

RESTORATIVE PRACTICES AND JUSTICE: A NEW PARADIGM FOR POST-CONFLICT IN COLOMBIA (PART II)

Restorative justice is a new paradigm which has entered the discussion on what our modern legal system should look like over the last 20 years, in counterpoint to the retributive paradigm. In addition, due to its overlap with transitional justice in terms of objectives and principles, restorative justice has grown as a form of positive language in post-conflict scenarios around the world. With this in mind, the recent Peace Accord between the Government of Colombia (GOC) and the FARC-EP guerrilla group negotiated in Havana included restorative justice as a guiding principle. This two-part Spotlight takes as its starting point the clarification of the concepts of restorative practices and justice (Part I), and goes on to examine the role this new paradigm could play in the implementation of the Peace Accord, as well as the broader peacebuilding context in the country (Part II).

THE RESTORATIVE PARADIGM IN THE PEACE ACCORD

The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace signed in November 2016 between the GOC and the FARC-EP guerrilla group, proposes a mixed model of justice that incorporates elements of both the retributive and restorative paradigms. Specifically, in Point 5, it addresses Victims of the Conflict and establishes an Integrated System of Truth, Justice, Reparation and Non-Repetition (SIVJRNR), indicating that its creation was, and subsequent implementation should be, crosscut by a series of structural principles:

*"[...] the recognition of victims as citizens with rights; that there must be full truth about what happened; the recognition of responsibility by all those who participated directly or indirectly in the conflict [...]; the satisfaction of victims' rights to truth, justice, reparation and non-repetition, on the premise of not exchanging impunities, and also taking into account the basic principles of the Special Jurisdiction for Peace (JEP), which includes that 'damage caused should be repaired and restored whenever possible'."*¹

Thus, essential elements of restorative justice are included in the Peace Accord, placing responsibility, the reparation of victims, and the restoration of damages at its center. Additionally, given that another essential objective of the Accord was the reintegration of former FARC-EP combatants into the nation's social, political, and economic community,² it also shows a kind of reconstruction, under its own terms, of the restorative paradigm's guiding objectives of responsibility, restoration, and reintegration (also known as the three Rs).³

On the one hand, the Peace Accord puts forward a model of retrospective justice, insofar as it seeks to understand the origins and dynamics of the armed conflict through historical memory exercises embodied in mechanisms such as the Commission for the Clarification of the Truth, Coexistence, and Non-Repetition (Truth Commission) and the Missing Persons Search Unit (UBPD). On the other hand, it also presents a model of prospective justice, insofar as it considers how one generation influences the lives of subsequent generations and, consequently, the community requiring restoration is not only "[...] a union of contemporaries, but also a link between generations that are more interconnected through time." In fact, the emphasis on the non-repetition of violence and future victimization is a fundamental axis that is reiterated throughout the Accord.

Restorative justice is therefore considered from the temporal perspective as well; that is, it is conceived looking into the past, but also towards the future. If both the Peace Accord and transitional justice are understood as an exercise in rationality anchored in a historical present, a transaction between the demands for justice and the current needs for peace;⁴ the guiding triad of past, present, and future of the restorative paradigm and, in turn, the model of justice agreed in Havana is complete.

The SIVJRNR is composed of three justice mechanisms, the JEP, the UBPD, and the Truth Commission;⁵ but their effectiveness depends on their articulated

and complementary application. The SIVJRNR therefore contemplates a series of judicial mechanisms that allow for the punishment of serious violations of human rights and International Humanitarian Law (IHL), but also establishes extrajudicial mechanisms that seek "[...] the clarification of the truth, the search for disappeared loved ones, and the reparation of damage caused to persons, collectives, and entire territories."⁶ Thus, the Peace Accord does beyond the provisions of this system to propose a collective approach against harm, which is understood from a social and not just a legal perspective; a vision of crime as a societal phenomenon typical of the restorative paradigm, and where the true extent of the system's integration lies.

