023: 45). Moreover, as mentioned before, in the *Restorative Sanctions*, 'the link between harm, perpetrator, and reparations is diffused or might not exist' (Sandoval et al. 2022: 489). More precisely, 'the connection with the reparation of the damage is a desirable, guiding criterion, but not a prerequisite for the sanction itself' (Marín-Ortiz 2022: 48). Indeed, the organizations and victims who have participated in the hearings have unequivocally argued that the sanction projects must respond to the reality of the victimizing events. It is hard to understand how the damage is consistent with the JEP's proposed reparation measures (Lemus 2024). For example, in macro-case 001, where kidnappings and forced disappearances are sanctioned, it makes little sense for the proposed sanction to be humanitarian

demining (Castañeda 2024). This situation was warned by the former director of UNMAS-Colombia, who stated that the victims did not participate much in the project's design related to humanitarian demining, which is part of the Resolution of Conclusions 02 of 2024. At UNMAS, they were concerned about the victims' perception of the designed project and whether they would consider it to have any restorative content because they did not participate in its design from the beginning (Parra 2024).

Regarding victims' claims to have a direct link between the harms and the *Restorative Sanctions*, Magistrate Parra (2023b) affirmed that they are trying to achieve the highest ratio possible, but that is a considerable challenge. He noted that the JEP works based on macro-harms, recognizing that the relationship between harm and reparation may be indirect, analytically established in the abstract, but in individual terms, it may be insignificant for victims, whose material situation is not transformed by symbolic projects or sanctions executed in a different place from where they reside. Furthermore, according to Magistrate Ramelli (2024), the JEP faces multiple constraints because the projects' execution depends on political decisions, the institutional offer, the budgets, the local authorities, and the ministries. As the JEP must create the whole structure, these processes exceed the normal functions of a judge, who typically determines a sanction without being in charge of guaranteeing the resources and conditions for its compliance (Ramelli 2024).

4.6. Concluding Remarks

Academic scholarship found that although victims' participation in the JEP can be improved, it has a restorative impact (Valencia-Cortés and Molano-Ayala 2023: 48). This finding was corroborated by fieldwork. Most of the victims interviewed who participated in the JEP perceive that participating has contributed to their reparation despite having qualms with the sanctioning projects. The JEP has contributed significantly to enriching the truth and finding evidence that was not investigated in the past. Moreover, the tribunal created spaces to hear, honor, and acknowledge the victims. Those who participated in both the ordinary justice system and the JEP affirm that they have been treated much better in the latter. Such spaces for participation have allowed victims to interact with each other and create new bonds among them.

However, significant challenges affect victims' relationship with the JEP. Victims state that although the JEP provides new information, the truth it produces is neither complete nor exhaustive. This feeling might be partially explained because the perpetrators initially used the JEP as a space to justify their actions in the war; their testimonies were still bounded by the defensive strategies of their lawyers, negatively impacting the restorative potential of the truth.

Moreover, how victims' participation is reflected in the court's decisions is unclear. This leads to widespread dissatisfaction with the proposed sanctions, as it is not clear how they respond to the harm or why the court decided to present projects that are not meaningful to the victims. In this sense, on many occasions, they have felt instrumentalized, as they feel that their participation was used to give legitimacy to a decision that does not represent them. This process should be of dialogic construction rather than dialogic validation (Castañeda 2024).

The massiveness of the armed conflict and the immense number of victims impede that all can participate. Furthermore, the institution's complexity affects victims' perception of the court, which uses technical and intricate language. Additionally, the participation is affected by structural inequalities, which also influence the victims' comprehension of the tribunal.

The JEP has a constitutional framework that limits its capacity to provide material reparations to victims. What victims demand regarding reparation and participation contrasts with what the JEP can do from its legal frameworks, the budgetary constraints, and the massiveness of the crimes. This is problematic because if the victims do not have a restorative perception of JEP's decisions, the restorative objective of the court will not be fulfilled. Due to material limitations, JEP's *Restorative Sanctions* must be articulated with the State's institutional offer, the availability of resources, the political will, and the massiveness of the conflict. Consequently, the JEP seems to be a tribunal with participation instead of a participative tribunal.

CHAPTER 5:

MEMORIAL JUSTICE

This chapter assesses the compatibility of the memorial initiatives proposed in the first three Resolutions of Conclusions with international criminal law standards. In other words, the chapter appraises memory's capacity to achieve retribution, rehabilitation, restoration, and deterrence. Furthermore, this chapter describes how the memorialization proposed in the first three Resolutions of Conclusions interacts with the constitutional framework and, more precisely, with victims' constitutionally protected rights. Furthermore, the chapter analyses how and why memory ended up being a feasible form of the quest for justice that tackles financial, political, and material constraints.

5.1. Introduction

As mentioned in the previous chapters, memory has a fundamental role in transitional processes. Due to its relevance in the first three Resolutions of Conclusions, the Colombian case opens a new dimension for the relationship between memory and justice. In 11 of the 15 projects proposed, memory plays a role in the judicial punishment of the perpetrators. Such relevance is groundbreaking because, in the previous transitional process, memory was an alternative, a complement, or a step towards justice, not the essence of the judicial sanction.

When there have been proper judicial trials, a social memory emerges from the drama of the proceedings, with victims and perpetrators under public light, with accusations and defenses, with witnesses from different social sectors, and with the terrifying possibility of punishment inevitably attracting the tension of the general public and provoking parallel trials in the day-to-day interaction (Nino 1997: 206). In a nutshell, there are collective memories of the trials.

In cases without judicial trials, memory has emerged as a tool to strengthen democracy, seeking to promote a socio-political discussion about the atrocities of the past. A clear example is the recent *Ley de Memoria Democrática* sanctioned in Spain, which aims to enhance victims' rights to truth, memory, and justice and unfold investigations without repealing the 1976 amnesty law (Mastromarino 2022b: 915).

Through such memorial practices, public authorities do not limit themselves to remembering an event of the past. There is an attempt to position that narrative at the collective level, reinterpreting it to ensure integration and pacification in the present, aiming to achieve endurance over time through rituals and symbols (Mastromarino 2022a: 66). These democratic virtues are related to memory potential to maintain the cohesion of groups, institutions, and nations, creating the illusion of a shared national past (Pollak 2006: 25). Consequently, certain narratives of the past can be used to strengthen democratic values. However, more memory does not necessarily mean more democracy (Jelin 2019). For instance, ‘EU memory politics has unintentionally facilitated exactly what it aimed to condemn: the political forces in Europe that are increasingly resorting to distortion of historical facts, and employ symbolism and rhetoric that echoes aspects of totalitarian propaganda’ (Pistan 2020: 34). Moreover, the sanction of memory laws can trigger memory wars because people who disagree with the officialized version react to express their discontent (Pistan 2024: 14). In a nutshell, memory policies do not imply that populations will passively receive the narrative proposed, there are always *underground memories* that oppose to the *official memories* (Pollak 2006: 18). Through memory, the past is constantly re-elaborated. Furthermore, as official institutions are no exception to these memorial disputes, *official memories* are also susceptible to variations.

Colombia experience a change in its *official memories*. Before the memorial transitional initiatives of the Group of Historical Memory that started with the Law of Justice and Peace of 2005,⁵² there was an official narrative to read the armed conflict as a quest against *narco-terrorism* that portrayed the Armed Forces as the heroes saving the country from the evil guerrillas (Gutiérrez-Rodríguez 2019). Through different initiatives, such as the Victims Law, the creation of the National Center for Historical Memory, the establishment of the Truth Commission foreseen in the FPA, and the JEP, there is an institutional effort to read the conflict through keys to interpretation that overcome the ‘good guys/ bad guys’ logic. Instead, current official memories aim to construct a narrative of the past that recognizes that both the guerrillas and the State committed grave human rights violations.

When memories emerging from transitional processes are plural, they serve peacebuilding and democracy. On the contrary, if they tend to exclude and create divisions, they can be memories for war (Wills 2022). As public memory is, by definition, a contested terrain, it is impossible to achieve a fully shared memory of the past. In that sense, memories for peacebuilding should be *polyphonic*, based on dialogue instead of in imposition, and grounded on a common convergence about the future (Mastromarino 2024: 8). The memories produced in the JEP, precisely through

⁵² See *supra* Section 2.2. of chapter 2.

contrasting the truth of the perpetrators, the victims, and the judicial investigations, are a form of *polyphonic memory* that serves peacebuilding. According to Judge Parra, '[t]hrough victims' observations, both in writing and during hearings, [the magistrates] have been able to observe different types of requests for the truth: the truth about facts beyond those discussed, the truth about other parties involved in these crimes, and the truth about those most responsible' (Parra-Vera 2022: 148).

