

Participation in Transitional Justice Measures

A Comparative Study



María Paula Saffon-Sanín
Viviana Tacha-Gutiérrez

Dejusticia
Series

PARTICIPATION IN TRANSITIONAL JUSTICE MEASURES

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*Dedicated to Ulises and Ofelia,
who were born and have grown
while this book was being produced.*

Contents

	Introduction	8
Chapter 1	General Objectives of Participation in Transitional Justice Measures	14
	Participation as Expression of Viewpoints	15
	Participation as Incidence	16
	Participation as the Transformation of Power Relationships	19
Chapter 2	Promotion of Transitional Justice Measures	24
	Conquest from Below	25
	Concession from Above	34
Chapter 3	Participatory Scenarios in the <i>Adoption</i> of Transitional Justice Measures	40
	Deliberation	41
	Consultation	46
	Ratification	48
	Complementarity of Participatory Scenarios during Adoption	54
Chapter 4	Participatory Scenarios in the <i>Implementation</i> of Transitional Justice Measures	56
	Justice	58
	- Composition of Courts or Tribunals	58
	- Participation in the Development of Judicial Proceedings	61
	- Monitoring and Dissemination of Information in Trials	64

Truth	67
- Establishment of Truth Commissions	67
- Participatory Spaces for Victims and Witnesses to Provide Testimony	69
- Collaboration of Social Organizations in Truth-Seeking	73
- Dissemination of Information about the Work of Truth Commissions	74
- Alternative Scenarios for the Construction of Truth	75
Reparations	77
- Participation in Judicial Reparations Processes	77
- Composition of the Institutions Charged with Implementing Administrative Reparations Programs	79
- Design of Reparations Measures	81
Guarantees of Non-Recurrence	83
- Composition of the Bodies Responsible for Implementing Measures of Non-Recurrence	84
- Participation in Institutional Reform and Purge Processes	86
- Participation in Public Policies Relating to Memory and Education	88
<hr/>	
Conclusions	92
<hr/>	
Annex	100
<hr/>	
Case Studies	100
<hr/>	
References	160
<hr/>	

Introduction

In his first report to the United Nations Human Rights Council, the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-recurrence, Pablo de Greiff, emphasized that his mandate would focus on victims; this implies that the implementation of the different transitional justice measures cannot happen “on the backs of victims, without their meaningful participation.”¹ According to the Rapporteur, victims’ participation is not just a theoretical question but also a practical one, which requires the analysis and systematization of the transitional justice experiences of different countries.²

This document is intended as a contribution towards that goal. Based on the detailed study of thirty-five transitional justice experiences in twenty countries,³ it explores the different scenarios that have allowed victims and civil society to participate in the adoption and implementation of transitional justice measures and illustrates the possibilities and limitations that such participation has had in different contexts.

Traditionally, participation has not been explicitly adopted as an axis of transitional justice mechanisms, but it has been present to different degrees and in various forms in many transitional

1 United Nations, General Assembly, Human Rights Council 21st Session, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence, Pablo de Greiff*, Distr. General A/HRC/21/46, 9 August 2012, para. 54.

2 *Ibid.*, para. 56.

3 The term *transitional justice experience* refers to a transitional justice measure or mechanism that is adopted or implemented; therefore, a country may have several transitional justice experiences when it adopts or implements a set of measures for truth, justice, reparations, and guarantees of non-recurrence.

contexts. In some contexts, victims and social organizations conquered participatory spaces *from below* through their fight against impunity and by demanding to be heard. In recent times, in part due to the influence of participatory development models,⁴ participation is starting to be seen as an important requirement for the legitimacy of transitional justice. Consequently, participation has begun to be granted *from above*, and today it is explicitly provided for in some transitional justice mechanisms. However, many of the transitional justice experiences that offer participatory spaces have not been designed with the specific purpose of promoting participation and if they were, they usually do not identify with clarity the specific purposes pursued through participation. Therefore, it is not always clear what the objectives of participation in different transitional justice scenarios are or if they are satisfied in practice.

This study seeks to contribute to the clarification of these issues. To this end, in the first part, it identifies the general objectives that can be pursued through the inclusion of participation in transitional justice measures and evaluates the potentials and limitations of these objectives in terms of the type of demands they impose and the possibility of their satisfaction. The three main objectives that may be pursued through participation are the expression of viewpoints, influence or incidence on results, and the transformation of power relationships—and each is more demanding than the former in terms of their requirements.

Based on these general normative considerations, the following parts of the study present and critically evaluate the different moments in which transitional justice can offer participatory scenarios: the promotion of measures (second part), their adoption (third part), and their implementation (fourth part). The second part of the study analyzes the promotion of transitional justice measures, both as a first moment in which participation is possible, and as a scenario that can facilitate this strategy—to a greater or lesser degree—in the two subsequent moments of transitional justice (adoption and implementation of measures). Indeed, the study draws a distinction between the ways in which transitional justice measures are promoted—promotion from below or as a

4 See, for example, de Greiff and Duthie (2009).

conquest, and promotion from above or as a concession—and argues that the first type of promotion makes it more likely that, during the adoption or implementation of the measures, participation will be more robust and effective.

The third and fourth parts lay out the different participatory scenarios that transitional justice offers in the adoption and implementation stages, and analyzes the extent to which the objectives of participation identified above can be met in practice. When transitional justice measures are adopted, participation can be achieved through deliberation, consultation, or ratification mechanisms. In the implementation phase, participation can be present in each transitional justice measure—justice, truth-seeking, reparations and guarantees of non-recurrence—through the composition of implementation bodies, the procedures that are developed, and their follow-up or dissemination, among others.

The fifth part of the study puts forth conclusions. The sixth part contains an annex that provides detailed descriptions of the cases we analyzed and source citation.

The study analyzes participatory scenarios involving not only victims but also civil society in a broader sense, as the latter has also been very important for the promotion, adoption, and implementation of transitional justice measures. In many cases, the distinction between these two groups is blurred, because they have similar interests and joint forms of struggle or because these interests blend in their organizational forms—for example, when victims organize as civil society associations or operate as part of a network of human rights, religious, or other types of organization. However, for each of these groups, participation can have different specific objectives in different transitional justice scenarios, and sometimes their interests and demands can even be antagonistic. The study takes into account this distinction where it is relevant, particularly in part four, which identifies the specific participatory scenarios and objectives of each transitional justice measure.

The analysis of the thirty-five selected transitional experiences is based on existing secondary literature; it does not include primary data on the participating or affected parties. Although superficial, this approach has the advantage of providing a general outline of the characteristics that participation has acquired,

the objectives it has sought, the degree to which these objectives have been met, and the advantages and disadvantages of their total or partial satisfaction. We hope that this outline can serve as a basis for more in-depth studies on participation from the perspective of those who took part in each of the participatory scenarios that have been reviewed here.

The study's annex describes each of the cases (countries) analyzed in this research study; therefore, if the reader has questions on any of the illustrative experiences mentioned in the body of the text, he or she can refer to the annex for additional details. In the annex, the reader will also find the specific references that the analysis is based on and that were not cited in the body of the text to ensure the fluid reading.

CHAPTER 1

General Objectives of Participation in Transitional Justice Measures

Overall, participation in the adoption or implementation of any type of measure or policy has the purpose of providing legitimacy by demonstrating that the measure or policy acknowledges and takes into account the needs, proposals, and viewpoints of the intended beneficiaries and the affected people. In the context of transitions from war to peace or authoritarianism to democracy, the legitimacy of transitional justice measures is important not only to gain the acceptance of the beneficiaries or the directly affected people. It is also crucial to obtain citizen support which may provide a solid foundation—and thereby a higher likelihood of continuity— to the new regime.

Now, it is not easy to determine the kind or degree of participation that is necessary to provide legitimacy to a transitional justice measure. Participation seeks at least three objectives, which entail different requirements for participation to be considered the source of legitimacy of a transitional justice measure. These are: the expression of different viewpoints, incidence, and the transformation of power relationships. Each of these objectives has strengths and weaknesses with respect to its requirements and the likelihood that they will be satisfied.

Participation as Expression of Viewpoints

The first objective of victim and civil society participation is for them to express their demands, proposals, and other views. Because the primary objective of a transitional justice measure is the recognition and satisfaction of victims' rights, its legitimacy depends importantly on the participation of victims, so that their needs can be heard and their interests are taken into account. Additionally, the participation of other parts of civil society can

provide legitimacy to transitional justice measures by showing that decision-makers take into account a pluralistic expression of voices, especially those that represent the most vulnerable and excluded sectors.

Note that, in principle, the objective of expressing views sees participation as an end in and of itself because participation is good on account of the space it provides to victims and civil society, regardless of the impact of this space on the content of the decisions or the social role of the participants. It is considered that this space makes transitional justice measures more legitimate than when they are the result of the participation of political elites or experts alone. Undoubtedly, the simple expression of the voices of victims and civil society enhances the democratic character of transitional justice measures, and may, in certain settings, be suitable for achieving the specific purposes of such measures.

However, participatory spaces that only guarantee the expression of voices have been criticized for failing to guarantee that participation effectively impacts the decisions adopted or for failing to generate meaningful changes in the roles of victims and other civil society sectors that have been traditionally excluded from the social and political context. According to this view, participation can have merely legitimizing effects on transitional justice measures by showing them to be more democratic than they truly are because they do not ensure that individuals influence the decisions that impact them or that they are empowered. This can generate feelings of frustration for the victims because it indicates that the expectations generated by participation will not be satisfied. In turn, this may erode trust in democratic institutions, which is crucial in post-transitional contexts.

There are, then, two additional objectives or purposes that participation can have and that conceive it, not as an end in itself, but as a means to achieve other ends without which the value of participation as a source of legitimacy diminishes or disappears.

Participation as Incidence

The second objective that participation may seek is effective influence or impact on the content of the decisions that are adopted. From this perspective, transitional justice measures only gain legitimacy from participation if they actually take into account the

views and proposals of the participating subjects. The objective of participation as incidence has two possible interpretations, one more stringent than the other. The first one considers incidence as a *receptivity* requirement, that is, it demands that the measures involving participation show that they are receptive or responsive to the preferences of participants. The second interpretation considers incidence as a *quality* requirement of the measures, in the sense that participation must increase the likelihood that the solutions that are adopted are better or superior.

The objective of participation as incidence is very important in order to prevent participation from becoming inane in scenarios where it specifically seeks that transitional justice measures address the needs of victims and guarantee their rights in the manner that they consider most suitable. Requiring that participation have a real or significant effect on decisions decreases the possibility that it will be used as window-dressing. However, the objective of participation as incidence can be problematic, especially in regard to its more demanding interpretation relating to the quality of the measures. This interpretation expects too much from participation and can ignore other important objectives that must also be fulfilled by transitional justice measures.

The expectation that victim and civil society participation will ensure the adoption of better or superior solutions ignores that, for some issues (criminal justice, administrative reparations, or institutional reform, for example), selecting the best solution requires the intervention of impartial individuals or bodies, sometimes of a technical or specialized nature, that have the capacity to assess complex legal or budgetary situations. In these situations, it is possible that the participating victims or members of civil society will not seek to propose the most appropriate solutions beforehand. Instead, they may wish to express their needs and preferences so that independent bodies can consider their input regarding the policies that will be adopted. Alternatively, they may seek to ensure that, as members of decision-making bodies, those needs and preferences will be taken into consideration while being balanced with other relevant objectives.

Thus, victim participation can be regarded as a condition that is necessary but not sufficient for the quality of certain transitional justice measures. To ensure the quality of the measures in

terms of impartiality, corrective or distributive justice, or efficiency, other factors must be considered. Demanding that, victim and civil society participation increase the quality of transitional justice measures can, on its own, endanger the participatory exercise because its failure to fulfill higher quality objectives can lead to the reassessment of the need or convenience of participation, without taking into account that it is valuable for democratic reasons other than quality (epistemic) results. In that sense, it would seem better to consider the effective impact of participation a procedural rather than a substantive democratic requirement.

Consequently, the objective of participation as incidence should be understood as requiring that transitional justice measures respond to, or are receptive of, the demands of those involved. As with the democratic paradigm, the receptivity of measures to the interests and preferences of participants does not imply that all these interests and preferences can or should be accepted in the final decision, but rather that all of them have the opportunity of being expressed and taken into account.

Indeed, although demands for truth-seeking, justice, reparations, and guarantees of non-recurrence have generated joint political action between victims and civil society, between these two groups and within each of them there may be important differences in interests or preferences. These differences can result from factors such as class, ideology, race, or gender, or from specific characteristics of the preceding conflict or the manner in which these sectors have advanced their cause. In many cases, the differences can be reduced or attenuated in deliberative scenarios where the groups can debate and reach agreements on how to make them compatible. However, if that is not the case, the final transitional justice decisions will not have the capacity to address, on an equal footing, all the interests and preferences of participating subjects.

Therefore, the objective of incidence as receptivity should be understood in the sense that all of the interests and preferences of participants will be heard and taken into account, and that their contradictions will be resolved in a democratic and informed manner. This implies that decision-makers must disclose clearly and with precision the reasons that led them to value, positively or negatively, the demands expressed in participatory scenarios.

It further entails that they should justify those decisions democratically, that is, giving more weight to the majority's voices but without violating the rights of minorities. The objective of incidence as receptivity also implies that decision-making bodies should open enough spaces—with enough potential for influencing decisions—for the expression of the demands of the different victims' and civil society groups, and not just those that are the most organized, recognized, or articulated.

In practice, there are significant difficulties for the participation of victims and grassroots civil society organizations that have fewer organizational capabilities, fewer resources, and less prestige. Such difficulties are particularly salient in spaces where decisions are made. This can lead to a situation in which transitional justice measures only address the interests and preferences of the organizations with more resources while excluding and marginalizing the weakest ones. Given the obvious democratic deficit issues that this can generate, the objective of participation as incidence requires the active promotion of the expression and also the participation in decision-making processes of less organized victims and social sectors. This can also imply fostering their organization and mobilization. Hence, the objective of incidence can be connected with the third objective of participation, which we discuss below.

Participation as the Transformation of Power Relationships

The third objective of participation is transforming the power relationships that place victims and other traditionally marginalized sectors of society in situations of exclusion and vulnerability. The notion behind this concept is that these actors' participation in transitional justice measures is an important opportunity to not only address the needs that originate from the atrocities perpetrated in the pre-transition period and prevent these atrocities from recurring but also to transform situations of structural injustice.¹ In contexts where such injustice exists and was created or

¹ For the notion of transformation of power relations applied to reparations see, for example, Uprimny and Saffon (2009, 31-70).

exacerbated by the conflict or the authoritarian regime that preceded the transition, participation may be deemed a source of legitimacy—and not simply of legitimization—only if transitional justice measures seek to reverse this injustice.

Participation can contribute to the transformation of power relationships when it explicitly pursues the political empowerment of victims and civil society, therefore allowing the participatory process to increase their organizational levels and their ability to influence decisions on the transitional justice measures and other political and social issues that affect them. To this end, it is necessary that participatory processes be designed with the aim of promoting the political organization and mobilization of victims and civil society, particularly of less organized and visible sectors and ensuring that their organization and mobilization have continuity over time. At first glance, the objective of participation as transformation may seem more demanding than the objective of participation as incidence that promotes higher-quality decisions; but this does not have to be the case if the objective of participation as transformation is given a political and procedural interpretation.

As with the objective of participation as influence, the objective of participation as transformation can be understood both from a substantive and a procedural point of view. In the first case, the transformation goal requires that participatory measures bring about change in power relationships not only through a process that contributes to the political empowerment of victims and civil society but also through measures with certain types of content, which contribute to the transformation of political and social power relationships. Evidently, this kind of transformation is a fundamental objective of transitional justice measures, which should always be taken into account in their design. Moreover, such transformation should be the political banner of victims and marginalized civil society sectors that are involved in transitional justice decision-making. However, demanding that participation alone guarantee that measures with this kind of content be adopted can raise expectations that are unlikely to be fulfilled. Their fulfillment would require the intervention of other factors—such as the political will of the actors directly involved in the transition, the initial political recognition of victims, the formation of

majorities that promote transformations both in the general political arena and in the civil society and victim sectors involved, the internal and external alignment of transitional justice measures, among others.

Therefore, in most cases, it seems appropriate to favor the political-procedural interpretation of the transformational objective of participation, requiring that transitional justice sustainably empower the victims and civil society sectors involved. This emphasis can facilitate the actual satisfaction of the other objectives of participation, i.e., the expression of a plurality of voices and the incidence as receptivity to the preferences of the participants in decision-making processes. Additionally, this emphasis may bolster the incidence that victims and civil society sectors can have on the adoption of transformative measures in a substantive sense. However, when this does not happen, it does not always mean that participation has failed; participation may still be considered transformative in a procedural sense if it establishes sufficient conditions to allow the sustainable empowerment of victims and the receptivity of transitional justice measures to their preferences.

Sustainable empowerment first requires, that it be explicitly acknowledged as one of the objectives of participatory scenarios of transitional justice measures and their implementation. It also requires the satisfaction of conditions that are basic—but often, historically absent—and that allow the possibility and sustainability of participation over time, such as participant security and real equality in access to participatory scenarios—particularly equal capacity to influence decision-making. This means that simply creating participatory mechanisms, even if they are highly protective, is not enough to empower victims and the most vulnerable social sectors if the measures do not take into account and seek to resolve the factors that have traditionally obstructed their political participation. In this sense, participation must be premised on disparity and not parity, and its objective should be to achieve the actual transformation of this disparity. Only if this happens, is it possible to consider that participation contributes effectively to the transformation of power relations and is, therefore, a source of legitimacy for transitional justice measures.

Based on the above reflection, the following sections identify different participatory scenarios that may arise at the time of the promotion, adoption, and implementation of transitional justice measures. They also evaluate further to what extent and for what reasons the mechanisms may satisfy one or more of the outlined general objectives.

CHAPTER 2

Promotion of Transitional Justice Measures

The first moment in which victims and civil society can participate in the development of transitional justice measures is at the time of their promotion. When these sectors mobilize politically to actively promote the adoption of such measures, the act of promotion is itself an expression of participation; additionally, active promotion can significantly increase the possibility not only that transitional justice measures will actually be adopted but also that the objectives of participation will be satisfied in the promotion, adoption, and implementation stages.

However, transitional justice measures are not always adopted as a consequence of active promotion efforts by victims and civil society. In many contexts, particularly in recent years due to the boom of transitional justice in the international human rights discourse, transitional justice measures have been promoted by political elites as a result of international pressure or a quest for domestic legitimation. In these instances, the promotion of transitional justice does not constitute a participatory scenario. Additionally, it may be difficult for robust and effective forms of participation to exist in the adoption and implementation of transitional justice measures given the absence of prior political mobilization and organization by victims and civil society.

Below we explore the implications that the different forms of promoting transitional justice can have on victim and civil society participation, and we review some examples.

Conquest from Below

Victim and civil society participation in the development of transitional justice measures can begin long before the measures are officially adopted, and even before the political transition from

war to peace, or dictatorship to democracy, has begun. This is the case when these sectors mobilize against impunity and demand the establishment of measures of justice, truth-seeking, reparations, and guarantees of non-recurrence.

Victims and civil society have different types of demands. With respect to justice, they include, among others: initiating judicial proceedings against those who perpetrated the atrocities, where these proceedings do not exist or have been closed; widening the scope of these proceedings in cases where they have been restricted temporarily by the type of offense, or by the rank of the perpetrators; creating special justice institutions to adjudicate crimes; the active participation of victims in these scenarios. With respect to truth, the search for missing persons or their remains; the creation of official truth-seeking bodies that function in parallel or as an alternative to justice mechanisms; the participation of victims in the composition of such bodies; granting judicial or quasi-judicial powers to these bodies; the possibility that their findings can be used before the judiciary; the possibility that official bodies take into account local truth-seeking processes. With respect to reparations, the creation of special administrative bodies for material, collective and symbolic reparations; the participation of victims in the planning and design of these programs and the bodies charged with their implementation. With respect to guarantees of non-recurrence, the promotion of policies for purging and reforming state institutions, and the participation of victims in the design and implementation of such policies.

The demands of victims and civil society can be crucial for furthering transitional justice processes. Indeed, quite often, governments are reluctant to establish measures that combat the impunity enjoyed by the perpetrators of atrocious crimes, either because they belong to their ranks or because they are negotiating peace with them and there is a pressing demand for amnesties or general pardons. In this sense, the fight against impunity must be carried out in opposition to important political interests and, when it succeeds, transitional justice is won from below.

In such instances, the participation of victims and civil society in the promotion of transitional justice measures satisfies not only the objective of expressing their viewpoint but also the objective of influencing the adoption of policies. Further, the process of

voice articulation, political organization, and collective mobilization implied in the fight against impunity can lead to the fulfillment of the objective of victims' political empowerment. Indeed, in such a process, victims take a leading role in the political arena and wager on their continuing mobilization to generate an impact in the adoption and implementation of transitional justice measures, and even to achieve broader political objectives.

In turn, the empowerment of victims and civil society in the promotion of transitional justice measures can facilitate their participation in adoption and implementation scenarios. Indeed, when participation becomes a political fact even before the adoption of transitional justice measures, it increases the likelihood that participation will continue, become stronger, and achieve the objectives of mobilized sectors in the adoption and implementation stages. At that point, such sectors would have overcome the most difficult challenges to collective action, including the articulation of needs and interests through representative organizations, the gathering of resources for ensuring their sustainability, the establishment of internal and transnational networks that give visibility to their demands and provide support, among others.

Argentina offers us one of the clearest examples of the importance of promoting transitional justice from below. In Argentina, mobilization for justice and against impunity started long before the transition; the Plaza de Mayo Mothers and Grandmothers, assuming an enormous risk, started their mobilization by demanding information on the fate of their disappeared children and grandchildren and that those responsible be brought to justice. The courageous struggle of the Mothers and Grandmothers and other victims and civil society groups quickly transformed into an international strategy promoting justice, which demanded a pronouncement from the Inter-American System's human rights bodies on the human rights violations occurring in the country. These groups' mobilization drew international attention to the atrocities of the military junta in Argentina and made other governments, like the United States, apply pressure on the Argentinian Government to improve the human rights situation. That pressure, combined with the severe economic crisis and the Falklands War defeat, weakened the military government to the point that it accepted a democratic transition in 1983.

Given their high levels of mobilization and organization, victims and civil society were able to promote criminal trials against the military junta immediately after Raul Alfonsín, the first democratically elected president, took office. However, when the main perpetrators started receiving convictions, the military threatened insurrection. This interrupted the judicial proceedings and eventually led to passing the Full Stop Law (1986) and the Due Obedience Law (1987). These laws suspended open judicial proceedings and prevented commencing new ones. Despite this setback, victims and civil society organizations continued their struggle at the national and international levels, which resulted in the two laws being declared unconstitutional by the Supreme Court in 2005 and, as a consequence, in the reopening of trials against perpetrators. These trials are currently ongoing.

The active and sustained promotion of justice by victims and civil society organizations also allowed them to adopt a key role in the reopened trials, as leaders of the strategy that brought the cases to justice, and fundamental sources of documentary and testimonial evidence. Their active participation in the trials has been largely the result of their prior participation in the promotion of transitional justice.

Similarly, previous mobilization and organization allowed victims and civil society organizations to advance and actively participate in many other debates related to transitional justice and, more generally, human rights policy and democracy in Argentina. These organizations have played a leading role in many topics, including policies related to administrative reparations, exhumation of corpses, victims' memorials, institutional reform of the army and the police, the incorporation of international human rights standards in the Constitution, the expansion of criminal trials to include the regime's economic and political collaborators, the prison regime applicable to perpetrators of atrocities, and the use of DNA testing in trials.

However, promoting transitional justice from below has also posed challenges to victim and civil society participation in Argentina. The leading role of certain organizations has made other organizations that are less vocal, less organized, and have fewer resources or representation in the center face difficulties in expressing their viewpoints, especially when these viewpoints

conflict with the most visible organizations. Additionally, under recent governments that have taken up the banner of human rights protection (2003-2015), the most visible organizations have openly established alliances with these governments which, on the one hand, have bolstered their resources and capacity to mobilize, but on the other hand have sometimes reduced their independence and ability to denounce government excesses.

The Argentinian case shows that the level of participation, organization, and mobilization that exists prior to adopting a transitional justice measure can be considered an *ex ante* condition for successful participation in the adoption and implementation of the measure, understanding success as the strength of participation and its effectiveness in reaching the proposed objectives. In Argentina, the early and constant promotion of participation of victims and civil society organizations led not only to the adoption of transitional justice measures that satisfied their needs but also to their empowerment as political actors with the capacity to influence the country's most important political debates. In this case, the strength and effectiveness of participation were an endogenous result of the mobilization of victims and civil society, which did not need to be stimulated by institutional mechanisms.

This does not mean that institutional mechanisms fostering participation are unimportant in a context where participation is actively promoted from below. These mechanisms have a fundamental role in guaranteeing that less organized or weaker victims also engage in robust and effective participation in transitional justice mechanisms, thereby ensuring that they have equal opportunities to be heard and to exert their influence in decision-making. Such mechanisms are also essential for ensuring the sustained viability of the most visible organizations, which, despite their resilience, may encounter difficulties when international cooperation resources diminish over time after the democratic transition occurs. In this regard, it is important that, even if *ex ante* conditions for the success of participation exist, the latter is still promoted as an official policy with the aim of guaranteeing the continuity and equality of opportunities of victims and civil society organizations.

The Colombian case is a good example of how combining the promotion of transitional justice from below with the

government-backed promotion of participation can increase the success of victim and civil society participation. In Colombia, in the last decade, victims and human rights organizations transformed from marginalized and persecuted sectors to increasingly organized political actors with a strong capacity to express their viewpoints and influence the national arena. This transformation has been the result of their active struggle against impunity, as well as of formal participatory mechanisms that were established in response to their demands.

Victims and civil society organizations have been fighting against impunity for a long time, but the articulation of this fight as a national political strategy for the promotion of transitional justice only took shape at the beginning of the twenty-first century, in response to the demobilization process of right-wing paramilitary groups. In 2005, the Colombian Government promoted a law that established special criminal proceedings with substantial sentencing reductions for the confession of atrocious crimes (Law 975 of 2005, or “Justice and Peace Law”). The law was preceded by legislative proposals that only provided for non-punitive justice mechanisms. However, the opposition of civil society organizations caused this non-punitive solution to be discarded. In practice, though, the criminal trials established by this law resulted in high levels of impunity because they only applied to perpetrators who were already the subjects of ongoing judicial proceedings, and, furthermore, the law did not establish mechanisms to guarantee victims’ rights. Victims and civil society organizations launched a legal mobilization strategy before Colombia’s high courts that caused several parts of this law and its derived regulations to be declared unconstitutional, or conditioned, with the aim of diminishing the risk of impunity, strengthening victims’ participation in judicial proceedings, and guaranteeing the rights to truth and to receive adequate judicial reparations. Through their permanent demands and resolute action before the Attorney General’s Office, the Public Ministry, and the judges responsible for applying the Justice and Peace Law, these organizations have insisted that its application favor victims’ rights, which has also contributed to broadening justice measures and participation in them.