Other elements that the Peace Accord shares with the restorative paradigm are the centrality of victims' needs and dignity, as well as their active participation in the entire process; it is no coincidence that the justice model is articulated with Point 5 of the Accord: Victims of the Conflict. The justice model's main objective is the integrated reparation of victims, and the restoration of the damage caused, taking the termination of "[...] the situation of social exclusion that caused their victimization" as its point of departure.⁷

An integrated understanding of the Peace Accord in its entirety ("an indissoluble whole") is essential at this point, because in following a maximalist peacebuilding model, it not only focuses on Demobilization, Disarmament, and Reintegration (DDR) mechanisms and truth, justice, and reparation measures, but also comprises of a set of actions to address the structural causes of the armed conflict and its victimization dynamics.⁸ Thus, the so-called construction of a stable and lasting peace is expressed as a new chapter in the history of the country, driven by all the active forces of the nation:

*"[...] a transition that contributes to the greater integration of our territories, greater social inclusion - especially of those who have lived on the margins of development and have suffered the effects of the conflict - and to strengthening our democracy so that it can be deployed throughout the national territory and ensure that social conflicts are dealt with through institutional channels, with full guarantees for those who participate in politics."*⁹

Consequently, the Peace Accord includes agreements for Integrated Rural Reform (Point 1), Political Participation (Point 2), and the Solution to the Problem of Illicit Drugs (Point 4), which aim to address structural violence such as the lack of access to land and productive development, a centralist and exclusive democratic system, as well as the proliferation of illicit crops and drug trafficking. The scope of the Accord's intervention therefore includes victims, perpetrators, and the national community as a whole; that is, just like the restorative paradigm, which seeks to repair the broken social fabric. Thus, in its restorative approach, the Accord seeks to re-establish community ties and reaffirm collective values such as coexistence, cultures of peace, and non-stigmatization, promoting reconciliation at the local and national levels.

THE RESTORATIVE PARADIGM IN THE PEACE ACCORD (TEXT QUOTES)

5. AGREEMENT ON VICTIMS OF CONFLICT: "INTEGRATED TRUTH, JUSTICE, REPARATION AND NON-REPETITION SYSTEM," INCLUDING THE SPECIAL JURISDICTION FOR PEACE (JEP); AND COMMITMENT TO HUMAN RIGHTS.

"Compensating victims is at the center of the Accord between the National Government and the FARC-EP [...] These principles were considered throughout the process of developing Point 5: Victims, and should cut across its implementation: the recognition of victims and responsibility; the satisfaction of victims' rights; victims' participation; clarification of the truth; protection and security guarantees; non-repetition guarantees; the principle of reconciliation; and the rights-based approach"

(Peace Accord, p. 124)

"The SIVJNR has a particular emphasis on restorative and reparative measures, and aims to achieve justice beyond retributive punishment."

(Peace Accord, p. 128)

"An orienting paradigm of the SIVJNR's Justice Component is the idea that the political community is not only a coming together of contemporaries, but also a link between generations connected across time. Justice is prospective in that it considers that a period of time unavoidably influences those that follow. It is a prospective justice that respects the values of the present, whilst also being concerned with ending conflicts that should not be perpetuated, for the sake of defending the rights of future generations"

(Peace Accord, p. 143-144)

"For this reason, one of the guiding paradigms of the SIVJNR's Justice Component will be the application of restorative justice that preferentially seeks the restoration of the damage caused and the reparation of the victims affected by the conflict, particularly in order to end the situation of social exclusion caused by victimization. Restorative justice prioritizes victims' needs and dignity, and is applied with an integrated approach that guarantees justice, truth, and non-repetition."

(Peace Accord, p. 144)

"45. In the justice component, two procedures will be applied:

1. Procedure in the case of recognition of truth and responsibility.
2. Procedure in the absence of recognition of truth and responsibility."

(Peace Accord, p. 152)

"Punishments will have as their essential purpose the satisfaction of victims' rights and the consolidation of peace. They must have the greatest function of restoring and repairing the damage caused, always in relation to the degree of recognition of truth and responsibility that is made before the SIVJNR's Justice Component through individual or collective declarations.

The JEP's own sanctions, which will be applied to those who recognize truth and responsibility before the Recognition Court, with regards very serious infractions, will have a minimum duration of five years and a maximum of eight years for the fulfillment of reparative and restorative functions."

(Peace Accord, p. 164-165)

"Provided the following requirements are met:

1. The activity carried out has repaired the victims or has had a restorative impact.
- [...] The system's own sanctions, in accordance with the provisions of number 60, shall have restorative and reparative content, as well as restrictions to freedoms and rights, such as freedom of residence and movement, necessary to their application. Those sanctioned shall guarantee non-repetition."