However, the memory of JEP's trials and findings differs from the memorialization proposed in the *Restorative Sanctions*. For instance, according to Judge Ramelli (2024), the JEP contributed to fighting the 'false positives' denialism by determining that the army killed at least 6.402 civilians between 2002 and 2008. Although a sector of the Colombian population still does not recognize the seriousness of these crimes, the findings of the JEP influenced the collective memory by providing verdicts that empowered the victims and nourished the public debate.

Based on the personal interviews, academic scholarship, and judicial documents, the following sections will analyze the memory proposed as a form of punishment for perpetrators in the Resolutions of Conclusions, the conditions it has to fulfill to achieve the desired restorative impact, complying with the constitutional rights of victims and the international standards of individual criminal justice. Accordingly, Section 5.2. will analyze the relevance of memory for the victims interviewed, particularly attending to how and why it contributes to their reparation. Section 5.3. will describe the projects proposed by the three Resolutions of Conclusions. Section 5.4. will discuss the type of memory that should emerge from the *Restorative Sanctions*, and Section 5.5. presents the conclusions.

5.2. The Significance of Memory for Victims

Memory's relevance for victims should be understood in the framework of broader historical claims of the victims' movement in Colombia. Public memory is a scenario of a political dispute that reflects the social struggles in the country (Vargas 2024). As a result of these political disputes, the State's definition of *victim*, i.e., who deserves the deployment of public policies to acknowledge and repair the damages they suffered, has changed over time. Colombia went from local definitions of the public problem of victims to transnational concepts, which implied a *standardization* and the generation of technical-legal devices to homogenize the definition of *victim* (Espinosa 2021: 420). According to this international standardization, a victim is a person who has suffered a violation of international human rights law or a serious violation of international humanitarian law.

Despite such homogenization, *hierarchies* of social mourning persist; consequently, some victims receive more attention than others (Espinosa 2022: 423). This grading relates to memory by

creating a dispute over who deserves to be publicly remembered. Through that remembrance, it is recognized that a citizen's rights were violated. By publicly acknowledging this, there is a contribution to the reparation and recognition of that person's citizenship and agency despite becoming a victim due to the perpetrators' actions.

As mentioned before,⁵³ *victim* is a contested category that might not be easily accepted due to the social stigmas regarding passivity and vulnerability. However, victims' activism highlights their agency. Moreover, as the FPA was achieved 'in a context where victims had a fairly robust set of constitutional and legislative rights' (Landau 2020: 1321), being a victim in Colombia means having specific rights to truth, justice, reparation, and guarantees of non-repetition. For this reason, victims like Janeth Rodriguez, Jacqueline Mósquera, and anonymous victims 3, 4, and 5 felt offended for not having been recognized as victims by the JEP. In the words of Janeth Rodríguez (2024), 'we feel *destroyed* for not being part of the peace process.'

However, independently of their participation in the JEP, victims have already taken actions to promote and build their memories. Most victims do not expect permission or support from the JEP to do memory; in the court, they see the opportunity to have their memories officially acknowledged by an institution. Victims participate in the JEP to give visibility to their memory so that their relatives and their organizational actions are not forgotten (Rojas-Lozano 2024).

Moreover, memory is closely related to symbolic reparations as long as 'to be effective for reconciliation, reparations should not only focus on assistance and compensation, but should also attend to the psychological and symbolic damages of war in communities affected by mass atrocity' (Firchow 2017: 333). According to the IACHR, memory, truth, and justice are essential for the reparation component, which has a moral vocation of reparation. However, in an exact sense, they do not replace the material reparation (Córdoba 2024). This is where the constitutional limits of the JEP, as an exceptional transitional tribunal, begin to clash with the expectations of the victims. As the JEP does not offer retributive justice in the sense of sending perpetrators to jail as many victims expect, but neither does it offer distributive justice because the court is not allowed to order individual reparations or land restitutions (Sentence C-080 of 2018), the only thing left for victims is the right to know what happened to their relatives and the possibility to transmit the memory of their case (Castañeda 2024). For many victims and organizations, memory has become a form of resistance that can have more social impact than any judicial decision (Lemus 2024).

Memory can help victims deal with their pain, establish links with others, and unfold a human rights activism that denounces the crimes they have suffered, advocating for the prevention of future

⁵³ See *supra* Section 3.2.

human rights violations (Wills 2021; Gutiérrez-Rodríguez 2020b). This was corroborated in the interviews with the victims, who recognize in memory a possibility to deal with their grief.

Memory is fundamental for victims. In the words of Jacqueline Mosquera (2024), ‘memory serves to repair, a little bit, the pain left by the war.’ For Delsa Vanegas (2024), memory is significant because remembering helps clarify the facts and contributes to dignifying the lives of people who served the country. In memory, victims have found a way to make their stories visible, hoping that it will contribute also to non-repetition. According to Aidee Forero (2024), ‘we are the voices of those who were silenced. We as mothers, widows, and families continue with this [struggle for memory because otherwise] they will be forgotten.’ In that regard, Esperanza Rojas affirmed that:

Memory is important for us. We want the memory of our loved ones to be included in all these memory processes because it is very sad to arrive at the CMPR and see that our relatives are not included, [it is sad] that we as victims are not visible and that our organizations are not very visible either. This work has been done together and has to be visible because history has been written with pain and sacrifice and, above all, over the victims (Rojas 2024).

This position is shared by Blanca Nubia Monroy (2024), for whom memory plays a fundamental role, to the point of affirming that ‘if we forget, these people die. If, however, we remember them, we have them in our memory. By having them in our memory, we revive these boys. We make them stay alive’ (Monroy 2024). The house of Blanca Nubia, where the interview took place, is full of artistic pieces made by her (image 2). She said that they have learned to do art as a form of memory that also contributes to their personal healing. Anonymous Victim 2 (2024), also expressed that making art helps her and gives her strength. When she is performing an artistic initiative,⁵⁴ ‘even though my son is so far away and I know I will never see him again, for me, it is as if, at that moment, my son is alive next to me.’ In the case of Anonymous Victim 1, when she was asked if participating in the JEP contributed to her reparation, she said:

Not really, no. What has helped me in the healing process is art. Art has been super, excellent for me. By doing it, you relax, you cry, you laugh, you are working and it is very, very good for the healing process. And maybe to get rid of hatred, that rage that I had against the perpetrators. And now I practically no longer feel hate for those people (Anonymous Victim 1).

⁵⁴ For instance, she has performed in the play *Develaciones*.



Image 2. The photo was taken during the interview with Blanca Nubia. It shows her next to a silkscreen print she made in an assisted workshop offered by the Universidad Pedagógica Nacional.

As the victims that participated in this research were contacted through the CMPR, where they gathered to do memorial artistic activities, all the victims interviewed had a connection with the binomial memory-arts. All mentioned a restorative impact of such activities. Cecilia Arenas — member of MAFAPO and sister of Mario Alexander Arenas, one of the men killed by the army in the framework of the ‘false positives’— affirmed that her artistic works are memory and resistance (Image 3). In her own words, ‘For me, this is the greatest thing. Through art, I express all my hate, my resentment, and my forgiveness. And I am bringing back to my memory all the beautiful things of that being that is gone’ (Arenas 2024).



Image 3. The photo was taken during the interview with Cecilia Arenas at her house. She shows the artistic works mentioned above.

As mentioned in chapter 4, victims had to *fight* for their participation in the JEP. Memory was used a tool in victims' struggles for participation. According to Delsa Vanegas (2024):

Making memory through art was a way to make an impact on the magistrates. We could not arrive at the court crying to tell what happened to us. No, the idea was to make an impact on the magistrates by taking this loom (Image 4) and taking the collective reports. It had an impact. From there, we understood that all these things we do, all this art we do, is also a way of making memory and history. This has helped us a lot.

Another interesting finding regarding the relevance of memory for victims relates to the possibility of bonding with other victims who have suffered from similar harm. Individual memories evolve into collective memories because victims are no longer just searching for their relatives. In the words of Manuela Páez-Rojas (2024) 'we are no longer looking for just my family member, but for 6,400 victims. When we go, let's say, on August 30, which commemorates forced disappearances, people

have come to us [saying] “I am looking for my husband, and you are exhibiting a photo of him”. Moreover, for Jacqueline Mosquera (2024), participating in such memorial initiatives is *nice* because she can share hugs with other victims. They feel they are not the only ones going through such a complicated situation (Hernández 2024). Anonymous Victim 3 (2024), expressed that memory has contributed to her personal healing because they know that other companions are in the same situation. This was the same position of Anonymous Victim 4 (2024), who expressed that by participating in the memorial initiatives, ‘you are with more people, you meet with more people. All of that, all of that has helped me’.