The political and legal mobilization of victims for transitional justice pushed their rights towards the center of the national political agenda; it also led to the consideration that their participation in political deliberation is increasingly necessary. Indeed, in 2010 the Colombian Government introduced before Congress a legislative proposal for the reparation of victims of the armed conflict, whose precedent was a 2007 proposal presented by the Liberal Party that had been prepared together with social organizations. Law 1448, known as the “Victims’ Law”, was approved in 2011, after several debates and discussion forums where both victims and civil society participated widely. Among other things, Congress conducted regional hearings with the purpose of listening to victims’ opinions on the legislative proposal.

As a result of the discussion, the Victims’ Law did not only establish a large catalogue of restitution and reparations measures—material, collective, and symbolic—but also a novel mechanism for victims to participate in their implementation. As will be explained in greater detail in the subsection “Composition of Bodies Responsible for the Execution of Administrative Reparations Programs,” the law created victim participation roundtables at the national, departmental (state), and municipal levels, so that all decisions related to the application of the law would be discussed and monitored by victim-elected representatives.

The leading political role of victims and civil society became even more central on account of the peace talks that were conducted between the Colombian Government and the most important guerilla group in the country—the Armed Revolutionary Forces of Colombia (FARC-EP per its acronym in Spanish)—between 2012 and 2016 in Cuba. Although the talks were advanced by representatives of each of the parties to the conflict, from the start they recognized the centrality of victims’ rights as well as the importance of the participation of society at large, and victims in particular, in the construction and implementation of peace. The parties defined victims’ rights as one of the six central themes to be negotiated. Also, they included participation as a guiding objective of the negotiation procedure in the basic agreement that established the peace talks.

Consequently, the negotiating table opened different participatory spaces including the reception of written proposals

prepared by the citizenry on the different agenda items; three regional forums and a national forum to collect thematic proposals from diverse sectors of society; the direct participation of sixty victims at the negotiating table, who offered input on the topic of victims' rights for the negotiating agenda; and the direct participation of ethnic and sexual minority representatives, who discussed with the negotiators the manner in which the Peace Agreement would adopt a cross-cutting gender approach as well as the incorporation of a chapter on ethnicity that specified the Agreement's respect for the special autonomy rights of ethnic groups in their territories.

The leading role of victims and civil society reached its peak after the Final Agreement was signed. The Agreement's ratification was submitted to the ballot box in October 2016 through a plebiscite, which was voted down by a very small margin and with high abstention levels (we offer a description and analysis of the ratification process in the following section and the Annex). Against this backdrop, and given the impossibility of implementing the Agreement without its renegotiation, a broad and vigorous citizen mobilization sprung forth in support of peace. On the same day that the plebiscite vote occurred, a group of citizens mobilized towards the presidential palace. Only three days after, in response to calls from the student movement and other citizens on social media, close to 30,000 people mobilized in Bogota, marching towards the city's main square. In the month after the vote, there were at least three more large mobilizations as well as many other demonstrations in different cities and municipalities in the country. One of the main slogans of the mobilizations was "Agreement Now!" and its objective was pressuring the negotiating parties and the opposition to find formulas that would allow renegotiating the Agreement and adopting it immediately in order to prevent a breakdown of the ceasefire. At the same time, two citizen initiatives were developed: "the camp for peace" and "peace to the streets." The first one called the citizenry to camp in Bogota's main square until the Final Agreement began being implemented. The second initiative promoted several assemblies with the purpose of analyzing the juncture and developing proposals for political and legal mobilization.

Through marches, camps, and assemblies, the citizenry became a key actor in demanding the search for solutions to the political deadlock that resulted from the victory of the “No” in the plebiscite. One of the most interesting aspects of the mobilization is that it was an expansive and inclusive peace front, which invited even “No” voters and abstainers to join in the cause of promoting a new agreement and insisted that civil society should show solidarity with victims, who were the ones most in need of immediate peace. To an important extent, the significant efforts made by the Government to reach a consensus with opposition leaders and to renegotiate the Peace Agreement with the FARC based on the opposition’s proposals sought to respond to the broad social mobilization.

The Colombian case illustrates how the organizational processes of victims incrementally achieve their inclusion in increasingly decisive political deliberation scenarios. Thus, if at first victims were able to have an impact on the public policy on reparations, later on, with the installation of the negotiating table between the Government and the FARC, and due to their cumulative organizing, victims were able to position the idea that the peace talks could not be conducted without their participation. During the peace process, also incrementally, victims achieved participatory spaces that were increasingly more direct. If it was already innovative that the negotiating parties created the opportunity to submit written proposals and conduct forums to collect opinions on the negotiation topics, the invitation of representatives from various victims’ sectors to talk with the negotiating parties was an enormous achievement.

However, these participation processes have also received criticism. According to many organizations, the Victims’ Law deliberations were not broad enough to include the viewpoint of the many different organizations, particularly those that are less organized, have fewer resources and are far from the country’s capital. Additionally, the regional forums promoted by Congress also received criticism; they were seen as electioneering spaces in which victims were invited not to participate in the design of the proposals, but to comment on proposals designed in the capital; further, their comments were not even considered. In terms of the spaces created by the peace talks, the main criticism referred to

the lack of representativeness of the people that were selected to participate in the forums and to talk with the peace negotiators, as well as to the delay of the parties in opening a participatory space for ethnic groups—despite their insistence since the beginning of the process.

Finally, as we will see in detail in the next section, submitting the Agreement to a plebiscite was criticized, among other reasons, for not providing the time and scenarios that were necessary for the voters to adequately understand and discuss the Peace Agreement. These problems generated the polarization of the electorate and the abstention of a large section of the citizenry. However, such an adverse outcome did not paralyze, but rather encouraged participation, as it led to an unprecedented mobilization of civil society. This mobilization was characterized by the creation of synergies between victims and the citizenry, which had previously not existed or were very limited. The broad mobilization for peace failed to completely counteract the enormous polarization that exists in the country with regard to peace, and that was reflected in the outcome of the plebiscite. This, together with the fragility of the ceasefire between the negotiating parties, led the Government to avoid using again a direct participatory mechanism to ratify the new Peace Agreement. That decision has been criticized not only by those who oppose the Agreement but also by many of its defenders.

In any event, the official spaces created for victims' participation in Colombia recognize the importance that victims have attained in the political arena. This recognition has led to the political empowerment of victims, which manifests not only in their increasingly frequent intervention in deliberation scenarios and their visibility in the media but also in their capacity to promote or support social mobilization for issues that go beyond victims' causes.

Concession from Above

The previous subsection shows that the promotion of transitional justice by victims and civil society can facilitate their robust and effective participation in the adoption and implementation of transitional justice measures, especially when it is complemented by official mechanisms that strengthen such participation, and

thus guarantee continuity over time as well as equal opportunities for different organizations. However, the promotion of these measures is not always advanced from below.

The recent popularity of transitional justice in the discourse and best practice standards of human rights has increasingly resulted in transitional justice measures that are promoted or granted by political elites without much demand from victims or civil society or without taking into account their specific claims. This phenomenon is the result, at least in part, of what some have recently termed *the transitional justice industry*: the promotion of a standard package of justice, truth-seeking, reparations, and non-recurrence measures, which are supposed to protect victims' rights, address impunity, and even guarantee the sustainability of peace and democracy in any transitional context, or even in the final stages of a conflict. It is possible that governments, including those that are directly responsible for or complicit in the commission of atrocities, view the promotion of transitional justice as a strategy to fulfill the demands of international organizations and donors for supporting the transitional process or to gain legitimacy domestically.

The concession of transitional justice measures from above generates considerable difficulties for victim and civil society participation. Concession from above implies that there will likely be no room for participation in the promotional phase. This not only frustrates the objectives of participation during promotion; it also reduces the chances that the content of the adopted measures will be satisfactory and, above all, that they will be applied in practice. Indeed, governments that do not believe in transitional justice may still adopt measures with the purpose of gaining legitimacy while minimizing their effectiveness and scope in practice. Such a strategy is facilitated by the absence of victims' demands, which usually serve to channel or at least limit the content of measures as well as to bolster their effective implementation and broaden their scope when it is very restricted. However, even when a government adopts a transitional justice measure from above with good intentions, it is possible that the lack of promotion from below reduces the measure's practical effectiveness. The latter may be thwarted by the measure's inability to adapt to the specific needs of the context, or by the lack of robust citizen support for

the political and legal promotion of implementation against the measure's opponents.

Furthermore, granting transitional justice measures from above can weaken the sway and effectiveness of participation during adoption and implementation in several ways. On the one hand, it is possible that the adopted measures do not provide for participatory spaces, because they do not respond to the demands of victims and civil society that demand such spaces, or they explicitly seek to reduce opportunities for opposition and contestation—something which will likely be preferred by governments that do not believe in democracy. It is possible that the absence of participatory spaces in the adoption and implementation of transitional justice measures promoted from above will not be questioned in those contexts because victims and civil society organizations lack strength and coordination, something which, in turn, is perpetuated by the absence of such mechanisms.

However, in light of the prominence that participation has acquired in the transitional justice discourse, it is possible that the total absence of participatory spaces will be eventually challenged by international agencies or local organizations that have the capacity to establish transnational networks. Therefore, governments that promote transitional justice from above without truly believing in it can promote the creation of participation opportunities as a strategy with the sole aim of obtaining legitimation and co-opting potential dissidents. This can be achieved, for example, by providing participatory spaces only to those who express loyalty to the regime, or in exchange for benefits, or by admitting only the expression of harmless viewpoints, or ensuring that such views have no impact on policy formulation and implementation. This strategy carries risks in the sense that, even if participatory spaces are tightly controlled, there is still the possibility that they will generate capabilities to organize and articulate demands that, in turn, can foster the opposition of groups that were originally co-opted. However, the risk that governments will abuse these participatory spaces with legitimation and co-optation purposes is much higher where victims and civil society possess low levels of political organization and mobilization in the promotion phase. In those contexts, victims and civil society organizations lack the strength and independence that are

necessary to avoid cooptation and to influence the content and implementation of transitional justice mechanisms.

As we discuss in the following sections, there are many cases where victims and civil society organizations complain about the lack of opportunities for participation, or the opening of spaces solely for legitimizing purposes or that are destined to be co-opted, in the adoption and implementation stages of transitional justice measures. This does not mean that participation in transitional justice measures is necessarily bound to fail where such measures are not actively promoted from below. In such contexts, governments that genuinely want transitional justice to be implemented, or local and international organizations that promote such implementation despite government reticence, may be able to promote the creation of participation opportunities and, more importantly, complementary measures prior or concurrent to the creation of these spaces, which ensure vigorous participation.

The main purpose of these measures should be creating or strengthening the capacity of victims and civil society to organize, mobilize, and build networks. Indeed, in such contexts, strengthening the capacity for the collective action of these sectors should be considered an *ex ante* condition for successful participation, interpreting success—as mentioned earlier—as the strength of participation and its effectiveness in achieving the objectives of expressing views, exerting influence, and generating political empowerment. In addition, measures that are aimed at strengthening participation should have the goal of guaranteeing equal opportunities for diverse victims and civil society organizations around the country. Only thus can these sectors' capacity for collective action have the effect of guaranteeing a plurality of voices and the representation of different interests and needs within these groups. The goal of equal opportunities implies that measures to promote organizational capacity should give preference to sectors that are less organized and connected and that have fewer resources. The greater their organization and mobilization capacity, the less the groups' need for official support to reach the objectives of participation.

The following sections discuss how the participation of victims and civil society in the stages of adoption and implementation of transitional justice measures is conditioned by the type

of spaces that are designed for this purpose in each of those moments. However, the discussion will also indicate the manner in which victims and civil society can exploit similar participatory spaces in different ways, in accordance to their previous levels of organization and mobilization. Hence, it is important to keep in mind, throughout the reading that the initial promotion of transitional justice may significantly determine whether the objectives of participation may be satisfied in subsequent stages.

CHAPTER 3

Participatory Scenarios in the *Adoption* of Transitional Justice Measures

The adoption stage of transitional justice measures refers to the process of discussion and design that takes place after their initial promotion. Participation in this process is very important to legitimize the transition and post-transitional regime that will be established. Submitting transitional justice measures to the approval of the people who will be part of that new regime provides a solid foundation to the new order and highlights its differences with the past one, often characterized by lack of consensus or exclusion of some groups.

The experiences studied show that the process for adopting transitional justice measures creates diverse democratic scenarios that, to a greater or lesser extent, allow victims and society as a whole to take part in and try to shape key decisions on the ways to overcome the period of abuse or atrocities that the transition is trying to leave behind.

There are at least three types of scenarios that allow participation in the adoption of transitional justice measures: deliberative spaces during the political discussion of the measures, prior consultation on the measures to be adopted, and the subsequent approval of these measures. In ascending order, each of these scenarios enables greater influence of participants in the final content of transitional justice measures, as each is more binding for States. Below we present the basic characteristics of each scenario and their potentials and limitations, which we illustrate with comparative participatory experiences. In closing, we present a brief reflection on the potential complementarity of these scenarios.

Deliberation

The first possible scenario for participation in the process of adoption of transitional justice measures is the one offered by spaces

for discussing the measures prior to their adoption. Such spaces may consist of public forums with civil society or public hearings or debates in Congress or other decision-making institutions of the State. The basic purpose of deliberation scenarios is allowing those that could potentially be affected by the measures to express their needs and preferences so that they can serve as input for the decisions and so that the decisions acquire democratic legitimacy.

Some of the scenarios that are most commonly used as deliberation mechanisms are conferences, forums, and roundtable discussions that bring together representatives of the State and diverse social sectors. These type of spaces have been vital for the design of important transitional justice mechanisms, as was the case of the Truth Commissions in South Africa and Morocco, which were preceded by extensive forums and debates where their terms were defined, or the East Timor Commission for Reception, Truth and Reconciliation, whose mandate was defined in meetings held by the United Nations with specific communities. Such spaces have also played a vital role in allowing victims to gain a central political role in the transition process and making the satisfaction of their needs a pressing goal.

This has been the case in the Colombian context, where the spaces created for discussing the points of the negotiation agenda between the Government and the FARC guerrilla group did not only provide feedback from the victims and other social sectors but also gave voice and prominence to these sectors in the country's political process. One of the most important results of this process is that victim and civil society participation became one of the fundamental and cross-cutting principles of the Final Agreement that was signed by the parties in 2016. As a result, the Agreement provides for diverse institutional spaces for participation at the local and national levels in the implementation of each of the mechanisms for achieving a stable and lasting peace. It also provides for special measures to promote the participation of women, respect the right to prior consultation of ethnic groups, and actively support the collective organization of social sectors that face difficulties accessing political participation on equal terms, such as women, the peasantry, former combatants, and social movements who wish to participate in politics. The

underlying logic behind the adoption of all these mechanisms is the notion that Colombian democracy has traditionally been exclusionary—especially against poor sectors and oppositional social movements—and its opening requires positive measures that guarantee equitable access to deliberation and decision-making spaces. In this sense, the Agreement not only intends to open participatory spaces in transitional justice mechanisms but also to contribute to the transformation of traditional forms of participation and the power relationships that explain them.

The participation of civil society will perhaps play a more central role in the peace negotiations between the Government and the ELN. The agenda, which was announced in March 2016 but only started being discussed in February 2017, includes as one of its six main points the participation of civil society in the negotiation process. It also includes the points of democracy for peace and transformations for peace, which in both cases focus on promoting participation during and after negotiations. These points explicitly offer a transformative vision of participation according to which participation should make civil society an active subject in the construction of peace and citizenship, and produce *transformative proposals* to overcome structural social problems such as poverty, exclusion, and corruption.

The absence of deliberative spaces can have negative effects in terms of the legitimacy of the institutions that are being created, and may generate tensions between the State and victims. The Argentine, Chilean, and German cases provide examples of how the lack of deliberation affects the legitimacy and operation of transitional justice measures. The National Commission on the Disappearance of Persons (CONADEP per its acronym in Spanish) in Argentina, which operated between 1983 and 1984, was established by presidential decree and was strongly opposed by civil society, particularly human rights organizations that demanded a public debate in Parliament on the creation of this Commission. Although CONADEP played a very important role in the elucidation of truth, it would have likely enjoyed greater legitimacy and capacity for action from the start if such debate had taken place.

In Chile and Germany, the administrative reparations programs were not discussed prior to their enactment. This explains,

in part, the exclusion of important victims' groups, which gave rise to political tensions. In Chile, at the beginning of the transition, the reparations policy only provided compensation for one group of victims (the detained-disappeared), which led other types of victims and human rights organizations to mobilize during several years to demand the expansion of coverage (to the tortured, the dispossessed, among others) as well as the adoption of more comprehensive policies. Such mobilization was interpreted by sectors of the Chilean right as an attempt to gain disproportionate privileges, especially because organizations were demanding administrative as well as to judicial reparations.

In Germany, early reparation programs for Holocaust victims were adopted and implemented; however, some categories of victims were left out. Such was the case, for instance, with victims of forced labor during the Third Reich. Some of those victims filed civil lawsuits in foreign courts (particularly in the United States) against companies that had benefited from forced labor. In response to those demands, a law was issued in 2001 to compensate victims of forced labor as well as owners of businesses confiscated by the Nazi regime; the law also provided for the payment of life insurance benefits under policies that Holocaust victims took out but were never paid to their beneficiaries.

It is almost impossible to prevent the emergence of tensions over the content and scope of transitional justice measures. However, many of these tensions could be eliminated or diminished before their implementation by creating deliberative spaces prior to their adoption. Victims and human rights organizations can conquer these spaces if they have the capacity to mobilize quickly and effectively to demand the government open spaces prior to the adoption of transitional justice measures and if the political conditions allow mobilization to have an impact. This is what happened with reparations policies in the Peruvian and Colombian cases; the activism of human rights organizations and other sectors was decisive in achieving the opening of scenarios for direct dialogue with the people who defined public policy. This enabled organizations to block regressive measures and advance progressive agendas regarding the rights to truth, justice, and reparations. However, when opening deliberative spaces depends on the capacity of organizations to exert pressure, the risk is that

deliberation will not occur before the adoption of measures in contexts where organizational capacity is weak or public institutions are closed off. This can generate a loss of legitimacy of the measures and present challenges for their implementation.

Deliberative spaces have great potential to facilitate the expression of the preferences and needs of victims and other sectors of civil society; however, they carry the risk of excluding sectors that are not organized or organizations that do not have the social, political, and economic capital to participate in these type of scenarios. Thus, the expression of needs and preferences directly depends on the political organization and mobilization capacity of participants; if such capacity is not promoted by the State, it is possible that less organized or dissenting voices will not be heard at all in the discussion. The South African case illustrates this. Although the scope of the Truth and Reconciliation Commission (TRC) was the subject of extensive discussions between political parties, Government, and civil society, including conferences and workshops in which academics and activists from around the world participated, many grassroots organizations considered that their views were not adequately taken into account, and that political parties, large NGOs, and academics were the ones that defined the TRC.

There is an additional exclusionary risk in deliberative spaces. Even when they are enabled, it is important that deliberative spaces allow victims to express themselves in reference to aspects other than those that have been defined as transitional justice. Otherwise, the political exclusion of victims could be perpetuated, since their role within the polity is reduced to their contributions regarding their rights as victims. The Colombian case offers an example. In the course of the victims' forums, whose findings were sent to the negotiating table between the Government and the FARC, some voices questioned whether victims should adopt political stances in reference to the process, thus implying that they should simply limit themselves to expressing their opinions on their personal experiences. This position was expressed by sectors that opposed the talks, and the parties at the table did not endorse it. Yet, its existence indicates that it may be important to explicitly create deliberative spaces that allow victims to build and set forth proposals that not only refer to transitional

justice but can also influence transitional policy more widely. In fact, this is what has been proposed by a sector of the Colombian social movement, which has called for the installation of a “social table” between the Government and civil society organizations to discuss the politics of the transition. The notion that underlies this proposal is that the solution to Colombia’s problems requires the broad participation of society and not just “elite pacts” between the Government and the leaders of insurgent groups.

To minimize the risks of excluding victims and less organized social sectors from spaces for deliberation, it is possible to create special participatory spaces, such as public hearings dedicated to the expression of victims’ preferences, that actively promote the participation of less organized victims’ groups. The participation of marginalized victims in such spaces can be increased through the use of communication tools that inform in different places and languages when they will be carried out, transportation subsidies that permit victims to attend, and nonacademic discussion formats that promote the informal expression of voices.

The expressive potential of deliberation spaces is not always accompanied by the potential of the voices that are expressed to influence decisions. Deliberative spaces rarely require that decisions effectively take into account or reflect the proposals that were articulated, which can leave the impression that they are merely legitimization exercises, as has been denounced by victims’ organizations in places like Nepal. To increase the influence of the participants of deliberative exercises in the decisions that are finally adopted, the decision-making authorities should be present in these spaces, and they should explain in the preamble of their decisions how they have taken into account the needs and preferences of the victims and of civil society expressed there.

Consultation

Victims and civil society can exert a more direct influence on transitional justice decisions in scenarios that involve the prior consultation of specific groups. Consultation demands not only that these groups express their needs and preferences previously but also that the adopted decisions demonstrate that they were taken into account. Hence, consultation is a condition for the validity of decisions.

The typical example of prior consultation is the one provided for in Convention 169 of the International Labor Organization (ILO), which requires that ethnic groups be consulted before the adoption of any decision that impacts them. This requirement applies to measures of justice, truth-seeking, reparations, and guarantees of non-recurrence where the potential beneficiary is an ethnic group. This is a common situation because racial and ethnic tensions are frequent causes or effects of internal conflicts, or because conflicts victimize ethnic groups disproportionately due to their greater vulnerability to rights violations resulting from discrimination.

The Colombian case provides interesting lessons in this regard. In 2011, against the backdrop of the parliamentary debate on the reparations law for victims of the armed conflict, the Government carried out consultation processes with indigenous, Afro-descendants, and Roma groups, in order to address their particular reparations needs through regulatory decrees that incorporated a differential approach. In terms of their impact, as perceived by the groups that were consulted, the consultations had varying degrees of success, which is largely explained by the different organizational level each of the groups had before the consultation. Thus, through the consultation, indigenous organizations exerted greater influence than Afro-descendants, given the former's increased capacity to articulate their interests and reach common consensus. In any event, the needs of these groups played a central role in the design of reparations, which would have hardly existed if the law had only been discussed through the regular process.

The East Timor experience is also illustrative. Prior to the creation of the Commission for Reception, Truth and Reconciliation, established by the United Nations Transitional Administration, consultations with indigenous communities were carried out. These resulted in the incorporation of traditional indigenous law in the mandate of the Commission, with the purpose of facilitating community reconciliation.

Although the use of prior consultation is explicitly required for decisions that affect ethnic groups, it is plausible and helpful to use it in other transitional justice decisions. This appears particularly convenient when the adequacy of transitional justice

measures is conditioned on the differential understanding and response to the needs of victims. That is the case, for instance, with material and symbolic reparations for particularly vulnerable social sectors (like women) and collective reparations measures for non-ethnic groups (such as workers' unions and political parties).

Ratification

Participants' preferences have the greatest impact when transitional justice measures are subjected to ratification mechanisms. Through ratification, the electorate decides whether measures adopted by political bodies should be approved. Therefore, the measures' validity and enforceability depend on the public's blessing, which, if favorable, provides them with a high level of democratic legitimacy. Generally, participants in these processes are all citizens who can vote, which means that results do not privilege victims' preferences. Moreover, it is common that ratification instruments (like the referenda and plebiscites, and unlike constituent assemblies) ask society whether it approves the entire content of the measures in question, leaving little space for reevaluating or rediscussing more precise points.

Ratification tends to be used for the approval of very momentous political and social transformations, such as the ones that involve a complete change of regime and constitution (as was the case in South Africa and Spain) or serious amendments to the constitution or the legislation in force (as in Guatemala, Northern Ireland, and Colombia). In these cases, the participation of the entire citizenry plays a fundamental role in legitimizing the new rules that will operate in the transition and post-transition. However, to ensure that victims are not marginalized, it is important to actively promote their participation in the ratification process and that this be combined with other participatory mechanisms that involve victims more directly, such as deliberation spaces.

The ability of ratification mechanisms to achieve the active participation of society, and specifically of victims, depends on two issues. On the one hand, the wide acceptance of the importance of ratification and the concrete mechanism chosen to achieve it. And on the other hand, state institutions' capacity to guarantee that voters have sufficient information on the normative or political content subject to ratification, and that there are

no obstacles to accessing polling stations, so that abstentions will not prevail.

On the first point, it is critical that before the beginning of a ratification process, there are discussions on the best way to carry it out, and that this debate achieves a broad consensus that prevents or diminishes polarization. The Colombian process provides bittersweet lessons in this regard. From the start of peace negotiations with the FARC, the president committed to consult with the people about the Final Agreement. However, there was no consensus on what the best mechanism was for conducting the consultation. While the Government considered the benefits and drawbacks of existing mechanisms for direct participation—plebiscite, referendum, and popular consultation—the FARC promoted the idea that ratification would only be possible by convening a constituent assembly.

Without having settled this discussion, the Government promoted a legislative proposal that would allow it to call a plebiscite with a special participatory threshold—lower than the one in existence for referendums. The proposal was criticized at various times by the FARC for not having been the subject of negotiations, but after Congress and the Constitutional Court approved it, the FARC supported setting it in motion. The proposal was widely debated both before Congress and in a public hearing convened by the Constitutional Court. The opposition to the Peace Agreement criticized it vehemently for trying to change the rules of the game of participation mechanisms to ensure popular approval. However, defenders of the Peace Agreement were also concerned about the plebiscite, since it did not offer the necessary time and spaces for a long and complex text (300 pages) to be adequately disseminated, understood, and discussed by voters. The Constitutional Court's decision on the plebiscite established some basic conditions for disseminating the Agreement; however, these do not seem to have been sufficient to guarantee the active participation that the mechanism required. In effect, the plebiscite took place less than two months after the signing of the Peace Agreement and, against all the predictions of opinion polls, it resulted in a negative outcome for the Agreement. The margin of victory was very narrow (50.21% of the votes) and abstention levels were historically high (62.9%). Although "Yes" votes were concentrated

in the poorest and most afflicted parts of the country (Fergusson and Molina 2016), abstentions also prevailed in these areas (ORP 2016). The outcome further illustrated that, instead of having diminished the polarization of society around peace, the plebiscite had accentuated it.

The adverse decision of the people prevented the implementation of the Agreement, gravely jeopardizing the ceasefire agreed to by the parties. Due to mobilizations that demanded a new agreement immediately, as well as to the willingness of the negotiating parties to continue the process without denying the results of the plebiscite, the Government decided to meet with the main opposition leaders to listen to their objections to the Agreement and then discuss them with the FARC in Cuba. After intense weeks of meetings, the parties managed to negotiate a new agreement—this time the *definitive* one—which took into account the vast majority of the opposition’s objections. Nevertheless, the opposition refused to proclaim that the Agreement had adequately responded to its objections, and demanded that negotiations remain open. Fearing that continued polarization would again lead to a negative outcome, and insisting on the urgency of starting the implementation of the Peace Agreement to prevent a breakdown of the ceasefire, the Government decided not to resubmit the new text to popular ratification. Instead, it asked Congress, as an indirect representative of the people, to ratify the new text. Congress ratified the text with large majorities, after a discussion that was vigorous although condensed in a couple of days, and in which the opposition participated but abstained from voting. Although the Constitutional Court considered that the ratification process was in accordance with the Constitution, the opposition severely criticized it, considering it a way of cheating the will of the people. The process of indirect ratification also caused concern among some sectors that favor the Agreement, who recognized the importance of its prompt implementation, but worried about the negative effects that the deficit of legitimacy might have on the implementation and sustainability of the peace agenda.

