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SYMBOLIC REPARATIONS, THE MISSING LINK IN TRANSITIONAL JUSTICE
One step further in the *Never Again* Quest

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ABSTRACT

The research aims to demonstrate how symbolic reparations should be understood as one of the components of the reparation pillar within transitional justice. Therefore, based on the holistic approach of transitional justice, the thesis will make a comprehensive analysis of the transitional justice framework with a particular focus on the pillar of reparations. Furthermore, within the scope of the pillar of reparation, the dissertation will address the concept of symbolic reparations starting from its definition, seeking to suggest how to improve this concept towards recognizing symbolic reparations as one of the components of the pillar of reparation.

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CHAPTER I – INTRODUCTION

1.1 Four Theater Plays to Set the Stage

In 2009 in Buenos Aires, Argentina, the premier of the play *Mi vida después* took place, written and directed by Lola Arias (Perez, 2013). Around the same time, three plays were produced based on the book called *Women's Side of War* from editor Lina Vušković: *Crossing the Line* from the Dah Theatre; *In the Valley of her Sufferings* from Art Polis, and *Seven Breaths* from the Youth Theatre. They were launched in Serbia, Kosovo and Bosnia Herzegovina (BiH), correspondingly, and happen to share the same aim of the Argentinian play.

Perez (2013), a scholar from the memory studies field, in an analysis of post-memory and its relation to the play *Mi vida después*, recounts a special legal phenomenon provoked by this play. In the play "six actors born in the 70s and early 80s reconstruct their parents' youth from photos, letters, tapes, used clothes, stories, dim memories," in a quest to inquire "Who were my parents when I was born?" (Arias 2009, p. 7). The actors re-enact the life of their real parents during the time of state terror in Argentina, while searching for their own relationship with that past (Arias, 2009).

Vanina Falco, who narrates one of the six stories, explains how during her childhood she believed that her father was a salesman, but he was actually a member of the police force. During the years of the regime, the secret police used to execute '*apropiaciones,*' a particular disappearance technique, that consisted in taken the children from the detained-disappeared parents, erasing their identities and gave to families associated with the regime. Falco's father had committed '*apropiación*' with her brother. By the time her brother became an adult and began to doubt his origin, she helped him to search for his identity and discover his true family (Perez, 2013).

Regardless of such a discovery, both retained the feeling of being siblings, and at the moment of the trial against her father, Falco attempted to testify, but the Argentinian Court denied her the right to do so. According to Argentina's penal law, relatives could not testify against the accused. But Falco and her brother appealed, and came up with an interesting argument. She said that by taking part in the play, she was already making her testimony public, both on the stage and in the media with articles about it. Based on that statement, the Court of Appeal with a non-unanimous vote, considered her

testimony, because as one of the judges confirmed, the way Falco was publicly disseminating her story, persuaded them of the viability of her petition to be heard in the trial (Perez, 2013).

Figure 1.1 – Photo from the play Mi vida Despues. Vanina Falco giving her testimony on Stage
Source: (Arias, 2013)

Perez (2013, p.12) explains that "none of the judges doubted the testimonial character of Falco's narration," and such legal phenomenon could be explain as to what Carla Crespo and Mariano Speratti identify as the *living testimony*. Crespo and Speratti narrate other two of the six stories of *Mi vida después,* but conversely to Falco's story where her father was unbeknown to her, the former never got to know their parents. They were *children of the disappeared*. According to Crespo, the genesis of the play, the reason why it was able to reach the audience, was because it became their *living testimony*. Speratti asserts that at some point he felt like the play had gone beyond their individual testimonies, and become the performance of a collective testimony (Perez, 2013).

Following such line of thoughts, Simić (2014) a lecturer in law, analyses the contribution of the three theatre-based projects, to the Transitional Justice (hereafter TJ) processes in the Balkan region, and reaches a similar conclusion. The plays performed by Dah Theatre, Art Polis, and Youth Theatre bring to life women's testimonies about rape, violence, war and all that they have endured during the conflict in the region. The scholar highlights the fact that those stories told through these plays are actually

legal testimonies that embody the lived experiences of women during the Yugoslav wars, and have been recurrently silenced (Simić, 2014).

In this regard, these three plays come to an important coincidence with *Mi vida después*. They give an extra-legal value to the narratives that they perform, based on their potential to establish a place for open discussions, with the capacity to explore legacies of the conflict and to determine the social needs, as well as to find support from the outside (Aston, 1999). These theater plays become as Simić (2014) recognizes, an opportunity for a critical reconsideration of some TJ mechanisms.

Thus, Simić (2014) sights such opportunity by comparing the submission of a testimony in a court room versus in a theater stage, just as it was argued by Falco in her petition. Though Simić acknowledges how during the transition after the Balkans war, the violence against women had been silenced. Most of the legal testimonies were misused by the States, buried among official documents lost in archives, or not archived at all. They became numbers and statistics, faceless and nameless, only raised for political gains to engage against other ethnic groups, to criticize and emphasize the horrors committed upon women (Simić, 2014).

It has not only been Simić, but other scholars as Biber (2013) well, who argues that legal testimonies, in a legal context, are simply proofs to back up a narration of the prosecution. They end up being plain evidences to support facts and charges. They become unavailable and/or fragmented (Childs & Ellison, 2000), and worst of all, because of the strict rules that govern the jurisdictional trials, a woman cannot fully explain what has happened to her (Simić, 2014).

On the contrary, Simić (2014, p. 67) considers that such "rigidity and formalities that the rules of evidence and procedure require in the courtroom vanish in documentary theatre". Theatre conversely takes women's life encroachments seriously (Sigsworth & Valji, 2012) by converting their testimonies into narratives towards which the public is more inclined to react (Simić, 2014). Theater has the capability to fully capture the individual journey that a woman has been transgressed, to experience the harm that has been inflicted upon her (Sigsworth & Valji, 2012).

Figure 1.2 - Scene from the Play in her In the Valley of her Sufferings
Source: (Artpolis - Art and Community Center, 2012)

Within this context, Simić (2014, p. 59) analyses the three plays from the Balkans, and concludes that they were produced to: a) "bring women' s voices into the public realm and make womens' experiences visible"; b) "to confront the audience with what has been done in `their´ name", and c) "to capture the suffering of women across ethnic lines and divisions, to show that pain and suffering do not have a particular ethnicity or religion". Now these conclusions certainly give foundation to Simić´s claim for the rethinking of the TJ mechanism. They literally embodied some of the objectives, that are design for some of the measures found under the pillars of a TJ model. They disclosure truth, preserve memory and restore the dignity of the victims, foremost when the actors are also the victims.

1.2 Theater plays as Temporary Monuments, a Stage for The Research Question

Empirical studies consider the willingness of victims to speak about their atrocities, of a high value for their sake, as well as their will to share their stories and learn from what has happened to others during the same period of violence (Simić, 2014). Even modern psychology scholars, based on a multitude of studies, recognize that on the one hand, the importance of talking about traumatic experiences for the

recovery of the mental health of victims, but also, on the other hand, the psychological trouble that repressing intense emotional pain could cause on them as well (Hayner, 2011).

In this context, those four theater plays demonstrate the capability of unconventional mechanisms, to become an ideal mean for victims to break silence, and deal with the wrongs of the past. They are alternatives where societies in transition can find new opportunities to hear those who have been unheard, and to let them tell the stories that have been untold. Spaces where in the words of Milosevic, the Dah Theatre director, complex dialogues can build a bridge among the community; built between the performers and the audience to deal with issues that are usually unspoken (Simić, 2014). They are a tool to reflect and reconsider interpretations and positions that would aid to transform private "abuses that were experienced individually and hidden away" (Felman, 2002, p. 7) "into collective empathy and acknowledgment of crimes committed" (Simić, 2014, p.58).

Likewise, the documentary playwright, Govedarica, considers theater plays as ´*temporary monuments*`, with the ´value of Symbolic Reparation`, because they have a ´commemorative function` but also a ´testimonial value` to acknowledge past facts. (Simić, 2014, 57-58). Now, for this author, more than just a perception, Govedarica understanding should be taken by the TJ field as a call from society, from the artistic movements that are more often creating new strategies on how to deal with past wrongs. Just as ´the women theater directors who use performance as a strategy for resistance, justice, and truth-seeking, while actively promoting social and Symbolic Reparation' (Simić, 2014, p. 53).

This author shares the awareness proposed by the abovementioned artist and scholars, about the potential that arts and cultural practices, like theater, can offer to transitional scenarios as Symbolic Reparations (hereafter SRs). For victims of post-armed conflict or post-authoritarian societies that seek to come to terms with a history of oppression and violence.

However, just as a Simić admits, "projects of Symbolic Reparation remain largely under-researched and under-theorised" (Simić, 2014, p. 66). Indeed, analyzing the arguments and vantages in favor of artistic agencies as valuable mechanisms to come to terms with the past -just as the ones posit about th documentary theater plays- it is difficult to understand why these alternatives would still be overlooked by the TJ field.

Consequently, such stage leads to the central research questions of the present text. Firstly, one has to research the theoretical reasons behind the belated acceptance of those artistic responses as proper TJ tools, to be considered as an unobjectionable piece in the structure of reparation programmes; not as a good joke (Sommer, 2015) that provides a lame response and seems unimportant before the other mechanisms and institutional responses designed to come to terms with the past. These inquiries will then look into the obstacles, the confusions and the reasons for why the current scholarship has not seriously considered SRs under the contemporary framework of TJ from a holistic approach.

Secondly, following an epistemological logic, this text will look into the place where SRs should fit within the discourse of the holistic approach of TJ. Mainly considering that such concept is actually not new in the technical language of TJ, it has just been neglected and placed aside. In this sense, the idea of this text is to not only inquire about the problem, but also to propose a possible theoretical solution. One that would look into the current understanding of SRs and open the discussion of its importance from the inside of the framework of TJ, not just as a complementary possibility, but more likely to posit as a determinant measure in the success of any transition model.

Furthermore, considering the abovementioned clarification on SRs, one primary query that would focus this research would be to start by questioning if the four presented plays could actually be examples of SRs. Hence, one has to start by recognizing that SR is a juristic term, used primarily in the context of the TJ field. (Sierra, 2015). Thus, the presented theater plays are artistic symbols created by their authors, which in some cases are also the victims of gross human right violations. But essentially, they are merely aesthetic creations that converge into a symbolic process through an aesthetic experience. Hence, albeit the intention of their creators, in the view of this author they are not SRs.

Nevertheless, they are aesthetic processes capable of creating symbols. Especially considering the political context where they have been created, the themes that they deal with and/or the subjects/objects of their creation. In fact, it could not be possible to analyze all the mentioned characteristics without finding that these aesthetic creations are perfectly suitable to become a reparation measure, as properly understood by TJ scholarship. They are capable of delivering some of the benefits projected, designed and foreseen by reparations programmes of States in transition, or by judges through their decisions in human right tribunals. However, as Sierra (2015) explains it, it would be unfair to claim those aesthetic creations as a SR.

An aesthetic creation is the result of an aesthetic experience, far from concepts of taste or customary notions of beauty. An aesthetic experience is intended to disrupt codified customary norms of perception, to interrupt existing systemic relations and to destabilize sedimented habits of thought. Moreover, an aesthetic experience occurs through the use of arts as cultural practices, seeking to alter understandings by generating new meanings and provoking new interpretations from created symbols (Symbolic Reparations Research Project, 2017).

1.3 The Methodological Approach and the Purposes of this Text

Thus, the relationship between aesthetic experiences and SRs is not out of reach. On the one hand, art works with symbols, therefore artistic initiatives can provide a powerful link between the aesthetic and the symbolic, a bridge -rational or imaginary, abstract or figurative- between the struggles of the victims and the cultural symbols they appropriate or create to represent them. Aesthetic experiences, understood as continual processes, of cultural practices or art endeavors, can bolster the transformative potential of SRs by generating meaningful material and immaterial forms or symbols (Symbolic Reparations Research Project, 2017).

On the other hand, both are mechanisms deliberate to deal with wrongs of the past. The former, whilst it has an origin far from the legal field, inasmuch as the latter, aims for social justice. Even in the absence of the State, or its legal and institutional aid, artistic initiatives and cultural practices have been an answer for the *ground-roots.* A tool for the people/victims to disclose the truth, to acknowledge the responsibility of the perpetrators, to restore the dignity of the victims, to preserve a historical record of past events and to seek for non-recurrence of the same. In other words, they have been a *popŭlus* mirror of the TJ right to reparation pillar and its sub-pillars, the measures of satisfaction and the guarantees of non-repetition.

In this sense, this text will deepen to examine the right to reparation and its evolution as one of the four pillars of TJ, under the contemporary conceptual framework of a holistic approach. A contemporary academic construction that considers the rights of victims as the core nucleus of any transitional model, namely, a) The right to know; b) The right to reparation; c) The right to justice and d) The right to peace and reconciliation. Four pillars characterized by their interplay and their interdependent relationship, that mutually influence each other. That reinforces their own objectives, while provoking

the necessary institutional changes in the correspondently transitional State, and furthermore, while aiming to reach the global non-repetition goal of never again.

Hence, by undertaking this academic discussion from such perspective, one could sustain that the main objective of this text is to be able to understand if those aesthetic creations/processes could become a SR that would belong to this pillar and subsequently fit under such approach. Therefore, the holistic approach will be used as the methodology for the elaboration of this text, with the intention of placing both author and reader in a theoretical bracket of understandings and conceptual paradigms that will permanently link the conclusions, to the right to reparation pillar, intrinsically also to the other three pillars and subsequently to SRs.

The inquiry frame of this thesis aims to spot some of the current paradigms that surround the pillar of the reparation, to question the possible weaknesses or shortcomings of its framework in the TJ field, specifically considering the five sub-pillars that have been built around the right to reparation, meaning: a) Restitution; b) Compensation; c) Rehabilitation; d) Satisfaction and, e) Guarantees of non-repetition.

This special focus also has the intention to solve the following hypothesis proposed by this author: The pillar of the right to reparation is lacking in a sixth sub-pillar, one missing link that can ascertain a synergetic bridge between the other five sub-pillars and reinforce the capability of the whole pillar to effectively contribute to the realization of the never again goal. This sixth sub-pillar is the SRs, which for this author is the theoretical place where these mechanisms fit within the framework of TJ from a holistic approach.

1.4 Outline of the Research

The holistic approach methodology will also serve as the ideal theoretical frame to integrate the methods, tools, and perspectives of other disciplines like Sociology, Psychology, Anthropology, Cultural Studies and Memory Studies among others. Indeed, the interdisciplinary nature of human rights and the retributive vantages of engaging in a multidisciplinary project, have been weighed regarding the selection of the methods that will be used in a sequential format throughout the text. The fact that the research pursues a critical analysis that involves the functioning and role of human rights in diverse societal contexts demands a mixed use of the selected methods (Langford, 2017).

In this regard, reaching out to empirical methods of memory studies as an undertaking discipline of multiple social sciences will broaden our understanding with insights into human behavior and institutions related with memorialisation processes (Langford, 2017). Art and cultural studies will also contribute from the use of semiology and aesthetics into the discussions of SR. Nonetheless, historical and doctrinal methods will encompass a comprehensive understanding of the background, origins, and growth of theories and concepts used throughout the text.

The main sources of this text are found in the considerable literature, journals and books, that each of the abovementioned disciplines have independently produced. It uses qualitative and critical analysis that gather experiences in memorialisation processes and will examine within the same critical criteria, the jurisprudence created by some national and international courts that have dealt directly with the issue of SR.

This thesis is an ambitious endeavor that will lay the ground basis for future inquiries into in-depth research with thoroughness in each of the different subjects that merge in this text. The current state of research finds diffusion of the different elements, concepts, and branches that are involved. Most of the social sciences (anthropology, sociology, psychology and cultural studies) have reached important advances in regards to memorialisation. The so called ´memory boom` of the past two decades, boosted researches concerning the ways societies have dealt with the legacies of past human rights abuses, mass atrocity, and other forms of severe social trauma, including genocide or civil war.

Nonetheless, the legal scholars from the TJ field, especially from criminology, as recognized by Parmentier and Weitekamp, have lagged behind with an academic silence and a general lack of attention to other types of mechanisms outside of the criminal justice systems. Although there is no doubt that the subject of SRs is relatively new in the field of TJ, as well as the field itself, they fit into the idea of these two scholars by expanding the concept of justice ´from a predominantly top-down mode of operation to encompass bottom-up approaches as well` (Parmentier & Weitekamp, 2007, p. 124).

Symbolic reparations can be seen as a kind of 'different justice', in the terms of Haldemann, (2008, p. 675). "one that is less vindictive and state-centered and is more caring and responsive to human suffering". It is a proposal that goes in the same direction as the latest currents of TJ, towards

encompassing notions of restorative justice. Acknowledging that judicial accountability for human rights violations is necessary, but not enough, to structure a transition that aims to bring sustainable peace and democracy (Minow, 1998).

In this context, apart from the present introduction, the outline of the text is structured in four more chapters. In the first two, the reader will find the current conceptualization of SRs and its understanding inside the current framework of TJ from a holistic approach. In the last two chapters, the focus will inductively and logically guide the reader towards the buildup of the right to reparation and finally, in the last chapter the author will draw the theoretical foundation for the proposal of a sixth sub-pillar under the right to reparation.

The idea is that the reader can analytically get a general picture of the current stage while making the connections between SR as another mechanism to be considered as important in the general framework of the TJ model, as well as any other reparation form contained within the sub-pillars of the right to reparation. Once these connections are outlined through the whole text, the reader will acquire enough elements to assume his position regarding the suitability of SRs as a tool to deal with past wrongs and even more to aid the victims overcoming the victimhood stage. In this last part, the reader will also find the conclusions of the author, along with the results of the hypothesis.

CHAPTER II – THE CURRENT SYMBOLISM OF THE SYMBOLIC REPARATIONS

2.1 Introduction

At present, the framework underpinning the current understanding of reparation hinges in two United Nations (Hereafter UN) resolutions, 60/147 and 1998/53. The former, the resolution 60/147 adopted by the General Assembly is on 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* (Hereafter BPGR or The Reparation Principles), first drafted by Theo van Boven, later revised by Cherif Bassiouni[1]. The second, resolution 1998/53 of the Commission on Human Rights on Impunity base, on the report presented by Louis Joinet is on the *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Hereafter PACI or The Principles to Combat Impunity), later updated by Diane Orentlicher.

Both of these soft law documents are considered as the legal framework of the right to reparation, in the international public sphere. They provide guidance about the structure of the reparation measures for the programmes adopted nowadays in most of the countries that are going through a transitional State. However, neither of these documents includes SRs among the recommended measures to deal with the wrongs of the past. In fact, neither the words symbol, symbolic nor symbolism are considered in those texts.

Thus, this context generates an inquiry, considering the described stage. Why do some scholars, from all kinds of disciplines, as well as this author, argue that SRs as a mechanism to confront protracted political violence, past human rights abuses and mass atrocity has become more relevant in the TJ field over the last decade? How is that so, when it cannot even be traced among they main regulatory documents of this legal field? This chapter will answer these questions, by elaborating on the current understanding of SR, symbolic, symbolism and symbol. Furthermore, it will stress the misconceptions and the confusions that have characterized the evolution of SR as a legal concept and the and consequences of such understanding.

[1] Theo Van Boven presented a preliminary report first in 1990 and a final in 1993. In 1996 and 1997 presented two revisions. In 1999 Cherif Bassiouni submitted a preliminary revised report and a final in 2000. Another revised version of the principles was completed in 2003, and at a session on 2004 the Commission on Human Rights call for both rapporteurs to prepare another revised draft. This consultation produced the final draft on the 1st of October 2004. The study, negotiations and drafting culminated in 2005 with the adoption of the principles by the Commission, with Resolution 2005/35 (Shelton, 2005).

2.2 Symbolic where? Symbolic what?

Under BPGR, memorialisation processes were established as either commemorations or public apologies. However, currently, those measures have been outpaced by other grander state forms of memory making Thus, through them, symbolism has emerged as a relevant subject within the right to reparation (Brown, 2013). Commemoration according to Brown are a *symbolic reparative activity* - linked to the notions of memory as the arena, and memorialisation as the instrument- conducted to shape political developments (Brown, 2013). Especially within divided and ethnically conflicted societies in transition, where such context gives symbols a particular potency and sensitivity (Kaufman, 2001).

Societies in transition face a paradoxical goal, "to reconceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects" (Teitel, 2003, p. 87). Transitions represent a selection of threshold symbolism value, with a potential for counter-histories, related to its capability to bind the three time-frame dimensions of the collective memory: a) The past: Recalling the narratives of historical events; b) The present: Enabling contemporary stories through a process intended to recognize and honor the victims, and to heal and rebuild trust between communities, and c) The future: Gearing the process towards the shaping of the upcoming, aiming to prevent further violence through education and awareness-raising, (UN Human Rights Council, 2014).

Powerful symbols can be the constructing nucleus of new narratives in divided societies that tend to keep one eye on the past, usually full of anachronistic narratives and symbols. Time runs, and as it goes, it underscores the challenge of maintaining the past as well as the limits and possibilities for transformation (Teitel, 2003). It is in this sense that Brown understands SRs also as spaces – physical locations and time frames - where narrative struggles take over the meaning of the conflict and the core issues of the transition (Brown, 2013).