Image 4. Personal photo taken during the interview with four victims of the Foundation FUNCOES.

These testimonies confirm what has been widely expressed regarding the relationship between memory and art, where, given certain conditions, the relationship between memory and participative art can contribute to victims’ reparation and to denounce massive atrocities, strengthening truth-telling and demanding the prevention of future human rights violations. (Rubiano 2017; Rubiano 2021; Acosta-Sierra 2021; Aranguren-Romero and Gallo Tapias 2021; Guerrero and López 2020; Gutiérrez-Rodríguez 2021).

Art is conceived as a means to unfold more horizontal conditions for bringing individual memories together, building shared memories, and making the leap towards collective memorialization, amplifying the voice of marginalized victim populations and communities. These forms of memory are linked with resistance because they bring together traumatic and spectral experiences and examples, not only accounting for the processes of violence they embody but also constituting sources for political mobilization (Guerrero and López 2020: 55).

In a nutshell, art can perform as a *vehicle of memory* that supports ‘the subjective labours of memory, for collective action and for reaffirmation of collective identities.’ (Jelin 2007: 148). Active subjects use these vehicles as tools to discuss and transmit their senses of the past and the consequent imagined futures on the battlefield of memory. Nonetheless, despite its potentialities, not every artistic intervention can favor memory and transitional justice. For them to function, it is desirable to comply with at least four principles of good practice: ‘iterative project cycles over time; driven by local context and priorities; providing space for locally driven narratives; and building capacities and networks of local actors’ (Fairey and Kerr 2020: 147).

5.3. Memory in the Resolutions of Conclusions

According to Judge Parra (2023b), before the Resolutions of Conclusions, the relationship between memory and justice was mainly tied to the judicial process. After these decisions, the relationship between justice and memory began to be anchored in public policies and debates on memory. The execution and determination of such memorial *Restorative Sanctions* depend on economic resources, inter-institutional articulation, and inter-institutional agreements.

Against this backdrop, the following subsections present the specific memorial sanctioning projects proposed in the first three Resolutions of Conclusions, paying particular attention to their scope and how victims participated in their design.

5.3.1. Resolution of Conclusions 01 of 2022

Six of the seven sanctioning projects presented in the first Resolution of Conclusions are directly linked with memory and respect the *Historical Memory and Symbolic Reparation* criterion mentioned in the thesis introduction. The first project is called *Exhibit Hall inside Colombia’s National Museum of Memory on murders and forced disappearances of people who were presented as combat casualties by agents of the State*.⁵⁵ According to the JEP’s Acknowledgment Chamber, during the process, victims proposed that this hall should expose the artistic works they have produced to show the illegitimate killing of their relatives. It is a chance to display the victims’

organization processes and their claims (Resolution of Conclusions 01 of 2022: para. 718). More than a monument, the proposal is building a living space to exhibit their photographic galleries and the knitted fabrics they have elaborated to represent their story (image 5) and communicate this to further generations (para. 717). The scope of this project is to construct, preserve, and diffuse the memory of the murdered and disappeared persons as a way to restore the damages associated with stigmatization, the good name, and the dignity of the victims, their relatives, and their communities (para. 716).



Image 5. Personal photo, taken during the interview with Cecilia Arenas, who shows one of the pieces she has done to represent her story.

As the Museum of Memory is not finished at the time of writing, the JEP's Acknowledgment Chamber proposes that the perpetrators participate in the physical construction of the Museum. Once finished, they can give talks, guides, presentations, dialogues, and other collective scenarios explaining macro-criminality patterns, motives, victims' profiles, and recognizing their

⁵⁵ In Spanish: *Salón de exposición dentro del museo nacional de la memoria de Colombia sobre asesinatos y desapariciones forzadas de personas para ser presentados como bajas en combate por agentes del estado.*

responsibility in the victimizing events (para. 721). All actions for this project's design, development, and implementation must be agreed directly with the victims, as well as the museographic script and the agenda of itinerant exhibitions (para. 722).

The second project presented in the Resolution is entitled *Memorial Park for the 6.402 victims of assassinations and forced disappearances that were presented as combat casualties by State agents*.⁵⁶ This project reflects a dialogic process since the Acknowledgment Chamber modified the perpetrators' initial proposal based on the victims' considerations. The initial project aimed to recover and maintain a monument in Ocaña (Norte de Santander), built as part of another judicial process. While the victims considered that a monument could be restorative, doing it in Ocaña and within the framework of another process does not make sense because they did not participate in its designing and structuring (para. 723). Again, the Acknowledgment Chamber proposed that perpetrators can physically construct the monument as part of their punishment. In order to be restorative, all design, development, and implementation actions must be agreed directly with the victims. The place for the memorial park should also be consulted with the accredited victims (para. 725). The memorial should represent and dignify the direct victims of assassinations and forced disappearances presented as combat casualties by agents of the State (para. 724).

The third project proposes that the perpetrators, as part of their sanction, must contribute to the construction and installation of plaques with the names of the victims who were apprehended in parks in different municipalities to be later murdered, forcibly disappeared, and presented as combat casualties by State agents (para. 726). The project originally proposed by the perpetrator wanted metal silhouettes of the victims with inscriptions telling their stories. However, in the dialogical process, victims manifested that this project was neither satisfactory, precise, nor restorative and, if implemented, would have to be reformulated entirely (para. 695). According to victims' experience, these initiatives are not restorative because they do not have high visibility and can be easily stolen (para. 698). The Acknowledgment Chamber considers that although the victims do not find the specific format proposed for this memory project satisfactory, they positively value proposals that contribute to repairing the damage to their relatives' honor, good name, and dignity (para. 698). For that reason, they reformulated the project from silhouettes to commemorative plaques. However, in the personal interviews, victims manifested explicit dissatisfaction regarding this project, which was not perceived as restorative. Indeed, they felt offended because it was proposed despite their disagreement (Castillo 2024).

⁵⁶ In Spanish: *Parque memorial de las 6.402 víctimas de asesinatos y desapariciones forzadas para ser presentados como bajas en combate por agentes del Estado*.

The fourth project aims to build physical spaces where the relatives of victims of assassinations and forced disappearances presented as casualties in combat by State agents can gather and carry out activities to strengthen their organization. It is expected that in these places, the victims will be able to carry out works of dignity and memory, as well as accompaniment and counseling for non-organized victims (para. 730).

The fifth project consists of producing a documentary entitled *The Truths of Catatumbo*.⁵⁷ Taking into account the considerations of the victims, the JEP's Acknowledgment Chamber requests explicitly that 1) this project needs to have permanent participation of the victims regarding —among others— its design, script, content, and focus; 2) that the documentary be widely disseminated nationally and territorially, especially among the civilian population and the military units with jurisdiction in Catatumbo; 3) that the documentary makes visible the truth clarified by the JEP regarding the actions of those most responsible and the damages suffered by the victims, and; 4) that it recognizes the Catatumbo identity, the richness of its territory, its customs and the idiosyncrasy of its population, since, as established by the Acknowledgement Chamber, one element that facilitated the crimes was the stigmatization on the *campesinos* of Catatumbo (para. 737). Nonetheless, in the interviews with the women of MAFAPO, they expressed open disagreement with this project, arguing that they already have documentaries (Méndez-Piñeros 2024; Castillo 2024; Monroy 2024).

The last project related to memory that is part of this Resolution of Conclusions is entitled *Lectures to Strengthen Non-repetition*⁵⁸. In the dialogical process, the victims opposed it because, at that time, the military had not made a complete and detailed contribution to the truth, so they argued that there was a risk that what would be shared through the teaching scenarios would be incomplete and biased (para. 666). Considering what was manifested by victims, the Acknowledgment Chamber accepted this project as long as it includes victims in its design and execution; disseminates judicial truth, especially to the new military; explains the macro-criminal patterns and the contextual factors that led to the crimes, and; shows the consequences for perpetrators and victims and can be unfolded in military training, units and universities (para. 740). Although, according to the document, victims manifested that participating in these lectures can be restorative as long as it creates a space to disseminate their memory (para. 742), in the personal interviews, victims were particularly offended by this project because it turned their perpetrators into teachers. For some, this is not perceived as a restorative punishment but as a reward to them (Méndez-Piñeros 2024).