The complex situation of the Colombian process, which is still in progress, offers the following preliminary lessons. First, it is important to establish a road map in the event that the people vote down a ratification process. The Colombian case illustrates well

the Government's lack of preparation for a defeat—its spokespeople always asserted during the plebiscite campaign that they did not have a “Plan B.” Anticipation of and better preparation for all the possibilities that could derive from the vote would have generated less uncertainty in the aftermath of the plebiscite.

Second, the legitimacy of peace agreements seems to become more relevant once the door to participation has been opened. Although it was not mandatory for the Colombian Government to submit the Final Agreement to a popular vote, the fact that it did created a precedent that empowered citizens vis-à-vis their right to participate in decisions related to the peace process. Subsequent ratification in Congress may have generated feelings of deception, frustration, or distrust about the process. Therefore, when participation expands incrementally, it is necessary to seek formulas that prevent regression and that, if possible, guarantee the strengthening of participation.

Third, although direct popular ratification is very important for providing broad legitimacy to transitional mechanisms, it also entails risks such as abstention and polarization, which can lead to endangering the transcendental goal of peace. This makes it essential that the different ratification mechanisms are carefully assessed in each context, and in accordance with the type of issue desired to be submitted for the people's consideration. The mechanism that maximizes the electorate's active and high-quality participation should be preferred.

In the Colombian case, submitting the Agreement to a plebiscite formally extended participation to the entire citizenry. However, it submitted an extremely complex text to a binary (and therefore likely polarizing) decision; it did not offer conditions for the text to be read, understood, and debated, and it did not establish mechanisms that could facilitate access to the polling stations of the populations on the periphery and that were most affected by the conflict. The narrow margin by which the “No” won, in addition to widespread abstention, casts doubt on the representativeness of the result, especially when many of the “No” voters expressed that they did want a Peace Agreement but did not agree with some of its specific content. A “Yes” victory, with an equally narrow margin of success, would have raised similar questions.

In addition to the risks of polarization, it is important that ratification tools do not become a mere instrument for political legitimization, and that they can be appropriated by the sectors that were most affected under the previous regime. Considering that victims and marginalized social sectors are generally excluded from the political sphere, it is necessary that communication strategies are not limited to traditional media but try to reach isolated populations through community media or the use of local meeting spaces, and that the messages they use can be easily accessed by populations that are illiterate or speak other languages.

The Guatemalan case illustrates the problems associated with weak communication strategies. After the signing of the peace accords between the Government and the Guatemalan National Revolutionary Unity (URNG per its acronym in Spanish) in December 1996, constitutional reforms were promoted, which were submitted to a referendum. The reforms were not approved at the ballot box, in which only 18% of registered voters participated. The non-deployment of dissemination tools has explained the immense level of abstention in remote regions. Many of these regions (especially those with an indigenous population majority) had been disproportionately affected by conflict, and yet, in several cases, inhabitants were not even aware that the peace agreement had been signed. Abstention served the interests of the elites, many of whom favored voting “No” on the referendum, and therefore kept the information centralized.

Unlike the Guatemalan and Colombian cases, the broad scope of the advertising campaigns in favor of the transition had a positive impact in the Spanish and Chilean cases. The massive use of media such as radio and television were decisive for the favorable result of the referenda that supported democratic openness after the death of dictator Francisco Franco in Spain, and under the dictatorship of Augusto Pinochet in Chile. In the Colombian case, campaigns seem to have also been important, but more so against the ratification that was being pursued. After winning, the head of the “No” campaign publicly admitted that the focus of the strategy had been to distort the contents of the Final Agreement and position certain issues based on the socioeconomic strata of voters. This led to a citizen lawsuit against the election before the Council of State, which, in a preliminary decision, indicated that

the vote could be defective because the citizenry had been misled; however, the lawsuit was closed in 2017. The controversy underlines the importance (if not legally, at least politically) of establishing clear campaign rules in ratification processes, so that the information provided to voters is complete and accurate.

Although ratification spaces promote the participation of society as a whole and do not privilege the participation of victims, the latter can take political ownership of the transitional justice process through active mobilization that demands that the measures that will be adopted take their needs into account. The risk of adopting measures that have little practical effect and are used to perpetuate power relationships is reduced when victims appropriate the transitional process. In addition, taking ownership can politically empower victims, and thus expand their capacity to influence the future implementation of transitional justice measures, and increase their political participation in other types of decisions.

The Chilean case provides an interesting example of how victims and other social sectors can take ownership of the ratification process, and thereby promote substantial political change. The plebiscite conducted in 1988 to consult the public on Pinochet's continuity in office was initially conceived by the military regime as a strategy to remain in power. It calculated the referendum could easily win a majority in favor of Pinochet and that this would provide him democratic legitimacy to continue governing. However, the active mobilization of victims and many other social sectors managed to turn the referendum into a mechanism that challenged the regime's authoritarianism, and eventually led to its defeat. This implied calling presidential elections within one year and the partial dismantling of the military regime.

The Colombian ratification process can also shed some light on this point. Although the Government promoted an official "Yes" campaign, broad social sectors started independent campaigns that promoted voting in support of the peace process, while keeping their distance from the Government and its official campaign. The importance of these independent campaigns was that citizens had a multiple reasons available to cast their vote and that support for the peace process did not necessarily imply support for other Government policies. However, this diversity

of support generated a lack of cohesion and of an unambiguous message in the “Yes” campaign. The “No” campaign took advantage of this. By sending a message that was simple and direct, even if misleading, it achieved unprecedented adherence even from those who supported peace but had doubts about the specific details of the Agreement. The “No” campaign manipulated the cause of victims, using their rights as its main banner, and claiming that the peace agreement would lead to impunity for the FARC, even though many victims and their organizations adhered to the “Yes” campaigns. In this way, paradoxically, the voice of victims was used against their own preferences, against peace, and against transitional justice.

Complementarity of Participatory Scenarios during Adoption

Each of the above participatory scenarios during the adoption of transitional justice measures responds to a different purpose, all of them important. For that reason, it seems desirable that, as much as possible, those scenarios be complementary and not mutually exclusive, thereby increasing the participation potential promoted by each one of them. For example, since ratification mechanisms do not favor the expression and influence of victims in the decisions that are adopted, it seems appropriate that such mechanisms be preceded by deliberation or consultation scenarios to ensure that the decisions to be ratified take into account the needs and preferences of the main beneficiaries of the transitional justice measures. This happened in South Africa, where—as we saw—ample participatory spaces were opened to discuss the establishment of the Truth and Reconciliation Commission (TRC), transitional arrangements were later approved through a citizen ratification mechanism, and the adoption of a new constitution consolidated the process.

Deliberation and prior consultation spaces can also be used in a complementary manner, as illustrated by the Colombian case. As we saw, although the Government promoted draft legislation for the reparation of victims of the armed conflict, victims and civil society organizations actively participated in the discussion through public hearings in Congress, forums, and conferences

that were extensively covered by the media. The spaces for deliberation were complemented by spaces for consultation with ethnic groups that had the purpose of discussing the adjustment of regulations to the cultural particularities of these groups.

CHAPTER 4
Participatory Scenarios
in the *Implementation*
of Transitional Justice Measures

In addition to participatory mechanisms at the time of adoption, different transitional justice measures (justice, truth-seeking, reparations, guarantees of non-recurrence) offer participatory scenarios at the time of implementation. These scenarios allow the participation of victims not only as the population that is the *object* of the measures but also as active agents in the implementation process. Furthermore, they provide opportunities for civil society participation in the process.

The participatory scenarios we identified are diverse. They include spaces in which the primary and direct objective is to guarantee the participation of victims and civil society—such as hearings and other scenarios in which victims can present their testimonies—as well as spaces that have a purpose other than participation but that create the possibility for victims and civil society to get involved—such as the composition of bodies responsible for implementing the measures, or information and dissemination spaces for the media. In addition, the participatory scenarios that we identified include not only official ones but also extra-official ones, which are created by victims with the purpose of being complementary or alternative to official ones.

Some of the participatory mechanisms that we identified are shared by all transitional justice measures—for example, the composition of decision-making bodies—but have particularities that stem from the objectives pursued by each measure and require an independent analysis. Therefore, at the risk of being repetitive, we opted to conduct an analysis of each participatory mechanism in each transitional justice measure. Below, then, we refer to the four basic transitional justice measures, identifying the opportunities that they open for participation and illustrating their potentialities and limitations with practical examples.

Justice

In the context of transitional justice, justice measures, strictly speaking, materialize in the conduct of trials. Depending on the context and its particularities, trials can have retributive or restorative purposes, or a dual or hybrid purpose. The traditional view of victims' participation in trials is limited to the moment when they can provide evidence or testimony that contributes to the advancement of the process. However, there are other relevant scenarios where victims and civil society can participate in judicial proceedings. We identify at least three participatory scenarios in relation to justice measures, in accordance to the moment in the implementation process when they occur: the composition of the courts or tribunals responsible for applying justice measures; participatory spaces during the trial; and the monitoring and dissemination of information on the trials through the media and social organizations. Below we analyze each scenario in detail.

Composition of Courts or Tribunals

Once justice mechanisms have been created, or the conditions for their application have been broadened, the possibility that victims and civil society participate directly in their implementation depends on whether the bodies responsible for their application accommodate such participation. As a general rule, justice measures are implemented by professional bodies and do not allow the participation of any non-specialist sector of society in their decision-making (including victims and civil society). In effect, justice measures are usually implemented through criminal trials against the perpetrators of the crimes committed during the transition or in civil or administrative courts to obtain reparation for the damages caused. These proceedings are carried out by specialized courts or tribunals both at the international and domestic levels.

Restorative justice mechanisms can provide an exception to that rule. These mechanisms are implemented as a complement or alternative to ordinary courts, with the purpose of repairing the relationship between victims and victimizers from a non-punitive perspective that is based on the recognition and compensation of damages. Frequently, the bodies that are responsible for mediating or facilitating the restorative exercise are composed of

members of the community that to which the victim or victimizer belongs, such as leaders or sages with legitimacy among the people, or the relatives or social groups of those involved in the conflict. There are also some community retributive justice experiences that seek to punish the crime (not only redress the damage), but through the application of the rules and procedures of the affected communities by the communities' local authorities.

Community mechanisms for restorative or retributive justice clearly expand the potential participation of victims and civil society, when compared to ordinary domestic and international justice mechanisms. Local communities can participate much more directly in the adoption of decisions through their legitimately recognized authorities. In addition, the application of community norms may open the door for the reflection of their worldviews in the decisions. Now, the satisfaction of these purposes can only be achieved if the effects of violence before the transition are not so devastating or divisive as to impede the identification of traditional leaders or authorities or their recognition as such by the community. It is also possible that setting into motion these processes could conflict with other important transitional objectives, such as respect for the rule of law.

The experiences of Rwanda, Uganda, and Sierra Leone illustrate both the potentials and some of the pitfalls of participation in community justice mechanisms. In Rwanda, in the year 2001, an informal community-based conflict resolution mechanism, denominated Gacaca, was established with the purpose of dealing with the genocide cases that would not be heard by the International Criminal Tribunal established by the United Nations Security Council for that country in 1994. In Sierra Leone, mechanisms to combat impunity were established within the framework of the Truth and Reconciliation Commission created in 2000. To this end, hearings with a restorative approach facilitated by community and religious leaders were held in special jurisdictions in accordance with the community laws of about eighteen ethnic groups that exist in the country. Uganda, for its part, stipulated the application of *traditional justice* in the 2007 Agreement for Accountability and Reconciliation (Juba Agreement), signed between the Government of Uganda and the Lord's Resistance Army, also with a restorative approach.

In all three cases, carrying out trials based on traditional standards sought to accommodate the requirements of justice to norms that were rooted in the community, with the idea that this would avoid the impression that the trials were a foreign imposition and, consequently, would broaden their legitimacy and effectiveness. This last point is illustrated very well by the Ugandan case, where communities from the North (the area that was most affected by the conflict) were reluctant to accept the intervention of the International Criminal Court (ICC) because they viewed it as an improper intervention of Western justice that could hinder a negotiated exit to the conflict. Although this opposition encouraged community participation in the local justice mechanisms, it also hampered the investigation and international judgment of those most responsible for the crimes. The latter issue is an important transitional goal, especially in contexts of institutional weakness in which domestic courts may lack the capacity to carry out the task. Therefore, the first risk of community justice is the tension that may arise between local mechanisms and ordinary justice mechanisms (national and international). This risk can be reduced through institutional designs that ensure complementarity between the different justice mechanisms, so that community mechanisms contribute to, rather than undermine, the legitimacy of other judicial institutions.

Another risk of community justice is that direct participation can cause even greater social division than existed before if the bodies responsible for administering justice act as partisans of the factions or visions in conflict rather than as impartial third parties. This risk can lead the justice bodies to threaten the criminal guarantees of suspects or promote visions that stand in the way of reconciliation. Studies on the Gacaca courts in Rwanda have identified both risks. Although these courts function as criminal tribunals, important guarantees such as the right not to testify against oneself or the presumption of innocence have been relaxed in favor of community standards. Furthermore, Gacaca trials have only been conducted against members of the Hutu ethnic group—who were the most responsible for the genocide, but not the only ones who committed atrocities. This has generated the perception that justice is biased, as well as a collective sense of Hutu guilt that has made it difficult to repair the social

fabric at the local level, which was one of the objectives sought by these trials.

These risks seem to be greater in community trials that have a retributive nature than in those of a restorative nature. Since the latter are intended to mend relations between victims and victimizers and repair the damage caused, they do not seem to carry the risk of violating basic criminal guarantees, while they have a greater potential for reconciliation. This is illustrated, for example, by the Ugandan case, where restorative hearings consisted of negotiations between the clans of victims and perpetrators, with the purpose of reaching agreements on what had happened and establishing compensation, so that ex-combatants could reintegrate into communities by accepting their responsibility.

Participation in the Development of Judicial Proceedings

Even when victims and civil society do not participate in the implementation of justice measures by being part of decision-making bodies, they can participate in the judicial proceedings by providing evidence and expressing their version of events during the procedural moments established for this purpose. Victim participation in this type of scenario has not purposes of expression and influence but also of transformation. Indeed, the idea is that participation counteracts the power relationship that the victimizer imposed on the victim when the crimes were perpetrated. This can be achieved by avoiding the narration of what happened solely from the perpetrator's perspective—which was the dominant perspective until the time of transition—and that the narrative justify or celebrate the commission of crimes by the victimizer.

Now then, the satisfaction of these different purposes depends on the presence of several material, organizational, and technical factors, without which participation can be used as a legitimizing mechanism and generate feelings of frustration and powerlessness in victims. The main factors that can strengthen victims' participation are: the existence of ample procedural spaces where victims can express their account of events, access to information about the proceedings, technical support to be able to understand and navigate the proceedings, and legal and psychosocial support throughout the proceedings.

As we saw in the previous section, participation is more common, and also easier to implement, in community justice mechanisms. These mechanisms are characterized by offering spaces in which the participation of victims plays a fundamental role both directly (in mediations or negotiations on how reparations will take place, or at hearings in which victims tell their version of events) and through the representation of local authorities or other members of the community. Participation also becomes easier because the proceedings take place in the communities of victims and apply local laws; as a result, fewer resources are needed to ensure that victims receive information, attend the proceedings, or understand how they are being conducted. Such participatory scenarios are not only offered to victims but also to other members of the local civil society.

By contrast, ordinary justice mechanisms generally do not offer participatory spaces beyond the procedural instances in which victims and civil society can provide documentary and testimonial evidence. Judicial processes, especially when they are of a criminal nature, tend to focus on the person that is being prosecuted, leaving little space for victims to speak. However, there are no obstacles that prevent judicial proceedings from providing specific participatory scenarios for victims. Such scenarios can include public hearings on certain types of crimes or criminality in certain places with high victimization, or intervention spaces where they can reply to or question the perpetrators' versions. These proceedings can also offer civil society the opportunity to participate through the submission of *amicus curiae* briefs or evidentiary documents. In order for participation (especially victims' participation) to accomplish its purposes, it is fundamental to guarantee the dissemination of information and financial, technical, legal, and psychosocial aid. Unlike community mechanisms, judicial proceedings usually take place in cities that are very distant from the areas where the victimization occurred, and they are characterized by formalities and costs that become an obstacle to victims' access.

Despite the potential of victims' participation in judicial proceedings, very few experiences offer examples of broad spaces for its exercise. The experience of the International Criminal Court (ICC) has been emblematic in its effort to move away from

a criminal scheme focused on the perpetrator and to create innovative spaces for the participation of victims and civil society. The ICC's procedure provides for victims' participation in the development of hearings; additionally, it allows NGOs to submit amicus curiae briefs, have observer status in some cases, serve as sources of information on crimes that are being investigated, and even directly assist the work of the ICC.

However, participatory experiences in ICC proceedings have not been free of difficulties, especially in relation to victims. To date, active participation has been much lower than expected. This is so because the procedure imposes high legal representation demands that are difficult to meet due to language barriers; the application form to be recognized as a victim is quite complex, and there is no provision of legal or economic aid, nor do protection measures exist. These limitations came to light in the Ugandan case. Although society was reluctant to accept the ICC's participation, forty-nine people applied to be recognized as victims within the proceedings opened in 2006. However, almost a year later only four of them had been approved, because it was claimed that the others had outstanding issues regarding proof of identity.

The Colombian case also offers a problematic example of victims' participation in the judicial process. The previously mentioned Justice and Peace Law provides for *versión libre* (spontaneous declaration) hearings in which those who have demobilized must contribute to truth-seeking by confessing to the events in which they participated or of which they have knowledge. Victims' and human rights organizations disputed the dominant role of perpetrators in the hearings and the way they used these spaces to justify their crimes. These organizations insisted before the Attorney General's Office that victims and their representatives should be authorized to enter the hearings and intervene directly. They also demanded financial support so they could attend the hearings, as well as the adaptation of the space foreseen for the hearings so they could be present. Once the proceedings had reached an advanced stage, the Attorney General's Office began to broadcast the *versión libre* hearings in the municipalities affected by violence, but in general the process has received harsh criticism for the limited voice and participation of victims.

Monitoring and Dissemination of Information in Trials

In addition to actively participating by providing evidence or stating their version of events, victims and civil society can also participate in trials as spectators or the public. The existence of a large audience is important because it offers a way of monitoring the proceedings that, depending on the way in which the trials develop, can contribute to or detract from their legitimacy. Justice mechanisms allow open attendance at proceedings to different degrees. Attendance might be limited in cases involving crimes against vulnerable victims (such as minors or women who have suffered sexual violence), and it might be restricted to some scenarios such as witness and decision-making hearings. The restriction of information in these cases fulfills important purposes, but it should not reach the point where the public lacks knowledge on some of the most relevant aspects of the proceedings.

Even when open participation is allowed in certain procedural moments, it is not usually permitted at a massive level due to the costs that it involves. For this reason, the media can play an important role as facilitators of the public's participation by broadcasting and disseminating what occurs in the trials. That role can also be played by social organizations that have the capacity to disseminate information. In that sense, the participation of a broader section of society in justice proceedings is conditional on the capacity and willingness of the media and social organizations to disseminate information, and on the existence of guarantees for accurate, impartial, and pluralistic information.. This form of participation can be enhanced if courts deploy communications strategies aimed at broadcasting good quality information on the proceedings.

An interesting option for deploying this strategy is establishing agreements between the courts and the media so that the former can provide fluid information on the proceedings, and the latter can commit to opening slots in their regular programming to disseminate the information. Three experiences are illustrative in this regard. In Sierra Leone, the Special Court created by a United Nations Security Council resolution to pursue those *most responsible* for human rights violations committed during the war established agreements with national and local radio

outlets to promote the adequate presentation of the trial reports. These agreements even provided for training mechanisms for journalists to ensure the information was handled properly. Similar agreements were established with the media to regulate the disclosure of information related to the proceedings carried out by the hybrid tribunals created in Bosnia and Herzegovina and in Cambodia to adjudicate atrocious crimes committed before the transition—the War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), respectively.

Another interesting option to ensure the adequate dissemination of information on the trials is the establishment of agreements between courts and social organizations. In contrast to the agreements with the media, agreements with organizations have the advantage of being supported by specialized staff that can perform deeper technical analysis than the press. In addition, the incidence networks of social organizations can ensure that the information is replicated by grassroots organizations at the local level. An example of this type of agreement is also offered by the case of Bosnia and Herzegovina, where the hybrid Court (WCC) established a support network with several civil society organizations when it began to operate. The network included four regional information centers, independent from the tribunal, which constituted a link between the WCC and the citizenry.

A third option for disseminating information on trials is that social organizations themselves take the initiative of monitoring the proceedings and disseminating their analyses. However, this practice carries the risk that, as it is not part of the tribunal's communications strategy, there will be obstacles to access information (and to ensure an adequate level of depth and quality). Still, this practice has the potential to ensure a greater level of independence and plurality, since the analyses of the disseminated information provide an alternative to the official perspective regarding the development of the trials. Once again, the case of Bosnia and Herzegovina is illustrative. The organization Balkan Initiative Reporting Network (BIRN) has disseminated information on the WCC's work and on each one of the war crime trials it has conducted. Additionally, it launched a radio program, *Radio Justice*, and a television broadcast, *TV Justice*, with the purpose of

providing information to society on the trials. Despite this important effort, the organization has expressed its dissatisfaction over the lack of willingness of judges and prosecutors to provide information and the lack of access to documents, audios, videos, etc., all of which works against the quality of the information they can provide.

A final option for the dissemination of judicial information consists of the establishment of partnerships between civil society organizations and the media. Again, this option presents the problem of lack of coordination with the tribunals' strategy, but, unlike the previous option, it has the potential of increasing access to information through alliances that build on the strengths of organizations and the media. The Cambodian case provides an important example of such experiences. The Asian International Justice Initiative (AIJI) was a collaborative project between the East-West Center and the WSD HANDA Center for Human Rights and International Justice at Stanford University (previously known as the Berkeley War Crimes Studies Center); it generated weekly reports on one of the trials, known as the *Duch Trial*, which were broadcasted on a television station every Monday at noon. Other organizations have carried out technical analyses on the work of the ECCC, like the organization Cambodia Tribunal Monitor, and various social organizations have undertaken efforts, such as community forums, to present the tribunals' work.

Despite the different options that exist for disseminating information on judicial proceedings, and their potential, dissemination efforts have also faced problems. In addition to problems relating to the reluctance of courts to provide information and the weakness of social organizations to demand it, information can be disseminated in a partial or biased way. This may contribute to exacerbating social divisions or perpetuating power relationships between victims and victimizers. The Colombian case offers an example of the latter. Once the first stage of the justice and peace trials started, they received vast coverage in the media. However, in this stage the perpetrators had a leading role and victim voices were silenced. This resulted in perpetrators' stories receiving massive and daily coverage in the media. In many cases, the perpetrators' narrative justified and even celebrated their crimes;

however, the media did not put it into context nor did it contrast it with the versions of victims. This led to the dissemination of a distorted interpretation of the events, which added to the victims' marginalization on the public stage.

Truth

Truth-seeking measures in transitional contexts generally consist of the establishment of special institutions—typically truth or historical clarification commissions—that are charged with constructing an official narrative of the violence committed during the preceding period of civil war or authoritarianism. Given their objectives, truth commissions provide both victims and civil society with ample opportunities to publicly present their versions of what happened and break their silence. They also allow the suffering of victims, together with the impact of violence on victims and society in general, to be recognized and to occupy an important place in the official narrative. In addition to providing spaces for victims and civil society to give their testimonies, truth commissions also offer other important opportunities for participation: when defining their composition, in the collection of evidence, and in the dissemination of information. On the other hand, official commissions are not the only truth-seeking measures; there are other non-official initiatives that complement the efforts of truth commissions and occasionally question their findings. These initiatives also offer significant spaces for the participation of victims and civil society, in particular when they are the result of local initiatives.

Below we examine in detail five participatory scenarios that we identified in comparative experiences on truth-seeking measures: the establishment of truth commissions, scenarios for participation where victims and witnesses can give testimony, the collaboration of social organizations in the construction of truth, the dissemination of information resulting from the work of truth commissions, and the construction of alternative truths.

Establishment of Truth Commissions

The first moment in which truth mechanisms offer important participatory spaces is the establishment of the bodies entrusted with

implementing such mechanisms. In fact, the promotion of this type of mechanism has been less controversial than the promotion of justice mechanisms, which is why the participation of victims in its promotion has been less relevant or has been included in the more general fight against impunity.

Truth mechanisms, unlike justice measures, tend to be implemented by institutions that do not require their members to be experts, thus allowing the participation of victims' representatives and other civil society sectors. Victims' participation is important because it offers these sectors not only the opportunity to tell their version of what happened but also to effectively influence the construction of the official narrative. This possibility allows the rebalancing of power relationships, by giving groups that had previously been invisible and subordinated because of their victimization the possibility of making crucial decisions about the violence that affected them.

However, if society as a whole—which has also been affected by violence, albeit more indirectly—is to accept the constructed narratives as legitimate, it is necessary that direct victims and also other social sectors, with their different perspectives, participate in their construction. If only or primarily victims are allowed to participate, there is a risk that the official narrative about what happened will not take into account the diversity of existing versions and thus be viewed as biased. This risk can be minimized by designing a selection process that guarantees pluralism in the composition of truth commissions, and that promotes the election of at least some members who can be considered impartial to antagonistic perspectives and independent of political power (such as academics or religious leaders, in some contexts, or foreign human rights leaders, in others).

Morocco's truth commission is a good example of pluralism because it comprised different social sectors, including activists, lawyers, academics, and even former political prisoners. The cases of the Democratic Republic of Congo (DRC) and Peru, on the other hand, are examples of the problems that can arise due to lack of pluralism, for a variety of reasons. In the case of the DRC, the members of the Truth and Reconciliation Commission were questioned because most represented the political groups running for office during the peace negotiations (the Pretoria

Agreement), thus excluding the representation of victims and neutral sectors. In the case of Peru, the Truth Commission was criticized because only one Quechua-speaking commissioner was selected, even though nearly 75% of the victims of the armed conflict spoke this language. In addition, some of the commissioners were contested by civil society because they represented the sectors that had generated the violence, such as a retired army general.

The risks of lack of representation or impartiality in truth commissions can be mitigated if the selection process is public and transparent. This entails a process with clear criteria for selecting the commissioners, and that demonstrates the independence and impartiality of all those not chosen to represent the sectors directly affected by violence. Concerning the rest of the commissioners, it is important that the proportionate representation of all affected sectors is ensured.

The cases of South Africa and Sierra Leone are good examples of the public and transparent selection of commissioners. In South Africa, the selection process was entrusted to an independent committee that conducted public interviews of the finalists. In Sierra Leone, the selection committee was led by the United Nations and included the participation of different societal sectors and even sectors of the armed opposition. The United Nations proposed foreign candidates, while civil society proposed national candidates. In both cases, the selected commissioners were, for the most part, considered to be independent and ethical individuals suited to perform the task.

