



THESSISMUN

2018

THESSALONIKI INTERNATIONAL STUDENT
MODEL UNITED NATIONS

**UN Economic and Social Council
(ECOSOC)**

Topic area B: "The role of transitional and restorative justice in promoting just, peaceful and inclusive post-conflict societies (Sustainable Development Goal 16)"



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Topic Area B: The role of transitional and restorative justice in promoting just, peaceful and inclusive post-conflict societies (Sustainable Development Goal 16)

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1. Welcoming Message

Dear participants,

It is our uttermost pleasure to welcome you to ThesisMUN 2018 and more specifically to Economic and Social Council. Our participation to ThesisMUN goes back to 2014 and despite the growing size of the conference, its unique characteristics such as academic excellence, organizational perfection and cooperation ambience are still omnipresent. For those reasons, we truly believe that your participation in ThesisMUN will be an unforgettable experience for you regardless of your previous experience in such simulations.

The document that you are holding in your hands is the study guide of our committee. The aim of this document –and our expectation- is that it will enable you to acquire a more profound insight into the topics under discussion. During your preparation, this guide will be a compass for your research and, combined with it, will allow you to present your position paper (your country's policy on the topic) to us. Additionally, it should contribute to your pre-conference academic preparation. However, apart from acquiring knowledge on the topics under discussion do not neglect to go through the rules of procedure that will facilitate our committee's work.

As the board members of ECOSOC we are here to assist you in your endeavor to address the prominent topics of action against climate change and the promotion of restorative justice. We acknowledge that this year's topics are both intriguing and challenging but we are here to answer your inquiries and assist you in any way possible.

We both expect that our cooperation will be based on trust, communication, punctuality and respect which all work both ways. We are looking forward to meeting you all next April in the beautiful city of Thessaloniki.

Best regards from Athens!

Your chairpersons,

Bogarakou Elpida

Lagouvardos-Kotronicis Orestis

2. Introduction to the institution

The Economic and Social Council (hereinafter ECOSOC) of the United Nations was established in 1945 and since then has been one of the six main bodies of the Organization.

In the 10th Chapter of the UN Charter (i.e. Chapter X), under article 61 the composition of the Council is displayed as follows. The Members of ECOSOC shall be fifty-four (54), with the possibility of reelection and with only one representative per member state. Each member state has the right to one vote and the decisions in the Economic and Social Council are made based on the majority of the members present and voting (Article 67).

The procedure followed by the ECOSOC is quite simple. The Economic and Social Council may set up commissions in economic, humanitarian and social fields, may invite any Member of the United Nations to participate, without the right of vote, in its debates and discussions, if the topic under discussion is directly related or relevant to that Member of the UN or its national interests. Other parties that may participate in its deliberations without the right to vote include representatives of specialized agencies. Those representatives may participate in the ECOSOC debates or the established commissions' debates and vice-versa, its representatives can participate in the deliberations of the specialized agencies. Lastly, the Economic and Social Council has the power to arrange for non-governmental organizations, international organizations or even national ones to attend in order to provide their consultation.

Nowadays, the Economic and Social Council of the United Nations is more needed than ever. It focuses on current burning issues upon the economic development, the humanitarian refugee crisis, the environment, children in need, food security and education.

More specifically, the current discussion of the Council on the issue of economic matters revolves around the Asia-Pacific region and how despite the positive signs, the threats of financial instability remain. What is more, on the humanitarian issues,

ECOSOC is currently discussing upon the boosting of winter-assistance for displaced persons from Iraq in conflict-affected villages, while urging the European Union to adopt more proactive measures in order to tackle effectively the migrant flows in the region. A ban on Europe's "dirty fuels" is a focal point of debates, as well, as we see "West African countries putting the health of their people first", while on World Soil Day an immediate need for healthy soils for essential services is expressed. Along with UNICEF, ECOSOC deals with the issues of children lacking access to clear water etc.

3. Introduction to the topic

Topic area B of the Economic and Social Council will be focused on the role of two different forms of judicial systems as these are used in cases of post - conflict areas. These forms are the transitional and restorative justice systems. The present study guide will help you define what exactly these forms of justice are and what the differences between them are. Moving on, you will be able to understand how these systems work and where they have been applied or could be applied in the future.

According to the International Center for Transitional Justice and recent developments in history (as case studies below will reaffirm) there are indicators that societies all over the world have been constantly combating with totalitarian regimes and dictatorships in the name of Freedom and Democracy in an effort to become more liberal (Latin America, Eastern Europe, Former Soviet Union and Africa). These times of transition from an absolutist, illiberal regime to a more liberal, democratic one are characterized by massive political and social movements. The State that is transitioning operates in uncertainty and one major issue occurs; how should a State reconcile past and future regimes, past and future leaders, past and future history, how

should the rule of law be created in the new regime and how will its social understanding be framed?¹

These questions regarding the conception of justice in periods of political instability and transition have started being addressed in the late 20th century according to Teitel² (2002) from 1980s onwards. It was deemed necessary that a legal and judicial system that would promote peacekeeping, peacebuilding and democratic ideals was to be formed. As one can easily understand, transitional and restorative justice are the types of systems used when a State is transitioning from one regime to the other, as it is often done in cases of civil wars and has been done in the case of the World Wars and the mechanisms used to reconcile the past with the present in a legal framework.

4. Definition of the terms “transitional” and “restorative” justice

The purpose of this Chapter is to explore, define and clarify what the terms “transitional” and “restorative” justice mean and what their uses are. It will also become clear why their application and mainstreaming in national and international policies is of great importance.