⁵⁷ *Las verdades del Catatumbo*.

⁵⁸ *Cátedras para fortalecer la No-Repetición*.

Although, according to the Resolution, the proposals gathered victims' observations and respected the organization process of the victims who participated in the dialogical process, the projects lacked their complete support when the Resolution was published. Through public communication, MAFAPO, CSPP (Committee in Solidarity with Political Prisoners), Asociación Minga, and CCALCP (Collective Lawyer Corporation Luis Carlos Pérez) jointly issued a public statement exposing their concerns and reserves: They questioned the JEP's statements where the tribunal affirmed that perpetrators offered *full, detailed and exhaustive truth*. Moreover, they claim that some of the projects released do not respect the victim-centered principle that should guide them and, consequently, will adversely affect the desired restoration (MAFAPO, CSPP, Asociación Minga, and CCALP, 2022).

5.3.2. Resolution of Conclusions 02 of 2022

In the second Resolution of Conclusions, two of the four proposed projects are related to memory. In this case, the perpetrators are not State agents but former FARC-EP combatants belonging to the macro-case 001. The first project is called *Memory and Symbolic Reparation*. It aims to promote actions, principally symbolic, that contribute to constructing historical memory to restore the damages caused (Resolution of Conclusions 02 of 2022, para. 177). Its specific objectives are:

- (i) To contribute to truth, memory, and guarantees of non-repetition, focusing on the claims made by the victims.
- (ii) To contribute to the restoration of the damage caused to the social fabric by the former FARC-EP, especially the harm caused by committing kidnappings and other deprivations of liberty.
- (iii) To widely socialize with communities the recognition exercises that the sanctioned have carried out during the judicial proceedings of the macro-cases (para 178).

However, victims' organizations manifested during the dialogical process that the memorial initiatives proposed do not reply to the primary needs of the victims in terms of collective reparation. They should be understood as complementary to the different actions requested by the victims (para. 550). In other words, while memory is part of victims' symbolic reparation, it cannot restore the damages by itself. Victims' representatives also noted that memorial initiatives, when developed by the perpetrators, run the risk of underestimating the victims' stories and focusing on the narrative of those who committed the harm, thus undermining the possible restorative impact of memory. In that sense, they recall that memory does not always contribute to healing: for some victims, remembering means going again through the pain they are trying to overcome (para. 551). It was also pointed out that works with symbolic content are not proportional to the damage caused

and are perishable because they can be replaced, modified, damaged, or even vandalized; such kind of sanction generates the belief that victims are not entitled to other than symbolic reparation (para. 552). Considering such claims, the JEP's Acknowledgment Chamber endorsed the project as long as victims who see a restorative impact on memory are guaranteed a leading role in executing the symbolic activities (para. 585).

The second project addresses the search for disappeared and kidnapped persons. Its fifth specific objective is to contribute to the construction and preservation of the historical memory of the victims of the conflict, as well as guarantees of non-repetition (para. 179). This project was accepted by victims as long as it could lead to the finding of persons or human remains (para. 556). However, there were technical claims because the proposal of the perpetrators was not explicitly related to crimes they committed; it referred (as can be read above in the objective) to people who disappeared in the context of the conflict in general (para. 555). The Acknowledgment Chamber endorsed the project as long as unfolding permanent searching activities are directly connected to the damages identified in the commission of crimes such as kidnapping and enforced disappearance. However, the perpetrators must participate in the activities of the UBDP⁵⁹ as part of their conditionality regime. They must contribute to extra activities, including reconstructing camp areas to identify search polygons and symbolic actions (para. 579).

The other two projects propose to develop Integrated Mine Action and Environmental Restoration activities. Although some victims expressed satisfaction with the proposals, strong critics stated that after six years of work and investigation, victims expected a restorative punishment more proportional to the gravity of the crimes committed. Many do not understand how such restorative proposals respond to harm (Redacción Colombia + 20, 2022).

5.3.3. Resolution of conclusions 03 of 2022

The last Resolution of Conclusions divides the restorative projects into two groups: a) Actions for Historical Memory and Restoration of the Victims' Good Name and b) Actions for Environmental Restoration and Recovery of Water Basins. This Resolution belongs to the macro-case 003, but it works with persons belonging to indigenous peoples in Northern Colombia; consequently, cultural and ethnic dimensions are of particular relevance.

In this case, perpetrators proposed memory components associated with reproducing content in tribute to the lives of the victims that will make visible the truth of the events that occurred and the harm suffered by families, communities, and constitutionally protected collective subjects (like the Indigenous peoples). This was proposed through two collective projects: the first focused on

creating a physical museum (*Casa-Museo*) to serve as a home for memory activities. The second centered on developing outreach activities for communicative pieces that honor the memory and lives of victims, such as a reportage and radio spots, a written reportage, and the creation of plaque monuments (Resolution of Conclusions 02 of 2022: para. 794).

Regarding Indigenous memories, the Kankuamo Indigenous Council indicated that the memorialization of them should refer to the *long fabric of stories that have been bleeding from the violence that has been continuous and systematic against their people since the beginning of time* (para. 795). Such a statement is fascinating because it opens a broader space for memory: a *long memory* (Catela 2017) that refers to colonial violence and transcends the internal armed conflict with the FARC-EP.

As happened with the other projects, victims presented their observations and expressed their concerns regarding how memory should not be used to clean the perpetrator's name at the expense of the victims; it is fundamental to have a focus that is genuinely restorative for the relatives that suffered different damages (para. 745).

The last project is entitled *Behind the Footprints of Memory*⁶⁰. It seeks to exalt the victims and ancestral memory, together with environmental impact activities in affected communities. It includes the construction of memorials with the participation of victims and reforestation and watershed recovery projects. The military involved would lead the territorial management, the victims would manage the budgets, and the perpetrators would physically execute the projects (paras. 764-767).

5.4. Memorial Justice vs. Bureaucratized Memory

Reparation policies must address the material effects of violence but also have a symbolic dimension, particularly because some damages are physically irreparable. Such policies must be linked to the recovery of truth and memory, making hidden human rights violations visible. This symbolic recognition rehabilitates victims as active citizens and catalyzes a reconciliation process between the State and its citizens (Uprimny-Yepes and Guzmán-Rodríguez 2010: 249-250).

As demonstrated in the previous section, following similar reasoning, memory earned a fundamental role in the sanctioning projects proposed by the JEP in the first three Resolutions of Conclusions. This means that memory could play an essential role in the judicial punishment of perpetrators responsible for the most grave human rights violations. Such protagonism is consequent with the relevance that memorialization has for the victims regarding its contributions to

⁵⁹ See the thesis introduction.

⁶⁰ In Spanish: *Tras las huellas de la memoria*.

personal healing, truth-telling, denouncing their victimizing events, and bonding with other persons who have experienced similar suffering. Moreover, by transmitting their testimonies, histories, and the life stories of their relatives, victims participate in society as active political subjects.

Furthermore, as previously mentioned,⁶¹ the sanctions do not depend solely on the judicial process. Since, unlike an ordinary process in which the judge establishes the sanction without worrying about obtaining the resources for its execution, in the JEP, it is necessary to guarantee a structure, through a dialogue with the institutional offer of the State, to allow the execution of the projects. In that sense, memorial initiatives could be unfolded through Colombia's institutional architecture on memory.⁶²

The focus of memory that appears in the Resolutions of Conclusions is based on the *duty of memory*, according to which 'remembrance – mediated now by the reflexive capacity of the subjects – is an antidote that will prevent future violence and horror, and that this memory and this moral obligation guarantee the formation of citizens with democratic beliefs and practices' (Jelin 2019: 186). According to the Resolutions of Conclusions, the commemorative actions that the perpetrators would carry out within the framework of the *Restorative Sanctions* must comply with certain conditions that should elaborate a reflection on the structural causes behind massive crimes. The underlying idea is that the perpetrators should not only accept responsibility for the criminal conduct but also for the damages caused as a consequence of the same (Marín-Ortiz 2022: 46). Moreover, these memorial initiatives unfolded by the perpetrators should guarantee the effective participation of victims to avoid the transmission of justifying speeches.

