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11

Ethno-Reparations: Collective Ethnic Justice and the Reparation of Indigenous Peoples and Black Communities in Colombia

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11.1. The Problem: The Blind Spot of Collective Ethnic Justice in Discussions About Transitional Justice

As the chapters in this book show, the massive dispossession of land in Colombia – estimated to be more than 5.5 million hectares (around 11% of its agricultural land area) – presents complex challenges for transitional justice. In addition to the formidable problems regarding the *implementation* of restitution policies – which range from the absence of systematic cadastral information to the lack of title deeds on the part of peasant-farmer landholders who were displaced from their plots, and also include death threats against those who seek restitution – there exist dilemmas regarding the very *conceptions* informing programs centered on restoring land to those who were dispossessed.

Several of the essays in this volume show that this emphasis on restitution, characteristic of the restorative logic of transitional justice, may conflict with ethical, political, and legal principles that are just as important. In particular, since, from the viewpoint of commutative justice, this logic focuses on restoration, programs that are exclusively

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inspired by it may neglect considerations of distributive justice. Acting on this logic alone, for example, such programs may reinforce the highly inequitable distribution of land that already existed in Colombia before the massive dispossessions that have taken place in recent decades, or they might limit themselves to restoring lands of little worth to small peasant-farmers.[1] Hence this book aims to broaden the conceptual and empirical panorama on transitional justice in Colombia and elsewhere through the inclusion of other criteria that should be taken into account when designing equitable and non-discriminatory agrarian policies.

It is against that backdrop that this chapter seeks to expand the analysis of such problems through the incorporation of another criterion for the distribution of land: one which, despite its profound social, economic, and legal repercussions in Colombia, has not been systematically included in the discussion of, and policies for, transitional justice. I call this criterion *collective ethnic justice* (CEJ) and posit that it is analytically different from transitional justice and social justice.

Enshrined in the 1991 Colombian Constitution, this criterion had already inspired the awarding of titles over large areas of land to indigenous peoples before the adoption of the 1991 document, and it has since continued to support the collective property rights granted to Afro-Colombian communities (as well as new title grants to indigenous peoples).

To get an idea of the practical importance of this criterion, we must only compare the area of land that would be subject to restitution policies (that is, the 5.5 million hectares estimated to have been forcibly seized) to the statistics on the areas where collective land titles have been granted to ethnic minorities. This comparison provides an initial estimate of the relative weights of transitional justice and collective ethnic justice as sources for the distribution and redistribution of land in Colombia.

In relation to indigenous peoples, the figures show that the size of the collective territories to which they have been given titles

[1] For details of this contrast between the commutative logic of transitional justice and the distributive logic of social justice, see the chapters in this book by Saffon and Uprimny and Kalmanovitz.

amounts to nearly six times the area of individually-owned lands that have been seized, which are the focus of transitional justice. In fact, Table 1 shows that more than 31 million hectares have been allocated as indigenous reserves, that is, as collective territories that may not be alienated. It is interesting to note that a large portion of this area was granted before the 1991 Constitution – the title to most of it, in fact, was granted during a single presidential administration, that of Virgilio Barco (1986-1990).

Year	Area (hectares)	% titles granted per year	% accumu-lated title grants year by year	% title grants per presidential term
1967	5,115	0.02	0.02	Lleras Restrepo 0.21
1968	61,605	0.20	0.21	
1973	2,000	0.01	0.22	Pastrana Borrero 0.64
1974	195,900	0.63	0.85	
1975	2,500	0.01	0.86	López Michelsen 1.56
1976	50,767	0.16	1.02	
1977	10,600	0.03	1.06	
1978	423,234	1.36	2.41	
1979	53,252	0.17	2.59	Turbay Ayala 13.90
1980	435,991	1.40	3.99	
1981	164,920	0.53	4.51	
1982	3.674,659	11.80	16.32	
1983	761,026	2.44	18.76	Belisario Betancur 11.11
1984	1.420,932	4.56	23.33	
1985	337,063	1.08	24.41	
1986	940,749	3.02	27.43	
1987	360,966	1.16	28.59	Virgilio Barco 50.84
1988	1,302,007	4.18	32.77	
1989	13,879,117	44.58	77.35	
1990	285,350	0.92	78.27	
1991	100,708	0.32	78.59	César Gaviria 8.22
1992	514,779	1.65	80.24	
1993	1,668,451	5.36	85.60	
1994	274,099	0.88	86.48	
1995	314,525	1.01	87.49	Ernesto Samper 7.90
1996	143,810	0.46	87.96	
1997	355,171	1.14	89.10	
1998	1.645,960	5.29	94.38	

1999	308,199	0.99	95.37	Andrés Pastrana 1.96
2000	185,097	0.59	95.97	
2001	51,207	0.16	96.13	
2002	67,137	0.22	96.35	
2003	1,125,792	3.62	99.96	Álvaro Uribe 3.62
Total	**31,133,773**			

Table 1: Indigenous Reserves in Colombia. Source: Houghton, Juan. "*Los territorios indígenas colombianos: teorías y prácticas*" ("Colombian Indigenous Territories: Theories and Practices"). Based on data provided by Incoder, available online at: www.constituyentesoberana.org.

As for Afro-descendant communities, collective title grants were established by the mandate of the 1991 Constitution (transitional Article 55). The key piece of legislation resulting from this mandate is Law 70 of 1993, which is regarded as one of the most important recent agrarian reforms in Latin America[2] and a novel form of collective reparation for the legacy of slavery.[3] The result has been the adjudication of territories with an area very close to the figure for the lands that transitional justice focuses on. In fact, since 1993, more than five million hectares have been granted to black communities along the Pacific Coast, who meet the requisites of socio-cultural identity and communitarian economic exploitation required by Law 70 of 1993.[4] Thus,

[2] Karl Offen, 2003, "The Territorial Turn: Making Black Territories in Pacific Colombia", in *Journal of Latin American Geography* 2: 1; Odile Hoffmann, 2007, *Comunidades negras en el Pacífico colombiano* (*Black Communities in the Colombian Pacific*), Quito: Instituto Francés de Estudios Andinos (IFEA) – Institut De Recherche Pour le Développement (IRD) – Ediciones Abya-Yala; Ulrich Oslender, 2008, *Comunidades negras y espacio en el Pacifico Colombiano* (*Black Communities and Space in the Colombian Pacific*), Bogotá: Instituto Colombiano de Antropología e Historia, ICANH.

[3] Claudia Mosquera Rosero-Labbé, 2007, "*Reparaciones para negros, afrocolombianos y raizales como rescatados de la Trata Negrera Transatlántica y desterrados de la guerra en Colombia*", ("Reparations for Blacks, Afro–Colombians and Raizal Peoples as Those Rescued from the Transatlantic Slave Trade and Uprooted by the War in Colombia"), in *Afro–Reparaciones: Memorias de la esclavitud y justicia reparativa para negros, afrocolombianos y raizales*, Claudia Mosquera Rosero-Labbé and Luiz Claudio Barcelos (eds.), Bogotá: Universidad Nacional de Colombia.

[4] On this process, see Arturo Escobar, 2008, *Territories of Difference. Place, Movements, Life, Redes*, Durham: Duke University Press; Libia Grueso, Carlos

unlike in most other Latin American legal regimes, the Colombian Constitution of 1991 – and the ensuing legislation and constitutional jurisprudence – recognized Afro-descendants as an ethnic group with collective rights similar to those of indigenous peoples.[5] Table 2 details, by department, the number of titles and areas granted, as well as the number of beneficiary families.

Departament	Number of titles	Hectares	Families
Antioquia	13	241,640	2,448
Valle del Cauca	26	339,483	6,053
Nariño	36	1,023,370	15,713
Chocó	56	2,944,919	29,071
Cauca	17	574,615	6,935
Risaralda	1	4,803	198
Total	**149**	**5.128.830**	**60.418**

Table 2: Distribution of Collective Titles Granted to Black Communities, by Department. Source: Grueso, Libia, 2006, "El Territorio como estrategia: construcción socio-cultural, natural y económica de los pueblos afro" ("Territory as strategy: the socio-cultural, natural and economic construction of Afro-descendant peoples") in Informe de Gestión 2006, Bogotá: PCN, citing the Instituto de Colombiano de Desarrollo Rural.

Of course, these nominal figures do not present a true idea of the size of the territories in which indigenous peoples and black communities are able to exercise their collective rights effectively. In fact, these two ethnic groups are the populations most affected by forced displacement and thus by the violent seizure of the lands they have title to. To be more precise, according to figures found in the 2005 Census, Afro-Colombians are the ethnic group most affected by displacement (1.44% of them have been displaced), followed by the members of indigenous nations (1.27%) and the remainder of the population

Rosero, and Arturo Escobar, 1998, "The Process of Black Community Organizing in the Southern Pacific Coast of Colombia", in *Cultures of Politics/Politics of Cultures. Revisioning Latin American Social Movements*, Sonia Álvarez, Evelina Dagnino, and Arturo Escobar (eds.), Boulder: Westview Press.

[5] See César Rodríguez-Garavito, Tatiana Alfonso, and Isabel Cavelier, 2010, *Raza y derechos humanos en Colombia*, Bogotá: Observatorio de Discriminación Racial y Ediciones Uniandes.

(0.68%). In addition, some of these collective lands overlap with environmental conservation areas that may not be economically exploited.

Nevertheless, these statistics support the case for the incorporation of CEJ into discussions on transitional justice and provide a useful starting point for this chapter for two reasons. First, these statistics show that the issue of agrarian policy and reform in Colombia can neither be analyzed nor resolved without taking into account that, in practice, an important criterion for the allocation of land has been a concern for the constitutionally-protected claims of collective ethnic justice.

Second, the data highlights the fact that, as far as these territories and populations are concerned, the dilemmas over transitional justice – that is, the challenges posed by the reparation of victims of the armed conflict – overlap with dilemmas that pertain to CEJ itself. In other words, the challenge of restoring seized lands and effecting reparations for the displaced population acquires special significance when the former are collective territories and the latter are communities whose cultural survival depends on effective enjoyment of their rights to those territories.

The combination of these dilemmas has been acknowledged by the most important state intervention on the subject of forced displacement: Judgment T-025, issued by the Constitutional Court in 2004, and the follow-up process, which, through new decisions (known in Spanish as "*Autos*") and public hearings, the Court has since advanced.[6] Specifically, in two fundamental decisions issued in 2009 (*Autos* 004 and 005), the Court required public policies on displacement to have a "differential focus" for ethnic groups (indigenous peoples and Afro-Colombian communities). This differential focus, the Court states, must guarantee that humanitarian aid, social programs,

[6] In fact, during the first six years of follow-up (January 2004 to January 2010), this process consisted of 84 decisions and 14 public hearings. For a detailed analysis of the impact of this case and the follow–up process, see César Rodríguez Garavito and Diana Rodríguez Franco, 2010, *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (*Courts and Social Change: How the Constitutional Court Transformed Forced Displacement in Colombia*), Bogotá: Dejusticia.

and policies of truth, justice, reparation and the guarantee of non-recurrence directed at ethnic groups protect their cultural identity and the collective relationship with the territory that such an identity entails.

However, the concept of a differential focus continues to be vague both in the Court's jurisprudence and in the public policy documents of the Colombian government. Moreover, although the state has acknowledged the need to combine criteria of transitional justice with those of collective ethnic justice, it has not converted this acknowledgement into concrete juridical guidelines or public policies. Thus, the conceptual clarification and practical application of this intersection of criteria for reparation continue to be pending tasks.

