



Towards culturally-sensitive transitional justice processes.
The case of Colombia.

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Abstract: This dissertation examines the role of cultural differences in Transitional Justice (TJ) processes. It starts by pointing out the weaknesses of the paradigmatic model of TJ, characterized as being legalist and top-down. It follows by suggesting the need to broaden the concept of justice that guides the TJ process to make it sensitive to cultural particularities and, thereby, to better incorporate the local communities' needs and priorities and acknowledge the different experiences of conflict and/or the harm done to individuals and communities. To that end, key concepts such as local participation, ownership, empowerment and home-grown initiatives are discussed and lessons are drawn from development studies and experiences in the field. Then, practical issues and challenges arising in making the model operational are dealt with, as regards the localization and cultural adaptation of the process and the roles of the different actors involved (that of the state, victims and survivors and of civil society) are analyzed. Finally, the TJ mechanisms established in Colombia are reviewed departing from the culturally-sensitive TJ model proposed. The analysis leads to the conclusion of an actual move towards an improved incorporation of cultural differences in TJ processes.

Key words: Transitional justice, culture, cultural differences, participation, ownership, localization, differential approach.

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1. INTRODUCTION

The present dissertation explores the value of acknowledging cultural differences for Transitional Justice¹ (TJ) theory, policy and practice, with the aim of making a contribution to current debates by incorporating this perspective that is often ignored: the need for TJ processes to be culturally adapted to each specific context.

Past experience of TJ processes² allows us to identify a dominant paradigm that focuses on legal standards and where policies and mechanisms are conceived and implemented in a top-down manner, from the national arena to the local context. Besides, in spite of invoking victim's rights as a source of inspiration and orientation, victims and survivors' realities, expectations and needs are not sufficiently considered, if they are at all.

During the last years, academics and practitioners have increasingly recognized that one-size-fits-all formulas and the importation of foreign models of TJ are not successful, as echoed by the 2004 United Nations (UN) Secretary General *Report on the rule of law and transitional justice in conflict and post-conflict societies*, as well as by recent literature on the subject³. Furthermore, while legal processes have a critical role in responding to conflict and impunity for large-scale human rights violations, “the centrality of law often leads to generic, linear and over simplistic templates for transitional justice, which fail to resonate and embed in local context”⁴.

¹ The concept of TJ used is the broad notion proposed by the United Nations Secretary General in the report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies that comprises “the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof” (S/2004/616, 23 August 2004, par. 8).

² For a history of TJ processes, see Teitel, Ruti G., *Transitional Justice*, Oxford, Oxford University Press, 2000; or Elster, Jon, *Transitional Justice in Historical Perspective*. Cambridge, Cambridge University Press, 2004.

³ See McEvoy, Kieran and McGregor, Lorna (eds.), *Transitional Justice from Below*, Hart Publishing, 2008; Roht-Arriaza, Naomi & Marriezcurrena, Javier, *Transitional Justice in the twenty-first century: beyond truth versus justice*. Cambridge, Cambridge University Press, 2006.

⁴ McEvoy & McGregor, 2008, p.10.

On the other hand, criminal justice and the categorization it requires of perpetrators, accomplices, or innocent witnesses does not always explain or reflect the facts, the roles played by the persons involved in a conflict, as it is the case of the bystanders or certain modes of forced or quasi-forced complicity or the cases where the same person can be both a victim and a perpetrator⁵.

Recent developments in international law have increasingly highlighted as well the critical importance of participation and ownership in TJ processes⁶. Again, the 2004 UN Secretary General report recognizes that TJ processes which have involved “substantial local consultations” have provided “a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims”⁷. The report advocated a policy shift of the UN towards an “active and meaningful participation of national stakeholders, including justice sector officials, civil society, professional associations, traditional leaders and key groups, such as women, minorities, displaced persons and refugees”⁸.

I would like to point at three main issues of the Secretary General’s report that my dissertation will tackle. Firstly, it limits the participation to a national level, thereby excluding the local one. Secondly, it doesn’t go as far as to encourage actual participation in the overall TJ process, that is, from the conception of mechanisms to their design, implementation and evaluation, but instead limits the required involvement to a participation consisting on consultations. Thirdly, the ideal model it proposes is somewhat paradoxical or even contradictory in that it should be based on internationally established standards and norms (founded on shared values) and at the same time be adapted to the specific national context.

Taking these considerations as starting points of a critical review of the paradigmatic model of TJ, my dissertation takes an anthropological approach that draws the attention to the impact of widespread human rights violations as well as TJ mechanisms in communities, not only in individuals.

⁵ Roht-Arriaza & Arriaza, 2008, p.161.

⁶ McEvoy, 2008 (b); Huyse, 2008, Vinck & Pham, 2008.

⁷ S/2004/616, 23 August 2004, para.17.

⁸ *Ibidem*, para.15.

I first analyze critically what can be considered the paradigmatic model or TJ, reflecting on two of its main characteristics, the legal, retributive logic and the top-down nature of policies, to then suggest the need for TJ to be oriented by a broader concept of justice that can better serve as a framework to incorporate the diverse and culturally influenced conceptions of what justice after mass atrocity actually means to victims and survivors.

Secondly, taking as a premise that top-down and typically Western law type of processes fail to be perceived in the local contexts as valid and legitimate, I explore how can TJ processes be embedded in the local context they are affecting, where “local context” means as well a specific cultural context. I draw insights from the development field, where the concepts of ownership and local participation have been well developed as key elements for an intervention’s success.

Thirdly, once the need to incorporate the cultural dimension in the “local context” is justified, I analyze the challenges in the practical ways to do it, the different options that can be contemplated and the advantages, disadvantages, the potentials and risks of the diverse models.

Finally, I take the case of the ongoing TJ process in Colombia to examine which is the role cultural specificities are playing, looking in particular at the incorporation of the indigenous peoples and Afro-Colombian communities’ participation and claims within the process and the mechanisms that are being set or are already operating through, on the one hand, the official documents setting up TJ mechanisms or elaborated in the framework of their implementation and, on the other hand, through reflections and criticisms of victims’ and human rights organizations. Finally, some observations and concluding remarks are made as to the possible ways to incorporate in a more meaningful and effective manner cultural specificities within the Colombian TJ process.

2. Rethinking the common transitional justice model

“Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?”⁹

Transitional Justice (TJ), as defined by the 2004 Secretary General of the United Nations report referred above “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”¹⁰.

While the notion has been applied to increasingly varied contexts, a common feature of TJ processes can be said to be their aim at giving responses to past massive human rights violations with the objective of fostering democratic changes, of building a durable peace and recognizing the victims of such past abuses. According to Huyse, there is a consensus within the academic and political circles on the core general goals of TJ processes at both the individual and the community levels, which are, firstly, healing the wounds of victims and survivors and, secondly, social repair, that is, restoring broken relationships between members of a group in order to prevent the recurrence of violence or deadly conflict. He affirms there is consensus as well on what he calls the “instrumental objectives” to reach those general goals: a search for reconciliation, accountability, truth telling and restitution for the damage that was inflicted¹¹. Throughout this dissertation, we will tackle conflicting points of view as regards the validity of these instrumental objectives in all different contexts, in the sense of assessing to what extent can universally valid rules, procedures or mechanisms be really asserted.

⁹ Orentlicher, 2007, p.18.

¹⁰ S/2004/616, 23 August 2004, para.8.

¹¹ Huyse, 2008, p. 10.

When looking at the different experiences all over the world, it is apparent that there are multiple ways to advance such transition. Nevertheless, it also becomes clear that over the last decades, the different processes have tended to adopt a similar approach at least in two ways: on the one hand, TJ processes have been guided by normative legal standards which confer a key role to the rights of victims and the struggle against impunity in the peacebuilding and reconciliation process. This retributive justice model has focused fundamentally on punishment as an aim per se. On the other hand, TJ processes have been articulated in a vertical way, meaning that policies have been adopted top-down, that is, decisions are made at the central level (the state) and from there they are taken to the local.

In short, the conventional TJ model has been impregnated by a legalist human rights discourse with the effect that it “lends itself to a ‘Western-centric’ and top-down focus; it self-presents (at least) as apolitical; it includes a capacity to disconnect from the real political and social world of transition through a process of ‘magical legalism’; and finally it suggests a predominant focus upon retribution as the primary mechanism to achieve accountability”¹².

The analysis of all the strengths and weaknesses of TJ processes and models goes beyond the scope of this research and moreover is limited by the facts that, firstly, there hasn’t been much academic or practitioner scientific research so far on the impact of TJ mechanisms and processes, and secondly, it is actually difficult to identify indicators that could be valid to measure the success of processes and mechanisms in the long term, since their effects would be difficult to isolate from those explained by other concurring factors. Thus, I will focus here on two main weaknesses that translate into the reproduction of certain forms of exclusion and are directly related to the lack of cultural adaptation or TJ policies and mechanisms I want to point out.

¹² McEvoy, 2008 (b), pp. 24-25.

2.1. The failed top-down paradigm

Post-conflict agendas have tended to be driven by donors rather than based on local people's needs; they have advanced top-down models of justice that have been criticized for being based in Western values and concepts that are imposed and lack relevance for the local communities¹³. This tendency to articulate TJ processes from the centers of power (that is, powerful political, economic or legal groups that alone make decisions on behalf of or that affect the overall society), entails the exclusion of important sectors of society and, particularly, of victims.

Following armed conflicts or authoritarian regimes, choices are to be made in what is presented as a balancing act between peace and justice in contexts where state institutions (including the judicial system) might not be developed or consolidated; a breaking point needs to be signaled and, sometimes, big budgets are to be managed, so a common response to resolve the dilemmas that appear has been the strengthening of public, unified and centralized actions which intend to be universally valid, effective and legitimate, or expected to be perceived as such by the overall population.

In this sense, TJ efforts have tended to assume the post-Cold War economic theories of development, whereby the establishment and consolidation of a state's institutional capacity to deliver justice is considered a key element in the process of building or rebuilding governance structures, those that can guarantee a context where a liberal economy can operate¹⁴. This has entailed state-centric processes to foster the rule of law and "serve justice", to use Kofi Annan's words.

The resulting tendency has been to privilege vertical articulations of the TJ process, that is, the adoption of top-down policies that do not take into consideration the specific victims and survivors' needs and expectations and contribute to consolidating the role of traditional power centers. Another critical issue of these model policies refers to the absence of differential approaches in the design, implementation and follow up of public policies that translate transitional formulae. They depart from the premises of the homogeneity of populations and universal behaviors, without considering the cultural,

¹³ Donais, 2009; Ingelaere, 2008.

¹⁴ McEvoy, 2008 (b), p.28.

socioeconomic and political factors that actually refutes that assumption.

More precisely, even if processes invoke and claim victims' rights, they maintain decision-making mechanisms characterized by vertical dynamics, which end up excluding victims and survivors from the process of building the new society and regime. Hence, this way of operating can contribute to reproducing or even deepening the pre-existing patterns of discrimination and exclusion, which can be especially problematic for victims facing particular conditions of vulnerability and social exclusion, such as indigenous groups and minorities, women, etc. If the process doesn't take into account their specific and differentiated experiences and resulting needs, instead of being an opportunity for the realization of the victims' rights, it can contribute to create new forms of discrimination and violence against them. TJ policies can in such way even have negative effects in victims' lives.

Furthermore, if TJ public policies translate the legal standards on victims' rights without incorporating a differential approach, the exclusion of victims from democratic transformation processes can be even higher. Theoretically "neutral" public policies can't contribute to making visible and overcoming the discrimination patterns that some social groups or sectors suffer and consequently, can't guarantee the full and effective realization the victims' human rights. In the case of minorities and indigenous groups, the lack or incorporation of a culturally-sensitive approach in a process dominated by the "majority's culture" can lead to their lack of interest and involvement in the process' mechanisms, to their rejection or ignorance of the mechanisms being set, which in turn makes those policies inadequate.

In sum, an adequate response to the victims' human rights violations requires a change in that approach to make it more aware and sensitive to the specific realities, expectations and needs of the victims and survivors. In this sense, as opposed to the liberal model (in Donais terms), that claims the universality of liberal norms, practices and institutions across cultures, the communitarian perspective emphasizes the importance of traditions of actual people and social context in determining the legitimacy and appropriateness of particular visions of political order, justice and ethics. According to this view, societies have the right to and should make their own choices based on their historical, cultural and linguistic resources that are essential both to

understand the causes of conflict and to look for sustainable solutions¹⁵.

2.2. **Shortcomings of the legalist discourse and practice**

Regarding the first element, the prevalence of legal standards, it can be explained by the fact that the last decades have seen a great development of international instruments granting a fundamental role to the rights of victims of serious human rights violations¹⁶. The recognition of the victims' rights to the truth, justice and reparations has accompanied a process of institutionalization of TJ through mechanisms aiming at, firstly, prosecuting the perpetrators of the violations (such as international or hybrid criminal tribunals), secondly, establishing the truth and preserving memory (like truth commissions) and, thirdly, providing reparations to the victims, which generally encompass guarantees of non-repetition, administrative programs, etc. The developing legal standards have progressively influenced, oriented or even determined which specific mechanisms were to be adopted in a particular transition process, to the extent of even preventing the adoption of some of them, as we will see further down, due to the new international rule that prohibits impunity.

The aforementioned 2004 report of the Secretary General states that “For the United Nations, “justice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant”¹⁷.

¹⁵Donais, 2009.

¹⁶ The main examples of it are the UN *Set of principles for the protection and promotion of human rights through action to combat impunity*, as well as the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law*, to which we should add the case law of the Inter-American Court of Human Rights, which has played a critical role in the recognition of the Rights of victims and the determination of their content and scope.

¹⁷ S/2004/616, 23 August 2004, para. 7.

The legalist discourse considers that TJ shall serve to bring justice to the victims and hold offenders accountable, in a very limited view of what the victim needs are beyond the punishment of perpetrators. These needs have been studied in recent TJ literature, as well as in criminology, victimology and restorative justice, from experiences of truth recovery, memorialization and other strategies for dealing with the past which have contributed to dismantle several of the assumptions regarding the satisfaction of such needs, the impact of TJ mechanisms on victims and their perception of the effectiveness and usefulness of such mechanisms¹⁸. In short, the legalist discourse of justice that has impregnated TJ mechanisms has proved in the field to have a number of weaknesses. We can highlight some of them.

Firstly, it should be noted that scarce attention has been paid to the role of law in different cultures and how populations' expectations for justice may differ. A central issue is that it can't be assumed that legal justice is desired or considered as being the higher priority in all countries after mass human rights violations, violence, repression or conflict. Culture and history may lead to different definitions of justice and to different paths to achieving it¹⁹.

Secondly, it is worth mentioning that international criminal trials have drawn their foundations from political and legal justifications whereby "such proceedings were mere aspirations and with no empirical data to substantiate their purported benefits"²⁰. Against the idea defended by some scholars that criminal trials as a form of legal redress have therapeutic results both for individuals and societies, Fletcher and Weinstein argue that, in fact, empirical data contradicts many of the traditional assumptions about their utility. The focus by international criminal justice on punishment of perpetrators in the belief that this should serve as a deterrent of future violations has prevailed notwithstanding the criminology literature that questions this deterrence theory.

Thirdly, TJ processes have tended to focus on civil and political rights, thereby translating a narrow conception of justice that leads to an under-inclusive portrayal of

¹⁸ McEvoy, 2008 (b), p.42

¹⁹ Weinstein et al, 2010, p.47.

²⁰ Fletcher & Weinstein, 2002, p. 584.

the experiences of conflict²¹. Such conception of justice in legal terms only, meaning basically retribution and imposing a dichotomy of victim/ perpetrator that has proved to be inadequate in many contexts. It is designed to identify only individual responsibility, but not political or moral responsibilities. Besides, there is no societal challenge to those people who became involved in violence either actively or by passive acquiescence, thereby relieving most of the population of even moral responsibility for the violence²².

Fourthly, the legalist practice of TJ entails a disconnection by individuals and communities from any sense of sovereignty over the process, which is characterized by a very limited participation of victims and survivors (if any), in their capacity of testimonies in trials or hearings²³.

Lastly, a key weakness derives from the lack of incorporation of the communal dimension in the experiences of conflict and the ways to come to terms with and repair the harm done to communities and peoples. Guilt and punishment, victimhood and reparation are viewed in a collective way in most of African societies²⁴, and the same can be found within indigenous peoples communities in Central and South American Countries (Guatemala, Peru, Salvador, etc.)²⁵.

As regards in particular the African continent, it is interesting to mention the findings of the NGO Penal Reform International research on Sub-Saharan Africa traditional and informal justice systems. They identified the ideal typical attributes of such systems which are, *inter alia*, the focus on reconciliation and the restoration of social harmony as well as on restorative penalties; the effects of a breach of a rule are perceived at the community level; traditional arbitrators are appointed from within the community on the basis of status or lineage, there is a high degree of community participation, the process is voluntary and decisions are based on agreements and the rules of evidence and procedure are flexible.

²¹ McGregor, 2008, p. 59.

²² Fletcher & Weinstein, 2002, p.605.

²³ See the studies developed by the International Center of Transitional Justice about Sierra Leone, Iraq, Northern Uganda, among others, available at their website www.icty.org. See as well Jessica Lincoln, 'Transitional Justice, Peace and Accountability, outreach and the role of international courts after conflict'. New York: Routledge, 2011.

²⁴ Huyse, 2008, p. 15.

²⁵ See González, 2009; Theidon, 2006 (a) & 2006 (b); Roht-Arriaza & Arriaza, 2008, Viane, 2010.

These characteristics contrast with those of the formal system, inherited from the times of colonization, which include, among others, that an impartial judge is appointed by the state, a low level of participation, the coercion being exercised by state, the problem viewed as that of the offender individually, the requirement of a due process and the involuntary nature of the process²⁶. In fact, these are precisely the features of the conventional retributive justice model that TJ processes have tended to embrace.

What is more, this lack of acknowledgement of the communal dimension is of special relevance if we consider that, in many contemporary conflicts, human suffering at the communal level has become a feature, in particular where the collaboration between the military and the paramilitary produces acts of violence and cruelty aimed at terrorizing and destroying the basis of community life, including the neighbor-on-neighbor violence²⁷. This raises the question as to what extent can this dimension be addressed without attending to the collective as a unit of analysis.

As a final note, I want to rescue Clifford Geertz argument that law represents a way of conceptualizing and articulating how we would like the social world to be. Law thus translates a worldview based on a specific culture; it derives its legitimacy and validity partly from the values and beliefs sustaining it. Considering that, insofar as TJ policies are marked by a legal discourse, based on a specific conception of justice, they constitute an attempt to apply values uniformly across cultures and societies, while limiting or negating the possibilities for the peoples in these societies to participate, influence and impact upon that process. Ironically, this is in essence a breach of those values by the very means of their supposed implementation²⁸.

²⁶ PRI, 2001, pp. 123-124.

²⁷ Fletcher & Weinstein, 2002, pp. 576-577.

²⁸ Lundy & McGovern, 2008, p. 102.