(Peace Accord, p. 172)

"Those appearing before the Recognition Court may present a detailed individual or collective project for the execution of labor, works, or reparative and restorative activities. This project will indicate obligations, objectives, schedules, times, and places for implementation, as well as the people responsible for carrying this out, and the place they will live. The sanctions imposed by the Court will pre-establish the places where those implementing the projects will reside; these shall be appropriate in terms of habitability and dignity."

(Peace Accord, p. 172)

CONVERGENCES AND DIVERGENCES BETWEEN TRANSITIONAL AND RESTORATIVE JUSTICE

From the outset, it must be stated that many scholars and practitioners point to the limitations of restorative justice in addressing transitional contexts marked by massive human rights violations and crimes against humanity perpetrated in a systematic manner.¹⁰ In fact, the modern paradigm of restorative justice is believed to have been designed from stable democratic contexts such as New Zealand, Australia, Canada, and the United States, to address phenomena such as offenses committed by adolescents, the rehabilitation of prisoners, coexistence in school settings, and in general, as a critical alternative to the ordinary functioning of criminal justice systems in modern societies.¹¹

On the other hand, transitional justice has its "most recent" origins in the second post-war period, where the allied victory allowed the imposition of a retributive paradigm to judge war crimes. Since then, transitional justice has been proposed as a mechanism to avoid impunity, within the framework of viable political negotiations that seek to end generalized violence.¹² In these contexts, retributive justice has been valued as a great advance, and an obligation to face transitions with minimum standards of justice; an imperative whose apex is the Rome Statute and the International Criminal Court, with its mandate to try people accused of war crimes, crimes against humanity, crimes of aggression, and genocide. From this perspective, restorative justice can moderate or be complementary to transitional justice, but cannot completely replace it, since the prosecution of those responsible is inescapable and concessions should not be made.¹³ The central idea of this thesis is that there is an insurmountable tension between the values of peace and justice. In other words, the imperative

of punishing those responsible for violence (justice) would be limited by the punitive concessions demanded by combatants in a peace negotiation to bring about a definitive ceasefire.¹⁴

However, this reasoning is based on a limited understanding of justice as punishment, as put forward by the retributive paradigm, leading to criticism of the latter's applicability to transitional contexts, and support for a restorative understanding of transitional justice.¹⁵ Firstly, restorative justice's true origins are rooted in the ancestral practices of Indigenous peoples, meaning that its contextual limitations may really be grounded in limited outside conceptions of what is and could be. Howard Zehr, a leader in the development and systematization of this field, finds in restorative justice "a theoretical and philosophical framework alternative to traditional law, which seeks the continuous evolution of its content."¹⁶ Unlike the rigidity of retributive justice, the restorative paradigm is characterized by ambiguity and adaptability, and its dynamic definition permits its adaptation to the demands of specific contexts.

One of the most visible transitional justice scenarios in the world, that which sought to overcome the apartheid system in South Africa, was guided by the principles of restorative justice. In fact, the Truth and Reconciliation Commission, led by prominent figures such as Nelson Mandela and Desmond Tutu, has become a point of reference for alternative ways of approaching a political transition from a legal standpoint.¹⁷ In this context, the imperatives of justice were read through the lens of truth, and the complete confession of crimes in

exchange for amnesties was sought in order to generate understanding of violent dynamics, prevent them, and not repeat them.

This was a prospective justice aimed at national reconciliation, the reintroduction of offenders into the community, and the restoration of victims' dignity in tune with traditional African thought, according to which human beings only come into being thanks to and through the humanity of their fellow human beings (Ubuntu). Everything must therefore be done to maintain or restore that harmony, and whoever disrupts another's humanity is also dehumanized. This is an example of how restorative justice can fit within a specific context, and even be legitimized by local culture.¹⁸ However, some argue that transitional restorative justice cases like South Africa, Rwanda, and Northern Ireland are really political myths invented to justify amnesties,¹⁹ whereas in fact, all transitions and truth commissions seek new national narratives that do not reflect a real consensus, but rather the process of constructing an identity in opposition to the recent and violent past; where the restoration of the social fabric is only one of several considerations.²⁰