To help fill this conceptual and practical void, I concentrate in this chapter on collective ethnic justice as a criterion for reparation in general, and on the allocation of land in particular. The aim of the chapter is twofold. From an analytical viewpoint, it seeks to give conceptual clarity to the criterion, explaining its relationship to other parameters of justice that are relevant to agrarian and reparation policies, and sketching out its juridical and public policy implications. From a legal and policy viewpoint, it aims to flesh out its implications for transitional justice programs by laying out the standards that, according to international and national law, must guide reparations to ethnic minorities that have been victims of violence, displacement, and land dispossession.

To provide a factual grounding for this conceptual analysis, I make use throughout this essay of empirical and juridical materials on the collective territorial rights of indigenous and Afro-Colombian peoples. In the case of indigenous peoples, I use, as my main reference, the most systematic state pronouncement to date on the forced displacement and reparation of that population: the above-mentioned *Auto* 004 of 2009, issued by the Constitutional Court as part of that tribunal's follow-up of the general problem of displacement since 2004, the year in which it issued the structural judgment on that subject (T-025).

With these goals in mind, I divide the text into five parts. In the first, I propose locating the debate on transitional justice within a wider

discussion of different types of conflicts involving land and forced displacement, some of which cause dispossession and uprooting but are not systematically included in the policies and studies on transitional justice – for example, forced displacement that implies the abandonment of collective territories, or that which originates in legal economic activities (like mining or large monocultures). To do this, I lay out a comprehensive typology of land dispossession, which includes these and other cases.

With this as the background, in the second part I characterize the different criteria of justice that underlie different approaches to the solution of those conflicts – including transitional justice, social justice, economic efficiency, and collective ethnic justice. On the basis of this characterization, I analyze in greater detail the content of collective ethnic justice and compare and contrast it to other criteria of justice related to land.

In the subsequent sections, I switch from conceptual to legal analysis to flesh out the consequences of CEJ and its impact on the policies and the legal framework on reparations. In the third section, I analyze the standards on ethno-reparations that are set forth by international law. In the fourth section, I move to the Colombian context and close the chapter by specifying the standards that – according to CEJ as embodied in international and national law – should guide reparations to ethnic groups that have been victims of violence, dispossession, and forced displacement.

11.2. Typology of Land Dispossession

To understand the dilemmas involved in the policies for assigning lands in times of transitional justice, it is necessary to enlarge the field of vision to appreciate the significance of the different criteria that come into play. In other words, it is necessary to locate the discussion on reparation policies within the range of other possible policies on distribution and redistribution of lands, which range from past policies of agrarian reform centered on social justice to contemporary policies

on the "modernization" of the countryside based on parameters of economic efficiency, as well as policies informed by CEJ.[7]

A useful step towards this broader panorama entails constructing a typology of the conflicts about land that are resolved in transitional, violent contexts. Therefore, to understand the approaches to conflicts about lands that are debated in transitional situations like the Colombian one, we first must explain the range of dispossessions that they try to deal with.

Table 3 sets forth a typology of land dispossession that combines two axes. On the one hand, the horizontal axis distinguishes between dispossession of individually-owned lands and that of collective territories. Thus, the variable here is the *title* to the land: an individual one in the case of the peasant-farmers stripped of their properties, and a collective one in the case of ethnic groups.[8]

[7] For an analyis of the historical focal points of agrarian reform and their contrast with market-centered policies, see the chapter by Gutiérrez in this book.

[8] I use the term "title" in a more sociological than legal sense to include not only the cases in which the dispossessed were owners of the property but also, as is common in the Colombian countryside, those in which the dispossessed were holders or possessors of the property.

Origin of dispossesion	Territory: Individual	Territory: Collective
Illegal	Forced sales of peasant-farmer plots (Córdoba, Sucre)	Indigenous peoples or black communities displaced by illegal groups (Awas, Nariño)
Legal	Peasant-farmers displaced by a mining project or building of a dam (Urrá)	Black communities or indigenous peoples displaced by palm plantations (Jiguamiandó/Curvaradó)

Table 3: Typology of land dispossession.

On the other hand, the variable on the vertical axis is the *origin* of dispossession, which distinguishes between dispossession caused by illegal activities and that caused by legal activities. The former include, for example, those caused by paramilitary and guerrilla groups as part of their strategy of territorial control and their involvement in narco-trafficking. The latter include all dispossession provoked by economic projects, which, although having the legal backing of the state, give rise to the forced displacement of individual proprietors or holders of lands (peasant-farmers) or those living on collective territories (the indigenous peoples and Afro-Colombian communities). Some well-documented illustrations of this type of dispossession are the displacements caused by mining projects or palm plantations,[9] or those

[9] See *Procuraduría General de la Nación* (PGN), 2008, *Primero las víctimas: criterios para la reparación integral de los grupos étnicos* (*The victims first: criteria for the integral reparation of ethnic groups*), Bogotá.

provoked by the construction of dams within indigenous and Afro-Colombian territories.[10]

Of course, the evidence shows that legal and illegal causes are frequently combined, as in the well-known seizures of land from the communities of Jiguamiandó y Curvaradó (in the Chocó province), where some palm companies have made use of paramilitary groups to occupy the zone, including the collective territories of black communities.[11] Despite the existence of these hybrid forms of dispossession, for analytical purposes, the legal/illegal categories are useful as ideal types.

The primary contribution of a broad typology like the one proposed here is that it includes the different forms of dispossession that come into play in the discussions of, and policies on, displacement and reparations. In fact, as has been shown in the reports of state institutions,[12] academic studies,[13] and judicial decisions,[14] the forced abandonment of the nearly 5.5 million hectares has not been caused only by the acts of illegal groups, but by a set of complex hybrid factors, which also include activities that are legally endorsed by the state (or even, on occasions, undertaken by the state itself, as occurs with the construction of macro-infrastructure projects in indigenous territories or the fumigation of illicit crops whose secondary effects are harmful for legal peasant-farmer economies).

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[10] See AIDA (Asociación Interamericana para la Defensa del Ambiente), 2009, *Grandes represas en América, ¿peor el remedio que la enfermedad? Principales consecuencias ambientales y en los derechos humanos y posibles alternativas* (*Big Dams in America: Is the Remedy Worse than the Disease? Principal Environmental Consequences, Human Rights, and Possible Alternatives*), Available online at: http://www.aida-americas.org/es.

[11] *El Espectador*, "*El dossier de los palmeros*" ("*The Palm Growers' Dossier*"), 21 May 2010.

[12] PGN, *supra* n. 9.

[13] Alejandro Reyes, 2009, *Guerreros y campesinos: el despojo de la tierra en Colombia* (*Warriors and Peasant–Farmers: The Seizure of Land in Colombia*), Bogotá: Norma.

[14] Constitutional Court *Auto* 008 de 2009 (on the seizure of lands from the displaced population); *Auto* 004.

By the same token, this typology allows for the inclusion of both cases of individual dispossession (which are usually the focus of the studies and policies of transitional justice and agrarian reform) and cases of displacement and usurpation in which the victims are ethnic minorities who occupy a collective territory.

The intersection of the two variables gives rise to four model types of situations of dispossession, which, in turn, lead to different requirements for reparation. The categories in the left-hand column of the table apply to displaced peasant-farmers. Such displacement may result from the acts of illegal groups, as happened in the case of the forced and massive sale of lands in the Córdoba and Sucre provinces in the 1990s through intimidation by the paramilitary groups that controlled the zone.[15] But the displacement of peasant-farmers may also arise from legal activities, such as mining or hydro-electric projects. A well-known case is the building of the Urrá dam in Córdoba, whose effects on traditional patterns of irrigation led to the forced displacement of rural inhabitants who individually owned or possessed lands.[16]

In the right-hand column of the table we find the situations highlighted in this chapter, that is, those where the victims are ethnic groups who have property or possession rights over communal territories. In some cases the forced abandonment of territories is rooted in disputes for the control of illegal activities like narcotrafficking (as in the massive displacement of the Awa indigenous people in Southern Colombia, who have been victim of the violence caused by guerrilla, paramilitary, and mafia groups). In other cases, the displacement occurred as a consequence of economic activities, which, in themselves, are legal (as in the abovementioned example of Jiguamiandó and Curvaradó, in the Chocó province).

[15] Reyes, *supra* n. 13.

[16] César Rodríguez-Garavito and Natalia Orduz, 2010, *Territorio, pueblos indígenas y desarrollo: el caso de la represa Urrá en Colombia* (*Territory, Indigenous Peoples and Development: The Dispute Over the Urra Dam in Colombia*), Bogotá: DeJuSticia.

11.3. Land Justice: Four Criteria

The above typology of conflicts over land is, at the same time, a map of the emphases of different approaches to the question of agrarian policy and reform. These emphases are shown in Table 4, which reproduces the typology of the previous table and highlights which conflicts are favored by the four different criteria of justice on the assigning of lands: transitional justice, social justice, justice as efficiency, and collective ethnic justice.

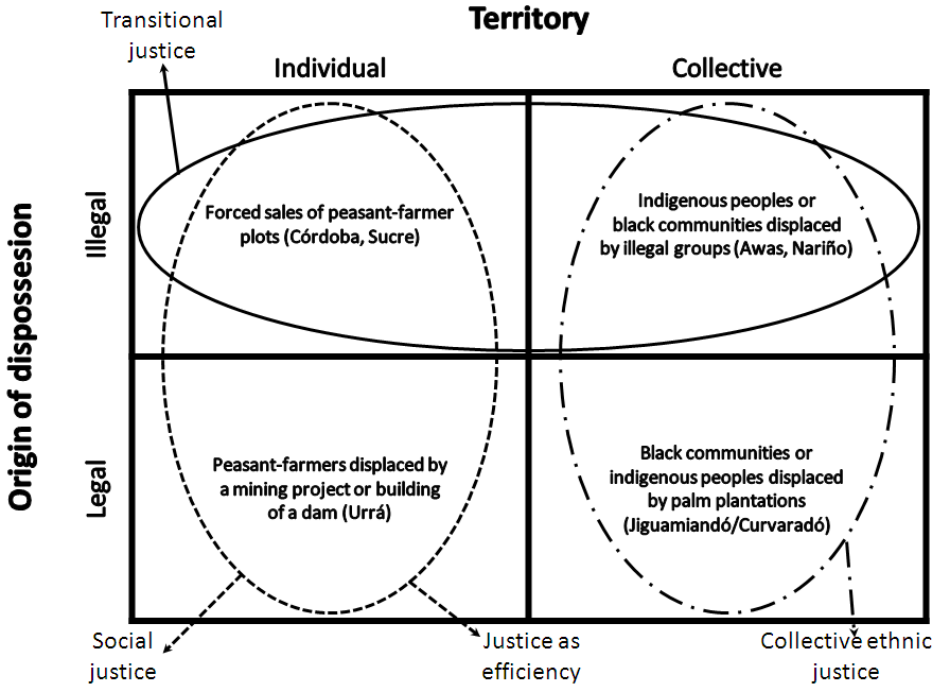

Table 4: Distribution of Land: Criteria of Justice.

The upper row of the table highlights *transitional justice's* emphasis on the victims of illegal dispossession in contexts of armed conflict. As Saffon and Uprimny show in their chapter in this book, transitional justice centers on the reparation of grave violations of human rights and international humanitarian law, like usurpations of lands and

forced, massive displacements. Thus, the privileged subjects of this approach are the victims of such violations.

In addition, transitional justice mostly looks toward the past and is guided by commutative justice, with its emphasis on restoring the situation that existed prior to the harm. Although the proposed typology includes dispossession of both individually and collectively-owned lands, until now the discussion on transitional justice in Colombia has tended to concentrate on the former, as is shown by the emphasis of the chapters in this book and the recurring mention of the 5.5 million hectares of individually-owned plots of land from which peasant-farmers have been displaced.