In that sense, the memorial justice proposed by the JEP should be an *exemplary memory* (Todorov 2002) that goes beyond the literal description of the facts, contemplating the reasons behind the heinous human rights atrocities and imparting knowledge encouraging non-repetition. The participation of the perpetrators is crucial not only because it allows the acknowledgment of crimes for sectors that historically denied them (for instance, regarding the crimes committed by the Security Forces) but also because they have crucial information regarding how the crimes were committed. As the scope of memory is the future, such contributions could be used to design strategies that prevent its recurrence.

Consequently, in theory, the proposals of the JEP's Acknowledgment Chamber will comply with the criteria suggested by the JEP (2020a: 10): i) participation of the victims without harming their rights, ii) addressing the harms caused, iii) contributing to the reconstruction of social ties and

⁶¹ See *supra* Section 4.4.

⁶² For instance the National Center for Historical Memory, the CMPR, the foreseen construction of a Museum of Memory.

the transformation of society to overcome the conflict and iv) being apt to achieve the reintegration of the perpetrators into society.

However, in practice, the perpetrators' statements may revive wounds and possibly reactivate the confrontation by generating new divisions (Valencia-Cortés and Molano-Ayala 2023: 42). These accounts can be very cruel and raw. Therefore, the JEP does not allow victims to relate to all perpetrators or testimonies (Parra-Vera 2022: 140). In that regard, art is again relevant considering the memorial practices of the victims interviewed. Colombian photographer Juan Manuel Echavarría suggests that art can serve to tackle suffering indirectly, as Perseus confronted Medusa. Looking directly at horror petrifies us, preventing reflection and emotion. By offering an indirect look, art allows us to see the horror without paralyzation, providing new perspectives and facilitating reflection (Aranguren-Romero and Gallo-Tapias 2021: 119).

Art can serve as an instrument to do memory and promote reconciliation, which is one of the JEP's objectives. In that sense, 'reconciliation remains a complex and controversial term. It has sometimes been associated with the concept of forgiveness, and sometimes with terms such as "coexistence" or "social reconstruction," thus implying that it does not necessarily need elements of forgiving' (Pistan 2024: 9). Although some perpetrators ask for forgiveness at JEP's acknowledgment hearings, not all victims are willing to forgive, nor should they. The objective of restorative justice is reparation and not forgiveness; this is not one of its pillars but an individual and contingent decision that some victims make (Zehr and Gohar 2015).

As contemplated by the Resolutions of Conclusions, to contribute to reconciliation (which does not mean there is an obligation or duty to forgive), the victims must actively participate in the memorial initiatives that perpetrators must unfold. However, many victims distrust the JEP, and there is a general feeling of dissatisfaction with the sanctioning proposals. Even if the proposals were modified to partially meet their demands, many victims do not understand why, if they expressed their discontent with some projects, such proposals ended up being part of the Resolution of Conclusions.

Such dissatisfaction arises from the procedure for deciding sanctions. As the process starts with the perpetrators, several victims' proposals were not discussed. For example, when talking to the victims, they had proposals for reparations related to memory, which do not appear in the Resolutions of Conclusions. For instance, in the interview, Mrs. Beatriz Méndez-Piñeros (2024) stated that a reparatory measure could be constructing a school, a university, or a street that would change its name in honor of her relatives. Anonymous Victim 1 (2024) said that it would be restorative for her to build a school named after victims of State crimes, where people could receive free education.

For this memorial justice to be restorative, it must focus on the victims' perspective. Otherwise, it could become a *bureaucratized memory* that meets all legal requirements but whose restorative effects are not perceived by the victims. Even if, for a vast majority of victims, psychological needs are as grave as their material needs (Sikking et al. 2021: 134), despite all the potential involved in memorial initiatives as forms of symbolic reparation, 'when the State leads the dialogue with victims, they may end up, one way or another, serving State interests as far as legitimacy is concerned' (Riaño and Uribe 2016: 24). This carries a risk of bureaucratization, that might pervert the restorative intentions into a worse mechanism for the dissemination of harm (Grandi 2020: 123-124).

In the Colombian transition, memory is winning unprecedented relevance, and to be successful, it should consider 'the active participation of victims as equal partners in a political community. [Not doing it] risks underestimating victims' agency or, worse, treating their perspective as "a complication, an inconvenience" rather than central to the reparations process' (Greeley et al. 2020: 168). Victims not only aspire to achieve symbolic comfort and get closer to a life in peace, but they also dream of conquering dignified living conditions: there is where the transformative force of memory shows its most significant limitations (Wills 2021: 204). By privileging reconciliation over other principles, such as material transformations, 'human rights discourse demands that victims give up their claims on material redistribution and settle instead for a "moral victory" that declares that evil has already been overcome' (Rothberg 2019: 15), a situation that might be more rhetorical than real, especially considering the continuation of violence in the country.

5.5. Memory and Victims' Rights

Regarding the specific rights of victims (Sentence C-579 of 2013), it is necessary to say that there was an effort to guarantee them, but —as occurs within Latin-American Transformative Constitutionalism— practical difficulties prevented their full realization. First, victims have the right to transparency in the selection and prioritization process. However, there was differential treatment among victims in macro-case 001 and macro-case 003⁶³; it was through victims' participation and struggles that they were able to also express themselves orally in macro-case 001.

Second, victims have the right to a serious, impartial, and effective investigation completed within a reasonable time. While it is hard to determine what reasonable time is due to the magnitude of the conflict and the massive number of victims and facts that the tribunal must investigate, it is understandable that eight years after the signing of the FPA, there is still no definitive judgment.

⁶³ See *supra* Section 4.2.

However, such time is perceived by victims as a lot, and not seeing results and not knowing the impacts of their participation affects this right. Justice must not only be done, but its unfolding must be seen.

Third, victims have the right to the existence of an appeal to challenge the decisions; this has been guaranteed as victims' participation has modified and transformed their instances of participation. Moreover, their participation still continues in the Tribunal for Peace, where they present their observations to the sanctioning proposals of the Resolutions of Conclusions.

Fourth, victims have the right to specialized counsel; this has also been guaranteed to the victims who have participated through their representatives.⁶⁴

Fifth, victims have the right to the truth. In that regard, victims have been able to ask questions, request that certain aspects be explored in greater depth, and demand a moral and affective truth uncommon in ordinary justice processes. However, not everyone can get specific information about their cases due to the massive number of crimes, and, in some cases, perpetrators have used their contributions to the truth as an opportunity to justify their actions during the war.

Sixth, victims have the right to full reparation. In this regard, the Constitutional Court has limited the JEP to sanction individual compensations and restitute land, arguing that Colombia already has some institutions in charge of such tasks. The reparation to which victims can aspire in the JEP is fundamentally immaterial, linked to the patterns of macro-criminality, the identification of macro-harm, and public recognition.

Finally, victims have the right to know where the remains of their relatives are located. Through JEP precautionary measures,⁶⁵ there has been an effort to guarantee this right by protecting zones where physical remains can be found. Doris Tejada —mother of Óscar Morales and member of MAFAPO— expressed that she will only feel repaired by finding the human remains of her son. Thanks to an articulated job between the JEP and the UBDP, they found the body of Oscar delivered with dignity in a solemn act in June (UBDP 2024). Although this is not the case for every victim, for Dario Morales (2024), the JEP contributed to multiplying the search efforts, injecting more resources and technology. In his words, it meant moving from the trowel to the retro excavator.

As can be seen, there is an effort to guarantee victims' rights. However, material conditions and structural inequalities impede its full materialization to all of them. Although there are certain nuances, the virtues of memorialization processes explain how the memorial sanctioning proposals described above can serve retribution, rehabilitation, restoration, and deterrence, but the

⁶⁴ The victims have access to the *Sistema Autónomo de Asesoría y Defensa* (SAAD). Members of the SAAD exposed victims' observations during the dialogical process.

⁶⁵ See *supra* section 4.3.

proportionality of this punishment in relation to the identified damages is not so clear, mainly because legally, there is no need to have a direct link between the damages and the sanctioning projects. This is an issue that the Tribunal for Peace should not overlook. The definitive sanction should make explicit how proportionality will be applied. Such decisions must be effectively communicated to victims, especially by replying to how their concerns were considered and the justification for declining their recommendations and observations.

5.6. Concluding Remarks

The memorial initiatives proposed in the Resolutions of Conclusions described in the third section of this Chapter respond to the judicial procedure that began with the proposals of the perpetrators and find broad legitimacy in all the literature that has analyzed the *duty of memory* and its potential to promote democracy. Moreover, such initiatives respond to some material difficulties because JEP's *Restorative Sanctions* are strongly related to policy issues that should guarantee the resources for their unfolding. As the JEP faces economic constraints to determine sanctions that tackle the material conditions of communities through the construction of schools, hospitals, and roads,⁶⁶ memory appears as a feasible solution that can contribute to the symbolic reparation of victims through an institutional offer already existing in the country.