These struggles and the interactions that have led communities to the construction of symbols and the transfer of collective memory, became a subject of particular concern for different disciplines since the "memory boom" (Hoskins, 2014). Commemorations and memorialisation of the traumas, triumphs and conflicts increased by the end of the twentieth-century and became almost an obsession of modern societies (Winter, 2010). Social scholar fields like cultural and memory studies launched in-depth

inquiries around memorialisation processes, boosting its relevance through the scholarship of TJ, (Winter 2006). Nonetheless, as Torpey (2006) explains, the fixation of memorialisation for correcting past wrongs is a function enervated by modern currents.

During the last two decades, TJ has experienced an expansion. The increase of State processes seeking closure for past wrongs or the questioning of other States where TJ was delayed, reflected a widespread sense of a *metatransition* (Teitel, 2003). The end of the century, a time that prompted the recall of historical injustices, enhanced the claims "for apologies, reparations, memoirs, and all manner of account settling related to past suffering and wrongdoing," (Teitel, 2003, p. 87) from the heirs of those who suffered the slave trade, and those generations who survived the Latin-American dictatorships. Their persistent discourse over the final years of the twentieth century was coined by those nations, as a symbolic force for the re-foundation of their State and their own existence (Zalaquett, 1998).

Hence, the initial 'top-down' peacebuilding perspective, designed from the international sphere, has transformed with the integration of a wider phenomenon of 'grassroots' initiatives and interdisciplinary activism that gradually reflected its influence in the legal responses against protracted political violence. In the absence of viable national justice mechanisms, victims, community and civil society groups started to organize and drive all their creative energy from the 'bottom-up' into alternative mechanisms (McEvoy and McGregor, 2008). For instance, Rwanda's Gacaca Courts (1997) and/or the Truth Commission of Argentina (1983) reinforced the framework of TJ to meet the challenges and needs faced on the ground. Likewise, the relevance of symbolism, as a backlash from the *memory boom*, started to find its way into the TJ frame through commemorations.

For instance, The National Commission for Truth and Reconciliation in Chile foresaw such symbolic importance when categorizing reparations into three categories: a) SR, to vindicate the victims' dignity and good name; b) legal and administrative measures, to solve several problems relating to the acknowledgement of death, family status, inheritance, legal representation for minors, and c) compensation, including social benefits, health care, education (McEvoy & McGregor, 2008).

2.3 The Misguidance from the guidelines

Special Rapporteur Joinet established in his first report (UN, 1997) that symbolic measures belong to the right to reparations, intended to provide moral reparations, on a collective basis. He described them as measures intended to carry out the State´s duty of remembrance, and to restore victims' dignity. He even enlisted some examples such as a formal public recognition of the State responsibility, an official declaration, commemorative ceremonies, the naming of public thoroughfares and the erection of monuments (UN, 1997).

This initial description, provided by Joinet, would become transcendental to the conceptualization of the term symbolic under the framework of TJ, as his reference about been intended to provide moral reparations, was associated to immateriality. Currently, within the TJ scholarship, SRs are considered to be synonymous with intangible or immaterial reparations, and are placed on the same level of importance as material reparations. Ironically in the framework, they are limited to be commemorations and/or public apologies.

In 2005, following such confusion surrounding SRs, Orentlicher shared De Greiff´s understanding that the feasibility of a state reparations programme, is dependent upon its design. Meaning, a reparations programme capable of distributing a variety of material and symbolic benefits amongst all the victims in a coherent fashion. (Report of the independent expert to update the Set of PACI, 2005: De Greiff, 2004).

The fashion coherence referenced by Orentlicher, relates to De Greiff´s “theory of the internal and external coherence”, which underlines the complexity of the reparation programmes, and posits the idea that in order to achieve a satisfactory degree of fairness and legitimacy, any TJ model needs to achieve two types of coherence. Firstly, an internal coherence, among its different benefits (material and symbolic, which can be distributed collectively or individually) and beneficiaries (victims, perpetrators, and society) in a way that they all reinforce each other. (De Greiff, 2006). Secondly, an external coherence, which should be structured with the aim of complementing the other TJ pillars from a holistic approach (De Greiff, 2004).

Later, De Greif issues a report (UN General Assembly, 2014) on the implementation of reparation programmes with a human rights-based approach, wherein he recounts the experience of various

countries with massive administrative programs, further elaborating on the importance of symbolic benefits.

An interesting fact from this report is how De Greif finds a great variety of examples of material measures, from the different sub-pillars of compensation, satisfaction, and rehabilitation, i.e., payments in cash, service packages for education, health or housing. However, for the SRs, he is restricted to one type of measure: commemorations and public apologies. All the examples that are mentioned resemble those two types of measures (UN General Assembly, 2014)

Those examples are: a) individualized letters of apology signed by the highest authority in government or public official apologies; b) sending each victim a copy of a truth commission report; c) supporting families in efforts to give proper burial to their loved ones; d) renaming public spaces; e) the establishment of days of commemoration; f) the creation of museums, memorials, and parks dedicated to the memory of victims; g) the rededication of places of detention and torture turning them into sites of memory, and h) the engaging of public acts of atonement.

This fact, allows this author to point out the tremendous imbalance that both, PACI, and BGPR, have created between the value given to material and symbolic measures and the actual practices that are being designed to maintain the so-called "internal coherence" in the reparation programmes. On this matter, De Greif recognizes that material measures have received more attention than any other form of reparation (UN General Assembly, 2014), causing eventual shortcomings in the design of symbolic measures. Moreover, reducing the so-called complexity of the programmes leads to limiting its reach to the less significant portion of the universe of victims.

2.4 Three Arguments against One Perception

This author will reason with three arguments, why such categorization between symbolic and material is not only misguided, but also the cause of the current unbalanced state of reparations. The first argument, is that the categorization of material and symbolic, disqualifies the importance of some measures and creates confusion.

For example, De Greif in his report (UN General Assembly, 2014) recollects a statement of Van Boven´s report (UN, 1993). He states in the former report, that the restoration of the good name of a

victim is a rehabilitation measure that could take the form of a symbolic measure. Thus, a contrasting partisan view could have considered that, rather than a symbolic value, that measure corresponds to a legal act with a legal value. But also, to label it as a symbolic act, could diminish the intention of the restoration. The rectification of someone´s good name cannot be reduced to a symbolic gesture, it represents far beyond this, speaking to the dignity of that person which per se, was good.

Instead, a more accurate categorization is presented by Letschert and Parmentier (2014), who propose, on the contrary, three categories: a) measures of a legal action, because they are shaped through it; b) symbolic measures, which can lead to the recognition of victimhood and, c) financial measures which relate to payment for damages suffered. However, this division also follows what this author considers inaccurate, this is, to use symbolic as a synonym of intangible or immaterial. Such division is only a demonstration of how in practice, the general meanings of these two notions, have been neglected (Moon, 2012).

Hence, a second argument to endorse the above consideration, analyses that such division does not count the fact that not every intangible measure carries a symbolic meaning. Swart (2008) exemplifies this, reflecting on the gesture of washing Reverend Chikane´s feet performed by his erstwhile opponent Adriaan Vlok, the former Minister of Law and Order of South Africa. For some people, this dramatic gesture by one who played a crucial role in the machinery of the apartheid was not based on his sincere remorse, but on the intention of negotiating a plea bargain (Swart, 2008). In this regard, Tavuchis (1991) argues that when apologies are instrumental, they cannot be truthful, because sincerity is necessary for true apology.

Thus, this type of apology can be labelled as a ´*performative utterance*` (Taft, 2000, p.1139) because the repentance and mourning of the offender is transformed into a public, performative act. Usually of the kind executed in front of a multitudinous audience that corresponds "first and foremost [to] a speech act." (Tavuchis, 1991, p.2). Within a political context, these official acts of apology are always tainted with underlying motivations or are commonly understood as strategic maneuvers rather than as sincere gestures (Swart, 2008). They can be perceived as impersonal and disconnected from reality, in other words, and consequentially lack "the symbolic foci of secular remedial rituals that serve to recall and reaffirm allegiance to codes of behavior" (Tavuchis, 1991, p.13). Nonetheless, Swart (Swart, 2008) explains that even insincere apologies, do have a restorative value.

Moreover, one could also state that there are also tangible measures that can also be symbolic, starting with monuments and memorials. But also, Phan (2009) noticed how the government of Cambodia underlined that the reparations that millions of victims were going to receive, was not more than a symbolic compensation, because of their lower material cost in comparison with other forms of reparation. Additionally, the scholar also remarked, that the Rules of the Extraordinary Chambers in the Courts of Cambodia, also reconfirm that the reparations, if granted, could only be in moral and symbolic forms, rather than in the form of monetary compensation (Phan, 2009). Following such line of thoughts, in 2017 the ICC, in the judgement of the Katanga case, acknowledged the symbolism of a monetary amount. For the first time since its creation, the Court ruled on the payment of what they denominated ´a symbolic compensation of USD 250` for each of the 297 victims[2].

The above examples, are a token to exemplify how the perspective carried out by the different rapporteurs' mirrors an enduring bifurcation between material and symbolic, recognized across the TJ scholarship and so on, in other disciplines. Though not conceptually clear, it is certainly a viewpoint that has outlined the way that reparations have been historically envisioned, designed and distributed. As asserted by Moon (2012, p.190) this is a "distinction, symptomatic of the enduring dualisms grounded in Enlightenment thought, [this] rendered immediately nonsensical at the moment of reception of reparation, at which point the symbolic freight of the material gesture is rendered immediately visible".

Likewise, some scholars, such as Minow (1998), conceived the division between economic and symbolic. Bottinelli (2005) referred to the effects of material and SRs order in the Inter-American System, to restore the existential status of the victims, although the Interamerican Court of Human Rights (hereafter ICtHR) relates reparations to the characteristics of the damages caused, meaning material and immaterial rather than to the nature of the measures. Sharpe (2007) also talked about the material and the symbolic. Hayner (2011), spoke of a need, from a holistic approach, to combine the ´symbolic with material benefits, and financial payments with clear statements of recognition or apology` and Walker (2013) stated that victims always see reparations as communicative gestures, notwithstanding if they are monetary or symbolic. Instead of recalling those measures as benefits, she

[2] Press Release: 24 March 2017. Katanga case: ICC Trial Chamber II awards victim's individual and collective reparations. https://www.icc-cpi.int/Pages/item.aspx?name=pr1288 (accessed 27.07.18).

emphasizes that such categorization can originate real effects of a moral, social, psychological, and political nature.

Moon (2012) urges for the abandonment of such taxonomical and oppositional qualification based on their potential to be a source of domination. This scholar from analyzing closely the Argentinian case of the *Madres de Plaza de Mayo*, argues that the material/symbolic division is a category of thought, that generates internal inconsistencies in State reparation programmes, while exposing their indivisible nature and the regulatory and coercive dimension. Standing not far from Moon's proposal, with the third argument, this author ponders whether the exposed confusion is rooted in the misconception and careless use of the notions of SRs, symbolic measures and symbolic benefits. This may be a backlash from the vague and unsettled perception that the meaning and function of reparations had in the past (Richards, 2007).

2.5 Measures, benefits and reparations: a symbolic symbiosis of a symbol

Reparations are commonly assimilated or referred to as benefits, and as exposed above, they can be material, symbolic, collective or individual. The reparation programmes are organized mainly around the designing and distribution of benefits trough material and symbolic measures and their individual or collective distribution. Within this understanding, "reparations" rather than a wide range of measures that seek to provide for legal redress of the massive violations of human rights, they are seen from a more narrowly and constructive perception, as the set of measures that can be implemented to provide beneficial gains to victims directly. (OHCHR, 2008)

In this context, the concept of benefits, and its relation with reparations has to be explained from a holistic approach, meaning, considering the great variety of measures they can encompass. Amidst these different types of measures, there are some that can produce reparative effects and acquire a compelling character within the implementation and success of the model, for example, trials or institutional reforms, but do not distribute a direct benefit for the victims themselves. Instead of reparations in the strict sense, provide legal redress for violations, and can be implemented among a whole set of measures that provide direct benefits to victims (UN General Assembly, 2014).

De Greiff, also explains, that those benefits are different from the sense of vindication that a victim can obtain after the trial of the perpetrator who committed ghastly crimes against him/her. Benefits produce

real changes in the circumstances of the lives of the victims (UN, 2012), benefits that in the case of the symbolic type are, "at least in part, geared towards fostering recognition" (UN, 2014, p.18). Nonetheless, not all symbolic benefits come exclusively from reparation measures, although, practice has shown that most of them do. For instance, the testimonies delivered in Truth Commissions can also provide symbolic benefits, or as well the ceremonial services performed alongside, like in the local Khulumani communities (Hayner, 2011).

Though, to clarify the difference between those three concepts, SRs, symbolic measures and symbolic benefits, it is important to define what symbolic means. Especially when considering that any reparation measure, tangible or intangible, can deliver a symbolic benefit. More or less, the meaning that really matters is symbolic, as the division between tangible and intangible seems useless nowadays (Brown, 2013). In fact, it is the symbolic factor that can influence the perception of how beneficial reparations can be. Two cases related to the compensation payments given to the family survivors in the aftermath of the dictatorships in Chile and Argentina, can exemplify this point.

For the former, where the payment was slightly higher than the monthly minimum wage, and at that moment Chileans pretty much depended on it for daily survival, those payments were not only accepted but also had a symbolic value. The daughter of one of the victims acknowledges that every time a check arrived, it was like if the State was performing a recognition of the crime, especially because of the State denial that lasted for so many years. In that context, the payments seem as a ratification of the rightfulness of their claims (Barahona, 1997).

For the latter, in the case of the *Madres de Plaza de Mayo*, they objected to the monetary compensation based on four symbolic reasons: a) such payment was grounded on the presumption of the death of the disappeared, so to receive it was like giving up on the hope of finding them alive; b) It meant collectively relinquishing and accepting the non-accountability for every one of the disappearances; c) the refusal of the financial and memorial reparations, was their *social control instrument*, to maintain a the past and keep the calls for justice in the present, and d) The economical reparation was seen as the attempt of the State to buy their silence, clean their hands and end their campaign for trials (Moon, 2012).

Both cases, demonstrate that the symbolic aspect of a measure can outweigh the benefit intrinsically intended. Reparation measures, tangible or not, can ´carry political meaning, not just palliative, significance` (Moon, 2012, p.187). In this sense, the symbolic rests upon the meaning that it can carry, and it is from such, that the measure can obtain its symbolic potential. Capable to deliver symbolic benefits individually to each victim, but also to the whole community, making a general sense of the lived pain (Hamber, 2006).

The symbolic then, depends on the construction of the symbol, a symbol that the community appropriates and accepts by itself. It cannot be legally decreed or imposed. A symbol can be individual, communal or territorial. It can become representational of certain population struggles, or of cosmogonic peace, or of a form of justice. A symbol can be defined as a machine that allows the universe of the senses to expand the meaning of something (Sierra, 2015).

A symbol is the transfiguration of a specific representation with a totally abstract sense. It's the construction of a public secret sense, an epiphany of a mystery. It is composed of two parts, the first, the significant, loaded with maximum certainty, but due to the arbitrary nature of creativity is also infinity. The second, the sign, with just a simple and limited meaning, although, the invisible part of the symbol is constructed from allegorical signs with indirect representations. The symbol also encompasses three dimensions: a) a cosmic one, relative to the non-visible world; b) an oneiric, related to the memories and gestures of our dreams and, c) a poetic one, which is reflected in the language (Durand, 1968).

Hence, a symbol can create spaces to expand the meaning of the world and things, (Sierra, 2015) and the measures that carry them, can turn out to be a public matter of relevance in the making of the collective memory for the victims (UN General Assembly, 2014). The symbol can endeavor "to change from conflict to a more peaceful milieu" (Brown, 2013, p. 276). Its potential to carry the meaning, can become a "transformative power consciously" pursued by the community (Brown, 2013). Then is when the symbolic, the communicative and the ritual, turn into a measure of reparation, more exactly a SR given its potency to carry a meaning and produce an effective change in the lives of the victims individually as well as in the whole community (Brown, 2013).

Thus, SRs surpass the individual and aggregate communal memories through collective mechanisms of transmission of a social/cultural nature, like; ritual commemorations; the creation of spectacles; the sacralisation of spaces, arts and cultural practices, and the promulgation of oral histories (Brown, 2013). Symbolic reparations, provoke solidarity, without imposing consensus or conformity of thoughts and hopes (Schöpflin, 2000) they become a social instrument, so that communities can create their own narratives to perdure across time (Olick & Robbins, 1998). In such natural form, commemorations and memorialisation's started to integrate the dialogues among divided societies. Albeit, its potential to create new zones of political and cultural confrontations has been overshadowed by day to day violence but which also uses that potential to maintain the polarization and even worse to fire up the ethno-political struggles (McDowell, 2007).

2.6 Conclusions

This chapter drew on the current state of affairs in regards to the notions of symbol and the symbolic in the TJ scholarship, as well as the consequences of those perceptions and understandings in practice. The Symbolic is related to a meaningfulness potential that can help victims individually, and society in collectively, to make sense of the painful events of the past (Hamber, 2006).

Across the chapter, it was also highlighted the interconnected relationship between symbolism and the construction of collective memory, towards the establishment of symbols to preserve the memory; and the appropriations of symbols as a means of reparation by the community. The symbolic is related to processes of memorialization because by "making the memory of the victims a public matter, they disburden their families from their sense of obligation to keep the memory alive and allow them to move on" (OHCHR, 2008, 23).

In this sense, it was argued that SRs can be seen as cultural practices, with the potential to answer particular needs of the communities, capable of driving artistic initiatives from the bottom-up into the nucleus of the right to reparation, providing recognition to victims not only as victims but also as citizens and as rights holders more generally. (OHCHR, 2008). Such capability has lately led scholars, into considering SRs as an essential mechanism to be used in the design of any TJ model from a holistic approach.

It was also said that symbolic is a conception entrenched in the notion of the symbol, which is a more philosophical construction, characterized for an arbitrariness nature that can provoke the spawning of symbols or their rejection with a sense that can only be understood within the core of each social context and specific cases. Symbols cannot be imposed by an official programme nor by a judicial decision, their genesis within the community has to be natural and collective.

However, all the above can be better understood through the lenses of a real law case. Thus, the special jurisdiction of justice and peace in Colombia has issued some interesting judgments, based on the transitional model that was structured after the demobilization of the paramilitary groups, under the rule of the 975 of 2005 law (nowadays 1448 of 2011). One of those judgments rule over the case of the events known as the massacre of Mampuján. This case would serve to exemplify the arbitrariness nature of the symbols, as the community chooses to appropriate their own symbol to come to terms with their past, rather than to accept and embrace a symbol decree through a jurisdictional decision.

The events occurred on March 10, 2000. A group of more or less 60 paramilitaries, outlaws of the right-wing in Colombia, arrived at the village of Mampuján a municipality of Bolívar. They held together around 1,400 persons, in the main square of the town, for the whole day and even until the darkest hours of the next morning, deciding about their destiny. The initial order was to carry out mass murder, however early in the morning of the 11th, the chief officer of the paramilitaries, threaten to kill everyone if they were not to leave by dawn. Approximately 300 families were forced to undertake an exodus, without much more than a pair of clothes and very little food (Edwar Cobos Téllez y Uber Banquez, 2010).

After inflicting terror on the population of Mampuján, the paramilitaries forced seven peasants to lead them to a close smaller village known as Tamarindo, in Las Brisas. Around 90 more fighters join the first group and march towards the second village looking for a guerrilla camp. Though, when they arrived, it was empty. The following day, the chief officer order to kill 11 inhabitants from Las Brisas, under accusations of being allies of the guerrilla. Thus later, judicial inquiries would proof they were just peasants (Edwar Cobos Téllez y Uber Banquez, 2010).

Justice Jiménez was the judge in charge of the case, and from the beginning she was interested in looking the great picture of what has happen, specially to comprehend the damages inflicted upon the

community. For that, she requested proofs of the cultural context of the affected area, and based on the presented proofs (a video and some testimonies), she defined the cultural characteristics of the population at first.

Additionally, based on those proofs, Justice Jimenez also decided on the reparation measures. Among others, she ordered a ceremony, where the perpetrators would participate. The Commemoration was intended to recognize the victims, and the presence of the paramilitaries to legitimize the acknowledgment of the facts in public. Although, it was also the opportunity for the perpetrators to offer public apologies to all the victims for every act committed on their command (Edwar Cobos Téllez y Uber Banquez, 2010).

Complementary to such public act, Justice Jiménez also ordered the construction of a museum for the victims and a monument, which the perpetrators were to afford, but also intended to reflect the cultural idiosyncrasy of the community. Other interesting measures where a) produce a documentary to illustrate about the tragedy, based on the decision of the trials first as their script, and the possibility to use the legal testimonies given by both victims and perpetrators during the process; b) the reconstruction of the cemetery, the construction of an educational center that would carry the names of the victims, and c) the victims suggested to adopt the song "No dudaría" as a hymn of their reconciliation (Edwar Cobos Téllez y Uber Banquez, 2010).

Figure. 2.1 - The monument offered by the perpetrators.
Source: (Amaya Baquero, 2018)

Acknowledging that for the first time a judge, aimed to fully exert the mandates of the 975 of 2005 Justice and Peace Law, that, follows closely the BGPR one has to recognize how innovative those measures were. Specifically, in relation with the symbolic reparations, Justice Jimenez tried to establish all the sufficient measures that could fulfill the objective of a full reparation. However, the decision did not take into account that some of the measures where are a static response, aim to modify the territory, from where the community had been forcibly displaced. So, when the community had to move out, unwillingly to do it from Mampuján their personal attachment and sense of belonging was tear apart.