In the left-hand column are two focuses on the agrarian question: *social justice* and *justice as efficiency*, which share an emphasis on individually-owned lands but offer contrasting views on the criteria for assigning them. Whereas social justice emphasizes the redistribution of lands to small farmers as a mechanism to achieve inclusion and social equity, justice as efficiency favors market criteria to promote rural productivity through large-scale private investment. In this sense, while the central subject of the former is the poor peasant-farmer, that of the second is the investor. In contrast with transitional justice, both approaches look toward the future to the transformation of patterns of land ownership and exploitation.

As documented in the chapter by Gutiérrez, these two approaches have inspired Colombian agrarian policies at different times. While social justice underlay the agrarian reform programs of the 1930s and 1960s, justice as efficiency marked the policies implemented by the governments of Álvaro Uribe at the beginning of this century.

Beyond the details of these approaches to the agrarian question, it is interesting to show their relation to the approach that I highlight in this text, which has not received as much attention in studies on lands and reparations: *collective ethnic justice.* The table highlights what I have noted in the previous sections: CEJ's key trait is that it applies to communal territories that serve as a space for expressing and affirming the culture of a collectivity (in the case of Colombia, its indigenous peoples and black communities).

Thus, when compared to the other approaches, CEJ exhibits important differences, which justify its separate analytical treatment and explain its practical effects. In contrast to social justice and justice as efficiency, collective ethnic justice, in addition to its reference to collective territories, emphasizes cultural identity as a criterion for the distribution of land.

In comparison to social justice – and using the terms of Fraser's well-known distinction between criteria of justice – we see that while social justice is centered on *redistribution* as a mechanism to counteract material inequities, ethnic justice revolves around cultural *recognition* as a way of correcting inequities of status.[17]

A paradigmatical demonstration of this approach is the abovementioned Law 70 of 1993 on the land rights of Colombian black communities. Article 1 defines its objective as follows:

> The object of the present law is to recognize the right to collective property of the black communities who have been occupying uncultivated lands in the rural areas along the riverbanks of the Pacific Basin, in accordance with their traditional practices of production, in conformity with the rules set forth in this law. It also aims to establish mechanisms for the protection of the cultural identity and rights of the black communities of Colombia as an ethnic group and to encourage their economic and social development, in order to guarantee that these communities obtain real conditions for equal opportunities in relation to the rest of Colombian society.
>
> ... This law will also apply to the uncultivated rural and riverside zones which have been occupied by black communities who have traditional practices of production in other regions of the country and comply with the requisites established in this law.

Thus, the main set of regulations on the traditional territorial rights of Afro-Colombians subordinate legal protection to the existence

[17] Nancy Fraser, 2003, "Redistribution or Recognition? A Critique of Justice Truncated", in *Redistribution or Recognition?,* Nancy Fraser and Axel Honneth (eds.), London: Verso.

of cultural patterns like "traditional practices of production", with the aim of protecting the identity of black communities as an "ethnic group". This recognition of cultural difference, therefore, is the precondition for promoting the redistribution of material opportunities through "the encouragement [of] economic and social development [of the communities]".

Also, because of this emphasis, CEJ is clearly far from justice as efficiency, whose criterion for assigning lands is the maximization of social utility, measured not as a relationship among collectivities, but among individual agents in the market.

For the purposes of the specific subject of this chapter – ethno-reparations in contexts of armed conflict like the Colombian one – it is especially important to examine the relationship between ethnic justice and transitional justice. The comparison yields two central differences and one key similarity.

With regard to the differences, CEJ, in contrast to transitional justice, seeks to compensate for harms caused by massive and historic violations of rights, which generated inequalities among ethnic groups (for example, the enslavement of the Afro-descendant population and the genocide committed against indigenous peoples in colonial times). In Colombia and other parts of the world, this historical and intergenerational justice underlies the claims for the restitution of ancestral territories usurped from the indigenous peoples during the age of colonization and the demands for repairing the Afro-descendant population for the legacy of slavery.[18]

A further difference between CEJ and transitional justice is that the former not only looks toward the past, but to the future as well. This is so because it seeks to transform, instead of restore, the historic relationships between ethnic-racial groups. Hence, a typical mechanism that embodies the CEJ approach is affirmative action, which grants special conditions that allow ethnic-racial groups that have suffered discrimination access to goods and services from which they, in contrast with other citizens, have been excluded (for example, higher

[18] Gerald Torres, 2008, "Indigenous Peoples, Afro-Indigenous Peoples and Reparations", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press.

education or skilled jobs). CEJ also looks to the future insofar as it seeks to promote a multi-ethnic and pluricultural society, as envisioned by the 1991 Colombian Constitution (Article 7), which reaffirms the cultural identity of such collectivities.

Notwithstanding these differences, CEJ and transitional justice overlap in one fundamental point: an interest in repairing the harms caused by forced displacement and dispossession of collective territories, which have taken place in the recent past (during the ongoing armed conflict). This intersection between the two criteria (seen in the upper right-hand box of Table 4) is precisely the center of the discussion on ethno-reparations, including the idea of a "differential focus" set forth by the Constitutional Court.

With the characterization of CEJ and other criteria of justice sketched out in this section as the background, in the following sections I move to an analysis of the practical consequences of this approach as embodied in international and national law.

11.4. Collective Ethnic Justice and Reparations: The Standards of International Law

Given the spirit of CEJ, local specificity is crucial when determining reparations for an ethnic group, as generalizing can lead to the adoption of measures that do not serve to repair for the harm done or, worse yet, cause greater harm to the group. In fact, the lack of standardized criteria on this subject at the international level, particularly in the UN system, is due in part to the difficulty of maintaining "jurisprudential consistency when considering the various claims received from indigenous peoples the world over".[19] Moreover, as Shelton observes, the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law affirm that "reparation 'is intended to promote justice' by redressing injury

[19] Claire Charters, 2008, "Reparations for Indigenous Peoples: Global Instruments and Institutions", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 165.

and thus should be proportional to the gravity of the violations or the harm suffered. The inclusion of these two elements (scope of the injury and magnitude of the misconduct) as tests for the nature and range of reparations give more flexibility to the decision-maker in affording redress than if either factor alone were the basis for judgment".[20]

Nevertheless, several recurring principles and criteria on reparations for ethnic groups can be deduced from an analysis of international human rights instruments and the jurisprudence of international human rights bodies, particularly those of the Inter-American System of Human Rights. The principles and criteria, which can serve as best practice guides, can be summarized as follows.

Reparations should include both procedural and substantive components. In accordance with international norms and the jurisprudence of human rights bodies, reparations must have both substantive and procedural components.[21] The substantive dimension is the subject of the other criteria discussed below. The procedural dimension requires states to provide access to justice. For ethnic groups in particular, Article 40 of the UN Declaration specifies that the recourses provided by the state must "give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights".

Similarly, the CERD Committee has emphasized the importance of ensuring that indigenous peoples have legal recourse at the domestic level.[22] In particular, the Committee has recommended that national institutions charged with resolving indigenous land issues take into consideration indigenous customary traditions.[23] Along the same lines,

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[20] Dinah Shelton, 2008, "Reparations for Indigenous Peoples: The Present Value of Past Wrongs", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 66 (citing Part IX of the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law).

[21] *Id*., 65.

[22] Charters, *op. cit.* 183, citing the CERD Committee's Concluding Observations: Suriname, UN Doc. CERD/C/64/CO/9, 12 March 2004.

[23] Charters, *op. cit.* 183, citing the CERD Committee's Concluding Observations: Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006.

the UN Special Rapporteur on Indigenous Peoples urged the South African government to provide indigenous communities with resources and technical cooperation so that they could more effectively pursue their land restitution claims in practice.[24]

Thus, in relation to the procedural component of reparations, states should instruct their institutions to adopt a differential focus and designate resources where necessary to increase their effectiveness and attentiveness to ethnic groups' claims. Moreover, it is important to bear in mind the general criterion that judicial remedies, to be considered effective, must also be expedient and offer a solution within a reasonable time period. Lack of compliance of a reasonable time period renders these recourses illusory and ineffective.[25]

Reparations for ethnic groups must have a collective dimension. Reparations must take into account the collective nature of the harm caused to the ethnic group. Similarly, it is important that reparations include measures that benefit the group as such, and not just individual victims who are members of the group. The Inter-American Court of Human Rights has held in cases involving ethnic groups that "reparations take on a special collective significance",[26] and that in light of the fact that the individual victims belonged to a certain ethnic group, an important component of the individual reparations would be the reparations granted to the community as a whole.[27]

Considering the collective nature of the harm caused by the violations, the Inter-American Court has ordered various measures of col-

[24] Charters, *op. cit.* 190, citing the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to South Africa, 15 December 2005, UN Doc. E/CN.4/ 2006/78/Add.2, para. 87.

[25] See, *inter alia*, IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, C-79, para. 134; UN Declaration, Art. 40.

[26] IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, C-125, para. 188.

[27] IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of 19 November 2004 (Reparations), C-116, para. 86; IACHR, *Case of the Moiwana Community v. Suriname*, Judgment of 15 June 2005, C-124, para. 194.

lective reparations, such as the establishment of a development fund to implement health, housing, and educational programs for the community[28] and the re-opening and staffing of a school in the village that had been shut down.[29]

Reparations must be adequate and effective; determination of reparations should be from the bottom-up and focus on meeting the needs of the ethnic group. The adequacy and effectiveness of reparations are measured "not on the basis of solely material and/or objective criteria (consisting in ascertaining whether such measures are proportionate to the gravity of the breach and the consequent harm), but also and especially through evaluating the extent to which they are considered as adequate and effective by the individuals and/or peoples concerned (subjective criterion)".[30] Thus, an approach to reparations that adopts the needs of the ethnic group as its starting point will help guarantee that the reparations provided to them meet these requirements. As former Inter-American Court attorney Karla I. Quintana Osuna and Gabriella Citroni observe, "[t]o be effective, such measures must meet the needs expressed by the indigenous community directly involved and avoid a paternalistic approach. Indeed, measures that are perceived by the community as externally imposed are likely to be useless and, in the long term, they may also produce negative effects …".[31]

In fact, this is the guiding principle now used by the Inter-American Court of Human Rights in deciding cases involving ethnic groups. The Court strives in its decisions "to satisfy the needs expressed directly by members of the indigenous communities in-

[28] IACHR, *Case of the Moiwana Community v. Suriname*, Judgment, *op.cit.*, para. 214.

[29] IACHR, *Case of Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 (Reparations and Costs), C-15, para. 96.

[30] Federico Lenzerini, 2008, "Reparations for Indigenous Peoples in International and Comparative Law", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 15.

[31] Gabriela Citroni and Karla Quintana, 2008, "Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights", in *Reparations for Indigenous Peoples: International and Comparative*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 321.

volved".[32] For example, following its decision in the *Case of the Plan de Sánchez Massacre v. Guatemala*, the Court arranged a committee that was incorporated into the community with the goal of formulating methods of medical and psychological evaluation, thereby allowing members of the indigenous group to participate in the creation of future public health policy.[33] Additionally, the Court ordered the state to provide money for the upkeep and improvement of a chapel that the community members had been visiting to pay homage to the victims killed in the massacre.[34] Moreover, as discussed *infra*, the Court has ensured that the beneficiary ethnic groups have equal say and capacity to participate in the implementation committees of development funds ordered in its judgments.