In any case, the overlap between transitional and restorative justice is evident in several areas. On the one hand, both emphasize inclusive and non-adversarial frameworks, i.e. a dialogue between victims and perpetrators rather than the assignation of blame and punishment. Both also promote values such as truth,

accountability, reparation, reconciliation, participation, and conflict resolution, among others.²¹ On the other hand, both can reinforce each other in their quest to renew and strengthen preexisting community ties, as well as those with actors traditionally marginalized by the judicial and political system.²² That being said, the incorrect implementation of restorative justice in complex and fragile transitional contexts is a danger which must be recognized. At the end of the day, heated debate in this field is a call for a more mature and comprehensive understanding of both restorative and transitional justice, as well as their intersections.²³

In reality, numerous variables converge in this discussion about justice models; analysis may involve not only retributive and restorative paradigms, but also distributive or procedural justice.²⁴ Ultimately, the dilemma of transitional justice seems to mirror that of the ordinary justice system: how to administer justice (restorative, retributive, and distributive) in a way that molds a legitimate and efficient system according to the objectives set by a society and its leaders. In the case of transitional justice, the objective is to move from a system of authoritarian government to a democratic system, or from a context of generalized and systematic violence to a society of peaceful coexistence.²⁵ Thus, the debate over whether the restorative paradigm is able to respond to this objective remains open.

THE MODEL OF JUSTICE IN THE PEACE ACCORD

The objective of transitional processes in Colombia, as defined in the Peace Accord, is the construction of a maximalist peace, which demands a justice model which is both holistic and broad. Colombia currently has a justice system in which differential doses of restorative and retributive (and also distributive) justice are administered; the real issue lies in what precise proportions of each are required, and the answer will not come solely from the negotiations in Havana and the text of the Peace Accord, but also from its implementation by SIVJRNR operators.

In general, while the Peace Accord aligns with the restorative paradigm described above, a detailed reading of all its provisions indicates a subsidiary or complementary retributive function. On the one hand, it foresees different liability regimes in five possible scenarios:

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| <ul style="list-style-type: none"> i. Those held not to be responsible according to selection criteria for serious violations, or because they have received amnesties. i. Those who recognize truth or full responsibility for serious violations will serve reparative and restorative penalties (5 to 8 years), including restrictions to their liberty which, however, do not constitute prison sentences, or equivalent measures. i. Those who belatedly recognize truth or full responsibility before the | <ul style="list-style-type: none"> JEP's trial section will serve essentially retributive punishments (5 to 8 years), with prison sentences. i. For the above two cases, those who did not have a decisive role in the most serious and representative acts will receive a reduced or adjusted sentence (2 to 5 years). i. Those who do not recognize full truth and responsibility will serve retributive penalties (15 to 20 years), with prison sentences.²⁶ |
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Thus, punishments with both reparative and restorative functions are considered a limited and ideal option. In fact, "restorative justice does not distance itself from retributive justice, but rather establishes an exception to it, whereby retribution (severity) is the rule and restoration (benefits) its exception."²⁷

Furthermore, in taking the procedures catalogued by the Peace Accord as our starting point, we would be acting in contradiction to the restorative logic, which dictates that the measures to be taken should emerge from dialogue between all parties and the resulting decisions regarding sanctions and victims' reparation.²⁸ The basic problem, not detailed here, is the amount of time and resources (material and human) demanded by restorative justice and practices. Transitions tend to involve countless violations and judicial processes that can hardly be approached with this level of detail and with such diverse outcomes. Therefore, limitations must be recognized, and collective restorative approaches based on contextual needs should be accepted.

On the other hand, the level of understanding and familiarity that operators have of the justice model and its restorative precepts must be considered; the interpretation and implementation of the Peace Accord by SIVJRNR operators is also fundamental, as many will be confronted with restorative tools for the first time, having received training in the retributive legal system. It is perfectly possible to have a grounding in restorative principles, but a retributive execution. Any one act can be understood through several different experiences and interpretations (social realities), each of which is true according to its particular perspective. This contradiction between the classic judicial truth and the historical truth with reparation sought by the Peace Accord is a fundamental problem that will be at the center of discussions about the SIVJRNR's restorative function.