4.1. Transitional Justice

Consequently, on the one hand, we use the transitional justice model. Many definitions have been used to describe it and all have common grounds. The core of the concept is illustrated by the Secretary General of the United Nations in 2010³, where transitional justice is:

¹ <https://www.ictj.org/about/transitional-justice>

² Teitel, R. G. (2002). *Transitional justice*. Oxford: Oxford University Press.

³ Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice - United Nations and the Rule of Law. (2010, March). Retrieved December, 2017, from <https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-united-nations-approach-to-transitional-justice/>

“the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”⁴

According to a popular definition, it refers to all ‘the choices made and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts’ (Siegel, 1998)⁵. In other words,⁶ transitional justice refers to the ways and mechanisms that are used from countries that emerge from conflict and war in order to address large-scale, systematic, human rights violations that the normal judicial system would not be able to resolve⁷.

Sub-Types of Transitional Justice⁸

In order to make the concept of transitional justice clearer, scholars have attempted to formulate various typologies of transitional justice. According to Cesarini in the book chapter “Transitional Justice” published in T. Landman, & N. Robinson in *The SAGE Handbook of Comparative Politics*, transitional justice has numerous manifestations⁹:

- ✓ **Retributive or Restorative.** Retributive justice seeks the punishment of perpetrators of atrocities and restorative aims at the political, moral, and material rehabilitation of victims;
- ✓ **Retrospective or Prospective** Retrospective concentrates on past misdeeds, and prospective on future deviant acts;

⁴ See S/2004/616.

⁵ Siegel, R. L. (1998). Transitional justice: A decade of debate and experience. *Human Rights Quarterly* 20 (2) 431-54. doi:10.1353/hrq.1998.0012.

⁶ See also Bickford's definition of transitional justice as ‘a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war, in order to build a more democratic, just, or peaceful future’ in Bickford, L. (2004) ‘Transitional justice’, in Shelton, D. L. (ed.), *The encyclopedia of genocide and crimes against humanity*. Macmillan Reference USA. Vol. 3 pp. 1045-47.

⁷ International Center for Transitional Justice definition, retrieved from <https://www.ictj.org/about/transitional-justice>

⁸ Information retrieved from: Cesarini, P. (2009). Transitional justice. In T. Landman, & N. Robinson, *The SAGE handbook of comparative politics*. London, UK: Sage UK. Retrieved from https://acg.idm.oclc.org/login?url=https://search.credoreference.com/content/entry/sageukcpoli/transitional_justice/0?institutionId=5970

⁹ Ibid, previous footnote

- ✓ **Exclusive or Inclusive** - with the former being led by a restricted and insulated circle of decision-makers, and the latter being carried out in close collaboration with victims and broad sectors of civil society;
- ✓ **Narrow or Extensive** - with the former targeting only top-level crimes and/or perpetrators, and the latter seeking to go after everyone involved in carrying out atrocities;
- ✓ **Endogenous or Exogenous**. Endogenous types are initiated by domestic actors, and exogenous by external entities;
- ✓ **Top-down or Bottom-up** - with the former instigated by political elites, and the latter by civil society. It can be immediate and delayed - with the former taking place right after regime change, and the latter many years (even decades) after democratization;
- ✓ **Bounded or Open-ended**. Bounded forms take place within clearly defined temporal boundaries and open – ended last over the course of several generations;
- ✓ **Confidential or Public**. Confidentiality is achieved with justice taking place behind closed doors and in the contrary, public justice takes place in open view (and with broad dissemination of outcomes);
- ✓ Transitional Justice can focus either on **individuals (perpetrators and victims) or collectives (groups of perpetrators and victims, and society as a whole)**;

While some of the classifications just mentioned are quite useful, others offer false dilemmas. In effect, ‘transitional justice mechanisms are not a dichotomous choice but a continuum of options, and those countries that choose one option are more likely to choose others as well’ (Sikkink and Walling, 2007)¹⁰. In both Latin America and Europe, for example, transitional justice processes have often been (and still are) multilayered affairs, crafted so as to be simultaneously retributive and restorative, retrospective and prospective, confidential and public, etc.

¹⁰ Sikkink, K.; Walling, C. B. ‘The impact of human rights trials in Latin America’ *Journal of Peace Research* 44 (4) 427-45. (2007) doi:10.1177/0022343307078953.

Luckily, other more detailed classifications are also available. The one presented in the following table divides transitional justice into six different sub-types distinguished according to the different objectives and methods involved.

Sub-types of transitional justice

<i>Sub-type</i>	<i>Objectives</i>	<i>Methods</i>
Criminal	Retribution	Trials (domestic, international, hybrid, etc.)
Historical	Truth	Official bodies of inquiry with public disclosure of findings
Reparatory	Rehabilitation and reintegration of victims	Restitution, compensation, apology, and memorialization
Administrative	Marginalization of authoritarian elites and collaborators	Purges, lustration and vetting
Institutional	Democratization	Institutional reform, civil and political rights
Redistributive	Socio-economic justice	Socio-economic rights, redistribution, affirmative action

Source: Teitel, R.G., *Transitional Justice* (2002) ¹¹

4.2. Restorative Justice

On the other hand, the concept of restorative justice is used to bridge the gaps and differences created by the political shift in the social matrix. Restorative Justice is not only a philosophical concept but also a set of intervention mechanisms that focus less

¹¹ Teitel, R. G. (2002). *Transitional justice*. Oxford: Oxford University Press.

on the gravity of a crime committed and more on the restitution of human relationships and civil society relationships. These relationships may include both relationships between members of the societies and state-society relationships (Wood and Wood, 2011)¹².