Reparation measures should respect the cultural identity of the ethnic group. Closely related to this bottom-up perspective and in line with the CEJ approach outlined above, existing international standards indicate that the ethnic group's cultural identity should also be a guideline in determining the measures of reparation and the manner in which they should be implemented.[35] Various international instruments support this idea. For example, Article 5 of ILO Convention 169 provides that in the implementation of the Convention's provisions to benefit indigenous and tribal peoples, "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected"[36] and "the integrity of the values, practices and institutions of these peoples shall be respected".[37] Similarly, the Guidelines on the Heritage of Indigenous Peoples provides for the restitution of human

[32] *Id.*, 326.

[33] Nieves Gómes, 2008, "Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 152.

[34] IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 104.

[35] Citroni and Quintana, *supra* n. 31: 320.

[36] ILO Convention 169, Art. 5(a).

[37] ILO Convention 169, Art. 5(b).

remains and associated funerary objects to indigenous peoples in a "culturally appropriate manner".[38]

In the Inter-American System of Human Rights, respect for the cultural identity of the beneficiary ethnic group is reflected in many of the reparation measures ordered by the Inter-American Court. For example, in the *Case of the Plan de Sánchez Massacre*, the Court ordered the Guatemalan state to conduct an act publicly honoring the memory of those executed, "tak[ing] into account the traditions and customs of the members of the affected communities in this act".[39] In various cases, the Court has ordered, as a measure of reparation, the translation of its decision into the language of the ethnic group and its dissemination.[40]

Furthermore, following this principle, the existence or non-existence of official state records should not determine the scope of the reparations. For example, in assessing who should be considered a victim for purposes of receiving reparations in the *Case of the Moiwana Community v. Suriname*, the Court took into consideration the fact that many Maroons do not have formal identity papers, and thus accepted alternative methods of proving identity, such as "a statement before a competent state official by a recognized leader of the Moiwana community members, as well as the declarations of two additional persons, all of which clearly attest to the individual's identity".[41]

Those implementing reparation measures should consult with the ethnic group, which should retain some level of control over the implementation. This principle is in complete accord with the general obligation that states have to consult with ethnic groups before adopt-

[38] Principles and Guidelines for the Protection of the Heritage of Indigenous People, Art. 21.

[39] IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 101.

[40] See, *inter alia*, IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, paras. 102-03; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment *op.cit.*, para. 227.

[41] IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 178.

ing legislative or administrative measures that affect them.[42] Furthermore, it bears a close relationship to the bottom-up, needs-based approach to reparations described above. In fact, at the international level, there is much support for this principle, as can be seen in the following illustrative examples.

Article 15(2) of the UN Declaration provides that "States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society". Likewise, Article 23 of the same instrument provides that "[i]ndigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions".

In the UN system, among other examples, the Committee on the Elimination of Racial Discrimination (CERD) has "consistently [recommended] discussions between the Aboriginal and Torres Strait Islander peoples and Australia with 'a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention'".[43] Significantly, the UN Special Rapporteur on Indigenous Peoples has recommended to the Canadian government that it negotiate compensation owed to the Métis ethnic group for past injustices.[44]

The importance of consultation in the context of reparations is emphasized also by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in various cases. For

[42] See, *inter alia*, ILO Convention 169, Art. 6; UN Declaration on the Rights of Indigenous Peoples, Art. 19.

[43] Charters, *op. cit.* 184, citing UN CERD Committee Decision 2(54) on Australia, 18 March 1999, UN Doc. A/54/18.

[44] Charters, *op. cit.* 191, citing Report of the UN Special Rapporteur on Indigenous Peoples, Mission to Canada, 2 December 2004, UN Doc. E/CN.4/2005/88/Add.3.

example, in deciding a case regarding land claims brought by Mayan communities against the state of Belize, the Inter-American Commission urged Belize to adopt the measures necessary to secure the Mayan people's land rights through fully informed consultations with them.[45]

For its part, the Inter-American Court in the *Case of the Moiwana Community v. Suriname*, ordered Suriname to adopt measures to ensure the property rights of the Moiwana community, requiring the state to guarantee the participation and informed consent of the victims and the indigenous communities, including, in fact, neighboring indigenous communities.[46] For the developmental fund also ordered by the Court in this case, the tribunal provided that the fund should be administered by an implementation committee composed of three members: one elected by the victims, another by the state, and the third jointly by the two.[47] Similarly, in the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay* and the *Case of the Yakye Axa Indigenous Community v. Paraguay*, the Court ordered the establishment of community development funds for the purpose of implementing education, housing, agriculture, and health projects, as well as providing drinking water and sanitation. In both of these cases, as well, the Court specified that the fund's implementation committee should be composed of three members, one elected by the victims, one elected by the state, and the third by joint agreement.[48]

Indeed, as seen in these examples, consultation with and control by the beneficiary ethnic group are important elements to help ensure that the reparation measures meet the needs of the group and that the group ultimately takes ownership of them.

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45 Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v. Belize*, Case No. 12.053, Report No. 40/04 of 12 October 2004, para. 197(1).

46 IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 210.

47 *Id.*, paras. 214-15.

48 IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, C-146, paras. 224-25; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment *op.cit.*, paras. 205-06.

Complementary, compensatory measures should form part of the reparations. In line with the above-mentioned argument that CEJ should look not only towards the past but also toward the future, the experience of the Inter-American Court has shown that integral reparations will often require that the state adopt collective measures to improve the living conditions of the ethnic group. This is especially true in cases where the violations have gravely affected the group's socio-economic conditions. For example, in the cases of the Sawhoyamaxa and Yakye Axa indigenous communities, the communities were forced to live in inhumane conditions precisely due to their inability at the domestic level to secure rights to their ancestral lands. Thus, the Court found it pertinent to order the creation of community development funds to provide drinking water and sanitation infrastructure, as well as implement education, health, housing, and agriculture projects.[49] Moreover, in both cases, the Court ordered that while the indigenous community remained landless, "given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms", the state must supply immediate and regular access to drinking water, medical care, infrastructure for the management of biological waste, and appropriate bilingual educational materials.[50]

Importantly, compensation as a form of reparation should not be confused with the investment of resources made by the state as part of its normal development activities or in compliance with its other obligations. For example, in the *Case of the Plan de Sánchez Massacre*, "[g]iven the harm caused to the members of the Plan de Sánchez community … owing to the facts of this case", the Court ordered the state to implement various educational, cultural, health, and infrastructure projects in these communities, "*in addition to the public works*

[49] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 224; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 205.

[50] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 230; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 221.

financed by the national budget allocated to that region or municipality".[51]

Reparations should take into consideration historical grievances and their lingering impact. Although this principle has not been as widely implemented as the others described in this section, it has been followed to some extent in the UN system. For example, as described above, the UN Special Rapporteur on Indigenous Peoples encouraged the government of South Africa not to limit the restitution of land claims by indigenous communities to a certain cut-off date.[52] Significantly, the UN Committee on the Elimination of Racial Discrimination "appears to require compensation for grievances suffered in the past … It recommended that Australia 'pursue an energetic policy of recognizing Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past'".[53]

The Special Rapporteur on Treaties, Agreement and Constructive Arrangements between Indigenous Peoples and States (hereinafter "Special Rapporteur on Treaties") called for the need to repair historical grievances to indigenous peoples, declaring:

> The Special Rapporteur is fully convinced that the overall Indigenous problematique today is also ethical in nature. He believes that humanity has contracted a debt with Indigenous peoples because of the historical misdeeds against them. Consequently, these must be redressed on the basis of equity and historical justice. He is also very much aware of the practical impossibility of taking the world back to the situation existing at the beginning of the encounters between Indigenous and non-Indigenous peoples five centuries ago. It is not possible to undo all that has been done (both positive and negative) in this time-

[51] IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 110.

[52] Charters, *op. cit.*, 190, citing the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to South Africa, 15 December 2005, UN Doc. E/CN.4/2006/78/Add.2, para. 87.

[53] Charters, 183, citing UN CERD Committee, Concluding Observations: Australia, 19 September 1994, UN Doc. A/49/18.

> lapse, but this does not negate the ethical imperative to undo (even at the expensive, if need be, of the straitjacket imposed by the unbending observance of the 'rule of [non-Indigenous] law') the wrongs done, both spiritually and materially, to the Indigenous peoples.[54]

The significance of the violation should be seen from the perspective of the ethnic group. Once it is determined that a violation has been committed and that reparations are thus necessary, the significance of the violation and the measures of reparation should be determined from the viewpoint of the ethnic group. In this regard, "[i]t is only with an appreciation of indigenous understanding of their culture as holistic, symbolic, communal and intergenerational that a clearer assessment of the nature and extent of losses sustained by indigenous peoples can be made".[55]

Adhering to this criterion, in determining compensation for non-pecuniary damages for both the Sawhoyamaxa and Yakye Axa indigenous communities, the Inter-American Court considered that "the special meaning that these lands have for indigenous peoples, in general, and for the members of the [communities], in particular, implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations".[56]

In the case of violations against specific members of the ethnic group, the reparations should take into account the role that these victims have or had within the community. Violations such as forced dis-

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[54] United Nations Economic and Social Council, "Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report" (Miguel Alfonso Martínez, Special Rapporteur). 22 June 1999, UN Doc. E/CN.4/Sub.2/1999/20.

[55] Ana Vrdoljak, 2007, "Reparations for Cultural Loss", in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 227.

[56] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 222; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 203.

placement and attacks targeting specific group leaders have an enormous impact on the traditional community structure. The Inter-American Court in the *Case of the Plan de Sánchez Massacre* analyzed this dynamic, finding:

> In the village of Plan de Sánchez, the traditional community structure was substituted by a vertical, militaristic structure; the traditional Mayan authorities were replaced by military agents and the heads of the PAC. The leaders who survived the massacre could not continue performing their role in the community because they were subjugated by the Army. The community's will, based on the consensus of its members and on the Mayan norms and values of respect and service, was eliminated and replaced by authoritarian practices and the arbitrary use of power. The imposition of the military structure affected community life in Plan de Sánchez, because it brought about the fragmentation of the group and the loss of reference points within it.[57]

The search for truth and justice, as part of integral reparation, is especially significant for ethnic groups. Without generalizing, it is important to note that in many cases, establishing the truth about the violations and obtaining justice have cultural and spiritual significance for the ethnic group affected, and is therefore an important component of integral reparation. In this connection, the mere recognition that a human rights violation has occurred is not a sufficient form of reparation, especially in cases concerning indigenous peoples.[58] On the contrary, it is even more important that reparation measures include thorough investigations and the identification and sanction of those responsible for the violations. For example, in the *Case of the Moiwana Community*, the Inter-American Court concluded that:

> … the ongoing impunity has a particularly severe impact upon the Moiwana villagers, as a N'djuka people. As indicated in the proven facts … justice and collective responsibility are central precepts within traditional N'djuka

[57] IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment, *op. cit.*, para. 49(16).

[58] Citroni and Quintana, *supra* n. 31: 334, n. 46.

> society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit – and perhaps other ancestral spirits – may torment their living next of kin.

The Court also found that the failure of the state to investigate and determine the location of the remains of the victims had especially serious consequences on the members of the community, threatening their integrity and that of future generations: "they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture … Since the various death rituals have not been performed according to N'djuka tradition, the community members fear 'spiritually-caused illnesses,' which they believe can affect the entire natural lineage and, if reconciliation is not achieved, will persist through generations …".[59]

The significance of land to ethnic groups must be considered in determining reparations. In cases of dispossession, restitution is the most preferred method of reparation. One of the clearest manifestations of CEJ in international law is the special protection given by the latter to ethnic groups' lands (including ancestral lands). Indeed, international legal standards are based on the acknowledgment of the close relationship between their cultural identity and ethnic lands, as well as the impact that failure to respect these groups' land rights has on many of their other rights. Thus, measures of reparation must include guarantees ensuring collective land rights, both in law and in fact.