Such a memorial justice should be *exemplary*⁶⁷, *polyphonic*⁶⁸, and sensitive to what victims want to remember and how. In that way, it can serve as an instrument for reconciliation, which does not necessarily imply the need to forgive. If, on the contrary, the memory produced by the activities unfolded by the perpetrators is not perceived as restorative for the victims, it can become a *bureaucratized memory* that fulfilled the legal procedure but is meaningless to the victims, or — worse— reproduces justifying speeches of the perpetrators. At the moment of writing, it is too early to know if these initiatives will end up being one or the other. What is clear is that the Resolutions of Conclusions foresee victims' participation as an essential condition to guarantee the restorative impact of such memorialization.

Although the proposals presented by the Acknowledgment Chamber state the need for constant communication with the victims to unfold the memorial initiatives, victims feel distrust and fear that the final narrative could reflect the perspective of the perpetrators. There are communication problems and a history of misunderstandings with State entities that exacerbate

⁶⁶ See *supra* section 5 of chapter 3.

⁶⁷ See *supra* the references to Todorov (2002)

⁶⁸ See *supra* the references to Mastromarino (2024).

such fears. Even if the Resolutions of Conclusions modified the projects, to a certain extent, to respond to victims' claims and to make explicit that their participation is mandatory to execute the projects, for many victims, it is unclear why the Acknowledgment Chamber approved the sanctioning proposals if they expressed their disagreement. The process of victim participation continues in the Tribunal for Peace. However, the lack of results and the time the JEP takes to communicate with victims undermines their relationship with the court and the possibility that these memorial projects will be restorative for them.



Image 6. Photo taken by the author that shows Aidee Forero, the mother of David Sebastián Galvis Forero, a soldier killed by the FARC-EP, exposing a weaving made of chakiras.

In a nutshell, memory can serve to do justice. It can be restorative, but only if it focuses on the victims and symbolically restores the presence of their relatives. Victims' dissatisfaction with the proposed memory actions has to do with the fear of transmitting the narrative of the perpetrators instead of the one of the victims. This dissatisfaction also stems from the proceeding to establish the sanctions, which starts with the proposals of the perpetrators and victims participate as consultants that inject legitimacy but cannot veto the initiatives. Moreover, material difficulties complicate the fulfillment of the *duty of memory* on which the sanctions are based. As the conflict continues in many regions and with other armed groups, the premise of these memorial initiatives is not to *remember to avoid repetition* but to *remember so that it stops happening*.

CHAPTER 6:

CONCLUSIONS AND RECOMMENDATIONS

As mentioned in the introduction, this research followed a multi-level approach that considered local, national, and supra-national authorities. Based on the findings of the preceding Chapters, which went from international to domestic and from general to specific, this final Chapter closes the ellipse. It returns to the initial queries and pins the lessons learned regarding the relationship between two pillars of Transitional Justice: memory and justice.

The Chapter is divided into four sections. The first summarises the findings of the previous chapters; the second highlights the lessons learned; the third presents a list of recommendations that could be implemented in future peace processes that follow a TJ path similar to the Colombian; and the fourth exposes a final consideration.

6.1. Findings from the Previous Chapters

The first Chapter reconstructed the interaction between Colombia and the ICC, paying attention to how the notion of penal alternativity, generally understood as lower imprisonment sentences, was expanded to recognize that unfolding restorative actions could be a valid form of punishment that complies with international criminal law if certain conditions are given. As explained in the Chapter, such decisions responded to a particular political context, the demands of the armed actors, and the need to find the best possible balance between justice and peace. As the Colombian case redefines the acceptable standards of international criminal justice by introducing *Restorative Sanctions*, analyzing them is vital to understanding what such sanctions should do to serve justice, having the victims at the center.

The second Chapter presented the constitutional framework regulating *Restorative Sanctions* and victims' participation. In this sense, the most relevant findings concern the limits imposed on the JEP to determine individual compensation and land restitution. The reparation offered by the JEP is collective and mainly immaterial (although projects with a deeper material dimension are not discarded, i.e., road construction or humanitarian demining). Finally, regarding victims'

participation, the Constitutional Court stated that although it is crucial, the JEP has full autonomy in determining the sanctions, which victims can not veto.

The third Chapter showed the protagonism of victims in transitional justice. A field that has promised more than it has achieved in practice and that finds in victims' participation an opportunity to have more significant impacts on populations that have experienced massive human rights violations. As described by the Chapter, victims' participation is the touchstone for determining the restorative value of the sanctioning projects. However, practical challenges, such as the large number of victims, the massiveness of the crimes, lack of political will, scarcity of resources, and the continuation of violence, hinder the restorative capacity of Colombian transitional justice.

Constitutional limits and external challenges strain the relationship of victims with the court. In that sense, Chapter 4 analyzed how victims participated in the JEP, identifying a series of particular achievements and challenges distinct from the exogenous elements exposed at the end of Chapter 3. Regarding its achievements, it highlights how victims' participation has contributed significantly to the judicial truth produced by the court. Victims' participation in the hearings and even the submission of reports have functioned as acts of early reparation (*actos de reparación temprana*), an official recognition that contrasts with years of denialism from the State. Likewise, victims who participated in both the ordinary justice system and the JEP recognize a more dignified treatment in the latter. Finally, the participation of victims in the JEP allowed them to establish ties with other victims who suffered similar victimizing events, allowing them to know that this did not happen only to them.

However, victims' participation also faces considerable challenges. To begin with, victims who were not prioritized and could not participate felt excluded. This substantially modifies their perception of the court and the restorative impacts of the sanctions. Even among the victims who participated in the JEP, there have been feelings of unjustified differential treatment since there were no harmonized rules to determine how their participation should be in all the macro-cases. Moreover, there were no unified criteria for opening them; some were opened based on criteria of representativeness of the most severe crimes, while others were based on territorial criteria. There are significant challenges in communicating the decisions of the JEP, which, being a specialized tribunal, handles a technical-legal language that most victims find hard to understand. These challenges, added to the short time the court has to investigate almost half a century of war, administrative difficulties that forced victims to present several times the documentation needed for their accreditation, and a complicated relationship with State entities, have led to a generalized feeling of dissatisfaction with the sanction projects proposed in the Resolutions of Conclusions. The

victims interviewed and their representative attorneys point out that participation is a fact and has brought benefits. However, the real impact of such participation remains unknown.

Against this backdrop, Chapter 5 analyzed the relevance of memory for victims and its protagonism in the *Restorative Sanctions*. As mentioned before, 11 out of the 15 restorative projects proposed in the first three Resolutions of Conclusions are related to memorial activities that perpetrators must perform as a form of judicial punishment.⁶⁹ Memory is also relevant for victims, who acknowledge it as an instrument that contributes to their healing because it allows them to honor their missing relatives, *be their eyes*⁷⁰, denounce, contribute to the truth, and weave bonds with other victims. *Restorative Sanctions* add to these qualities the potential to serve as a form of judicial punishment for perpetrators. Nevertheless, due to the difficulties described in the previous chapters, the relationship between victims and the JEP is complex, undermining the restorative capacity of the memory proposed in the Resolutions of Conclusions.

This *memorial justice* should be exemplary, polyphonic, and participatory. In this way, it can contribute to peacebuilding and not to conflict escalation. The aim of the transitional institutions created by the FPA is to build an *inclusive memory* that recognizes the pain of the different sectors in the conflict and goes beyond *defensive memories* that only recognize the violations committed against the group to which some victims belong. For this to be possible, *memorial justice* must be sensitive to victims' struggles and demands. Thus, although it is necessary to incorporate the perpetrators' narrative, *memorial justice* should serve as a way to honor victims, avoid justifying speeches of the atrocities committed during the war, and remember victims in a reparative sense that does not reproduce a paralyzing pain.

6.2. Lessons learned

Based on restorative justice theories, *Restorative Sanctions* are one of the cornerstones of the FPA (Parra-Vera 2022: 155). They should function as a form of judicial punishment for the perpetrators holding the most significant responsibility for the most severe crimes committed during the armed conflict that fulfill the following conditions: acknowledge their responsibility; contribute to comprehensive truth; contribute to victims' reparation; guarantee non-repetition and refrain from committing new crimes (Law 1957 of 2019: art. 20). The objective of the sanctions is to contribute to restoring the damages and reconstructing the social fabric that the armed conflict has wounded. However, as they are a judicial punishment that should comply with international criminal justice, the sanctions still need to serve rehabilitation, retribution, restoration, and deterrence.