Participatory Spaces for Victims and Witnesses to Provide Testimony

As mentioned in the introduction to this section, the institutional spaces created by truth commissions to hear the narratives of victims and other witnesses are the participatory spaces par excellence of truth-seeking measures. The existence of these spaces, the way they operate, and the degree to which the narratives expressed therein are effectively reflected in the written reports of the commissions are criteria for assessing the extent to which victim and civil society participation meets the objectives of expression, influence, and transformation of power relationships. If

participatory spaces are limited, exclude many sectors, or receive minimal attention, the expression objective will be called into question. But so will be the transformative purpose of these type of spaces to the extent that, as discussed above, the participation of victims seeks to enable them to overcome their marginality, break their silence, and allow their testimonies to challenge those of perpetrators. If the spaces for participation are broad and receive sufficient attention, their level of incidence will depend on whether the commission reports take into account the testimonies of victims and other social sectors.

Of all the spaces that exist for victims to tell their version of what happened, public hearings offer the greatest opportunity for participation. These hearings place victims at the center of the political stage. They also offer them the opportunity to narrate their stories orally and with few formalities or limitations, which allows them to express their suffering in a genuine and personal manner. Victims who do not participate in hearings can still identify with the testimonies of participants and, thus, to some extent share the narrative experience. In addition, victims' narratives can generate empathy and acknowledgment of their suffering among broad social sectors. In fact, these personal narratives have the power to challenge the stereotypes and misconceptions about how and why violations occurred. Victims' narratives can thus transcend the barriers created by cultural or political differences, and allow the social sectors that listen to the hearings to relate to the pain of victims and to participate in the construction of a narrative that acknowledges and includes their suffering.

Several factors can limit the potential of public hearings. First, publicizing the hearings can affect the privacy and safety of victims. Since these are important objectives, it may be justified to restrict publicity; however, this restriction should not, as far as possible, lead to a complete lack of publicity, but rather to a selection of what can be made public in order to achieve a balance between the different objectives at play. For example, publicizing hearings can threaten the right to privacy of victims of certain crimes, such as those involving children or sexual violence cases. Consequently, truth commissions should opt for making only some of the hearings public, as in the cases of South Africa, East Timor, Peru, and Morocco.

Moreover, in some contexts, publicizing hearings can be considered risky because of possible reprisals against those who testify. This happened in El Salvador, for example, where the truth commission decided to conduct its investigations privately in order to protect those who gave testimony. Creating protection programs can reduce the risk of new forms of violence against victims and witnesses while ensuring that the objectives of publicizing the hearings are not sacrificed altogether. This happened in South Africa, where the Truth Commission incorporated a program to offer greater guarantees to victims and encourage their participation. However, these types of programs are only justified if they work well enough to avoid putting the lives of victims at risk.

Second, the potential of public hearings can be limited by the budget and time needed for many victims and witnesses to tell their stories. These difficulties can be overcome by expanding the mechanisms used by truth commissions to receive testimonies, and by conducting thematic public hearings on those crimes that have had a greater social impact. In relation to the former, commissions can allow victims and witnesses to submit written declarations with their versions, receive testimonies from people living in exile abroad, and make field visits to receive the testimonies of people who live in remote areas and do not have the resources to attend the hearings. Several truth commissions have used these mechanisms to increase participation. The Moroccan truth commission received written testimonies, whereas the one in Argentina allowed people living in exile to give their testimonies in embassies and consulates, and the one in Guatemala traveled to remote regions to gather the testimonies of a greater number of victims.

With regard to hearings, truth commissions can hold special, public, or private hearings, with the purpose of calling attention to the most important issues for the construction of the truth about what happened. Special hearings can focus on violations that, according to the commission, should be given special attention, either because they were recurrent or particularly serious crimes, or because they were committed against people entitled to special protection, such as ethnic or political groups, or against women or children. While all the victims of the crime in question may not be able to participate directly in the hearings, it is

possible that they will feel represented by those who do, and that the rest of society will acknowledge their suffering. This can help address the obstacles that arise from a lack of resources for the direct participation of all victims. The truth commissions of South Africa and Peru conducted these these of hearings.

Most public hearings and other official truth-seeking spaces can face two additional and serious limitations that can adversely affect participation. The first is imposing restrictions on what victims and witnesses can say in their narratives or on what can be included in the final reports of commissions. The typical example of this restriction is the prohibition of naming the perpetrators of the crimes that are reported. This prohibition is problematic because it contradicts the objective of combatting impunity by assigning responsibility, and it limits society's knowledge of what happened. This prohibition can reduce the effective truth-telling capacity of commissions, and hence their legitimacy in the eyes of victims and of society in general. Also, since victims are generally the main advocates of the fight against impunity, the prohibition of naming those responsible can discourage them from participating in the narrative spaces, as they may prefer not to collaborate in an effort that could affect their struggle and that they consider lacks legitimacy. Something similar can happen with civil society sectors that believe in the importance of assigning responsibilities.

The experiences of Morocco and Guatemala are examples of the limitations of the prohibition to mention those responsible in truth-seeking spaces. This prohibition led social organizations to question the work of the Moroccan Equity and Reconciliation Commission (ERC) and of the Commission for Historical Clarification of Guatemala. Further, as discussed in the section "Alternative Spaces for the Construction of Truth," this also led social organizations to create alternative and non-official truth-seeking initiatives where victims could participate without restrictions. These spaces were created in opposition to official initiatives and, thus, questioned their legitimacy.

The second type of limitation consists of imposing time limits or restrictions to the topics that can be discussed in truth commissions. This can occur if commissions define a specific time period or the types of violations that they will address, which means

that those atrocities that are not mentioned or are committed outside the specified time period will be excluded. These limitations evidently prevent certain victims from telling their versions about what happened and from being officially recognized as such. If the justification for these limitations is inadequate or discriminatory, this exclusion reduces the participatory potential of truth-seeking mechanisms; it can also generate new violations of victims' rights, thus hurting the legitimacy of truth commissions.

The National Truth and Reconciliation Commission of Chile demonstrates the risks of excluding certain types of crimes from the commission's mandate. Its work excluded victims of certain offenses, such as torture survivors. These victims objected to the restriction and fought for an extension of the commission's mandate or the creation of a new commission. They were only able to achieve the former thirteen years after the establishment of the original commission.

Collaboration of Social Organizations in Truth-Seeking

Social organizations do not play a predominant role in the spaces offered by truth commissions to narrate what happened, except as facilitators for the participation of victims or witnesses and as critical spectators. However, social organizations can actively participate in the work of these commissions in other ways, primarily by providing information and establishing links with victims and civil society sectors. Collaboration between truth commissions and social organizations increases their participation and that of the sectors they represent, and it can also increase the legitimacy of their work and even the quality of their results.

Given the extensive and longstanding work of documentation and reporting by human rights organizations and other groups (such as some religious groups) of the acts of violence committed during wars and dictatorships, they can provide very important information to truth commissions. This information can be complemented and contrasted with the information received from official sources and obtained from the testimonies given by perpetrators, victims, and witnesses. In order for this collaboration to be productive, truth commissions should establish serious and respectful channels of communication with

social organizations, or even institutionalized arrangements for collective work.

The Chilean case is a good example of these type of channels and joint work. Different social organizations and the Catholic Church provided the truth commission with crucial information collected through their rigorous documentation of cases of violence and support to the victims during the dictatorship. These organizations also collaborated with the commission by receiving testimonies that served as inputs for its report.

In contrast, the case of Guatemala illustrates the problems that can arise due to the lack of recognition of the work of social organizations and the contributions they can make to truth commissions. As mentioned above, the comments of social organizations about the limitations of the truth commission mandate were ignored, which caused tensions and resulted in the organizations carrying out an independent truth-seeking project, rather than collaborating with the commission.

Dissemination of Information about the Work of Truth Commissions

As in the case of justice measures, access to information about the work of truth commissions is critical for the participation of victims and civil society, as they can become involved not only by providing testimony but also as spectators (and, thus, evaluators) of the truth-building process. The previous section explained that the participation of spectators is facilitated by the frequent use of public hearings for truth-seeking purposes. However, the limited space and the cost of attending those hearings prevent most victims and civil society from directly participating in them as spectators. Consequently, the communications media and social organizations that conduct outreach also play an important role in these scenarios.

The dissemination of information about truth commissions is relevant in all stages of their work; but it is especially important, first, during the public hearings where victims and witnesses testify, and second, during the presentation of the commissions' final reports. With regard to the former, television and radio broadcasting of public hearings enables those who cannot attend to hear the victims' narrations, and thus acknowledge their

suffering, empathize, and feel that they are part of the truth-seeking process. Whether or not this happens depends on the communication media's willingness to broadcast the hearings (live or delayed), which is easier if truth commissions adopt the strategy of establishing agreements with the media, or if the public or state media adopts this policy. The latter occurred in the case of South Africa and Morocco, where public television broadcasted the truth commissions' hearings.

In relation to the second point, broad dissemination of the final reports of truth commissions is essential for the content of reports to be known by the general public and, thus, widely debated and accepted as the official or legitimate version of what happened. For this to be the case, it is important that the reports are made public and are easily accessible to all citizens, and also that relevant spaces exist for their presentation and discussion.

Most truth commissions have published their reports, although there are a few exceptions, such as East Timor, where the Government decided not to publish it. However, not all commissions have created adequate spaces for debate and reflection on the contents of reports, which has led to the questioning and stigmatization of the reports by opponents. This happened in Chile, where the military establishment, which retained much of its power in the democratic transition, challenged the findings of the truth commission and generated a climate of polarization in relation to the truth that prevented the commission's report from being recognized by all social sectors.

Alternative Scenarios for the Construction of Truth

As mentioned briefly in the previous sections, the lack of acceptance by victims and social organizations of the way truth commissions operate or of their conclusions can lead them to undertake alternative truth-seeking initiatives, either concurrently or after the publication of the commissions' final reports. However, these exercises can also be undertaken for reasons other than the lack of legitimacy of official commissions, and in this sense, they can complement (without causing any tension with) the work of truth commissions.

In any case, alternative or non-official truth-seeking initiatives are important scenarios for the participation of victims and

civil society. As they generally stem from critical or dissenting perspectives or local initiatives, these exercises increase the number of versions about what happened being discussed in the public arena, and they prevent the truth-seeking process from being monopolized by official institutions and by victims and organizations with greater capacity for mobilization and advocacy.

Even when not conducted with the purpose of collaborating or complementing institutional spaces, alternative initiatives can have a significant impact on them by questioning the way they operate or their content, and by exerting pressure for them to be better explained or for their scope to be broadened. The alternative truth commissions created in Guatemala and Morocco are good examples of this. Although they were created in direct opposition to the official commissions, alternative commissions opened very important spaces for victims to narrate their versions and to identify those responsible for their victimization.

Now, the fact that they are not linked to official projects means that alternative truth-seeking initiatives face the risk of being stigmatized and even persecuted. The case of Guatemala provides an example of this risk. The Inter-Diocese Project for the Recovery of Historical Memory (REMHI per its acronym in Spanish), established by civil society under the leadership of the Catholic Church, created an alternative space that made significant contributions to the truth-seeking process through its extensive documentation efforts and fieldwork. However, the project was attacked and persecuted to the point that some of its most prominent members were murdered after the presentation of the conclusions of its work.

In order to avoid the risk of persecution faced by alternative truth-seeking projects, the State must offer protection measures to those who promote them and allow them to express their dissidence without fear of reprisals, even when these initiatives radically challenge official mechanisms. Such protection measures can demonstrate the democratic nature of the official institutions, and thus legitimize their transitional justice efforts, even in the face of resistance. They can also demonstrate that the country is, in fact, carrying out a profound transition from authoritarianism or violence to democracy and peace.

Reparations

The primary objective of reparations measures is to recognize and redress the harm caused to the victims of crimes or human rights violations. This objective can be achieved by a variety of complementary options, including restitution measures to restore the victim to the situation that existed before the violation, whenever possible; compensation measures, when restitution is not possible; and complementary measures of satisfaction or symbolic reparations. Reparation measures can be implemented through judicial decisions in specific cases, or through general administrative programs. The participation opportunities of victims and civil society in these measures depend on the type of procedure through which they are implemented.

Below we analyze the options for participation in the different types of procedures. We focus less on judicial proceedings because the considerations about justice mechanisms that were made above generally apply to them also. However, the first scenario described below is related to judicial proceedings; the second speaks to the establishment of reparation bodies (such as commissions); and the third scenario is where victims participate in the design of administrative reparation measures.

Participation in Judicial Reparations Processes

When it is foreseen that reparations will be provided by judicial means, the opportunities for the participation of victims and civil society are similar to those mentioned in the section above on justice measures. In brief, the possibilities for participation are greater when justice processes are community-based, which is common in reparations measures and is a vital aspect of restorative justice. The risks present in community-based justice also exist in the case of reparations measures, although they are for the most part mitigated because no criminal guarantees or sanctions are at stake.

Reparations can be granted through criminal, civil, or administrative proceedings within the ordinary justice system. In these cases, judges decide how the harm caused to victims in a specific case should be redressed. The participation of victims and other social sectors in these proceedings is also generally limited to the

presentation of evidence about what happened and the type and severity of the damages. However, participation can increase if special spaces are created for victims to not only submit evidence but also express what reparations they believe they are entitled to, which include the value of monetary compensation as well as symbolic forms of reparation.

The existence of these spaces offers the possibility for participation in the form of expression as well as of incidence, especially if it is legally required that judges' rulings specifically address the demands of victims, and if judges can order reparations other than material measures. In addition, participation can be potentially transformative if victims play an important role in determining the course of the proceedings, and if they are protected from coercion or intimidation.

The case of Colombia is an interesting but problematic example of the participation of victims in judicial decisions about reparations. It is interesting because, contrary to the majority of ordinary judicial processes, the Justice and Peace Law created a specific space for participation where victims and perpetrators could attempt to reach an agreement on the amount and form of reparations. This took place before the judicial ruling, which took into account the agreement, if it was reached, and otherwise ordered reparations based on the considerations of the judge (which could take into account the victim's demands). The problem with this settlement stage is that it did not contemplate a mechanism to avoid replicating the unequal power relationships between victims and perpetrators in the negotiation, which could ensure that victims would not feel intimidated. Balance of power issues are particularly problematic in Colombia, given that justice processes were conducted in the midst of conflict, which meant that the possibility of threats and retaliation was high. The participation of victims under these circumstances made it necessary to implement an adequate protection scheme, and it would have perhaps functioned better if victims had not had to confront the perpetrator directly.

Composition of the Institutions Charged with Implementing Administrative Reparations Programs

When reparations are granted through administrative programs (complementary to or independent of judicial schemes), these programs are generally implemented by government institutions using standardized procedures. Although these institutions are usually composed of people with technical or bureaucratic capacities to carry out their work, at least some of the members can and should be laypersons tasked with representing victims and civil society.

In fact, while the work of these institutions is technical, for the most part, many of the decisions they make are also political. They include decisions about the formulation of criteria to determine who is considered a victim, what acts are considered violations eligible for redress, the starting date of the violations to be redressed, the type and amount of reparations that should be granted, and their order or priority, among others. All of these decisions are crucial for the rights of victims as well as for the post-transition society because they contribute to the construction of the official narrative of what took place.

For this reason, it is important that the sectors affected by these decisions are represented in the decision-making processes, enabling their participation for the purposes of incidence and transformation. Now, as in the case of the composition of truth commissions, the representation of these sectors should be proportional and combined with the selection of impartial and independent members, so that they provide broader perspectives than those of the directly affected parties as well as relevant technical inputs.

The cases of South Africa, Peru, and Colombia are good examples of plural representation of victims or civil society in the composition of the institutions charged with implementing administrative reparation programs, although in some cases the composition has not been without problems. In South Africa, the Reparations and Rehabilitation Committee, operating under the Truth and Reconciliation Commission (TRC), included “representatives of the South African community,” who were selected by the TRC.

In Peru, on the other hand, two institutions were created to implement reparation measures, as recommended by the Truth

and Reconciliation Commission. The first is the High-Level Multisector Commission (CMAN per its acronym in Spanish), in charge of monitoring state actions and policies related to peace, collective reparations, and national reconciliation. The CMAN is a collegiate body composed of sectors of the executive branch as well as civil society representatives. The second body is the Reparations Council (CR per its acronym in Spanish), tasked exclusively with maintaining the Unique Victims Registry and thus establishing who will be considered victims for the purpose of reparations. The CR comprises members of human rights organizations, the business sector, and representatives of the military.

The representation of the military in the CR has been criticized, and rightly so, given the involvement of the military sector in carrying out human rights violations. This representation was justified by the fact that the military were a party to the conflict and represent important interests in the post-transition phase. However, since the decisions on reparations are critical for the realization of victims' rights, the participation of those who caused the damages in these decisions can undermine the realization of these rights, while the absence of representation does not appear to affect any of the interests of the military establishment directly.

The reparations law passed in Colombia in 2011 (commonly known as the Victims' Law) establishes a duty to guarantee the selection of victims' representatives in all decision-making bodies created by the law. Consequently, Victims' Participation Roundtables (MPV, for their acronym in Spanish) were established at the municipal, departmental, and national levels to offer spaces for discussion, exchange, feedback, training, and monitoring of the provisions of the law. These roundtables hold seats (and thus have both voice and vote) on the National System for Attention and Reparations to Victims (SNARIV per its acronym in Spanish), which is responsible for implementing the reparations law. The SNARIV has two units, in both of which victims selected by the MPV participate: the Special Administrative Unit for the Management of Land Restitution, dedicated exclusively to the restitution of dispossessed lands, as stipulated by the law; and the Victims' Unit, in charge of implementing all of the other reparation and assistance measures provided for under the law. The Land Restitution Unit is conducted by a board of directors that includes two

victims' representatives chosen by the national MPV, two representatives of indigenous communities selected by the Permanent Roundtable for Indigenous Peoples, and two representatives of black, Afro-descendant, *raizal*, and *palenquero* communities.¹

As can be seen, Colombia created a complex institutional architecture for the implementation of the reparations policy, with a high level of participation of victims and other civil society sectors (primarily ethnic minorities) not only at the national level but at the regional and local levels as well. Since the program is just beginning, we have yet to see how well these different levels of participation will operate in practice. However, the inclusion of local representation is a very important innovation that will reduce the risk of excluding those victims who are less organized or mobilized.

Design of Reparations Measures

The participation of victims and civil society should not be limited to representation in the institutions charged with the implementation of the administrative reparation programs, but rather can (and should) also include their involvement in the design or formulation of the content of the reparation measures to be carried out. This engagement can consist of deliberation or consultation with the beneficiaries of reparation measures.

These types of activities are necessary to enable victims to become active agents rather than merely the object of the measures in question. Therefore, participation in these exercises can serve not only the purpose of expression, but also those of transformation and incidence if victims effectively play an important role in defining (and even implementing) the measures and if their demands are taken into account. In addition, the participation of victims in shaping the content of reparation measures can make those measures more effective, since it is victims themselves who will judge whether the reparation measures serve to redress the harm caused.

1 *Raizales* are an Afro-Caribbean group that inhabits the Archipelago of San Andres, Providencia and Santa Catalina; *palenqueros* are groups descended from slaves that escaped to freedom and settled in *palenques* or towns founded by runaway slaves.

Once again, the Colombian administrative reparations program offers a good example of the potentials of participation. As we have discussed, this experience not only guarantees the involvement of victims in the different bodies that make decisions about the overall implementation of the program; it also entails creating spaces at the national, regional, and local levels (the victims' participation roundtables) to deliberate, discuss, and provide feedback on the decisions made by those bodies. These spaces offer victims the chance to influence the specific content of the reparation measures that will be implemented, especially because they exist at the local level where victims will request and receive the reparations. Given the importance of participation in the Colombian program, the Victims' Unit, in charge of coordinating reparation measures at the national level, also has a participation sub-directorate tasked with, among others, the development of a participation protocol and the design of mechanisms to promote effective participation. As mentioned above, it is not yet clear how this participation will work in practice or whether it will have a real impact in terms of incidence and transformation. However, the fact that so many participatory mechanisms have been formally established not only to adopt general decisions but also to influence their concrete content is worthy of acknowledgment.

The participation of victims in the design and formulation of the content of reparation measures is especially important in the case of collective and symbolic reparations. The degree of satisfaction of these measures is mainly contingent on providing specifically what the victims believe necessary to redress the harm caused to the groups to which they belong (indigenous peoples, women, unions, students, social organizations, etc.) or to restore their dignity, according to their specific needs and cultural, political, or moral views. Thus, more than with any other measure, it is critical that victims define or contribute to defining measures of collective and symbolic reparations.

The case of Chile is an example of the problems that may arise if collective reparations are not designed with the participation of the beneficiary communities. In fact, the Mapuche people did not participate in the design and implementation of reparation measures. Since the measures consisted primarily of monetary compensation, they appear to have had adversely affected

the community networks and bonds of solidarity of these people, who had only a partially monetized subsistence and exchange structure.

In contrast, Peru is a good example of the participation of victims in collective and symbolic reparation measures. Since 2006, the above-mentioned CMAN focused on the implementation of a collective reparations program (PRC per its acronym in Spanish), favoring collective over individual reparations. The program in turn prioritized peasants and indigenous communities and rural centers affected by violence. The intervention methodology designed for the implementation of the PRC includes the active participation of each community, which must identify the reparations that adequately meet their needs and priorities. However, this identification must take into account the general framework of action established by the CMAN, which has received criticism for focusing on development and social investment projects rather than reparation policies, thus limiting the communities' choices.

While specific reparation measures should inevitably be chosen in the context of more general guidelines, these guidelines should not excessively restrict the decisions of communities, which in theory have been given the power to establish their reparations. One way to mitigate this limitation is to also guarantee the participation of communities in the formulation of the general guidelines.

Guarantees of Non-Recurrence

In contrast to the above measures, non-recurrence is not an actual measure, but rather an objective that can be promoted through various measures in different areas. For this reason, it is not always easy to define how victims' participation should and could be ensured, since this depends on the area and the measure in question. However, the most well-defined areas in which measures to guarantee non-recurrence are carried out are, on the one hand, institutional reform and purges of the security forces and other state bodies and, on the other hand, those aimed at preserving memory with regards to education, archives, and museums.

Below we indicate the participatory scenarios offered by these measures, starting with the composition of the different bodies that may be responsible for their implementation, and then

distinguishing participatory scenarios in each of the two areas that were mentioned—that is, institutional reforms and purges, on the one hand, and education in human rights and memory, on the other.

Composition of the Bodies Responsible for Implementing Measures of Non-Recurrence

Both institutional reform and purging measures, and education and memory measures, offer victims and civil society the possibility to participate in the bodies responsible for their implementation. Here again, though these bodies require the participation of technical and independent personnel, there is also room for non-specialists to represent the social sectors affected by and interested in the measures. As is the case with reparations, participation is justified because many of the decisions are political and have a direct effect on victims and society in general. These decisions include, for example, defining which state institutions should be eliminated or transformed, and what their new objectives, policies, and mandates should be; which are the criteria to determine whether a public official should be banned from public service for his or her involvement in earlier violence, and what are the implications of this ban; which past violence narratives should be included in educational curricula and materials; how should these narratives be represented in museums; how should this documentation be archived, etc.

As with truth commissions and administrative reparations bodies, victim and civil society participation should ensure proportional representation and be combined with the participation of technical and independent personnel. However, in the case of purges, it is common that implementing bodies include (and in some cases privilege) members of the institution being purged or representatives of the sector to which the purged institution belongs. This practice may be justifiable to the extent that those who have been selected in this manner may possess valuable information on how the institution operates and the degrees of responsibility that can be attributed to its members for perpetrating or being complicit in the violence. However, the allocation of responsibilities may fall short if the members of the bodies that

are undertaking the purges are sympathetic with those who are subject to the purge or share their ideas on the role of the institution in the period before the transition. Therefore, it is important that in such cases the bodies also include civil society representatives that can prevent bias in decision-making.

This happened, for example, in the German case, where purges of members of the Stasi (the Ministry for State Security) of the German Democratic Republic (GDR) began in 1989, after it was dissolved. Two commissions were in charge of implementation: an administrative one, whose members were part of the institution subject to the purge; and a mixed one, which combined members of said institution with outsiders, including persons who had professional experience in the field, lawyers, and members of civil society “with great moral integrity.” These people were elected by their peers or by members of Parliament, although their election was not publicized widely.

In the case of El Salvador, the influence exercised by the members of the sector subject to the purge was even more limited with the provision that they could have a voice but could not vote on the decisions. In effect, the peace accords signed in 1992 between the State and the Farabundo Martí National Liberation Front (FMLN per its acronym in Spanish) ordered the transformation of the armed forces. As a result, in consultation with the parties to the accords, the Secretary-General of the United Nations formed an ad hoc commission charged with evaluating the officer corps of the armed forces. The commission was composed of three well-known personalities in the country and two officers appointed by the President of the Republic who only had access to the deliberations.

Finally, the Hungarian case offers an example of a body implementing a purge policy that does not require the presence of members of the purged institution or sector. In that country, the purge process began in 1994, in response to society’s demands that members of the security apparatus of the communist regime cease having influence in the public sphere. The commission created to implement the purge policy is composed of three members nominated by the National Security Committee together with the president of the Supreme Court of Justice, all of them appointed by Parliament.

Participation in Institutional Reform and Purge Processes

In addition to participation in policy-implementing bodies, institutional reform and purge measures can open up additional spaces for participation, such as the possibility that victims and civil society give evidence or testimonies, confront the versions of those to be purged, participate as the audience to these processes through publicity and dissemination mechanisms, or actively engage in the promotion of reforms. These forms of participation can be important for victims and civil society to express their versions about what happened, influence decisions, and play a relevant role in processes that affect them directly.

However, there appear to be few scenarios for participation in these type of measures. Military reforms and purges, in particular, are usually handled with a high degree of confidentiality, which means that participation is not even guaranteed through the dissemination of the proceedings and results. This is quite problematic because, in the case of measures that offer few spaces for direct participation of victims and civil society, their opportunities for participation rely almost exclusively on whether they have access to information. While the confidentiality of certain matters may be important, it should not be absolute, since the reasons for confidentiality must be balanced with other important objectives of the transitional measures. Indeed, lack of publicity and transparency can harm not only the rights of victims but also the rights of those who are subject to the purge, since this high level of confidentiality prevents the general public from monitoring the procedures. In addition, the lack of publicity and transparency goes against the overall transitional justice objective of rebuilding the citizens' trust in state institutions.

The above-mentioned cases of Germany and El Salvador serve as examples of lack of publicity. In the German case, despite citizens' demands for the publication of the names of Stasi informants, the purge process imposed sanctions but never publicized the names of the individuals that were sanctioned, nor the reasons and arguments for sanctioning them. In the case of El Salvador, the report prepared by the ad hoc commission was disclosed only to the president of the country and to the Secretary-General

of the United Nations. The latter, in turn, presented a report to that organization's Security Council.

For its part, the case of the Czech Republic illustrates the problem of lack of transparency in purge processes. A series of purges began in 1991 and 1992 to veto all the officials who had a strong affiliation with the Communist Party and who were considered "a risk" to the new regime. The policy, which was initially conceived for a five-year period but has been extended several times, has been highly questioned due to the lack of public debate and for violating the rights of the individuals subject to the purges in a highly polarized and ideological context. Some critics even argue that the policy has generated collective responsibilities rather than individual ones.