In this sense, to build a symbol for these kind of memory, static as the monument for example, designed with customary symbols like a traditional outfit of a peasant, carrying packages of ñame and yucca (local products), only reinforced the feeling of what they have lost. Furthermore, in the case two different transgressions were committed, against two different communities, that was not taking into account when the monument was created.

Instead, psychologist Ballestas, director of the Seed Seeds of Peace Foundation, and missionary Geiser arrive to "Mampuján Nuevo", the new location where they had built their new town after being displaced. There, they started a process, a long side with the community, working on strategies to overcome their trauma and move towards resilience. One of those strategies was to teach the women the techniques of quilting, which consisted in cutting geometric figures of fabric, and joining them together to make quilts (Reconciliación Colombia, 2015).

The women of Mampuján embrace these technique in a communal way. They would gather around to start quilting, while naturally talking about what had happened, all the disgraceful events which occur and could not be verbalize for so many years. They started then to talk through their quilts, and around the quilts. The quilts became their symbol, and after the first tapestry called "Displacement", they understood they wanted to start quilting their story and heling themselves (Parra, 2014). Alexandra Valdez says on that matter, "If the tapestries would of talk, they woul testify of all the tears they have received" (Reconciliación Colombia, 2015). After first tapestry in 2006, this psychosocial work has continued to bear fruits until today, being establish not only as the community symbol, but even providing new sources of income (Castrillón, 2015).

Moreover, the community from Las Brisas also lived a similar experience. When they realized that the first sentence in the special prosecution trials, did not even mention the crimes committed in their territory, they felt encouraged to tell their story, to let their truth be known. Therefore, one of its leaders, Rafael Posso, started to draw what had happen to them, and by doing he started also an aesthetic process. Creating a collective memory of his community (Brisas, 2018).

Posso was the artist, but also a victim, and when he decided to draw their misfortunes the community started to engage in dialogues with the other survivors. After he asked would initially as for their permission to do the draw their stories, they would start to talk about it as a mean of a catharsis. The drawings made, between 2009 and 2014, became the symbol for Las Brisas (Brisas, 2018). From these two cases, and retrieving what it was said in the chapter, it can be concluded.

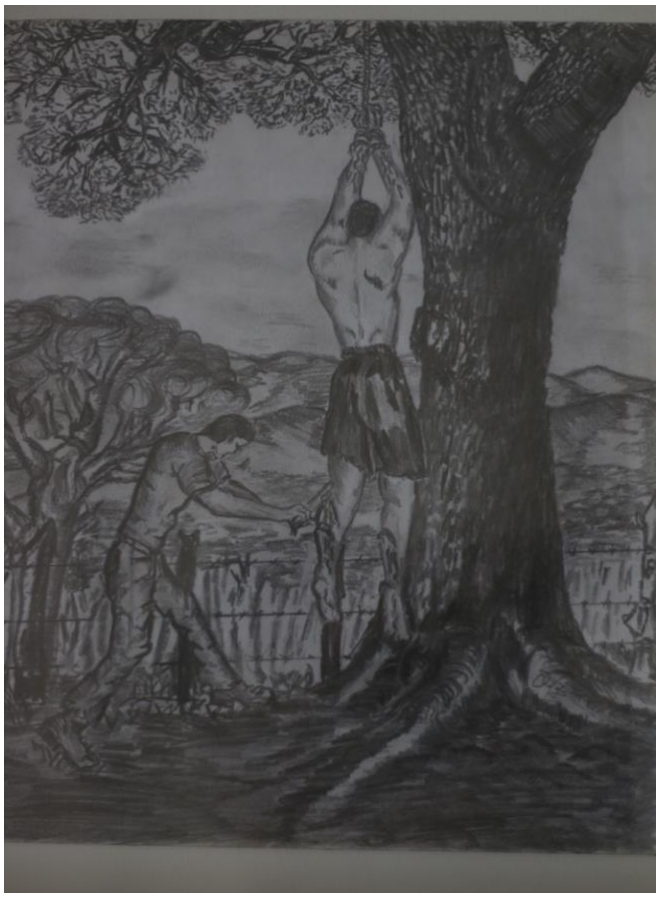
1. The collective action of planning, cutting, embroider and talk allowed the women to overcome traumatic events, as well as regain confidence as individuals part of a community.
2. The tapestries and the drawings, serve as benefits to the community providing a real change in their lives.
3. The process around tapestries and the drawings became the selected mean to collectively construct their memory.
4. The tapestries and the drawings, can be understood as archives or documents containing truth and memory, being living testimonies that disentangle the way those communities experienced the violence of the conflict.
5. The tapestries and the drawings, where embrace as their symbols to be repaired, regarding them with more value, than the other measures, like the monument.
6. The tapestries and the drawings, are the results of aesthetic process and became art pieces that carry a meaning with the potential to aid those communities overcome oblivion, silence, and indifference.
7. Although, Mampuján and Las Brisas are neighbor communities, with similar cultural context and backgrounds. The fact that each community embrace their own symbol, shows the arbitrariness nature of the symbols, and the necessity of each community to be determined, and recognize. To speak about their own truth, to choose their own means and to transfer their own memory.

Figure 2.2 - Women making tapestries
Source: (Castrillón, 2015)

Figure 2.3- Close up of the First Tapestry

Figure 2.4- The Displacement" The first Tapestry

Source: (MAGAZINE & MAGAZINE, 2018)



*E*n *el tamarindo hacíamos encuentros culturales y deportivos. Ahí se tomaban decisiones, se enamoraba, se divertía. En la masacre colgaron del árbol a José Mercado y le cortaron los gemelos para sacarle información. ¿Para que dijera qué? No sabía nada, pero decían que nos mataban por guerrilleros. Cuando la esposa lo recogió al otro día, un paramilitar le dijo: "Mírelo, pero no llore".*

[At the tamarind tree we had cultural and sports encounters. It was there that decisions were made, where you fell in love and where you could enjoy yourself by the tree. During the massacre they hung José Mercado from the tree and cut his calves to divulge information. What would he say? He did not know anything. He said they were killing us for being guerrilla fighters. When the next day his wife picked him up, one paramilitary told her: "Look at him, but do not cry."]

Figure 2.5 Draw and Description
Artist Rafael Posso
Source: (Brisas, 2018)

A Wilfrido Mercado le echaron un polvillo en la cara y pusieron a un perro para que, estando vivo, se comiera su rostro. Su compañera tenía un hijo en brazos y estaba embarazada. Le dijeron: "Vea cómo un perro se come a otro perro". Hubo tortura física y psicológica. Los paramilitares aseguraron en versiones libres que no nos habían torturado.

[They dropped a fine powder on Wilfrido Mercado's face and put a dog on him so that the dog would eat his face while he was still alive. His partner had a child in her arms and she was pregnant. They said to her, "See how a dog eats another dog." That was physical and psychological torture. The paramilitaries assured in their testimonies that they had not tortured us.]

Figure 2.6 –Draw and Description.
Artist Rafael Posso
Source: (Brisas, 2018)

CHAPTER III – FROM THE HEURISTIC TO THE HOLISTIC APPROACH

3.1 Introduction

As the general objective of the text aims to make a critical assessment on SR as a valuable mechanism to be counted in the design of modern TJ models, it is critical to understand the contemporary notion of a holistic approach. Considering SR through this approach can increase its relevance to the other types of mechanisms that are already well received within the TJ scholarship. It would be through such notion that its contribution could start to be understood as necessary between the interplay of all the other pillars and sub-pillars that build TJ.

In this chapter, the focus is put on the understanding of the holistic approach, and the evolution of TJ towards its construction as a contemporary concept. For this, the author will draw from some of the different approaches that in the short history of the TJ field have been articulated. Scholars like De Greiff, Lambourne, and Partmentier have inserted their own outlines in the creating of a framework that will aid to understand the concepts, mechanisms, rights, institutions etc. that intervene in the resolution of the two paradigms that are brought into the context for any society that has been in conflict-ridden (Parmentier, 2003) and is now addressing the legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma (Bickford, 2004).

These two paradigms are ´dealing with the past` (Huyse, 1996) and define the ´post-conflict justice` (Bassiouni, 2002). Some authors have used one of both concepts to refer allegorically to the term transitional justice. Either the former to emphasize the long-term nature of the process, (Baumgartner, et. al 2015) or the later seeking for a broader and more neutral conception (Parmentier, 2003). I will argue in this thesis, that both notions are innately bound in the frame of a TJ process, therefore they shouldn´t be considered as opposed, but rather, as complementary.

In any case, those theoretical discussions are part of the evolutionary process that TJ scholarship has experimented with since the times of the Nüremberg trials, without knowing it, and especially during the last three decades being conscious of it. A quest through a path of its consolidation under the scope of International Public Law. Therefore, its constant necessity to upgrade and update the conceptions that it encompasses, to reinforce its theoretical framework, (Parmentier, 2003) and to reckon worldwide TJ processes experiences. Above all, there is a necessity to understand that not every process is a

"linear transition from 'A' to 'B' but rather an ongoing and complicated set of negotiations and dialogues between many different actors" (Baumgartner, et. al, 2015).

During all these periods, and even since the times of the war that was going to end all wars, as H.G Wells described World War I, numerous mechanisms have been structured as tools to deal with the post-conflict/post-autocratic regimes consequences. From the reparations programme of the Versailles Treaty (1919), to the Truth National Commission on the Disappeared in Argentina (1983), The Gacaca Courts in Rwanda (2001) and most recently, the Kosovo Specialist Chambers & Specialist Prosecutor's (2018). These mechanisms, being just a small example of the diverse and varying picture of the schemes that have been designed; corroborating one of TJ´s main principles "there is no *one-size-fits-all* response to serious violations of human rights" (UN Commission on Human Rights, 2004, p. 5).

In such regard, the late contributions of the scholars in the TJ field have been focused on finding more reasonable understanding, to improve the way to deal with past wrongs. The idea of building a heuristic approach (Parmentier, 2003), a syncretic approach (Lambourne, 2009), or a comprehensive approach (UN, 2012) have all been proposals to construct a strong conceptual framework capable to identify synergies and potentiate (Baumgartner, et. al, 2015) all those mechanisms and practices that have evolved and underpinned a global common goal declared since 1948; never again. The idea of being able to stop mass atrocities, genocide, mass killings, disappearances, extra-judicial executions, ethnic cleansing, widespread torture, systematic rape, destruction of villages, and forced removals.

3.2 The Official Origin of the Conceptual Framework

In his speech, during the discussion of the approval of the text of the Convention for the Prevention and Punishment of the Crime of Genocide (CPSDG) in front of the General Assembly of the UN in December 9th of 1948, the delegate of the United States Ernest Gross referred to his audience with these words (Gross, 1948):

> "The unanimous vote of the General Assembly on this matter in it self-reflected the determination of the peoples of the United Nations wherever their race, creed or nationality to assure that the vulgarism that has recently shocked the conscience of mankind would never again take place"

However, a general picture of what has happened since then, would undoubtedly show a lack of capability to reach that common goal. The number of conflicts, casualties and ghastly crimes perpetrated after World War II, have escalated again and again, e.g.: a) Bangladesh 1971, the ten months of the liberation war resulted in the deaths of more than 500,000 people, mostly Hindus; b) Cambodia 1975, between 1.7 and 2 million persons died in the Khmer Rouge's "Killing Fields"; c) East Timor, 1975-99 during the 25 years of struggle with the Indonesian army invasion, about a third of the total population were killed; d) Rwanda 1994, approximately 800.000 Tutsis and Hutu moderates were slaughtered in more than 100 days; e) Bosnia 1992-1995 in a campaign of ethnic cleansing, the war in the Balkans region claimed the lives of an estimated 100.000 people and displaced more than two million; f) Guatemala, 1960-96, an estimated of 200.000 people died during the war, many thousands of them were Mayan victims of the so-called "Silent Holocaust"; g) Darfur 2003, the Government of Sudan carried out a genocide against civilians, murdering almost 300.000 and displacing over two million more (Spiegel Online, 2018: United to End Genocide, 2018).

Such panorama speaks for itself about the idealism that surrounds the never again goal. In fact, the Post-World War II period is considered one of the most violent in human history (Eriksson & Wallensteen, 2004). Indeed, the conquest of peace and stability requires more than determination. It is necessary to engage the root causes of the conflict in a legitimate and fair manner. The restoration of the law and the institutional reforms in the transitional period need to be designed to face coined-issues of post-conflict/post-autocratic regimes societies, like ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes among others (UN Security Council, 2004).

Thus, war-torn societies crux a far more conundrum and challenging panorama. The process to come to terms with large-scale past abuses in a transitional context, is often entrenched within devastated institutions, exhausted resources, diminished security and a traumatized and divided population (UN Security Council, 2004). According to Uprimny-Yepes, and Guzmán-Rodríguez (2010), the reality in a transitional context poses a puzzle that encounters a factual daunting situation and the ethical rules that societies are supposed to follow.

Foremost, this context implies a philosophical query of justice. It configures a tension between the duty of the State to redress the wrong doings -corrective justice-, and the duty of the State to reach an equitable distribution of goods and burdens among all the members of the society -distributive justice- (Uprimny-Yepes, and Guzmán-Rodríguez 2010). Freeman argues that such dilemma is actually not in-between corrective and distributive justice, as from his view, the former is part of the latter, as it ´specifies rightful (re)distribution` (2007, p.39). Instead for Freeman the predicament is that the focus on rectifying past wrongs, makes reparative justice unharmonious with distributive justice (Walker, 2015). Reparative justice, in the sense of receiving a full and effective reparation in the line of *The Reparation Principles* (Walker, 2010).

Now, these quandaries are important to underscore, because they broad the elements that have to be considered when understanding the paradoxical goal of peace, in the immediate post-conflict period, and its maintenance for long term. Justice, peace and democracy, as explained by Kofi Annan, "are not mutually exclusive objectives, but rather mutually reinforcing imperatives," and the fragility of post-conflict settings requires a "strategic planning, careful integration and sensible sequencing of activities" (UN Security Council, 2004, 1).

For Annan, the rule of law, justice, and transitional justice, configure the core conceptions that can enhance human rights, in the quest for reaching what this author considers the common global goals: peace and never again. However, such path need these three elements to be articulated from a comprehensive approach, meaning, attending to "all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms" (UN Security Council, 2004, 1). For this, Annan considers also the necessity to gain a common understanding, of each concept, its goals and its methods.

In the rule of law case, Annan describes it as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws" (UN Security Council, 2004, p.4). Regarding to justice, he establishes it as an "ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs" (UN Security Council, 2004, p.4-5).

Lastly, Annan posits TJ as "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." Then, he furthers enlists the judicial and non-judicial mechanisms, that should be considered in the structuring of a TJ model, explaining that in any case, they should be applied under strategies designed from a holistic approach; that is considering an "integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof" (UN Security Council, 2004, p. 5).

3.3 The Heuristic Approach

Arguably, the UN Security Council 2004 definition of transitional justice can be understood as the official launch of the idea of the necessity of a holistic approach. However, such construction was already foreseen for scholars like Parmentier, who recapitulated old literature of TJ, stating that up to that point, the TJ scholarship had already been studied in an "isolated form," without understanding "their mutual interrelationship and interdependency," four main issues (Parmentier, 2003, p.207). From the 90´s he remarks that post-regime societies, in the pursue for justice, had to face the issues of truth and accountability (Huyse, 1996: Kritz, 1995). Later, from the 21st century, he considers that attention of the various communities and sectors of society had shifted towards some fundamental necessities in order to reconstruct society, the issues of reparation and reconciliation (Parmentier, 2003).

Based on these four issues from a heuristic approach, Parmentier proposes a theoretical framework called the TARR model, which he considers to bring three benefits to the TJ scholarship (Parmentier, 2003, 208): a) "thorough and systematic investigation of the various relationships between the four key issues"; b) "to gauge the significance of the various institutions and mechanisms that deal with gross human rights violations in relationship to the four basic issues", and c) "a new approach to the concept of post-conflict justice, which should be understood as the interplay between the four key issues".

The TARR model is based on a concept that considers the evolutionary tendencies in TJ. One first wave demarked by the move away from the culture of impunity to a culture of accountability, (Mathews, 2002) and most recently, from the latter to a restorative culture. From the "predominantly top-down mode of operation to encompass bottom-up approaches" (Parmentier, and Weitekamp, 2007, p.124). From the international response to conflicts, to the reinforcement of the institutions of the nation-state in the domestic level, to a currently major focus in the local-community initiatives.

Those tendencies according to Parmentier (2003) have marked the road towards the structuring of a post-conflict justice, which from a normative point of view can be understood as a justice that embraces the principles of restorative justice and pairs them within the building blocks of TJ, in combination with limited retributive measures. Now, those building blocks are the same key issues of TJ, so it is in that regard, they become pillars to count when designing a transitional model. In this context, the retributive approach means that the "punishment is justified as the morally appropriate response to crime" (Ashworth, 1997, pp.1096-1097), and restorative justice is understood as an option of justice, that aims for the restoration of the relational, by repairing both the individual and the social harm (Bazemore &Walgrave, 1999).

Weitekamp (et.al, 2006) distinguish four pillars of restorative justice: a) Personalism, which understands crime as violation committed against people and their relationships, b) Reparation of the victim which is superimpose to the punish of the perpetrator; c) Reintegration, of both victims and perpetrators, preferred instead of the isolated punishment, and b) Participation, which intends to involve in the dealing of the crime, not only the directly interested but also the indirect stakeholders, (Roche, 2003).

For post-conflict justice, retributive and restorative justice are essential to deal with the past. From the TARR perspective the mechanisms of these two types of justice, should be gear towards the restoration and enhancing of the justice systems that broke down during the period of the conflict/regime (Parmentier & Weitekamp, 2007).

The TARR model acknowledges the complexity of structuring a post-conflict justice, towards the reach of its two goals, namely, "to prevent the reoccurrence of the violent conflict, and to repair the harm that was suffered during the conflict" (Weitekamp, et.al, 2006, p.8). Mainly because of the number of institutions, procedures and mechanisms that need to be implemented in order to deal with the type of international and political crimes, usually involved in transitional context (Parmentier, 2003).

In this sense, the success of the of a TJ model that uses the heuristic approach the TARR model, relies on the interplay between its four building blocks, for that, Parmentier highlights three aspects that need to be consider: a) "a recognition of the complementary character of restorative and retributive

mechanisms, each with their specific characteristics and their specific contribution to situations of mass violence"; b) "a genuine cooperation between courts and tribunals on the one hand, and truth commissions and other similar mechanisms on the other hand, built on the idea of accountability and reconciliation in the long run"; and c) "the development of ´good practices` for restorative mechanisms in dealing with crimes of mass violence" (Weitekamp, et. al, 2006, p.12).

All what it has been explained above, allows to assert that the perspective input in the heuristic approach, is criminological. Therefore, it encourages to adapt the methodological structure commonly use for the analysis of common crimes, into the conceptualization of the framework for dealing with political crimes and gross and mass violations usually committed during transitional periods. Hence, the three dimensions of such structure are: a) "conceptualizing and describing criminal behavior"; b) "Explaining crimes and their consequences for individuals, groups and society as a whole", and c) "designing criminal policies, to prevent and to repress crimes, and to rehabilitate the victims and offenders involved".

In this context, the framework insists that in order to avoid the essentializing approaches it is necessary to investigate the key issues that each society prioritize, understanding the particularities of the conflict and/or violence that has suffered and the interest of the population. Just as after WWII the main issue was the international accountability, and then by the early 80´s in Argentina after the Military Junta deposed, the importance was focus on the searching of the truth as a result of the experiences of enforced disappearances suffered. The same as in the early 90´s when the inquiry of South Africa, attempt to rebuild a society that was crack by the segregation, with the use of truth and reconciliation processes. By placing the attention in the main challenges related to each society, the understanding of the strategies and mechanisms to be use or even create, becomes easier (Parmentier & Weitekamp, 2007).

In this regard, the question to answer would be always, "What are then the key issues that new regimes are facing in their pursuit of justice?" (Parmentier, and Weitekamp, 2007, p.126). In one of the latest publications, from the initial four issues that Parmentier drew in 2003, by 2007 the framework had been updated to six core issues, i.e: a) searching the truth about the past; b) ensuring accountability for the acts committed; c) providing reparation to victims; d) promoting reconciliation in society; e) dealing with the trauma of the victims, and f) building trust among all parties.

Two graphics can give a better understanding of how the six key issues under the TJ-TARR model develop its interrelation, [figure 3.1] and the integration between the first four pillars and the mechanisms of retributive justice (coercive/judicial) and restorative justice (cooperative/non-judicial) at the national and the international level [figure 3.2].