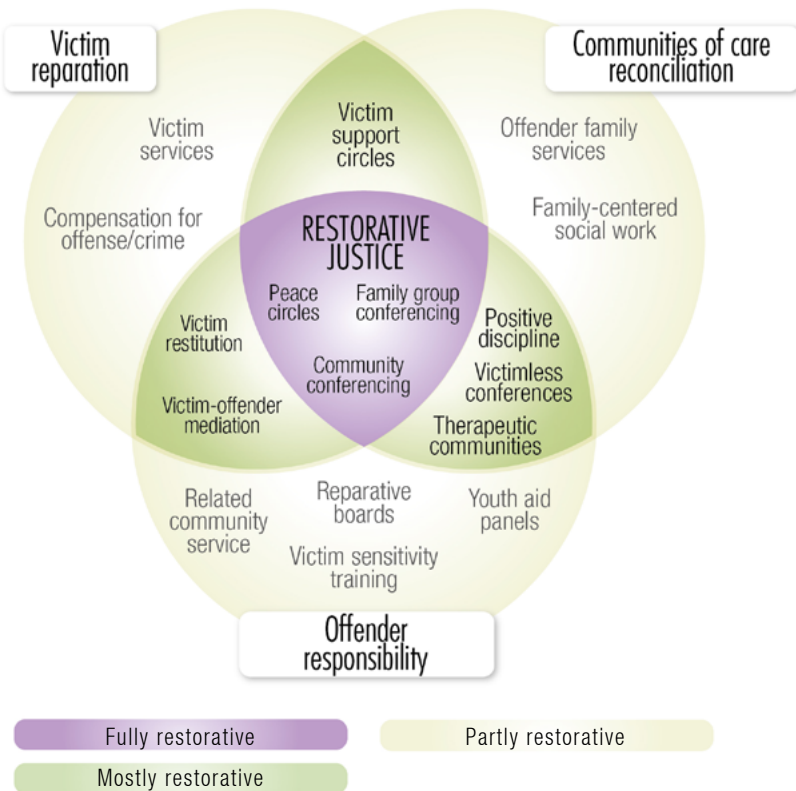
There are no strictly restorative practices provided for in the Peace Accord. Following Watchel's typology (see Chart), the Colombian transitional justice model contains restorative elements that seek reparations for victims, reconciliation with communities, and the accountability of offenders. But in examining the categories more closely, one could only argue that the Peace Accord's activities are partly restorative; only in some cases are they mostly restorative, and in no circumstances are they fully restorative.

There are also many elements that fall outside the sphere of control of SIVJRN operators, including, on the one hand, the effective reincorporation of former FARC-EP combatants and, on the other, the construction of a maximalist peace. The Peace Accord is envisioned as a series of processes that make up a binding whole; they are agreements whose destiny is closely interlinked, meaning that the will of the Government and the implementation of the Accord as a whole will also profoundly impact its intended restorative purpose. What SIVJRN operators can try to safeguard is the process' reflective aspect, which is fundamental to the restorative paradigm. The purpose of generating a new historical narrative is not only to reveal facts and dates, but rather to call on perpetrators, victims, and society to consider how the conflict happened, and what was felt or thought when a violent act was committed or received; it is a collective catharsis in which

society reflects on how damage has been inflicted in multiple directions, as well as its corresponding perpetrators. So, the emotional dimension is key to the restorative paradigm.

These discussions often seem far removed from the social realities they address. However, in the Colombian context, the Plebiscite (on whether to accept the Peace Accord or not) was a perfect scenario where the public dimension of this debate was manifested. The "No" campaign and the majority population it represented had one key demand: to achieve a more retributive justice, with prison sentences; but achieving this end would disfigure the Accord's restorative component.²⁹ Thus, this is not just a discussion involving negotiators, politicians, judges, and those directly involved, but rather, the battle for a justice model transcends the whole of society.

RESTORATIVE JUSTICE CLASSIFICATIONS³⁰



CONCLUSIONS

In essence, restorative justice puts the discussion of the very justice model under which each society is governed on the table. Colombia is part of a great majority of nation states that have adopted the punitive and retributive justice model as their own. The peace process and its transitional justice model, however, suspend the ordinary course of our legal system to implement exceptional justice which privileges peace. To a large extent, the idea of justice underlying this model belongs to a restorative approach. However, society and its institutions continue to operate under the punitive system's mental structure and rules when implementing restorative justice.