2.3. The need to broaden the conception of justice

“Justice is at once philosophical and political, public and intensely private, universal in its existence and yet individualized and culturally shaped in its expression. The seeming universality of the value of justice reinforces the tendency of scholars and practitioners to treat it without nuance, without reference to its manifold cultural and individual expressions”²⁹.

Justice can be interpreted in a variety of ways; it must be understood as a “discursive category that both reproduces and shapes cultural, political, and ideological imperatives at the same time it distorts (or refracts) them”³⁰. For survivors of mass atrocity, the idea of justice encompasses more than criminal trials and the pronouncements of judges in The Hague and Arusha³¹. Justice meanings can include issues going from the return of land or other stolen property, to finding and identifying the bodies of the missing, to trying *all* perpetrators of human rights violations, paying reparation, securing jobs, guaranteeing victims’ relatives the basic social services, etc³². These meanings are context-specific; they are articulated by individuals and communities at the local level.

Thus, the idea of justice that is to guide TJ policies should be defined in each context where it is going to be implemented, in accordance with the meaning it has for the peoples concerned, their values and beliefs, that is, their underlying culture. Justice must be both “formally and vernacularly invested with meaning at each moment in its discursive trajectory, at each moment in which justice becomes a functioning frame of reference for social actors in practice”³³. In this sense, inasmuch as justice means a rationale for social action, it can contribute to rebuilding community life³⁴, that is, to social reconstruction.

A review of past experiences shows that the typical TJ model is “embedded in a vision of social justice that is based on a neoliberal privileging of choice, rather than

²⁹ Rama Mani, 2002, p. 182.

³⁰ Goodale & Clarke, 2010, p.6.

³¹ Stover & Weinstein, 2004, p. 323.

³² Stover & Weinstein, 2004, p.323.

³³ Goodale & Clarke, 2010, p.11.

³⁴ Stover & Weinstein, 2004, p.12.

alternatives that could be more community-based or focused on socialist or religious conceptions of justice”³⁵. Furthermore, the gaps between global visions of justice and specific visions in local contexts create a fundamental dilemma for human rights practice³⁶, as we will see below.

Considering that, it seems necessary to find a different approach to the concept of justice that serves as a basis and guide of the TJ process, a conception that can be better adapted to the multiple understandings and the different levels and dimensions that should be tackled. To that end, Rama Mani’s tridimensional concept can be a basis from which that new approach can be derived.

The first key issue in Mani’s theory is that, after conflict, justice must be restored in an integrated way, covering all its dimensions; the injustices experienced by ordinary people during and often prior to the conflict have to be redressed for citizens to be able to place their trust in the new peaceful dispensation and participate in efforts to build peace³⁷.

Therefore, she proposes a model of tridimensional justice³⁸, whereby the first dimension is that legal justice or the rule of law, and the apparatus of the justice system, which is often delegitimized, debilitated or destroyed during conflict, have to be restored and, in so doing, an indication is given to both combatants and survivors that there is a return to security, stability and order. The second dimension is that of rectificatory justice, which refers to dealing with injustices in terms of physical violence suffered during the conflict. The third dimension, which she calls distributive justice, entails addressing the underlying causes of conflict, which often lie in real or perceived socioeconomic, political or cultural injustice. This last dimension focuses on how post-conflict societies deal with grievances such as inequitable distributions and access to political and economic resources that underlie conflict.

The rationale for this third dimension is to prevent the recurrence of conflict and to build the foundations of peace. Distributive justice strategies would include

³⁵ Merry, 2006 (c), p.103.

³⁶ Merry, 2006 (c), p.102.

³⁷ Mani, 2002, p. 4.

³⁸ Mani, 2002, pp. 5-8.

backward-looking measures aiming at rectifying past systemic injustices and inequalities which were in the roots of the conflict and forward-looking measures aiming at meeting basic needs, socioeconomic as well as political rights, to improve the overall situation³⁹.

The adoption of this conception of justice to be the framework of the TJ processes' range of possible policies and measures could imply adopting as well a development-sensitive approach. Such approach means being aware of the links between both, foster the synergies and directly addressing development-related issues such as those related to the coverage of basic needs or other socioeconomic measures aimed at improving the overall living conditions.

The way the relationship between the two fields is seen depends on the conception of TJ one has. Duthie considers that it could be argued that TJ objectives include the protection and redress for gross violations of *all* human rights, that is, not only civil and political rights but also economic, social and cultural rights. This is justified because under an authoritarian regime or during conflicts, these types of crimes can be more widespread than crimes that result in civil and political rights violations, involving more perpetrators and affecting more victims⁴⁰. This integration of economic, social and cultural rights was advocated as well by the former UN High Commissioner for Human Rights Louise Arbour⁴¹.

There are several reasons that justify this broadening of the TJ framework. Firstly, certain development-related crimes may constitute serious human rights violations. Secondly, addressing development issues may be instrumental to the goals of TJ, like pursuing accountability for perpetrators of serious human rights violations, providing redress to victims and preventing the recurrence of those violations. Thirdly, addressing development issues may be instrumental to the goals of development, this is, TJ measures may provide for instance the only forum in which justice for past economic crimes could be pursued. They could make a contribution to fighting and redressing

³⁹ Mani, 2002, p. 9.

⁴⁰ Duthie, 2008, p.294.

⁴¹ See conference of 25 October 2008, "Economic and Social Justice for Societies in Transition, by Louise Arbour, available at www.chrgj.org/docs/Arbour_25_October_2006.pdf.

corruption that otherwise would not be made at all. It can generate the momentum behind needed reforms or make a modest contribution to shaping a country's development in a particular way so as to make it more sensitive to conflict and past abuses and therefore more sustainable and equitable⁴².

In sum, a broader conception of justice is needed in order to better respond to the different realities that are found in each context, the differing needs, expectations and preferences of the local people concerned by the transitions that are being fostered through these processes. This conception should go beyond the legal emphasis in retribution in order to incorporate the restorative components that are widely found in many cultures traditional practices and understandings, as well as a historical perspective of the social, political, economic and cultural factors that are in the roots of past and present injustice.

It is worth noting that past experiences in particular with practices of tradition-based justice mechanisms indicate that communities rank with differing orders the objectives of reconciliation, accountability, truth seeking and reparation⁴³. The differences in attitudes about peace, justice and reconstruction can be explained by several factors, such as exposure to violence, socioeconomic characteristics, as well as culture insofar as it shapes the way experiences are explained and understood. Weinstein and his colleagues' research across five different countries (Bosnia-Herzegovina, Croatia, Rwanda, Uganda and Iraq), lead to the finding that "the way people feel about judicial mechanisms is strongly influenced by experience of the violence, prior experiences with those on the other side, beliefs in retributive justice, access to accurate information, cultural beliefs and practices and identity group membership"⁴⁴.

Furthermore, local politics profoundly shape the responses of identity groups to whatever form of transitional justice is proposed and these attitudes are influenced, in turn, by cultural practices and historical experience. Therefore, "each country and

⁴² Duthie, 2008, pp. 304-306.

⁴³ Huyse, 2008, p. 4; Weinstein et al., 2010, p. 37.

⁴⁴ Weinstein, 2010, p. 39.

culture must be considered separately and interventions must be developed that make sense for the populations of concern”⁴⁵.

The research on attitudes towards justice and reconciliation in these six post-conflict countries through surveys and qualitative research pointed as well to the inadequacy of an homogenized image of victims or survivors; instead, they identified a multiplicity of constituencies based on, *inter alia*, ethnic and sectarian identity. Besides, the understandings of justice found among the surveyed populations were broader than those found on the basis of national and international TJ mechanisms, going beyond criminal prosecution to include dimensions such as social justice and security⁴⁶.

In the same line, Matilde González writes about a project aimed at understanding the distance and contrast between the discourses of conflict and peace at the national level in Guatemala and the interpretations built at the community level as a result of the local people’s experience and culture with an approach to local history that would account for the complexity and diversity of cultures in Guatemala. Instead of pretending to understand the realities and internal dynamics of communities from the distance (and thus inevitably, in a prejudiced way), this local history of community studies approach wanted to contribute to the visibility of Mayan people’s agency as opposed to being “submissive victims”⁴⁷.

The case of the TJ process in Guatemala is actually of special interest, insofar as the peace accords signed under the auspices of the UN constituted the first case to incorporate a broader understanding of justice than the “traditional” one, whereby the underlying causes of conflict were addressed, the political nature of the TJ process was recognized and, at least officially, the involvement of local populations (and particularly, indigenous peoples) was sought at least on the papers.

A last example is that of *campesinos* communities in Ayacucho, Peru, where the fratricidal nature of the armed conflict and the large participation of civilians in the killings marked the reconstruction process. The explanation that those communities found for the traumatic events they had gone through was marked by the logics of

⁴⁵ Weinstein, 2010, p. 41.

⁴⁶ Weinstein et al., 2010.

⁴⁷ González, 2009, p. 299.

exteriority⁴⁸, whereby the “harmful” thing came from the exterior and grabbed hold of certain individuals. That logic, in turn, influenced the way reconciliation was to be attained, a long process which included among its steps those of apologizing, punishing and repairing, a process that showed that “retributive and restorative justice are not mutually exclusive: rather, they are two facets of the Judeo-Christian legacy that has greatly influenced legal consciousness of these communities”⁴⁹.

In short, the values and ideas informing justice should be articulated within and by each community, based on its specific realities and needs, for both conceptual and practical reasons. The proposed broadened framework intends not to impose a certain view of what these conceptions and needs might be, but to allow for the broader claims that are made from below to be included within the process of transition. Justice is most effective when it works in consort with other processes of social reconstruction and reflects the needs and wishes of those most directly affected by violence⁵⁰.

⁴⁸ Theidon, 2006 (b), p. 89.

⁴⁹ Theidon, 2006 (b), p. 97.

⁵⁰ Stover & Weinstein, 2004, p.11.

3. Towards culturally-sensitive transitional justice processes. Drawing lessons from past experiences and from the development field

In the 90's, after years dominated by the theories of economic development spread around the world by the International Monetary Fund (IMF), the fourth decade of development policies and practices was marked by the emergence of a series of new concerns. These included environmental issues, monetary reform, as well as the inclusion of social and cultural factors in the development projects. Furthermore, this was the decade in which the rights of indigenous peoples and minorities were defined⁵¹. That decade was also characterized by the setting up of the first TJ mechanisms and policies, although we still had to wait another decade for the concept of TJ to be coined.

Nowadays, there is a growing debate about the appropriate models of TJ and the different levels at which policies and measures should be adopted (international, national, local / community) as well as how can the different models, mechanisms and policies be combined to be most effective. The debate results from a series of criticisms of the way TJ processes have operated, in that they have tended to exclude the active participation of the local communities, which has led to a lack of ownership and success, or because they are implemented in such a way as to impose Western models of justice and democratization, which led to them being considered a new way of colonialism⁵².

A reaction to these criticisms can be found in the first years of the millennium in several UN reports and documents arguing the need to consider local communities as important stakeholders and active agents of change and defining new UN norms and standards embracing the key concepts of local ownership, local leadership and local constituency for change⁵³. Besides, it is increasingly being argued that in order to

⁵¹ In 1989 the International Labor Organization (ILO) adopted the Convention No. 169 concerning Indigenous and Tribal Peoples; in 1993, the General Assembly of the UN adopted the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, the same year, at the Council of Europe adopted the European Charter for Regional or Minority Languages and in 1995 the Framework Convention for the Protection of National Minorities.

⁵² Skaar, Glopen & Suhrke, 2005, p. 44.

⁵³ See, *inter alia*, the 2003 UN Division for the Advancement of Women's Expert group report titled "Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women"

institutionalize and sustain peace, issues of ownership and participation may be critical⁵⁴. The shift of TJ to the local has meant an unprecedented attention in customary law and other forms of informal justice as complements of the hitherto paradigmatic model mechanisms of truth commissions and tribunals⁵⁵.

Nevertheless, “despite of being identified as key issues in international reports and development circles for many years, the virtues of local ownership, empowerment and participatory approaches have tended only to be implemented in a vague, weak and ad hoc manner”⁵⁶. It seems that many of those arguments have not been translated in a comprehensive manner into TJ theory and practice. International actors have tended to adopt a standardized, technical, apolitical, one-size-fits-all approach in the implementation of the legal TJ model most commonly applied, while seeking minimal engagement with local legal traditions and populations⁵⁷.

As opposed to the commonly applied model, the conceptual framework presented in this dissertation advocates what we can call a “vernacularized or indigenized” TJ processes, to use Sally Engle Merry’s term, where “vernacularized” means adapted to local institutions and meanings and “indigenization” refers to “shifts in meaning, particularly to the way new ideas are framed and presented in terms of existing cultural norms, values and practices”⁵⁸, a term commonly used in the field of development.

What this means is to move away from replication, a process where “the transnational model sets the overall organization, mission, and ideology of an intervention while the local context provides its distinctive content; local cultural understandings shape the way the work is carried out” to “hybridity”, that is, “a vernacularization that is more interactive, with symbols, ideologies and organizational forms generated in one locality merging with those of other localities to produce new,

(EGM/PEACE/2003/BP.1) or the 2004 UNSG report on the Rule of Law and TJ referred to above (S/2004/616, 3 August 2004).

⁵⁴ We have to consider that about 40% of post-conflict societies return to conflict within a period of five years, a fact that, in contexts where large internationally-funded peace-building, rule of law and democratization programs have been implemented indicates the failure of such programs.

⁵⁵ Shaw & Waldorf, 2010.

⁵⁶ Lundy & McGovern, 2008, p.107.

⁵⁷ Mani, 2002, p. 169.

⁵⁸ Merry, 2006 (b), p. 39.

hybrid institutions process that merge imported institutions and symbols with local ones, sometimes uneasily⁵⁹.

The following epigraphs intend to rethink the TJ process model as experienced hitherto. Firstly, key concepts used in the proposed theoretical framework of TJ will be clarified. Then, we will see how this broadened or more inclusive model of TJ that is sensitive to cultural differences can be implemented, which are the challenges and possible solutions, while drawing lessons from the accumulated experiences of policies and practice of development cooperation and TJ.

3.1. Reflections on the concept of culture

In the development field, after over fifty years of development cooperation policies, it is now considered factual that the development of a people can't be separated from their culture. Furthermore, for any development policy to be successful, it must acknowledge and recognize the principles of cultural diversity.

Back in 1998, the World Decade for Cultural Development was launched with the objectives of, *inter alia*, asserting the cultural dimension in development and affirming and enhancing cultural identities. The preamble to the declaration of the Decade of Culture affirmed that "Culture constitutes a fundamental part of each individual and community and consequently, development (whose ultimate aim should be focused on man) must have a cultural dimension".

More recently, the 2004 Human Development Report, titled "Cultural liberty in today's diverse world" recognized for the first time the impact of the cultural dimensions and the cultural diversity characterizing our societies in human development. The report advanced the need not only for democracy and equitable growth but also for multicultural policies that recognize cultural differences, defend diversity and promote cultural liberty to reach a full development⁶⁰.

In the same line and at the normative level, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions acknowledged

⁵⁹ Merry, 2006 (a), pp. 45-46.

⁶⁰ Human Development Report 2004, UNDP, 2004, p.V.

that cultural diversity is one of the main factors leading to communities' sustainable development, while underlining its importance for the full realization of Human Rights and Fundamental Freedoms and, therefore, it recalled the need to incorporate culture within national and international development policies⁶¹.

Thus, the role of culture as a factor in the conception, design, implementation and evaluation of development projects and programs can be considered as generally recognized, while its meaning in practice has been problematic, as we will see further below. At this point, it seems necessary to establish a working definition of the term "culture", a concept that has been debated and contested over and over by social and cultural anthropologists.

The concept of culture I will be using is its broad version proposed by the UNESCO in the 1982 Mexico Declaration, whereby culture is "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs. [...] It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations"⁶².

This is, culture as the way of thinking and feeling about the world. As Clifford Geertz described it, culture is the web of significance that man has spun for himself. It is the code that allows us to interpret signals in a meaningful way, it defines what is real and important and what is superfluous. In short, it is the way we make sense of the world.

Culture is not static and homogenous, but dynamic and constantly contested⁶³. Cultural resources are used selectively in any context by particular interests to

⁶¹ UNESCO, 2005 Convention, p.3.

⁶² UNESCO, Mexico City Declaration on Cultural Policies, August 1982, p.1. This definition is in line with the conclusions of the World Commission on Culture and Development (Our Creative Diversity, 1995) and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998), and with the 2001 UNESCO Declaration on Cultural Diversity.

⁶³ Merry, 2003, p. 58.

emphasize differences and mobilize people. Cultural meanings and values underlie daily life conduct, activities and practices. Institutions and organizations also have a culture, and those devoted to development or legal issues are no exception. Cultural assumptions shape both institutional public policies as well as private interests.

It should be highlighted that all development interventions as well as all TJ initiatives have an underlying culture, this is, they are framed within a value system and thus depart from a series of ethical and moral assumptions, which in turn determine or shape preferences of behavior or activities and the purposes that are defined as the result of such action. In sum, there is no such thing like value-free development or TJ policy or mechanism, even if in both cases, they are often presented as eminently technical. Both “share a notion of (or faith in) reason, progress, ‘improvement’ and redemption that have their roots in Western Christianity and the Enlightenment. They combine an approach to the present that is rationalistic and technocratic (in the sense it asks what the most effective and efficient way to produce a result is) with an essentially utopian view of the future”⁶⁴.

Contrary to that idea of being technical and thus potentially universalized, both TJ processes and development express political preferences and are based on cultural ideas. Most development projects and TJ policies and mechanisms are formulated in the ideational terms and concepts of Western liberal democracies instead of being embedded in the local ones, which constitutes a requirement for culturally adapted interventions.

The last years have seen the emergence of a multidisciplinary literature that, in reaction to these considerations, advocates a different approach to TJ that has been qualified as “bottom-up” or “local” or “home-grown”, where those concepts are used indistinctively and, quite often, without actually defining what they mean. This new literature uses these and other concepts that come from the development and the conflict studies such as “ownership” and “local participation”, typical of the rhetoric of civil society and good governance. These concepts are now incorporated to the operating guidelines of donors and international organizations (OCDE, OHCHR, etc). That being

⁶⁴ Colvin, 2008, p.413.

so, the lack of clarity of the meanings of such concepts might not only lead to confusion, but also be manipulated, as we will see below. In any case, arguments made with such vague concepts fail to be operationally relevant. Therefore, I will clarify the notions I will be using in this dissertation.

3.2. Defining the model's key concepts of local participation, ownership and bottom-up or home-grown initiative

The notion of local TJ is based in that “those who have been excluded will be included; that the voiceless will be heard and empowered and that locals will inform policy and practice appropriate to their local needs”⁶⁵. This perspective considers that for TJ measures to be sustainable, they must be embedded in the affected communities and driven by the very same people that have lived through the conflict and have been affected by it. TJ measures are therefore based on those communities’ needs, expectations and will; they acknowledge the experience of the affected communities, who actually participate not only in their definition and design, but also in their implementation.