In contrast, the Argentine case shows that the participation of victims and social organizations in purge processes is justified and that their participation can even lead to greater control and efficiency in the processes. The constitutional reform of 1994 established that those who had interrupted the constitutional order by force should be disqualified from holding public office. After this constitutional amendment, victims and human rights organizations used various existing institutional mechanisms to transform them into challenges to current or future officials. The human rights movement, in particular, influenced military promotions, which require agreement from the Argentine Senate. They did so by making use of the General Transparency Law, which allows the participation of civil society in congressional deliberations. At first, human rights organizations participated by their own initiative in military promotion processes; however, their input became so relevant that Congress began to submit official requests for information on the military to civil society organizations such as the Permanent Assembly on Human Rights (APDH per its acronym in Spanish) and the Center for Legal and Social Studies (CELS per its acronym in Spanish). As a result of all these activities, Law 26571 of 2009, on "Political Party Reform," modified the organic law on political parties, establishing that those involved in international crimes or serious human rights violations cannot be candidates in primary elections, candidates in general elections for national office, or be appointed to party positions.

Finally, the Colombian case is illustrative of civil society participation in institutional reform processes that have a wider scope than purges but that also have the objective of guaranteeing non-recurrence. Starting in 2004, the State undertook an institutional reform process aimed at fulfilling the rights of the victims of forced displacement, who constitute the majority of the victims of the armed conflict in the country. The process originated in a Constitutional Court ruling (T-025 of 2004), which asserted that the situation of the displaced population constituted “an unconstitutional state of affairs” and ordered the State to develop a coherent and effective public policy to provide for and protect the fundamental rights of this population. The Court retained jurisdiction to evaluate the State’s compliance with its ruling and, since 2007, invited the Commission to Monitor Public Policy on Forced Displacement (CSPPDF per its acronym in Spanish), which had been created by different organizations and academic and civil society personalities, to participate in the monitoring process. The CSPPDF acted as counterpart to the State by producing alternative reports on the State’s implementation of the ruling and presenting them in public hearings. Its participation has been crucial not only to monitor the State’s implementation of the rights of victims of forced displacement but also in shaping the content of implementation decisions, which, as a result, have had to take into account the needs and interests of victims and to balance them against other relevant factors.

Participation in Public Policies Relating to Memory and Education

In contrast to institutional reform and purge measures, the participation of victims and civil society in remembrance and education policies can produce fewer misgivings and difficulties. Participation can generate a high potential for expression and influence if the processes for creating textbooks, archives, and museum exhibitions offer spaces where victims and civil society can express their versions of what happened, and if their versions are effectively taken into account. Moreover, participation can also have a transformational potential if victims and civil society participate actively in the creation of these texts, archives, and exhibitions, or if they define the perspective, form, and content of such materials.

An interesting measure that can help achieve these participation potential consists in governments granting certain public spaces to victims and civil society organizations so that they can build monuments or memory museums, with governmental support. The Chilean case offers an example of this type of measure. Organizations of relatives of the detained-disappeared proposed to the Government the construction of a plaza and a mausoleum in the General Cemetery of the city of Santiago, to bury the remains of the victims who had been found, and to build a wall with a plaque bearing the name of all the people whose lives had been cut short by political repression. This program was part of the moral reparations line of the National Reparations and Reconciliation Corporation.

Other noteworthy measures in Chile include the creation of the National Human Rights Institute, the Museum of Memory and Human Rights, and the Human Rights Program of the Ministry of the Interior—which, through a symbolic reparations fund, has financed projects at the request of victims’ organizations, and has provided technical support for their implementation. In particular, these projects have materialized as artwork that is usually chosen in art competitions where victims are represented.

The Argentine case provides another example of these type of measures. On December 10, 1997, an initiative created by ten human rights organizations was submitted to the legislators of the Autonomous City of Buenos Aires, and it became law on July 21, 1998. The law ordered the construction of the Remembrance Park and the Monument to the Victims of State Terrorism, which was officially inaugurated on November 7, 2007, with the presence of local and national authorities, including the president.

Similarly, through Law 1412 of 2004, the legislature of the Autonomous City of Buenos Aires transformed the location of one of the main clandestine detention centers during the military dictatorship (the Navy School of Mechanics or ESMA for its acronym in Spanish) into the Space for the Remembrance and Promotion of Human Rights. This outcome was accomplished through the legal actions of victims and human rights organizations against a measure of the previous Government, which intended to use this location as a “green space for public use.” These organizations considered that this measure would erase the events that

had occurred in that place; instead, they demanded the creation of a remembrance museum (for which they had been trying to make arrangements for a long while), which would also confer a new meaning to the location.

Finally, in Buenos Aires it was also possible to recover and preserve other locations where clandestine detention centers had operated. Thus, in 2003, the Legislature of the City of Buenos Aires declared the premises where El Olimpo clandestine detention center had as a historic site. In September 2005, the city's Legislature also declared the premises where the clandestine detention center Club Atlético operated as a historic site.

Conclusions

It is very important that victims and civil society participate in transitional justice measures. A victim-centered approach—focused on their demands, needs, and aspirations—should involve a serious assessment of the different participatory mechanisms that can be implemented based on the specific context and the transitional justice measures that each country has decided to adopt. To this end, it is necessary to understand clearly the different objectives that can be sought through participation, the *ex ante* conditions that facilitate reaching these objectives, the different transitional justice moments in which participation can occur, and the different mechanisms through which participation can be effected in each one of these moments.

Despite its importance, participation has not been one of the central axes of discussions on transitional justice measures. This has been changing over time, and every day we hear more and more voices advocating for the introduction of participatory approaches and measures to prevent elites and experts from being the only ones making decisions on truth-seeking, justice, reparations, and non-recurrence. In practice, however, participation has been frequent despite the lack of official spaces that promote it. Through their activism, victims, their organizations and social movements have advocated for inclusive policies, and have thus contributed to the promotion of truth-seeking, justice, and reparations measures that are respectful of international standards and respond to the political and social realities in their countries and regions. They have also contributed to stopping policies that are regressive or the purpose of which is to ensure impunity for serious crimes and human rights violations.

Nevertheless, participatory practice could be better directed and yield greater results if participation were openly recognized

as an indispensable axis of transitional justice and if its objectives and the conditions for its success were carefully defined. This would increase the possibility that transitional justice measures not only offer a space where victims can express themselves but also truly respond to the demands of those who suffered during periods of repression or conflict, and contribute to transforming power relationships in post-transitional societies. This could increase the legitimacy of transitional justice measures, of the transitional process as a whole, and, additionally, of the new order born out of the transition.

The purpose of our research was to identify the general objectives that participatory mechanisms have in all types of transitional justice measures, explaining how these objectives connect to the wider purpose of providing legitimacy to the transitional measures and process, and specifically examining their potential and limitations. The study also analyzed the *ex ante* conditions for successful participation and suggested the different ways in which participation should be promoted according to the degree to which these conditions are present. Finally, the study identified the participatory scenarios that exist, both in practice and potentially, in the different developmental stages of transitional justice measures—promotion, adoption, and implementation—explicitly noting their specific objectives and indicating their limitations and potential.

In short, we believe that the objectives of participation in transitional justice measures can be expression, influence, and the transformation of power relationships. All three objectives can be pursued in a complementary manner ensuring, in every case, the highest possible level of participation and a reasonable degree of expectations about the mechanisms' potential outcomes. It is essential that those who make the decisions regarding transitional justice models or measures understand with clarity the objectives that can be achieved through participation. This will enable them to balance the expectations of the various sectors that usually compete in a transitional scenario, and to do so in a democratic way. Participation can thus contribute to the dual purpose of recognizing victims and including them in the political decision-making process as active agents with full rights.

Achieving the goals of transitional justice measures depends largely on the existing level of participation at the time the

measures are initially promoted. Where victims and civil society drive the promotion of measures from below, their organization and mobilization make it easier to establish explicit participation opportunities during adoption and implementation, and they make this participation more likely to achieve not only the objective of expression but also those of influence and empowerment. However, in contexts where victim and civil society participation levels are low during the promotion stage, it is still possible that participation during the adoption and implementation of transitional justice measures will be robust and meet these objectives. For that to be the case, mechanisms must be established to promote the organizational capacity of these sectors and to ensure equal opportunities and the continuity over time of the different organizations.

To achieve the objectives of participation, it is also important that the participatory scenarios provided for during the adoption and implementation of transitional justice measures have certain characteristics. In the adoption phase, it is crucial to establish participatory mechanisms that provide space for openly debating the type of measures that citizens want to adopt to deal with a past of violence and atrocities. Mechanisms such as deliberation in institutional and non-institutional spaces allow for the opening of discussion channels and expand the range of possibilities. On the other hand, consultation is an important tool that can be used in contexts where there are groups that have historically suffered discrimination or that have been particularly affected by violence. These groups should be consulted to ensure that transitional justice measures meet their differentiated needs as individuals and as communities. Finally, ratification opens for the entire population the discussion on transcendental reforms, even to those sectors that, in general, do not feel affected; furthermore it is crucial for providing legitimacy to the transitional process and the new regime that it is trying to establish.

The implementation of transitional justice measures offers an even greater variety of scenarios in which victims, civil society organizations, and society in general can participate in the enforcement and monitoring of different transitional justice measures. For example, concerning justice measures, victims and civil society can participate in the composition of restorative justice

courts or tribunals; they can further participate in various procedural moments of both these and criminal courts through their testimony or by submitting evidence. The media also plays a key role in the dissemination of information on prosecutions, fostering not only the flow of information but also opening necessary discussions. However, in practice, participatory scenarios related to justice have been limited by various factors of a technical and a political nature. Moreover, some participatory scenarios present challenges for victims and their communities, as in the case of trials with a restorative approach. Still, concerning justice, both victims and their organizations have mobilized very broadly to demand a more central role in trials.

Regarding truth-seeking measures, victims have perhaps participated more openly than justice measures. This is probably due to the nature of the truth commissions that have been created in several parts of the world, which, with nuances and differences, seek to construct a narrative about violence that is based on the accounts of victims. This, however, does not mean that victims' participation is restricted to the spaces provided by these commissions for accounts or testimonies. The composition of truth commissions is another crucial scenario for civil society to help clarify the truth, in which diverse sectors can be represented. Again, the media plays a major role, establishing a link between the work of the commission and society as a whole. Many victims and people who were not victimized can share in the work and findings of truth commissions if the scenarios where this information is made available are open—though the security and privacy of victims should always be ensured, especially in cases where personal integrity was violated or that involved children. Civil society has also been a key agent in truth-seeking and remembrance exercises, by promoting non-official spaces, either because of political differences with official commissions or simply by creating alternatives that enrich the difficult task of constructing the truth. Now then, for these scenarios to be participatory, it is important to guarantee a minimum standard of safety conditions as well as to allow controversy and the free debate of ideas. Consequently, participation in truth-seeking measures offers several possibilities for it to be a constructive and inclusive exercise.

Reparations, by contrast, seem to offer spaces that are less open to ensuring victims' participation. This is so, on the one hand, because they are often granted judicially and, on the other hand, because when they are granted administratively, the possibilities for victim involvement appear to be restricted. However, it is possible and desirable to open more participation channels so that decisions on the reparations that an individual or community deserve are made by victims themselves, not exclusively by judges or public officials. There is no reason for not including victim and civil society representatives in restorative judicial or administrative decision-making bodies. The few experiences that have done this show the potential to make the needs of victims a key element in decision-making. Additionally, for reparations to have an impact and transformative potential, it is important that the proceedings ensure that the needs and expectations of victims will be taken into account explicitly. In terms of individual judicial and administrative reparations, it is possible to open spaces where victims can express both their perception of the damages they suffered and their concrete demands on how they should be redressed. It is also possible to formally require that decision-making bodies effectively include these demands in their decisions. Collective reparations offer more participation possibilities for affected communities, and it is desirable that they are the ones who lead the way to redress communal harms.

Finally, guarantees of non-recurrence also offer a wide range of participatory possibilities; yet, participation has been quite limited in practice. There are enormous possibilities for victims' participation in institutional reform and purges as well as in the design of policies on education and memory initiatives. Moreover, it is desirable that all of society be vigorously incorporated in such important measures. In practice, there are a few interesting experiences, especially regarding policies on education and memory, in which victims and their organizations have played a major role in their adoption, organization, implementation, and even their management. This, however, has not been replicated in institutional reform processes and purges, which generally remain closed and only consult experts. Participation should be expanded in these scenarios so the entire citizenry can be vigilant and aware of any change, to ensure that human rights violations and abuses will not be repeated.

The experiences we have analyzed in this study provide a set of examples of participatory practices that evidence at least two things. First, participation is a historic demand that has occurred in diverse places and has increased over time. Second, it is possible to learn from the positive and negative examples that have already been experienced by different societies. Participation appears to be a good route for legitimizing political transition processes as well as the new political order that they seek to establish—which cannot be built on the backs of those most involved and most affected. However, to prevent participatory exercises from becoming mere legitimizing tools, it is important to understand, explicitly determine, and ponder the objectives of each participatory mechanism. It is also important to take into account the *ex ante* conditions for meeting these objectives as well as the potential and limitations of each institutional design for attaining them.

We hope this study will be useful in classifying and examining existing experiences, as well as in the design of future experiences that have participation as one of their explicit axes and that might find in this analysis both alternatives and assessment criteria. We also hope that this study serves as the basis for other, more detailed studies of the experiences analyzed, which could take into account the perceptions of their participants and include a more fine-grained analysis of the local impact of the diverse participatory mechanisms we identified.

Additionally, we hope that our analysis of the objectives of participation and the *ex ante* conditions for their success informs the reading of the study on the specific stages of participation, as well as of the annex (below), which provides a detailed description of experiences by country. Finally, we hope that this research is useful for the evaluation of other ongoing or future transitional experiences that have incorporated or seek to incorporate participatory mechanisms.

Annex Case Studies

Table of the Countries Analyzed as Part of the Research, per Experience, According to the Adoption or Implementation of the Measures

	Adoption			Implementation			
	Deliberation	Consultation	Ratification	Truth	Justice	Reparations	Guarantees of Non-Recurrence
Argentina							
Bosnia-Herzegovina							
Cambodia							
Chile							
Colombia							
Czech Republic							
El Salvador							
Germany							
Guatemala							
Hungary							
International Criminal Court							
Morocco							
Northern Ireland							
Peru							
Rwanda							
Sierra Leone							
South Africa							
Spain							
East Timor							
Uganda							

Experiences by Country

As we mentioned in the main text, the study was based on transitional justice *experiences*, a term that we use to refer to a transitional justice measure or mechanism that is adopted or implemented, either in the adoption stage — whether deliberation, consultation, or ratification— or during the implementation of the measures— whether truth-seeking, justice, reparations, or guarantees of non-recurrence. Thus, a country can have several transitional justice experiences when it adopts a set of measures on truth-seeking, justice, reparations, or guarantees of non-recurrence. This annex serves as the basis for the investigation and is organized by case. To better present the information, the experiences are grouped by country and organized in alphabetical order. It is important to point out that some countries had experiences with measures that we did not include here. Therefore, the following pages will contain information only on those that were studied in this research.

1. ARGENTINA

On March 24, 1976, the constitutional Government of Isabel Martínez de Peron was overthrown and a military dictatorship, led by the Military Junta, was installed. The Military Junta left power in 1983.

I. ADOPTION

Deliberation

One of the measures adopted by the democratic Government of President Raul Alfonsín, which brought to a close the period of military dictatorship in 1983, was the annulment of the “self-amnesty” decreed by the last Military Junta. Additionally, the Alfonsín Government also organized the criminal prosecution of the military personnel responsible for human rights violations, in response to the demands of the victims and human rights movement—whose most vocal members were the Grandmothers and Mothers of the Plaza de Mayo, who demanded justice nationally and internationally during the dictatorship. Three main ideas guided the scheme defined by the Government: the distinction between “three levels of responsibility,”¹ the idea of

1 Those who ordered the illegal repression plan be carried out,

“self-purification” of the armed forces, and the goal of concluding the trials within a relatively short time (Parenti and Pellegrini 2010, 136).

Once democracy was reestablished in 1983, the activism of human rights entities centered on mobilizing judicial activity to in this context, reveal the truth of the violations perpetrated by the dictatorship and ensure that those who were responsible were investigated and sanctioned (CELS 2008, 223). In 1985, the most relevant criminal trial convicted five members of the first three Military Juntas and proved the existence of a systematic plan to exercise repression.² Later on, after the military threatened insurrection, two laws were passed to end these trials: the Full Stop Law (1986) and the Due Obedience Law, in addition to presidential pardons benefitting people who had been convicted or were subject to trial (1989-1991). This provoked discontent among victims and human rights organizations, which in turn contributed to the political and legal delegitimization of these exculpatory mechanisms. It should be stressed that organizations like Human Rights Watch (HRW) and the Center for Justice and International Law (CEJIL) and the families of the victims played an important role in promoting justice, whether in the reopening of trials or through the use of various mechanisms, such as the filing of *amicus curiae*, habeas corpus, habeas data complaints before criminal prosecutors, individual petitions before the Inter-American Commission on Human Rights (IACHR), as well as sending numerous requests to Spain to obtain in that country the answers they could not find in Argentina (for example, the Mignone, Lapacó, and Urteaga cases) (228-232).

In this sense, and due to the initiative of human rights organizations, beginning in 1995 several federal courts in the country held “truth trials” to process cases involving events that occurred during the dictatorship. Although it was not possible to establish criminal responsibility through them, their purpose was to clarify

those who carried it out, and, lastly, those who acted beyond the scope of the orders.

2 Cf. ruling of the Federal Criminal and Federal Correctional Court of the Federal Capital of December 9, 1985, quoted in Parenti and Pellegrini (2010, 136)

the fate of the disappeared and to identify the responsible individuals, while preserving the intent to prosecute.

The participation of the Center for Legal and Social Studies (CELS per its acronym in Spanish) was also instrumental in the fight against impunity. Their contribution to the Poblete case, in late 2000, was particularly relevant. CELS requested the annulment of both the Full Stop Law and Due Obedience Law, obtaining successful results in 2001—mostly on the basis of international criminal law and international human rights law— together with the non-application of the laws in the case that was being tried (CELS 2008, 105). This ruling encouraged many judges to make similar decisions. On November 9, 2001, the Poblete ruling was upheld and the unconstitutionality of the challenged provisions was affirmed (107). However, the final decision was in the hands of the Supreme Court, which was pressured by the Government and the armed forces. This pressure were denounced by human rights organizations before the IACHR (110). As a result of a lengthy process promoted by human rights organizations, relatives of the victims, and all those committed to democracy (49), on June 14, 2005, the Supreme Court of Justice declared the unconstitutionality of the laws and its previous doctrine on their validity. The Supreme Court's decision against these impunity laws resulted in the reopening of criminal proceedings against those responsible for atrocities during the dictatorship and an extensive national debate. These trials are ongoing.

II. IMPLEMENTATION

Truth

After democracy was restored, the National Commission on the Disappearance of Persons (CONADEP per its acronym in Spanish) was created through Decree 18 of December 15, 1983. Its members were people who were considered highly ethical, from different professional and ideological backgrounds. Its role complemented that of the judiciary, and it was tasked with receiving complaints and evidence, establishing the fate of missing persons and the whereabouts of abducted children, informing the judiciary of any attempt to conceal or destroy evidence, and issuing, within 180 days from its establishment, a final report containing a detailed explanation of the facts (it submitted its final report,

Never Again, in September 1984). However, CONADEP was banned from “making judgments about facts and circumstances that are the exclusive competence of the Judiciary” (article 2). It acted in many areas, such as,

the on-site investigations of clandestine detention centers, with the attendance of the persons that had been released; visiting morgues to collect information on irregularities in the arrival of bodies; carrying out activities in neighborhoods and workplaces to determine the location of clandestine detention centers and kidnapping modalities; receiving testimonies from victims, relatives, and retired and active duty military and security personnel; reviewing prison and police records and investigating acts involving assets of the disappeared (Parenti and Pellegrini 2010, 139).

The *Never Again* report was widely distributed and has been sold massively as a book.

Guarantees of Non-Recurrence

On December 10, 1997, ten human rights organizations created an initiative that was submitted to the legislators of the Autonomous City of Buenos Aires and became law on July 21, 1998. This law provided for the construction of the Remembrance Park and the Monument to the Victims of State Terrorism, which was officially inaugurated on November 7, 2007, with the presence of local and national authorities, including the president of Argentina. The park is located in front of the La Plata River, as many of the victims were thrown into the river to drown (the so-called death flights). It is a place of remembrance and testimony because inscribed there are the names of human beings who were meant to be forgotten (Monumento a las víctimas del terrorismo del Estado, n.d.).

The National Memory Archive was created by Decree No. 1259 of the National Executive Branch on December 16, 2003. Its purpose is obtaining, analyzing, and preserving information, testimony, and documents on human rights violations and the dictatorship, and making them available to the community. The Archive now holds CONADEP’s records. Since its creation, one of its main tasks has been to digitize the country’s court files. It has also collected information from other institutions such as the Federal Broadcasting Committee (COMFER per its acronym in

Spanish) and the national news agency Télam, or entities such as the Ministry of Foreign Affairs, the Ministry of International Trade, and the Ministry of Worship (CELS 2005, 45). It has established some agreements with institutions in the region, such as Paraguay's Archives of Terror or Brazil's repression archives (48).

Similarly, by law 1412 of 2004, the legislature of the Autonomous City of Buenos Aires, dedicated the site of where the Navy School of Mechanics (ESMA per its acronym in Spanish)—one of the main clandestine detention centers during the military dictatorship—to the Space for Remembrance and the Promotion of Human Rights. This same location had been designated by the previous Government as “green space for public use,” which victims and organizations saw as an attempt to erase what had happened in this place. Through legal action, they were able to suspend this measure. The subsequent installation of the Space for Remembrance and a museum was considered a victory for victims and for human rights organizations, who since the 1980s had been engaged in efforts at the municipal level for the creation of a museum. Moreover, in 2004 the portraits of the military junta dictators that were still displayed at the Military College were removed as a result of pressure by human rights organizations.

Another measure was to restore and preserve the premises where clandestine detention centers operated. Thus, in 2003, the Legislature of the City of Buenos Aires declared as a historic site the premises where the El Olimpo clandestine detention center had operated. In September 2005, the city's Legislature also designated the premises where the clandestine detention center Club Atlético operated as a historic site (CELS 2005, 43-44). Additionally, the minister of defense promoted creating a site honoring the victims of the Trelew Massacre in the Almirante Marcos Zar Naval Base where, on August 22, 1972, sixteen political prisoners were murdered and three others were seriously injured (Parenti and Pelligrini 2010, 149).

It is also important to note that Argentina has conducted processes to challenge or remove individuals that exercise—or intend to exercise—public office and are in some way responsible for crimes perpetrated during the dictatorship. Accordingly, the 1994 constitutional reform established that people who had interrupted the constitutional order by force would be disqualified

from holding public office. After the amendment, victims and human rights organizations

made strategic use of various mechanisms that had already been established, and transformed them into procedures for challenging current or future officials, on the basis of different justifications and in accordance with the progress, or lack thereof, of the truth and justice process in Argentina. Among others, processes challenging military promotions and the removal of members of the armed forces; challenges to or removal of officials that were members of the security forces; challenges to members of the judiciary as well as challenges to officials holding elective office (Morales 2011, 86-86).

In particular, the human rights movement influenced the military promotion process, which requires consent from the Argentine Senate. Their influence was such, that Congress began submitting official requests for information on the military to the Permanent Assembly on Human Rights (APDH per its acronym in Spanish) and CELS (94). As a result of all these activities, Law 26571 of 2009 (“Political Party Reform”) modified the organic law on political parties; it banned from standing in primary elections, general elections for national office, or being appointed to party positions those who had been

indicted for genocide, crimes against humanity, or war crimes, acts of illegal repression that constitute grave human rights violations, torture, forced disappearance of persons, abduction of children, and other grave human rights violations or whose criminal behavior is, under the Rome Statute, a crime under the jurisdiction of the International Criminal Court, for events that occurred between March 24, 1976, and December 10, 1983.³

2. BOSNIA-HERZEGOVINA

The disintegration of the Socialist Federal Republic of Yugoslavia generated a conflict between the territorial ambitions of the Serbs and the Croats, which found in Bosnia-Herzegovina the ideal confrontation scenario given its vulnerable ethno-political homogeneity (44% Muslim, 31% Serbs, and 17% Croats).

3 Article 15.f. of Law 26571, which amended article 33 of Law 23298.

I. IMPLEMENTATION

Justice

The Dayton Peace Accords were signed in 1995, after the war to secede from Yugoslavia. The Accords created the State of Bosnia and Herzegovina, which contains three peoples (Bosniaks, Serbs, Croats). In 2005 a hybrid tribunal composed of national and international personnel, the War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC), was established. It was designed to eventually become a national institution without foreign intervention, and its mandate extended until December 2012. There are three levels of justice in Bosnia and Herzegovina: the International Criminal Tribunal for the former Yugoslavia (ICTY), the WCC, and fully domestic courts.

The WCC was created to complete the functions of the ICTY (that would end in 2013), that is, as part of its completion strategy. Due to disillusionment with the work of the ICTY, the WCC has had to carry out its work amongst widespread mistrust of the judiciary. Notwithstanding, the work of these courts is important to show that guarantees exist and that impunity will not be tolerated, and also for promoting new social demands regarding accountability standards and procedures (Martín-Ortega and Herman 2010, 298).

The WCC has a Public Outreach and Information Section (PIOS), and the Prosecutor's Office has its own public relations department, which focuses exclusively on media relations.⁴ However, outreach strategies have not been very effective due to PIOS' lack of staff, which has hindered its capacity to implement certain activities. Still, PIOS produces a newsletter on weekly activities, and audio recordings of the hearings are available on request (Martín-Ortega and Herman 2010, 299-300).

The WCC established agreements with the media to distribute information on the trials, although they did not receive massive coverage by the mainstream media. The Balkan Investigative Reporting Network (BIRN) has disseminated information on the work of the WCC and on each of the war crimes trials that have

4 See Prosecutor's Office. Available at <http://www.tuzilastvobih.gov.ba/>

been held. BIRN's *Justice Report* program covers every trial that unfolds before the WCC. BIRN has also launched a radio program, *Justice Radio*, and a television broadcast, *Justice TV*, with the purpose of providing information to society on the trials. The organization has expressed its dissatisfaction with the lack of availability of judges and prosecutors to provide information and the lack of access to documents, audios, videos, and photographs.

When the WCC started operating, and due to lack of resources, it approached several civil society organizations to establish support networks for its work. The network, composed of several organizations, has four regional information centers which function independently from the tribunal and liaise between the WCC and the citizenry. Although the hearings are open to the public, there has not been massive attendance. Usually, the hearings are attended by NGOs or foreign personnel. For this reason, the WCC should take a more active role in disseminating the information and have NGOs lead the information process.

3. CAMBODIA

Between 1975 and 1979, the Khmer Rouge, the political group that dominated the country, murdered, tortured, and exterminated about one third of the population, which at that time was nearly eight million people.

I. IMPLEMENTATION

Justice

In 2003, a hybrid court known as the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established for a period of three years with the purpose of submitting to trial those most responsible for crimes committed by the Khmer Rouge between April 17, 1975, and January 6, 1979.