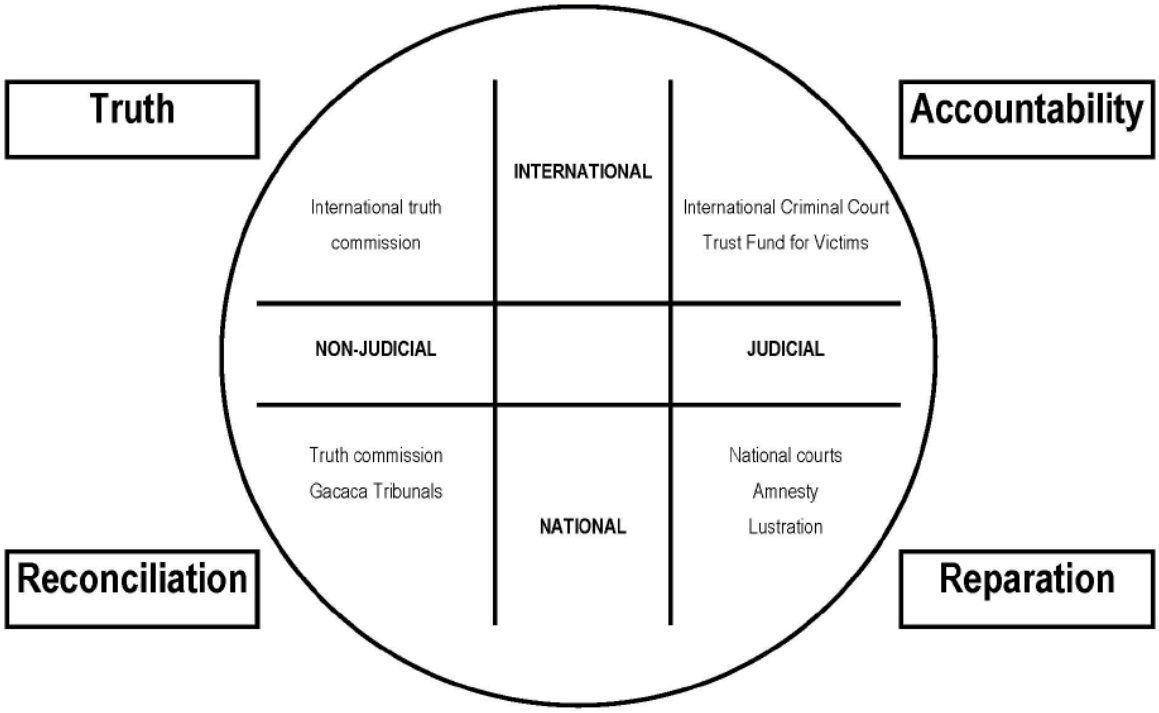


Figure 3.1 - Source: (Weitekamp, et. al, 2006, p.12).

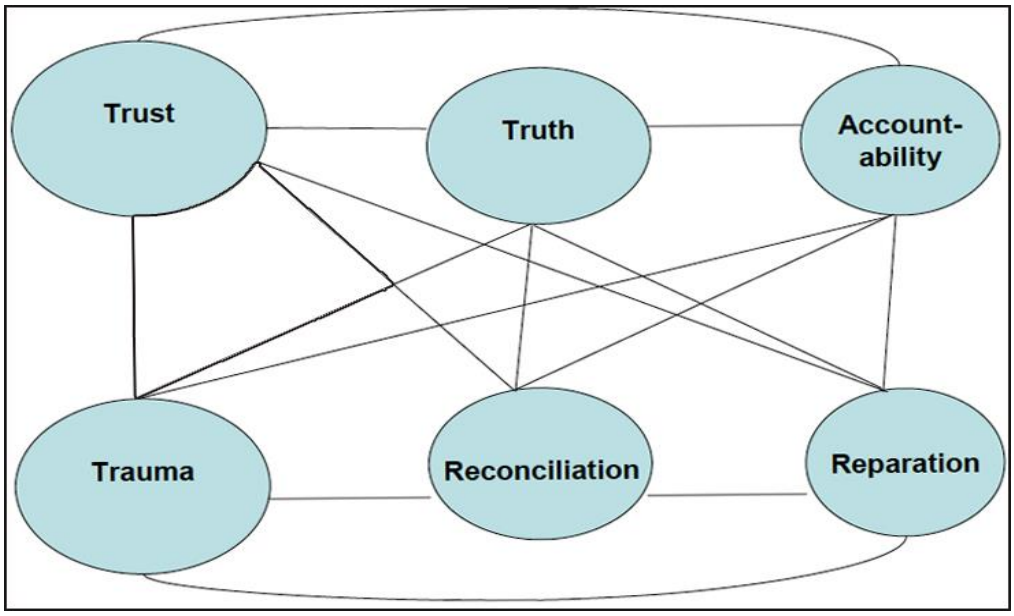


Figure 3.2 - Source: (Parmentier & Weitekamp, 2007)

3.4 The Holistic Approach

However, before Parmentier, in 1997 Joinet presented his report on The Principles to Combat Impunity, which for some institutions like Swisspeace, was the first recognition of the main pillars of the holistic approach to deal with the past, i.e., the right to know, the right to justice, the right to reparations and the guarantee of non-recurrence (Swisspeace, 2016).

This holistic approach, just as the heuristic, aims to reinforce the importance of the mutually exerted influence and dependency of all its four pillars over each other. It posits the victims and perpetrators as the central focus of the model, and underscores that all the mechanisms should aim for their transformation into citizens with equal rights. However, it emphasizes on the longevity of the transitional process, that has like its goals, the establishment of a culture of accountability (overthrowing the past culture of impunity), the rule of law and reconciliation (Baumgartner, et. al, 2015)

The four pillars in the holistic approach not only form the core of the model, but each one also entails its own structure composed of three elements (Swisspeace, 2012): a) "An individual right on the part of the victim and his/her family"; b) "A collective right on the part of society" and, c) "An obligation on the part of the state to ensure that such rights are enabled and actualized." Now, all the four pillars interact with three dimensions that imply a challenge and an opportunity. These three dimensions are a) the context; b) the actors and, c) the mechanisms.

The context challenges the structure to be sensitive with the conflict dynamics and cogently with the social, political, cultural and economic circumstances. The opportunity subsequently calls for a meaningful approach that would consider the sensitive issues from all the different spheres that can affect the victims, spark old tensions or create new ones. Therefore, it is important to analyze all the elements that can influence the corresponding society in transition, i.e., history, culture, religions, languages and traditions (Swisspeace, 2012, p.8).

Careful planning and implementation is essential to avoid or at least minimize unintended negative impacts, as well as paying attention to the bottom-up dynamics and the strengthening of local-community structures and mechanisms. Including the direct victims of violence and historically

marginalized ones as active participations is crucial to build future capacity, ensure the sustainability of the process and gain legitimacy (Swisspeace, 2012, p.8).

This latter perspective shows the importance of the second dimension, the actors, and explains the interconnection between the two dimensions. With understanding of the context also comes necessity to increase the "knowledge about," and "inclusion of" the "relevant actors," which is the challenge. To hear and incorporate the perspective from different actors, ensuring in that way the legitimacy, is the opportunity. Such process can include governments, civil society groups, affected populations, perpetrators, international organizations, and other states as well as donors (Swisspeace, 2012, 8-9).

For the last dimension, the mechanisms and measures, the challenge is to ensure that their design can plausibly contribute towards conflict transformation, reconciliation and the rule of law. Past experiences have demonstrated that mechanisms designed with isolated purposes cannot achieve the comprehensive transformations required for sustainable and just peace by themselves. Hence, the opportunity of the framework is to enhance each of the mechanisms and interventions as they have been structured under each of the four pillars - broadening and extending their own goals by recognizing its limitations to reach the expected objectives and understanding their integrally interconnected nature (Swisspeace, 2012, p.9).

Furthermore, the framework highlights how specific elements, practices, interventions or mechanisms can exert a direct influence on the broader pillars. Every one of these is a piece of the broader whole, as they all play an equable roll in the realization of the main goals as the base for peacebuilding. The meaningfulness of every discrete piece relies upon the transformative potential and integral connection of each and the whole, as they are projected to intervene on three levels, regarding an effective contribution to conflict transformation and reconciliation. All the above can be achieved through institutional and normative reforms, as well as provoking swift entrenched power relations that influence critical inequalities and injustice. (Swisspeace, 2016).

On the individual level by intervening in the recognition of the ones that have been historically marginalized and in the repairing of harms that have been inflicted upon them, securing their substantive rights as citizens, as well as their equal access to resources. On a collective level by acting towards reducing societal attitudes and discourses that promote conflict and discrimination between

individuals and groups, by forging new interactions through symbolic means. Lastly, on the level of the state, the aim of the approach is to contribute to the transition towards democracy, by generating transformations in political structures, promoting constitutional reforms and citizenship laws (Swisspeace, 2016).

Conflict transformation refers to post-conflict goals, however, it is foster by all the mechanisms and tools designed to deal with the past, like truth commissions, tribunals, reparations or institutional reforms. Thus, the framework fills the gap of the interplay between those specific mechanisms and processes and the broader social and political transformation as the foundation for a longer-term peaceful future. (Baumgartner, et.al, 2015)

Hence, the relationship between dealing with the past and conflict transformation links the processes among transitional justice instruments and their contribution to broader goals (Kayser-Whande & Schell-Faucon, 2010). The concept of conflict transformation is a broad term that concentrates on the ongoing processes and widely aims for transforming relationships, behaviors, attitudes, institutions and structures that have perpetuated violence. Reconciliation and the restoring of relationships looks for "the acceptance of different views of the past and helping a society to resolve conflicts in a non-violent and constructive way" (Baumgartner, et.al, 2015, p.4).

The following graphic [Figure 3.3] will aid in understanding how from the holistic approach, the interaction between the three rights - to know, to justice and to reparation - and the non-repetition guarantee is developed. Furthermore, it allows us to comprehend which the mechanisms and interventions are, based on their practical experience and how these scholars at these institutions have portrayed them under each of the four pillars. Additionally, the graphic serves to identify the synergies between all the elements that deal with the past, and their contribution towards the broader goals of the rule of law, long-term peace and reconciliation and conflict transformation.

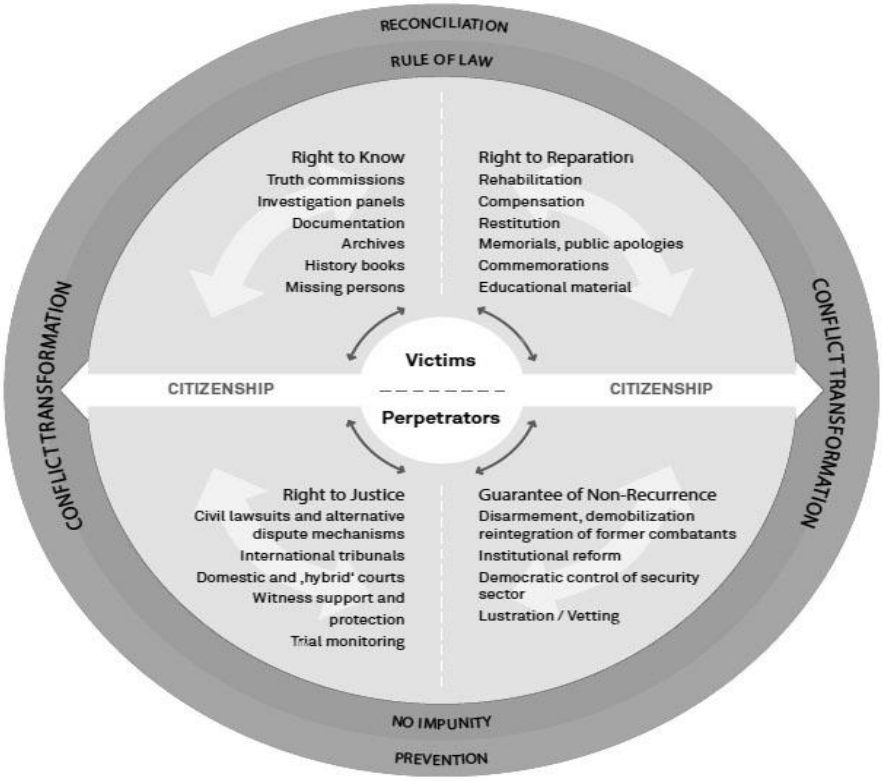


Figure. 3.3 - Source: (Baumgartner, et.al, 2015, p.4)

3.5 The Comprehensive and Syncretic Approaches

The UN, also follows Joinet's comprehensive approach found in his scheme. But it refers to the pillars, as components from processes and mechanisms of a judicial and non-judicial nature, that include: a) prosecution initiatives; b) initiatives in respect of the right to truth; c) delivering reparations; d) institutional reform and national consultations, (UN, 2010). According to the special rapporteur De Greiff, these components are the same as those found in his mandate; a) justice; b) truth; c) reparations and, d) guarantees of non-recurrence, which together form a set of measures designed to redress legacies of abuse. However, he also emphasizes the importance of their collective implementation, suggesting that the weakness of each individual component can, in the interaction with the others, find elements that can make up for its limitations (UN, 2012).

Moreover, De Greiff considers that the four components, aside from serving to pursue the ultimate goals of peace and justice, should also be conceptualized in every model to contribute to the realization of four goals, a) providing recognition to victims; b) fostering trust; c) contributing to reconciliation, and d) strengthening the rule of law. The two former, mediate goals and the two latter, final goals (De Greiff, 2012, p.7).

In this sense, it is important to highlight how the central focus of this approach is to reinforce those human rights norms that were systematically violated (De Greiff, 2012). Otherwise, as the experienced has demonstrated, if the population is not confident that the restoration of the rule of law will: a) redress their grievances, b) reinstitute legitimacy through democratic governmental structures, c) provide the fair administration and pursuit of justice, and d) protect their human rights; then none of the expected goals can be achieved (UN, 2004: UN, 2010).

For a better understanding of what De Greiif (UN, 2012) has denominated the web of interrelationships between the four the components, with special attention given to their "bidirectional relations" refer to Table 3.1

THE WEB OF INTERRELATIONSHIPS				
	REPARATION	**TRUTH**	**JUSTICE**	**N-RG**
R		Truth-telling calls for reparations, so words do not turn into inconsequential chatter	Criminal prosecutions without reparations do not provide a direct benefit to victims, apart from a sense of vindication	Vetting office holders complements remedies as victims will not regain trust in institutions that continue to be run by past abusers even if they have been prosecuted.
T	Measures of reparation call for truth disclosure		Criminal prosecutions can be interpreted as a justice measure when they are accompanied by other truth-seeking initiatives	
J	Victims have stronger regards towards compensatory measures if they feel that efforts to prosecute perpetrators have been placed in motion	Truth-seeking initiatives need to avoid the whitewash perception, this is when truth emerges but no consequences follow		Vetting of public officials must be accompanied by the creation of robust prosecutorial mechanisms, otherwise it is perceived as a bureaucratic excercise
NRG	Vetting without substantive remedies is unlikely to have an impact due to the magnitude of the violations		Criminal trials can be perceived as if justice is being done, when trials constitute one of several accountability measures, including others like vetting of those responsible for human rights violations.	

Table 3.1 – Original: Inspired in UN (2012)

The TJ model when applied from the comprehensive approach, implies looking beyond the structure itself and trying to comprehend the potential reaction of victims towards the TJ model, based on two particular concerns. Firstly, insufficiency, for example when there is the perception of not enough trials conducted against perpetrators, not enough resources for the reparation programmes, and so on. Secondly the perception of an unfair or unjust process. In the latter, there is a generalized feeling that the measures taken, do not count as justice initiatives.

It is important to note, that De Greiff does not differentiates between *comprehensive*, *coherent*, or *holistic*, as they all rely on the same well-founded aspiration; that the different TJ measures despite of their weaknesses, can acquire the sense of a justice measure as a consequence of their interaction avoiding being perceived as convenient and prudent concession in murky times (De Greiff, 2012).

However, he admits that the issue is more fundamental as a great number of transitional states do not frame these measures as policies rather than as a norm, as in practice this admits a certain degree of abstraction. Thus, the implementation of these measures in practice, is often not comprehensive or gradually implemented, and the different components of the model are from the beginning not conceived as a whole. (De Greiff, 2011) For this reason De Greiff claims it is necessary to consider his already mentioned ´theory of the internal and external coherence`. This way the following two outcomes can be ensured. On the one hand, measures are not to be conceived as discrete and independent initiatives but rather as parts of an integrated policy, (De Greiff, 2006) and on the other hand, they would not be traded off against one another, because victims do not ignore the lack of action in one component, just because of the efforts directed at the others (UN, 2012).

Lambourne (2014), also criticizes the current models however, from the limitations that the TJ scholarship has indirectly impose. From her point of view, the traditional perspective of TJ limits the model to the promotion of human rights, democracy and the rule of law (Lambourne, 2014). Instead her approach takes justice as intertwined with reconciliation and peace, therefore, she considers it necessary to reconcile restorative and retributive justice, as a contribution to develop a transformative justice model that supports sustainable peacebuilding (Lambourne, 2009).

In this sense, a TJ model implemented from a syncretic approach requires the understanding of *transition* as an interim process that links the past and the future, in terms of *transformation*. This

implies “a long-term, sustainable processes embedded in society and adoption of psychosocial, political and economic, as well as legal, perspectives on justice” (Lambourne, 2009, 30). The syncretic approach suggests further integration of restorative and retributive justice, underscoring the difficulty that any TJ model faces, to address hideous psychological and physical pain and the devastation caused by large scale.

The main characteristic, of this model is its “transdisciplinary” nature. A clear example of this is that juridical accountability is linked to psychosocial processes, socioeconomic conditions and political context (Lambourne, 20014). Moreover, it deems vital that the needs, expectations and experiences of conflict participants are considered in the design of mechanisms as well as ensuring the satisfaction of justice is developed according to the needs of the community and its local practices. In this sense, it is structured in order to consider the cultural nuances of those who are involved in the transitional process, perpetrators, victims and survivors, as well as other members of society, under the premise that they must also to be involved in the peacebuilding process (Lambourne, 2009).

In this model, civil society takes part in the development of the structure from the beginning, as the designing, to facilitate the process of ensuring that the expectations of the local population and their cultural perspectives are considered at planning stage. It acknowledges that transformative justice requires a transformation in the different relationship fields, spheres and levels of society from a cultural, economic and political perspective (Lambourne, 2014). Aside from the abovementioned, this author considers that the syncretic approach follows this structure closely, the claims and the purposes of the other frameworks. Furthermore, conceptualization of this model or any of the others goes beyond the scope of this thesis.

Furthermore, there are theoretical differences and epistemological conceptualizations that could further be investigated, however, within the scope of this work. It is sufficient to highlight how despite the different perspectives that have been used to draw the different approaches, they all have found common paths. According to Kayser-Wande and Schell-Faucon, (2010, pp. 98-99) such commonalities can be summarized in four points: “a) A belief that it is central to address past human rights violations to achieve a just and peaceful society”; b) “An assumption that a wider-ranging (often political) change and transformation process is taking place and that dealing with the past is part of it”; c) “A hypothesis

that dealing with a violent past helps to reconcile a divided society", and d) "The inclusion of often vaguely defined visions of a democratic, just and peaceful future".

3.6 Conclusion

The models that were presented have enabled an understanding of the "holistic approach" as a concept, and as the methodology used in this work to comprehend a TJ model. Though, it is important to note that all the approaches are academic theories, continually being subjected to the scrutiny of other scholars, and therefore susceptible to new proposals. This author will then draw the conclusions of this chapter, using the most relevant elements from each approach, to construct the holistic perspective necessary to the objectives of this text, i.e.: to understand, wherein the frame of a TJ model do SR fit, and how they can gain the same relevance, that has been given to other mechanisms.

In this sense, this author considers adhering entirely to just one model could end up affecting the academic analysis drawn on in this text. Conversely, an overview that aims to underscore its complementarity is essential to reinforce and locate SR as a significant tool to be considered in the designing of any TJ models. With the same importance as the other mechanisms such as historical commissions, truth commissions, traditional trials, national and international tribunals. This author proposes that the holistic model must be understood based on the following premises, and following the model presented in this next graphic.

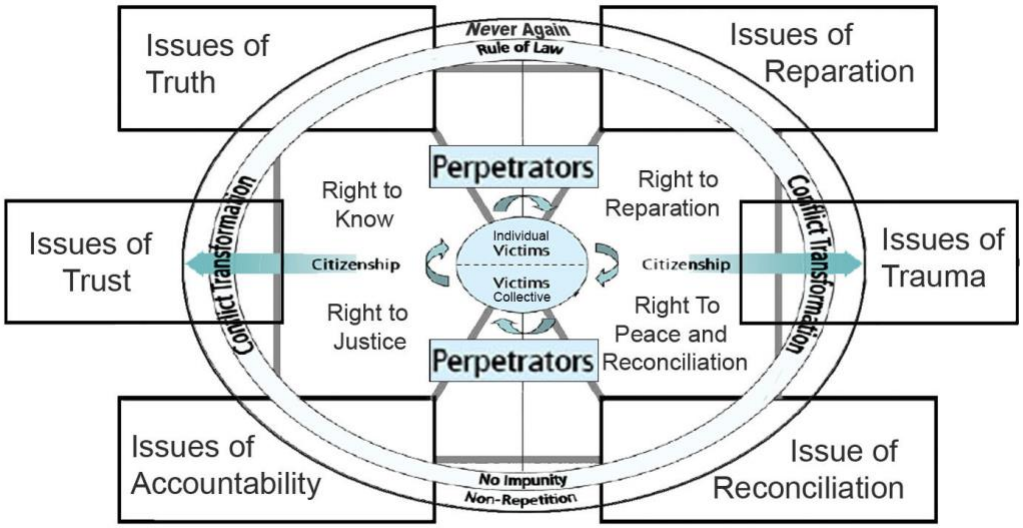


Figure 3.4 - Original: Inspired in (Baumgartner, et.al, 2015: Parmentier & Weitekamp, 2007)

1. The TARR model serves to categorize and determine the different challenges that any TJ model, from any approach, has to resolve. The holistic approach contributes to the establishment of the four pillars, which serve as the foundation of any TJ Model. The challenges that the TARR model highlights from the six issues should be resolved by always taking the perspective of the four pillars of the holistic approach.