Thus, restorative practices need to be deepened and institutionalized as a basis for the social justice required by victims, perpetrators, and communities affected by the armed conflict. In fact, one would not be mistaken in thinking that the reality of Colombian communities deeply marked by violence and marginalization, as well as corresponding resistance movements, calls for alternative justice models like the restorative one. Restorative practices, as mechanisms of reconciliation, coexistence, and guaranteed non-repetition, can form the basis of territorial peace. Ultimately, this is not a conversation about transitional justice, but rather about making permanent transitions in order to incorporate the restorative paradigm into the ordinary justice system.

¹ Government of Colombia & FARC-EP (2016) Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace. Havana, Cuba. p. 127. Available at: <https://bit.ly/2ruJIE>
² Issue addressed in Point III of the Peace Accord, containing that stipulated in (3.2) Reincorporation of the FARC-EP into civilian life – in economic, social, and political terms – according to their interests
³ Britto, D. (2005). Justicia restaurativa: una mirada desde la perspectiva de género. Cali: Universidad Javeriana de Cali.
⁴ Orozco, I. (2008). Justicia Transicional en tiempos de deber de memoria. Bogotá: Temis – Universidad de los Andes.
⁵ In reality, the SIVJRN is made up of five mechanisms or measures, which in addition to the institutions mentioned also include integrated reparation measures for peacebuilding and non-repetition guarantees.
⁶ Government of Colombia & FARC-EP Op. Cit. p. 127
⁷ Government of Colombia & FARC-EP Op. Cit. p. 144
⁸ Rettberg, A. (2010) *iseñar el futuro Una revisión de los dilemas de la construcción de paz para el posconflicto en Conflicto Armado: Seguridad y construcción de paz en Colombia*. Bogotá: Universidad de los Andes.
⁹ Government of Colombia & FARC-EP Op. Cit. p. 6
¹⁰ Pearson A. (2017) Is Restorative Justice a Piece of the Colombian Transitional Justice Puzzle? *Restorative Justice: An International Journal*, 5 (2), 293–308.
¹¹ Uprimny R. & Saffon, M.P. (2005) *Justicia Transicional y Justicia Restaurativa: tensiones y complementariedades en Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional de Rettberg, A. (Ed.)*. Bogotá: Universidad de los Andes.
¹² *Ibid.*
¹³ Uprimny R. & Saffon, M.P. *Óp. Cit.*
¹⁴ Gómez-Velazquez, A. & Correa-Saavedra J. (2015) *¿Sobredimensión de la tensión entre justicia y paz? reflexiones sobre justicia transicional, justicia penal y justicia restaurativa en Colombia*. *International Law: Revista*

colombiana de Derecho Internacional, 26, 193-247.
¹⁵ *Ibid.*
¹⁶ Tonche, J. & Umaña, C.E. (2017) *Sistema Integral de Verdad, Justicia, Reparación y No Repetición: un acuerdo de justicia ¿restaurativa?* *Revista Derecho del Estado*, 38, 223-241.
¹⁷ J.L. Gibson (2002) *Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa*.
¹⁸ *Ibid.*
¹⁹ Wilson, S. (2001) *The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty*. *South African Journal on Human Rights*, 17 (4), 531-562.
²⁰ Green, S. (2016) *Restorative justice in transition*. *Restorative Justice*, 4 (1), 137-139.
²¹ Clampa, K. & Doak, J. (2012) *More than Words: Restorative Justice Concepts in Transitional Justice Settings*. *International Criminal Law Review*, 12, 339–360.
²² Doak, J. & O'Mahony, D. (2012) *Transitional Justice and Restorative Justice*. *International Criminal Law Review*, 12, 305–311.
²³ Nickson, R. & Braithwaite, J. (2014) *Deeper, Broader, Longer Transitional Justice*. *European Journal of Criminology*, 11 (4), 445-463.
²⁴ J.L. Gibson *Óp. Cit.*
²⁵ Orozco, I. *Óp. Cit.*
²⁶ *Gobierno de Colombia & FARC-EP Op. Cit. Pág. 164-166.*
²⁷ Tonche, J. & Umaña, C.E. *Óp. Cit. Pág. 238.*
²⁸ Tonche, J. & Umaña, C.E. *Óp. Cit.*
²⁹ Tonche, J. & Umaña, C.E. *Óp. Cit.*
³⁰ Wachtel, T. (2013). *Definiendo que es restaurativo*. *International Institute for Restorative Practices*.