Moreover, because of the significance of land, territory, and resources to ethnic communities, restitution of land (accompanied by repairing any environmental harm caused) is the ideal means of reparation when they have been dispossessed of lands they have traditionally

[59] IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 195.

occupied or used. Only if this is not possible for legitimate reasons, the state may use the alternative of providing fair compensation. Such compensation should consist of other lands, territories, or resources of equal quality, size, and legal status, or, if this is not possible, monetary or other appropriate compensation.

These principles are supported by numerous international instruments and jurisprudence. For example, Article 28 of the UN Declaration on the Rights of Indigenous Peoples specifies:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size, and legal status or of monetary compensation or other appropriate redress.

Article 10 of the Declaration states that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return".

The requirement that compensation be fair has both procedural and substantive components. In fulfilling the former, obtaining the agreement of the ethnic group through transparent processes is of vital importance. In regards to the substantive aspect, alternative lands must be equal in quality, size, and legal status. If monetary compensation is given, the amount must also be considered equitable and fair. For example, the Special Rapporteur on Indigenous Peoples criticized the New Zealand government's redress to the Maori people as follows: "The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less than 1% of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade (approxi-

mately NZ $800 million) is about 1.6% of the government budget for a single year".[60]

Recognizing the importance of restoring to indigenous peoples their traditionally occupied or used lands, the CERD Committee's General Recommendations on Indigenous Peoples similarly urges states to return "territories traditionally owned or otherwise inhabited or used" that have been taken from indigenous peoples "without their free and informed consent".[61]

ILO Convention 169 also establishes a strong presumption against removing indigenous and Afro-descendant peoples from their lands. It first recognizes that states must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship".[62] Therefore, relocation of these groups from their lands is allowed only when "considered necessary as an exceptional measure".[63] Additionally, "[w]henever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist".[64] The Convention further establishes that the next best alternative is to provide them with "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development".[65] Importantly, monetary compensation as mode of reparation is permitted only when the ethnic group has expressed a preference for it and there are "appropriate guarantees".[66]

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60 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to New Zealand, 13 March 2006, UN Doc. E/CN.4/2006/78/Add.3, para. 27.

61 UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII: Indigenous Peoples, 18 August 1997, UN Doc. A/52/18, annex V.

62 ILO Convention 169, Art. 13.

63 *Ibid.*, Art. 16(2).

64 *Ibid.*, Art. 16(3).

65 *Ibid.*, Art. 16(4).

66 *Ibid.*, Art. 16(4).

The Inter-American Court of Human Rights has extensive jurisprudence on the importance of land to ethnic groups and the appropriate measures of reparation when their land rights have been violated. For example, in the cases of the Sawhoyamaxa and Yakye Axa indigenous communities, the Court expounded on the special significance that land had for these communities: "The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity".[67]

Thus, the ideal form of reparation is restitution of ancestral lands to ethnic groups. The Court's holding in the Sawhoyamaxa case is illustrative: "the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the *restitutio in integrum* principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands".[68]

The fact that ethnic groups have lost possession of their traditional lands does not preclude their claims of ownership:

> [T]he members of indigenous peoples who have unwillingly left their traditional lands, or lost possession therof [sic], maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith … [T]he members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and

[67] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 118; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 135.

[68] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 210.

> quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

Regarding time restrictions on restitution claims in particular, the Court has provided that in cases "where the relationship with the land is expressed … in traditional … activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, … such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear".[69]

In circumstances in which the traditional lands are currently in private hands, the Court has specified that "the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society", taking into account for this determination the "specificities … values, practices, customs and customary law" of the ethnic community affected.[70] States are permitted to consider other forms of reparation only when they have "concrete and justified reasons".[71] In those cases, "the compensation granted must be guided primarily by the meaning of the land" for the ethnic groups affected.[72]

The specific parameters for the determination of alternative lands were established by the Court in the case of the Yakye Axa community: "If for objective and well-founded reasons the claim to ancestral territory of the members of the Yakye Axa Community is not possible, the State must grant them alternative land, (i) chosen by means of a consensus with the community, (ii) in accordance with its own manner of consultation and decision-making, practices and customs. In either

[69] IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 132.

[70] IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 217.

[71] *Id.*, para. 149.

[72] *Id*.

case, (iii) the area of land must be sufficient to ensure preservation and development of the Community's own manner of live [sic]".[73]

Lastly, the recognition of the ethnic group's land rights must be made "effective in reality and actual practice".[74] In this connection, "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established".[75] The Court's conclusion in the case of the Yakye Axa community highlights this observation: "The common basis of the human rights violations against the members of the Yakye Axa Community found in the instant Judgment is primarily the lack of materialization of the ancestral territorial rights of the members of the Community, whose existence has not been challenged by the State".[76] The Court therefore ordered the Paraguayan state to delimit, demarcate, grant title, deed, and transfer the identified traditional land to the Yakye Axa community free of cost within a three year period.[77]

11.5. Collective Ethnic Justice and Reparations in Colombia

How does CEJ (as embodied in international legal standards) translate into concrete regulations and policies on transitional justice and reparations in Colombia? I close the chapter in this section by tackling this question. To that end, I seek to flesh out each of the above-explained international principles in turn.

As noted, despite the considerable impact of CEJ in the granting of collective land titles to indigenous peoples and Afro-descendant communities, discussion of reparations to ethnic groups in Colombia has been relatively scarce. This becomes evident in the case of forced displacement, for example, as documents and policy produced by the national government and even, to a certain extent, by the Constitutional Court, often use the language of aid, assistance, attention or pro-

[73] *Id.*, para. 217. Enumeration added.

[74] *Id.*, para. 141.

[75] *Id.*, para. 143.

[76] *Id.*, para. 211.

[77] *Id.*, paras. 215, 217.

tection – rather than reparations – in addressing the forcibly displaced indigenous and Afro-Colombian populations.

Given the infrequency of discussion on reparations with respect to ethnic groups, many of the norms presented in this section have been produced in the context of establishing guidelines for aid, assistance, attention, or protection for forcibly displaced ethnic groups or, in the case of Law 70 of 1993, in the context of strengthening rights to black communities' territories, in general. Nonetheless, these norms can also be applied in the reparations context, especially if the Colombian state aspires to have a policy *vis-à-vis* transitional justice that respects the above-mentioned international standards on reparations to ethnic groups.

It is worth highlighting one notable exception to the general lack of policies on reparations to ethnic groups: the "Victims First" (*"Primero las víctimas*") project undertaken by the Office of the Attorney General (*Procuraduría General de la Nación*, hereinafter "OAG"), which aims to develop criteria on reparations to ethnic groups. The initiative is based on the feedback collected from ethnic groups in Colombia, as well as from jurisprudence of the Inter-American Court of Human Rights.[78] Given the affinity between such an initiative and the conceptual and legal perspective on CEJ advanced in this chapter, I draw extensively in considering each of the standards on reparations laid out in the previous section.

Reparations should include procedural in addition to substantive components. As the OAG recommends in its Victims First project, effective realization of ethnic communities' right to territory requires that the state institute effective recourses for territory claims. In accordance with international jurisprudence cited by the OAG in its report, these remedies must respect due process principles and offer responses within a reasonable timeframe.[79]

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[78] PGN, 2008, "*Primero las Víctimas: Criterios para la Reparación Integral de Grupos Étnicos, Fase 2*" ("Victims First: Criteria for Integral Reparation to Ethnic Groups, Phase 2"), 21-23.

[79] *Ibid.*: 117-18.

Furthermore, the recommendations made by ethnic communities themselves on how to improve mechanisms designed to benefit them should be taken into account. For example, a general provision of Law 70 of 1993 relating to the rights of Afro-Colombian communities states: "The regulation of this law will be done taking into account the recommendations of the black communities that are its beneficiaries …".[80]

Reparations for ethnic groups must have collective dimension. As the OAG emphasizes, the Constitutional Court has manifested that "the rights of indigenous communities – which can be extended to tribal peoples (Afro-descendants) – are not 'reducible to those of their members considered individually. Rather, these rights belong to the communities themselves, which, as such … are autonomous, collective subjects and not simple aggregates of their members'".[81] In a recent judgment, the Constitutional Court reiterated that "the fundamental rights of indigenous communities should not be confused with the collective rights of other groups of people; these communities are subjects collective in nature and not just the simple sum of their individual subjects who happen to share the same rights or diffuse or group interests".[82]

Therefore, the OAG recommends that "the measures of reparation should be both collective and individual in nature, given the two

[80] Law 70 of 1993, Ch. 8, Art. 60 ("*La reglamentación de la presente ley se hará teniendo en cuenta las recomendaciones de las comunidades negras beneficiarias de ella ...* ").

[81] Victims First, *supra* n. 78: 99-100, citing the Constitutional Court of Colombia, Judgment T-380 of 1993 ("*los derechos de las comunidades indígenas – extensivos a los pueblos tribales (afrodescendientes) – 'no se reducen a los predicables de sus miembros individualmente considerados, sino que logran radicarse en la comunidad misma que como tal aparece dotada de singularidad propia ... como sujetos colectivos autónomos y no como simples agregados de sus miembros*'").

[82] Constitutional Court of Colombia, Judgment T-769 of 2009: 19 ("*los derechos fundamentales de las comunidades indígenas no deben confundirse con los derechos colectivos de otros grupos humanos; estas comunidades son un sujeto colectivo y no una simple sumatoria de sujetos individuales que comparten los mismos derechos o intereses difusos o agrupados*").

dimensions of the right to cultural identity".[83] In fact, the OAG has urged that "claims made by ethnic groups be formulated collectively through their legitimate authorities … unless, in accordance with the groups' internal procedures, it is decided that individual requests can also be made".[84]

In the context of territory rights, the importance of the collective dimension of ethnic groups' rights is even more pronounced. For example, Chapter III of Law 70 of 1993, entitled "Recognition of the Right to Collective Property",[85] includes provisions on the inalienable, non-prescriptive and non-burdenable nature of Afro-Colombian lands designated for collective use.[86]

Given the collective nature of ethnic groups' territory rights, forced displacement affects this collective dimension in multiple ways. The Constitutional Court's jurisprudence on indigenous peoples in situations of forced displacement has explained that "among the various aspects of forced displacement that constitute a violation of these collective rights are: the loss or abandonment of traditional territories, the uprooting that causes breaking with cultural practices directly associated with territory, the especially pronounced displacement of leaders and traditional authorities and its consequences on cultural integrity, and the general rupture of the social fabric caused by this crime".[87]

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[83] Victims First, *supra* n. 78: 29 ("*Las medidas de reparación deben ser de carácter colectivo e individual, dadas las dos dimensiones del derecho a la identidad cultural*").

[84] *Ibid.*: 99 ("*Las reclamaciones de los grupos étnicos se formularán de manera colectiva a través de sus autoridades legítimas ... salvo que de acuerdo con sus procedimientos internos se decida formular solicitudes individuales*").

[85] Law 70 of 1993, Ch. 3 ("*Reconocimiento del Derecho a la Propiedad Colectiva*").

[86] *Ibid.*, Ch. 3, Art. 7.