2. From the four pillars that have presented in the holistic approach, this author considers that the guarantees of repetition do not belong in there. The reason is that they are a State duty rather than victims right. In that sense, the four pillars must exclusively correspond to the rights of the victims, as proposed by Joinet and Orentlicher. However, as they only propose three rights, this author proposes as fourth pillar, the right to peace and reconciliation.

3. The right to peace is a novelty of the last decade and is still an academic notion under construction. Nonetheless, for this author, considering the importance of peacebuilding as understood by the comprehensive, the holistic and the syncretic approaches, it should also be considered as well as one of the rights of the victims.

4. From this perspective, peace is not only a goal of all the society, but more critical is a right of the victims. This right within in a post-conflict stage goes hand to hand with reconciliation, not only because of its relevance as it was argued during the chapter but also because one is a pre-condition for the other. In the words of Novak (2005, 245) "[…] a peace process can only succeed in a genuine desire for reconciliation".

5. Guarantees of non-repetition, are related to institutional reforms and subsequently with the rule of law, the non-impunity and the never again goals. In this sense, they should be considered a result of an objective to reach by all the mechanisms design under the four pillars. Not just as one pillar. To level, the guarantees of non-repetition to the victims' rights, removes the focus from them and gives them an extra burden that they should not have to assume.

6. Although the perpetrators share some of the victims' rights, their interest cannot either be level to the victims' interest. It is different, and it should be located outside of the essential nucleus of the model, interacting with them but also contributing to the fulfillment of the victims' rights. In other words, sometimes victims' rights, are not perpetrators rights rather than their duties.

7. The mechanisms that are constructed or designed under each right constitute the sub-pillars of each pillar. In this sense, they should also be buildup using a holistic approach, as their interplay is also fundamental for the success of the other sub-pillars and consequentially of the whole pillar.

8. The mechanisms designed within the framework of each pillar come from either a retributive or restorative justice perspective. Additionally, they should consider the cultural, economic, psycho-social, and political context, as well as the victim's need and desires. SRs belong to the sub-pillar of the right to reparation and, are arisen from the perspective of the restorative justice. In this sense, SRs are measures that embrace the essentialist definition of restorative justice, as acknowledged by the heuristic and syncretic approaches. Moreover, because they are the result of a process that can be recognized, as mainly deliberative and inclusionary, critical characters of restorative justice Walgrave (2005).

9. The SRs in the holistic approach should be understood from the angle proposed by Bazemore and Walgrave (1999) this is reduced to their most crucial characteristic, their potential for reparation.

10. To fully comprehend that potential, this author proposes to assimilate SRs as measures capable to "healing through remembering", under the model developed by McCold (2002) [Figure 3.5], that identifies different types and degrees of restorative justice practices in post-conflict situations, categorizing their potential as fully, mostly and partly restorative.

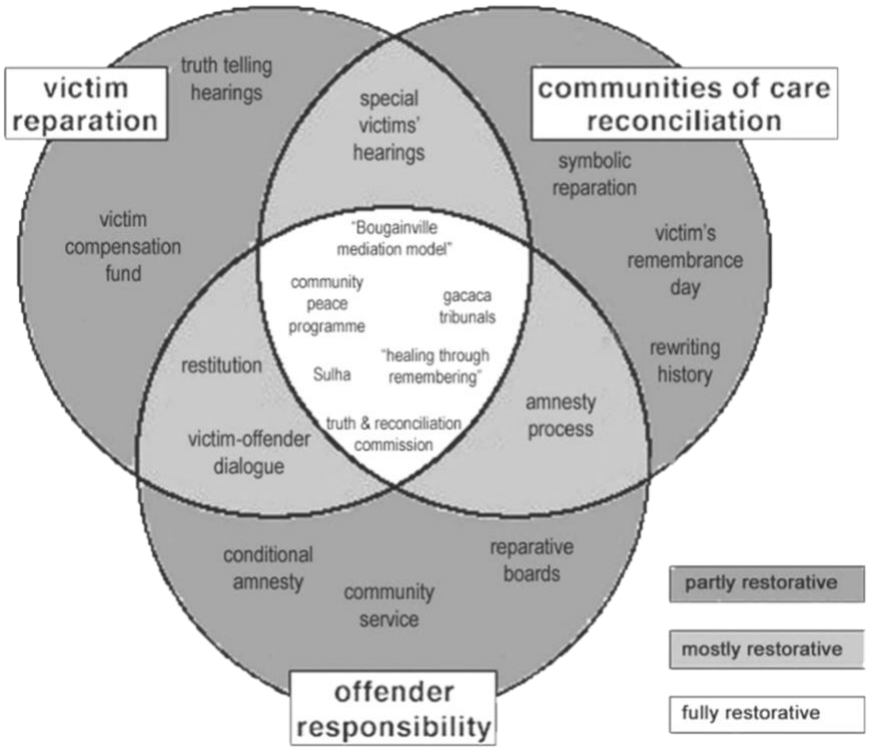


Figure 3.5 - Restorative transitional justice typology (Source: Weitekamp, et. al, 2006: Vanspauwen, 2003)

CHAPTER IV – FIVE PLUS ONE, THE RIGHT TO REPARATION

4.1 Introduction

The pillar of reparation under a holistic approach of TJ, encompasses two latitudes of regulatory dispositions, the mandates that impose the reparation as State duty and, the provisions that contain the victim's right. The current buildup of both normative frames is being prescribed in a large number of international treaties and instruments at universal and regional level.

In this chapter, the author would deepen into the theorization of both normative frames, inquiring about its different components, from the structure of the remedies to the structure of the right to reparation and its sub-pillars. The study would emphasize in the contributions from the multilateral levels, specially the UN. The reason, relies in the fact that rather than in the hard law, nowadays it is in the contributions of the soft law where the International Public Law has established the scope of reparations.

For instance, the theory of internationally wrongful acts which is the foundation of the concept of reparation as a duty, was elaborated through the *Report of the International Law Commission on the work of its fifty-third session* (UN, 2001) adopted by the UN General Assembly through the resolution 56/83 of 2002 (Sullo, 2005). This theory, of a customary origin, conceives reparation as the obligation that results from a breach or violation that is attributable to a particular State, because of the failures of its government to fulfil its international duties. Said violation constitutes a wrongful act that binds the State to being legally and morally responsible, compelling it to redress the injury caused by offering effective remedies and making a full reparation (UN, 2002).

In this context, States do not only have the international duty to respect and protect human rights but also to prevent their violation. Consequentially, if a violation takes place under its responsibility, the duty of the States is extended into providing adequate remedies to victims, in the form of delivering full reparations and guaranteeing that serious investigations are carried out. Likewise, ensuring that violations do not go unpunished and that those responsible for the gross violations of human rights are not granted immunity (UN,1993).

Precisely on that account, Inter-American Court of Human Rights (hereafter IACtHR) in its first ever judgment the Velásquez Rodríguez v. Honduras, (1988), stated that as part of their obligation to prevent human rights violations States have the duty to carry out serious investigations of gross violations human rights. Some years later, in 2014, the same Court would ratify its position in the case known as ´*The Disappeared from the Palace of Justice*` (Case of Rodríguez Vera Et Al., 2014), asserting that the duty to conduct a serious investigation includes the identification, the processing, the trial, and the punishment, as appropriate, of those responsible.

This particular relationship, between justice and reparation, is a concept contained in the mainly legal non-treaty texts adopted by UN human rights charter-based and treaty bodies in the form of the right to remedies. This right emphasizes that the protection of rights is connected to the possibility of exercising effective remedial action through multiple kinds of mechanisms, namely: truth commissions, prosecutions, compensation schemes, memorialisation or commemoration process, among others (Shelton, 2005).

From the body of soft law on the issue, the two documents that should be considered as the base of the legal framework of the right to reparation, as stated before are the resolution 60/147 the BPGR and resolution 1998/53 of the PACI. Nonetheless, it is important to note that these reports did not create new substantive international obligations. They do however, mark a significant advancement in international law, as complete studies that for some fifteen years have analyzed various mechanisms, forms, procedures and models, from both the domestic and the international sphere, structured to implement existing legal obligations on the matter of reparations (Shelton, 2005).

The first remark that should be highlighted from those UN reports, is the central premise of Van Boven´s study, which would further serve as the bedrock for the elaboration of BGPR: ´gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature irreparable` (UN, 1993, p. 53). Furthermore, he explains that for such crimes, no remedy or redress can stand to the harm perpetrated, because due to their grave nature, such crimes constitute an attack on human dignity (UN, 2006).

However, according to both Van Boven and Joinet, also States to the fullest extent possible, need to sustain the rights of the victims, -principles 3 and 4 of BGPR (UN, 1993), and principles 33 and 36 of PACI (UN, 1997) correspondently- through:

a) Removing or redressing the consequences of the wrongful acts;
b) Relieving the suffering of the victims;
c) Affording justice to victims;
d) Preventing and deterring future violations;
e) Guaranteeing appropriate and proportional measures to confront the gravity of the violation, the circumstances of each case and the resulting harm;
f) Responding to all the needs and wishes of the victims;
g) Covering all the injuries inflicted upon the victims, and
h) making possible for the victims to seek redress from the perpetrator.

Nowadays, in accordance with the vast international hard-law surrounding this topic (human right treaties, humanitarian law texts, and international criminal law instruments); and also, considering the abovementioned soft-law, there is an agreement that expeditious and fully effective reparations models should include at least five forms of reparation, which in the term proposed by this author are to be referred as sub-pillars, i.e.: a) Restitution; b) Compensation; c) Rehabilitation; d) Satisfaction and, e) guarantees of non-repetition.

Nonetheless, from this point it should be clear, the position of this author is that the abovementioned scheme is outdated and lacking of a sixth sub-pillar. From the point of view of this author, that sixth sub-pillar ate the SRs, and they are needed to reinforce the holistic approach inside the pillar of the right to reparation, in order to fulfill the ultimate goal, the never again. However, to consider it as a feasible contribution, firstly the text would draw on the current understandings and some of the shortcomings of the other five sub-pillars.

4.2 The Construction of the Right to Reparation Pillar, an Ambiguous Road

In 1988, the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Van Boven (UN,1993) with a mandate entitled: *Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental*

freedoms. This demonstrates that the right to reparations here is not only mentioned as a concept in itself, it is referred to as a right composed by three axes. Although, Van Boven also mentions the forms of satisfaction and guarantees of non-repetition as principles of the reparation for victims (UN,1993).

In his 1993 report, Van Boven (UN,1993) also highlights the importance of the last draft presented by the International Law Commission (hereafter ILC) at the time, due to its inclusion of a number of State duties relevant to reparation -in the context of inter-State relations- namely, restitution in kind, compensation, satisfaction and guarantees of non-repetition. This draft was an important asset for the elaboration of the right to reparation, as it lay down the grounds from which to further develop State duties which would later become/form the sub-pillars of the right to reparation. Van Boven summarizes its contribution in four points (UN, 1993, pp.19-20):

a) Presented the concept of full reparation, as a sum of all the mentioned forms;
b) Brought up the importance of the non-repetition as a subsequent duty that followed the necessity of the cessation of the wrongful conduct, in the sense that is not enough to the injured party that the responsible State stops causing the damage, there is also a need for a guarantee that would assure the conduct would not happen again;
c) Defined, restitution in kind as the re-establishment of the situation that existed before the wrongful act was committed; but also highlighted its limits and pointed out the necessity of compensation, stating that because the damage cannot ever be made right, then compensation follows as it economically covers any assessable damage inflicted,
d) Described satisfaction measures as essential for a full reparation, in the sense that they deal with the moral damage, and also highlighted apologies as a possible form of those measures. However, it also mixed the satisfaction measures with the monetary compensations, specifically the nominal damages, and the relief that the injured party can feel when a disciplinary action or punishment is conducted against those responsible.

Acknowledging the above, Van Boven (UN,1993) draws four forms of reparation: a) restitution; b) compensation; c) rehabilitation, and d) satisfaction and guarantees of non-repetition. It can be seen in this 1993 report, that satisfaction and guarantees of non-repetition are grouped together as if they were one sub-pillar, and furthermore, the guarantees to prevent the recurrence are presented as measures intended to satisfy the victim. Such vagueness in the structure of non-repetition guarantees and

satisfaction measures during the 90´s, lasted through the configuration of the two set of principles, namely, BGPR and PCAI, and to some extent still remains today.

In the current configuration of *The Reparation Principles* adopted by the Resolution 60/147, for example, this lack of clarity has led to further confusion. One that Shelton (2005) has argued goes against the *pacta sunt servanda*, a core principle of the International Public Law. According to principle 22 of *The Reparation Principles* the cessation of the breach is understood as a reparation measure under the form of satisfaction (UN, 2006). A probable cause of this confusion is the influence of the ILC Articles on State Responsibility on Van Boven´s 1993 report. In the ILC draft, the non-repetition guarantees derive from the cessation of the breach, and as mentioned, in Van Boven´s report they are merged into one form, the non-repetition guarantees and the satisfaction measures.

This ambiguity relating to the nature of these two sub-pillars of reparation undermines the rule of International Public Law itself (Shelton, 2005). Specifically, because it suggests that in the absence of a victim there is no obligation for the State to stop a particular action that does not comply with an international obligation. Instead, this scholar, considers, that the cessation of the breach such be placed as an obligation prior to, and independent of reparation, in accordance with the ILC's opinion.

The confusion described above was also demonstrated in Joinet´s 1997 report (UN, 1997), it is likely as a consequence of the influence of Van Boven's 1993 report on the former. From a standing of a preventive basis, Joinet draws a series of measures aimed to guarantee the non-recurrence of violations. Albeit this elaboration, in the view of this author, overseas the fact that the guarantees of non-repetition were framed under part III of Joinet´s report. This situation started to generate the same former confusion, as this part was specifically dedicated to the right to reparation, and the prior two parts to the right to know and the right to justice correspondently (UN, 1997). Thus, it was not clear if the guarantees of non-recurrence should of be understood as a sub-pillar of the right to reparation or as a fouth pillar among the other three rights.

Moreover, Joinet (UN,1997) defined the right to reparation as the sum of two types of measures, individual and general collective. As part of the first type, he included restitution, compensation, and rehabilitation, and as a part of the second, he included satisfaction measures describing and naming them as symbolic measures intended to provide moral relief (UN, 1997). Yet in Orentlicher´s revised

report (UN Commission on Human Rights, Report of the independent expert, 2005), the words *individual* and *general* were deleted from Principle 34 [former Principle 36]. In other words, she reconsidered the categorization of dimensions for the forms of reparation. Nevertheless, in Orentlicher's report, the confusion as to whether the guarantees of non-recurrence are part of the right of reparation remain.

Another interesting consideration, that demonstrates the ambiguous evolution of such concepts prior to the establishment of the five sub-pillars of the right to reparation, is the title of Van Boven´s first report. The report is titled *Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms.* However, as revealed in the report, the intention was to elaborate on a set of standards to strengthen the whole right to reparation. What is demonstrated with this title, is the doubts that existed in the early 90´s in regards to whether the guarantees of non-repetition and the measures of satisfaction were essential forms of the right to reparation.

Van Boven´s reports of 1996 (UN Sub-Commission on the Promotion and Protection of Human Rights, 1996) and 1997 (UN Commission on Human Rights, 1997) were drafted with the same-title and also Bassiouni´s first report (UN, 2000). The uncertainty regarding these concepts lasted for all those years, regardless of the fact that in Joinet´s report (UN,1997), the right to reparation entitled both individual and collective measures had been determined. It was not until 2003, when Bassiouni and Van Boven, together presented the fourth revised version, that finally the title was modified to *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law* (Shelton, 2005).

The title of the 2003 report, leads this work to the analysis of the evolution of a further notion that, through the years and through the different reports, has also contributed to the development of the right to reparation, as it is now defined, victims' right to remedies.

4.3 Victims' Rights and Victims´ Right to Remedies - a Holistic Interplay

In his report of 1993, Van Boven (UN) considers remedies a duty that every State should afford victims, however, he does not define them. It is likely that this lack of definition is a reflection of the borderless perception between the concepts of remedies and reparations, that it had already been noted

in some treaties and international instruments as aforementioned. In his following reports of 1996 (UN Sub-Commission on the Promotion and Protection of Human Rights, 1996) and 1997 (UN Commission on Human Rights, 1997) Van Boven explicitly refers to the right to remedy however, limits this reference to the affirmation that it includes the right to access to national and international procedures.

This changed drastically with Bassiouni´s report (UN, 2000) in which he proposes a complete list of remedies that compose the victims right to remedy, namely: a) Equal and effective access to justice; b) Adequate, effective and prompt reparation for harm suffered, and c) access to relevant information concerning violations and reparations. Shelton (2005) explains, that this list, demonstrates the effort made by the Rapporteur's to distinguish and reinforce the international binding essence of remedial rights. Shelton believes this to be the only explanation for (Shelton, 2005) why Bassiouni places remedies under the obligation to respect and to ensure respect for human rights and International Humanitarian Law, a topic that exceeds the reparation duty latitude.

Furthermore, this author considers that by defining the enlisted rights as the victims right to remedies, it was the Rapporteur's intention to emphasize a holistic approach regarding the right to reparation. It posits the interlinked relationship between the right to reparation and other victims' rights, as developed by Joinet and Orentlicher, namely, the right to justice and the right to know.

For instance, the right to justice is obviously intrinsically related to the right to access justice (lit. a), as it covers the right of victims to have available fair, independent and impartial judicial remedy, administrative or other proceedings or remedies that may be non-judicial. Furthermore, as explicated by Orentlicher the right to access relevant information concerning violations and reparations (lit. c), represents the remedial dimension of the right to know, as it is based on a jurisprudential construct of the Inter-American System, that has explicitly recognized the reparative effect of the knowledge of the circumstances surrounding enforced disappearance (UN Commission on Human Rights, Report of the independent expert, 2005).

Such interplay of the pillars of TJ, regarding the right to remedies, can be understood as essential to the structure of the TJ model and inter-conditional to the success of the transitional main goals from a holistic approach, i.e., the long-term perspective of sustainable peace after a period of disproportionate human rights violations. In these regard, Novak (2005) emphasizes such interrelation by stating that the

goal of peace can only succeed on the basis of a genuine desire for reconciliation, which at the same time, is pre-conditioned to the development of the pillars of truth and justice. Thus, the development of the pillar of reparation is imperative for achieving a minimum feeling of justice among people (Novak, 2005).

Based on the above analysis, and in particular the work of the special rapporteurs, this author argues that reparation cannot be comprehended outside of the holistic approach, as all its sub-pillars are essential to reach a full reparation. Without one of the sub-pillars, impunity can prevail considering that reparation conflicts with impunity, as it is intended to promote social justice (UN, 1993).

In their final report in 2005 (UN Commission on Human Rights, Resolution 2005/35), Van Boven and Bassiouni, agree with this perception. There in their report they established that a State *shall* provide *full reparation* to victims for acts or omissions which can be attributed to the State and constitute gross violations of IHRL or serious violations of IHL. According to their report, full and effective reparation, *should* include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Orentlicher (UN Commission on Human Rights, Report of the independent expert, 2005) also stated in Principle 34 of her revised report that; `The right to reparation […] "shall" include measures of restitution, compensation, rehabilitation, and satisfaction…´. In this regard, to further understand what both statements intend, it is necessary to clarify as Shelton (2005) explains, that the word *shall* is used only in cases where a binding international norm is in effect, otherwise the term to be used is *should*.

Overall, the abovementioned demonstrates that States have an international binding duty under which they are obliged to provide the five sub-pillars of reparations to allow victims obtain a full and effective remedy. However, the forms or sub-pillars that States may use to fulfill their duty may vary, depending on the varying characteristics of each specific case. Largely because there is no combination or formula of reparation that will be ever able to meet the victims many needs, when such suffering as experienced as a consequence of gross human rights violations. (Letschert & Parmentier, 2014).

4.4 A Box of Tools to Repair the Irreparable

Roht-Arriaza, states that the forms of reparation, or as referred to in this text the five sub-pillars, represent a box of tools intended to repair what is impossible to mend. These tools may be individual and/or collective and projected to provide material and moral reparations, the former ´for the body to

enable survival` and the latter ´for the spirit and the sense of justice, and some sense of a decorous and secure future for future generations` (Roht-Arriaza, 2006)

Indeed, the five sub-pillars can be understood to be structured in a way that provides various models of reparation in order to address various different type of harms under a constant interrelation caused collectively. They inherently interplay, and this is the basis for their strength as the reparation building block (Parmentier, & Sullo, 2014) Their interconnection at moments can make them seem similar in nature, and on some levels, they share objectives and purposes that should be developed within a complex compendium of different types of measures. One of the issues encountered is that these forms are still discussed among scholars, sometimes confuse and sometimes misuse, potentially as the result of the political and juridical struggles that impacted their evolution.

The determination, of the sub-pillars of the right to reparation, has not been an easy road and the vagueness of their conceptualization has been a constant through their evolution. However, there has been some consensus regarding particular issues. For instance, until today, the fact that the different forms of reparation from a paradox entrenched at the heart of an ideal and impossible solution, that proposes to return the victim to the position where he or she would have been if the violations had not occurred. (Roht-Arriaza, 2006) is commonly acknowledged. This is the idea of full restitution or restitutio in integrum, which lies behind an idyllic restoration of the *status quo ante* (Hamber, 2006, p. 455).