The ECCC has a Public Affairs Section, which has Media Relations, Public Information, and Outreach offices. Because of the distance between the Court and the capital Phnom Penh (the ECCC is sixteen kilometers away), a second Public Relations office was located in this city. This office was established to better interact with the media, both national and international, and the general public, and thus promote a wider understanding of the ECCC's work and raise awareness about its importance

(Martin-Ortega and Herman 2010, 299-300). The Public Affairs Section produces a monthly report on the work of the ECCC, conducts weekly informational meetings with the media, has distributed posters across the country explaining who would be prosecuted and the evidence to be considered by the judges. Particularly in the *Duch trial*, it prepared fact sheets describing the background information of the case that included photographs of the lawyers and the judges involved in the trial along with their biographies. The ECCC has social networking sites and a Web page (Extraordinary Chambers in the Courts of Cambodia, 2006), which provide access to, among others, press releases, live streaming video, information addressed to the media, video and photographic archives, publications, speeches, and a weekly radio program.

It is important to highlight the work of human rights organizations that, in light of the Tribunal's lack of resources (the Public Affairs Section has acknowledged that it was unable to carry out a comprehensive strategy due to financial constraints) (Martin-Ortega and Herman 2010, 302), has been able to maximize public impact by trying to ensure that the trials are covered by the media. The Asian International Justice Initiative (AIJI) and the East-West Center prepared weekly reports on the *Duch Trial*, which were broadcasted through the CTN television channel every Monday at noon. This allowed the trials to be witnessed by those in attendance and, through the television broadcast, by approximately 20% of the population. Other organizations have undertaken technical analysis of the ECCC's work, such as the Cambodia Tribunal Monitor and the Open Society Justice Initiative (OSJI). Several Cambodian social organizations have conducted activities such as community forums to present the work of the courts.

At the beginning, civil society attendance at the hearings was not high (this was attributed, in part, to the distance of the ECCC to the capital although, it increased gradually, and eventually the trials had high participation rates in comparison to other international tribunals. A few weeks into the *Duch Trial*, a bus system was established to transport attendees, which was widely publicized by the Public Affairs Section. It is estimated that 20,000 people attended the different hearings (Martín-Ortega and Herman 2010, 303).

4. CHILE

On September 11, 1973 a coup ousted the democratic Government of Chilean President Salvador Allende; the ensuing dictatorship that was led by Augusto Pinochet remained in power until 1990.

I. ADOPTION

Deliberation (Lira, 2006)

Victims, human rights organizations and NGOs have actively participated in the reparations programs created in Chile since 1990. The families of the executed, detained-disappeared, and surviving torture victims have been actively involved in the design of the programs that the Chilean State has established for these categories of violations. Participation has consisted of criticism of proposed programs—including criticizing the exclusion of the second group from the initial reparations program—and the presentation of alternative proposals. Between 1999 and 2001, the Mesa de Diálogo (a human rights roundtable) was established. It called on diverse sectors of society (human rights organizations, academia, members of the church, and the military) to discuss the design of a human rights program, and it reached an agreement after ten months of work, which led to commitments by the security forces. In June 2003, organizations representing families of the victims filed a proposal called “Truth, Justice and Reparation Measures” containing propositions for different reparations measures. In August of that same year, then president of Chile, Ricardo Lagos, presented a proposal to the country to conduct reparations and modify the existing programs. To prepare this proposal and submit the legislative initiative, the president received close to fifty propositions from different groups. Different programs were adopted after receiving input from the beneficiary sectors. This was the case with the victim reparations program for torture survivors and political prisoners, who influenced the creation of the National Commission on Political Imprisonment and Torture in 2003 to receive victims’ testimonies; the reparations program for civil servants who were dismissed en masse from their posts during the dictatorship (*exonerados políticos*), which was the result of the work of organizations representing *exonerados* (Comando de Exonerados Chile); and the reparations program for farmers who were excluded from the agrarian reform, where the Catholic

Church and farmer organizations were able to participate. Farmer organizations even participated in the process of identifying the beneficiaries.

Ratification (Romero, 2009)

The transition from dictatorship to democracy in Chile came about through different mechanisms and with the military's acquiescence. In this sense, it is considered a pacted transition or a transition under the tutelage of the military. Three plebiscites are important for understanding the Chilean transition. The first one took place in 1980, nine years before General Augusto Pinochet left the presidency, and it was held to approve the Constitution that would pave the way for "democratic openness" reforms. In reality, these constitutional reforms were intended to reinforce the military regime and promote its institutionalization through supposedly democratic foundations. The reform was passed and Pinochet was appointed president for an eight-year period. The second plebiscite was held in 1988 and asked citizens whether Augusto Pinochet should continue occupying the president's office. The "No" vote won the plebiscite, which meant that presidential elections had to be called within a year. This electoral result led different sectors of society to the realization that it was necessary to reform the 1980 Constitution; even the regime itself concluded the reforms were necessary to ensure its survival and as a means to avoid demands for a new constitution. Consequently, "democratizing" reforms were proposed as a result of an agreement between the regime and opposition parties, which had come together as the Coalition of Parties for Democracy – with the exclusion of the Communist party, which was still illegal. Thus, and as was mandated by the 1980 Constitution, a third plebiscite was held in 1989 to submit the reforms to a vote. They were approved with 86% of the votes.

II. IMPLEMENTATION

Truth

In Chile, diverse mechanisms were used to accomplish truth-seeking and reparations, among these, three commissions. The first one, the National Commission for Truth and Reconciliation (CNVR, for its Spanish acronym), composed of lawyers and

politicians, was intended to clarify the truth of what happened between September 11, 1973, and March 10, 1990, concerning the detained-disappeared, those who were executed, and tortures that resulted in death. The victims who chose to appear before the Commission gave testimonies.⁵ Similarly, “it requested information from both domestic and international human rights groups, labor unions, political parties, professional associations, churches, embassies, consulates, and other public bodies as well as the armed and public order forces” (Guzmán 2010, 212-213). However, the CNVR’s mandate did not allow it to make determinations regarding specific individuals who were culpable. The second commission, the National Corporation for Reparation and Reconciliation (CNRR per its acronym in Spanish), was chaired by an attorney from the Vicariate of Solidarity, an organization of the Catholic Church, and its members were lawyers, politicians, and a medical doctor. Its first and fundamental goal was to complete the identification of the victims who died or disappeared between 1973 and 1990. Its specific role was to foster the reparation of victims’ moral damages and provide social and legal assistance to their families; support the process of establishing the whereabouts and the circumstances in which detainees had disappeared and died; and to make proposals to consolidate a culture of respect for fundamental rights in Chile. Finally, the National Commission on Political Imprisonment and Torture (CNPPT per its acronym in Spanish), composed of lawyers, a psychologist, and members of the Vicariate of Solidarity, had the purpose of identifying the people who suffered political imprisonment and torture, and of proposing the conditions, characteristics, forms, and modes of austere and symbolic reparations measures. The CNPPT “received complaints in accordance with a pre-established form, investigated the cases with the help of legal staff, interviewed thousands of people, and requested reports from numerous entities; additionally, it heard experts’ opinions, received visits from government officials and developed a large campaign to disseminate information” (217).

5 Notwithstanding, the Commission summoned them to register their cases in the Commission’s registry and to request a hearing in order to be heard.

Reparations (Lira, 2006)

In Chile, several reparations programs were implemented between 1990 and 2003 for different groups: families of the disappeared and families of victims of execution, exiles returning to the country, people who resigned from public office for political reasons, displaced farmers, among others. Initially, a reparations program for the families of victims of executions, detained-disappeared, and victims of political violence was created. The program was rooted in the recommendations of the 1990 National Commission for Truth and Reconciliation Report. To execute the recommendations of the Commission, the National Corporation for Reparation and Reconciliation was established. It is managed by a Council composed of six persons nominated by the president and ratified by the Senate. Considering that justice and reparations measures have operated in parallel, there have been disputes over the compatibility or incompatibility of the benefits of administrative reparations and judicial reparations in the same case. Victims have also questioned the absence of reparations other than material measures, for example, symbolic measures. Additionally, there were also disputes between victims and sections of the Chilean right that tried to present the reparations as disproportionate privileges for victims. Due to the absence of the ethnic communities (peoples of Mapuche origins) in the design and implementation of the reparations measures, especially economic measures, they have had a negative impact on the community networks of these groups because they organize themselves using a communal, non-monetary logic that has been negatively impacted by the influx of this money.

Guarantees of Non-Recurrence

The CNRR put forth several proposals for the redress and vindication of victims, which included restoring the good name of the fallen through monuments, remembrance parks, and other symbolic reparation projects (Guzmán 2010, 219). In the same vein, the CNPPT recommended declaring the main torture centers as monuments (223).

The best known monument, with the most symbolic value—and which is the result of a proposal to the State from organizations of families of the detainees and disappeared—stands in

the General Cemetery of Santiago de Chile, in the form of a wall inscribed with the names of all the people whose lives were extinguished by political repression, and where the remains of the victims that were found have been laid to rest.

It is also important to note the creation of the National Human Rights Institute, the Museum of Memory and Human Rights, and the design of the Ministry of the Interior's human rights program, which, through a symbolic reparations fund and at the request of victims' organizations, has financed projects and provided technical support to carry them out. In particular, these projects have materialized in works of art that are usually selected in art competitions where victims are represented. Finally, it is worth noting the existence of private works—created with the State's financial support—such as the Peace Park, built where the Villa Grimaldi torture house used to stand and which is managed by victims' organizations (Correa 2011, 472).

5. COLOMBIA

For more than fifty years, Colombia has lived through an internal armed conflict confronting the State with different guerrilla groups as well as right-wing paramilitary groups that have deeply complicit ties with the military and political and economic elites. Sociopolitical violence against civilians has been a constant throughout the conflict years. So have the attempts—not always successful—to seek a negotiated peace. Several guerrilla groups such as M-19, EPL, and Quintín Lame negotiated their demobilization and reincorporation into civilian life in the late 1980s and early 1990s. At that time, and again in the late 1990s, the Revolutionary Armed Forces of Colombia (FARC-EP by its acronym in Spanish)—the country's oldest guerrilla group—participated in failed negotiations.

In the first years of the twenty-first century, paramilitary groups, federated as the United Self-Defense Forces of Colombia (AUC by its acronym in Spanish), negotiated their demobilization and reintegration. However, many of their strongholds did not demobilize, or they rearmed and continue to be the main source of the country's political violence. In 2016, after several years of negotiations, the Colombian State finally reached a peace agreement with the FARC, and the final text was signed

in November and ratified by Congress in December 2016. On the date of completion of this report (January of 2017), the implementation of the Agreement had still not begun, so it is not possible to submit its very interesting contents—many specifically aimed at ensuring the participation of victims in the various mechanisms for implementing the Agreement in terms of truth, justice, reparations, and non-recurrence—to detailed description and analysis in this document. We only discuss the participation instances that were opened during the process to negotiate and ratify the Peace Agreement, as well as the participation principles it established. On the other hand, in March 2016, the Colombian State announced that the public phase of peace negotiations with the National Liberation Army guerrilla group (ELN by its acronym in Spanish) would begin that year, but the beginning of public negotiations was postponed until February of 2017, due to the Government's requirement that the group release the kidnapped people in its possession. Therefore, we only offer very summarized information on what the agreement that serves as the basis of the negotiations provides for, in terms of participation.

I. ADOPTION *Deliberation*

Motivated by a negotiation process initiated in 2002 between the Government and paramilitary groups, and faced with the victims' constant demands for a major role in the justice, truth, and reparations measures that were being adopted by the Colombian State, in 2010, the Government proposed to Congress a reparations law for victims of the armed conflict. This proposal was preceded by a similar legislative initiative presented during the previous Government by the Colombian Liberal Party, which had worked with social organizations since 2007. In order to approve the law that was finally passed in 2011 (Law 1448 of 2011), the draft legislation was discussed in several debates and forums in which human rights organizations and other social organizations, mainly the ones based in the capital city of Bogota, exercised ample participation. Grassroots organizations and non-organized victims had lower participation levels. The Congress of the Republic held regional hearings to listen directly to the victims; however, many organizations questioned Congress' use of these spaces for

electoral proselytism, that the victims were not invited to participate in the design of the proposals but to comment on proposals that had been designed in the capital, and that these comments were not even taken into account. Similarly, many social organizations questioned the creation of certain participatory scenarios (hearings, forums, conferences) as mechanisms to legitimize the law under the auspices of participatory openness, although, in reality, the mechanisms were far from accomplishing this purpose. Similarly, human rights NGOs in Bogota were more likely to have influence and effectively participate in dialogue scenarios with members of Congress who supported the initiative and with state representatives.

In addition, in September 2012 the Colombian Government and the FARC agreed to establish peace talks based in Havana (Cuba), grounded on the “General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace.”⁶ This base agreement for the negotiations included six thematic issues to be discussed by the parties: rural development, political participation, the problem of illicit drugs, victims’ rights, the end of the conflict, and the implementation of any agreement reached. From the moment the process began, different spaces for victims’ participation were promoted.

First of all, the base agreement explicitly stated that building peace required the participation of all of society and that the negotiations and the prospective agreement should “ensure the broadest possible participation.” Consequently, in principle, a mechanism to receive citizens’ proposals on the agenda items was established. However, in the course of the negotiations, and considering how to address the agenda item related to victims, the parties agreed to a set of guiding principles under what they called, “Declaration of Principles for the Discussion of Item Five of the Agenda: Victims” (Mesa de Conversaciones, 2014). One of the adopted principles was, precisely, participation, which asserted: “the discussion on the satisfaction of the rights of the victims of serious human rights violations and breaches of International Humanitarian Law because of the conflict necessarily requires

6 Available at: <https://www.mesadeconversaciones.com.co/sites/default/files/AcuerdoGeneralTerminacionConflicto.pdf>.

the participation of the victims, by different means and at different times” (Mesa de Conversaciones, 2014). In that same declaration, the parties asked the United Nations in Colombia and the Peace Dialogue Analysis and Monitoring Center at the National University of Colombia, to organize forums where victims could express their views on the victims item that was included in the General Agreement agenda. As a result, three regional forums took place in different parts of the country (Villavicencio, Barrancabermeja, and Barranquilla) and a national one took place in the city of Cali. The national forum was attended by 1,457 people from 32 departments (722 women and 735 men), victims of different victimizing events (United Nations and Universidad Nacional de Colombia, 2014). Further, according to the United Nations report, delegations from diverse social sectors and several types of organizations also participated: unions, farmer organizations, LGBTI organizations, youth organizations, and ethnic group representatives, among others. The forums produced proposals, sent to the dialogue table in Havana, on the following areas: acknowledgement of responsibility, satisfaction of victims’ rights, victims’ participation, truth-seeking, reparations, guarantees of protection and security, guarantees of non-recurrence, reconciliation and human rights approach. (United Nations and Universidad Nacional de Colombia, 2014).

Afterward, as part of the Declaration of Principles and as a result of the forums, the parties expressly agreed to the “direct participation” of the victims of the armed conflict at the negotiating table, acknowledging that the voice of the victims provides “essential input” to the discussions on the victims agenda item (Mesa de Conversaciones, 2014). To carry out this pact, they invited five delegations, each composed of twelve people, for a total of sixty victims. These delegations traveled to Havana between August and December 2014. The United Nations and the National University, which organized the forums mentioned above, selected the victims in each delegation. The visit of each one of the delegations was organized so that each victim had fifteen minutes to address both the Colombian Government and the FARC guerrilla delegations. At the end of each cycle, each group of victims issued a joint statement to the Dialogue Table, which was disseminated through the media and thus made known to all of Colombian society.

Lastly, in the final months of the negotiations, the parties also opened direct participatory spaces at the table for representatives of ethnic and sexual minorities; these culminated in the adoption of a differential gender approach in the Agreement, and also the inclusion of an ethnic chapter that specifies how implementation will respect the special autonomy and cultural diversity rights of ethnic groups in their territories.

None of the participatory processes mentioned above was exempt from criticism. On the one hand, in the forums carried out in Colombia, there were discussions on the representativeness of the victims who came to these spaces to express their views or proposals. The discussion deepened when it was necessary to select the people designated to go to Havana in each of the delegations. This discussion revolved around several issues. On the one hand, a critical issue was which criterion should apply for designating the victims. Some believed that victimization (facts) should determine the choice, while others insisted that the criterion to determine who should go to Havana had to be based on the perpetrator. This reverted to the debate on victims' recognition, as the sector that promoted the latter position argued that only the victims of the FARC, the insurgent group sitting at the table, could go to the dialogue table, which implicitly denied the existence of victims of state crimes and thus attributed to the guerrilla group all of the responsibility for the armed conflict.

Another point of discussion revolved around the issues that victims should address in participatory scenarios. Certain sectors characterized some of the victims' interventions in the forums negatively, asserting they were "politicizing," referring to the positions adopted by some of the victims in their statements in reference to the peace process or agenda items other than the "victims." What was in dispute was whether the victims could speak only to matters that affected them as victims of violations, or if they could express broader positions on the direction of the political process that was being facilitated by the dialogue table. Finally, another issue that was the object of dispute revolved around the legitimacy of the participatory mechanisms. Some sectors sought to minimize the impact of the forums and the delegations that went to Havana, noting that in a country that—according to official records—has more than seven million victims,

a scenario that could not even summon 1% of the victims could not be considered participatory.

However, these scenarios also strongly accentuated the need to give greater protagonism to the victims in the peace talks. The victims' delegations that went to the negotiating table in Havana received relatively ample media coverage. This allowed society to see victims' groups expressing themselves before those who have caused them so much pain and to see the parties—the insurgency and the State—meeting with them and listening to them. Although the sessions were closed, the victims gave statements to the media, which established connections between what was happening in Cuba and Colombian society. Most of the victims' delegates expressed their satisfaction at being able to communicate to the guerrilla and the Colombian State their outrage, anger, or pain, but also proposals or views on the course of the negotiations. Although not all victims were part of organizational processes, and in fact, those that were did not attend on behalf of their organizations, they were able to convey proposals they had been building collectively for years, founded on their experiences as victims and also leaders.

Additionally, the direct participation of ethnic groups was criticized, primarily, for the delay in its implementation and the brief periods left for discussion. Although ethnic groups insisted that, due to their right to prior consultation, their demands should be taken into account by the negotiators from the beginning of the process, a space for participation was only opened at the end of the process and as a result of the incremental pressure exercised by the groups. Despite attaining the explicit recognition of their rights in the Peace Agreement, the expedited procedure used to receive and consider their proposals differs very much from prior consultation processes in which there is more space for deliberation.

The importance of the participation of victims and civil society in deliberation spaces was not limited to the dialogue table but became the basic principle and cross-cutting axis of the Agreement signed by the parties in September 2016. According to the introduction of the text, “citizen participation is the foundation of all the agreements,” which is seen in each of the six points that were negotiated. In effect, almost all the mechanisms

for achieving peace foresee spaces for participation at the local or national level so that civil society, especially victims and traditionally marginalized sectors, participate in its implementation. Similarly, the implementation mechanisms promote the participation of women and respect the right to prior consultation of ethnic groups. Finally, with a view to ensuring that participation is not limited to these spaces and that it strengthens over time, the Agreement provides for government support mechanisms for the collective organization of women, the peasantry, former combatants, and social movements that wish to participate in politics. The underlying logic behind the adoption of all these mechanisms is the notion that Colombian democracy has been traditionally exclusionary—especially against poor sectors and opposition social movements—and that opening it requires the adoption of positive measures that ensure equitable access to deliberation and decision-making spaces. In this sense, the Agreement intends not only to open participatory spaces in transitional justice mechanisms but also that these spaces contribute to the transformation of traditional participation forms and the power relations that explain them.

It is very possible that civil society participation will take a more important role in the peace negotiations between the Government and the ELN. Indeed, the negotiation agenda was announced to the public in March 2016 but only began being developed in February 2017, and includes among its six main points—apart from points similar to the FARC agreement’s points on victims’ rights, the end of the conflict, and implementation—the participation of civil society during the negotiation process, democracy for peace, and transformations for peace. These three points seek to promote the wide participation of civil society during and after the negotiation table, ensuring that civil society is an active agent in the construction of peace and citizenship, that there are guarantees for public demonstrations, and that its input is taken into account for the development of transformative programs to overcome structural social problems.

The opening of these participatory spaces is still pending due to the delay of the parties in starting negotiations. In the meantime, sectors of the Colombian social and popular movement have begun promoting the expansion of these spaces through a

proposal to create a “social table” that works in parallel but is articulated with the negotiating table, allowing a debate between the popular social movement and representatives of the State on the diverse social and political problems of the country.⁷

Consultation

In 2011, Congress passed Law 1448 of 2011, known as the “Victims and Land Restitution Law.” This law empowered the president to issue “decrees with force of law” concerning reparations for three ethnic groups: indigenous peoples; Afro-Colombian, *raizal* (Afro-Caribbean group that inhabits the Archipelago of San Andres, Providencia and Santa Catalina), and *palenquero* (groups descended from slaves that escaped to freedom and settled in *palenques* or towns founded by runaway slaves) communities; and the Roma or Romani people. The decrees were to be issued after consulting with the groups. This was based on the fundamental right to prior consultation on the decisions that affect these ethnic groups that is recognized by Colombian law. With respect to indigenous peoples, the consultation process lasted about a year, in a dialogue that included indigenous organizations assembled in the Permanent Roundtable and representatives of the Colombian Government and State. Each worked on the formulation of a draft decree and, subsequently, a technical committee composed of the Government and indigenous peoples was formed to reach consensus on a single proposal that would be taken to the regions for discussion. Finally, Decree 4633 of 2011 was issued, in what has been described as a participatory process that resulted in a law protecting cultural differences and tailored to the reparations needs of these peoples. A similar process was carried out with Afro-Colombian communities, with the coordination of the Roundtable of Afro-Colombian Organizations, composed of most of the Afro social organizations in the country, which conducted workshops in several cities and a national meeting. The end result was also the issuance of a decree-law specific to these communities, Decree 4635 of 2011. This regulation, however, has not been as well-received as the decree for indigenous peoples. Some Afro-Colombian communities were dissatisfied with the consultation

7 For additional information, see Mesa Social para la Paz (n.d.).

process and felt they had not been represented, even raising the possibility of contesting its constitutionality before the Constitutional Court.

With these prior consultations, the Government intended to conduct a brief consultation to fulfill constitutional requirements (Lemaitre 2013, 15). Additionally, it should be noted that many of the issues addressed in the decrees were highly technical and referred to specialized branches of law and transitional justice. The fact that most participants were not professionals resulted in comprehension difficulties, which was even expressed directly in some of the meetings where participants requested assistance and time to clarify the State proposals (16). In addition, the methodology did not take into account the type of knowledge the participants had (17), and victims' voices were limited, due to time and resource constraints, to commenting on the legal articles but without expressing their concerns or talking about their experiences (34).

Notwithstanding, in both cases it is important to highlight that organizations have used these participatory spaces, both formal and informal, with the Government and between leaders, to build relationships of trust with public officials, other social leaders, NGO activists, and the professional network that revolve around this topic (Lemaitre 2013, 36).

Ratification

From the beginning of the peace talks between the Colombian Government and the FARC, the Government promised the citizenry it would consult the will of the people on the Final Agreement, once it had been signed. Thus, the Government promoted before Congress a statutory law that set out specific rules on the participatory mechanism chosen to consult the will of the people: the plebiscite. The law was approved in 2015, but it had to be reviewed by the Constitutional Court before being enacted. In July 2016, the Court issued a decision giving legal feasibility to the plebiscite. Pursuant to this law, the president would submit to the people the definitive text of the "Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace." The Agreement would be deemed approved if the "Yes" vote obtained more than 13% of the votes

from the registered electorate and exceeded the “No” votes that had been cast.

The debate over the ratification of the agreement revealed several tensions. The first one referred to the mechanism used to consult the people about the Final Agreement. While the Government weighed several possibilities among the available citizen participatory mechanisms, with a focus on specifically asking about the Agreement, the FARC insisted that the best way to ratify the Final Agreement was by convening a constituent assembly. The sectors that sympathized with this position noted that a true transition could only be accomplished by necessarily reforming the Political Constitution. Meanwhile, other sectors warned of the danger and inconvenience of this mechanism as it could jeopardize the agreements if the constituent assembly decided to disregard them, which, for this reason, brought into question whether this was the best way to guarantee the agreement. The discussions that had been finalized in the dialogue table could be reopened, with an uncertain outcome, this time in a constituent assembly whose composition could replicate the current configuration of popular election bodies. Ultimately, after lengthy discussions, and once the Constitutional Court had declared the mechanism was constitutional, the FARC accepted the use of a plebiscite.

The second tension related to the representativeness of the voting threshold. Existing and general rules on direct participatory mechanisms stipulate the existence of two thresholds: one concerning participation and another regarding approval. The statutory law promoted for this special plebiscite only provided for an approval threshold of 13%, which was backed by the Constitutional Court. This approval threshold was lower than the participatory threshold generally used for referenda, but in practice, it established a similar requirement because it referred to approval. Moreover, it did not contradict the existing rules as they did not provide for a specific threshold for plebiscites. Notwithstanding, several sectors criticized the establishment of ad hoc rules instead of the application of the existing ones, and interpreted the strategy as a way of lowering the requirements for approval.

Additionally, the Court made observations that would be important for calling the plebiscite and dealing with a potential adverse outcome. In effect, the Court held that the people’s decision

is only binding on the president of the Republic and not on the other branches of government. The Court stated the plebiscite is a mechanism for asking the people about government policy and consequently only has political effects (that is, it does not have legal effects). Therefore, it is only binding on whoever is promoting the policy, which in this case is the president.

Furthermore, the Court considered that, in order to guarantee more effective participation, the Final Agreement should be made public once the president had informed Congress of his intent to call the plebiscite, the text should be publicized during a period longer than the one provided for by law, and it should be disseminated taking into account

all the inhabitants of the territory, including those living in the country's most remote areas, as well as... a differential approach for those communities that do not use the Spanish language and for people with disabilities, the same as for those who reside in remote areas of the territory.⁸

Despite the Court's observations, the Government was authorized to call the plebiscite for October 2, that is, less than three months after the decision that affirmed its constitutionality and less than two months after the signing of the Final Agreement. During this period, the Government carried out activities to explain and disseminate the Agreement in different parts of the country, as well as a "Yes" campaign, which was joined by the parallel campaigns of many political parties and social sectors that were not part of the Government's coalition. This plurality of campaigns was notable for the diversity of perspectives supporting peace but suffered from coordination problems and the absence of an unequivocal message that was simple and forceful. The opposition to the Agreement developed an active "No" campaign that, despite having fewer resources, was more cohesive and managed to focus the discussion on the most polarizing aspects of the Agreement, such as the absence of prison sentences for the perpetrators of atrocious crimes who confessed and fully repaired their victims and the possibility that perpetrators could participate in

8 Constitutional Court, Sentence C-379 of 2016; judge writing for the Court [Magistrado Ponente], Luis Ernesto Vargas.

politics. The campaign was also successful because, as its head publicly admitted after the vote, it included many misrepresentations about what the Agreement said.

Although some analysts expressed concern about the outcome of the plebiscite, the vast majority of those who supported it felt confident that it would triumph, as indicated by all the opinion surveys. On October 2, 2016, citizens voted and, against all predictions, the “No” won by a narrow margin (50.21% of votes) and with high abstention levels (62.9%). “Yes” votes were concentrated in the peripheral areas of the country, which were characterized by poverty, a weak state presence, and the prevalence of the armed conflict (Fergusson and Molina, 2016). However, this is where abstention was highest (ORP, 2016), largely because adequate conditions were not provided so that people could access the polling stations—among other things, new voters were not allowed to register before the elections, nor was it guaranteed there would be polling stations in the rural areas located far from transportation routes.