An illustration of a case where these notions are actually not applicable (contrary to what has been the case), we can refer to the *Gacaca* courts in Rwanda. These were an adaptation of a traditional conflict resolution mechanism, an adaptation done “from the top” and that was then imposed on the population, to the extent that participation in these courts was made compulsory⁶⁶. The resulting mechanism can be considered to represent a form of “state-enforced informality”⁶⁷. The *Gacaca* thus exemplifies not the community-produced bottom-up initiative as it was presented, but a “customary” or “traditional” process imposed top-down by the state⁶⁸, since the defining requirement, namely, the involvement of the local people, was lacking in the adoption and adaptation of the traditional mechanism. Besides, the brackets in “traditional” are explained by the fact that they were only inspired by a traditional

⁶⁵ Lundy, 2009, p. 326.

⁶⁶ Ingelaere, 2008.

⁶⁷ Shaw & Waldorf, 2010.

⁶⁸ Engle Merry, 2006 (a).

practice, but in the adaptation the practice was substantially modified.

As regards the concept of local participation, Sarah White interestingly analyzes the different forms it takes in development projects, while linking them with a series of interests that each form might serve and suggests in her analytical framework two particular models that I consider to define the type of participation that is required for TJ: the representative and the transformative ones.

On the one hand, representative participation is characterized by a function of giving a voice to the local people, who might be interested in the leverage they get through their participation, while the external agent (donor, NGO, etc.) is interested in the sustainability that kind of involvement ensures.

On the other hand, in transformative participation, a central idea is that of encouraging empowerment, namely, “the practical experience of being involved in considering options, making decisions, and taking collective action”⁶⁹. Supportive outsiders can’t bring about but only facilitate the process of empowerment, which is a continuing dynamic which transforms peoples’ reality and their sense of it⁷⁰.

The key element of the needed participation is that those participating are not only involved in processes but also share in power, meaning that the process fosters the ability to identify and analyze problems, conceive and design solutions, get the necessary resources and implement the solutions. In this sense, as proposed in development studies decades ago, the concept of participation means empowerment and refers to community-based processes where local people define local problems and, based on their knowledge, they conceive and implement solutions, that is, they own and control the processes they have themselves generated. This guarantees the sustainability of processes, as opposed to those encouraged by external funding and/or actors that too often die as soon as such funding is over. This ability to make decisions about and control the process is what will couch the feeling of ownership so, at the end, it is a political issue.

Both forms of participation, the representative and the transformative, are to be applied to the processes of analyzing a particular context and, based on that assessment,

⁶⁹ White, 1996, p.146.

⁷⁰ White, 1996, p.147.

designing, implementing and evaluating TJ policies and mechanisms. The specific form of participation to be fostered or even required will depend on the policy or mechanism and will consider feasibility issues, as we will see further below when we examine the operational options and practical challenges of this model.

In short, the model of local/ home-grown TJ advocated is a process that includes not only geographic boundaries but also local ownership and engagement of those most affected by the conflict. Local ownership means involving locals in formulating processes and initiatives that reflect the culture and values of the jurisdiction in question in such a way that the “local people” will have the final, decision-making power over a project’s authorship, design, implementation and outcome⁷¹. Furthermore, local/ home-grown TJ means emerging from the grassroots, or bottom-up, and empowering those most affected by the conflict or the grave abuses so as to guarantee local ownership. In essence, the central issue is “how local populations are conceptualized –as active agents of change, stakeholders, sources of knowledge and expertise, or as passive victims and mere recipients”⁷².

3.3. Note on the special attention to minorities and indigenous peoples

Another key issue in this framework we are developing for culturally-adapted TJ processes are the diversity of cultures existing in most if not all of the contexts where such processes are to be implemented, and the fact that there might be population groups that require a special attention from a legal point of view (in the sense of conventional obligations) as well as from the effectiveness of the process perspective. It is worth noting, as a further argument for the required special attention, that many of the contexts that have gone through TJ processes were characterized by wholesale attacks against minorities or indigenous communities, not just through physical attacks but also by seizure of land and property, economic marginalization, the prohibition of

⁷¹ White, 1996, p.143 & Lundy, 2009, p. 329;

⁷² Lundy, 2009, p. 329.

community organization, the dismantling of political structures and forms of assimilation⁷³.

As regards the rights of minorities in accordance with international standards, a framework consisting of four pillars that are the right to life, to no discrimination, to protection of identity and to participation in public affairs⁷⁴. The right to participation in public affairs requires ensuring that minorities participate in decision-making processes that affect them at the local and national level. Furthermore, as regards the rights of indigenous peoples as codified in the UN Declaration on the Rights of Indigenous Peoples and in the Convention 169 of the International Labour Organization, they have both an individual and a collective dimension.

Minorities and Indigenous Peoples (MIP) rights can have an added value within TJ processes in relation to certain forms of assimilation, insofar as they include the duty to protect indigenous peoples' identity. Furthermore, they can also "strengthen moves to reclaim land from which communities have been forcibly displaced by war, state repression, or economic development –an issue that transitional justice process often struggle to grapple"⁷⁵, insofar as an argument can be made that the identity of the indigenous communities has been threatened when losing the link with their land.

According to Chris Chapman, "when ethnic groups have suffered massive and systematic abuses, respecting MIP rights within the transitional justice process is an important symbolic gesture, demonstrating that a clean break has been made with the past and encouraging all communities to have faith in the process. The fact that members of marginalized communities for the first time that a state body is inviting them to participate, taking steps to accommodate their cultural specificities such as language and listening to their testimony, can be a powerful force for the reestablishment of bonds of trust between the state and its citizens"⁷⁶.

⁷³ It is worth noting that in spite of the expanding jurisprudence on minority rights issues (see www.minorityrights.org/1258/minority-rights-jurisprudence.html) these have largely not been applied to international criminal prosecution efforts (Chapman, 2011, p.254).

⁷⁴ Chapman, 2011.

⁷⁵ Chapman, 2011, p.259.

⁷⁶ Chapman, 2011, p.263.

Hence, minorities and indigenous peoples must be able to participate in decision-making processes on issues that directly affect them. Measures should be adopted in order to ensure that participation considering the special obstacles that these communities might face, such as language handicaps, or the fact that they are living in isolated areas causing access difficulties, etc.

Furthermore, in connection with Mani's tridimensional conception of justice described above, the requirements of justice for minorities and indigenous groups will very likely need to be framed within the distributive dimension of the concept, meaning looking way backwards to identify and tackle the root causes of the conflicting situation of discrimination and vulnerability.

Lastly, MIP rights require that their cultural practices be respected and promoted; when applying this principle to TJ processes, a case can be made for the use of traditional mechanisms used by MIP communities to promote reconciliation and justice, where they exist.

3.4. Incorporating culture in TJ processes. Learning from past experiences

“No society is devoid of its own concepts of justice and its practices of law and peaceful resolution of disputes however battered by conflict. The difficulty for international actors is translating such realization into practice”⁷⁷

We have hitherto seen the weaknesses of the paradigmatic TJ model and we have suggested a change in the sense of, firstly, broadening the concept of justice that guides the process and, secondly, of making it sensitive to cultural issues, so that the process can be better adapted to the different kinds of contexts where TJ is fostered and their diverse cultures, this is, to better incorporate the local communities' needs and priorities, acknowledge the different experiences of conflict and the harm done to individuals and communities.

⁷⁷ Rama Mani, 2002, p.84.

The model departs from the premise that a key element in post-conflict societies is to create a sense of ownership and responsibility, that is, TJ needs to be domestically rooted and “owned” by the local population, and not imported or imposed. This means that, as Lederach emphasized, it is necessary “to build on the cultural and contextual resources for peace and conflict resolution present within the setting”⁷⁸. Practitioners and academics reached the same conclusion when dealing with development cooperation initiatives. In the same line, Cockwell observes that a sustainable peace can only be founded on the indigenous, societal resources for intergroup dialogue, cooperation and consensus⁷⁹. Hence, in order to foster this ownership and responsibility, the process should ensure that they have “played a part in shaping the face of justice in their societies”⁸⁰.

In accordance with this theoretical framework, the most effective way to ensure the cultural appropriateness of TJ policies and mechanisms is to involve the people to whom they are supposed to serve or by whom they are supposed to be used in their design, implementation and evaluation. The more intimately involved with a certain initiative or action people are, the higher the feeling of ownership will be. Thus, “when ensuring the participation by a significant cross section of the population in a truly consultative sense, that allows interaction, discourse and consensus, it is much more probable that the cultural bias and preferences of the population will be expressed both in style and in substance”⁸¹. This form of participation can lead to the kind of involvement that is required for the TJ mechanisms to be effective and sustainable in the long term, an involvement characterized by commitment, empowerment and ownership of the action and process, which won’t be considered as having been imposed.

Along the same line, the sustainable human development philosophy argues that “those who are the beneficiaries, along with a broader range of stakeholders who have an interest in the development process, should be centrally and actively involved in

⁷⁸ Mani, 2002, p.14, citing John Paul Lederach’s “Building Peace. Sustainable Reconciliation in Divided Societies”.

⁷⁹ Mani, 2002, p.14, citing John Cockell “Peacebuilding and Human Security”.

⁸⁰ Mani, 2002, p.171.

⁸¹ CLT/DEC/CD/96/01, 1995, p.20.

planning and implementing development programs”⁸². But, when it comes to TJ processes, who are these beneficiaries and other stakeholders?

Now, questions arise as to how can this model be made operational, that is, how to implement this proposed process that should be owned by the concerned peoples, that empowers communities of victims and survivors through their participation therein and which thereby manages to articulate a process that is culturally adapted? We will now examine practical issues concerning the localization of the process, including some methodological difficulties, in the first place, and then the role of the different actors involved (that of the state, victims and survivors and of civil society), while analyzing specific challenges that can be found at the practical level and based on past experiences described by field researchers, from which lessons will be drawn.

3.4.1. Challenges of localization and local participation

TJ processes so far have confirmed a tendency to exclude local communities as active participants in TJ measures, “which is a primary flaw raising fundamental questions of legitimacy, local ownership and participation. Simply involving local people at the implementation stage of these initiatives is not enough”⁸³. For a fully participatory process, they should also take part at every stage in the process, including conception, design, decision-making and management, as we have argued before. At the end, the final objective is that TJ processes operate in a “dignified locality” in the sense that it produces valid (local) knowledge.

As it was pointed out in section 2, once the need to ensure the participation of the local communities is affirmed, the questions that arise are what is the local, who are “the locals” and how can we build on what is locally demanded and needed, considering that “there are always tensions underlying issues such as who is involved, how, and on whose terms”⁸⁴. The first thing is to recognize that “the local people” is not an homogenous group and that special mechanisms will be required to ensure the

⁸² UNDP, 1996, Chapter II.

⁸³ Lundy & McGovern, 2008, p.100.

⁸⁴ White, 1996, p. 154.

involvement of disadvantaged or marginalized groups. The fact that local actors are often the cause of a breakdown in the rule of law in the first place is an important complicating factor in efforts to implement the principle of locally owned TJ⁸⁵.

Furthermore, experiences in the field show how important it is to understand the local power dynamics and the prevailing interests among specific communities or groups to assess the quality and meaning of local participation. In the case of Peru, Kimberly Theidon gives an interesting insight of the dynamics of participation of communities in the Truth Commission. Among the issues she notes, it is worth highlighting, firstly, the fact that a certain version of events was agreed upon by the communities to be given in the framework of the commission hearings, a version that would guarantee the idea of collective innocence of the communities in question. Thus, these “memory projects” were created by communities as a reaction of the Commission’s categorization of victims/ perpetrators, following the logics of law, and the expectations of the community members to get some economic compensation. Secondly, women were constantly told to be quiet in order not to introduce variations in the “official” truth created by the communities’ authorities⁸⁶.

Another example of shortcomings in the practice of participation implemented is the referendum that was organized in Guatemala on the improvement of indigenous peoples’ rights, in accordance with the provisions of the Peace Accords. The process to develop the new “constitutional regime” was led by Mayan organizations, while *ladinos*, who have traditionally concentrated economic, social and political power, were marginalized. The fact that they were not part of the process triggered fear that the “Mayan culture would be imposed to them” through the new legal recognition of their specificities. The final result was the failure of such new legal framework being approved, on top of the fact that it was a lost opportunity to foster dialogue among the different socio-cultural groups that would have allowed a deeper understanding of the causes of the Civil War, social, political and economic exclusion of population groups and the structural violence that such discrimination entails⁸⁷.

⁸⁵ Lundy, 2009, p.336.

⁸⁶ Theidon, 2010, p.102-104.

⁸⁷ Roht-Arriaza & Arriaza, 2008.

Besides, surveys have constituted the main means through which the participation of the overall population has been sought⁸⁸. Whereas community consultation is essential in order to define the appropriate responses, it is still not clear how surveys should be conducted to make sure that survivors' priorities are properly interpreted and translated. So far, consultations have been done mainly through interview techniques and surveys, which might be criticized for several reasons.

On the one hand, the informants or the questions might be biased⁸⁹. Besides the fact that there might be trust issues regarding official efforts of gathering data after mass violence, it is unclear how this methodology can take into consideration different cultural frames and the fact that some key concepts such as justice, reparations, truth recovery or reconciliation can be contested in non-Western and culturally diverse societies⁹⁰. This key issue should be taken into account, namely, that words in a language and how they are used often illustrate a unique perspective on reality that a culture has developed to make sense of the world: language embodies an approach to reality.

An in-depth analysis of the semantic logics of the terms related to those concepts can show "the cultural understandings that are beneath the visible surface"⁹¹. Viaene's fieldwork in Guatemala with Q'eqchi' indigenous peoples demonstrated that, for instance, survivors never demanded spontaneously that the perpetrators be prosecuted in the framework of the interviews and focus groups she held. She explains this by a series of factors, which include the lack of presence of human rights organizations advocating for criminal trials, the fear of the local perpetrators, lack of familiarity with the judicial system, etc. but, most interestingly, she found the more

⁸⁸ Among others, the following examples can be mentioned: firstly, the surveys referred to in epigraph 4.4 and Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover and Andrian di Giovanni, *When the War ends: A Population-Based survey on Attitudes about Peace, Justice and social Reconstruction in Northern Uganda*, New York, Human Rights Center, University of California, Berkeley, 2007; the Payson Center for International Development, Tulane University, International Center for Transitional Justice, 2005; Patrick Vinck, Phong Pham, Suliman Baldo and Rachel Shigenkane, *Living With Fear: A Population-Based Survey About Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo*, New York, Human Rights Center, University of California, Berkeley and ICTJ, 2004

⁸⁹ Weinstein et al., 2010, p.38.

⁹⁰ Viaene, 2011, p.66.

⁹¹ Viaene, 2011, p.187.

influential cause related to the Q'eqchi' worldview and the idea that divine justice would be done against perpetrators⁹².

On the other hand, these surveys are generally done on an individual basis, which raises questions on their ability to examine the collective dimension of the experiences. They are done at the national level without taking a differential approach to target minority or other vulnerable groups for which special measures might be required.

Local NGOs have also been consulted as representing “the local voice”, whereas interaction with other citizens remains in most cases left to top-down efforts such as raising awareness or information campaigns⁹³. There are some exceptions where civil society organizations have been involved more actively, like in the Guatemala process, although such involvement was basically encouraged in the initial phases, not later.

Lastly, the local context has to be considered as emergent, that is, dynamic, constantly changing, and should be seen as being created by the “engagement of actors, internal and external, in their mutual, sometimes conflicting efforts to remake the world. As such, it is unpredictable and unknowable before the fact. It is, of course, conditioned by the ‘content’ of prior local practice and perspectives, but not determined by it”⁹⁴. More content knowledge is needed about the local realities and in gathering it, in particular by those social and cultural anthropologists that are often involved in projects, the risk of essentializing or reifying cultures has to be avoided.

3.4.2. Traditional, community-based mechanisms: potentials, risks and controversies

We are assisting to a shift in the TJ paradigm whereby normative approaches are gradually giving way to more realistic, empirically based assessments of the potential role of traditional mechanisms within the broader reconciliation and TJ policy

⁹² Viaene, 2011, pp. 195-199. She found that people knew that, due to the excess of elevating themselves to the position of the supreme being by investing themselves with the capacity to decide between life and death, they were guilty and, if they did not recognize their transgression nor seek to rehabilitate the persons' harmed dignity, he would be punished by God, following the internal logics of the cosmos, that is to rebalance the social and spiritual relations within the community.

⁹³ Shaw & Waldorf, 2010, p. 4.

⁹⁴ Colvin, 2008, p. 424.

framework⁹⁵. This evolution has gone first through a phase of mythification of traditional mechanisms due to their virtues inasmuch they are home-grown, locally owned and culturally embedded. Sound research on their practices has nevertheless identified a series of weaknesses, as we will see later. Beyond this particular way of adapting TJ to the local contexts, a new consciousness seems to be emerging that TJ policies and mechanisms have to be adapted to the local context where they are to be implemented, which means as well the cultural context.

One of the possibilities can be, in a post-conflict context, to opt for customary law and practices, which offer a series of advantages, such as its greater capacity (sometimes higher legitimacy) than the formal justice system, which might have been part of the massive abuses or just remains devastated and incapable of providing the necessary services. Furthermore, it might be more responsive to local needs than state or international justice mechanisms and it can provide a certain degree of accountability for low-level perpetrators and bystanders and even some limited restitution for a wide range of victims⁹⁶. There are as well risks and disadvantages of customary law and practices, as is that of reconstituting pre-conflict structures of exclusion or discrimination.

In this sense, an example can be found in the context of post-conflict Mozambique, where a community-based conflict resolution initiative was adopted to foster reconciliation at the local level through the so-called “magamba spirits”, consisting of the return of the spirits of victims in the body of a living person in order to repair the harm done where spirits play a role of mediators. In this case, women victims were excluded due to the inability “to return as spirits to the realm of the living to claim justice”⁹⁷, and hence, through this gender bias the traditional practice contributed to the reinforcement of a patriarchal power.

Traditional justice works in certain contexts, depending on factors such as the local power dynamics, the vertical nature of the conflict and the perceived legitimacy of

⁹⁵ Huyse, 2008.

⁹⁶ Shaw & Waldorf, 2010, p.16.

⁹⁷ Egreja & Dias-Lambranca, 2008, p.80.

the mechanism in question⁹⁸. There are some examples of successful implementation of TJ mechanisms based on traditional peacebuilding, conflict resolution and customary law practices that are worth mentioning.

One of them is the case of East-Timor, where the so-called Truth, Reception and Reconciliation Commission organized community reconciliation processes that incorporated traditional *adat* dispute resolution, including public airing of facts⁹⁹, apology and or reparation and acceptance of responsibility in exchange for conditional amnesty for low-level offenders. Other examples can be found in Uganda, where the use of traditional justice mechanisms was encouraged by the Peace Agreement, which was innovative and showed an increasing interest in such mechanisms in times of transition¹⁰⁰. There, traditional conflict-resolution mechanisms of the Acholi people have been used¹⁰¹.