Hence the primary principle that guides the structure of any program [administrative schemes] or decision [jurisdictional] on reparation is *restitutio in integrum*. This form, implies that, whenever possible, all efforts should be made to restore the victim to the situation they were in before the violation occurred (2005 Report of the independent expert to update the Set of PACI). In order to erase the effects of the crime, to undo the damage caused (Uprimny-Yepes, & Guzmán-Rodríguez, 2010), to ensure the secession of the activity or conduct that is considered a violation of the victims' rights (ICHR, 2013), to restore the rights that were limited, transgressed or taken from the victim.

Nevertheless, the mandate generates perplexities, (Uprimny-Yepes, & Guzmán-Rodríguez, 2010), as is not possible to restore the negative effect on a persons health, the loss of a loved one, the loss of time,

the destruction of homes (not just houses), the decimation of communities, the disenfranchisement of culture, peace and harmony (Roht-Arriaza, 2006)

Moreover, some scholars have argued that restitution can in occasions turn into re-victimization, especially when the victim before the crime is immersed in a poor and unequal society. In such cases, the idea of social justice in terms of full restitution turns weak and almost cruel, when the return of the person is to a previous situation of material deprivation and discrimination, (Uprimny-Yepes, & Guzmán-Rodríguez, 2010). Considering that it is possible that the contextual and factual conditions of their past situation contributed towards the violation, it is plausible that restitution would eventually lead to the recurrence of the same or new infringements of the victims' rights.

It is not always feasible to overcome such perplexities in most cases of human rights violations, therefore, in order to attempt to redress the harm integrally, the other forms become relevant. According, to the Interamerican Commission on Human Rights(2013, p147) the injured party cannot always be guaranteed enjoyment *in integrum*, in which case it necessary to grant different measures of reparation to ensure it is appropriately matched to the consequences of the violation, including the payment of fair compensation. Also on this matter, the Inter-American Court of Human Rights ruled:

> "The desired aim is full restitution for the injury suffered. This is something that is unfortunately often impossible to achieve, given the irreversible nature of the damages suffered. Under such circumstances, it is appropriate to fix the payment of ´fair compensation` in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered" (Godínez Cruz v. Honduras, 1990, p.8)

This indemnification or compensation concerns measures of a merely pecuniary nature that intend to atone the victims' injuries or losses with an amount of money, which has to be quantified, for either physical and mental or moral damages. Compensation is like a financial reimbursement for damage. (Letschert and Parmentier, 2014). In the terms used by the IACHR (2013, p.47): a full restitution includes "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."

The purpose and scope of compensation concerns provable damages or proximate losses. It incorporates an element of proportionality, it takes into account equitable and measurable considerations in affording reparations (Shelton, 2005, p.375). Henceforth, the difficulties of compensation are related to being able to measure emotional damage, particularly in instances when this damage is being suffered by someone who has not directly endured the crime.

Van Boven, in his 1993 report, cites the case No. 107/1981, of the Human Rights Committee, and remarks how the Committee recognizes that as a result of the death or disappearance of a person, the victim's family members suffer, and for this reason they are entitled to their own right of compensation. Is not only about the injury inflicted upon the immediate victim, but also about the anguish and stress provoked because of it. In the case of a disappeared person, the relatives have the right to know what has happened; otherwise the continuing uncertainty concerning the victims fate continues to causes suffering and anguish.

The committee specifies that the amount or the nature of the compensation determined should not only be based upon physical damage but also the psychological impact. Consequently, the determination of that type of indemnity must be based upon principles of equity. Financial compensation can then take the form of a lump-sum, a pension, or a package of services (Roht-Arriaza, 2006), reimbursements through administrative reparation programs, the payment of school tuition, or collective investments in community projects (Letschert & Parmentier, 2014, p. 6).

It should be considered that for various damages money is not as an effective remedy. There are certain things that money cannot buy and the complexity of reparation exposes the possibility of providing benefits of other type to large number of victims. (UN, General Assembly, 2014). On examples is when victims are recovering from physical and psychological harm, and are in inappropriate living conditions caused by the violations. For these types of damages, victims required special assistance or rehabilitation in order to minimize the harm suffered and to mitigate the violations after effects. (ICHR, 2013, pp. 91-92).

Rehabilitation measures include legal, medical, psychological and psychiatric treatments, occupational therapy, as well as social assistance, aimed at aiding the personal development of those affected.

Rehabilitation can include any services that are needed by the victim in order to ensure that they are provided with the necessary professional assistance to attend the suffered damages.

Nonetheless, as with the other forms, rehabilitation has not always been comprehended this way. As noted by Van Boven, the law adopted in 1991 by the Polish Parliament, concerning the reversion of judgments from the so-called Stalinist period, was considered as a form of rehabilitation of gross violations of human rights by the judiciary. Conversely, in article 22 of GBPR *s*, an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim is? Or was? understood as a satisfaction measure. Similar confusion can be observed in the Friendly Settlement Report of the IACHR from 2013, in which it was stated that the measures of satisfaction are aimed at helping ensure psychological relief from the suffering and weight of the past, however, according to the abovementioned, this is the task of the rehabilitation form.

The lack of clarity that reigned for some years about the determination and conceptualization of the sub-pillars of the right to reparation has been settled for the most part in regards to restitution, compensation, and rehabilitation. Conversely, in regards to the satisfaction measures and the guarantees of non-repetition, as has been highlighted previously, there are still some gaps with their conceptualization. Therefore, the definition of the two sub-pillars may be precise in theory, but in practice, the implementation of measures under within the scope of each form lack of effectiveness.

4.5 Conceptualization Issues: Measures and Guarantees

On the one hand, guarantees of non-repetition aim to prevent victims from suffering further assaults and ensure that are not re-victimized. These guarantees encompass a euphemistic expression that cover all kinds of strategies, measures, and reforms; legislative, administrative or of any other type that seeks to assure the avoidance of similar violent conflicts in the future (Letschert & Parmentier, 2014). However, as explain it by De Greiff, the conceptual issue with guarantees of non-recurrence is that they cannot be understood as a measure. Instead they are a function intended to accomplish the holistic purpose of the four pillars of TJ, the final goal, the never again.

Guarantees of non-repetition are intended to broaden the scope of the four core elements of TJ from a holistic or comprehensive approach, namely, truth, justice, reconciliation, and reparation in the sense

that the four themselves are supposed to contribute: a) “criminal (accountable) justice mainly through deterrence"; b) "truth commissions through disclosure, clarification and the formulation of recommendations with a preventive intent", and c) "reparations by strengthening the hand of victims to claim redress for the past and future violations and to enforce their rights more assertively”. In order to be effective deliberate, diverse interventions from all the four pillars must be combined in order to effectively discourage the likelihood of recurrence.

Guarantees also impulse the interplay and interdependence of the other sub-pillars of the right to reparation, therefore, both BGPR and PACI have established a variety of mechanisms to accomplish non-recurrence as a holistic purpose in itself, not just the prevention of isolated violations. As a sub-pillar of the right to reparation, the guarantee of non-repetition aspires to ensure institutional reform and systematic change (Mani 2005, p. 55), through legal, political, administrative, and cultural measures that seek to foster change by overthrowing the structure in which the violations occurred (ICHR, 2013). Some of these mechanisms are the reform of institutions, the demobilization of unofficial armed groups, the repealing of emergency legislation incompatible with fundamental rights, the vetting of the security forces and the judiciary in order to implement programs for the protection of human rights defenders and the training of security forces in human rights and IHL (Letschert, ¬ Parmentier, 2014)

On the other hand, satisfaction measures are used to restore the victims’ dignity and in some cases their reputation. In the same sense as guarantees of non-repetition, they reinforce the holistic approach towards TJ, and the interrelation of its four pillars as they aim to disclose the truth; and as stated before, truth is the first pre-requisite to justice (ICHR, 2018, p. 123) and, together both are the preconditions for reconciliation (Novak, 2005). In this sense, they also seek to contribute towards the goal of non-repetition, as the symbolic nature entrenched in measures of satisfaction is intended to strengthen the State’s commitment to the non-repetition of similar encroachments (ICHR, 2018, p. 123)) and for this reason problems regarding their conceptualization occur. In practice, as satisfaction measures are usually directed at States in order to prevent future human rights violation and consequently they are often taken as guarantees of non-repetition.

In accordance with UN (Commission on Human Rights, 2005) resolution 60/147, the sub-pillar of satisfaction is composed of eight possible measures that are applicable individually or collectively: a)

Effective measures aimed at the cessation of continuing violations; b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; e) Public apology, including acknowledgement of the facts and acceptance of responsibility; f) Judicial and administrative sanctions against persons liable for the violations; g) Commemorations and tributes to the victims; h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

As shown in principles 22 and 23 of Resolution 60/147, both satisfaction measures and guarantees of non-repetition, are referred to but they continue to be undefined. This leaves flexibility for the relevant authorities to interpret them as sub-pillars of reparation, causing this confusion regarding conceptualization. Additionally, the fact that any measure of reparation can produce a certain level of satisfaction, also tends to underscore the confusion as not all measures that do so, should all be placed in this sub-pillar, or as in vice versa.

Additionally, the non-exhaustive list of the "Principles of Reparations" designed by the two special rapporteurs, has allowed shortcomings into the contemporary structure of guarantees of non-recurrence and measures of satisfaction, in the reparation models. Rather than acting as a reference guide with examples of possible measures or guarantees, it has become a checklist, used by the authorities to structure schemes without ensuring that they are properly adapted to ensure the satisfaction of victims. Factors such as the institutional context, characteristics, capacities, history, cultural circumstances and individual dispositions are vital issues that cannot be addressed from a one-size-fits-all approach (UN, General Assembly, 2014).

4.6 Conclusions

1. The uncertainty regarding the conceptualization of measures of satisfaction and guarantees of non-repetition should be understood in light of the contemporary debates that surround the study of reparations in TJ: a) the prevalence of retributive justice versus the restorative and transformative justice; b) the individual versus the collective measures; c) the judicial versus the non-judicial approaches, and d) "the top-down versus the bottom-up policies perspective.

2. Scholars are questioning contemporary TJ models because of the crucial differences that have been historically under-look between post-authoritarian contexts, from where the model of TJ was bred, and post-conflict situations in which it is predominantly now implemented. These differences between each context where there is a necessity to input a TJ model, alters the implementation and the efficiency of TJ mechanisms such as criminal trials, truth commissions, and reparations programmes because they all depend on specific institutional preconditions; that at the same time, can vary according to each circumstance. There can be no mistake, they cannot effectively redress all kind of violations, in every scenario, as they all were structured under specific settings and aims. (UN, General Assembly, 2014).

3. The contemporary reality of TJ reveals how the dominant approach followed the field is based upon three discourses: a) the prevalence of legal standards concepts developed in relation to the fight against impunity (never again) in the quest for peace; b) the preference and favor of the individual rights of victims rather than a communal perspective of society, and c) the articulation of processes from a central institutional level, which implies that the fundamental decisions are taken from a national and general overview towards the local context (Uprimny-Yepes, & Guzmán-Rodríguez, 2010, p.263).

4. The use of international standards without functional analysis (UN, General Assembly, 2014), have led to paradoxical models, where the rights of victims form the guidelines and not the victims themselves, resulting in their realities, expectations, and contributions not being considered. (Uprimny-Yepes, & Guzmán-Rodríguez, 2010 p.263). So, the key to resolve this dilemma is rooted in the concepts of transformative justice and the holistic approach to the right to reparation, in accordance with the theory of the internal and external coherence for reparation programs, created by the special rapporteur De Greiff (UN, General Assembly, 2014).

5. The limitations of restitution, compensation and rehabilitation measures and the conceptualization issues of guarantees of non-repetition and measures of satisfaction, have led this author to believe that the five sub-pillars are not enough to accomplish a model that could ensure a satisfactory degree of fairness and legitimacy as posited by De Greiff. For long-lasting transformations, a new form, a new pillar is required (UN, General Assembly, 2014).

6. A new form would serve to recognize the necessity of the intervention and the advocacy of the civil society organizations (not just Non-Governmental Organizations) in the domain of State institutional reparations (UN, General Assembly, 2014). This new mechanism would need to allow cultural and community values to influence individual spheres (UN, General Assembly, 2014) because the significant variation of reparation is "from the perspective of the individual to the society at large" (Shelton, 2005, p.22). It would need to seek for the understanding of the victim's logic about the damages, as in many cases, measures that aim for a dignitary and/or sensitive reparation are more valued more than economic or physical. (Shelton, 2005)

CHAPTER V - BEYOND THE SYMBOLISM OF MEMORIALIZATION PROCESSES

5.1 Introduction

The chapter before, is exposes the context of ambiguity that currently brackets the interplay between the five sub-pillars of TJ, and far most the bidirectional relationship between the non-repetition guarantees and the measures of satisfaction. Considering such context, this author reflects on the necessity for more resilience affording and redressing reparations, mainly but no only, between the decision-makers, the beneficiaries and the benefits. Indeed, one could argue that the nature and range of non-repetition guarantees and measures of satisfaction, would allow such flexibility (Shelton, 2005, p. 21), but on the contrary practice shows differently.

Moreover, it is in such paradigm between non-repetition and measures of satisfaction that SRS drive its way into the block building of the right to reparation. Proposing itself as a new opportunity, as new sub-pillar that looks to bring new instruments and mechanisms to the tool box, instead of remaining subjugated under the measures of satisfaction. Nonetheless, this author also argues that is necessary for the sake this proposal, to surpass the misconceptions of the symbolic inside the TJ scholarship. Just as it has been draw in this text, SR cannot be confused anymore with measures that offer a symbolic benefit, it has use of the technical language has to be enhanced because as at the end, just as Hamber stated, all the reparation measures, forms, and sub-pillars are for a large part symbolic (Letschert & Parmentier, 2014, p.6).

The Symbolic Reparation that is being proposed across this text, represents "strong social and community values, (…) provides recognition to victims not only as victims but also as citizens and as rights holders more generally" (Letschert, and Van Boven, 2011, p.161). Now, it has been draw so far, where it belongs in the model of TJ from a holistic approach and furthermore, where can it find its place in the sub-pillar of reparation, yet its origin and current conceptualization finds its grounds on memorialisation processes.

Today, SRs are entrenched in the sub-pillar of satisfaction, and according to the list proposed in principle 22 of the BGPR, but as it was stated before, the big issue regarding the satisfaction measures is that they are not defined, they are just a list. This issue generates furthermore, conceptual problems to define what SRs are. Therefore, in this chapter the author will first analyze in detail the eight

measures proposed by the principle 22, to argue why SRs do not belong to that sub-pillar and furthermore why they should become a whole new one.

Having clarify the abovementioned, the author will further elaborate on them, form of commemorations as from what is going to be explain below, it is the only measure that can be understood as a SR, although as it is conceived by the TJ scholarship currently, is limited. Today this measure is seen by a majority of the TJ scholars as the construction of monuments, statues or plaques. However, since it has been studied by other disciplines, specially the cultural and the memory studies, the term as conceived by the BGPR namely, "commemorations and tributes to the victims" is now understood as a broader category that covers all kind of memorialization processes designed to keep the victims' memory and/or legacy alive. For this matter, this chapter will deep in the concept of memorialization, regarding its importance as a memory mechanism that can reinforce the never again goal.

5.2 The Measures of Satisfaction a Confusing Checking-List

The Principles of Reparation, have been adopted by numerous legal systems both international and domestic. For example, in 2008 the Interamerican System of Human Rights approved the "Principal Guidelines for a Comprehensive Reparations Policy". Following such directive, the two main organs of the system have also subsequently adopted both guidelines, the one produced by the UN and the one adapted for the regional system. The Inter-American Commission of Human Rights (hereafter IACHR), in both editions of the report on the "Impact of the Friendly Settlement Procedure" recognizes that the measures that are decided when the cases are solve using the friendly settlement mechanism, are consistent also with the BGPR (IACHR, 2013: IACHR, 2018).

Based on that consistency, one could expect that the IACHR also in terms of measures of satisfaction will follow strictly the principle 22 of the BGPR, however, it does not. Based on the experience that this organ has had with the use of the friendly settlements, has come to the conclusion that from the eight-different type of measures of satisfaction only five could be understood as such. This author, shares the position of the IACHR. According to this Commission the measures of satisfaction are: a) acceptance of responsibility and public acknowledgment; b) search for and restitution of the remains of victims; c) official declarations restoring the victim's honor and reputation; d) enforcement of court-ordered and administrative sanctions against those responsible, and e) tributes and monuments to honor the victims.

Although the IACHR does not formally explain why it reduced the list, this author then, would elaborate on the possible arguments that has led the IACHR to sharpen the conceptualization of the satisfaction sub-pillar.

The IACHR excludes lit a, namely: "the effective measures aimed at the cessation of continuing violations." Probably the argument here follows the perspective that has led the scholar Shelton to criticize its establishment as a measure, meaning, the cessation of a violation of a human right is not a measure is an international obligation. In the case of lit h, namely, "the inclusion of an accurate account of the violations that occurred in IHRL and IHL law training and in educational material at all levels," its exclusion is probably based on the fact that it refers to a complementary action of education, and according to the position of IACHR, educative measures belong to the sub-pillar of the guarantees of non-repetition (IACHR, 2018). This author shares the IACHR position on this regard.

Additionally, the IACHR does not count lit b, namely "the verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations," as a measure of satisfaction. Concerning this lit., this author argues that it should be understood and used as a condition, pertinent to be applied for all the measures that compose the satisfaction sub-pillar, rather than taking it as a measure of it.

Having study, and agreed with the list formulated by the IACHR, this author considers that to define the measures of satisfaction is an imminent necessity for the TJ model. Without clarification in this regard, the law and policy makers, as well as the judges will continue committing mistakes when designing this type of measures. Therefore, a definition proposed by this author is:

The satisfaction measures are those who aim for the creation of state mechanisms, that seek to produce a metaphysical benefit for the victims. This type of benefit is symbolic, but it does not create a symbol, only a sense of relief or satisfaction. The satisfaction measures have an institutional nature, as they look for the acceptance and repentance of the establishment, in regards of the systematic violations of

human rights. Therefore, the satisfaction measures aim for the vindication of the victims' dignity and their reputation through the verification of the facts and the full and public disclosure of the truth.

This proposal aims to recall the fact that all the measures enlisted under principle 22 of the BGPR, are characterized by the need of the state apparatus intervention to ensure its effectiveness. In other words, they have to be generated and structured exclusively from a top-down perspective. Moreover, the proposal underlines the fact that the satisfaction measures do not create a symbol as define by Durand and explained in the second chapter. They can be meaningful, and so, they can deliver a symbolic benefit but as it has been explained that does not makes them a symbolic reparation.

In fact, this author, firmly considers that the only measure from the list of principle 22 of the BGPR that can be understood as a SR, and because of that reason it does not belong to that sub-pillar, are the "Commemorations and tributes to the victims" also call by the IACHR as "Tributes and monuments to honor the victims". For this author, is clear that these types of measures belong to the new sub-pillar of SRs, and they should be referred as memorialization processes. To call label them as commemorations, tributes or monuments limits their nature and the possibilities of what a memorialization can be. As it would be explained in the next chapter, commemorations are just one more of the different forms of memorialisation's.

5.3 Commemorations, the open door for memorialization.

In regards to what can a commemoration be, numerous proposals have been drawn from the different disciplines and perspectives studying memorialization process, thus one precise explanation as what can be understood as a commemoration has also been drawn by the IACHR. According to this Commission (IACHR, 2018) commemorations can be divided in four categories: a) the construction of monuments in the victims' honor; b) the elaboration of documentaries that dignify the memory of the victims and its relatives; c) naming public spaces and buildings after the victims, and d) and installing commemorative plaques.

According to Runia, a commemoration opposes history, in the sense that the latter is comprehensible because it includes us; we are part of it because we are the ones who made it. However, when history lacks adequate reasons for explaining events, they become histories, and commemoration becomes the expression of the agents that narrate those histories. Therefore, commemorations are an attempt to

account for the unimaginable and incomprehensible, but also, they are intended to separate the ones that have done the commemoration, from the ones that produced the events that needed to be commemorated. Commemorations confront society and provoke self-questioning: "was it really we who did it?" and "Who are we that this could have happened?" (Runia, 2006).

Kasabova agrees with Ruina to some extent, but argues that his rejection of a representationalist account of the past, is based on an endurantist presentism position that annuls the possibility of present commemorators to re-identify, to conceive themselves as past agents of the incomprehensible events. The endurantist claims "that past events are wholly present at any moment of their existence, so they are continuants without temporal extension," and presentism, has the view "that only the present is real and that, necessarily, everything is present" (Simons, 2008).

Such positions confuse two different but interconnected concepts, occurrents, and continuants. The former refers to things that persist but have temporal and spatial parts, like wars, deaths or burials. The latter refers to physical objects that have a spatial location and endure through time like books, memorials, or tombstones. Consequently, from the endurantist view, as there are no temporal parts, everything exists as a whole then occurrents are temporal parts of continuants (Simons 2008). As explained by Kasabova, this confusion is problematic within the nature of commemorations (as continuants), because if they are not useful to grasp the past, then they would neither serve to grasp what is happening at present (Kasabova 2008, p.332).