Maybe the most quoted definition is by Tony Marshall: “Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” This definition has two problems. First, it does not consider that the outcome of the process must be reparative or restorative. Second, Marshall’s definition excludes actions that may lead to reparative outcomes without “parties coming together”¹³.

In 2002, Howard Zehr proposed another definition, which orients the process toward restoration: “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible” (p. 37). This clearly remains a process-based definition, which may exclude (partly) reparative actions through imposed obligations.¹⁴

Gordon Bazemore and Lode Walgrave have proposed a simple and essentialist definition: “Restorative justice is every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime”¹⁵ (p. 48). This definition conceptualizes the essence of restorative justice procedures that aim at

¹² Wood, W. R., & Wood. (2011). Restorative justice. In W. Chambliss, *Key issues in crime and punishment: courts, law, and justice*. Thousand Oaks, CA: Sage Publications. Retrieved from https://acg.idm.oclc.org/login?url=https://search.credoreference.com/content/entry/sagecourts/restorative_justice/0?institutionId=5970

¹³ Weitekamp, E. G. M., & Weitekamp. (2010). Restorative justice. In B. S. Fisher, & S. P. Lab (Eds.), *Encyclopedia of victimology and crime prevention*. Thousand Oaks, CA: Sage Publications. Retrieved from: https://acg.idm.oclc.org/login?url=https://search.credoreference.com/content/entry/sagevcpr/restorative_justice/0?institutionId=5970

¹⁴ As mentioned in the Encyclopedia of Victimology and Crime Prevention (see above footnote n.5).

¹⁵ Bazemore, G., & Walgrave, L. (1999). *Restorative juvenile justice: Repairing the harm of youth crime*. Monsey, NY: Criminal Justice Press.

rehabilitating relationships between offenders and victims. This is achieved by the fact that Restorative Justice seeks to include victims in their own cases, meaning that they will be able to meet with the perpetrators and engage in the rehabilitation process of the offender. It also seeks to provide offenders the opportunity to be accountable for any harm they have committed (restorative justice supporters refrain from using the word crime as they feel that crime is better understood as harm). The theoretical framework of restorative justice was formed as traditional justice has failed in three goals; acceptance of responsibility from the offenders, the making of amends and the return/restoration of the parties involved to their social roles and lives.

As Wood & Wood (par. 5-6, 2011)¹⁶ describe, traditional justice failed to acknowledge the “problems in justice practices” such as:

1. the exclusion of victims from participating in and having knowledge of their cases,
2. the failure of criminal justice systems to provide or allow for meaningful redress for victims,
3. the revictimization of victims by policing and prosecutorial agencies,
4. the problems in adversarial forms of justice that discourage offenders from taking responsibility for their offenses,
5. the lack of means by which offenders could take responsibility and make amends to those they have harmed,
6. the lack of successful offender reintegration, and
7. the forging of justice policies that excluded and often harmed local communities for the benefit of the state.

All the aforementioned points sum up the reasons why the conceptualization of restorative justice came to be and is now more relevant than ever before.

¹⁶ Wood, W. R., & Wood. (2011). Restorative justice. In W. Chambliss, *Key issues in crime and punishment: courts, law, and justice*. Thousand Oaks, CA: Sage Publications. Retrieved from https://acg.idm.oclc.org/login?url=https://search.credoreference.com/content/entry/sagecourts/restorative_justice/0?institutionId=5970

4.3. Differences between Transitional and Restorative Justice

Despite the fact that there is a tendency to apply the restorative justice paradigm to transitional justice processes, we must not overlook the fact that both types of justice have very different problem - solving approaches. Transitional justice aims to find the balances between the demands of justice and peace in high risk and unstable environments that transition from war to peace and/or totalitarianism to democracy, in which systemic atrocities have been committed. However, restorative justice emerged in the context of societies characterized by political stability, as an alternative to the functioning of the criminal justice system and most specifically as an alternative to the methods utilized¹⁷ to punish ordinary deviance and crime. In fact, the restorative justice model was framed as a critique to the repressive and retributive character of criminal law. Mediation has been used the past years in the US as a reconciliation technique between offenders and victims or victims' relatives.

Further differences are indicated in the different ways the two systems view crimes. For transitional justice, crimes are acts against the State and a violation of rule of law, the criminal justice system is responsible to control crime, offender accountability is demarcated by taking punishment, crime is an individual act and individual responsibility, law as general deterrence process, victims are peripheral, and lastly, transitional justice focuses on framing blame and guilt on the past. In contrast, in the restorative justice model, crimes are acts against other persons or communities, communities in their turn are responsible for crime control, accountability of the offenders comes from assuming responsibility and taking action to repair harm, crime has individual and social dimensions, punishment is not always effective, victims are central to the process of resolving a crime, offender can reconcile with the victim and it focuses more on problem - solving and the future.