In the Latin American context, Peru offers as well examples of traditional practices consisting on the dehumanization and rehumanization of members of *Sendero Luminoso* (“*Shining Path*”, a Marxist guerrilla) through public reincorporation ceremonies¹⁰². Lastly, an Asian example is found in Cambodia, where religious and local civic authorities staged ceremonies to welcome back khmer rouge soldiers who laid down the arms in the 1980’s.¹⁰³

These mechanisms are local almost by definition, as they rely heavily on specific cultural traditions and mass community involvement¹⁰⁴, they generally occur without central government or international intervention, are initiated by local community or religious actors and tend to emphasize the maintenance of relationships and the rehabilitation of those found guilty into the community. The fact that this

⁹⁸ Roht-Arriaza & Arriaza, 2008, p.161.

⁹⁹ Roht-Arriaza & Arriaza, 2008, p.164.

¹⁰⁰ Huyse, 2008, p.1.

¹⁰¹ See Ojera Latigo, James, ‘Northern Uganda: tradition-based practices in the Acholi region’, pp. 85-118 in *Transitional Justice & Reconciliation After Violent Conflict. Learning from African Experiences*. Stockholm: IDEA, 2008.

¹⁰² See Theidon, Kimberly, ‘How we learned to kill our brother: memory, morality and reconciliation in Peru’ pp. 1-16 in *Bulletin de L’Institut Français d’Etudes Andines*, Vol.29, issue 3, 2000.

¹⁰³ See Gellman, Mneesha, ‘No justice, no peace? National reconciliation and local conflict resolution in Cambodia’, pp.37-57 in *Asian Perspective*, Vol. 32, issue 2, 2008. Available at www.asianperspective.org (consulted on 25 April 2011).

¹⁰⁴ Roht-Arriaza & Arriaza, 2008, p.164,

mechanisms are seen to comply with the community's own values, in particular principles of justice and community ties, increases the chances of outcomes being accepted by both offenders and victims¹⁰⁵.

An issue to shortly reflect on refers to the debate on how traditional are the so-called traditional justice mechanisms used, in particular when it is raised to delegitimize certain claims by local communities (often, by indigenous peoples) of their right to maintain certain specific cultural differences. Some anthropologists and other commentators' criticisms have focused on the fact that so-called "traditional mechanisms" are not all actually traditional. The question is why should the legitimacy be derived from the fact they can really be considered traditional, as opposed to newly created, while the crucial element is that they are socio-culturally embedded, that is, that they make sense to the peoples that are to use them or be affected by them.

In this sense, one should look at how are mechanisms adapted, with what kind of interferences and the extent to which they are still based on the peoples' worldview, conception of justice, or values (their culture, in short) to see whether they have or haven't been devoid of their sense. The debate on cultural diversity should be able to go beyond that dichotomy in order to focus on understanding local forms and the logics of social ties, their transformations and the way in which local actors have tried to survive and understand mass atrocities¹⁰⁶. Furthermore, interferences of the "outside" world or of "external elements" are inevitable forasmuch as peoples, communities don't leave in isolation, but in contact with such outside world, and that contact triggers changes, adaptations, fosters dynamism and contestation of the culture.

In sum, it should be assumed that societies constantly reshape new forms and expressions of "traditional" patterns. An illustrating case can be found in Gorongosa (Mozambique), where based on old practices of healing and reconciliation, survivors of the civil war "inspired by their own cultural wisdom developed their own socio-cultural mechanisms to create healing and attain justice and reconciliation"¹⁰⁷ through rituals that tackle "collective truths of victimization and post-war responsibility and

¹⁰⁵ Chapman, 2011, p.268.

¹⁰⁶ Pouligny et al, 2008, p.7.

¹⁰⁷ Igreja & Dias-Lambranca, 2008, p.80.

accountability in accordance with the African logic, whereby responsibility and guilt are collective”¹⁰⁸.

A final issue to be dealt with are the human rights challenges of community justice, that is, the risks derived from delegating the administration of justice to local communities in the context of a weak state, as it is typically the case in a transition, risks that include vigilantism, exclusionary communitarianism and the reification of unequal gender or other power relations¹⁰⁹.

Many authors who have studied the field of informalism, community justice, community mediation or restorative justice have highlighted the dangers of community as a site of exclusionary practices or unequal power relations. Good practices derive from a sound analysis and assessment of these risks and from building on existing skills and abilities, while being cautious about romanticizing community intention or capacity¹¹⁰.

From a theoretical point of view, the confronted dilemma can be overcome through a compromise between the liberal-cosmopolitan conception of justice, which supports the idea that there is a set of values, ideas and principles about justice that can be universally applied across societies and cultures, and the communitarian view, which argues that ideas and values informing justice are and must be articulated within and by each community, based on its specific realities¹¹¹.

Such compromise would lead to having the ideas of justice articulated internally but would define at the same time a universal standard against which to evaluate them in order to make sure that they do not entrench unjust principles or discriminate against weak groups under the guise of respect of traditional values. This is, finding a balance that allows for the accommodation of accepted and acceptable local practices with universal standards¹¹² in a process of vernacularization or indigenization, to use the terms referred to above¹¹³.

¹⁰⁸ Igreja & Dias-Lambranca, 2008, p.77.

¹⁰⁹ McEvoy, 2008 (b), p.40.

¹¹⁰ McEvoy, 2008 (b).

¹¹¹ Mani, 2002, p.48-49.

¹¹² Mani, 2002. p.170.

¹¹³ Merry, 2006 (b) see supra note 58.

Along the same line, the Minorities and Indigenous Rights (MIP) approach advocated by the International Minority Group is that “the push to recognize collective rights can be counterbalanced by guarantees of individual Human Rights (the correct application of an MIP approach requires that). A number of elements of MIP rights emphasize individual rights, such as the rights of members of minorities to identify as members of the group or to “opt out”, antidiscrimination protections that forbid discrimination by any actor including members of one’s own community, and the requirement that a community’s cultural practices must not violate individual human rights”¹¹⁴.

Yet, the application of these theoretical approaches to practical cases generally constitutes a challenge not that easily solvable. At the same time, it should be noted that it is often the case that culture is perceived as a problem for human rights almost by definition, in particular when it comes to women subordination, whereas political, economic or structural factors are excluded¹¹⁵. Culture is often used by leaders to their own benefit, as a justification or excuse to resist human rights reform.

Anyhow, what seems to be critically important is “to create a dialogue between the weaker and the stronger within the cultural community and society at large. Women and minority groups must be able to dialogue over interpretations of cultural values with politicians, officials, traditional leaders, and family heads in both the rural and the urban areas”¹¹⁶. In that process, the local appropriation of human rights concepts can be fostered, so that human rights are adapted to local contexts and their systems of meaning. In sum, it is necessary to recognize that “rights can emerge through culture, not just in opposition to it. The strategic use of culture includes challenging the authority of cultural leaders who claim to speak for the community as a whole”¹¹⁷.

¹¹⁴ Chapman, 2011, p.263.

¹¹⁵ Merry, 2003, p.63.

¹¹⁶ Ibhawo, 2000, p. 855.

¹¹⁷ Sunder, 2003, p.83.

3.4.3. Considerations on the actors involved

3.4.3.a. The role of the state

TJ processes have hitherto been “state-centered and state-driven processes” that “organize themselves conceptually and politically along the lines of the nation-state”¹¹⁸. The rationale of this is that, insofar as the transitional process may aim at rescuing values such as that of national unity and the rule of law, it is critical that democracy building (or re-building) policies come from a political entity that is (or at least is perceived as being) legitimate and that is strong enough to implement the required policies. At the same time, fostering cohesion and civic trust requires a minimum material equity, while democratic transformation requires that the state, as a subject of international law and main guarantor of human rights, takes over its role of guaranteeing respect and protection of such rights.

A preliminary consideration to be done refers to the need to take into account the specificity of each context where TJ processes are to be fostered and the differing factors leading to the conflict or widespread and mass atrocity. Following the logics of the reasoning proposed so far, in the sense that no formulae is to be suggested as “the right one” to be implemented, what follows are a series of considerations that policy-makers, practitioners and donors could consider before they opt for supporting one or another model.

One of the first questions that arise is whether TJ mechanisms should be implemented in such a way as to imply or require the strengthening of the state. Which state are we talking about? What does it represent for the population, this is, has it been involved in the past human rights violations, or there has been a separation point that allows for the population to differentiate the new state institutions from those responsible of the previous violence? To what extent are those institutions trusted?

Certainly, a sustainable and durable peace in a context where human rights are effectively respected requires a certain degree of institutional strengthening. This might

¹¹⁸ Colvin, 2008, p.416.

be a question of timing, of allowing for a process of progressive confidence building.

Anyhow, we should note that states have international obligations to adopt coherent, coordinated and effective measures to guarantee a democratic transition process in accordance with human rights standards and, on the other hand, when public policies or measures in favor of victims do not derive from consultative and deliberative processes, those policies and measures will breach such standards and, in the long term, will be ineffective.

Hence, in accordance with the line of argument developed hitherto, the first step to be taken by a Government that intends to advance a TJ process is to gather the broadest information possible about what the concerned population expects, paying especial attention to victims, on the one hand, and to the most vulnerable groups in society, which will most likely represent a high percentage of those victims. This might require the adoption of special measures to get the input of those groups and, to that effect, finding partnerships with civil society organizations can be effective.

One of the arguments in favor of a limited role for the state is that of Scott, who suggests that “state-centric” grand schemes often fail spectacularly in that they oversimplify. They may “fail to take sufficient account of local customs and practical knowledge and to engage properly with community and civil society structures. Such failures, often justified in the name of efficiency or professional expertise, may in turn lead to incompetence or maladministration and encourage grassroots resistance to such state-led initiatives”¹¹⁹.

In the same line, McEvoy asserts that legal institutions associated with TJ would operate most effectively “if they run in conjunction with properly managed, effective and accountable local and indigenous processes, which comply with basic international human rights standards”¹²⁰. According to him, “peace-making circles in South Africa and community-based restorative justice programs in Northern Ireland are evidence that

¹¹⁹ Scott C, James, “Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed”, referred to by McEvoy 2008 (b), p. 28.

¹²⁰ McEvoy, 2008 (b), p. 32.

properly resourced and managed local community structures are capable of engagement in and direction of transitional justice processes”¹²¹.

Furthermore, there is no point in promoting an ideal of state justice that does not work in the better-resourced context of the developed world. As McEvoy argues, even in the United Kingdom an average of 3-4% of crimes result in a successful prosecution, where the Justice sector is actually well resourced and the norms of rule of law have had a long time to be established and embedded. How then can we expect state justice to operate better in contexts where certainly the Justice sector will be even less resourced? This argument supports the option of fostering the use of community-based practices that can live aside with state-organized and/ or internationally sponsored forms of retributive justice and truth telling.

One last argument refers to the need to “acknowledge in a more honest way the limitations of legal thinking and practice that aren’t properly “grounded in the real world”¹²². The consciousness of those limitations (as we have described above) requires giving space to actors other than the state or ‘state-like’ institutions in justice provision, meaning being open to the insights and knowledge from disciplines other than law in better understanding the meaning of justice in transition.

Now, there are different approaches to and implications of localization. One of the possibilities is formalizing community-based/homegrown initiatives by state control, that is, formalizing customary law. We will deal with the issue of partnership in the epigraph on the role of civil society organizations further below, but let us note now that it is critical that, whatever partnership is created, it should foster transformative and representative participation and avoid the forms of participation that are limited to formality, whereby it is used to draw legitimacy of the final results of the process but that hasn’t been meaningful and real in the sense defined above¹²³.

One way to “localize” can be contemplated is that of involving local institutions in the process, which can have several advantages. These can include local governments councils, as well as unofficial political powers, such as community political leaders, or

¹²¹ McEvoy, 2008 (b), p. 32.

¹²² MCEvoy, 2008, p.44.

¹²³ See subsection 3.2 for the definition of the concepts of transformative and representative participation proposed by Sarah White.

indigenous peoples' authorities. The integration of these institutions might provide the advantages of decentralizing power, and may contribute to encouraging a stronger community involvement in TJ initiatives, more acceptance of such initiatives and thus, more effectiveness. Needless to say that, again, this is not a generalized recommendation, but a possibility whose implementation will depend on the context, meaning that questions will have to be answered as to who those local institutions and authorities are, how is power managed, to what extent they reproduce practices that shouldn't be supported, etc.

Laura Arriaza and Naomi Roht-Arriaza argue that policy makers, when designing TJ mechanisms, should identify local community-based initiatives and at least be aware of them as to avoid undermining them¹²⁴. They argue that, while local-level initiatives can foster the integration of cultural practices and promote participation and a sense of ownership, which makes such initiatives sustainable beyond the short deadlines of external project funding, they also have disadvantages. If “that kind of spontaneous and culturally specific initiative” is programmed or encouraged by governments or international donors, it might lose its value¹²⁵. Besides, small initiatives and adapted time frames by donors can lead to successful project financing, as a recent approach in the development field defends.

Fletcher and Weinstein argue instead that community-generated responses should be supported and that linkages should be created between these efforts and the other interventions they propose in their ecological paradigm, whereby social repair should be sought through a series of diverse mechanisms addressing the collective dimension of the consequences of mass violence. These include state-level interventions to attend issues like refugee returns, restoration of government, structures, as well as legal and economic reform, truth commissions and trials (which may enable a nationwide consensus on the past events) and psychological interventions. Community interventions (memorials, rebuilding of cultural institutions, etc.) may originate from

¹²⁴ Roht-Arriaza & Arriaza, 2008.

¹²⁵ Roht-Arriaza & Arriaza, 2008, p.170.

outside the community but they must be supplemented by community-generated responses such as public rituals of mourning to restore some sense of agency¹²⁶.

In line with Fletcher and Weinstein, the conditions may be found for community-based initiatives to be supported by the state that does not have a delegitimizing effect nor hollows them, while there might be different kinds of support to be provided. This can go from funding initiatives in part or in whole, to acknowledging a certain initiative carried out by a community in order to recognize publicly its value or even the message it carries. A good example of failing in doing so can be a case in Guatemala, where the Guatemalan State did not act as to acknowledge a series of initiatives through which Mayan Q'eqchi survivors mobilized local and cultural practices on justice and reconciliation to confront the legacy of past atrocities¹²⁷. Instead, by ignoring such initiatives, they failed to acknowledge publicly the losses of the concerned people and to recognize their victimization.

On the other hand, Arriaza and Roht-Arriaza point to the need for policy-makers and practitioners to do an in-depth examination of the initiatives being carried out at the community-level in order to at least not harm them. We can go further and say that state-led initiatives, when not aware of the local realities and the cultural specificities in the process of seeking justice and reconciliation, can become counterproductive in that they undermine those local processes. We can find examples of such effects in Viaene's research on the TJ process in Guatemala¹²⁸ and Theidon's research on postwar Peru¹²⁹.

As regards the case of Guatemala, the implementation of two programs by the state, one targeting victims and the other one members of the self-defense patrols (*Patrullas de Auto Defensa*) generated frustration and incomprehensiveness among the beneficiaries and revealed a mismatch between the national initiatives and the local or micro realities that "undermined the fragile process of rebuilding community life"¹³⁰.

In Peru, a gap was found in the moment of the reading of the Final Report elaborated by the Truth and Reconciliation Commission. The *criollo* political elite

¹²⁶ Fletcher & Weinstein, 2002, p.625.

¹²⁷ Viaene, 2011, p. 121.

¹²⁸ See Viaene, 2011, pp.103-128.

¹²⁹ See Theidon, 2006 (a).

¹³⁰ Viaene, 2011, p.107.

reacted in such a way as to distance itself from the idea of reconciliation with members of the *Shining Path* and stating that they could never forgive, forget nor dialogue with them. Nonetheless, reconciliation processes were actually taking place at the community level on the basis of traditional peacebuilding and conflict resolution practices of the Quechua indigenous peoples¹³¹.

Thus, field research confirms the fact that “a great deal is to be learned in postwar contexts by studying preexisting conciliatory practices that respond to the needs of daily life. Reconciliation is forged and lived locally, and state policies can either facilitate or hinder these processes”¹³². So, TJ state policies, programs and actions should be imbued, if not with the needs and expectations coming from these local realities, at least with the knowledge of their existence and prevalence within local communities in order to be adapted to the local cultural context and to be meaningful and perceived as valid.

3.4.3.b. *Victims / survivors*

Just like in the development cooperation field there was a shift from the passive beneficiary of projects to the active participant in the project implementation, the role victims are expected to play within the TJ process has also changed. The victimized vision of survivors, derived from the interpretative framework of human rights violations that defines a polarity between perpetrators and victims and which emphasizes their suffering rather than their capacity to make choices, resist and participate politically¹³³, is being overcome. There is an increased awareness of the fact that victims want to be “full citizens” again, they want to participate in the reconstruction of their country, be considered as normal people, overcome their visible

¹³¹ Theidon, 2006 (a), pp.454-455.

¹³² Theidon, 2006 (a), 456.

¹³³ Jelin, Elisabeth, *State Repression and the Labors of Memory*. Minneapolis, 2003, referred to by Viaene, 2010, p. 181.

and invisible disability and other losses and they will only be willing to engage as such in the new regime if their human dignity is restored and their needs are addressed¹³⁴.

Hence, acknowledging victims' agency "fosters not only the 'devictimization' but also implies further in-depth research to grasp the role of deeper cultural and spiritual forces and values that survivors exert to survive the lived atrocities"¹³⁵. The 2005 Report on the set of principles to combat impunity reflected the primacy of victims' perspective¹³⁶, the requirement is not limited to that but includes victims' agency in defining their own interests and preferences and in participating in national processes aimed at designing policies of TJ¹³⁷.

Victims' needs are influenced and shaped by a series of factors, which include the nature, duration and consequences of the violations suffered, as well as cultural differences and the level of education and information¹³⁸, so again, it is not possible to operate based on generalizations whatsoever due to the specificities of each context.

Nevertheless, most of the literature reviewed indicates that there is in fact a set of victims' needs and expectations that can be found in all contexts. Victims' needs would include, in the first place, physical security, that is, violence must come to an end. Secondly, the recognition of their status, their suffering and needs, as well as their humanity. Thirdly, some kind of justice and acknowledgement of the harm done to them, including the causes of their suffering, the wrongful nature of those acts, its condemnation and the confirmation that what happened was a breach of the social contract of norms and values, which constitutes the starting point for the restoration of the social fabric. Fourthly, truth, in the sense of responding to the main questions as to who, when, where and why, taking into consideration that understanding what happened and why is generally critical for victims to be able to trust social values again. Lastly, some kind of reparation¹³⁹.

¹³⁴ Schotsmans, 2005, p.106. The identified needs are generalized as being characteristic of all victims based on fieldwork developed mainly in Sub-Saharan Africa.

¹³⁵ Viaene, 2010, p. 181.

¹³⁶ E/CN.4/2005/102/Add.1, 25 February 2005.

¹³⁷ Orentlicher, 2007, p.19.

¹³⁸ Schotsmans, 2005, p.105.

¹³⁹ Schotsmans, 2005, pp. 107-122.

As regards justice, victims expect its dispensation at the individual level, which will never be possible in cases of gross and systematic human rights violations. This fact turns the claimed objective and even the right of bringing justice to victims into an illusion, which entails a failure of the Western justice model in contexts of mass atrocity, since feelings of frustration and the perception of a lasting impunity will prevail among those victims for whom there was no trial. This incapacity of bringing “trial-justice” to all victims obliges to search for other models, and here traditionally-based conflict resolution and reconciliation mechanisms have tended to become central, as was the case in Rwanda with the *Gacaca*.