[87] Constitutional Court of Colombia, Order 004 of 2009: 32 ("*Entre los distintos factores del desplazamiento forzado que conllevan una violación de estos derechos colectivos se encuentran la pérdida o el abandono del territorio tradicional, el desarraigo que rompe las pautas culturales directamente asociadas al territorio, el desplazamiento especialmente agudo de los líderes y autoridades tradicionales con sus necesarias secuelas sobre la integridad cultural, y en general la ruptura del tejido social causada por este crimen*").

Reparation measures that address forced displacement therefore must be evaluated from both a collective and individual perspective.[88]

Even in the event of indemnizations that involve the transfer of something of economic value to an ethnic group, Presidential Directive No. 01 of 2010 provides that measures should be taken to ensure its collective enjoyment by the group.[89]

Reparations must be adequate and effective; determination of reparations should come from the bottom-up and focus on meeting the needs of the ethnic group. In Chapter VII of Law 70, on "Planning and Promotion of Economic and Social Development",[90] various articles reflect this principle. Article 49 of this chapter, for example, states:

> The design, execution and coordination of the plans, programs and projects relating to economic and social development, which are undertaken by the Government and international technical cooperation initiatives for the benefit of the black communities addressed by this law, should involve the participation of these communities' representatives, with the objective of responding to their particular necessities, preserving the environment, conserving their traditional practices of production, eradicating poverty, and respecting and recognizing their cultural and social life. These plans, programs and projects should reflect the aspirations of the black communities in the area of development.

Reparations should respect the specific and unique cultural identity of the ethnic group. The OAG provides that reparation measures should adhere to the cosmovision of the ethnic group.[91] The framework for such measures should be the ethnic communities' customary laws, practices and values.[92] For example, the OAG warns that

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88 *Ibid.*: 24.

89 Presidential Directive No. 001 of 2010, regarding prior consultation of ethnic groups, Sec. 5(b).

90 Law 70 of 1993, Ch. 7 ("*Planeación y Fomento del Desarrollo Económico y Social*").

91 Victims First, *supra* n. 78: 29.

92 *Ibid.*: 100.

the recognition of reparations measures should not depend on the existence of official documents that accredit juridical personality (that is, that give legal recognition of a person before the law).[93] As the obligation to provide such documents is the state's responsibility,[94] the absence of them cannot be used as a reason for not repairing a victim.[95] Thus, as the OAG observes, alternative means, which respect the cultural identity of the group, may be used for proving that someone is a victim and should receive reparations.

In the context of protecting and repairing territory rights, respecting the specific cultural identities of ethnic groups is of vital importance and has been emphasized repeatedly in various domestic norms. For example, Law 70 commits the state to adopting measures to guarantee Afro-Colombian communities' right to economic and social development, "attending to the characteristics of their cultural autonomy".[96]

For its part, the Constitutional Court in Order 04 of 2009 concerning the displaced indigenous population mandated that the Plans for Ethnic Preservation and Protection (*Planes de Salvaguarda Étnica*) include the provision of "mechanisms for strengthening the social and cultural integrity of each beneficiary ethnic group".[97]

In the Directive on the Prevention of and Integral Attention to Indigenous Population in the Situation of Forced Displacement and Risk, with a Differential Focus, issued by the Ministry of the Interior and Justice (MIJ) and the Presidential Agency for Social Action and International Cooperation (Social Action), MIJ and Social Action warned: "Without the entities being prepared to attend this population and its cultural specificities, in addition to the lack of protocols on how to relate and communicate with the population, entities and officials

93 *Ibid.*: 104.

94 American Convention on Human Rights, Art. 3.

95 Victims First, *supra* n. 78: 105.

96 Law 70 of 1993, Ch. 7, Art. 47 ("*atendiendo los elementos de su autonomía cultural*").

97 Order 004 of 2009, *supra* n. 87: 34 ("*herramientas para el fortalecimiento de la integridad cultural y social de cada etnia beneficiaria*").

may disregard and even unintentionally abuse aspects of the displaced person's identity and dignity".[98] Return or relocation of displaced indigenous peoples, MIJ and Social Action add, must include state-coordinated measures that guarantee the population's ability, "as collectivities, to maintain their specific cultural characteristics",[99] wherever they may end up.[100]

Lastly, the most recent version of Social Action's proposed Roadmap for the Protection of Ethnic Groups' Territory Rights (*Ruta de Protección de los Derechos Territoriales de los Grupos Étnicos*) (hereinafter Ethnic Roadmap), allows traditional possession of territory by an ethnic group to be proven according to the uses and customs of that group.[101]

Those implementing reparation measures should consult with the ethnic group, which should retain some level of control of their implementation. To fulfill the above-mentioned requirement of respecting the unique cultural identities of ethnic groups, measures should always be consulted with them before implementation and involve their participation during implementation. Although it does not specifically address the issue of reparations as such, Law 70 demonstrates the applicability of this principle in many of its provisions: Article 44 explicitly states, "As a mechanism for protecting cultural identity, the black communities will participate in the design, elaboration and evaluation of environmental, cultural and socioeconomic impact

[98] Ministry of the Interior and Justice (*Ministerio del Interior y de Justicia*) and the Presidential Agency for Social Action and International Cooperation (*Agencia Presidencial para la Acción Social y la Cooperación Internacional*), Directive on the Prevention of and Integral Attention to Indigenous Population in the Situation of Forced Displacement and Risk, with a Differential Focus, 2006: 9. ("*Al no estar las entidades preparadas para atender a esta población con sus especificidades culturales, sumado a la no–disponibilidad de protocolos de relación y comunicación con ellos, las entidades y funcionarios pueden ignorar, o incluso sin proponérselo, maltratar aspectos de la identidad y dignidad del desplazado*").

[99] MIJ and Social Action Directive, 9 ("*como sujetos colectivos que mantienen características culturales específicas*").

[100] MIJ and Social Action Directive, 9.

[101] "*Ruta de Protección de los Derechos Territoriales de los Grupos Étnicos*" ("Social Action, Roadmap for the Protection of Ethnic Groups' Territory Rights") Proposal: October 2009: 30-31.

studies that are conducted for projects undertaken in the areas referred to by this law".[102] Article 45 adds, "[f]or the purpose of following up on the mandates of this law, the national government will form a high-level Consultative Commission, with the participation of black communities from Antioquia, Valle [del Cauca], Cauca, Chocó, Nariño, the Atlantic Coast and the other regions of the country referred to in this law, as well as with the Raizal communities of San Andrés, Providencia and Santa Catalina".[103] Similarly, Article 38 provides:

> The members of black communities should have, at their disposal, means of professional, technological and technical training and education, which will help place them on an equal footing with other citizens … These special training and education programs should be based on the black communities' economic environments, cultural and social conditions, and concrete necessities. All studies in this regard should be done with the cooperation of the black communities, who will be consulted about the organization and operation of these special programs. They will gradually assume responsibility for the programs' organization and operation.[104]

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[102] Law 70 of 1993, Ch. 6, Art. 44 ("*Como un mecanismo de protección de la identidad cultural, las comunidades negras participarán en el diseño, elaboración y evaluación de los estudios de impacto ambiental, socioeconómico y cultural, que se realicen sobre los proyectos que se pretendan adelantar en las áreas a que se refiere esta ley*").

[103] *Ibid.*, Ch. 6, Art. 45 ("*El Gobierno Nacional conformará una Comisión Consultiva de alto nivel, con la participación de representantes de las comunidades negras de Antioquia, Valle, Cauca, Chocó, Nariño, Costa Atlántica y demás regiones del país a que se refiere esta ley y de raizales de San Andrés, Providencia y Santa Catalina, para el seguimiento de lo dispuesto en la presente ley*").

[104] *Ibid.*, Ch. 6, Art. 38 ("*Los miembros de las comunidades negras deben disponer de medios de formación técnica, tecnológica y profesional que los ubiquen en condiciones de igualdad con los demás ciudadanos.… Estos programas especiales de formación deberán basarse en el entorno económico, las condiciones sociales y culturales y las necesidades concretas de las comunidades negras. Todo estudio a este respecto deberá realizarse en cooperación con las comunidades negras las cuales serán consultadas sobre la organización y funcionamiento de tales programas. Estas comunidades asumirán progresivamente la responsabili-*

In relation to reparations specifically, the OAG requires that measures be determined with the ethnic group's participation.[105] Thus, "in the definition of measures of reparation, as well as in their execution, the communities should participate through their authorities".[106]

With regard to the displaced indigenous population, the Constitutional Court in Order 004 mandated: "In designing the Program of Guarantees of the Rights of Indigenous Peoples Affected by Forced Displacement, [the government] will apply the constitutional parameters on participation of organizations that advocate for indigenous peoples' rights and leaders of the indigenous peoples most affected by forced displacement".[107] As for the Plans for Ethnic Preservation and Protection, these must be "subject to prior, due consultation with the authorities of each of the beneficiary ethnic groups, in accordance with the parameters indicated repeatedly in constitutional jurisprudence so that the participation is effective and respectful of ethno-cultural diversity".[108]

In relation to the displaced Afro-Colombian population, the Constitutional Court, in Order 005 of 2009 regarding this population, likewise required that

> the national government … and the authorities on territory in the corresponding jurisdictions design and execute a specific plan for protection and attention in relation to

dad de la organización y el funcionamiento de tales programas especiales de formación").

[105] Victims First, *supra* n. 78: 29.

[106] *Ibid.*: 105 ("*En la definición de las medidas de reparación así como en su ejecución se debe contar con la participación de las comunidades a través de sus autoridades*").

[107] Order 004 of 2009, *supra* n. 87: 33 ("*En el diseño [del Programa de Garantía de los Derechos de los Pueblos Indígenas Afectados por el Desplazamiento] se aplicarán los parámetros constitucionales de participación de las organizaciones que abogan por los derechos de los pueblos indígenas, así como de líderes de los pueblos indígenas más afectados por el desplazamiento*").

[108] *Ibid.*: 34 ("*Ha de ser debidamente consultado en forma previa con las autoridades de cada una de las etnias beneficiarias, de conformidad con los parámetros que ha señalado de manera reiterada la jurisprudencia constitucional para que la participación sea efectiva y respetuosa de la diversidad etnocultural*").

> each of [the communities indicated by the Court], with the effective participation of these communities and respect for their constituted authorities. For the design and implementation of the specific plans, the authorities should … promote the effective participation of these communities, following the jurisprudential rules on the participation of ethnic groups, respecting the legitimately constituted authorities, and guaranteeing sufficient opportunities for the leaders to present to their communities the measures that will be adopted and for the communities to present suggestions or observations that should be specifically considered by the corresponding national authorities and authorities on territory.[109]

Moreover, for the national plan on prevention, protection and attention, the Court "ordered the national government, specifically the Director of Social Action – in his capacity as the coordinator of the National System for the Integral Attention to the Displaced Population – and the [National Council for the Integral Attention to the Population Displaced by Violence], to design an integral plan of prevention, protection and attention to the Afro-Colombian population, with the effective participation of Afro-Colombian communities and full respect for their constituted authorities, as well as the participation of the relevant traditional authorities".[110]

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[109] Order 005 of 2009: para. 169 ("*el gobierno nacional … y las autoridades territoriales de las respectivas jurisdicciones, deberán en relación con cada una de estas comunidades, diseñar y poner en marcha un plan específico de protección y atención, con la participación efectiva de estas y el respeto por sus autoridades constituidas. Para el diseño e implementación de los planes específicos, las autoridades deberán: … Promover la participación efectiva de estas comunidades, siguiendo las reglas jurisprudenciales sobre participación de los grupos étnicos, respetando las autoridades legítimamente constituidas, y garantizando espacio suficiente para que los líderes presenten a las comunidades las medidas que serían adoptadas y para que éstas presenten sugerencias u observaciones que deberán ser valoradas específicamente por las autoridades gubernamentales nacionales y territoriales correspondientes*").