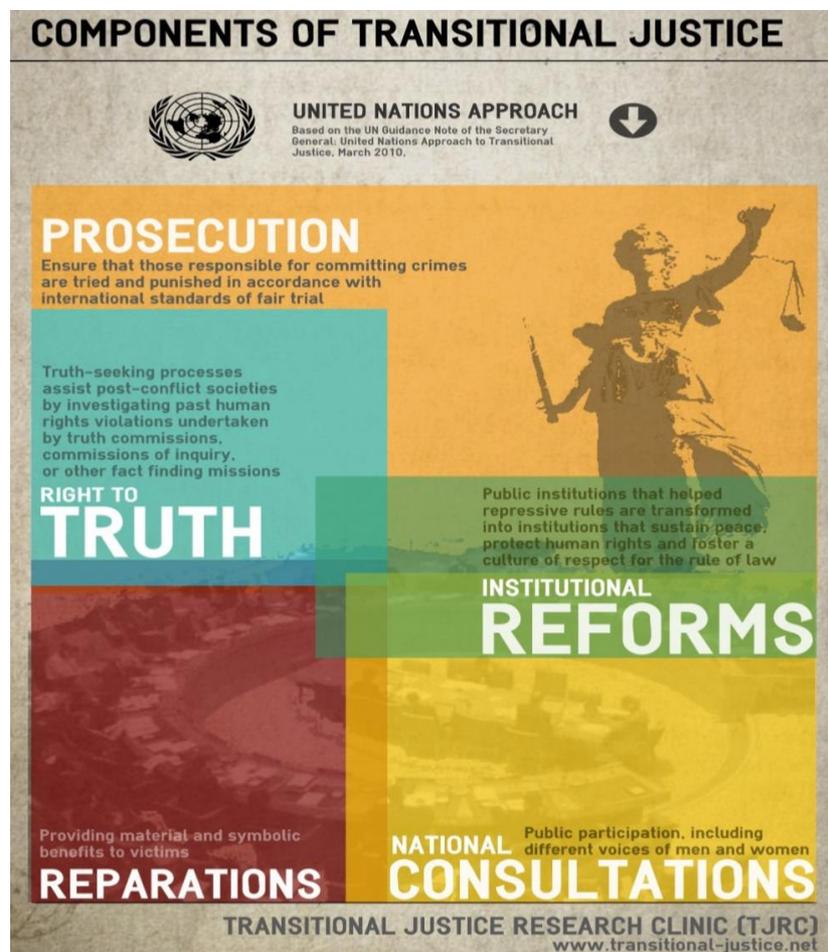
Another conceptual difference of the two systems occurs regarding the notion of reconciliation is illustrated in the following passage:

¹⁷ <https://www.britannica.com/topic/restorative-justice>

“Although there is an important coincidence between restorative justice and transitional justice regarding their generic purpose of reconciliation, there are deep conceptual differences between the various conceptions of reconciliation that underlie each of these models of justice. The notion of reconciliation that underlies restorative justice generally implies an absolute agreement among all social actors –including victims and perpetrators- regarding the need and utility of pardons, and the value of the reestablishment of social ties and harmony”¹⁸.

Below you may find an infographic that summarizes the key features of each model so that you can schematically spot the differences:

1. The following infographic summarizes the proposed components of Transitional Justice by the UN, as outlined in the *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice*. The Guidance Note of the Secretary-General



¹⁸ This text is based on an article that has been published in Spanish in the following books: Rettberg, Angelika (comp.). 2005. Entre el perdón y el paredón. Preguntas y dilemas de la justicia transicional [Between Forgiveness and the Wall. Questions and Dilemmas of Transitional Justice]. Bogotá: Universidad de los Andes – CESO – IDRC, pp. 2-232; Uprimny, Rodrigo (dir.), Botero, Catalina, Restrepo, Esteban, Saffon, Maria Paula. 2006. Justicia transicional sin transición? Verdad, justicia y reparación para Colombia Transitional Justice without Transition? Truth, Justice and Reparations for Colombia]. Bogotá: DeJuSticia, pp. 109-38

on the United Nations Approach to Transitional Justice was issued on 10 March 2010 by the UN Secretary-General. The Guidance Note was developed by the Rule of Law Coordination and Resource Group, with the leadership of the *Office of the High Commissioner for Human Rights* (hereafter OHCHR), and supported by the Rule of Law Unit in the Executive Office of the Secretary-General¹⁹.

The differences between restorative justice and transitional justice are also illustrated in the following table:

Restorative vs Transitional Justice

	Restorative Justice	Transitional Justice
Faced conducts	Ordinary crime	Massive and/or atrocious crimes
Contexts of application	Normality	Exceptional contexts of transition
Dilemma	How to replace the repressive and retributive character of the criminal system?	How to reckon with past wrongs, achieving an equilibrium between justice and peace?
Underlying logic	Inadequacy of punishment for reestablishment social harmony	Need of a minimum dose of punishment to achieve equilibrium between justice and peace

Source: Teitel, R.G., *Transitional Justice* (2002)²⁰

4.4. Complementarities between Transitional and Restorative Justice

Usually, restorative justice can be used as a complementary construct of Transitional Justice although it cannot work as a substitute of it. The complementarities between the two are the reason why they are often confused or defined as one and the same.

¹⁹ Retrieved from www.transitional-justice.net of the Transitional Justice Research Clinic

²⁰ Ibid, 10.

To start with, one can argue that there is complementarity between restorative and transitional justice on a conceptual level because they share the same concerns. Both systems are interested in achieving reconciliation. Transitional justice looks forward to building strong communitarian ties that are in accordance with restorative justice objectives. Every transitional justice application is oriented towards achieving reconciliation and lasting peace as well as preventing the recurrence of atrocities.

Ivan Orozco in 2002 argued that in certain transitional contexts, due to the nature of the previous conflict, the tools of restorative justice (which will be described in a different section) are utilized to result in a successful transitional justice process. Cases that are under this category are those cases of transitions that occur after armed conflict or civil war, in which violence is horizontal and each armed actor has been offender and victim of atrocious crimes at once.