Regarding the definition and implementation of reparations programs, culture takes a key role for the chosen model to be perceived as making sense and being legitimate, especially when it comes to the symbolic forms of reparation (which can largely contribute to the process of reconciliation) as for example those related to “the victims’ need to remember, which can take different forms depending on culture, tradition and religion”¹⁴⁰. Furthermore, understanding the local culture will be essential as well to prevent the replication through reparations of discrimination models against vulnerable groups, like women or children where paternalist models prevail for instance, or minority groups.

Notwithstanding the previous assertions about victims attitudes towards justice and reconciliation or their needs and expectations, there are some exceptions such as cases where peoples or communities that have opted for other paths to the future and reconciliation, including forgiving without any prior truth-seeking, justice or recognition. One of these cases is that of Sierra Leone, where peoples felt distant from the Truth and Reconciliation Commission (TRC) not only because of typical factors of fear derived from the insecurity and the recurrence of violence, but especially because they adopted the approach of forgiving and forgetting, which “derived from local strategies of recovery and reintegration that were never seriously addressed in Sierra Leone’s TRC”¹⁴¹.

¹⁴⁰ Schotsmans, 2005, p. 131.

¹⁴¹ Shaw, 2005.

This example raises a relevant issue regarding the idea that the practice of truth telling, that is, the public recounting of memories of violence, contributes to healing, which is a problematic assumption that nevertheless has been considered as being universally valid¹⁴². Again, it is an idea coming from the Western culture that can't be extrapolated to the rest. Furthermore, it is often the case that outside experts design and implement projects aimed at repairing the lives of distant and vulnerable 'others' with what they consider to be technical formulae, whereby a factor or action X will lead to effect or result Z in attitudes of people. Those designs are based in a sort of "technicist dream", namely, that societies can be understood and manipulated, and people behave rationally or at least predictably, while individuals and groups in fact do not act in universal or predictable patterns"¹⁴³.

Going back to the Sierra Leone case, it also raises questions about the place of international legal obligations as to what extent are they to be subjugated to the priorities identified by the victims themselves. Should international obligations trump victims' preferences? Another example that even led to contestation is that of the International Criminal Court indictment of 5 members of the Lord's Resistance Army (LRA), in Uganda. The Acholi people, who have been the main victims of the LRA, asked to withdraw the arrest warrant and defer the case to traditional Acholi ceremonies of reconciliation and forgiveness. A further question that complicates the issue even more is that it was the leaders of the Acholi people who requested that deference, but did these leaders represent effectively the Acholi people?

Diane Orentlicher deals with this example and affirms that an approach towards the LRA that is rooted in local culture is inherently more likely to be meaningful to victims than prosecutions that seem alien to the Acholi people. Nevertheless, she ends up asserting that norms are necessary and that one should regard with suspicion the claims of exceptionalism based on culture to avoid prosecutions. It might be dangerous to defend that that the international rule prohibiting amnesties for the most atrocious crimes should be softened as to devoid it of effectiveness. She concludes that it is

¹⁴² Hamber & Wilson, 2002, p. 37.

¹⁴³ Colvin, 2008, p.423.

necessary to keep supporting the broad trend of international law supporting criminal accountability for those who bear primary responsibility for atrocious crimes¹⁴⁴.

In sum, there is no doubt that cultural specificities can be claimed as a cover for other non-defendable interests. The question here though is that, insofar as the claimed preference of victims and survivors diverges from the rules of international law, what would be recommendable would be to guarantee that it is effectively a preference of the concerned people and, if confirmed, act accordingly to respect it. This is, the first step is to ascertain that the reason of the rejection of the norm is cultural, and is not due to the will to preserve political or social power by those already holding it, as it is often the case.

Hence, the main value to be protected are the needs and interests of victims and survivors, which should be privileged over the implementation of an international rule that is rejected, especially when the rule in question pursues the aim of punishing per se, and might be implemented in such a way as to disconnect justice from those to whom it should serve and without contributing to any of the objectives of the TJ process. At least, so far international criminal justice hasn't proved to cause any of the expects that are often attributed to it, such as the deterrence, or the contribution to reconciliation, or event to the feeling among victims that "justice has been done".

When we are dealing with the complicated situation where a consolidated rule of international human rights law or humanitarian law is locally contested, the recommendable option could be to promote a dialogue through insiders at the community level to find resonance of the norm one intends to implement in the cultural background of that community in order to find a basis for local support. The worst option, and that which will likely trigger to the worst effects, is the imposition of norms that are perceived as foreign, which can lead to pervasive effects even in the long term.

¹⁴⁴ Orentlicher, 2007, p.21.

3.4.3.c. The role of civil society. Potentials and risks

In the development discourse, civil society organizations¹⁴⁵ are considered to have the potential capacity of reaching and facilitating the participation of citizens at the local level, while at the same time they are assumed to have a sound knowledge of the local realities in terms of sociopolitical dynamics as well as the cultural frame. Non-Governmental Organizations (NGOs) have the potential of addressing objectives and problems with successful approaches; they can educate and empower particular constituencies, represent them, as well as act as interlocutors and facilitators of public consultations¹⁴⁶.

As regards TJ, the participation of civil society in the process of defining and prioritizing the objectives of the processes and the mechanisms or forms to implement them could give the process an added value. Besides, it can help with victims assistance, investigation and adversarial public action. It can contribute as well to disseminate information on the mechanisms to be set up or already operating in order to encourage participation or simply awareness of their existence, and they can mobilize society in advocacy efforts in case the mechanisms and policies in fact do not respond to their expectations and needs. Roht-Arriaza further argues that civil society's contribution is necessary in order to tackle underlying causes of conflict. Besides, they can provide credible and relevant considerations on the local culture, on politics, economy and social issues.

More specifically, victims' organizations can play a critical role in the definition and implementation of TJ mechanisms. They can contribute to competition or can overcome it by uniting all victims under an umbrella organization, provided that the rights of every category of victims are taken into proper consideration¹⁴⁷.

¹⁴⁵ The type of organizations included in the concept of civil society used here are victims' organizations, development non-governmental organizations, community groups, indigenous organizations, human rights organizations, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, coalitions, social networks and advocacy groups.

¹⁴⁶ Duthie, 2009, p.9.

¹⁴⁷ Schotsmans, 2005, p.132.

That is their potential, as Duthie, puts it, while it should be tested on a case-by-case basis whether the specific NGOs are actually capable of performing such roles. The realities in the field show that many NGOs are not representative, they have no capacity to reach people/ communities, and the “may be selective and exclusionary, elitist, ineffective, and unaccountable to important constituencies”¹⁴⁸. Some NGOs may have been created only to get funds from the avalanche of donors and international NGOs that generally operate in post-conflict situations, while others, even if they were originally grass-roots organizations or movements, might change their own strategies to respond to donor’s agendas, increasingly losing their connection with realities’ problems while focusing on complying with the donors demands. Another risk is, in contexts of post-conflict, when civil society is in fact weak, disorganized and lacks independence¹⁴⁹. Lastly, it can be risky to focus extremely on their role because, specially after long periods of conflict or authoritarian rule, they might be weak and disunited, which can quite limit their capacity of influence and impact.

As regards the participation of victims’ organizations, there are specific risks to be considered. Firstly, the potential competition between organizations that can arise if there are several might be in detriment of the victims themselves as the focus on power and monopolising decision-making processes can prevent victims actual needs to be really considered. Secondly, the way victims are treated is important in the sense that creating dependency must be avoided; instead, the organizations representing them should operate in such a way as to empower them. Thirdly, there is a risk of capitalizing “the benefits” foreseen within the agreed mechanisms by one organization, if there is only one interlocutor.

Based on a case study on the Democratic Republic of Congo, Vinck and Pham argue that “the mobilization of civil society and, more broadly, the population, contributes to a democratization of the transition process, securing legitimacy and public accountability for the policies set forth. The knowledge acquired through consultation also directly informs policy design, revealing, for example, the nature and

¹⁴⁸ Duthie, 2009, p.9, referring to the book “NGO and the Millennium Development Goals: Citizen Action to Reduce Poverty”, Ed. by Jennifer M.Brinkerhoff, Stephen C. Smith and Hildy Teegen. New York: Plagrave Macmillan, 2007.

¹⁴⁹ Brahm, 2007.

importance of local practices and where people stand on the path toward social reconstruction, which is affected by their hierarchy of needs –means of survival and safety are the basic priorities”¹⁵⁰.

3.5. Conclusions

In TJ, while the need for contextualization is widely recognized, there is still a need to add one dimension to that context, that is, the cultural dimension¹⁵¹. Culture influences people’s beliefs and interpretations about life in general and, in particular, about the meanings and consequences of harmful and horrific events. These beliefs and interpretations are shaped by people’s worldview, which is rooted in their culture and religion. Thus, culture provides a framework for both individual and collective interpretations of the past and present, which shall be acknowledged in the aftermath of conflict in order to address the consequences of such events at both the individual and collective levels in a meaningful manner.

As the UN expert on impunity, Diane Orentlicher, asserted, “the unique historical experience of each society that has endured serious violations of human rights will inevitably shape its citizens’ understanding of justice”¹⁵². This understanding, or we would better say these understandings, are to be captured and reflected in the TJ process, which will be better framed with a broader concept of justice than the exclusively legal one. Furthermore, in order to be able to reflect and actually be based on these understandings, the process of defining TJ policies and mechanisms, including the objectives they are to serve, shall involve local communities and might need to adopt special measures to ensure the incorporation of the experiences of the most vulnerable, marginalized and discriminated against, that is, women, children, minority communities and indigenous peoples.

Hence, the model advocated in this chapter offers a series of advantages in relation to the paradigm that has been reviewed and criticized in the first section.

¹⁵⁰ Vinck & Pham, 2008, p. 404.

¹⁵¹ Viaene & Brems, 2010, p.206

¹⁵² Orentlicher, 2007, p.17

Firstly, it allows for the TJ process to take into consideration the voices of those directly affected, as well as that of the people working on the field in order to contribute to the realization of rights. Secondly, it offers the possibility of building a more inclusive process that is not articulated from those traditionally holding power. Thirdly, it constitutes an opportunity to give visibility to the contribution and the role played by people that don't participate in decision-making processes and those belonging to the most marginalized and oppressed social groups, which in turn implies a way of empowering them. Fourthly, it allows for the definition of frameworks that are flexible enough to incorporate local experiences and the perceptions, needs and expectations of the different groups of victims and survivors, taking into account the obstacles that might prevent the most vulnerable among them to effectively participate in the process.

Furthermore, inasmuch as the TJ process is guided by this broader concept of justice, it can embrace a set of measures that responds to the different levels and dimensions at which justice is understood and claimed, including the individual and communal levels and the legal, distributive and retributive dimensions, while allowing for a combinations thereof according to what each community defines as best suited as their path to reconciliation, to social reconstruction.

4. The case of Colombia

4.1. Why Colombia?

*“¿Cómo proponer mestizajes culturales, conceptuales y normativos que rompan con los modos de producción de mestizajes violentos y desiguales que durante tantos siglos provocaron el robo de la historia y de las identidades indígenas?”
Boaventura Sousa de Santos¹⁵³*

The first issue to be noted is the fact that it is controversial to speak of TJ in Colombia. That is because the long lasting conflict (between forty-six and sixty-two years now, depending on the starting point considered) is still ongoing, and human rights violations persist, so the alleged TJ process doesn't really have a breaking point from where a transition could be said to have started¹⁵⁴. The discourse is being preached in a situation of an ongoing conflict in which expectations of an ending are low¹⁵⁵ and where the peace process has been limited to only one of the actors¹⁵⁶.

Nevertheless, the discourse of TJ has gained an increased importance in the Colombian context and is not just a discourse being used; it has translated into institutions and laws, as we will analyze further below. One of the advantages of the introduction of TJ has been the progressive emergence of victims as social and political actors that the TJ process needs to involve, as well as their increased visibility and the fact that organizations have been created to represent them and give them voice, while

¹⁵³ Sousa de Santos, 2010, pp.64. Translation from the author: How can cultural, conceptual and normative *mestizajes* that break away from the modes of production of violent and unequal *mestizajes*, which triggered the stealing of history and indigenous identity? “Mestizaje” means the mixing of races. It can be translated as miscegenation.

¹⁵⁴ Some authors actually argue that it makes no sense to speak of TJ in Colombia, or not even about any transition whatsoever. It has been suggested that the process would actually aim at legitimizing impunity and the lack of an effective reparation for victims, as in Uprimny, Rodrigo and Saffon, María Paula, *Uses and Abuses of Transitional Justice in Colombia*, 2007, available at http://www.dejusticia.org/interna.php?id_tipo_publicacion=2&id_publicacion=352, (accessed on 30 May 2011).

¹⁵⁵ On April 13, 2011, the conclusions of a national survey on perceptions of peace and human rights indicated that most of the Colombian society doesn't see the end of the conflict happening any time soon. See the conclusions of the survey at <http://justiciaporcolombia.org/node/389> (accessed on 3 June 2011).

¹⁵⁶ Uprimny et al., 2006, p.42.

at the same time fostering empowerment processes¹⁵⁷.

Besides, TJ is being claimed to tackle not only the violations of IHL and human rights law in the framework of the armed conflict, but the historical injustices of which indigenous peoples and Afro-Colombian communities¹⁵⁸ are victims, which relates to the reflections done above on the conceptions of justice and the necessary dimensions and levels it should touch upon.

On top of these claims, if we take into account the fact that most of the population understands the need to tackle the structural causes of the conflict¹⁵⁹ and the conclusions of a survey on victims' expectations which point out, in the first place, at those related to the improvement of their life conditions¹⁶⁰, we can already find a justification for the proposed broadening of the conception of justice guiding the TJ process in Colombia.

Moreover, Colombia is seen as a model in terms of legislation protecting indigenous rights and minority groups in the region (other countries like Peru, Guatemala or Bolivia with higher indigenous population have a legislative framework that is less sensitive to multicultural issues). In this sense, the Colombian case can be useful to understand the dynamics of multiculturalism and to imagine possible ways of responding to the claims of cultural minorities within the TJ process.

In sum, the Colombian case can be perceived as offering an opportunity to reflect on what is being done in such a way as to include the considerations done in the first chapters of this dissertation. It is nonetheless true that the context presents as well a series of challenges due to the ongoing violence and the limited possibilities for freedom of speech that can and do in fact undermine the real possibilities of dialogue and meaningful participation of the population in political processes, which are essential components of the proposed model.

¹⁵⁷ Gómez, 2010, p. 209.

¹⁵⁸ See Gómez Isa, Felipe, 'El derecho de los pueblos indígenas a la reparación por injusticias históricas', pp. 157-191 in Álvarez, Natalia, Daniel Oliva y Nieves Zúñiga (eds.), *La Declaración sobre los derechos de los pueblos indígenas*. Madrid: Los Libros de la Catarata, 2009, and Mosquera Rosero-Labbé, Claudia & Luiz Claudio Barcelos (eds.), 'Afro-reparaciones: memorias de la esclavitud y justicia reparativa para negros, afrocolombianos y raizales'. Bogotá: Observatorio del Caribe Colombiano, 2007, available at www.bdigital.unal.edu.co/1237/ (accessed on 3 June 2011).

¹⁵⁹ See national survey on perceptions of peace and human rights, *op.cit.*

¹⁶⁰ Rettberg, 2008, p.61.

4.2. Brushstrokes on the features of the conflict and its victims

The ongoing internal armed conflict in Colombia¹⁶¹ has confronted the Colombian security forces, the paramilitary and guerrilla groups for over forty years¹⁶² in what the 2003 UN Human Development Report on Colombia described as a particularly complex war, portrayed as an eight-faces challenge¹⁶³. This complexity derives from at least three main features of the conflict. Firstly, its long duration has allowed for the conflict to be “contaminated” with the most diverse factors and processes. Secondly, it takes place in a variety of settings from a geographic, economic, cultural and ethnic point of view (mountains, plains, the jungle, cities and villages, areas with or without the presence of the state, with different histories, cultures and ethnic profiles, etc.). Thirdly, the conflict is characterized by the multiplicity of armed actors, which include guerrillas adhering to the different Marxist tendencies, self-defense groups¹⁶⁴ and paramilitaries from all kinds of origin, drug dealers and traffickers and several bodies of the public force¹⁶⁵.

All the parties have involved civil society in the hostilities, in a context where no distinction whatsoever was made between civilians and combatants. The different communities have been frequently classified by the security forces as supporters of the *guerrilla* forces (instead of victims) on the exclusive basis of their place of residence (areas controlled by ‘enemy forces’), which has led to systematic abuses against human rights defenders, trade unionists, farmers, indigenous and Afro-Colombian

¹⁶¹ For an interdisciplinary analysis of the conflict, see ‘Colombia en su laberinto. Una Mirada al conflicto’, Gómez Isa, Felipe (Dir.). Madrid: Catarata, 2008. Historical background on the country and the conflict can be found in Bushnell, David, ‘The Making of Modern Colombia, A Nation in spite of itself’. Los Angeles: University of California Press, 1993; Safford Frank and Palacios, Marco, ‘Colombia: Fragmented Land, Divided Society’. New York: Oxford University Press, 2002 and Lievano Aguirre, Indalecio, ‘Los Grandes Conflictos Sociales y Económicos de Nuestra Historia’, Volumes 1 and 2. Bogotá: Imprenta Nacional de Colombia, 1996.

¹⁶² The beginning of the conflict is a matter of dispute. Some authors locate it at the end of the 40s, in the period called “La Violencia”, while others point at the mid 60s.

¹⁶³ UNDP, 2003, p.144.

¹⁶⁴ The united self-defense forces of Colombia (*Autodefensas Unidas de Colombia –AUC*) is a umbrella organization grouping extreme-right paramilitary groups who were established to protect and control different local economic, social and political interests through their armed fight against the leftist guerrilla groups.

¹⁶⁵ UNDP, 2003, p.144.

communities and whoever leaving in areas that are considered to be strategic for the conflicting parties¹⁶⁶.

Thus, one of the main characteristics of the conflict has been the civilian condition of most of its victims¹⁶⁷. Furthermore, most of them are impoverished: the most vulnerable population of Colombia is the one that has suffered the worst effects of the armed violence¹⁶⁸. During the last 20 years, over 70.000 have died as a consequence of the hostilities (most of them civilians), while there are between 3 and 4 million internationally displaced persons (IDP). There are between 15.000 and 30.000 enforced disappearances since 1964 and in the last 10 years there have been about 20.000 cases of kidnapping or hostage taking¹⁶⁹.

Another characteristic found in the Colombian conflict is the neighbor-to-neighbor violence, that is, the social proximity between victims and perpetrators at the local level, which was the case as well in contexts like Guatemala and Peru, among others. Victims and perpetrators live side by side, to the extent that over 5% of victims might meet the perpetrator on a daily basis, while 18% know the person responsible of the violation he or she was a victim of¹⁷⁰.

In 2003, the UN Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène, warned the world for the first time about the ethnic and racial dimension of the armed conflict in Colombia¹⁷¹. One year later, the report of the UN High Commissioner of Human Rights (UNHCHR) noted that the armed conflict was threatening the country's ethnic and cultural diversity¹⁷².