In this sense, Kasabova considers that continuants have a genidentity, that is, an "existential relation holding between their temporal parts or phases, and their identity across time in terms of their genesis from one moment to the next" (Kasabova 2008, p. 333). To put it succinctly, the "occurrent can instantiate a continuant as a whole because it is an exemplary or defining part of that continuant" (Kasabova 2008, p. 333) e.g. the death of a soldier is no temporal part of his/her tombstone, but they have a ground-consequence relation, "without the occurrent ´soldier's death` there would be no continuant ´tombstone`" (Kasabova 2008, p. 333). In this logic, the continuant can be representational and contribute to the retroactive reconstruction of the past (memory), because it transmits the sense of the actions and events that occurred, because it instantiates the sense of an occurrent as an exemplary component (Kasabova 2008, p. 333).

How can commemorations as a continuant deal with the past? As proposed by Kasabova, the answer is entrenched in its etymology. Words like memory, memorial and commemorations are Latinisms derived from the Greek nouns mnemon and mnemosyne (Kasabova 2008, p. 336). The latter, explained by the scholar, "personifies the conservation of memory by registering past events and bringing them back into the present" (Kasabova, 2008, p. 336) as inverse to Lethe, understood as the loss of memory. Commemorations were a relevant aspect for mnemosyne in past societies, where the regime of memory was ruled by oral means; as opposed to contemporary societies ruled by a regime where memory in the words of Hartog "is obliterated by the written word" (Kasabova, 2008, p. 333).

What these scholars explain, shifts the attention towards a more profound question elaborated by many scholars: how does memory deal with the past? According to Kasabova, memory allows for vivid recognition, in the sense of cognitive access to the past, by situating past episodes in a spatio-temporal context and those are the conditions for the re-identification or representation of past actions (Kasabova 2008, p. 336). When cognition is possible, societies acquire chromesthesia (Hacking, 1995, p. 249), the sense of time awareness, the reason why we can bring experiences from the past to the present, within consciousness of who they are, what they did and what their future will be. Hartog defines such vivid recognition, such faithful reproduction of the past events, as collective memory (Hartog 2012, p. 208-214).

5.4 The Roll of Collective Memory in Transitional Processes

The term collective memory, coined in the framework of a modern theory of culture, is an academic construct originally from the 1920´s. Maurice Halbwachs first used it in his sociological studies on the mémoire collective, as a part of culture, tradition and social institutions. According to Halbawachs, collective memory encompasses individual memories while remaining distinct from them (Czarnota 2001, p. 119). He bases his theory on another concept les cadres sociaux, the social frameworks, meaning the people surrounding us. Without them, without human interaction, individuals are denied access to collective phenomena as language and customs, but also to their own memory. The reason for this, is socially natural because as social creatures, humans usually have shared and lived experiences in the company of others (Erll 2011, p. 15).

Social frameworks in Halbwachs´ theory "are thought patterns, cognitive schemata, that guide our perception and memory in particular directions," (Erll, 2011, p. 15) constituted from diverse

phenomena of culture, material, social and mental, as the primary sources of a shared knowledge. Social frameworks express, decode and transfer the contents of collective memory through individual acts of memories (Halbwachs, 1992, p. 40); thus, memory is not a purely individual phenomenon. It has a collective dimension that nourishes the group with different experiences and thought systems. Collective memory is reflected through the individual acts of memory, since "each memory is a viewpoint on the collective memory" (Habwachs, 1980, p. 48).

Halbwachs considers interaction and communication between fellow humans as fundamental to acquire knowledge, collective concepts of time and space that build a collective symbolic order that allows us to interpret and remember past events. Remembrance is a central function within the framework of collective memory, the pivot that reinforces identity formation and belonging attachments. The things that are remembered by the group follow their present self-image, self-interests, and self-needs; therefore, the process of remembering is an exceptionally selective and reconstructive manner; in the same way, as when a rememberer adopts the collective memory, it is because it belongs to the group (Erll 2011, p. 17).

However, why are the understanding of collective memory vital for transitional justice? Czarnota argues that collective memory has acquired special relevance in the second half of the twentieth century, in particular in States on transitional processes, developing models to deal with painful pasts. In those States, the law is being schemed towards the preservation and the re-shaping of an identity. Meaning, legal mechanisms are being used "to control the present and the future by expanding itself into the past through an attempt, if not actually to regulate collective memories, then at least to provide a legal framework that might allow the modification of collective memories" (Czarnota, 2001, p. 115).

During the process of post-conflict state-building or democratization, modern nation-states in a reflexive reaction have frequently been involved in the re-designing of the past, in the re-writing and the re-interpretation of histories through normativity (Czarnota 2001, p. 119). For example, in the Holocaust, the Cambodian genocide, and the genocide in Rwanda, the new ruling government had endorsed inputs for a new collective memory establishing the bases for global collective memory (Balint, 1997, p. 231-247).

Czarnota denotes how collective memories are in the core of violent conflicts, mostly ethnic, religious and political. They generate divisions in society and communities, especially fiercely disputing over the definitions and identities of groups, which become factors of empowerment or disempowerment (Czarnota 2001, p. 121). Therefore, based on the implementation of legal standards and seeking a future social order, States influence the internal historical narratives of the communities imposing them upon the past, to show continuity. In the words of Halbwachs, they procure the creation of new social time frames and spatial borders (Czarnota 2001, p. 119).

Nevertheless, it is often in this context that the past thoroughly compromises conventional law and ordinary legal institutions. Moreover, most ordinary legal systems tend to prioritize individual rights over collective rights with a disastrous effect on the historical claims of the community when using the ordinary ways to translate a social discourse (Czarnota 2001, p. 124-125). Hence, dealing with collective memories requires new institutional structures with special characteristics able to respond at the same time to both, the need for radical change and the need for substantive continuity. On that matter, Czarnota concluded that these core issues are best addressed by the unique institutions developed under a transition period, usually quasi-judicial (Czarnota 2001, p. 124-125).

In fact, the PACI from the beginning highlighted the importance of collective memory under the scope of the right to know. Joinet in his report (UN, 1997) stated that the objective of the Duty to Remember -later renamed by Orentchiler as the duty to preserve memory- consisted in the safeguarding of historical narratives from revisionist and negationist, and underlined the value of the knowledge of the history of oppression, by categorizing collective memory as the people's national heritage. Also, in this regard, The Chilean National Commission for Truth and Reconciliation also saw the importance of collective memory. In their report it can be read (Zalaquett 1992, p. 1433):

"Truth was considered an absolute, unrenounceable value for many reasons. To provide for measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however different these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring."

5.5 Memory: Collective, Communicative and Cultural

The above, allows us to understand that the discourse of memory, as marked by Huyssen, is not and cannot be, distant from the discourse of justice and human rights. In fact, they have a necessary relationship entrenched between the nation-state, its citizenship issues, and national traditions. Contemporary memory studies and human rights fortify and supplement each other by strengthening common goals, as well as by mitigating their own deficiencies. They both seek for the acknowledgment of past wrongs and the purview of correctness towards the future. In other words, they both intend to prevent "traumatic memory, from becoming a vacuous exercise feeding parasitically and narrowly on itself" (Huyssen 2011, p. 608-609).

The issue with memory is its fragility which is related to its lack of strong normative juridical dimension that could endorse its concerns with the past while effectively producing effects on the present (Huyssen 2011, p. 612). An illustrative example was presented by Van Boven in his 1993 report, on the need for a moral compensation for the victims of the slave trade and other early forms of slavery.

Van Boven recognizes how difficult and complicated it would be to uphold a legal duty to pay such compensation; instead, he makes an abstract recommendation about an "effective affirmative action [that] should be carried out until ... the members of these groups experience no further handicaps or deprivations". It seems like he was limited to just foster a measure for the dissemination through the media, history books and educational materials of "an accurate record of the history of slavery, including an account of the acts and the activities of the perpetrators and their accomplices of the sufferings of the victims." (Van Boven 1993, p. 12).

In regards to the shortcomings of human rights before memory, in additional to the already mentioned, incapacity of ordinary law to absorb the claims of group/cultural rights; Huyssen (2011) remarks how "memory discourses in the public sphere -in journalism, films, media, literature, arts, education, and even urban graffiti-" have been capable of activating trials for human rights violations. Some examples from De Greif underline the importance and necessity for civil society activism to push for human rights justice. Through their work, organizations like Madres de la Plaza de Mayo in Argentina, Vicaría de la Solidaridad in Chile, and the Centre for Human Rights Legal Action in Guatemala, were able to

perpetuate the validity of their claims through time, by keeping the vivid memory of the horrors suffered. The Special Rapporteur exalts their work, because without their persistence, human rights law alone would not be enough .

Once again, Huyssen finds the answer to the void between human rights and memory, in collective memory. He explains that just as the Nation is the social framework for providing rights, the nation can also be a privileged space to define collective memory. However, Huyssen's referral grasps an anthropological point of view, aiming to exalt the homogeneity of the collective, of any culture capable of building up homogeneous claims (Huyssen 2011, p. 615). Although he recognizes the challenge for such homogeneity in a world with new forms of immigration, an increasing flow of migration, a diasporic memory mixings and the number of group of memories with diverse focus areas or struggles: "indigenous peoples, language rights, the gender inequality, sexual rights, citizenship rights, and political rights for immigrants" (Huyssen 2011, p. 616). This is not an easy task because "memories clash just as rights claims confront" even at the national level (Huyssen, 2011, p. 615).

The usage given to collective memory by Huyssen opposes the notion of Halbwachs` of a merged collective and individual memory and is closer to the work of Jan Assman (2008), who divides collective memory in two different modi memoranda:

> a) Communicative memory: Refers to the memory that we use an obtained in our daily life. It does not depend on any institutions or requires technical knowledge to obtained, because is popular not formalized, and it does not need special systems to learn, for its transmission or interpretation. We accumulate every day, everyone has it, for just being and interact and communicate with others. It is not represented in any especial forms of material symbolization, is renovated and it does last more than eighty years, or three interacting generations. (Assmann, 2008),
>
> b) Cultural Memory: It is exteriorized, formalized, materialized and objectified in different elements and practices that specifically belong to each culture and each epoch. Through its cultivation it shapes society's self-image. It is stored away in stable symbolic forms that, do not easy mutate, like de language or the manners do. On the contrary, its stable and not transcendent-situation allows the collectivity to rest upon the communal knowledge, located for the most part (but not exclusively) in the past. (Assmann, 2008).

Asman further explains that by cultural memory he is not attributing a human function to human-mind-less-things. Instead, he is broadening the notion of transmission of memories which exist not only because of human interaction, but also because of the material contact between a remembering mind and a reminding object. Things are outward symbols capable of triggering the memories that they carry and have been previously invested into them by humans (Assmann 2008, p. 111).

Nonetheless, it has to be observed that the material objectification of Cultural Memory, with a fixed set of contents and meanings, like almost every other academic theory, was based on former works of other scholars: Aby Warburg, whose interest was the memory of art and the readoption of vivid images and symbols in different epochs and cultures, and Pierre Nora, who draws on the idea of collective memory to describe the numerous popular and political forms of addressing the past (Erll 2011, p. 13).

Warburg theory hinges in pathos-formulas, a kind of imagines agentes with affective properties he attributes to cultural symbols, which give them a special power to activate memories and persist throughout time. To explain that special power, he uses a figure called the pathos formulas from a model structure by the memory psychologist Semon. Warburg attributes to this pathos formulas the capacity to store mnemic-energy and to be able to release it under other different historical circumstances of time and space. Based on this, he develops the concept of cultural memory of images or social memory, which as explained by the scholar, is the memory of symbols upon where culture rests, because symbols are a cultural energy-store (Michaud and Hawkes 2007).

Warburg's main interest was the highly expressive visual culture, which he relates to the unconscious, mental processes of construction of identity by social groups, based on their present needs but also related to their past. Hence, his concept of social memory accommodates to historical variants and inherent footprints that maintain the sight of its essence, of its origins. He also claimed that the works of art (objects + symbols) are the central medium of cultural memory, because of their potential: a) to survive for long periods of time, b) to cross great spaces, c) to evoke memory, and b) to create cultural continuity. These last two characteristics served as the root to his argument that culture and its transmission are products of human activity (Erll 2011, p. 21-22).

Nora´s theory is based on a seven-parts work he edited between 1984 and 1992, focused on the recollection of les lieux de mémoire of the French nation. So, the majority of his considerations have a nationalistic perspective. However, if his work is read from a non-local approach, as some authors have said, it is the most prominent example of a mnemohistorical approach (Erll 2011, p. 23). He claims that during the twentieth century there was a rupture that fragmented the fostering of a collective identity in France, separating their past and present. That breach, as understood by Nora, was too high for the contemporary observer of the sites of memory, for whom those sites represented nothing but nostalgy (Carrier 2000, p. 37-58).

Les lieux de mémoire for Nora include "geographical locations, buildings, monuments and works of art as well as historical persons, memorial days, philosophical and scientific texts, or symbolic actions," e.g. "Paris, Versailles, and the Eiffel Tower are sites of memory, but so are Joan of Arc, the French flag, 14 July, the Marseillaise, and Descartes's Discours de la méthode" (Erll 2011, p. 23). Though according to Nora, in order for les lieux de mémoire (events or objects) to be identified as such, they need to fulfill certain conditions of three dimensions of memory material, functional, and symbolic:

a) Material dimension: Cultural objectification in the broadest sense of the term which includes not only tangible things, but also refers to those moments that break a temporal continuity. For example, commemorative minutes of silence before sports events or the Muslim call for prayer five times a day (Erll 2011, p. 24).

b) Functional dimension: Objects before becoming sites of memory that they had or were created for a particular purpose. In this sense, objectification justifies a function in the society of existence. For example, famous books that later became iconic, but were first created with a recreational or academic purpose. In Colombia, "One hundred years of solitude" from the Garcia Marquez is a book that nowadays, represents a whole country, not only because of its worldwide reconnaissance, but because even some people relate to the town described in the story "Macondo" as Colombia itself (Erll 2011, p. 24).

c) Symbolic dimension: This is what makes a cultural object a site of memory, so in addition to its function, the objectification must have a symbolic signification, which has to be intentional. Either attributed from its creation or acquired later (Erll 2011, p. 24).

From Nora´s perspective, because of the "breakdown of the connection" between the lived "group-nation-specific" and the "identity-forming-past," sites of memory are now understood as an "artificial placeholder for the no longer existent, natural collective memory" (Erll 2011, p. 23). Assmann´s, on the contrary, recognizes them as external symbols that groups construct, because they do not have a memory; therefore he considered monuments, museums, libraries, archives, and other mnemonic institutions, as reminders, and that is the cultural memory (Assmann 2008, p. 111).

5.6 Conclusions

The different academic works presented above, can lead to question one why is it essential for TJ to trace academic perspectives on collective and cultural memory? The answer in this case, is bifurcated. On the one hand, they nourished with scientific and/or academic knowledge the right to reparation and subsequently, the sub-pillars of satisfaction and the new proposed in this text of SRs. On the other hand, they underscore the undermined importance given to commemorations, memory sites, and memorials, mainly from the legal/juristical academy.

Some scholars have argued that "memory of past injury can only be a weak substitute for justice," (Huyssen 2011, p. 612) and this author would argue that such an assumption is feeble. From a holistic approach, such statement undermines the importance of alternative mechanisms created through the evolution of TJ to effectively engage past atrocities. Moreover, one could argue that it doubts the effectiveness of truth and reconciliation commissions, of traditional trials.

Conversely, the work of these scholars raises awareness on the importance of memory mechanisms that have a legal provision base, intended to exert an international duty of States, the duty to remember. They are mechanisms that favor the struggle of victims´ not to forget, and not to let oppressive systems accomplish their goals to obliterate all memory of their victims. Memorialization is one part of the multiples responses that societies in transition have to deal with in human rights abuses of prior regimes.

CHAPTER VI- MEMORIALISATION: A BLUNTED TOOL TO CONFRONT OBLIVION

6.1 Introduction

The text will further deepen the importance of the creation and appropriation of symbols in any reparation model through processes of memorialization and artistic/cultural practices. This chapter draws on the importance that both aesthetic processes to fulfill the objectives of the pillar of reparation within the designing of a TJ model from a holistic approach. It will start by stressing the current conceptualization of memorialization, and then it will draw on the importance of cultural heritage as a concept to be taking into account by the TJ scholarship. These two concepts, in a complementary way are the main elements of the sixth sub-pillar of the right to repair. In that regards, towards the end of chapter the author will address a conceptualization of SRs as such and at that point the reader will finally understand why this author has stated that SRs are the missing link that can ensure the effectiveness of the right to reparation and reinforce the internal and external coherence that according to De Greiff´s theory, any program and/or judgment should consider when structuring an ideal model of reparation (De Greiff, 2006).

The term memorialisation refers to the process of creating a cultural memory; it covers a variety of initiatives that can serve as a breadth of means from national to religious or political patriotism. Advocates for memorials concur on the valuable contribution of these type of processes in the rebuilding of broken societies, mainly because of its role to confront the oblivion of the past, within the scope of a transitional model (Brown, 2013). There, memorials stand as relevant policies of truth-telling and accountable trials, all mechanisms intended to seek for the social justice of victims and to reach sustainable and stable peace through an interaction between the wrongs of the present and the will for the future (Brett et al. 2007).

Following the report on memorialization processes presented by the Special Rapporteur in the field of cultural rights, Farida Shaheed, they can be divided into two categories (UN Human Rights Council, 2014): a) commemorations and tributes, and b) public memorials, and memory sites. The first two are understood as public activities of homage or remembrance that encompass public apologies, reburials, walking tours, parades and temporary exhibits and rituals among others. The second two are distinguished for being objects or landmarks physically representational, placed in the public sphere (Brett et al. 2007).

Memory sites or authentic sites are for example concentration camps, former torture and detention centers, sites of mass killings and graves, and emblematic monuments of repressive regimes. Public memorials or symbolic sites are related to the permanent or ephemeral construction of monuments carrying the names of victims, renamed public spaces, squares or streets, buildings or infrastructure, installing commemorative plaques and museums of history/memory (Brown, 2013).

In this context, memorialization processes that are of transitional justice concern are those designed to evoke specific events that comprehend a period of gross violations of human rights like wars and conflicts, dictatorships or mass atrocities. Late in the 1990´s, the transitional justice paradigm recognized memorials´ capability, as political and sociocultural measures intended to contribute to the never again goal, to promote a democratic culture, to reinforce reconciliation processes, and likewise, generate societal guarantees against further tragedies (UN Human Rights Council, 2014). General objectives projected to be realized, as a result of the processes of interaction among society, with the aspiration of causing a set of reactions from its individuals. Personal reflection, mourning, spiritual solace, pride, anger, sadness, learning or even curiosity regarding the representation of the past and their self-identification within a contemporary context (Brett et al. 2007).

6.2 Memorialization from a Hollistic Approach

In any case, memorialization processes, as provisions that belong to the pillar of the right to reparation, also need to be understood from a holistic approach. Hence, because of such nature, the capability of memorialisation to provide an effective remedy, to accomplish the general objectives and to construct remembrance, is conditioned to act under a framework that combines this type of process with other sorts of measures from the other sub-pillars and pillars (Blustein, 2012).

If such a holistic model is structured, fixing memorialization processes as one more of a set of mechanisms intended to repair the irreparable, then regardless of their design, form or shape, they can be assigned with one or more aspirational purposes of different types, such as (UN Human Rights Council, 2014: Blustein, 2012):

a) Private or personal: i) to deal with the victims' suffering causing powerful moral, psychological, and social effects, ii) to attend the direct and indirect needs and losses

suffered by victims and their communities, and iii) to honors the victims´ lives and deaths.

b) Reflective: i) to validate victims´ moral standing and political status, ii) to acknowledge the facts as resistance from forgetting and/or to protest against the past establishment, iii) to give meaning to the suffering of families and survivor communities, and iv) to serve as catalysts for social change.

c) Public: i) To reconstruct social and/or political relationships, ii) to express solidarity, iii) to endorse a moral regeneration from social recognition, iv) to channel reconciliation processes of former enemies, v) to stimulate the building of sustainable peace after long periods of violence and, vi) to integrate bystanders in the transitional context;

d) Educative: i) to generate public, educational and historical debates, ii) to vindicate victims´ truth, to oppose official narratives intended to minimize State Responsibility or demonize the victim's role

e) Group Identity: i) to construct national identities, ii) to affirm predominance over a territory, iv) to gather people around one emphasized identity and justify various political agendas.

However, it is possible in any case that memorialisation may focus more on one goal rather than another, because of the multiplicity of memorial entrepreneurs, and that could exacerbate the spiral cycle, increasing tensions and mutual suspicion among the community immerses in the process. Memory discourse can be polemic, discordant, and generate divisions among stakeholders and/or the government, especially when its outcome shadows the victims' struggles.