4.5. Values and Principles of Restorative Justice²¹

The values and principles of the Restorative Justice System revolve around the democratic ideals and decision making, respect, and fairness. The core principles are articulated by Van Ness & Strong (1997) and are as follows²²:

1. *The Principle of Repair*: “Justice requires that healing be enabled for victims, offenders, and communities that have been injured by crime. The extent to which harm is repaired is assessed by the degree to which all parties identify the damage of a crime that needs to be addressed, and develop and carry out a plan to do so”.
2. *The Principle of Stakeholder Involvement*: “Victims, offenders, and communities should have the opportunity for active involvement in the justice process as early and as fully as possible. The extent to which effective stakeholder involvement is achieved is assessed by the degree to which

²¹ As mentioned in the 21st Century Criminology: A Reference Handbook

²² van Ness, D., & Heetderks Strong, K. (2002). *Restoring justice* (2nd ed.). Cincinnati, OH: Anderson.

victims, offenders, and individuals from the community affected by a crime or harmful action are intentionally and actively engaged in decision making about how to accomplish this repair”.

3. *The Principle of Transformation in Community and Government Roles and Relationships*: “The relative roles and responsibilities of government and community must be rethought. In promoting justice, the government is responsible for preserving a just order, and community for establishing a just peace. The extent to which the community-government relationship is transformed in a restorative process is assessed by the degree to which a response to crime operationalizes a deliberate rethinking and reshaping of the role of the criminal justice system in relation to that of community members and groups”.

*Restorative Justice Processes*²³

The processes used for the restorative justice programs vary depending on the case and can always be accommodated in the specific context they are applied to (i.e the case of post conflict areas).

One of the methods is Restorative Conferencing and includes different types of conferencing and meetings. Restorative conferencing has emerged as a response to juvenile crime. The RC is a type of mediation between offenders, victims, representatives from the community, and both parties' family and friends, in which they address consequences and restitution²⁴. The first type of RC is the victim-offender mediation (VOM). It is also known as victim-offender conferencing, dialogue, reconciliation or restorative justice dialogue. The process is usually a meeting with the presence of a trained mediator and the two parties involved (victim and offender). The VOM system usually involves few participants and is the only option for offenders that are incarcerated at that time. Furthermore, Family Group Conferencing (FGC) involves a larger number of participants than the VOM process

²³ All information in this section retrieved from <http://mineslaw.com/node/152>

²⁴ <http://mineslaw.com/node/152>

by adding people that are connected with the parties involved. FGC is mostly used for juvenile cases.

In addition, Community Restorative Boards, also known as Community Justice Committees, are normally comprised of a small group of well - trained mediators that conduct face - to - face public meetings. Participation in these meetings might be the result of a sentence or a procedure outside the arbitrary process of the legal system. Victims meet with the board and offender, or submit a written statement which is shared with the offender and the board. Then the nature of the deviant behavior or crime is discussed until all parties reach an agreed sentence for the given offense.

Moreover, there are the restorative circles and restorative systems and the approach involves a much wider circle of participants than conventional victim/offender conferencing, and begins with establishing a restorative system in the neighborhood or school where circles will be held.

There are also circles of Support and Accountability (CoSA) that guarantee the safe integration of sex offenders in the public life and Sentencing Circles (also known as Peacemaking Circles) that use traditional rituals and structures to involve all interested parties. The Sentencing Circles have five steps to be followed; (1) application by the offender; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle; and (5) follow-up circles to monitor progress.

Restorative circles more specifically follow the pattern below²⁵:

- *Opening and closing*: Creating the atmosphere for the meeting, setting the goals (the purpose of the circle)
- *Talking piece*: an item passed around the circle. Everyone listens to the individual holding the talking piece. This can serve as a way to bring out the quiet voices and a way of active listening

²⁵ Boyes-Watson, Carolyn. (2005). "Seeds of Change: Using peacemaking circles to build a village for every child." *Child Welfare*, 84(2), pp. 191–208.

- *Guidelines*: setting general rules to remind everyone how to treat others in the circle, making it a safe environment for everyone to speak comfortably and honestly
- *The "Keeper"*: At least one person to facilitate the circle; the "Keeper" prepares the circle and keeps the dialogue going. Their job is to mediate, not dictate the group. There is a shared leadership in the circle, as everyone has the opportunity to contribute and learn from the group.
- *Respect*: in every aspect of the circle, there is to be respect towards everyone in the circle and being sensitive to all discussions.



Restorative Justice and Victim/Community and Offender overlapping process retrieved from <https://www.colorado.edu/osccr/students/cu-restorative-justice>

5. Attempts to Implement Transitional and Restorative Justice/Case Studies

Transitional Justice and DDR initiatives have been applied in many different occasions. Below you can find the abstract of each case study and proceed with the readings that will be provided in the section “Readings according to term”²⁶. The following case studies are showcased and illustrated by the International Center for Transitional Justice:

1. *The Case of Afghanistan*: «In Afghanistan's nation-building process, security has been prioritized over justice. Slow progress on crucial institutional reforms continues to impede efforts to create a competent and professional police force, a functioning civil service, and an accountable judiciary; all three of which are vital to successful disarmament, transitional justice and, ultimately, security».
2. *The Case of Bosnia and Herzegovina*: «The Disarmament, Demobilization and Reintegration (hereinafter: DDR) process implemented in Bosnia and Herzegovina (BiH) following the 1992-1994 war helped facilitate the transition to peace. However, the almost total failure of international and domestic authorities to support demobilized combatants in post-conflict BiH and politically powerful veterans' associations impeded the progress of justice for civilian war victims».
3. *The Case of Cambodia*: «Demobilization was first initiated in Cambodia in 1992, but there have been few attempts to link DDR processes to transitional justice measures. The government's overriding consideration has been the preservation of stability, narrowly interpreted by the CPP (Cambodian People's Party) elite in terms of their own security».
4. *The Case of Colombia*: «The DDR process in Colombia aims to guarantee citizens their fundamental rights while at the same time to create space for the integration of demobilized armed groups. It remains to be seen if the Colombian DDR and transitional justice model can be implemented such that

²⁶ More on the cases described you can find on <https://www.ictj.org/publications>

it satisfies both the requirements of an immediate cessation of violence while also meeting victim's demands for reparation».