⁶⁹ See *supra* Section 3 of chapter 5.

⁷⁰ In Spanish: *ser los ojos de quienes ya no están y ver por ellos*.

The first lesson learned relates to retributive justice. As mentioned at the end of Chapter 5, how the sanctions proposed in the Resolutions of Conclusions respond to these four elements is relatively clear. Nevertheless, it is unclear how proportionate this punishment will be regarding the losses discovered and the gravity of the crimes committed, primarily because there is no legal requirement to establish a direct connection between the sanctioned projects and the damages identified. The Tribunal for Peace, the JEP's instance determining the final sanction, should not ignore this matter. Consequently, to serve retributive justice adequately, the final sentences need to specify precisely how proportionality is applied in the memorial initiatives that perpetrators should unfold. Victims must be adequately informed of these decisions, particularly regarding how their concerns were taken into account and the rationale for rejecting or incorporating their suggestions and observations, respecting their rights and centrality.

The second lesson learned regards truth. As mentioned in Chapter 4, the most significant achievement of victims' participation relates to their contributions to a comprehensive truth. There is a difference between the judicial truth, the truth of the facts, and the truth that victims expect. In the JEP, these three types of truth interact in a particular way. The judicial truth that this court constructs is the result of contrasting points of view: that of the perpetrators, that of the victims who question the statements of the perpetrators, and that of the judicial investigation. The result is a polyphonic truth, which is the primary material for the memory that emanates from the JEP, i.e., for the private discussions that the *drama of the public trials* (Nino 1997) raises and will eventually be remembered by the population.

Nonetheless, this contrasting exercise poses complex challenges. For instance, the voluntary declarations of the perpetrators before the JEP can be used, as happened in its early years, to justify their actions in the war. Confronting victims with a justifying account rather than acknowledging the facts can be re-victimizing. In that sense, a lesson learned from the JEP involves selection and care so that victims are not exposed to counterproductive statements (Parra-Vera 2022). The recognition by the perpetrators was gradual and progressive, requiring them to understand the court's logic. At the same time, the JEP also needed to understand the most appropriate way to mediate the relationship between the perpetrators, the victims, and the judiciary.

As the JEP is a restorative transitional tribunal, the truth it inquires into must go beyond the truth of the facts. This truth must respond to the victims' demands about the moral and affective dimension of their relationship with the direct victims. In this sense, emotionality has a place that is not usual for conventional trials. This is the third lesson: the JEP should build a truth that speaks of the consequences of the crimes, also from the moral point of view, which must contribute to an emotional and restorative truth for the victims.

Although judicial decisions do not resolve public debates, will not *per se* unify a divided country, and may even at times exacerbate memorial disputes (Pistan 2024: 14), there is no doubt that the Resolutions of Conclusions and the findings of the JEP play a fundamental role in the production of memories. Memorial *Restorative Sanctions* will be used as an instrument to convey the judicial truth identified by the court.

The JEP's procedures find a judicial truth. These findings can move from the judicial to the social and, in this process, influence collective memories. Transitional institutions offer new inputs for these memorial disputes. The social remembrance of those facts, i.e., the memory of JEP's findings, differs from the actions that perpetrators must execute to comply with their sanctions. In this case, memorial *Restorative Sanctions* offer an opportunity for memory to be nourished by the perpetrators' actions and not only by the court's findings. Such recognition must give meaning to the events experienced by the victims, acknowledging their dignity (Bula-Beleño et al. 2020, 145).

The fourth lesson relates to harmonized standards for victims' participation. Just as the JEP's Tribunal for Peace should clarify which observations of the victims were taken into account, which were not, and why, the JEP's Acknowledgment Chamber must make apparent the parameters for selecting the victims that participate in its proceedings, communicating effectively with them and providing alternatives to participate when their cases are not within its jurisdiction (e.g., because they are victims of paramilitaries), for example through collective accreditation. Such a process not only allows the court to find a way to deal with the difficulty of having a massive number of victims but also strengthens their organizational processes.

As noted in Chapter 4, there is no uniform application of a methodology to decide or compare which case or situation is prioritized over others; consequently, the opportunities for victims' participation in these procedures are not robust (Bula-Beleño et al. 2020: 64). Therefore, it is necessary to standardize and systematically apply prioritization criteria to define what is the way to approach and unfold the investigations (Vargas 2024).

The lack of unified criteria is also evident in the characterization of damages, as there was no uniform taxonomy to classify them. Although several types are recognized, such as moral, health, and life project damages, the categorization and its rationale lack clarity; these categories vary between cases, not due to differences in the generating facts, but because of the application of different typological frameworks in each macro case, which makes a consistent evaluation difficult (Marín-Ortiz 2022: 31).

Clear standards and better communication from the court, in language understandable to victims, could have avoided some victims' dissatisfaction. Moreover, the lack of standardized criteria for both the selection of victims and the opening of macro-cases impacts the centrality of

the victims and their perception of the court. Likewise, there must be clarity regarding the scope of victims' participation. For victims who lead organizational processes, participation should not be exhausted in recounting their pain and reliving events that hurt them but should serve to give visibility to their struggles, claims, and resistance. On the other hand, from the judicial point of view, there seems to be an interest in participation that focuses on their value as witnesses to nurture the legal process in terms of determining the facts and the construction of individual charges and responsibilities.

The fifth lesson regards the procedure to structure the *Restorative Sanctions*, which begins with the perpetrators. The JEP can only propose projects when they do not do so. In this sense, the participation of victims, although significant, is not truly central. Victims are consulted, and they offer advice but cannot formulate restorative projects. As victims are the touchstone to determine whether a sanction has a restorative value or not, they should be included from the beginning in the structuring of the projects (Parra 2024). Future transitional restorative tribunals should begin by asking the prioritized victims how they would like to be repaired, explaining the scope of the court and its limitations, and then presenting these proposals to the perpetrators. In that way, perpetrators adjust to the victims' proposals, not *vice versa*.

Although the Resolutions of Conclusions warn that memorial initiatives developed by the perpetrators must have a permanent consultation process with the victims, many feel offended because the projects were admitted despite their disagreement. Such situations hinder victims' relationship with the JEP. Among other things, victims fear that the memorial actions unfolded by the perpetrators might revolve around their perspective, relegating the narrative of the victims. To avoid it, the Resolutions of Conclusions explicitly mention the need for victims to participate in developing the memorial initiatives. However, victims still have a sense of distrust and weariness after eight years without a determined sanction.

Such timing is understandable due to the magnitude of the JEP's task. Moreover, judges have functions that go far beyond the functions of an ordinary judge, whose job is to determine the sanction without being responsible for building the structure to execute it. In the JEP, there must be alliances with the political power to build sanctioning projects that align with the State's institutional offer. Such a situation leads to lesson sixth: For future processes, it would be desirable for the court to have greater financial and political autonomy so that the execution of sanctions does not depend on political will. Otherwise, a process that should be judicial is partially transformed into a political process closely linked to public policies.

Memory became a viable alternative for sanctioning the perpetrators in a way that also contributes to repairing the damages they caused because Colombia has been developing memory

policies since 2005. Accordingly, there is an institutional architecture to unfold them. This leads to the seventh lesson: memory can serve justice only if the necessary institutional architecture to implement such initiatives exists.

The eighth lesson regards the relationship between art and memory, one of the most interesting findings of this research. Such link is recognized in some projects proposed in the Resolutions of Conclusions, and all the victims' interviewed acknowledged the importance of memory and arts for personal and public healing. Blanca Nubia Monroy, mother of Julián Oviedo Monroy, an accredited victim in macro-case 003, emphasized how memory symbolically allows her son to live again. Art helped her to transmit the memory with love.

Her position on art and memory was common in all the victims interviewed, regardless of whether guerrillas, paramilitaries, or the State killed their relatives. They expressed how participative art helps them get rid of their pain, heal, release nostalgia and sadness, and transmit frozen feelings. The testimony of Jacqueline Mosquera is also representative when she says that art has served as a therapy that also helped her to get in touch with other victims who are now her companions at the organization, with whom she can share, hug, and feel that she is not alone.