The negative result demanded that the negotiating parties seek alternatives for reaching a new Agreement that, without jeopardizing the continuity of the ceasefire, would at least modify the elements of the text that had generated the most reluctance among “No” voters. Consequently, the Government summoned the main political spokespeople of the “No” campaign to a series of intense discussions, which led to the development of multiple proposals to modify the Final Agreement, and which were subsequently discussed at the negotiating table in Havana. In less than two months, the parties managed to negotiate a new agreement—this time “definitive”—which took into account the vast majority of the opposition’s proposals and which also clarified several issues that were controversial and for which the expectations that a new consensus could be achieved were low. Of the more than 400 proposals presented by the opposition (Semana, November 5, 2016), only one was discarded by the parties—the one banning the political participation of members of the guerrillas who committed atrocious crimes—because they considered that it was the essential reason for which the guerrilla had decided to negotiate peace.

With a new Peace Agreement, Colombia faced, once again, the question of how to ratify it. Diverse voices, not only those of the opposition, considered that direct popular ratification was important to provide political legitimacy to the new agreement and prevent the impression that the results of the first plebiscite would be circumvented. However, these voices diverged on the type of ratification mechanism that should be used—plebiscite, referendum, or regional town hall meetings—the time in which it should be carried out—before or after the implementation of the Agreement, taking into account the urgency of starting its implementation to avoid a breakdown of the ceasefire—and the contents that should be submitted for ratification—the agreement in bloc, by parts, or only its more controversial or less urgent elements.

For its part, the Government and its support bases considered that a new ratification was very risky since it would delay starting implementation of the Agreement, and could exacerbate political polarization, in addition to submitting the Peace Agreement to the electoral logic of the next representative elections (2018). For these reasons, the Government decided to submit the new Agreement for the endorsement of Congress, arguing that this was the quintessential scenario of representative democracy, and that its ratification would allow implementing the Agreement without delays. Thus, for two days, each of the chambers of Congress discussed the new text that had been agreed to, listening to the spokespeople of all the political parties represented in Congress, to the “No” spokespeople who lacked such political representation, to the National Government, and to victims’ representatives. The Agreement was ratified with large majorities on November 30, 2016. A couple of weeks later, the Constitutional Court validated the indirect popular ratification mechanism, when it analyzed the Government’s proposal for constitutional reform that would allow it to implement the Peace Agreement through expedited legislative procedures and special legislative powers of the executive, and that required popular ratification to enter into force. According to the Court, popular ratification is a complex process, and it is deemed completed if, after direct consultation with the people, the results are considered in a good faith context in which broader consensus are sought, culminating with the ratification of a representative body such as Congress.

The ratification of the Congress and the decision of the Court cleared the path for Government to promote the immediate implementation of the Definitive Peace Agreement through decrees with force of law and the adoption of laws and constitutional reforms through expedited procedures.

II. IMPLEMENTATION

Justice (Comisión Colombiana de Juristas, 2007)

Within the framework of the negotiation process initiated between the Colombian Government and paramilitary groups in 2002, a special criminal procedure to significantly reduce penalties in exchange for confessing atrocious crimes was created (Law 975 of 2005). Social organizations, especially human rights and victims' organizations, seriously questioned the political will of the armed groups to contribute to truth-seeking, justice, and reparations, and also the legitimacy of the process itself. The law provided for *versión libre* (spontaneous declaration) hearings in which those who have demobilized must contribute to truth-seeking by confessing to the events they participated in or knew about. The hearings received significant media coverage when the trials began.

Victims and human rights organizations disputed the prominent role of the perpetrators in the hearings and the way they used these spaces to justify their crimes. They insisted before the Attorney General's Office that victims and their representatives should be authorized to enter the *versión libre* hearings and intervene directly. They also demanded that they be given financial support to attend the hearings and that the spaces be adapted so that they could be present. At an advanced stage of the process, the Attorney General's Office began to broadcast the *versión libre* hearings in the municipalities affected by violence. The opening of participatory spaces to victims and their representatives was a result of the former's political and legal mobilization. In particular, the strategy of filing *tutela* actions—a type of flexible *amparo* writ to enforce constitutional rights—to defend their fundamental rights was crucial to obtaining the participation of victims in the first stage of the process.

Reparations

The 2011 law on reparations to victims and land restitution (Law 1448) adopted measures for land restitution, financial compensation, satisfaction, rehabilitation, and guarantees of non-recurrence. To ensure participation in its implementation, the law establishes the duty to guarantee the election of victims' representatives to the proposed decision-making bodies and the design of participatory spaces at the national, departmental, and municipal levels. The Victim's Law created Victim Participation Roundtables (MPV per its acronym in Spanish) as spaces for thematic work and effective participation for the discussion, exchange, feedback, training, and monitoring of the legal provisions on reparations. The Victims' Law also created a National System for Attention and Reparations to Victims (SNARIV per its acronym in Spanish), in which the national, departmental, and municipal MPVs have a seat. The SNARIV has two units: the Victims' Unit, responsible for implementing all reparation and assistance measures with the exception of restitution measures, and another unit specializing in land called the Special Administrative Unit for the Management of Land Restitution. Victims elected by the MPVs have a seat on both units. The Land Unit is managed by a board of directors which includes two victims' representatives selected by the national MPV, two representatives of indigenous communities elected by the Permanent Roundtable for Indigenous Peoples, and two representatives of black, Afro-descendants, *raizal*, and *palenquero* communities. The structure of the Victims Unit includes a participation sub-directorate tasked with developing a participation protocol and designing mechanisms that promote effective participation, among others (Comisión Colombiana de Juristas, 2012).

However, the participatory system has some structural problems; its implementation has not been efficient (Berrío 2013, 39-40) and, in practice, it does not seem to guarantee on its own, fluid communications between victims and the Government—sometimes, it simply seeks public approval of predetermined state policies (1). Thus, victims' representatives complained about the lack of guarantees for effective participation during the design and implementation of assistance, attention, and reparations policies (5), as some participatory spaces were reduced to useful

moments for meeting formal victims' participation requirements to validate predetermined state responses, as happened with Decree 4800 of 2011, which was subjected to a consultation process that consisted of collecting suggestions (13).

Many of the existing problems are primarily caused by a lack of coherence in the timeframes for designing everything that has been planned under Law 1448 of 2011; the weakness of the participatory mechanism for representatives and their incidence in key participatory spaces (the committees and board of directors that design and adopt the final decisions on the implementation and execution of programs for victim assistance, attention, and reparation); the weakness of local institutions to ensure effective participation; and the fact that the law did not provide for any transitional mechanism between the participatory tables of the displaced population and the participatory tables of the victims of the armed conflict (Berrío 2013, 37). In addition, these tables are not considered crucial decision-making scenarios because they do not have the autonomy to decide on the design and implementation of the public policy on reparations; as a consequence, they are reduced to an exclusively deliberative space among victims whose decision-making capacity is practically null. In addition, the committees and board of directors of governmental entities in which victims' representatives have a seat do not have mechanisms to evaluate the weight of victims' proposals in the design and implementation of public policy, and in the composition of some of the committees and boards, the Government does not even require convening victims' representatives (22).

Guarantees of Non-Recurrence

From the year 2004, the Colombian State has undertaken an institutional reform process aimed at fulfilling the rights of the population victimized by forced displacement. The process originated in a decision of the Constitutional Court (Sentence T-025 of 2004), which held that the situation of the forcibly displaced population was "an unconstitutional state of affairs" and ordered the State to develop a coherent and effective public policy to provide assistance and protect the fundamental rights of this segment of society—including their rights as victims of the crime of forced displacement (and often other crimes) to justice, truth,

reparations, and non-recurrence. The Court retained its jurisdiction to evaluate the Government's compliance with the decision. As part of the evaluation process, the Court ordered the State to submit periodic reports on its implementation, which are discussed in public hearings before this tribunal. Similarly, from 2007, the Court invited the Commission to Monitor Public Policy on Forced Displacement (CSPPDF per its acronym in Spanish), created by different academic and civil society organizations and personalities,⁹ to participate in the monitoring process as the Government's counterpart by producing alternative reports on compliance with the decision and presenting them at the public hearings. Since then, the CSPPDF has produced reports that concentrate, unlike the State's reports which focus on the institutional offer, on the construction and measurement of indicators to assess the satisfaction of the rights of the displaced population. For this purpose, the CSPPDF has developed an important representative survey of the displaced population that investigates the level of satisfaction of their different rights. Thus, the CSPPDF is an interesting example of civil society participation in the implementation of a transitional justice measure with a strong technical and knowledge production component.

6. CZECH REPUBLIC

After World War II, Czechoslovakia was governed by a communist regime until 1989. In 1993 the country split into the Czech Republic and Slovakia.

9 The CSPPDF's website lists as participants, "former Ombudsperson and former President of the Constitutional Court, Eduardo Cifuentes; journalist Patricia Lara; the National Director of the Catholic Church's Social Services Ministry in Colombia – Caritas Colombia, Monsignor Hector Fabio Henao; economist Luis Jorge Garay; the President of the Jorge Tadeo Lozano University, Dr. Jose Fernando Isaza; the Director of the Center for Law, Justice and Society – DEJUSTICIA, Rodrigo Uprimny Yepes; the President of the National Indigenous Organization of Colombia, Luis Evelis Andrade; leader Rosalba Castillo from the organization AfroAmérica XXI; National University of Colombia Professor, late Orlando Fals Borda; the President of Viva la Ciudadanía Corporation, Pedro Santana; and National University Professor and President of Codhes, Marco Romero. The Commission has the international accompaniment of Nobel Peace Prize Laureate Rigoberta Menchu, the organization Plan International and former UNHCR Representative in Colombia Roberto Meier."

I. IMPLEMENTATION

Guarantees of Non-Recurrence

A purge policy was established through two laws that were passed in 1991 and 1992. It originated in the need to address violations committed during the communist regime and pave the way for a new political regime. These laws specified the access requirements for certain public offices and even the ones that could not be held by those who had had political responsibilities during the communist regime. However, the first law (Act 451 of 1991) was passed with only 49% of the General Assembly votes.

The purge affected many public offices, although the ones that were considered strategic were excluded from the process, such as the general office of the prosecutor, senior posts in the judiciary, and all managerial positions such as public universities, the central bank, and state enterprises. All public posts that had a strong connection with the Communist Party and were considered “a risk” for the succeeding regime were subject to purge. One of the most controversial purge categories was that of “secret police collaborators,” as it was difficult to determine whether collaboration was intentional, unintentional, or even if it happened under any kind of threat, which would imply subjecting a victim of the regime to the purge process; the debate reached the Constitutional Court, and in 1992 the Court ruled this category was unconstitutional. A certificate would be issued by the entities conducting the purge, and it could be contested before the administrative authorities or even in the judiciary. The policy was initially instituted for a period of five years but has been renewed several times since then. Although opinion polls indicated the renewals lacked support, a 2003 initiative that intended to abolish the law failed in Parliament. Generally, the policy has been strongly criticized because it lacks public debates, concessions, or negotiations with the outgoing regime and violates the rights of the people subject to the purges in a highly polarized and ideological context. Some critics even argue that the law promotes collective and not individual responsibilities.

7. EL SALVADOR

Starting in the year 1980, the Salvadoran State waged a war against the Farabundo Martí National Liberation Front (FMLN per its acronym in Spanish). It ended with the signing of the Peace Accords in Chapultepec (Mexico) on January 16, 1992.

I. IMPLEMENTATION

Guarantees of Non-Recurrence

One of the mechanisms established to overcome the conflict was an armed forces reform. It sought to redefine military doctrine, restructure the operations and organization of the army, decrease the number of troops, “purify” the officer corps, and modify military education. The new military doctrine defined a more restricted role for the armed forces, limiting it to defending the nation’s sovereignty and territorial integrity in case of an external aggression.

To conduct the purification, an ad hoc commission to purge the armed forces was created. It was composed of three Salvadoran nationals of recognized independence of mind and unimpeachable democratic credentials (Martínez 2010, 308), who were appointed by the Secretary-General of the United Nations; and it allowed two officers from the armed forces, appointed by the president of El Salvador, to participate in the deliberations.

The Commission began its work on May 19, 1992, and discharged its duties over a period of four months. This period presented a challenge, since the Commission was only able to investigate 11% of military commanders— In addition, there were difficulties raised by

the limited information that—with very significant delays—was provided by the Armed Forces and the fact that the limited information that was supplied did not include any record of acts against the life, liberty, security, and physical integrity of the civilian population ... In short, since its inception, the military resisted this effort (IDHUCA 2002, 46).

However, the fact that the purification process included the officer corps should be highlighted. The ad hoc commission report was confidential, and it was delivered to the UN Secretary-General and the president of El Salvador on September 23, 1992.

Along with the purification process, a process concentrating the members of the army and the guerrillas took place, which resulted in the subsequent disarmament and demobilization of the FMLN and reduced armed forces troops by half.

8. GERMANY

Germany was one of the main actors in the Second World War (1939-1945). During this period, the German State, governed by the National Socialist Party, persecuted and committed serious crimes against different social and political groups.

I. ADOPTION

Deliberation (Authers, 2006)

In June 2001, the German Parliament passed a law approving a budget to compensate victims of forced labor during the Third Reich and the owners of companies seized by the Nazi regime, and to pay life insurance claims on policies in the name of Holocaust victims that were never paid to the beneficiaries. It was calculated that approximately two million people would benefit from this law. The law was applied by five government entities and two international human rights organizations. The law was approved as a response to civil lawsuits filed by victims in foreign courts (particularly in the US) against companies that had benefited from forced labor. Although reparations programs for Holocaust victims had been implemented in the past, some categories were left out, which explains why the debate on reparations was reopened almost sixty years later. The victims of forced labor and slavery had a high level of influence in several aspects of the programs: first, concerning the objective or name of the program itself. From the beginning, the surviving victims objected to calling it a "reparations" program due to the discussion on the impossibility of "repairing" the Holocaust, which resulted in having to find a more suitable name that pointed at the responsibility of the companies that benefited from forced labor; second, and in the same vein, concerning the responsibility of the companies. The victims did not want the Holocaust to be forgotten. Therefore, the program's agreement had to contain an explicit acceptance of responsibility by the companies (moreover, each check was accompanied by an apology note that was signed

by the German president). The victims' capacity to influence the design of this program can be attributed to, among other reasons, the influence of the Jewish community in the United States, along with the influence of the State of Israel. The two NGOs that participated in the process had the capacity to influence the reparations policy from the very beginning. The influence can also be explained by the need of the companies to "stop" the million-dollar lawsuits filed against them in American courts, and, ultimately, by the fact that the German State could not deny implementing a reparations program for victims of the Nazi regime, due to the political consequences this would have in the midst of constant pressure to reject that regime at all cost. Against this backdrop, the program, which started being discussed in 1999, was negotiated between the German Government and influential international civil society organizations, different States (particularly States in Eastern Europe and the United States) and a German organization that assembled and represented the interests of the companies involved.

II. IMPLEMENTATION

Guarantees of Non-Recurrence (German Democratic Republic or East Germany) (UNDP, 2006)

In 1989, discussions began on the need to conduct purges of members of the Stasi, the Ministry for State Security of the former German Democratic Republic (GDR), after the GDR dissolved and joined the Federal Republic of Germany. The initial decision focused on Stasi members, with regulations on protecting files with the purpose of preserving them for later declassification and lustration. East Germans provided important momentum to the proceedings although the judges that heard the proceedings applied West German laws, which some opponents considered was the imposition of western rules in a very different context. Two purge commissions were established. The first one was of an administrative nature, and its members belonged to the institution that was being purged and were appointed to the commission by virtue of their duties and not through election. The other commission was of a mixed nature and was composed of people that belonged to the institution and outsiders, with experience in the field, lawyers, and civil society members of "great moral

integrity.” They were elected by their peers or members of Parliament. The policy was initiated by people who wanted to know who had been a Stasi informant, and also that those responsible be denied access to public institutionality. However, citizen demands that informants be publicly exposed due to their “misconduct” were never satisfied, because the purge process imposed sanctions but did not publicize their reasons or causes. The facts were kept confidential and, as a consequence, the results were not part of a broader truth-seeking and satisfaction process.

9. GUATEMALA

Guatemala suffered an internal armed conflict that began in 1960 and ended with the December 1996 peace accords between the Government and the Guatemalan National Revolutionary Unity (URNG per its acronym in Spanish). The final peace agreement was signed on December 29, 2006.

I. ADOPTION

Ratification (Hernández, 1999)

The peace accords were included in the Constitution through reforms that were then submitted to a popular consultation (about 50 reforms). The consultation contained four questions on the following subjects: nation and social rights, legislative branch, executive branch, and judicial branch/ administration of justice. The constitutional reforms were not approved. Abstentionism was the winner of the day (only 18% of the registered voters cast ballots), and the “No” won on all four questions among the voters, though by a small margin. According to the results by region, the “Yes” won in those areas most affected by violence during the 1980s and 1990s, while the “No” prevailed in the areas that were affected by violence in the 1960s, when the conflict first started.

The “No” vote won in the capital city, almost tripling “Yes” votes; this was considered a determining factor in the consultations’ failure because the capital concentrated 26% of the electorate and the voting was of 20%. It is argued the “No” vote won because of the complex manner in which the reforms were presented, in addition to the absence of different types of communication tools—written communication prevailed, and there was

no use of audiovisual strategies—or public debate. This would have had an impact, particularly in illiterate communities. In line with this analysis, the electoral loss is also attributed to the lack of publicity given to the process and the lack of information on the constitutional reforms that were at stake.

The debate between those who favored the “Yes” and those who favored the “No” vote was centered in the capital between the upper and middle classes, and in debates in the written press (editorials, opinion columns). The discussions were not exempt from polarization, in addition to racism against indigenous communities, which have historically suffered exclusion and were the most affected by violence. Moreover, worry was also expressed over the possibility that popular consultation, which usually had low voter turnout, continued being used as a mechanism to reform the Constitution when the circumstances required a constituent assembly with more space for participation, more discussion and information. Opinion surveys conducted after the consultation indicated “lack of information” (37% of respondents) was the reason explaining the victory of the “No” vote. Also, when asked if the next Government should continue the peace process, 83% of respondents responded affirmatively.

II. IMPLEMENTATION

Truth (Hayner, 2011)

The Commission for Historical Clarification functioned between 1997 and 1999. It was adopted in the 1994 Oslo peace process but began its work three years later. The design of the Commission was inspired by the Truth Commission of El Salvador; however, it was strongly influenced by the military establishment, which pushed so the Commission, in contrast to the Salvadoran one, would not name the perpetrators. Civil society strongly opposed the terms that defined the Commission’s work, especially that it was not tasked with naming the perpetrators and that it was completely disconnected from judicial proceedings. The Commission conducted important fieldwork, collecting testimonies in isolated regions where frequently people were not even aware that peace accords had been signed. The Commission took into account the work of human rights organizations. Additionally, civil society undertook alternative historical clarification actions, including

the Interdiocesan Project for the Recovery of Historical Memory (REHMI per its acronym in Spanish), led by the Catholic Church, which included fieldwork and documentation and came under attack and suffered persecution. Some of its members were murdered when presenting their findings. There were levels of collaboration between official and unofficial initiatives.

Guarantees of Non-Recurrence

The changes introduced by the 1985 Constitution resulted in the appearance of new factors that added diversity to the political scenario, including action by social organizations against militarization and human rights violations (Aragón 2000, 9). In the framework of the peace process, it was decided the debates would center around specific topics, including demilitarization and strengthening civilian power, with the objective of dismantling the de facto power structures that had developed in the country, empowering civil society, building citizenry, and shifting its power relationship with the government apparatus from vertical to horizontal.

The commitments between the URNG and the Government included the need to reform the Constitution with the purpose of changing ethnic inequality, strengthening spaces for civil representation in Congress, and the fight against corruption in the judiciary, and undertaking “the political modernization of the State in terms of the demilitarization of public power through the suppression of the National Defense General Staff—the institution responsible for directing counter-insurgency intelligence” (Aragón 2000, 15). The reform was conducted amid reserves established by the president of Congress, who decided to create a Multiparty Body, with the exclusive participation of the parties, while leaving open the possibility that organizations of all kinds submit their proposals for reform, which resulted in a very positive response from civil society organizations. In total, 27 proposals, including those of civil society organizations, were presented (Aragón, 2000).

In the Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society (AFPC per its acronym in Spanish), the parties agreed to several commitments aimed at modifying the role of the armed forces during the

conflict, and the institutional role they should play in a situation of democracy and peace. The objective was that the armed forces would carry out their actions in accordance with democratic principles—including subordination to civilian power—and be effective in their duty to protect society.

Within this framework, a proposal to reform the military education system was put forth. It sought to make the armed forces

consistent, in its philosophical framework, with respect for the Constitution of the Republic and other laws, with a culture of peace and democratic coexistence, with the doctrine defined in the ... Agreement, with national values, integral human development, knowledge of national history, respect for human rights, the identity and rights of indigenous peoples, and the primacy of the human person (Universidad Rafael Landívar et al. 1998, 152).

In addition, the reduction of army troops (their size decreased from 54,875 in January 1996 to 15,500 in June 2004) (Aguilera 2006, 18) and the military budget were carried out.

10. HUNGARY

With the fall of Germany, its ally in the Second World War, Hungary was invaded by Russian troops, which led to the establishment of a communist regime. In 1949 the Hungarian People's Republic was created and lasted until 1989, when it became the Republic of Hungary.

I. IMPLEMENTATION

Guarantees of Non-Recurrence (UNDP, 2006)

When the transition from a communist regime to a liberal democracy was negotiated in 1989, a purge process was not part of the discussion. Such a process was initiated in 1994, due to fears that members of the communist regime's security apparatus still exercised influence in the public sphere. The policy was demanded by Hungarian society itself; between 1992 and 2002, opinion surveys consistently showed support for this type of measure and, additionally, for the publication of the information obtained by secret agents. Initiatives for the implementation of a lustration policy had been presented to Parliament since 1990, and the policy was finally adopted in 1995, although the Constitutional

Court declared the main provisions of the law unconstitutional. In 1996, another law was issued to address the shortcomings of the previous one, which was supplemented by additional legislation in 2000 and 2001. The law issued in 2000 contained a list of those who should be subjected to the lustration process. The 1994 commission was composed of three members nominated by the National Security Authority together with the president of the Supreme Court, all of them appointed by Parliament.

11. INTERNATIONAL CRIMINAL COURT

On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute, which created the International Criminal Court (ICC). This treaty entered into force on July 1, 2002.

I. ADOPTION *Deliberation*

The process of establishing the ICC was marked from the start by the participation of civil society organizations assembled in the Coalition for the International Criminal Court (close to 2,500 organizations). The Coalition gave impetus to the idea of creating an international tribunal to judge international crimes and participated in the conferences leading to the adoption of the Rome Statute, even surpassing the number of delegates from the States. Civil society activism was important for the development of the conference, and some of the provisions of the Rome Statute can even be attributed to the Coalition.

II. IMPLEMENTATION *Justice* (Haslam, 2011)

Several articles of the Rome Statute allow civil society participation, including article 15 that allows NGOs to be a source of information on the crimes and article 44 that allows NGO members to assist the ICC's work directly. Also, the ICC's Rules of Procedure and Evidence enable organizations to submit amicus curiae briefs and grants observer status to certain categories of NGOs. The role of the Coalition has been instrumental in supporting the ICC's work, promoting the ratification of the Rome Statute by the States, and questioning American opposition, among others.

This has given rise to debates about the *delegation* of court functions to organizations and the need for these to keep their independence with respect to the work of the ICC. Further, some critics assert the ICC has favored the participation of organized civil society over the participation of victims themselves. In that sense, some consider the ICC has given too much space to the “institutionalization” of civil society (to organizations), in contrast to the limited participation it has afforded to victims.

The Rome Statute allows victims to participate in all stages of the criminal procedure, albeit with the ICC’s authorization and accompanied by their representatives (article 68.3 of the Rome Statute). However, in practice, victims have not participated as much as anticipated because their participation requires highly qualified legal representation that, many times, is out of victims’ reach due to language barriers, etc. Some groups have called on the ICC to lower its legal representation standards. The procedures for victims’ participation have also been criticized for the complexity of the application form to request recognition as a victim, the lack of legal and financial aid for applying, and the lack of protective measures. The decisions of the prosecution or of the ICC could also have a negative impact on participation; for example, some consider the prosecution’s restrictive accusations to be problematic because victims’ participation is only recognized if the person can prove he or she were the victim of the charge brought against the accused. The limitations on victims’ participation came to light in the Uganda case: although Ugandan society expressed reservations about the intervention of the Court since the very beginning, forty-nine people applied to be recognized as victims within the proceedings in 2006. However, almost a year later only the participation of four of them had been approved, claiming that the others had outstanding issues regarding proof of identity.

12. MOROCCO

After Morocco’s independence in 1956, a constitutional monarchy led by Hassan II was installed in the country. It lasted from 1960 until 1999, the year of his death. In this period, known as the “Years of Lead,” serious and systematic human rights violations were perpetrated in Morocco and Western Sahara.

I. ADOPTION

Deliberation (Hayner, 2011)

Morocco began a reconciliation process in the early 1990s that materialized in constitutional reforms aimed at creating the alternation of government and the adoption of the rule of law and human rights standards. The creation of the Advisory Council on Human Rights (ACHR) was particularly relevant. This process made citizens aware of the importance of their participation in the management of public affairs, which contributed to the consolidation of freedom of expression and association.

Human rights organizations played an important role in deciding the establishment of a truth commission. A conference, with the participation of nationals and foreigners, was held to discuss the terms of the truth commission, which was called Equity and Reconciliation Commission (ERC).

II. IMPLEMENTATION

Truth

On November 6, 2003, King Mohammed VI created the ERC in response to the recommendations of the Advisory Council on Human Rights (ACHR). It was the first truth commission in an Arab country. The ERC was officially installed on January 7, 2004 and completed its work in 2006. It was composed of a chairman and sixteen members (lawyers, academics, and former political prisoners), half of them from the ACHR. It had three permanent working groups: research, studies and searches, and reparations (Hayner, 2011).

The bylaws of the ERC stated its mission, the violations subject to its jurisdiction (forced disappearances and arbitrary detentions of a systematic or mass character), and how its work would be organized. The ERC had twenty-three months to examine the period from 1956 (Moroccan independence) to 1999 (when the Independent Commission of Arbitration, responsible for compensating victims of forced and arbitrary detentions, was approved), the longest period ever examined by a truth commission.

The ERC's first action was to study the admissibility of the 20,046 petitions it received; of these, 16,861 met the admissibility requirements and the remainder referred to people who had already been named in a petition or petitions that did not contain

sufficient information. A file was opened for each petition, and the information was completed through visits to the regions, where direct hearings were held with the affected people, letters were sent to the petitioners with requests to complete the information, meetings were held at the headquarters, among others.

During this stage, university researchers, professors, and lawyers collaborated with the ERC, working under the supervision of the reparations working group. In the evaluation of forced disappearances and arbitrary detentions, it conducted investigations (collecting testimonies, holding public hearings with victims—some of which were televised by public media outlets—and conducting closed hearings with witnesses and those formerly responsible, reviewing official archives and collecting data from all available sources) and established contact with the public powers, victims, their families, or their representatives, and interested non-governmental organizations. However, the ERC had a tense relationship with civil society organizations, especially because it did not have investigative powers and it was not allowed to name the perpetrators. As an alternative to the official Commission, the Human Rights Association of Morocco conducted public hearings where victims could mention the names of perpetrators.