5. *The Case of Peru*: «The reparations policy for victims of Peru's internal armed conflict, which lasted from 1980 to 2000, includes the internally displaced population among its beneficiaries under the Official Register of Victims. However, displaced persons are given lower priority than the other categories of victims also included in the program, such as those who were killed or who suffered disappearance, torture, or other types of attacks on the right to physical well-being and life. This paper analyzes the development of this reparations policy in each of its stages: agenda, program, design, management, and evaluation. It describes the development of the policy in relation to the political situation, the armed conflict, and the transition process that began with the new millennium».
6. *Restorative Justice in The Case of South Africa*: «From 1948 to 1990, the South African government implemented and enforced an institutionalized system of racial segregation, known as "apartheid." The aim of apartheid was the separation of the races from each other, with whites dominating and granting more privileges than the other races. Acts were established to ensure the separation of races from areas of residing, working, traveling and recreational areas. The act of separation had then continued for the next 50 years, resulting in extreme damage to the economy as well as the nation. The extent of the damage caused by Apartheid was so extreme, that a calling for peace and reconciliation had to be made by the President Nelson Mandela. The call for reconciliation resulted in the formation of the Truth and Reconciliation Commission (hereinafter: TRC), a court-like body intended to investigate human rights violations perpetrated during the apartheid regime. So it was set up for anybody who felt they had been a victim of violence and/or human rights abuse. These victims were allowed to come forward and be heard at the TRC and also privileged perpetrators, allowing them to also

give testimony and request amnesty from prosecution²⁷. The case of South Africa has been commonly used to compare the restorative justice system with the retributive justice system of the Nuremberg Trials²⁸».

7. *The Case of Rwanda*: «In Rwanda, formerly incarcerated members of one of two primary tribal groups, the Hutu, implicated in genocidal killings of the other primary tribal group, the Tutsi, participate in lengthy (sometimes multiple-day) “truth-telling” sessions in communal courts (known as Gacaca). Aimed at repentance, reparation, and eventually possible reconciliation with surviving family members of their victims, participants in these sessions ultimately accept responsibility for murder and other crimes, apologize, and make commitments of extensive service or reparation (as money, goods or services) aimed at eventual healing and peace».

6. Legal Framework of the United Nations

“In addition to judicial mechanisms, gross human rights violations can also be addressed through broader transitional justice measures. In the Declaration of the High-level Meeting on the Rule of Law, Member States stressed the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. They noted that these approaches include truth-seeking

²⁷ Laura McLeod, George Mason, spring 2015, University -Fairfax Virginia, Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process.

N. Riveros Anzola, Department of Politics MA in Post-war Recovery Studies University of York, 2016-2017, “South Africa's Truth and Reconciliation Commission (TRC): Lessons for Colombia”

Tsering Tashi, Political Science Central European University, “Transitional justice in South Africa: A middle way approach to reconciliation”

²⁸

http://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1271&context=srhonors_theses

processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes [para. 21].”

- United Nations and The Rule of Law²⁹

6.1. Conventions and Protocols:

- **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977)** Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Entry into force: 7 December 1979, in accordance with Article 95.³⁰
- **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)** Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Entry into force: 7 December 1978, in accordance with Article 23.³¹
- **Geneva Convention relative to the Protection of Civilian Persons in Time of War.**
Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949. Entry into force: 21 October 1950.³²

²⁹ <https://www.un.org/ruleoflaw/>

³⁰ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Protocoll.aspx>

³¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx>

³² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtectionOfCivilianPersons.aspx>

➤ **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity**³³

Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968. Entry into force: 11 November 1970, in accordance with article VIII.

6.2. Key resolutions:

- A/HRC/RES/21/15, Human rights and transitional justice (2012)³⁴
- A/HRC/RES/18/7, Creation of the mandate of the Special Rapporteur (2011)³⁵
- A/HRC/RES/12/11, Human rights and transitional justice (2009)³⁶
- E/CN.4/RES/2005/70, Human rights and transitional justice (2005)³⁷
- E/CN.4/RES/2005/81, Impunity (2005)³⁸

In July 2002, the United Nations Economic and Social Council adopted "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters" [E/CN.15/2002/5/Add.1] as a guide to encourage member states to implement restorative justice in the operation of their domestic juvenile criminal justice systems.