[110] *Ibid.*: para. 182 ("*[La Corte Constitucional] [o]rdenará al gobierno nacional, a través del Director de Acción Social como coordinador del Sistema Nacional de Atención a la Población Desplazada, y al [Consejo Nacional para la Atención In-*

The Ethnic Roadmap proposed by Social Action also recognizes the importance of consultation and participation of ethnic groups in relation to territory-related claims, specifying: "The indigenous governments (*cabildos*) or traditional ethnic organizations, as well as the boards of the black communities' community councils, in their capacity as ethnic authorities, should be informed and consulted about requests for protection that correspond to territories in their jurisdiction, as well as the scope of the measures to be taken. For this purpose, these authorities will be contacted, and information will be requested from them to help identify the territory and determine the rights violated".[111]

Complementary, compensatory measures should form part of the reparations. As the OAG observes, reparations for violations of ethnic groups' territory rights should be accompanied by measures that offer compensation: integral reparations do not consist solely of procedures or recourses that guarantee territory rights, but rather, they also require complementary measures that ensure the materialization of those rights and decent living conditions for the communities.[112] As the MIJ and Social Action Directive explains, "in the framework of return or relocation, programs directed toward socioeconomic consolidation or stabilization have as their objective the restitution of rights and the establishment of conditions for social and economic sustainability for the population. They should guarantee access to programs related to

tegral a la Población Desplazada por la Violencia], diseñar un plan integral de prevención, protección y atención a la población afro colombiana, con la participación efectiva de las comunidades afro y el pleno respeto por sus autoridades constituidas, y de las autoridades territoriales concernidas").

[111] Proposed Ethnic Roadmap: 42 ("*Los cabildos indígenas o asociaciones étnicas tradicionales y las juntas de los consejos comunitarios de comunidades negras en su calidad de autoridades étnicas deberán ser informadas y consultadas sobre las solicitudes de protección que correspondan a los territorios de su jurisdicción y de los alcances de la medida, para lo cual se oficiará a dichas autoridades, solicitando además la información necesaria para complementar la identificación del territorio y de los derechos vulnerados*").

[112] Victims First, *supra* n. 78: 120.

land, housing, health, education, food, earning income, training and education, and the strengthening of organizations".[113]

Drawing on the jurisprudence of the Inter-American Court of Human Rights, the OAG subsequently recommends the creation of funds for community development and community programs to improve infrastructure and medical attention.[114]

This concept has also been endorsed by the Constitutional Court, which, in Order 005 of 2009, specified that the "integral plan for prevention, protection and attention should contain, as a minimum … a plan for the provision or improvement of housing for the displaced Afro-Colombian population".[115]

Reparations should consider historical grievances and their lingering impact. The OAG recommends that reparation measures "recognize the special vulnerability of indigenous and tribal peoples, derived from exclusion, racism and historic marginalization to which they have been subjected. These elements should be taken into account in the formulation and adoption of judicial, administrative or judicial-administrative programs for the reparation of these victims".[116]

The Constitutional Court in Order 005 of 2009 "insisted that, in light of the situation of historic marginalization and segregation that

[113] MIJ and Social Action Directive: 16 ("*En el marco del retorno o reubicación, los programas de consolidación y estabilización socioeconómica tienen como propósito restituir los derechos y generar condiciones de sostenibilidad económica y social para la población, deben garantizar el acceso a los programas relacionados con tierras, vivienda, salud, educación, alimentación, generación de ingresos, capacitación y fortalecimiento organizativo*").

[114] Victims First, *supra* n. 78: 121.

[115] Order 005 of 2009: para. 182 ("*El plan integral de prevención, protección y atención deberá contener como mínimo…[u]n plan para la provisión y/o mejoramiento de soluciones de vivienda para la población afrocolombiana desplazada*").

[116] Victims First, *supra* n. 78: 32 ("*Reconocer la especial vulnerabilidad de los pueblos indígenas y tribales, derivada de la exclusión, el racismo y la marginación histórica a los que han sido sometidos, elementos que deben ser tenidos en cuenta en la formulación y adopción de los programas judiciales, administrativos o mixtos para la reparación de las víctimas*").

Afro-Colombians have faced, they should enjoy special State protection".[117] Emphasizing its holding in a prior case, the Court stated:

> in relation to the special treatment that should be provided to Afro-Colombians, the Court expressed [in Judgment T-422 of 1996] that `the positive differentiation corresponds to the recognition of the situation of social marginalization of the black population, which has impeded access to opportunities for cultural, social and economic development. As with social groups who have suffered past persecution and unjust treatment which explain their current weakened state, special legal measures aimed toward creating new living conditions contribute to establishing social equity and consolidating internal peace. For these reasons, they are constitutionally legitimate'.[118]

Reparations to ethnic groups therefore might include affirmative action initiatives that restore and promote access to opportunities and resources for cultural, social and economic development, which were historically denied to them.

The significance of the violation should be seen from the perspective of the ethnic group. The importance of this principle is evident in the following sentiment, expressed by the National Conference of Afro-Colombian Organizations (*Conferencia Nacional de Organizaciones Afrocolombianas* – CNOA), the Association of Displaced Afro-Colombians (*Asociación de Afrocolombianos Desplazados* –

[117] Order 005 of 2009: para. 19 ("*[la Corte Constitucional] ha insistido en que dada la situación de histórica marginalidad y segregación que han afrontado los afrocolombianos, éstos deben gozar de una especial protección por parte del Estado*").

[118] *Ibid.*: para. 19, citing Colombian Constitutional Court Judgment T-422 of 1996, ("*en relación con el tratamiento especial que se debe brindar a los afrocolombianos, la Corte expresó: 'La diferenciación positiva correspondería al reconocimiento de la situación de marginación social de la que ha sido víctima la población negra y que ha repercutido negativamente en el acceso a las oportunidades de desarrollo económico, social y cultural. Como ocurre con grupos sociales que han sufrido persecuciones y tratamientos injustos en el pasado que explican su postración actual, el tratamiento legal especial enderezado a crear nuevas condiciones de vida, tiende a instaurar la equidad social y consolidar la paz interna y, por lo mismo, adquiere legitimidad constitucional'*").

AFRODES) and the Organization of Black Communities (*Organización de Comunidades Negras* – ORCONE): "If Afro-Colombian peoples' relationship to territory is understood … one can comprehend why forced displacement is akin to ethnocide".[119]

The OAG insists that reparations must take into account the gravity of the violations and the harm caused, especially from the point of view of the ethnic group.[120] In this connection, the role of the victim or victims within the community should be considered.[121] Moreover, CNOA, AFRODES, and ORCONE warn against assuming the homogeneity of Afro-Colombian peoples, emphasizing that "the recognition of the diversity of being Afro-Colombian within the same community

[119] National Conference of Afro–Colombian Organizations (*Conferencia Nacional de Organizaciones Afrocolombianas* – CNOA), Association of Displaced Afro–Colombians (*Asociación de Afrocolombianos Desplazados* – AFRODES) and the Organization of Black Communities (*Organización de Comunidades Negras* – ORCONE), 2008, Public Policy with a Differential Focus for the Afro–Colombian Population in Situations of Forced Displacement or Confinement: Proposals for Construction (*Política Pública con Enfoque Diferencial para la Población Afrocolombiana en Situaciones de Desplazamiento Forzado o Confinamiento: Propuestas para la Construcción*): 11 ("*Si se comprende la relación con el territorio … se podrá entender por qué el desplazamiento forzado puede asimilarse a un etnocidio*").

[120] Victims First, *supra* n. 78: 107.

[121] *Ibid.*: 104. See, e.g., Order 004 of 2009: 17, citing the Fundación Dos Mundos: "Additionally, indigenous children and adolescents have a fundamental role in the preservation and reproduction of their cultures. In this regard, forced displacement produces a destructive effect with irreversible ramifications. In effect, the uprooting and removal of minors from their community and cultural environments rupture the transmission of cultural knowledge and norms in many cases. Additionally, this is often accompanied by the loss of respect for their families, their elders and their own cultures". ("*Adicionalmente, los niños, niñas y adolescentes indígenas y afrodescendientes cumplen un rol fundamental en la preservación y reproducción de sus culturas, respecto del cual el desplazamiento forzado genera un efecto destructivo de repercusiones irreversibles. En efecto, el desarraigo y la remoción de estos menores de edad de sus entornos culturales comunitarios, trae como consecuencia en una alta proporción de los casos una ruptura en el proceso de transmisión de los conocimientos y pautas culturales, aparejado a frecuentes casos de pérdida de respeto hacia sus familias, sus mayores y sus propias culturas*").

… is crucial for not disregarding violations committed against Afro-Colombians who live in contexts different from ancestral territories".[122]

For its part, the fact that the Constitutional Court proffered Orders 004 and 005 shows that it is analyzing the impact of forced displacement on indigenous and Afro-Colombian ethnic groups from their perspective. In particular, Order 005 emphasizes "the heightened risk of cultural destruction of Afro-Colombian communities due to internal forced displacement, confinement and resistance".[123] In this connection, "one clear example of this is what occurs in some fishing communities. The communities in confinement or resistance lose contact and relation with other communities as a result of being unable to circulate freely within their territory. This poses a serious limitation to the expression of their intercultural life".[124]

Taking into account the role of the victims as the OAG recommends, Constitutional Court Order 004 observes: "Another alarming facet of forced displacement of indigenous peoples in Colombia is that, according to reports received by the Court, there is an extensive and constant trend of permanent forced displacement of indigenous leaders and authorities who are threatened or attacked. This has devastating consequence on their cultural institutions. The central cultural role filled by authorities and leaders implies that their displacement is espe-

[122] CNOA *et al.*: 12 ("*El reconocimiento de esta diversidad de ser afrocolombiano dentro de una misma comunidad de referentes y sentidos compartidos, es crucial para evitar el desconocimiento de las violaciones que se cometen contra afrocolombianos que habitan en contextos diferentes a los territorios ancestrales*").

[123] *Order 005 of 2009*: 34 ("*El riesgo acentuado de destrucción cultural de las comunidades afrocolombianas por el desplazamiento forzado interno, el confinamiento y la Resistencia*"). Confinement, a form of displacement that has been particularly neglected, occurs when Afro-descendent communities are forcibly displaced within their own territory, thus being restricted to a limited part of the territory and losing the ability to circulate freely or exercise control over their land.

[124] *Ibid.*: para. 98 ("*Un claro ejemplo de esto en [sic] lo que ocurren en algunas comunidades dedicadas a la pesca. Las comunidades confinadas o en resistencia pierden, como efecto de la imposibilidad de movilizarse libremente por su territorio, contacto y relación con otras comunidades lo que a la postre constituye una seria limitación de la expresión de su vida intercultural*").

cially harmful for the preservation of ethnic and social structures of their respective groups".[125]

The Court thus orders that the Plans for Ethnic Preservation and Protection include "a basic component of protection for the leaders, traditional authorities and persons in risk because of their positions of leadership or activism".[126]

The importance of evaluating the situation from the ethnic groups' perspective is also reflected in Judgment T-769 of 2009, which ordered the suspension of a major mining project in Northeastern Colombia that had been undertaken in indigenous territories without prior consultation to the indigenous communities. In this case, the Court cites the observation of the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: "Whenever large-scale development projects are undertaken in areas occupied by indigenous peoples, it is probably that these communities face profound social and economic changes that the competent authorities are unable to comprehend, much less anticipate".[127]

The search for truth and justice, as part of integral reparation, is especially significant for ethnic groups. The OAG indicates that "the effective realization of the fundamental right to integral reparations in terms of restitution, indemnization, rehabilitation and satisfaction requires the materialization of the rights to truth, justice and non-

[125] Order 004 of 2009: 13 ("*Otra faceta alarmante del desplazamiento forzado de los pueblos indígenas en Colombia es que, según se ha reportado a la Corte, hay un patrón extensivo, constante de desplazamiento forzado permanente de líderes y autoridades indígenas que son amenazados o agredidos, con efectos devastadores para las estructuras culturales. El rol cultural central que juegan las autoridades y líderes hace que su desplazamiento sea especialmente nocivo para la preservación de las estructuras sociales y étnicas de sus respectivos pueblos*").