The 2010 report of the UNHCHR further noted that indigenous peoples and Afro-

¹⁶⁶ AMR 23/023/2008, 2008, p.17.

¹⁶⁷ It should be noted, firstly, that its statistics on victims are only relatively credible inasmuch as many of the human rights violations are not denounced, and secondly, that the figures change depending on when the beginning of the conflict is considered to be. Here we depart from the date considered by the Colombian Commission of Jurists (CCJ) and the Institute of Studies for Peace and Development (INDEPAZ), who developed a study on the victims between 1964 and 2007: 'Experiencias de investigación las cifras del conflicto colombiano', by Diego Otera Prada, June 2008, available at <http://www.indepaz.org.co>.

¹⁶⁸ Rettberg, 2008, p.9.

¹⁶⁹ AMR 23/023/2008, 1008, p.16.

¹⁷⁰ Rettberg, 2008, pp.54-55.

¹⁷¹ UNHCR, 2005, p.1.

¹⁷² E/CN.4/2005, 28 February 2005, par. 7 (annex II on vulnerable groups).

Colombian communities suffer disproportionately the violation of their rights in the framework of the armed conflict and that their lives and their territorial and cultural rights are threatened by the presence of armed groups within their territories¹⁷³. The same argument was made by the 2010 annual report of the Inter-American Commission of Human Rights, which highlighted the fact that indigenous peoples are victimized in an acute and disproportionate manner by the internal armed conflict¹⁷⁴.

According to the Colombian National Department of Statistics and the census conducted in 2005, there are 87 indigenous peoples¹⁷⁵ in Colombia, 1.378.884 persons that amount to 3,4% of the population, while there are 4.311.757 Afro-Colombian¹⁷⁶, amounting to 10,6% of the population¹⁷⁷. The IACHR report states that the prospectus of disappearance of 65 indigenous peoples that have been declared at risk thereof as a consequence or fundamentally due to the armed conflict, discrimination and the lack of protection, entails a series of transversal historical and deep violations of individual and collective human rights protected under the American Convention of Human Rights¹⁷⁸.

Hence, among the impacts of the armed conflict on ethnic groups we can highlight, inter alia, the effect on the people or community as a collective subject, the deterioration of the political project of territorial autonomy and the violation of the exercise of territoriality, the generalized worsening of life conditions, the permanent alteration of the processes of identity and cultural integrity building, the weakening of the organization and the response capacities of the ethnic communities and authorities. The IACHR report points out the selective homicides, especially of indigenous leaders and traditional authorities; threats and harassment by armed groups; incursions in the ethnic communities and territories together with the sowing of antipersonnel mines;

¹⁷³ A/HRC/16/22, 3 February 2011, par.69.

¹⁷⁴ OEA/Ser.L/V/II, 7 March 2011, Chapter IV, par.132.

¹⁷⁵ The National Indigenous Organization of Colombia (ONIC) recognizes 102 peoples. See short description of each group at <http://www.onic.org.co/Pueblos.shtml> (accessed on 8 June 2011).

¹⁷⁶ According to the National Administrative Department of Statistics (DANE in its Spanish acronym) recognize a series of deficiencies in the 2005 census and say that Afro-colombian people amount to about 25% of the Colombian population, that is, 10.5 million people.

¹⁷⁷ See detailed information on the population and the historical background in "Colombia: una nación multicultural", DANE, 2007, p. 23, available at www.dane.gov.co/censo/files/presentaciones/grupos_eticos.pdf (accessed on 8 June 2011).

¹⁷⁸ OEA/Ser.L/V/II, 7 March 2011, Chapter IV, par.131.

cross-fire effects in their territories and forced displacement¹⁷⁹.

Therefore, the probability of members of these communities of being forcibly displaced is higher¹⁸⁰, due to the fact that they are located in areas characterized by their rich biodiversity, or the availability of minerals or oil, which comes along with intense military activity and the implementation or will thereof of huge economic projects, such as mining development, oil exploitation, hydroelectric or agro industrial projects¹⁸¹. On top of the situation of special vulnerability, these communities are victims as well of a historically rooted marginalization and discrimination¹⁸².

As regards the peace process, after several failed attempts of negotiations with the different armed groups by the successive governments of Colombia, Alvaro Uribe won the presidential elections in 2002 and started implementing the so-called “Democratic Security Policy”, which included a peace policy whereby socio-economic and legal benefits would be provided to combatants who agreed to hand over their weapons and reintegrate into civilian life. In the mid-2003, the Uribe government signed with paramilitary leaders an agreement¹⁸³, whereby the paramilitary leadership agreed to demobilize their troops by the end of 2005¹⁸⁴. That year, the Colombian Congress approved Law 975/2005 establishing a special criminal procedure for ex-combatants facing criminal charges for gross human rights violations¹⁸⁵, which foresees a series of instruments and rights that have justified the use of the TJ discourse in Colombia, as we will see further below.

Finally, it is worth making one last note on recent developments. Juan Manuel

¹⁷⁹ OEA/Ser.L/V/II, 7 March 2011, Chapter IV, par.134.

¹⁸⁰ According to the census of 2005 cited above, Afro-Colombian people are the most affected by displacement (14,4% of the population has been displaced), followed by members of indigenous peoples (1,27%) and the rest of the population (0,68%).

¹⁸¹ AMR 23/023/2008, 1008, p.70.

¹⁸² See report of UN Expert on Minority issues, Sra. Gay McDougall, following her visit to Colombia in 2010, A/HRC/16/45/Add.1, 25 January 2011.

¹⁸³ See the agreement “Acuerdo de Santa Fe del Ralito”, available at <http://www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm> (accessed 2 June 2011).

¹⁸⁴ The demobilization process, its shortcomings and failures and the infringement of victims humans rights’ in accordance with international standards is analyzed in Felipe Gómez Isa in ‘Justicia, verdad y reparación en el proceso de desmovilización paramilitar en Colombia’, in *Colombia en su laberinto. Una Mirada al Conflicto*. Madrid: Catarata, 2008. The micropolitics of the demobilization process and the realities on the ground are described by Kimberly in ‘Transitional Subjects: the Disarmament, Demobilization and Reintegration of Former Combatants in Colombia’. ICTJ, Vol.1, issue 1, 2007.

¹⁸⁵ Díaz, 2008, p. 195.

Santos's victory in the presidential elections and his taking office in August 2010 has marked a political turning point in several ways. To start with, he has recognized the fact there is an internal armed conflict and has defined a state strategy to confront it that has moved away from that of his predecessor in that it intends to foster the peace process through development and social inclusion policies rather than through the "democratic security" militarized policies of Uribe's Government¹⁸⁶. This change has led to the adoption in June 2011 of the Victims and restitution of lands law, which has been considered as a historical step¹⁸⁷.

4.3. Relevant aspects of the legal framework, multiculturalism and the differential approach

As we suggested above, the Colombian legal and institutional framework provides a context with a great potential for the advancement of culturally-sensitive TJ policies and mechanisms. We will now examine with further detail what are considered relevant aspects of this context, such as the constitutionally recognized multiculturalism, the Constitutional provisions regarding indigenous peoples and Afro-Colombian communities, the right to prior consent and the consequent differential approach required to translate that framework into policies adapted to the multicultural context.

In the first place, we should mention the 1991 Constitution of Colombia, which enshrines the state's recognition of cultural and ethnic differences within the nation and the public obligation to protect it. The Constitution establishes a social and democratic state subject to the rule of law, participative, pluralist and engaged with human dignity, where a differentiated citizenship supported with participation mechanisms is recognized. Collective communities' rights are based on this legal framework, which entails the Colombian state obligation to design and implement public policies that

¹⁸⁶ On Uribe's legislatures policies and laws, see the report elaborated by the International Commission of Jurists, 'Colombia: socavando el estado de derecho y consolidando la impunidad', 2005, available at www.unhcr.org/refworld/pdfid/48a928210.pdf (consulted on 5 March 2011).

¹⁸⁷ See the OHCHR press release at <http://www.hchr.org.co/publico/comunicados/2011/comunicados2011.php3?cod=12&cat=86> (consulted on 20 June 2011) as well as a report about the law of one of the main Colombian journals, El Semanal, at <http://www.semana.com/nacion/ley-victimas-paso-historico/157521-3.aspx> (consulted on 20 June 2011).

adopt this differential approach as well as new legal instruments to develop the new constitutional postulates¹⁸⁸. This new regime allows indigenous communities to adopt the category of “peoples” implying both autonomy and the category of subject of collective rights. The same would apply to Afro-Colombian communities, including the *palenqueras* and *raizales*, through law 70 of 1993¹⁸⁹.

Furthermore, Law 61 of 1991 ratified the 169 ILO Convention, which establishes the basic principles that all states should consider when designing legislation and public policies related with ethnic groups. These policies should respect cultural diversity, the groups’ ways of life, organizational structures, traditional institutions as well their own practices that guarantee the peoples’ autonomy. Their effective participation shall be ensured as regards those decisions that affect them, so the adequate mechanisms and procedures have to be established to that effect.

The newly established constitutional regime of indigenous peoples provides for rights related to cultural identity, territorial autonomy, political and social autonomy, as well as the right to the special indigenous jurisdiction, environmental rights and rights of control over the exploitation of natural resources in their territories and economic rights. The recognition of indigenous and Afro-Colombian communities as subjects of law has given rise to tensions between individual and collective rights and between economic development and cultural protection.

An international soft-law instrument that is relevant to our analysis is the 2007 Declaration on the rights of indigenous peoples, which sets the basic standards and to which the Constitutional Court has referred in its judgments. The Declaration prohibits discrimination against indigenous peoples and advances their full and effective participation in all issues affecting them, while at the same time protecting their right to be different and to freely pursue their own vision of economic, social and cultural development¹⁹⁰. Thus, the rights enshrined require participative approaches to indigenous issues, the establishment of free, prior and informed consent and the

¹⁸⁸ Izquierdo, 2009, p. 25.

¹⁸⁹ As provided by the transitory article 55, a law was enacted within two years to recognize black communities’ collective property rights.

¹⁹⁰ A/61/L.67 and Add.1, 13 September 2007, Articles 3, 18, 19, 41

consideration of different development options in order to move towards a multicultural democracy¹⁹¹.

As regards to the actual implementation of this framework, the main mechanism that has allowed for it has been the “action of tutelage”¹⁹², which has opened a channel of communication between indigenous justice and state law. Since the constitutional reform, the Constitutional Court has been faced to the challenge of implementing and developing the new legal provisions through its jurisprudence. The Court’s judgments have formed a doctrine whereby the right to ethnic survival has been used in order to balance indigenous peoples’ and other rights and even to grant indigenous peoples entitlements to community members, by giving it primacy over other considerations and rights (such as economic development, right to private property, etc.), while considering it the source of other rights of the indigenous peoples¹⁹³.

It is worth noting that the Constitutional Court rulings on indigenous issues have been guided by the norm according to which “a higher degree of autonomy shall be granted to communities with greater preservation of their uses and customs”¹⁹⁴, which is a way of rewarding historical resistance to cultural assimilation or annihilation attempts by the hegemonic State¹⁹⁵. The doctrine of cultural preservation upheld by the Court fosters a radicalization of social differences insofar as it prevents the claim of indigenous identity within society as a whole or outside the ancestral territory, while it denies the possibility of claiming or reinterpreting the past outside the frame of the community and its territory¹⁹⁶. Furthermore, the doctrine has resulted in essentializing indigenous peoples, in reducing them to immobility and requiring their members to reiterate uncritically their fixed ways of living¹⁹⁷.

In this sense, the concept of cultural identity sanctioned by the Court reflects a notion of static cultures and their concomitant incommensurability, a concept that is not

¹⁹¹ Izquierdo, 2009, p.32.

¹⁹² The “*acción de tutela*” is an appeal mechanism aimed at protecting fundamental rights in accordance with the Constitutional Court determination of that “fundamental” nature.

¹⁹³ Ariza, 2004, p.57.

¹⁹⁴ Constitutional Court, Judgment T-254, 1994.

¹⁹⁵ Ariza, 2004, p.67.

¹⁹⁶ Ariza, pp.75-76.

¹⁹⁷ Ariza, p.82.

far from a racist view and seems dangerous. That is why “coming up with acceptable forms of cultural difference, not “too other” (which runs the risk of “repugnance”), yet different enough to offer the best possible likelihood of a *pueblos*’s claims being recognized, is quite a balancing act”¹⁹⁸ that appears to be necessary.

In relation to the right to free, prior and informed consent (hereafter, prior consent), due to the fact that it has been systematically violated, there has been a wide jurisprudence from the Constitutional Court regarding both laws and public policies and economic projects which had an impact on the use of land and natural resources¹⁹⁹. Since 1992²⁰⁰, and in a context where a specific law or regulation on the procedure to be followed for the required consent is lacking, the Court has determined that prior consent is a fundamental right, both individual and collective, that can be claimed through the action of tutelage²⁰¹.

Very recently, the Court issued a judgment regarding prior consent that has been considered historical: T-129 of 2011, which very interestingly establishes the “need that the state guarantees and encourages in an articulated manner the real and effective application of the fundamental right to prior consent of ethnic communities, because the instruments underlying such prior consent allow for a conciliation between different positions and reach an intermediate point of intercultural dialogue where peoples exercise their right to autonomy with their own life plans in front of the economic models based on a market economy or similar”²⁰².

One last relevant component of the legal framework that is worth mentioning refers to the differential approach, which has been legally recognized since the 1991 Constitution, with the ratification of the 169 ILO Convention and the Declaration on the

¹⁹⁸ Goodale & Engle Merry, 2007, p. 234.

¹⁹⁹ A/HRC/15/34/, 8 January 2010, par. 44.

²⁰⁰ The first Constitutional Court judgment on the issue of prior consent was T-428, where the tribunal asserted the need thereof in cases of economic projects that were to affect the indigenous peoples territories.

²⁰¹ Among the multiple judgments, we can mention the SU-383 of 2003, which ordered the realization of the consultation procedures with indigenous peoples of the Amazonia as regards the policy of fumigation of illicit crops, or the C-175 of 2009, which declared the Rural Development Statute as being inapplicable, the same than C-030 of 2008 did in relation to the Forest law, or C-461 of 2008, which declared that the National Development Plan’s applicability as conditioned to previous consultation.

²⁰² Constitutional Court, Judgment T-029/2011, 3 March 2011, par.5.1. Available at <http://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm> (accessed on 21 June 2011).

rights of Indigenous Peoples. The advancement of its recognition has had again the Constitutional Court as its main ally, with its judgment T-25 of 2004 and the follow-up orders²⁰³, whereby the Court required that public policies related to displacement adopt a “differential approach” towards ethnic groups (indigenous peoples and Afro-Colombian population). In accordance with the Court, such approach should guarantee that humanitarian action, social programs and the policies of truth, justice, reparation and non-repetition for ethnic groups protect their cultural identity and the collective relationship with the territory comprised therein²⁰⁴.

The term “differential approach” is widely used within the human rights, development and humanitarian action communities to refer to both state policies and NGOs and UN Agencies’ strategies and operational guidelines and is applied to ethnic issues as well as to gender, or age. In fact, in Colombia, the UNHCR has been the main agency in advancing and encouraging the adoption of the ethnic differentiated approach²⁰⁵, which has been increasingly recognized and adopted by the Colombian state institutions in recent years²⁰⁶.

Nevertheless, the concept remains quite vague in both the Court rulings and the public policy documents developed by the Colombian Government, which have been limited to the recognition that there is a need to combine criteria of TJ with criteria of collective ethnic justice²⁰⁷. Thus, we can briefly refer to the guidelines proposed by the UNHCR. In their definition, the ethnic differential approach strategy is articulated around seven principles, that are: equality (which might lead to the state adoption of affirmative action), diversity (respect of differences and protection of the ethnic groups’ individual and collective rights through affirmative action), participation (guaranteeing

²⁰³ See Constitutional Court, Judgment T-25/04 at <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm> and autos 004/09 <http://www.corteconstitucional.gov.co/relatoria/autos/2009/a004-09.htm> and 005/09 at <http://www.corteconstitucional.gov.co/relatoria/autos/2009/A005-09.htm> (last accessed 8 June 2011).

²⁰⁴ Rodríguez & Lam, 201, p.9.

²⁰⁵ See for instance the UNHCR document “Enfoque diferencial étnico de la oficina de ACNUR en Colombia. Estrategia de transversalización y protección de la diversidad”, December 2005. Available at www.acnur.org/biblioteca/pdf/4554.pdf?view=1.

²⁰⁶ We can see public policy documents, such as those developed by the National Council for Economic and Social Policy (CONPES, in its Spanish acronym), which affirm to have adopted a differentiated approach as regards ethnicity, gender and age, and particularly with the Government of Santos (<http://www.dnp.gov.co/CONPES.aspx>).

²⁰⁷ Rodríguez & Lam, 2011, p.10.

the right to prior consent and the consensus-building jointly with indigenous peoples and Afro-Colombian communities to design public policies through the coordinated management thereof at the local and national level, including state authorities, ethnic authorities, NGOs and International Cooperation agencies), interculturality (matching ethnic groups' law with Human Rights), integrality (the inclusion of civil, political, economic, social and cultural rights), sustainability and adaptability (flexibility to adapt to different contexts²⁰⁸).

Lastly, it is worth noting that there are not only constitutional and other legal provisions aimed at protecting the rights of ethnic groups, but also an institutional framework tasked with specific policy-making for these population groups. The Ministry of Interior and Justice has a Department of Indigenous, Minorities and Roma affairs and a Department of Black communities, Afro-Colombian, *Raizales* and *Palenqueras*. Furthermore, the Vice-president heads the Inter-sectorial Commission for the Advancement of the Afro-Colombian, *Palenquera* and *Raizal* population.

To sum up, we have seen a formal context where it would seem that all or most of the necessary elements are present in order to be able to set up processes aimed at the conception, design and implementation of TJ policies and mechanisms that would be culturally-sensitive in that cultural specificities of both indigenous peoples and Afro-Colombian communities would be acknowledged and incorporated. What is more, the legal framework sets forth state obligations in that sense, that is, the obligation to ensure participation of these communities and peoples, that they give their consent to the laws and policies that affect them and the adoption of a differential approach as regards these populations.

Now, to what extent and how is this differential approach articulated in the design, adoption and implementation of TJ public policies and mechanisms beyond the formalities and normative considerations? In other words, how effective is that normative framework?

²⁰⁸ UNHCR, strategic paper, supra note 205, at pp. 5-6.

4.4. Critical review of TJ mechanisms and policies

This epigraph examines the processes of conception, design and implementation of the different mechanisms and TJ laws and the operational methodologies of the relevant institutions that are nowadays in place in Colombia. The analysis is done from the point of view of the elements presented in the previous sections as part of a broader TJ model that is culturally adapted to the context²⁰⁹, that is, looking at the means and levels of participation of the different population groups (in particular, victims, indigenous peoples and Afro-Colombian communities) in the process and to the extent to which instruments and institutions acknowledge the need for a differential approach.