Regarding reparations, the ERC welcomed the requests of victims of grave human rights violations or their families; in particular, when drafting the approach and reparations policy, the ERC took into account the views of different human rights organizations. In its conclusions, it made recommendations to preserve memory, ensure non-repetition, eliminate the effects of violence, and restore and strengthen trust towards institutions and respect for the law and human rights. With respect to rehabilitation, the ERC considered it was included in the right to truth-seeking and memory preservation, and, therefore that it was necessary to adopt community reparation measures (taking into account that collective violations occurred in some regions, which contributed to their exclusion and marginalization) with a gender perspective (considering the situation of women, who had suffered serious violations). In regard to community reparations, the ERC organized or participated in seminars in various cities and regions (Al Hoceima, Errachidia, Figuig, Khenifra, Marrakesh, among others), organized a national forum on

reparations with the participation of over 200 associations and 50 experts—national and international—and held several consultation meetings with public authorities and civil society actors.

It is important to bear in mind the difficulties faced by the ERC due to the lack of reliable records and academic studies on the contemporary history of Morocco, coupled with the fragility and imprecision of certain oral testimonies, the deplorable state of national archives, the uneven cooperation of the security forces, and the outright refusal of certain people to collaborate (National Council for Human Rights 2006, 12). For these reasons, the public hearings with victims—disseminated through the media—their testimonies, academic forums, and dozens of seminars organized by the ERC or NGOs were fundamental for conducting the ERC's work and also expanded public debate over more than half a century of Moroccan history (40).

13. NORTHERN IRELAND

During the second half of the twentieth century, a conflict arose between those who promoted independence from the United Kingdom (most of them Catholic) and those who advocated remaining in the United Kingdom (most of them Protestant). The conflict formally ended on December 10, 1998, with the signing of the Good Friday Agreement.

I. ADOPTION

Ratification (Brown, 2012; Lundy and Grover, 2008)

The agreement signed by the political parties of Northern Ireland in 1998 (which was ratified by the British and Irish States to end the Northern Ireland conflict, and is known as the Good Friday or Belfast Agreement) was submitted to a referendum in the Republic of Ireland and in Northern Ireland (part of the United Kingdom). In the first case, the referendum focused on approving the reforms that were needed to adjust the Constitution of the Republic of Ireland to the Good Friday Agreement; in the second case, it focused on approving or rejecting the Agreement. The Agreement included points on the establishment of democratic institutions in Northern Ireland (autonomous legislature); cooperation bodies comprised of Dublin and Belfast personnel (States of Ireland and Northern Ireland) to monitor the agreements; the

creation of a British-Irish Council that included Northern Ireland, Scotland, Wales, the Isle of Man, and the Channel Islands; disarmament of paramilitary groups operating in Northern Ireland, and measures for the victims of violence; Britain's demilitarization of Northern Ireland; reforms to Northern Ireland's police and criminal justice system; the implementation of programs to release prisoners; and respect for human rights. Participation in the referendum was high, particularly in Northern Ireland, where about 81% of the registered electorate voted on the instrument, and the "Yes" vote won with 71%. In the Republic of Ireland almost 56% of the registered electorate participated, handing victory to the "Yes" with 94% of the votes.

14. PERU

Peru experienced an internal armed conflict that began in 1980 and lasted until the late 1990s; the main actors in the conflict were the armed forces, paramilitary and guerrilla groups, and an authoritarian government.

I. ADOPTION

Deliberation

In June 2001, after Alberto Fujimori resigned the presidency while he was in Japan, and during the democratic transition stage that began with the Government of President Valentin Paniagua, the Peruvian State created a Truth and Reconciliation Commission (TRC). One of its mandates was to develop proposals to redress and restore dignity to victims by clarifying the human rights violations that occurred from May 1980 to November 2000¹⁰ in the context of the internal conflict, as well as to promote reconciliation. Initially, the TRC was composed of seven members, but later that number was increased to twelve; it was composed of university presidents, members of Congress, NGO representatives, members of religious communities, and a retired lieutenant general (Caro 2010, 369). The TRC had eighteen months to issue

10 In particular, to analyze the political, social, and cultural conditions that enabled violence, contribute to the clarification of the grave human rights violations that were perpetrated, make reparations and reform proposals, and establish monitoring mechanisms for its recommendations.

its report, which could be extended for five more. The TRC delivered its report on August 28, 2003, that is, two years after starting its mandate. To present its recommendations, the TRC opened a participatory process that called upon victims and human rights organizations. The process consisted of dialogue, consultation, and feedback on the proposals. Thus, the Comprehensive Reparations Plan (PIR per its acronym in Spanish) is the product of a political process of consultation, opinion exchanges, and negotiations between the Government and organizations.

II. IMPLEMENTATION

Truth

In the TRC's work, listening to the voices of victims played a preponderant role. The Commission held public hearings (which caused a large impact), in which it received direct testimony from both victims and witnesses of serious human rights violations. It also received witness statements (González and Varney 2013, 15) and created a database with the experiences of other truth commissions, like the South African one, which allowed it to "examine the characterization of the country's victimized population by sex, age, place of origin, level of education, type of violation suffered" (Caro 2010, 372). The TRC encountered several difficulties in preparing its proposals and, as a consequence, the role of human rights and victims' organizations was essential for their completion. A joint investigation on reparations conducted in 2002 by the Association for Human Rights in Peru (APRODEH per its acronym in Spanish) and the International Center for Transitional Justice (ICTJ) led NGOs to open an important debate on this topic because it had not been sufficiently clarified or developed. Thus,

the Peace and Hope Association, the Episcopal Commission for Social Action (CEAS [for its acronym in Spanish]), the CNDDHH, and the Office of the People's Advocate, gathered as the Initiative Group (composed of ten institutions under the name Working Group on Reparations GTR [per its acronym in Spanish]), began to have meetings with the TRC on this matter. [In the meetings] it became clear there was a need to develop and maintain direct relationships with those affected, not only because they would be the beneficiaries of the reparations measures but also because they would be key allies for demanding and defending their implementation after the TRC (Guillerot and Margarell 2006, 103).

For instance, on November 6 thru 9, 2002, the II International Gathering “Civil Society and Truth Commissions: Towards the Full Reparation of Victims and the Supervision of the Recommendations of the TRC” took place. In this gathering, the document “Basic Criteria for the Design of a Reparations Program in Peru” was approved; it set general objectives, beneficiaries, concrete reparations measures, and economic and political strategies for the design and implementation of the reparations program. As a result of these activities, in January 2003 the TRC decided to create the Group on the Comprehensive Reparations Plan (GPIR per its acronym in Spanish), which had the GTR as one of its members; other members of the GPIR were consultants. However, due to the lack of time (the TRC was scheduled to deliver its report in July of that year), the GTR continued playing a key role in supporting the design of the Integral Reparations Plan. As a result, a workshop was held on April 4 through 6, 2003 on its implementation. It was conducted in consultation with victims—recognizing them as stakeholders with capacity to develop proposals and make contributions—and with the participation of victims’ organizations, NGO members, the GTR, the TRC, and ICTJ. Thus, the PIR “has been conceived, essentially, as a political process to organize consensus and negotiations, with exchanges, dialogue, and conciliation between positions of the TRC, NGOs, and organizations representing victims. The PIR is the result of this process of triangulating the work” (Guillerot 2003, 84).

Reparations

The TRC designed a national reparations policy that has components of symbolic and material reparations, as well as individual and collective measures. Specifically, it has seven programs: symbolic reparations, health care, education, restitution of citizen rights, access to housing, economic, and collective reparations. Additionally, because violations affected diverse dimensions of the population, the PIR was designed to be implemented through five cross-cutting approaches: psychosocial, participatory, intercultural, gender equality, and symbolic (Comisión de la Verdad y Reconciliación 2003, 156-159).

The body created to monitor all of the TRC’s recommendations was the High Level Multisector Commission (CMAN per its

acronym in Spanish), tasked with monitoring state actions and policies regarding peace, collective reparations, and national reconciliation. CMAN is a collegial body composed of thirteen members: nine representatives from different ministries (justice, health, education, defense, interior, agriculture, energy and mines, labor, and the Presidency of the Council of Ministers) and four representatives of civil society organizations (Association of Deans of Professional Colleges, the National Assembly of University Presidents, the National Association of Research, Social Promotion and Development Centers [ANC per its acronym in Spanish] and the National Coordinator for Human Rights [CNDDHH per its acronym in Spanish]) (Paredes and Correa 2011, 7). Another entity of the reparations program is the Reparations Council (CR per its acronym in Spanish), whose sole duty is to manage the Victims' Register (i.e. to define who is considered a victim for reparations purposes). The CR is composed of members of the armed forces, members of human rights organizations, and entrepreneurs.

Starting in 2006, emphasis has been placed on the implementation of the Collective Reparations Program (PRC per its acronym in Spanish), giving it precedence over individual reparations. The CMAN, in the implementation of the PRC, prioritized peasant and indigenous communities, and the rural centers affected by violence. Their autonomy, communal authority, ownership and use of land, productive capacity, among other aspects of community life, were affected. Therefore, the goal of the reparations program was

to contribute to the reconstruction and consolidation of the collective institutionality of communities, human settlements, and other populated centers that as a consequence of the period of violence lost all or part of their social and physical infrastructure, and to compensate the decapitalization suffered by entire populations, putting technical and capital resources at their disposal for their comprehensive reconstruction (Guillerot and Margarell 2006, 47).

The intervention methodology designed to execute the PRC provides for the participation of the community in defining reparations. Each community must identify appropriate reparations according to their priorities, taking into account the framework or general lines of action offered by the CMAN, which are

generally development initiatives and social investments rather than reparations policies. The PRC began its implementation in June 2007 as part of the PIR, although victim registration had not been completed, based on the Census for Peace, which was a preliminary record of the communities affected by violence that had been implemented by the Ministry of Women and Vulnerable Populations (MIMDES per its acronym in Spanish) before the creation of the Reparations Council.

The TRC did not determine the specific groups benefiting from such measures; however, it set certain criteria for identifying them and prioritizing their attention (Guillerot and Margarell 2006, 48). Community involvement has been an important factor in defining and implementing reparations. The selected community establishes a management committee to define the content of the CRP. These projects can focus on

the recovery and reconstruction of economic, productive, and commercial infrastructure and the development of human capabilities and access to economic opportunities; or, on the recovery and expansion of basic education, health, sanitation, rural electrification, recuperating community heritage, and other projects the community might be interested in (Correa 2013, 13).

Communities have focused on the development of new irrigation systems, livestock-related activities, community halls, classrooms, sewers, or the construction of roads and paths (Paredes and Correa 2011, 13).

However, the implementation of collective reparations has encountered some difficulties.

Community members have indicated they ignore the reasons why their community was selected for the implementation of these projects ... there is little effort to include an intercultural approach, although the law stipulates that the PIR should guarantee the establishment of respectful and egalitarian relationships in the reparations process (Guillerot and Carranza 2009, 35).

The participation of women has been low (men have made most of the decisions concerning the selection of financed projects); communities have had difficulty accessing technical support to help them make informed decisions on the projects; in some cases local governments did not provide the advice and

support that would have made greater participation and transparency possible; most communities did not have access to reliable information and therefore could not receive answers to their questions regarding the administrative process (in some cases, the projects that were funded did not have community interests as their primary focus); the small team in Lima that ran the program did not work with regional governments so the projects would be in harmony with regional development policies, which reduced their ability to have a larger impact on the life and economy of communities; the projects have been considered as development projects and not reparations (for example, the construction or improvement of roads, schools, and health centers); and the importance of using the appropriate and adequate messages and symbols in this process has not received enough attention (Correa 2013, 13-14).

15. RWANDA

Between 1961 and 1994, the Government of Rwanda was in the hands of the Hutu ethnic group, who committed genocide against the Tutsi population. It is estimated that in approximately a three-month period, 15% of the population was exterminated; at that time the population was nearly seven million people.

I. IMPLEMENTATION

Justice (Clarck, 2010)

In 1994 a resolution of the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR). Its purpose was to prosecute those most responsible for the genocide, while the rest of the perpetrators would be tried in the national courts. In 2001, as a result of discussions on how to handle genocide cases that would not be heard by the ICTR, an informal community conflict resolution mechanism called Gacaca was established as part of the general transitional justice policy. In the Gacaca system, hearings are conducted in open spaces and in front of the entire community. The community itself elects the leaders that direct the trials. The proceedings are carried out without the involvement of lawyers or professionals (in 2001 more than 250,000 judges were chosen for this system in 11,000 jurisdictions). Gacaca has two objectives: to process genocide

suspects (there were 120,000 detainees in prisons when Gacaca began operating) and enable the process of repairing the social fabric. Gacaca may impose penalties of imprisonment: although the Gacaca courts aim to restore social harmony, they have a retributive approach. Gacaca participants perceive community participation as the adequate means of achieving other goals such as truth-seeking, reparation, and reconciliation. The community is highly involved in the trials (many Rwandans personally attended the hearings and gave evidence at the trials).

The Gacaca system has been criticized for many reasons. Some reference the individual rights of the incriminated; trials may violate due process because they do not apply the rules of liberal law. Other criticisms relate to state interference in what should be a community system, to the possibility of generating a collective sentiment of guilt in the Hutu ethnic group (the main perpetrators of the genocide), and to the fact that Gacaca trials are conducted in a context where ethnic differences are still alive, leaving the selection of judges, the investigation, and proving and determining innocence or guilt to the community. Trust levels between the two communities involved may decrease or exacerbate differences, thus creating the opposite effect of what was intended. Notwithstanding, the Gacaca system has also received positive criticism regarding its *reconciliation* potential and, especially, the possibility of mass participation it creates for communities affected by violence.

16. SIERRA LEONE

In 1991 an eleven-year conflict broke in Sierra Leone. It left thousands dead, displaced, or as refugees. In 2009, the conflict came to an end with the support of the international community.

I. IMPLEMENTATION

Justice (Iloff, 2012)

In July 1999 the Government and the rebels reached a peace agreement; however, the conflict only ended formally in 2002. The agreement incorporated an amnesty for former combatants; this caused it to be questioned by the United Nations because the amnesty applied to international crimes and other serious human rights violations. In 2000, the Truth and Reconciliation

Commission (TRC) was created; its purpose, among others, was to address the problem of impunity and provide answers to victims. Hearings were held with a restorative approach. When the TRC was established, it was ensured that it could seek assistance from community and religious leaders to facilitate public meetings and resolve local conflicts. The purpose of some of the mechanisms was reconciliation, with an emphasis on reintegrating former combatants into the communities.

Since before the war, Sierra Leone's justice system provided for special jurisdictions based on traditional law, given that most of the country's population—which encompasses close to 18 ethnic groups—resides in *customary law* jurisdictions. The crimes perpetrated during the war were prosecuted through the use of these jurisdictions and local justice. This possibly increased community participation levels.

A special court for Sierra Leone also was established by resolution of the United Nations Security Council with the goal of pursuing those **most responsible** for human rights violations committed during the war. In part, it was created as a response to pressure from organizations that considered the 1999 peace agreements had not been fully satisfied when the rebel group unleashed acts of violence against the civilian population. Sierra Leone's special court established agreements with national and local radio outlets to promote the adequate presentation of the reports on the trials. Journalists were trained.

17. SOUTH AFRICA

Between 1960 and 1994, the practice of racial segregation against the black population was institutionalized in what has been known as *apartheid*. This regime was left behind by a transitional process that resulted from political negotiations between the Government and dissidents.

I. ADOPTION *Deliberation*

The law that created the Truth and Reconciliation Commission (TRC)—one of the key institutional mechanisms selected for the South African transition and the most representative one in this country—was the result of political negotiations between the

Government and dissidents, and of a large number of debates that were promoted by civil society between 1994 and 1995. It is considered that two conferences, organized by the Institute for Democracy in South Africa and by Justice in Transition, were important for the 1994 debate. The participants ranged from local actors and academics to guests from Latin America and other parts of the world; the purpose was identifying how to best conduct the transition. These conferences gave rise to the recommendation to adopt a truth commission. The organization Justice in Transition led a series of workshops and lectures on the TRC's draft framework. However, the scant participation of grassroots organizations generated criticism; additionally, some considered that the process to establish the TRC was driven mostly by political parties, NGOs, and individuals such as academics, etc., without the participation of victims. The parliamentary committee that studied the proposal prepared the final draft and held a series of public hearings to receive comments. Finally, the "Act for the Promotion of National Unity and Reconciliation, Act No. 34 of 1995" was adopted and gave life to the TRC.

Ratification

The process of constitutional change was an important part of the transition in South Africa; it began in 1990 when the apartheid system started being dismantled. The ban that had been placed on certain organizations and political parties, such as the African National Congress (ANC), was lifted and the opposition leader Nelson Mandela, who spent twenty-seven years in prison, was released. The Convention for a Democratic South Africa (CODESA) began discussions to promote a new constitution. Thus, negotiations between various parties started taking place and some of the laws that implemented apartheid started being lifted, and the "Interim Constitution," which featured a multiracial interim cabinet that would lead the South African transition, was adopted. In this case, a referendum that was limited to white voters (the last one that excluded blacks) was conducted; it asked whether they approved the constitutional reforms that would end the apartheid regime. The reforms were approved.

This led to the 1993 Constitution, a provisional constitution for the transitional period, which established the *Government*

of *National Unity*, a five-year transition period, and ordered the implementation of the appropriate measures for adopting a new constitution, which culminated in the convening of a national constituent assembly. The parties agreed previously on the constitutional principles that should be incorporated in the new constitution and the objectives of the constitutional process. A constitutional committee, led by party representatives of the African National Congress and the National Party, was created to approve the constitutional text, in an assembly process that began in 1994. Six thematic committees were created to receive all the parties' opinions on the Constitution. Additionally, an advertising campaign invited all citizens to comment on the content of the new constitution. During the process, a national peace committee, the National Peace Secretariat, regional structures, and representatives of all of the country's populations were created, in addition to the presence of 15,000 peace monitors, which gave a participatory foundation to the process. The Constitution was finally adopted by the Constituent Assembly on October 11, 1996, certified by the Constitutional Court on December 4, and signed by then President Nelson Mandela on December 10 of that year.

II. IMPLEMENTATION

Truth

The Truth and Reconciliation Commission (TRC), established by Parliament through Act 34 of 1995, operated from the year it was created until 2002, with the goal of investigating human rights violations perpetrated between March 1, 1960 — the date the apartheid regime banned the African National Congress and the Pan Africanist Congress— and 1994— the year of the first democratic elections. Its objective was to establish the causes, nature, and extent of grave violations, including their background, circumstances, factors, and context. It also granted amnesties to those who fully confessed their actions, recommended reparations measures, wrote a seven-volume final report published on March 21, 2003, and sparked broader debate in South African society. The work of the TRC was divided among three committees: the Human Rights Violations Committee, the Reparations and Rehabilitation Committee and the Amnesty Committee.

The commissioners were publicly selected. The TRC directed a witness protection program, which was important in order to conduct public hearings while offering stronger guarantees to the victims. The TRC received close to 21,000 testimonies from victims. Approximately 200 hearings were public. They were widely covered by the media (both on radio and television). In addition, the TRC was the first commission in the world that held institutional and special hearings.¹¹ In effect, the TRC identified a number of influential institutions in apartheid society, which led it to conduct *institutional hearings* on their role and participation. It also held *special hearings* which dealt with three specific issues.

The six institutional hearings referred to: business and labor, which analyzed how measures that were discriminatory regarding economic and labor relations were adopted; faith communities, which examined the role played by certain churches and sought to accomplish reconciliation between communities as a key element of transformation; the legal community, which analyzed and identified the role played by lawyers between 1960 and 1994, the role of the legal system, and the institutional changes that were needed to prevent the abuses that occurred from ever happening again; the health sector, which analyzed the ethical and human rights problems faced by health professionals in their daily life and practice; the media, which considered and discussed their role; and prisons which studied and elucidated the way this state institution was an integral part of the chain of oppression for those who opposed apartheid.

The special hearings focused on: compulsory military service, analyzing how certain members of the armed forces were victims of a system they were forced to defend, and allowing them to share their experiences so that recommendations on rehabilitation and reconciliation could be developed based on their experience; children and youth, which, with their participation, sought to describe how they were affected by apartheid and the active role they played against the system; and women, so they could narrate their experience in their own words.

11 The detailed contents of the hearings can be found in volume 4 of the Truth and Reconciliation's Committee Final Report (2003).

Reparations (Colvin, 2008)

The TRC had a Reparations and Rehabilitation Committee (RRC) that was responsible for reparations and rehabilitation; however, its work was *overshadowed* or eroded by the work of the Amnesty Committee. The members of the RRC had to be qualified, South African citizens, and “representative of the South African community.” They were selected by the TRC. The work of the RRC was to collect evidence that would identify victims, confirming their identity, and determine whether they could be officially recognized as such. Additionally, the RRC was charged with making recommendations for a comprehensive reparations policy. The recommendations were put forth and included in the final report of the TRC, which referred to economic, symbolic, and community reparations. However, to be implemented, the recommendations had to be adopted as a policy by the president and Parliament. The implementation of the recommendations took a very long time. One of the programs consisted of a one-time payment as compensation to those the TRC identified as victims of human rights violations. The delay generated widespread complaints as well as ruptures in communities, families, and friendships, due to the different waiting times for the payments. Another problem of the reparations policy is that the TRC amnesty decisions blocked civil suits against its beneficiaries (even excluding state responsibility), which has been considered unconstitutional by some sectors.

18. SPAIN

In 1939, after the 1936 coup, a dictatorial regime headed by Francisco Franco was installed in Spain. Franco’s death in 1975 marked the end of that period and the beginning of the transition towards democracy.

I. ADOPTION *Ratification*

In 1975, after the death of General Francisco Franco, the Regency Council was established to assume the functions of the State and facilitate the transition from the Franco dictatorship to a social state under the rule of law. Different political parties agreed on the proposal of the eighth Basic Law of the Realm (conserving the

Franco regime), later known or approved as the Law for Political Reform. The law was approved by the parliament and submitted to a popular referendum on December 1976. The law repealed the Francoist political system and called for holding democratic elections that same year. The Spanish people approved it through a referendum vote on December 15, 1976, and it was passed as law in 1977. Turnout was 77.8% of the electoral census; 94.45% of voters voted “Yes” while the “No” vote only won 2.57% of the votes, which was even lower than the percentage of blank ballots (2.98%). The press’s effective and decisive participation was one of the essential elements that made the transition to democracy possible. During this period, the press took on roles that served as a platform for launching democracy. Thus, different ideas about the political future of Spain were published daily. Its work was so important that “in the absence of other speech bodies, the press became what has been called the *Paper Parliament*” (Oneto 1982, quoted in Farias 1999, 76). The political debate that was established through the press fostered openness towards journalistic pluralism because it included political actors that had been banned up to that moment but who became “tolerated” and, eventually, acquired legal recognition.

However, it is necessary to clarify that not all the press had the same inclination. There were those that supported continuity with partial reforms (*Pueblo* and *El Alcázar*) or structural reforms (*ABC*); those who avoided openly opposing the regime but supported a political opening and structural reforms (*Informaciones*, *Ya*, and *La Vanguardia*); and those who openly supported ending Francoism as a political system (*Revista Cambio 16*) (Zugasti 2008, 55).

In that sense, the media provided new ways of interpreting reality and, in particular, became the critical consciousness of the democratic reform process during the transitions, exerting pressure to accelerate the process in the face of the risk of making excessive concessions to the most conservative Francoist sectors, still active and present in the political institutions that the reformers were trying to replace (Zugasti 2008, 67).

19. EAST TIMOR

East Timor gained its independence from Portugal in 1975 but was occupied by Indonesia from that same year until 1999. It obtained its definitive independence in 2002.

I. IMPLEMENTATION

Truth

The Commission for Reception, Truth and Reconciliation operated between 2002 and 2005. It was established by the United Nations Transitional Administration in East Timor (UNTAET). The terms of the Commission were consulted and discussed with political parties, human rights organizations, women's groups, and religious leaders. The Commission held public hearings. It also led the processes of low-level perpetrators to reintegrate back into the community. This was done with the participation of community leaders, the affected community and direct victims. The Commission designed a reparations plan. The report was never released publicly, on account of the State's decision, and has had little distribution within the country.

20. UGANDA

Uganda gained its independence in 1962 but, since that time, violence has been a permanent feature in this country and authoritarian coup governments have converged with insurgent movements. In particular, an armed conflict has taken hold in the north of the country which peace negotiations in 2007 sought to bring to an end.

I. IMPLEMENTATION

Justice

Uganda is the first case investigated by the International Criminal Court (ICC), which opened a formal investigation on this country in 2004. Some sectors of Ugandan society, especially those in the north—the area most affected by conflict—resisted the ICC intervention. Resistance was founded on the perception that the intervention would prevent signing a peace agreement with the rebel group; that, in principle, the ICC lacked legitimacy; and on resistance to the imposition of Western justice over local justice. Before the signing of the Agreement on Accountability and Reconciliation between the Government of the Republic of

Uganda and the Lord's Resistance Army in 2007, and on a quest for solutions to conflict, humanitarian organizations and human rights defenders expressed the need for a negotiated and non-military solution to the conflict as well as for the use of traditional ceremonies regarding the crimes that were perpetrated.

In the year 2000, an amnesty law, backed by consultations across the country and promoted by the victims, was approved. The 2007 Agreement on Accountability and Reconciliation (Juba Agreement) stipulated that "traditional justice" mechanisms would be promoted as part of the reconciliation project and explicitly referenced some of them. These mechanisms are the basis of practices and rituals to reintegrate into the community the children who were recruited during the war. Both the affected community and victims permanently participate in these ceremonies, because their purpose is the reconciliation and reintegration of the former combatants to the communities. The completion of the Mato Oput ceremony, for example, has the primary purpose of reconciling the victim and the perpetrator, with the perpetrator's previous acceptance of responsibility. It consists of a negotiation between the clans of the victim and the victimizer to reach an agreement about the events that occurred and determine compensations. There have been discussions on the possibility that, in addition to local or community justice, restorative justice could be applied. This discussion arises out of the role of the International Criminal Court in this country.

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Participation in Transitional Justice Measures

A Comparative Study

This book offers a comparative and critical study of participatory experiences in transitional justice. Based on a detailed study of 35 transitional justice experiences from 20 countries, the document explores the different scenarios that have allowed victims and civil society to participate in the promotion, adoption, and implementation of measures related to truth, justice, reparation, and guarantees of non-recurrence, and illustrates the potentials and limitations of such participation in different contexts.

The book begins by identifying the general objectives that participation in transitional justice measures can pursue (expression of viewpoints, incidence on outcomes, and transformation of power relationships), as well as the demands they impose and the possibilities that have to be satisfied. The following parts of the book analyze how these objectives may or may not be satisfied in the participatory scenarios that are available in the different transitional justice moments: the promotion, adoption, and implementation of transitional justice measures. Such scenarios include the promotion (by civil society or governments) of measures for truth-seeking, justice, reparation, and to guarantee non-recurrence; the deliberation, prior consultation, and ratification of the measures that will be officially adopted; and participation in the implementation of each of these measures through the establishment of entities, the procedures that are developed, and their monitoring or dissemination, among others.

For further reference, the book contains an annex that describes the analyzed cases in detail.

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