Thus, memorialisation processes should take into account the narrative of marginal voices and their suffered inquires, but also the multiplicity and diversity of them, in an attempt to close the representational gap with people´s past. Memorialisation processes should be designed to not leave space for misguided interpretations between different groups in the community involved. Otherwise, discussions can originate. Here are some of the most common, categorized into three groups based on:

a) For their meaning or purpose: i) To justify or proclaim moral, legal, ethnic, and ideological superiority against an opposite side of the population; ii) To self-victimize and/or hoist martyrdom ; iii) To impose definitions of perpetrators and heroes ; iv) To establish

categories of victims, originating in a kind of competition in victimhood , and v) to carry nationalist propaganda that manipulates symbols and revitalizes emotions based on historical or ancestral rights (Todorov, 2004: Commission for Historical Clarification, 2013: UN Human Rights Council, 2014);

b) For Societal Challenges: i) The contemporary multifaceted and diverse societies on transition, with ethnic, national or linguistic backgrounds, religious or political ideology; ii) The historical discriminations and focused disenfranchisement of minorities, indigenous peoples, women, or other groups that have suffered permanent exclusion; iii) The memorialization tyranny as a consequence of the excessive use of the mechanism and the continuous multiplication of memorials (Kattan, 2002: UN Human Rights Council, 2014);

c) For Constructing Process: i) Which particular narrative should be assumed, exclusive or inclusive? ii) When should it be forged or erected, immediately following the events or after several generations? iii) For how long? iv) Where should it take place or be placed, in an authentic site or in a publicly accessible and visible place? v) Which is the ideal process to consult and who should be consulted, and about what exactly? vi) Who funds the project and who should be involved and how? Vii) How much autonomy should artists and designers enjoy, and who should lead such initiatives, the State or civil society? (UN Human Rights Council, 2014)

All these issues framed within the memorialization processes are the dilemmas that in practice show the shortcomings of this mechanism, mainly because of its lack of legal framework. Though, memorialization as it has been so far developed, (mainly by memory studies, anthropology, sociology, political science, history and philosophy) pictures a frame of issues and challenges that fortify the arguments of this author around the historical undermining of its capability. It is treated as a second-class measure from a non-exhaustive list of the sub-pillar of satisfaction.

Recognizing these flaws, this author argues that if memorialization processes are to occupy the relevance they deserve among the model of TJ from a holistic approach, then this mechanism has to be acknowledged and raise as part of the sixth sub-pillar of the right to reparation, as a form of SRs. Nonetheless, for this to happen, the concept of memorialization by itself is not enough, it needs to be understood and complemented with the notion of cultural heritage, and especially its category of the intangible.

In other words, memorialisation processes are crucial under the framework of TJ from a holistic approach, but they need to be complemented with artistic/cultural practices that have the potential to contribute with some of the objectives that are pursue with a full reparation, i.e., the preservation of the memory, the disclosure of the truth, the restoration of the dignity and the non-repetition among others.

6.3 The Spawning Arguments of Memorialization in TJ

The sum of these two concepts, memorialization processes and cultural heritage, constitute the sixth sub-pillar of SRs. Thus, the current reality of these two concepts is their prematurity and connectionless. In fact, it is of the position of this author that memorialization as a mechanism of transitional justice has traditionally been under-regulated, under-acknowledged, under-estimated and under-valued by the legal academics of TJ (Brett et al. 2007). Mainly due to the incorrect framework under the measures of satisfaction, distant from cultural rights. Such circumstances may be rooted in many factors; here they are presented in three arguments.

First, memorialization has been traditionally understood just as commemorative ceremonies and monuments construction, but as Shaheed accurately highlights in her report, "monuments do not always correspond to the wishes or culture of the communities concerned" (UN Human Rights Council, 2014). This republican tendency is a backlash from the period between 1989 – 1995, the "age of commemorations of second world war" as named by Annette Wieviorka (1993).

Back in those days, as explained by the scholar, monuments and ceremonies were political gestures with a specific purpose according to the individual or body that needed them, so prescribed with a monolithic reading that aim for officially writing and rewriting history (Lifton and Olson, 2006). In most of the cases, with a perspective of seeking immortality of heroic acts. After WWII the intention was to acclaim the international campaign that frees the world from the European menace of National-socialism, with no regards to the toll of civilian casualties. An example of this is the bust of the commander of the Royal Air Force Arthur Harris, unveiled in London in 1992, celebrating the bombing of Dresden, a war-action that many have portrayed as militarily unnecessary (Carrier, 1996).

Additionally, the use of monuments has also become unwanted. The purpose given to them faints as time goes by, and the preservation of memory is blurred. The odd idea of their long-lived capacity to

maintain and transfer memories to new generations deposes before scientific studies that give a count of how knowledge of the past becomes scarcer and vaguer over the years. Even if it is "discussed in everyday communication, it has limited depth in time, reaching not beyond three generations," or in "literate societies living memory goes no further back than eighty years"(Assmann, 2008).

Interestingly, Vansina ass stated in Assman´s work emphasizes that on the contrary, traditions intensely formalized and institutionalized in the forms of cultural practices. As narratives, songs, dances, and rituals among others, endure for more extended periods as they are continually revised in stages of initiation, instruction, and examination. Moreover, he explains that those traditions are cultural memory based on fixed points in the past, but a past that is not preserved as knowledge. Instead, the knowledge of the past is cast in symbols when related to a concept of identity or tradition, which the develops the properties and functions of memory, and effectively continues evealing in the changing present (Assmann, 2008).

Conversely, if such time frame and the importance of the transferability of memory are not considered, then the concept of culture in "cultural memory" would be limited to what Aleida Assmann calls 'culture as monument.' (Assmann, 2008). Just as it occurs nowadays where monuments are merely a subset representation of the societal construction of versions of the past. The development of knowledge of the past in symbolic breadths, the cultural attribute in the anthropological sense as understood by Cotterrell (2006), meaning the general social practices, beliefs, traditions, shared understandings and values encapsulated in a specific environment.

Secondly, as a result of the institutional contour that has been given to memorialization, the mechanism has been driven from a top-down perspective, especially in the judgements of national and international courts (Sierra, 2015), excluding initiatives that are originated from bottom-up, from activists, artists, political groups or communities willing to engage with the overlooked memory of victims and to confront State denial policies ((UN Human Rights Council, 2014).

One of the reasons for such perception is the fact that memorials have been relegated to the cultural sphere as artistic objects or to the private sphere as personal mourning. The result is that a holistic approach does not consider them under a transitional justice perspective and does not give them the importance of other mechanisms that could contribute a broader strategy for democracy building, as

truth commissions, accountable trials or institutional reforms. “Memory sites fall between the cracks of existing policies for historic preservation, transitional justice, democratic governance, urban planning, and human rights (Brett et al. 2007, p2).”

Memory and cultural studies have recognized the importance of artistic practices and initiatives in remembrance, yet rarely the question of the role of artistic forms and their societal impact crosses into the transitional justice field. Even Shaheed in her report on memorialization, recognizes artworks, films, documentaries, and literature as a third category of memorialization processes, naming them artistic initiatives or cultural expressions. Although, she also explicitly places them outside of the scope of her report.

Thirdly and finally, the transitional justice model from a holistic approach has been shaped from the perspective of combating the impunity of civil and political rights, neglecting the reach of cultural rights. The PACI was a study entrusted to Joinet with a clear idea of elaborating mechanisms from an individual approach, different from the collective perspective of the study entrusted to Guissé on the impunity of perpetrators of human rights violations of economic, social and cultural rights. Henceforth, in the outcome of the former, the use of memorial practices was projected towards the violations of the right to life, physical integrity and liberty among others.

Although, with the evolution of transitional justice, memorialization processes have involved the exercising of other rights. Namely, the right to religion and belief (article 18), freedom of expression (article 19), peaceful assembly (article 21), and association (article 22) from the Covenant on Civil and Political Rights. Also, others from the Covenant on Economic, Social and Cultural Rights like the right to participate in cultural life and the right to artistic freedom and creativity (article 15).

Furthermore, with the evolution of transitional justice, there is also an acknowledgment of what exterminates extermination, paraphrasing Wieviorka, (1993) question. Not only civil and political rights, but also, like it happened with the Shoa in Europe along with the attempt to exterminate the Jewish community, their Yiddish language became a dead language. Still taught in schools and preserved in literature, but no longer a language transmitted orally, a part of Jewish identity and culture.

Besides, the evolution of TJ has been linked to the evolution of cultural heritage, especially in regards to reparations in the field of memory and symbolism. Both interconnected through the negative and positive influences that memorialized narratives have on social interactions and people's self-identities, as well as their perception of other social groups. Moreover, the role of cultural rights has become significant concerning reconciliation strategies and restorative justice (Hazan, 2012).

6.4 Cultural Heritage, the Needed Complementary for Memorialisation

These three arguments are the foundational basis of the hypothesis drawn for this text. They are well-established reasons for an intrinsic but overlooked relationship of memorialization. However, if the memorialization processes will be complemented, by the integration of the notions of cultural rights and the use of artistic practices, in regards to the creation of a collective memory, then most of the issues that currently scholars see on memorialisation can be overcome. Nevertheless, one has to admit that such conceptualization is still in a premature stage. Just as it has happened with memorialisation, the notions of cultural rights, and cultural heritage are contemporary notions in the need of further inquiries, moreover within the TJ scholarship. It is of the understanding of this author, that both concepts, critical for the development of SRs.

The perspective of this author aims to broader the concept of memorialization, stock on the perspective of building monuments and memorials comes from the conception of highlighting the importance of the right to access and enjoy cultural heritage, on the basis of non-discrimination and irrespective of ethnicity, race or any kind of group affiliation as a human right. Furthermore, as it has already been stated, rest on the legal basis of its intrinsically connection to the right to participate in cultural life established in article 15 of the International Covenant on Economic, Social and Cultural Rights (UN, 2011).

In such terms, both rights protect the possibilities of victims and communities to "know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage of others [and] participate in the identification, interpretation and development of cultural heritage" (UN, 2011, p.4). This interpretation of the mentioned rights, serves to emphasize the conception of cultural heritage, wrongly view by a majority or related at least with buildings of historical value, bridges, monasteries and mosques.

On the contrary, its notion is broader and multilayered concept that has had dramatic evolution, in the last two decades. It has gone beyond the perception coined in monuments and museum collections to a complex matrix that incorporates that a range of meanings, values, associations and related concepts artistic, historic and cultural sites, practices, perspectives and traditions from all diversities (UN, 2018: Viejo-Rose, 2015). In other terms from being take as properties and material objects, the latest literature on the subject, has come to understand its abstract nature. Open its conception from assessing CH as aesthetic processes, that go through numerous understandings such as places, products, projects, and performances (Viejo-Rose, 2015).

Furthermore, CH as intrinsically related to the right to participate in cultural life, influence social cohesion and cultural identity, for that its violation may be a threaten for the stability of any society, and even worse before fragile societies in a post-conflict stage. Its destruction or abuse can be a hindrance for peace and reconciliation. (UN, 2016). Cultural heritage encompasses the resources that any society creates and shared as common good important for their identification. Specifically, because it enables the inner development, of the collective, the individuals and the minor groups; of all the di layers that compose contemporary multiverse and globalized societies. (UN, 2018)

In this regard, the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage states that “cultural heritage is an important component of cultural identity and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights” and defines “intentional destruction” as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience” (UN, 2018, p.4).

The Special rapporteur Shaheed emphasizes in her report on the mission to Serbia and Kosovo, the risk that in transitional context implied the “patterns and acts of cultural heritage destruction”. The damage to human beings done by such crimes is sometimes is indescribable, as its irreparability affects not just one person, but the identity of a collectivity. Those wrongful crimes are impediments for a full reconciliation. Therefore, she calls for when gross violations of cultural rights are committed they follow the same necessities as when gross violations of human rights are exerted, societies need for their, accountability and reparation (UN, 2018)

The importance of cultural rights, can also be understood in the frame of the objective of the perpetrators, in most of the cases is not enough with the force displacement of victims. Furthermore, the destruction is bracket in the desire of the annihilation of a community, an ethnical cleansing. In those cases, the intention of the destruction of the cultural heritage is so that victims, do not find any reason to return. If that happens, is like they never exist, they are banish from history and their perpetrators can then claim a monolithic identity. Sadly, that is not a story of the past. That is exactly what has happened, and it is still a valid proclaim, of the displaced persons from Kosovo (UN, 2018).

The severe affectation of the destructions of cultural heritage, analyzing it from the scope of the collective memory is that there will be no longer knowledge to be share with future generations, that affects the empathetic processes between members of the community, as it also affects their traditions, their rituals and all kinds of cultural practices that usually act like a mean for social interaction or the structuring of the basic structures of our society, friendships and families. In general, the exercise of violence that affects the rights to access and enjoy cultural heritage, endangers the continuity of society as it disenfranchises the rights of future generations.

6.5 Cultural Heritage and Memory

Notwithstanding, the importance of cultural heritage can also be observed from its intrinsic relation with collective memory. Just as Viejo-Rose (2015) has stated, another change that the conception has seen in the last decades is related with the progressively new approaches of assemblage. Meaning, more and more elements, conceptions, traditions and so on, are being understood nowadays as possible cultural heritage. As if there were not limits, it now includes "material and immaterial forms, representations and aspirations, mortar and emotions, values and interpretations, symbols and narratives" (Viejo-Rose 2015, p2).

However, one crucial component of this assemblage is memory: deprived of the conception of memory everything that can be insinuated about "time and narrative, continuity and change, individual and collective identifications, heritage would be reduced to 'old things'" (Viejo-Rose 2015, p2). Besides, scholarships from all the disciplines have been intervening in favor of nuanced considerations of the concept, so adding all the conceptualization of memory, as it has been addressed in chapter five, does indeed accomplishes this expansion (Viejo-Rose 2015).

Cultural Heritage is defined as the "ways of living developed by a community and passed on from generation to generation, including customs, practices, places, objects, artistic expressions and values. Cultural Heritage is often expressed as either Intangible or Tangible Cultural Heritage" (Culture in Development, 2018). Taking in consideration that it is fundamental for the conception the transferability, it has to be understood that this occurs by the action of human activity. Cultural Heritage, are the products crafted through tangible representations in community systems of value, of beliefs, of traditions and of lifestyles, and these it can be visible and tangible, but furthermore it can be traced from the past (Viejo-Rose 2015).

In this sense, memorialisation's and cultural heritage are intrinsically interconnected as instruments that configure the collective memory of our societies, and for that they belong to our sense of knowing, understanding and interpreting of history. In that regards, they play an essential role in the building of roles other two concepts inherit in our societies identity and politics (Viejo-Rose 2015). "Cultural heritage as the ruinous remains of past creations, memories as the imperfect remains of past experiences". (Viejo-Rose 2015, p2).

Indeed, as it has been exposed there is an intrinsic link between memory and cultural heritage. So, by accepting such relation we could also ended up accepting their problematic that memorialisation's processes can also have, some of these can be:

a) the dilemma of an objective truth, memorialisation processes can bring justice to victims, but they need to offer the multiple perspectives that will be able to provide an inclusive, representative, and dialogic view of history;
b) the dilemma of the placing, physical objects and geographical territories can bring memories to the communities from a violent past, by building a monument or using such space for certain cultural practices these processes can jeopardize re-building processes of culture and peace;
c) the actor's dilemma, as it has been exemplified in the cases that have been consider across the text the artistic practices come from artist, from civil society, therefore the difficulty but also the necessity is how to involve the establishment. The logical answer will be by making policies that could be accord to the necessities of each culture.

It is the believe of this author, that the state of affairs, in the terms of the use and conceptualization of cultural heritage is still too early. Not enough scientific work has been done to factually measure the impact that cultural practices can have in regards of the better ways to balance cultural practices and the creation of a collective memory.

Thus, for all what it has been stated in this text, if the ultimate goal of reparation is to bring back the victims to a stage where they were before the transgressions were committed upon them; but also, if it is of the aim of a TJ model to improve that stage with a complete transformation of the core causes of the conflict, then it is the believe of this author that the use of intangible cultural heritage is the answer.

By using the practices and aesthetic processes that are encompassed in this concept, communities are not only rescuing their values, but also reinforcing their union and the believes that connects them. When peaceful communities find themselves in secure and peaceful environments, is usually because they find commonalities, the find common aims and goals. It is such moment, when "never again", old enemies will find reason to continue violence. According to the UNESCO intangible cultural heritage refers mainly but no all to:

a) oral traditions, and expressions including language as a vehicle of the intangible cultural heritage.
b) performing arts, range from vocal or instrumental music, dance and theater to pantomime, poetry and other forms of expression. They cover numerous cultural expressions that reflect human creativity.
c) social practices, rituals, festive events, social practices, rituals and festive events are habitual activities that structure the lives of communities and groups and that are shared by and relevant to many of their members
d) Knowledge and practices concerning nature and the universe include knowledge, knowhow, skills, practices and representations developed by communities by interacting with the natural environment.
e) knowledge and skills to produce traditional crafts. Performing arts the skills and knowledge involved in craftsmanship rather than the craft products themselves. Rather than focusing on preserving craft objects, safeguarding attempts should instead concentrate on encouraging artisans to continue to produce craft and to pass their skills and knowledge onto others, particularly within their own communities.

CONCLUSION

The structuring of symbolic reparation processes that involves artistic and cultural practices, entrenched in the intangible cultural heritage frame, would reinforce the reparation of the victims that have suffered gross violation of their human rights, but also would aid the whole compound of the society overcome the transition period. In this sense, it aims to be a complementary form of the five sub-pillars that build the right to reparation. It has to be clear, that for this author SRs need to be considered as a different and independent sub-pillar from the satisfaction measures frame. It aims to extend the possibilities of memorialization by including the complementarity of cultural heritage and even more of intangible cultural heritage. The SRs as a sub-pillar do not intended to overshadow all the other forms, its conception should be purview as complementary in the right to reparation pillar and consequentially to the other three pillars of any TJ model from a holistic approach.

The symbolic reparation processes should be structure to aim six goals.

1. To aid the disclosure of the truth: Artistic expressions work as a mean to express the truth of the different parties involve in the situation that is the cause of the transition. In this sense, they are ideal to concrete, build and communicate narratives for their experiences. In this way, this mean becomes an alternative to disclose the truth in other context that vary from the jurisdictional courts or even the audiences of the truth commissions.
2. Restore the dignity: The subjectivity of art, of an aesthetic expression and the intimacy of the artistic process, can deep into the restoration of the irreparable. An abstract and personal process that allows the different parties find relief and recover the essence of the involve, by giving them purposes and reasons. Helps to overthrown the annulment that was impose on them.
3. To create Memory: The results of the artistic expressions use in the symbolic reparation processes aim to choose a symbol that would perpetuate through time the expressed. In that regard, would follow up memorialization processes, but not stay limited by the statically nature of memory sites.
4. To satisfy victims need: As it should be conceived as a participative process, between professionals and parties interested, it aims to recognize their needs, their motivations and so their will. The results should be the outcome of dialogues and exercises intended to have a better understanding of context, identities, wrongs, archetypes and more.

5. To recover community values: The building of societies and even more specific of communities, is the result of long lasting process of defining identities and shared values. Solidarity, caring for the other, protecting the collectivity, group work and general joy are some of the values that can be rooted in communities that have achieved a sustainable peace. Now, these values are not the same, they vary depending on the context, the country and the core of the transition cause. Also factors like religion or cultural costumes have a fundamental influence, therefore it is in the frame of intangible cultural heritage that these values can be determined and recover, not only because through its different expressions it represents them, but also because its hereditary essence makes its transmission from generation to generation, an easier channel to spread them as a legacy in the whole community.

6. To vanquish wrong archetypes: The duration of the conflict, or the regimes; the systematic structure of the wrongdoing, and the restrictions created by the context, contribute to build up of misbelieving's, the misunderstood of reasons and causes, reinforces the myths and the untrusty background. It separates people, it disenfranchises the whole society making individuals feel weak and fearful. The idea is to break the barriers that uphold those archetypes and vanquish them on spaces where facts, ideas and believes can be share and discuss to build up on community understandings.

The symbolic reparation processes aim to reach four goals.

a) The Understanding the transition: By learning or just getting to know, specific cases, stories and characters with specific detail of facts, members of a same society can have a better understanding of the causes of the transition, about the necessity of the transition and the specific characteristics that build up on a transition.
b) Reconciliation: The better understanding usually is the result of an encounter, and encounter that can be casual or intended, directly or indirectly. This encounter produces that member of the society that might have been involve somehow in the core reason that produced the necessity of the transition, from different perspectives. As victims, as perpetrator or as third not-participants. Either of those groups, has had play a role, and somehow has never had the opportunity to engage in a dialogue (not merely of words) with members of the other parties. If that occurs, there are big chances of having reconcile with the other group, in a way that the acknowledge their existence, their harm, their intentions and can conciliate with them, not necessarily by forgiving but overcoming the distrust or hostilities.

c) Resocialization: As a result of dealing with wrongs of the past, mistrusts, broken or non-existent relations, victims or perpetrators have the opportunity to deal with the individual inner reasons (suffering, guilt, revenge, ideology) and the collectives causes, the social imaginary created by the core causes of the transition. Both dimensions have created archetypes that have aid to break the social woven and sustained through the period of the conflict or the dictatorship or the core cause of the transition. As those archetypes are resolve and dissolve, the resocialization can occur, therefore victims can transcend the victimhood stage, perpetrators fully reintegrate into society and bystandards (third non-participants) stop with their disregard or contempt of a reality.

d) Guaranteeing the Non-recurrence: The above effects can be produced by multiple exercises or practices. But my argument is that the use of arts as a multimedia, multimodal and multilingual mean is the ideal to this process of reparation that should be understood as the real symbolic reparation. But also, among the arts, recurring to the ICH of each society would guarantee that the wrongs of the past that are being repair through this form, would not happen again. The hypothesis is that as ICH has been built through time and through the collective absorption of the community values, then those values are the guarantees of non-recurrence. Basically because of two reasons: a) Values make people identify with each other so it breaks and overcomes the archetypes that cause the social conflicts, that reflected on the general situation core cause of the transition and, b) These values makes societies strong, give purpose and meaning to belonging, and that can be translated in positive actions that benefit the collectivity, in ensuring to avoid any disregard for human rights and also its permanence through time as they are transmitted through ICH.

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