Prior to the examination of processes, policies and mechanisms, some brief considerations regarding the context should contribute to the understanding of such processes. TJ mechanisms were first introduced by the Government of Álvaro Uribe in a period that was characterized by the creation of consensus-building spaces at the international level in the cooperation sector, in order to agree on a strategic plan with civil society organizations in the fields of human rights promotion and democracy and peace building²¹⁰.

In spite of this openness declared at the international level, the same attitude can't be found at other levels of the administration, where social dialogue is confined to the institutions' low and middle levels and excluded from the high, decision-making ones²¹¹. The Uribe Government period was characterized by the repeated and constant disqualifications and defamatory remarks on human rights defenders, their harassment, persecution and stigmatization by both the president and the vice-president. Nowadays,

²⁰⁹ The analysis is thus limited and will exclude perspectives, considerations and questions regarding critical aspects of the transition process such as an analysis from a legal point of view (that is, identifying the mismatches between instruments currently in place and international standards), or questioning the appropriateness of strengthening a state while the conflict is still not over and state actors keep having an eminent role as perpetrators of violations of human rights and international humanitarian law, etc.

²¹⁰ This openness to consensus is reflected in the final declaration of the meeting on international support to Colombia in London, in July 2003 (document available at <http://www.hchr.org.co/documentoseinformes/documentos/internacional/DeclaraciondeLondres.pdf>) as well as in the Declaration of Cartagena, in 2005, which followed the Second Roundtable on Coordination and International cooperation for Colombia (document available at <http://www.hchr.org.co/documentoseinformes/documentos/internacional/DeclaraciondeCartagena.pdf>).

²¹¹ Arias, 2010, p. 238.

under the Government of Santos, in spite of his promises in terms of improving the situation of human rights, human rights defenders are still suffering continuous threats, attacks and harassment²¹².

Besides, it can be the case that the openness to dialogue by the Colombian Government has followed international pressure seeking to increase the legitimacy of the policies to be supported and funded²¹³, whereas it was not meant to be honest and true. This might have contributed to the mistrust by human rights organizations, who have adopted a strategy whereby support is sought among international organizations so that they take over the role of advocacy and denounce the situation of human rights violations.

On the other hand, several characteristics of the Colombian civil society can be noted. In the first place, it is polarized in a way that reflects the divisions of the conflict, so we can find organizations that still explain “violent events” in terms of state fighting terrorist groups (the typically Uribean description), others who withhold a more complex view as that described here, and all the positions in the middle. Secondly, victims organizations have been established recently²¹⁴, and still lack the capacity to act with autonomy and independence at the legal and political high levels; therefore, the interlocutors in the dialogue with the relevant institutions have been basically human rights organizations.

Now, to what extent have victims, survivors and the Colombian society as a whole been considered in the design of the TJ policies and mechanisms? Since 2006, several initiatives have been implemented²¹⁵ in order to capture the opinions, perceptions and claims of the Colombian population on the armed conflict and on justice, truth, reparations and reconciliation issues. They have included a survey on

²¹² See press release of the Non Governmental Program of Human Rights Defenders Protection form May 27, 2011 at

http://www.somosdefensores.org/index.php?option=com_content&view=article&id=77:defensores-colombianos-de-derechos-humanos-siguen-sufriendo-amenazas-ataques-acoso-y-escuchas-ilegales-bajo-el-gobierno-de-santos-en-colombia&catid=8:novedades&Itemid=3 (consulted on 5 June 2011).

²¹³ Arias, 2010, p.241.

²¹⁴ Most of the victims’ organizations have been created since 2006-2007, many of them at the neighborhood level, and some networks have also been established in order to group them, but there are still young and vulnerable and rely upon foreign support in order to guarantee assistance to victims.

²¹⁵ FS, 2009, pp.19-23.

perceptions of justice, truth and reconciliation done in the beginning of 2006²¹⁶, a survey on perceptions on the conflict, possible peace-building and conflict resolution actions and the society's participation²¹⁷, another one on the perceptions of the Colombian society on the "parapolitics"²¹⁸, a survey focused on the perception by the Colombian society of victims and human rights organizations²¹⁹, all of them in 2007, a study on victims' perceptions and claims on reparations and on the perceptions of justice, reparations, reconciliation done in 2008. In 2011 a new report has been released on the perceptions on peace and human rights²²⁰. Among them, I want to focus and comment on two of them.

On the one hand, in 2008, the organization *Fundación Social* developed a study on perceptions of justice, reconciliation, truth and reparations with a special emphasis in 4 regions²²¹. The study included interviews with institutions and organizations working at the national level, a survey done at the national level with additional samples from 4 regions (Valle, Antioquia, Montes de María and Meta) in August en 2008, and qualitative studies of the 4 regions.

Among the findings of the study, we should highlight those related to the difficulties for indigenous peoples and Afro-Colombian populations to access justice, which are explained by a series of factors including the lack of trust in state and particular state-justice institutions due to the long lasting discrimination they have suffered before them, the lack of security, the lack of bilingual services at the

²¹⁶ See report developed by the Fundación Social, Norwegian Refugee Committee, International Center for Transitional Justice and the Consejería en Proyectos, '*Percepciones y opiniones de los colombianos sobre justicia, verdad, reparación y reconciliación*', Bogotá, 2006. Available at www.verdadabierta.com.

²¹⁷ See Indepaz, Universidad de los Andes, '*Ciudadanía y Conflicto. II Encuesta de percepciones desde la cotidianidad*', May 2007.

²¹⁸ The term refers to the links between the political leaders and the paramilitaries, which was asserted, inter alia, by the Inter-American Court of Human Rights judgment on the case Valle Jaramillo and others v. Colombia, 27 of November 2008. See the conclusions of the survey of Revista Semana, '*Gran encuesta sobre la para – política*', revue number 1305, from 7 to 14 of May 2007. Available at www.semana.com.

²¹⁹ Oxfam-United Kingdom, '*Percepciones de los colombianos sobre las víctimas del conflicto armado y las ONG de derechos humanos*', Bogotá, May 2008.

²²⁰ See the main conclusions of the '*Primera encuesta nacional sobre percepciones de paz y derechos humanos de la opinion pública colombiana*' at <http://www.somosdefensores.org>.

²²¹ The study was part of a project aimed at supporting civil society's formulation of public policies proposals on TJ, funded by the European Commission in 2007 and implemented by the consortium between the International Center of Transitional Justice (ICTJ) and Fundación Social.

administration, the lack of knowledge of their rights and the possibilities of claiming them and the high rates of illiteracy²²². In none of the four regions did the researchers find institutional programs nor protocols that have adopted the ethnic differential approach required to serve the indigenous and Afro-Colombian populations, apart from the fact that services are provided in Spanish only, which proves the fact that these populations haven't been considered when designing justice mechanisms²²³. In this sense, the study recommends the implementation of processes of rapprochement to victims, particularly to indigenous peoples and Afro-Colombian communities in their own languages²²⁴.

On the other hand, the study seems to suffer the same shortcoming in the sense that the participation of indigenous peoples' organizations is quite scarce, with only one representative of a *resguardo*²²⁵ having been involved, in accordance with the list of organizations and institutions involved in the study. On the other hand, the survey²²⁶ form used suffers from several of the shortcomings mentioned above²²⁷. Firstly, most of the questions are not open, and the possible answers provided are culturally biased and shaped by the legalist conception of justice that we have described, whereas it doesn't leave space for options to be suggested, such as in regards of the institutions whose role the surveyed person considers to be central in a process of reconciliation. Besides, it does not take into account the fact that state security forces are also responsible of human rights violations (only the guerrilla and paramilitary are presented as such). As regards reparations, the set of possible mechanisms or instruments is presented as a closed list again.

²²² Fundación Social, 2009, p. 125.

²²³ Fundación Social, 2009, p. 186.

²²⁴ Fundación Social, 2009, p. 198.

²²⁵ Indigenous community legally recognized by the state that is governed in accordance with the traditional rules and practices of the people and has a collective property license of the land. In accordance with the department of indigenous affairs of the Ministry of Interior there are 567 *resguardos indígenas* in Colombia.

²²⁶ See the survey sample (*formulario de encuesta*) at <http://derechoshumanospaz.org/?FU=.7&ID=es>.

²²⁷ See section 3.4.1 on the challenges of local participation.

The second study I want to refer to is the one done by Angelika Rettberg²²⁸, which departs from the ascertainment that normative conceptions prevail in the field of reparations, without actually being sustained through empirical verification²²⁹. She states that it is better known what governments, international organizations and NGO think of the forms reparations should adopt than how do victims actually perceive their situation and define their needs. The disconnection between victims and their representatives or those who allegedly give them voice, she warns, has implications both for the design of public policies and in daily conditions of the affected individuals and communities. The study concludes, *inter alia*, that the main victims' claim is that of financial reparation²³⁰.

Again, when we look at the survey form, we see the same kind of closed questions that reflect the retributive justice paradigm and, even if in this case some elements that incorporate indigenous peoples' cultural specificities (such as including indigenous tribunals to try the perpetrators), it remains limited and, overall, biased.

One last remark to be made is that it is not clear to what extent the findings of the surveys are taken into account by the state institutions in charge of coordinating the processes that lead to the adoption of TJ policies and mechanisms. Certainly, a context where human rights activists, indigenous peoples and Afro-Colombian leaders, trade unionists, etc. are harassed, disappeared and killed and where state institutions lack the needed trust, poses enormous challenges and obstacles to the implementation of a fully and effectively participatory process that is coordinated by state institutions or that involve them at least, but that seems to be important to ensure that efforts made to gather information on population perceptions don't remain unrewarding, useless.

Beyond these civil society and international donors' efforts to try to comprehend what are the victims, survivors and general population needs and expectations as regards the TJ process, what the Colombian successive Governments have done (more

²²⁸ The study was done in the framework of a project aiming at supporting the National Prosecutor in the implementation of the Peace and Justice Law, funded by the German Development Agency GTZ. The study investigated, *inter alia*, the different forms of victimization, the social proximity between victims and perpetrators at the local level, the preferences in terms of reparation measures, truth and justice and included an evaluation of the reparation programs.

²²⁹ Rettberg, 2008, p.16.

²³⁰ Rettberg, 2008, p.9.

so that of Santos than its predecessor) has been the establishment of consensus-building spaces in an *ad hoc* manner, that is, in connection with specific laws or mechanisms, as we will see further below regarding the Victims' Law, but such initiatives remain framed in a top-down state-driven model: law initiatives arise at the state institutions level, are developed therein and then taken to the local spaces to be presented and to gather the opinions of the people concerned, which may or not lead to modifications.

As regards the mechanisms that have been established, we should start by examining the law 975 of 2005, known as the Justice and Peace Law. It was adopted after a two-year public debate where the government, the donor community, intergovernmental agencies, local political elites and various civil society organizations debated the merits or comparative TJ processes and the applicability in the Colombian context, in particular the applicability of the rights to truth, justice and reparations²³¹.

The law claims to aim at facilitating peace processes and the integration into civilian life of members of illegal armed groups, guaranteeing the victims' rights to truth, justice and reparation. To that effect, it sets a framework for the investigation, judgment, punishment and granting of benefits to members of such groups that demobilize²³². It provides alternative forms of punishment, reduced prison sentences of between 5 to 8 years. Initially, the sentence reduction was not conditional upon an effective contribution to the reparation of victims²³³; demobilized persons only had the obligation to return illegally acquired assets to the state. This was modified by the Constitutional Court²³⁴, which added to the conditionality that the demobilized person should effectively promote a full disclosure of the truth²³⁵.

The political and economic agendas of community and civil society organizations received scarce consideration within the political negotiation process, which resulted in that "crucial issues for such actors including restitution, retribution of land and paramilitary interference in local community development and governance bodies have

²³¹ Diaz, 2008, p. 195.

²³² Guembe & Olea, 2007, p. 127.

²³³ Diaz, 2008, p.203.

²³⁴ Constitutional Court, Judgment C-370/2006.

²³⁵ An analysis of the 975 law in accordance with international standards can be found in Gómez Isa, Felipe, 'Justicia, Verdad y reparación en el proceso de desmovilización military en Colombia', pp. 87-166 in Gómez Isa, Felipe (dir.), *Colombia en su laberinto. Una Mirada al conflicto*. Madrid: Catarata, 2008.

not been addressed by institutionalized transitional justice”²³⁶. The voices of the victims “were not adequately represented and thus have not been duly considered”²³⁷. Furthermore, the process has not considered either the local, cultural and gendered conceptions of what constitutes rehabilitation and re-socialization of ex-combatants²³⁸ in breach of the UN standards for processes of Demobilization, Disarmament and Reintegration²³⁹.

The law did not set up any special non-judicial truth telling mechanism, but instead established the Reconciliation and Reparations National Commission (CNRR in its Spanish acronym), which was tasked with the elaboration of a report about the causes of the emergence and development of the illegal armed groups, of preparing a national plan for collective reparations and the definition of criteria for the reparations to be given under law 975. This has led to a situation where the victims’ voice has been silenced and the voices that are actually being heard are those of the perpetrators and their “free versions”²⁴⁰, in relation to which victims can only hope they contain a “full disclosure of the truth”²⁴¹. In sum, it is not clear how the CNRR could meet its two objectives if it is not tasked with the construction of the truth in a restorative sense, a process that should include the voices, stories and needs of victims²⁴².

As regards the report foreseen by the law, a Historical Memory Group was established with the objective of designing, elaborating and disseminating a narrative on the internal armed conflict which identifies the reasons explaining the emergence and evolution of illegal armed groups, as well as “the different truths and memories of violence, with a differential approach and a preferential option for those victims that

²³⁶ Diaz, 2008, p.197.

²³⁷ Guembe & Olea, 2007, p. 138.

²³⁸ Theidon, 2007, p. 71.

²³⁹ Such standards, adopted in 2006, state the “need for measures to be conducted in consultation and collaboration with all members of the community and stakeholders engaged in the community” and recommends that DDR programs make use of locally appropriate development incentives”.

²⁴⁰ In accordance with Article 17 of the law 975/2005, demobilized combatants provide this so-called “free version” and confession of the facts they know under the interrogation of the National Prosecutor General.

²⁴¹ The Constitutional Court judgment C-370/2006 modified the initial provision of the law referring to the free version with the introduction of this formal requirement where before the demobilization was not conditional to or related to the effectiveness of victims right to the truth.

²⁴² Leadith, 2009, p.10.

have been suppressed or silenced”²⁴³. The Group has adopted a work approach that intends to depart from the local versions of history, while looking at the root factors explaining the conflict and the local logics and dynamics. It is worth noting, though, that in spite of the fact that the Group affirms to have adopted a differential approach (including the ethnic one), there is no specific research line looking at indigenous peoples and Afro-Colombian communities’ perspectives, while there is one for gender²⁴⁴.

The working methodology of the Historical Memory Group consists of taking what they call an “emblematic case” through which the whole historical framework is rebuilt, in order to evidence the processes surrounding the facts, which in turn give them political significance. This methodology entails dialogue and participative exercises with the inhabitants of the localities and regions where the researched events took place through workshops, talks, exhibitions, audiovisual and photographic work and the compilation of the diverse expression forms developed at the community level²⁴⁵. Through this exercise of collective building, the Group wants to privilege the local and regional voices. Again, the methodology defined asserts the need by those working on memory-building to be sensitive to political, gender, class, ethnicity, age and sexual orientation differences among the victims communities so that the different voices and their tensions can be effectively incorporated²⁴⁶. Hence, the definition of the objectives and methodology of work of the Historical Memory Group has integrated the approach that we have considered that is best adapted to incorporate cultural differences within the mechanism.

In terms of reparations, the Justice and Peace law didn’t provide for the state obligation to pay compensations, but only for a limited restitution and rehabilitation through a Trust Fund created by the law, which is to collect and manage all goods handed over by the ex-paramilitary. The law establishes that it is the perpetrator’s responsibility to provide the resources to compensate the victims through individual and

²⁴³ See the description of the *Grupo de Memoria Histórica* in the website: <http://www.memoriahistorica-cnrr.org.co/s-quienes/sub-objetivos/>

²⁴⁴ See research lines at <http://www.memoriahistorica-cnrr.org.co/s-quienes/sub-lineas/>

²⁴⁵ CNRR, September 2009, p.24.

²⁴⁶ CNRR, September 2009, p. 27.

collective as well as symbolic measures. Nevertheless, the Trust Fund has limited resources, since ex-paramilitaries are not handing over their illegally acquired properties and goods and most of those that have been returned (immovable assets and land) are subject to legal processes or have debts, which prevents the Trust Fund from using them²⁴⁷.

The normative framework regulating reparation is quite complex. On the one hand, there is an ordinary normative system that regulates the general conditions of reparations through criminal and civil procedure provisions and the norms on state administrative responsibility. On the other hand, there are a series of instruments aimed at regulating specifically the right to reparation of the victims of the armed conflict, which is conformed basically by the 975 law provisions that we have just described and the implementing regulation 1290 of 2008, whereby an individual administrative reparations program for victims of illegal armed groups²⁴⁸ was established²⁴⁹.

Furthermore, under law 975, the CNRR is in charge of developing a program of collective reparations. So far, the work of the CNRR at this level has consisted on a series of pilot projects that have been implemented since 2007. Recently, the Commission presented the results of these first experiences and the lessons learnt in the process, which have served to define the Collective Reparations Program²⁵⁰. The group in charge of this area of work has concluded that collective reparations must be linked to the development of the country, this is, public social policies shall be connected to development objectives²⁵¹. In this sense, the proposed Integral Reparations Plan developed by the CNRR includes elements of citizenship-building, recovery of the democratic state, subject to the rule of law and recommendations in connection with

²⁴⁷ International Crisis Group, 2008, p.11.

²⁴⁸ Díaz, Sánchez & Uprimny, 2009, p.627.

²⁴⁹ The deadline for applications finished in April 2010 and applications are still being processes. What remains to be seen is how the new victims' law will affect those victims that have already received compensation through this program.

²⁵⁰ A presentation of the experiences of the pilot projects took place the 16th of May 2011. See the press release about the event at <http://www.cnrr.org.co/contenido/09e/spip.php?article4437> (consulted on 22 June 2011). The proposal elaborated by the group will be submitted for approval to the Special Unit for Victims Assistance that is to be created by virtue of Law 1448 of 10 June 2011 (the Victims law).

²⁵¹ *Ibidem*. Statements by Ana Teresa Bernal, the civil society representative commissioner at the CNRR group working on collective reparations.

both specific populations and gender issues, and it has components of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition²⁵².

Another important area of work of the CNRR that should be mentioned is that of reconciliation. The CNRR defines “reconciliation” as “both an end and a long term process of persons or societies aimed at building a climate of peaceful coexistence based on the establishment of trust-based relationship between citizens and state institutions and amongst each other, as well as the deepening of democracy, with the participation of institutions and civil society”²⁵³.

Since 2007, the commission has worked with the different actors of the armed conflict with the aim of formulating public policies’ proposals that are based on and articulate the different groups’ needs. During the 5 years of work, this area has organized, among other activities, consultative workshops with victims at the regional level about their social imaginaries of reconciliation and regional dialogues with strategic actors²⁵⁴.