[126] *Ibid.*: 34 ("*componente básico de protección de los líderes, autoridades tradicionales y personas en riesgo por sus posturas de activismo o de liderazgo*").

[127] Constitutional Court of Colombia, Judgment T-769 of 2009: 34, citing the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People ("*Siempre que se lleven a cabo proyectos a gran escala en áreas ocupadas por pueblos indígenas, es probable que estas comunidades tengan que atravesar cambios sociales y económicos profundos que las autoridades competentes nos son capaces de entender, mucho menos anticipar*").

repetition".[128] Specifically, "integral reparation to ethnic groups implies the right to truth, as established in judicial proceedings, the right to historical and political truth, and the right to the identification, prosecution and punishment of the material and intellectual authors of the violations".[129]

Constitutional jurisprudence supports this principle, as Order 004 requires the Plans for Ethnic Preservation and Protection to comply with victims' fundamental rights to truth, justice, reparation and guarantees of non-repetition.[130] It also orders the Prosecutor General (*Fiscal General de la Nación*) to take actions to avoid impunity for the criminal conduct of which indigenous peoples have been victims.[131]

The significance of land to ethnic groups must be considered in determining reparations. In cases of dispossession, restitution is the most preferred method of reparation. The rules contained in ILO Convention 169 concerning these criteria form part of Colombia's normative framework, as this international instrument was approved and incorporated into domestic law through Law 21 of 1991. Since then, its principles have been reiterated by various state institutions.

The OAG has issued extensive guidelines on the subject of territory and reparations, emphasizing that reparation measures should include respecting and guaranteeing ethnic communities' collective rights to territory.[132] It also warns that disregard for rights to territory endangers ethnic groups' inalienable right to life, as well as their ethnic and cultural integrity.[133] Furthermore, the right to reparations implies the restitution of ethnic territories that have been abandoned for

[128] Victims First, *supra* n. 78: 29 ("*La efectiva realización del derecho fundamental a la reparación integral en sus componentes de restitución, indemnización, rehabilitación y satisfacción exige la materialización de los derechos a la verdad, la justicia y la no repetición*").

[129] *Ibid.*: 103 ("*La reparación integral de los grupos étnicos implica el derecho a la verdad judicial y a la verdad política e histórica, así como el derecho a que se identifiquen, juzguen y sancionen los autores intelectuales y materiales*").

[130] Order 004 of 2009: 34.

[131] *Ibid.*: Res. 4.

[132] Victims First, *supra* n. 78: 112.

[133] *Ibid.*: 114.

reasons external to the community or usurped from them.[134] Only in extreme cases may reparations consist of providing ethnic groups with alternative territories.[135]

This last principle is reiterated in MIJ and Social Action's Directive, which explicitly provides that for state authorities to work toward relocation of displaced indigenous groups, "it is necessary that the groups concerned make such a request in writing, expressing their interest in being relocated to places other than where they came from, that is, to not return to their place of origin".[136]

The subject of territory and its significance for indigenous and Afro-Colombian peoples has also been addressed in detail by the Constitutional Court. For example, Order 005 explains that for Afro-Colombian peoples,

> territory has an extremely profound importance that goes beyond simply having a place to live and sustain themselves. Territory is an expression of their collective memory, of their conception of freedom … Territory is an integral concept that includes land, the community, the environment, and the interdependent relationships of these various elements. Customs and traditions related to their habitat, which they have maintained for centuries and which are expressed in traditional knowledge also form part of the conception of territory.[137]

[134] *Ibid.*: 119.

[135] *Ibid.*: 120.

[136] MIJ and Social Action Directive: 15 ("*es necesario que los interesados soliciten por escrito expresando el interés de reubicarse en lugares diferentes a los de su procedencia., es decir de no retornar a su lugar de origen*").

[137] Order 005 of 2009: para. 93 ("*el territorio tiene una importancia muy profunda que va más allá de simplemente contar con un lugar para vivir y sostenerse. El territorio es una expresión de su memoria colectiva, de su concepción de la libertad…El territorio es una concepción integral que incluye la tierra, la comunidad, la naturaleza y las relaciones de interdependencia de los diversos componentes. Del territorio también hacen parte los usos y costumbres vinculados a su habitat que las comunidades afrocolombianas han mantenido por siglos y que se expresan también en los saberes que la gente tiene*").

The significance of violations of indigenous peoples' territory rights was described by the Court in Order 004 as follows: "Indigenous peoples are especially exposed in a state of defenseless to the armed conflict and forced displacement, primarily because of their situation *vis-à-vis* land … At the same time, the importance of their territories for their ethnic cultures, subsistence and integrity render the causes of forced displacement as well as forced displacement itself more harmful".[138] Thus, the fact that their relationship to territory is crucial for their cultural and physical survival must not be forgotten.[139]

In fact, the Court has held that for both indigenous and Afro-Colombian peoples, the relationship that they have with their territory and its natural resources transforms forced displacement into a direct threat to their cultural survival.[140] It thus follows that the principal objective in relation to the forcibly displaced population is to guarantee their return in conditions of safety and dignity.[141] The state must also address special cases where individuals, families and communities cannot return to their territories due to continuing threats by those who displaced them.[142]

Although it is not exclusive to ethnic groups, the following passage from Constitutional Court Judgment T-602 of 2003 summarizes several of the principles mentioned above and serves as an appropriate conclusion to this chapter. In it, the Court shows a preference for returning displaced persons to their places of origin, emphasizes the importance of analyzing the violation through the lens of those affected, and suggests remedial measures that consider historic marginalization and promote affirmative action:

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[138] Order 004 of 2009: 9-10 ("*Los pueblos indígenas están especialmente expuestos, en indefensión, al conflicto armado y al desplazamiento, principalmente por su situación ante la tierra … Simultáneamente, para los pueblos indígenas la importancia de sus territorios para sus culturas y su subsistencia e integridad étnicas, hace más lesivos tanto los factores causales del desplazamiento como el desplazamiento en sí mismo*").

[139] *Ibid.*: 12.

[140] *Ibid.*: 32, citing Colombian Constitutional Court Order 218 of 2006.

[141] *Ibid.*: 34.

[142] *Ibid.*

> [In] Judgment T-602 of 2003 … the Court emphasized that 'when it is not possible to return persons displaced to their place of origin in conditions of dignity, willingness and security, the State response should be articulated around affirmative actions … that guarantee (i) non-discriminatory access to basic goods and services, (ii) the promotion of equality, and (iii) attention to ethnic minorities and traditionally marginalized groups, as it cannot be disregarded that Colombia is a pluriethnic and multicultural country, and that a large part of the forcibly displaced population belong to ethnic groups … [Moreover] it is well-known that these groups still face prevalent discrimination in rural areas and poor urban zones. Expressed in other words, the attention provided to the forcibly displaced population should be based in affirmative actions and in differential foci sensible to gender, age, ethnicity, handicap and sexual preference.[143]

11.6. Conclusion

In this chapter, I have sought to contribute to expanding our understanding of the range of theoretical, political, and legal approaches to distributive issues in transitional contexts. To this end, I have offered a typology of criteria for land allocation that includes – alongside the well-known approaches of distributive justice, corrective justice, and

[143] *Ibid.*: 31, citing Constitutional Court Judgment T-602 of 2003 ("*la sentencia T-602 de 2003, precitada, donde la Corte enfatizó que 'siempre que no sea posible el retorno al lugar de origen de los desplazados en condiciones de dignidad, voluntariedad y seguridad, la respuesta estatal debe articularse en torno a acciones afirmativas (...) que garanticen (i) el acceso a bienes y servicios básicos en condiciones de no discriminación, (ii) la promoción de la igualdad, y (iii) la atención a minorías étnicas y a grupos tradicionalmente marginados, ya que no puede obviarse que Colombia es un país pluriétnico y multicultural y que buena parte de la población desplazada pertenece a los distintos grupos étnicos … y, bien sabido es que éstas padecen todavía una fuerte discriminación en las áreas rurales y en las zonas urbanas marginales. Para expresarlo en otros términos, la atención a la población desplazada debe basarse en acciones afirmativas y en enfoques diferenciales sensibles al género, la generación, la etnia, la discapacidad y la opción sexual"*).

economic efficiency – a fourth criteria that is conceptually distinct and has specific support in international and domestic law: collective ethnic justice.

To flesh out the content of CEJ, I pursued a threefold argument. First, from a theoretical perspective, I examined the analytical and practical differences and similarities among the four approaches to land allocation and, on that basis, substantiated the analytical distinctiveness of CEJ. Second, from an empirical viewpoint, I pointed to evidence showing that, in practice, CEJ has informed massive programs of land allocation in Colombia, through the granting of collective land titles to indigenous peoples and Afro-descendent communities. Finally, from a legal perspective, I attempted to specify the content of CEJ as it has been established in international law and jurisprudence, as well as in Colombian law and court decisions.

Based on these arguments, this chapter singles out the standards that must guide reparations to ethnic minorities that have been victims of violence, displacement, and land dispossession, in Colombia and elsewhere. Specifically in the Colombian context – in line with international law, existing national legislation, and the key decisions of the Constitutional Court (Decisions 004 and 005 of 2009) – reparations to indigenous peoples and Afro-descendant communities that have suffered land dispossession and forced displacement must: (1) be consulted with the ethnic group, which should retain some level of control of their implementation; (2) include complementary, compensatory measures; (3) consider historical grievances rooted in ethnic and racial discrimination and their lingering impact; (4) be based on an assessment of the significance of land dispossession from the viewpoint of the ethnic groups as collectivities; (5) go hand-in-hand with the search for truth and justice, as part of integral reparation; and (6) take into account the particular importance of land to ethnic groups, which entails a preference for land restitution as a mode of reparation.

Beyond legal justifications, the fulfillment of these standards is instrumental for political reasons. As Holmes points out in his concluding remarks in this book, "[p]roperty restitution seems a much too minor policy change to have any serious impact on the yawning gulf between the urban haves and the rural have-nots that has tormented Co-

lombia for so many bloody decades" – a gulf whose reduction he rightly sees as a political precondition for any meaningful democratic reform. Given that the indigenous peoples and black communities that are the beneficiaries of CEJ are among the poorest and most victimized of the rural have-nots, the task of systematically incorporating this criterion in discussions and policies on land reform should be a central concern for anyone interested in genuine democratic transformation in Colombia.

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Distributive Justice in Transitions

Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and Maria Paula Saffon (editors)

The chapters of this book explore, from different disciplinary perspectives, the relationship between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts. They specifically discuss the role of land reform as an instrument of these goals, and examine how the balance between different perspectives has been attempted (or not) in selected cases of internal armed conflicts, and how it should be attempted in principle. Although most chapters closely examine the Colombian case, some provide a comparative perspective that includes countries in Latin America, Africa, and Eastern Europe, while others examine some of the more general, theoretical issues involved.

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