6.3. Key reports:

Secretary General Reports:

- S/2011/634, The rule of law and transitional justice in conflict and post-conflict societies (2011)³⁹

³³ <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/51/IMG/NR024351.pdf?OpenElement>

³⁴ <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/174/47/PDF/G1217447.pdf?OpenElement>

³⁵ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/18/7

³⁶ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/12/11

³⁷ http://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/RES/2005/70

³⁸ http://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/RES/2005/81

- A/61/636-S/2006/980, Uniting our strengths: Enhancing United Nations support for the rule of law (2006)⁴⁰
- S/2004/616, The rule of law and transitional justice in conflict and post-conflict societies (2004)⁴¹

UN High Commissioner for Human Rights Reports:

- A/HRC/27/21, Report of the Office of the UN High Commissioner for Human Rights, Analytical study focusing on gender-biased and sexual violence in relation to transitional justice (2014)⁴²
- A/HRC/18/23, Report of the UN High Commissioner for Human Rights, Human rights and transitional justice (2011)⁴³
- A/HRC/12/18, Report of the UN High Commissioner for Human Rights, Analytical Study on Transitional Justice and Human Rights (2009)⁴⁴
- A/HRC/12/18/Add.1, Report of the UN High Commissioner for Human Rights, Inventory of Transitional Justice in Peace Agreement (2009)⁴⁵
- E/CN.4/2006/93, Study by the Office of the UN High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the UN system (2006)⁴⁶
- A/HRC/4/87, Report of the Office of the UN High Commissioner for Human Rights, Human Rights and transitional justice (2006)⁴⁷
- E/CN.4/Sub.2/1997/8, Sub-commission, Final report on the question of the impunity of perpetrators of human rights violations (1997)⁴⁸

³⁹ http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/634

⁴⁰ http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2006/980

⁴¹

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616&referer=http://www.un.org/en/documents/

⁴² http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/21

⁴³ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/23

⁴⁴ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/18

⁴⁵ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/18/Add.1

⁴⁶ http://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/2006/93

⁴⁷ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/4/87

⁴⁸ http://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/Sub.2/1997/8

- E/CN.4/Sub.2/1997/20, Sub-commission, The administration of justice and the human rights of detainees, Question of the impunity of perpetrators of human rights violations (civil and political) (1997)⁴⁹

OHCHR (Office of High Commissioner on Human Rights) Publications:

- HR/PUB/06/2, Mapping the justice sector⁵⁰
- HR/PUB/06/3, Monitoring legal systems⁵¹
- HR/PUB/14/4, Rule of Law Tools for Post-Conflict States⁵²
- HR/PUB/06/5, Vetting: an operational framework⁵³
- HR/PUB/09/2, National Consultations on Transitional Justice⁵⁴
- HR/PUB/13/5, Transitional Justice and Economic, Social and Cultural Rights⁵⁵

Last but not least, the International Criminal Court (ICC)⁵⁶ was formed and is an exemplary case of trans-national restorative justice. The ICC is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The ICC is based on a treaty and is joined by 100 countries. One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence⁵⁷ is the series of rights granted to the victims; victims have the possibility under the Statute to present their views and observations before the Court. The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain

⁴⁹ http://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/Sub.2/1997/20

⁵⁰ <http://www.ohchr.org/Documents/Publications/RuleoflawMappingen.pdf>

⁵¹ <http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringen.pdf>

⁵² http://www.ohchr.org/Documents/Publications/HR_PUB_14_4_Archives_en.pdf

⁵³ <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>

⁵⁴ http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf

⁵⁵ <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>

⁵⁶ <https://www.icc-cpi.int/>

⁵⁷ <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>

justice. For the first time, an international court has the power to order an individual to pay reparation to another individual; it is also the first time that an international criminal court has had such power. Pursuant to article 75, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation.

7. Recent Developments

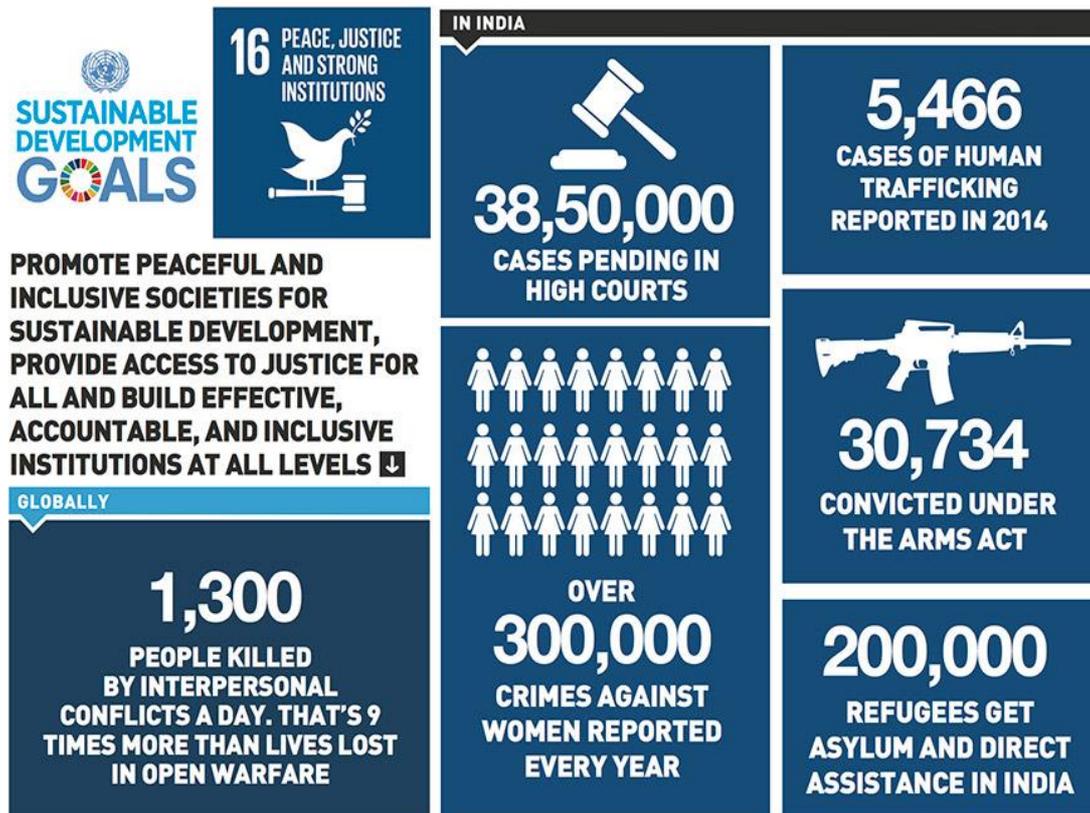
As mentioned in the beginning, new forms of judiciary practices were deemed significant so as to form peaceful, just and inclusive societies. It is true that in times of great instability, such as in the case of conflict and post - conflict societies, that the State is incapable of working under the rule of law. Violent conflicts have increased and civilian casualties have sky rocketed. Thus, the United Nations' Agenda 2030 and the Sustainable Development Goals include specifically the issues of Peace, Justice and Strong Institutions. According to the United Nations Development Program⁵⁸ facts and figures show that:

- Among the institutions most affected by corruption are the judiciary and police
- Corruption, bribery, theft and tax evasion cost some US \$1.26 trillion for developing countries per year; this amount of money could be used to lift those who are living on less than \$1.25 a day above \$1.25 for at least six years
- The rate of children leaving primary school in conflict affected countries reached 50 percent in 2011, which accounts to 28.5 million children, showing the impact of unstable societies on one of the major goals of the post 2015 agenda: education.

⁵⁸ <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions/targets/>

- The rule of law and development have a significant interrelation and are mutually reinforcing, making it essential for sustainable development at the national and international level.

Sustainable Development Goal 16: Peace, Justice and Strong Institutions



Source: United Nations Sustainable Development Goals

<http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions/targets/>

For these reasons, Sustainable Goal 16 was introduced. In addition, the agenda of the United Nations in 2018 in general aims at mainstreaming the use of alternative types of judiciary approach such as restorative justice and mediation in national and international policies.

8. Limitations of Restorative Justice Model⁵⁹

Although promising, the restorative justice system has some limitations. These limitations should be taken into consideration when making recommendations and introducing new motions. Some of the shortcomings of the model are:

1. Restorative Justice programs are applied in a very unsystematic manner; Restorative justice as an alternative way of resolving conflict is not yet mainstreamed in national and international policies. There is no firm and strict law that acknowledges the process as one of the criminal law.
2. Restorative justice models often do not serve as alternatives to incarceration and often lead to stronger, wider, and different nets of social control; Victim Offender conferencing has not been yet accepted as an alternative way of sentencing and might, in cases, be used as a means to propagate or influence communities against law enforcement and judicial systems.
3. Restorative justice models do not include all types of criminal behavior and focus on specific groups such as juvenile delinquents, first-time offenders etc; There are no specific crimes targeted and there is no provision on how to act in cases of manslaughter and murder.
4. Competing agencies, with unclear missions, who have different stakes in restorative justice and often compete or contradict restorative justice principles.
5. Evaluation processes are non-existent; There are no follow – up sessions to see if the processes used were successful. More research on the matter.
6. There is another notion, that of penal mediation, that is self – contradictory; Penal Mediation differs from mediation in restorative justice. Penal Mediation refers to a form of alternative dispute resolution outside the court commonly known as ADR or Alternative Dispute Resolution. Penal mediation can be performed by judges, investigators and law enforcement.

⁵⁹ <https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=178049>

This constitutes the contradiction mentioned above as mediation is mostly performed by a neutral mediator accepted by both sides⁶⁰.

7. Restorative Justice has raised questions of the functionality of law in a due process manner.
8. Critics have argued that this approach may lead to wildly different sentences for similar offenses, particularly where such programs may be used as an alternative to existing courts.

9. Conclusion

Despite the positive and exciting new developments in the mainstreaming of alternative judicial forms, it has to be stressed out that so far only very little has been achieved by the application of restorative justice practices. Most crimes in the world go undetected and, especially in post conflict societies, destabilization plays an important role in the peoples' decision to mistrust judicial institutions. Corruption, bribery, human rights violations are only some of the issues that post-conflict societies have to face. John Braithwaite pointed out that 90% of the occurring victimizations will always be untouched by restorative justice processes since most victims are victims of white-collar crime without even realizing that they were victimized⁶¹.

⁶⁰ http://www.antonioacasella.eu/restorative/Lhuillier_22aug2007.pdf

⁶¹ Braithwaite, J. (1999). Restorative justice: Assessing optimistic and pessimistic accounts. In M. H. Tonry (Ed.), *Crime and justice: A review of research*. Chicago: University of Chicago Press.

10. Points to be addressed

1. When it comes, to restoration, what kind of criteria will be used for each case?
2. Would restoration also include monetary compensation and if yes in which cases and what amounts of money could be standardized?
3. Do social class and the distinction between developing and developed countries play an important role in the implementation and formulation of such practices?
4. Who decides in a restorative justice model? The most pointed problem facing restorative justice is the question of “whose justice.”
5. Can this model bring about change that will lead to healthier institutions and peaceful societies?
6. Could the process of restorative justice be an instrument to regain peoples’ trust in institutions?
7. What are the changes that countries should undergo to achieve mainstreaming such policies in post conflict areas?
8. If mediation fails what are the sentences that could be attributed to perpetrators?
9. How can we mainstream transitional and restorative justice into national policies to create strong institutions that will help stabilize political upheavals?
10. What are the legal reforms Member States should undergo in each occasion?
11. In cases of political instability, who will be responsible to implement the methods used to reach Sustainable Goal 16?
12. Which actors/agencies, national and international, should be called in action for supervision and/or implementation?

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