These workshops lead to the elaboration of a publication jointly with the International Migrations Organization (IMO) office in Colombia, called “Social imagery guide. Specific populations build reconciliation in Colombia”, published in 2009 and aimed at guiding the processes whereby indigenous peoples’ groups and Afro-Colombian communities develop reconciliation proposals based on their own social imageries.

Interestingly, the guide acknowledges the fact that cultural and historical characteristics and the attitudes of the different actors towards transitional processes are fundamental aspects of the definition of political and legal strategies that will allow to guarantee victims’ access to justice and society’s access to the truth, justice and reparation²⁵⁵. This is explained by the fact that truth, justice, reparation and reconciliation have particular meanings within the different population groups, so

²⁵² *Ibidem*.

²⁵³ CNRR “Strategic definitions”, p. Available at www.cnrr.org.co/cd/pdf/Definiciones_estrategicas.pdf (consulted on 22 June 2011).

²⁵⁴ See the section on Reconciliation in the CNRR site:

<http://www.cnrr.org.co/contenido/09e/spip.php?article3874> (consulted on 22 June 2011).

²⁵⁵ CNRR-IMO, December 2009, p. 6.

investigating and assuming the different *cosmovisions* or worldviews is not only a responsibility of the CNRR but also an opportunity to find ways towards reconciliation in Colombia²⁵⁶.

In the framework of these workshops with indigenous and Afro-Colombian communities, the researchers were able to identify specific impacts of the armed conflict on these groups as well as the knowledge and practices with which those impacts were confronted or simply lived, while victims defined differentiated needs, as well as the particular dimension of a lost cultural identity and autonomy within their ancestral territories²⁵⁷.

One last remark about the CNRR's adoption of the ethnic differential approach refers to its overall activities. The Commission has defined its "mission areas of work according to the provisions thereto included in Law 975 and with relevant constitutional provisions"²⁵⁸. One of them, which is of special interest, is that named "Gender and specific populations", whose aim is to guarantee the adoption of the differential approach at these two levels within all areas of work and strategic guidelines and definitions of the CNRR. It considers women, children, elderly, handicapped persons, indigenous peoples and Afro-Colombian communities as being priority target groups of their activities. The action plan of this area, which is to have a horizontal monitoring role in connection with the different areas of action of the CNRR²⁵⁹, acknowledges the need for a differential approach in terms of gender, age and ethnicity and the reasons that justify the adoption of such approach beyond the legal obligation thereto.

The general objective defined in the Action Plan is to guarantee the incorporation within all actions, projects, recommendations and strategic documents of the CNRR of the perspectives of the priority population groups²⁶⁰. Again, in this case, the assertion of such incorporation would be better guaranteed and verified if there were expected results in connection with it, the same way they are indeed defined in relation

²⁵⁶ CNRR-IMO, December 2009, p.7.

²⁵⁷ CNRR-IMO, December 2009, p.7.

²⁵⁸ See Mission Areas at <http://www.cnrr.org.co/new09/areas/index.html?rubrique4> (consulted on 22 June 22).

²⁵⁹ See the Action plan at <http://www.cnrr.org.co/contenido/09e/spip.php?article37>.

²⁶⁰ CNRR, Action Plan, p.4. Available at <http://www.cnrr.org.co/contenido/09e/spip.php?article37>.

to gender issues. In this sense, while the gender differential approach seems widely incorporated and assimilated throughout the CNRR's work, the ethnic component still requires further measures to become really transversal.

Nowadays, it remains to be seen what the future of the CNRR will be after the adoption of the Victims Law, which foresees the elimination of the Commission²⁶¹ and the establishment from scratch of a new institutionality to implement the new legal framework for the assistance, attention and reparation of victims. This has been criticized by the OHCHR, who has advocated the maintenance of that institution to allow it to complete the activities currently ongoing.

As regards the involvement of civil society organizations within the work of the CNRR, the International Crisis Group actually found that the main human rights and victims' organizations²⁶² are reluctant to cooperate with the Commission²⁶³. With the exception of the Historical Memory Group, which has a higher degree of autonomy, the Commission is an eminently political body, whose commissioners are nominated by the Vice-president, who has actually taken over the presidency during the current Government of Santos, while that position was delegated in an external person during his predecessor's legislatures²⁶⁴.

Lastly, and despite the fact that it is a very recently adopted law, it is worth commenting briefly on the Law 1448, the so-called Victims and Land Restitution Law (hereafter, Victims Law), sanctioned the 10th of June 2011 by President Santos. The adoption of this new legal instrument has been presented by the media²⁶⁵ as well as UN

²⁶¹ Article 205 par.2 of Law 1448/2011 provides the derogation of articles 50 and 51 of the Justice and Peace Law (975/2005) which established the CNRR and defined its functions respectively.

²⁶² The main human rights and victims' organizations, whose activities include the provision of legal and psychological assistance to victims, are the Movimiento de Víctimas de Crímenes de Estado (MOVICE), Justapaz, the Comisión Intereclesial de Justicia y Paz, the Iniciativa de Mujeres por la Paz, the Comisión Colombiana de Juristas and the Colectivo de Abogados José Alvear Restrepo

²⁶³ International Crisis Group, 2008, p. 4-5.

²⁶⁴ The lack of independence due to the Vice-President assumption of the presidency of the CNRR and his management of human resources within the CNRR have already triggered several criticisms and the last year has been marked by resignations. See press articles <http://www.elpais.com.co/elpais/colombia/noticias/presentan-denuncias-contra-vicepresidente-angelino-garzon> and http://www.eltiempo.com/politica/ARTICULO-WEB-NEW_NOTA_INTERIOR-9506073.html (consulted on 22 June 2011).

²⁶⁵ See articles in the Colombian media <http://www.lanacion.com.co/2011/05/26/ley-de-victimas-un-desafio-historico/> and <http://www.lanacion.com.co/2011/05/26/ley-de-victimas-un-desafio-historico/> (consulted on 21 June 2011).

agencies' offices in Colombia²⁶⁶ as a historical step.

The law project departed from the Statute of Victims elaborated during last Uribe's legislature, and has been amended and reviewed substantially. The final law has introduced important elements such as the recognition of victims of state actors (while previously there only were victims of illegal armed groups), which entail a political turning point, but still includes certain provisions that do not match (or doesn't do so clearly enough) international standards²⁶⁷.

Furthermore, there are several positive elements to be highlighted in relation to the incorporation of cultural differences in the law. On the one hand, it affirms the adoption of a differential approach²⁶⁸. On the other hand, the law foresees the adoption of specific implementing regulations for the rights and protection guarantees of indigenous peoples, roma, black communities, Afro-Colombian, raizales and palenqueros. The norms developing the differential public policy towards these communities are to be adopted after a consultative process involving these groups' authorities and organizations representing them²⁶⁹. This will be the first time that a law is developed following a process of consultation with indigenous peoples, black and roma communities in accordance with their right to free, prior, informed consent and the jurisprudence of the Constitutional Court on this right, as we saw in the previous subsection.

Nevertheless, there have as well been shortcomings, as reflected by victims' organizations, in the way the instrument has been developed and the levels of involvement of victims' and civil society organizations. In this sense, the Victims National Roundtable (*Mesa Nacional de Víctimas*), a network of the main victims' organizations in Colombia, published a press release on their perception of the Victims' Law, where they do recognize some important improvements and steps taken, but

²⁶⁶ See in particular the press release issued by the OHCHR in Colombia to welcome the law at <http://www.hchr.org.co/publico/comunicados/2011/comunicados2011.php3?cod=12&cat=86> (consulted on 21 June 2011).

²⁶⁷ See the observations done by the OHCHR to the law in their press release about it at <http://www.hchr.org.co/publico/comunicados/2011/comunicados2011.php3?cod=14&cat=86> (consulted on 23 June 2011).

²⁶⁸ Article 13 of Law 1448, 10 June 2011.

²⁶⁹ Article 205.b of Law 1448, 10 June 2011.

criticize the fact that several articles fail to meet victims' expectations and even infringe upon the Colombian jurisprudence²⁷⁰. The organization further claims that, in spite of their efforts to develop and take to the Congress several proposals allegedly based on national and international jurisprudence, they have not been heard nor taken into account in writing the law²⁷¹. Thus, they consider that, insofar as the law does not include the voices of those directly affected by it, it lacks the necessary legitimacy and calls into question its democratic character²⁷².

The CNRR has organized during several months in the beginning of 2011 the so-called "regional dialogues", where victims and other civil society organizations had a space to discuss the proposed law²⁷³. Besides, victims' organizations have been invited to participate in hearings at the Congress. However, these dialogues were rather used to present the law provisions than to collect the views and expectations of the victims in order to incorporate them, while the hearings could have been another way to seek legitimacy through formal involvement of the affected groups. Again, the quality of participation seems to have been deficient, rather interested in the legitimacy drawn from the formalities than from the results of a meaningful participative process.

To sum up, the processes that should follow the recent adoption of the Victims' Law constitute an opportunity to guarantee the rights of victims and survivors in a culturally-sensitive TJ process, whereby the social, political and cultural principles and objectives enshrined in the Constitution can be fostered and the broader concept of justice including the different levels and dimensions can be advanced to move towards an egalitarian multicultural society within an effective participative democracy.

²⁷⁰ The *Mesa Nacional de Víctimas* statement is available at <http://www.pacificocolombia.org/novedades/pronunciamento-mesa-nacional-victimas-sobre-victimas/452> (consulted on 23 June 2011).

²⁷² The MOVICE is actually studying now the legal merits to lodge a complaint against the law. See main problematic issues explained by a Congressman for the *Polo Democrático Alternativo* (a leftist party) who is also part of the MOVICE at http://www.hernandohernandeztapasco.net/206/index.php?option=com_content&view=article&id=348:lo-que-preocupa-a-las-victimas-de-la-ley-que-busca-repararlas&catid=67:articulospaginadeinicio (consulted on 23 June 2011).

²⁷³ For more information on the regional dialogues, see news published at <http://www.cnrr.org.co/contenido/09e/spip.php?rubrique138> (consulted on 23 June 2011).

4.5. Conclusions

Beyond the short and mid-term general objectives of TJ processes, this is, healing of victims and survivors' wounds and restoring broken relationships between members of a group in order to prevent the recurrence of violence or deadly conflict and the instrumental objectives to that effect²⁷⁴, each context has its specificities insofar legal and political mechanisms are defined in accordance with the cultural and historical characteristics and the motivations of the social actors where those processes take place.

In Colombia, the 1991 Constitution's preamble and fundamental principles can be read as a statement of objectives that are to be attained rather than a description of the factual current situation. The specific goals that are to be pursued through the TJ process include strengthening social cohesion, consolidating democracy (which is constitutionally declared as being participative), building a multicultural society and citizenship. As part of those objectives, the ideological explanation of violence and the armed conflict, including political, cultural, economic and social factors, should be revealed, while the structural causes of injustice have to be eliminated.

Certainly, these are all goals requiring the necessary political will to advance them so that the policy-documents and laws declaring to pursue them are not worthless scraps of paper. The current government seems to have taken several steps in that direction, although at the same time some contradicting ones as well, such as the vice-president taking the presidency of CNRR and thereby increasing the political control over a body some see as in the process of dying. However, the analysis of the TJ mechanisms that have already been set indicates a move away from the top-down legalist model towards the adoption of the elements described in section 3 as those needed for a culturally adapted TJ process.

One of the main signs in this sense is the adoption of the ethnic differential approach within TJ institutional policies and legal instruments, which reflects the assumption by state institutions responsible of their formulation, on the one hand, that there are no culturally neutral policies and, on the other hand, that there is no

²⁷⁴ Huyse, 2008, p.10.

homogeneity of populations and universal behaviors and worldviews; these are culturally shaped and influenced.

In this sense, the inclusion of that approach within policies and laws should allow for the specific and differentiated experiences and resulting needs of victims and survivors to be the departing point for TJ measures. Furthermore, the differentiation can contribute to making visible and overcoming the discrimination patterns that some social groups or sectors suffer and consequently, can guarantee the full and effective realization of victims' human rights.

Nevertheless, there is still space for improvement in the adoption of the approach beyond the formal recognition, as we have seen, *inter alia*, in relation to the research lines of the Historical Memory Group, or the indicators and expected results defined by the CNRR Area of Gender and Specific Populations to verify and measure the effective incorporation of the approach in a transversal manner, throughout the overall CNRR activities.

As regards the involvement of victims, survivors, society at large and civil society organizations in the overall process of designing, implementing and evaluating the TJ mechanisms, there is still a long way to go as well. Their participation has been very limited at both the representative and transformative levels (especially this last one). In maintaining vertical dynamics in decision-making processes, with the resulting exclusion of victims and survivors, pre-existing patterns of discrimination and exclusion are not only reproduced but can even be strengthened, which is especially problematic for victims facing particular conditions of vulnerability and social exclusion, such as indigenous groups and other ethnic minorities, women, etc.

If the TJ long term goals mentioned above are to be achieved, further measures should be adopted to guarantee the levels and quality of participation in such way that victims and survivors are considered active citizens and are empowered in the process of identifying, designing, implementing and evaluating measures that are based on their knowledge. In that way, they would own and control the processes they have themselves generated.

In sum, the Colombian process is progressively distancing itself from the conventional TJ concept reviewed in section 2 in rejecting the premises of the

homogeneity of populations and universal behaviors and instead taking into account cultural, socioeconomic and political factors, but still maintains a top-down articulation of the process from the center of power, although some progress has been done in involving victims and civil society organization in debates, but just not in a meaningful manner.

So far, one of the main instruments used to gather information on the different groups' needs, expectations and attitudes towards the TJ process has been surveys, elaborated mainly by civil society organizations with the support of international donors. Surveys will probably continue to be used in order to evaluate the TJ mechanisms that are being established currently.

In this regard, an increased cooperation with state institutions (inasmuch as security considerations allow it) should be sought, in order to guarantee that findings are considered in the design and formulation of mechanisms and policies. As we have seen above, they need to be better adapted to cultural diversity and more open to different conceptions of justice, reparations, rehabilitation, etc., that is, the differential approach should be adopted. To that end, the involvement of persons with the capacity to act as intercultural translators might be useful. As mentioned before, when the participation by a significant cross section of the population is ensured in a truly consultative sense, that allows interaction, discourse and consensus, it is much more likely that the cultural bias and preferences of the population will be expressed both in style and in substance²⁷⁵.

Furthermore, the limitations of that instrument should be assumed and, thus, recourse should be made to other complementary methods such as focus groups (such as the “dialogues” organized by the CNRR, as long as they are really horizontal) in order to incorporate the collective dimension of experiences, perceptions and attitudes. Again, the ethnic differential approach here would entail targeting indigenous peoples, Afro-Colombian and other minority groups distinctively.

Positive steps have already been identified as regards the incorporation of the communal dimension within the TJ measures hitherto adopted, such as the collective reparations projects implemented during the last three years and the plan thereof

²⁷⁵ CLT/DEC/CD/96/01, 1995, p.20.

elaborated by the CNRR. The acknowledgement of the communal dimension is of special relevance in a conflict such as that of Colombia, characterized by human suffering at the communal level and acts of violence and cruelty aimed at terrorizing and destroying the basis of community life, including the neighbor-on-neighbor violence²⁷⁶.

These findings bring us back to Mani's theory of justice referred to above, which advocates the idea that justice must be restored in an integrated way, covering all its dimensions: the injustices experienced by ordinary people during and often prior to the conflict have to be redressed for citizens to be able to place their trust in the new peaceful dispensation and participate in efforts to build peace²⁷⁷. In this sense, within the Colombian process we can see signs of inclusion of Mani's distributive justice component, such as the research lines and guiding principles of the Historical Memory Group, signs that the underlying causes of conflict, which often lie in real or perceived socioeconomic, political or cultural injustice, are being addressed.

Besides, there are several elements that show that TJ institutional policies and laws are not exclusively focused on civil and political rights, but have instead adopted a broader view that includes economic, social and cultural rights. Individual and collective reparations might be able to tackle their realization. The CNRR area of collective reparations has proved to be aware of the links between TJ and development and does intend not only to foster the synergies but to directly address development-related issues such as those related to the coverage of basic needs or other socioeconomic measures aimed at improving the overall living conditions. In that regard, the risk of conceptual misrepresentations should be avoided, that is, measures that result from the dispensation of justice have to be presented as such, as the realization of victims' rights, not as part of development or humanitarian assistance programs.

In sum, the Colombian case provides an illustration of the broadening of the concept of justice as argued in this dissertation in the consideration of the different levels (individual and communal) and dimensions (looking at historical injustices,

²⁷⁶ Fletcher & Weinstein, 2002, pp. 576-577.

²⁷⁷ Mani, 2002, p. 4.

linking the processes of TJ and development). A turning point had already been marked by the Guatemalan peace accords, which paid an unprecedented attention to the structural and systemic causes of conflict and redress social and distributive injustices²⁷⁸ and in Colombia, the Historical Memory Group has followed their steps.

Another sign of progress refers to furthering the protection of MIP rights within the process, which is an important symbolic gesture, demonstrating that a clean break has been made with the past and encouraging all communities to have faith in the process. The fact that members of marginalized communities for the first time that a state body is inviting them to participate, taking steps to accommodate their cultural specificities such as language and listening to their testimony, can be a powerful force for the reestablishment of bonds of trust between the state and its citizens²⁷⁹. In this sense, again, the Colombian TJ process has followed that of Peru and Guatemala and gone further, at least in a formal way. The next months, with the implementation of the processes foreseen by the Victims' Law in order to elaborate the specific implementing regulations and to create the necessary institutionality will be critical to see whether it remains a formality or, instead, the historical marginalization and discrimination of indigenous peoples and Afro-Colombian minorities is reversed.

As regards the treatment of cultural difference, it is worth making a last remark. So far, the constitutional regime protecting cultural differences has been advanced mainly through the Constitutional Court judgments, which have adopted a doctrine of preservation of cultures that runs the risk of essentializing peoples and their cultures. In that sense, the consultative process foreseen by the Victims' Law can be a window of opportunity to introduce new dynamics in the relationship between state institutions and law and indigenous authorities and laws, insofar as indigenous peoples should have the opportunity to define themselves what their expectations are in accordance with their cosmovision and culture, instead of the Constitutional Court having recourse to anthropological or ethnographic literature.

²⁷⁸ Mani, 2002, p. 9.

²⁷⁹ Chapman, 2011, p.263.

In this sense, the processes unleashed by the Victims' law to elaborate the implementing regulations for many of its provisions constitute an opportunity to, firstly, contribute to modify indigenous peoples' perception of the formal legal system as an incarnation of the oppression and discrimination they have been victims of since colonial times and, secondly, to improve their access to justice and prevent the need for the action of tutelage of the Constitutional Court to become an indirect way of imposing state law over customary indigenous law.

In short, in the Colombian context there are several signs of steps being taken to avoid practices that have proved ineffective or failed in the past, of lessons having been learnt and thus has a potential, in spite of the unquestionable challenges imposed by the ongoing conflict, of becoming a model of integration of cultural differences and of true advancement of a multicultural society within a pluralist and participative democracy

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Towards culturally-sensitive transitional justice processes : the case of Colombia

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