Moreover, Esperanza Rojas, an accredited victim in macro-case 01 and the Director of the Foundation for the Protection of the Rights of Victims of Abduction and Enforced Disappearance — FUNVIDES—, said that art can be healing and that it has allowed her to meet victims who previously rejected her for being a mourner of a member of the security forces, in that sense art has contributed to overcoming *defensive memories*. However, she specified that the process should start with the victims, who should be asked how they want to be repaired. Art could help them heal, but it is difficult because some victims cannot or do not even want to see the perpetrators. Her daughter, Manuela Paez Rojas, says that art serves, builds, and heals if the victims participate, but it cannot be an imposition.

Despite the problematic relationship with the JEP, the victims who have participated in artistic training processes, who have woven links with other victims through art that makes memory, all agreed that art and memory could have a leading role in the *Restorative Sanctions*, warning, of course, that it is not a matter of doing what perpetrators want. Such reparative potentialities exist if victims participate autonomously and engage with perpetrators in the creative process.

These initiatives aim at symbolic reparations. However, human rights practice must be aware that 'as a juridical tool, symbolic reparation, especially memorialization practices, lacks adequate conceptual elaboration, and its potential remains underutilized ... [due to] programmatic

failures to integrate memorial practices into multilayered strategies for honoring victims, and advancing justice and social reconciliation’ (Greely et al. 2020: 167).

Memory is a complex concept in which the relationship between reparation, justice, truth, and prevention of future human rights violations is not linear. Social memorialization relates to disputed memories that can contribute to peace or to a more profound polarization. Beyond discussing the past, what is at stake are possible and imagined futures, which are consistent with specific interpretations of what societies lived. However, these ‘successful’ cases should not be used to build a bureaucratized way of using memory in a standardized manner for TJ processes that might be at the service of State interests. Instead, they should actively involve victims and citizens who did not directly experience such damages in order to build a democratic society.

In a nutshell, memory has emerged as a form of justice for three main reasons. First, it meets the requirements of the JEP regarding immaterial and collective reparation. Experiences and testimonies prove that memory can contribute to the reparation of victims. Second, it responds to the established procedure since the perpetrators made these proposals and were subsequently consulted with the victims. Third, an institutional architecture in Colombia supports the execution of memorial sanctions. Having said this, if the participation of the victims is not significant and they do not recognize a restorative value in the initiatives developed by the perpetrators, this *memorial justice* could become a *bureaucratized memory* that complies with the legal procedure but whose legitimacy is questionable.

6.3. Recommendations

The following list of recommendations emerges from the lessons learned. They seek to create a more victim-centered, transparent, and equitable transitional system. They range from the design of judicial procedures to the construction of collective memory, emphasizing the meaningful participation of victims, the harmonization of criteria, and the production of a restorative truth. The objective is to achieve *memorial justice*, contributing to victims’ reparation and peacebuilding. The list is divided into three clusters of recommendations. The first one regards procedural modifications to increase victims’ participation; the second refers to harmonizing rules to avoid a differentiated treatment among victims; and the third one presents recommendations that aim for better involvement of victims in the construction of truth.

6.3.1. Participation and Advising

The first cluster of recommendations calls upon the State to carry out victims’ participation not as a formality but as an essential process to determine the restorative content of the sanctions. The court

must be very sensitive to their claims to ensure the fulfillment of their rights to the maximum extent possible. Accordingly, this research proposes the following specific recommendations:

- **Recommendation 1:** Peace negotiators, legislators, and policymakers in charge of establishing the legal frameworks and procedures for transitional courts, as well as the judges and magistrates who will preside over them, should ensure that future restorative transitional courts have a procedure for the design of sanctions that starts by consulting the victims how they wish to be repaired. Starting with the victims and not the perpetrators increases the restorative potential of the sanctions. Moreover, it narrows the relationship between the damage caused, the victims involved, and the *Restorative Sanctions*.
- **Recommendation 2:** Judicial administrators, transitional court communication teams, and restorative justice specialists in charge of designing the mechanisms for interaction between the court and the victims should develop a system that allows constant, effective, and clear communication between the court and the victims. In that way, they can understand the court's objective, limits, and criteria.
- **Recommendation 3:** Judges, prosecutors, and legal teams of transitional courts, as well as facilitators and mediators who work directly with victims in these processes, should not see victims' participation as an end in itself. The objectives of such participation should be made clear so that the impact of participation on both the process and the final sanction is also evident.

6.3.2. Participation and Rules Harmonization

The second cluster of recommendations arises from an important lesson learned: the lack of harmonized criteria generated deep dissatisfaction among victims, who felt stratified and treated differentially without apparent justification. This experience has highlighted the critical need to establish more transparent, equitable, and consistent processes. Therefore, these recommendations focus on improving victims' selection and participation, defining clear procedures, harmonizing case selection, and standardizing investigation methodologies.

- **Recommendation 4:** Selection and accreditation committees of the transitional courts, human rights officers in charge of the interaction with victims, and legal teams responsible for designing selection and participation criteria should design a transparent selection

process that allows victims to know why they were not selected and how they could participate, for example through a collective accreditation process.

- **Recommendation 5:** Judicial policymakers, transitional court administrators, and restorative justice specialists in charge of structuring victim participation mechanisms should define the victims' participation process in as much detail as possible. Clarifying the instances they should address and the scope of such participation.
- **Recommendation 6:** Chief prosecutors, chief judges of the transitional courts, case selection committees, and the investigative teams in charge of analyzing and categorizing cases should determine the macro cases through a harmonized process that makes all cases respond to the same criteria. They should also design a harmonized research methodology. This will avoid the feeling of unjustified differential treatment.

6.3.3. Participation and Truth

The following recommendations address a crucial aspect of transitional justice: the construction of truth and memory. These guidelines arise from the understanding that truth must not only be factual but also healing and transformative. Experience has shown that a purely legal or perpetrator-centered approach can be insufficient and even harmful to victims. Therefore, these recommendations propose a paradigm shift, placing victims at the center of the truth-building process, acknowledging their knowledge and experiences, and seeking innovative and sensitive ways of narrating the past. Emphasis is placed on the importance of inclusive and polyphonic memory and on the potential of art to process painful truths in ways that foster healing and peacebuilding.

- **Recommendation 7:** Judges, prosecutors, transitional court investigators, and restorative justice specialists in charge of designing the data collection and analysis processes should ensure that the participation of the victims is significant in terms of the production of truth. They have valuable information as witnesses and have carried out investigations to find out what happened to their relatives. However, the truth produced by the tribunal must go beyond the judicial reconstruction of the facts and recognize the organizational and resistance processes of the victims.

- **Recommendation 8:** Judges, prosecutors, forensic psychologists, and victim support teams of the transitional courts, as well as the designers of protocols for taking testimony and voluntary versions, should ensure that, in line with the first recommendation, the process of building a restorative truth begins with the victims, asking what they want to know and preventing them from being exposed to hours and hours of voluntary versions with painful, explicit or re-victimizing narratives.

- **Recommendation 9:** Historical memory committees, transitional court communication teams, historians, and specialists in the construction of collective narratives associated with transitional justice processes should ensure the construction of an inclusive, polyphonic, and participatory memory based on the findings of the court and the actions of the perpetrators; avoiding justificatory narratives and giving priority to how the victims want those who are missing to be remembered.

- **Recommendation 10:** Judges, prosecutors, interdisciplinary teams of transitional courts, peacebuilding specialists, and those in charge of designing symbolic reparation measures and reconciliation processes must recognize that the truth the court reveals can be painful, explicit, and re-victimizing. Consequently, they must make room for art in the memorial processes, truth-telling, and perpetrators' actions, as this can help build a truth that is not petrifying but allows us to see into the future and the construction of peace.

6.4. Seeing the sky in a grain of sand...

The Colombian model is considered a global reference for negotiated solutions to armed conflicts because it found the best possible balance between justice, peace, and memory. Having said this, by giving value to individual experiences, this thesis shows that the Colombian model is more than just a country study because it encapsulates a human dimension that transcends the specific armed conflict, thus unveiling the sky in a grain of sand.

That said, the lessons learned and the recommendations described above could successfully guide future transitional processes only in the presence of the three conditions that led Colombia to assign a leading role to memory, i.e., victims acknowledge that memory could be restorative, perpetrators partake in the memorial initiatives, and the Government is willing to create or support an institutional architecture to implement memory policies. Moreover, if *memorial justice* does not sufficiently involve victims, it will result in a *bureaucratized memory* that complies with legal procedures but has questionable legitimacy.

In conclusion, despite the inevitable relevance of external challenges in transitional processes, *memorial justice* reflects on the past while envisioning a democratic future.

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