TRANSITIONAL JUSTICE AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CONTRIBUTIONS AND CHALLENGES FROM A LATIN AMERICAN PERSPECTIVE

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ABSTRACT

Transitional justice has been historically linked to dealing with the legacy of massive and systematic civil and political rights violations. However, some scholars and practitioners have stressed the importance of including an economic, social and cultural rights perspective in transitional justice. This is a relatively new area of research, with limited analysis of the challenges or best ways to address economic, social and cultural rights through the transitional justice framework.

In this context, Latin America plays an important role, with cases of inclusion of an economic, social and cultural rights approach in transitional justice processes. This thesis examines these cases with the aim to analyse the way in which the economic, social and cultural rights dimension of transitional justice is developed. To this end, this thesis conducts a doctrinal analysis of the normative framework of transitional justice and the nature of economic, social and cultural rights State's obligations in Latin America. Moreover, it conducts a case study of Chile to provide a specific transitional justice context, comparing the inclusion of an economic, social and cultural rights approach in this country with other Latin American experiences.

It is concluded that there is still a marginal inclusion of an economic, social and cultural rights approach in transitional justice processes in Latin America. Moreover, in the cases where this approach is incorporated, it has been mainly secondary to civil and political rights. In addition, there is observable lack of consistency in the language of economic, social and cultural rights. Despite this, transitional countries in Latin America offer interesting examples on how to embrace an economic, social and cultural rights approach, through legal principles of national and international law and the broad interpretation of notions enshrined in transitional justice and the civil and political rights framework.

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TABLE OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ADHR	American Declaration of the Rights and Duties of Man
CESCR	Committee on Economic, Social and Cultural Rights
CUP	Cambridge University Press
ESCR	Economic, Social and Cultural Rights
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo
HumRtsQ	Human Rights Quarterly
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICTJ	International Center for Transitional Justice
IJTJ	The International Journal of Transitional Justice
ILO	International Labour Organization
INDH	National Institute for Human Rights Chile
NGO	Non-Governmental Organization
NYUJIntlL&Pol	New York University Journal of International Law and Politics
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OUP	Oxford University Press
PRAIS	Programme of Reparation and Integral Health Care Chile
TJ	Transitional Justice
UDHR	Universal Declaration of Human Rights
UDP	Universidad Diego Portales

UN	United Nations
UNCommHR	United Nations Commission on Human Rights
UNHCR	United Nations Refugee Agency
UNDPA	United Nations Development Programme
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSG	United Nations Secretary-General
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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02 May 1948	American Declaration of the Rights and Duties of Man, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949)
02 May 1948	Charter of the Organization of American States, (OAS 1994) O.A.S.T.S. No. l-F, OEA/Ser.A/2/ Rev. 4 at 4-6, OEA/Ser.C/Il.5
09 December 1948	Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277
10 December 1948	Universal Declaration of Human Rights, GA Res 217 (A) III
12 August 1949	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31
12 August 1949	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85
12 August 1949	Geneva Convention III Relative to the Treatment of Prisoners of War, 75 UNTS 135
12 August 1949	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287
07 March 1966	Convention on the Elimination of Racial Discrimination, 660 UNTS 195
16 December 1966	International Covenant on Civil and Political Rights, 999 UNTS 171
16 December 1966	International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3
26 November 1968	Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, A/RES/2391(XXIII)
23 May 1969	Vienna Convention on the Law of the Treaties, UN Doc A/Conf.39/27
22 November 1969	American Convention on Human Rights, 1144 UNTS 123
08 June 1977	Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609
01 October 1979	Statute of the Inter-American Commission on Human Rights, Resolution No 447

01 October 1979	Statute of the Inter-American Court of Human Rights, Resolution No 448
08 December 1979	Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13
10 December 1984	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85
09 December 1985	Inter-American Convention to Prevent and Punish Torture, A-49
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CHAPTER I

INTRODUCTION

1. CONTEXT AND SCOPE OF THE THESIS

There is little clarity about how and when the terminology of transitional justice (TJ) was chosen; however its origins can be generally tracked to the end of the Second World War, in particular the Nuremberg Criminal Trials.[1] Then, during the period of the Cold War, and influenced by the end of dictatorships in Latin America and democratization movements in Eastern Europe and Africa, TJ started to be associated with the building of new democratic regimes after a turbulent period, caused by an internal armed conflict, or the transition from a repressive regime to democracy.[2]

In general, there is a multiplicity of definitions and understandings of TJ.[3] Still, what these definitions have in common is the identification of TJ with the implementation of mechanisms to deal with a legacy of massive and systematic human rights violations.[4] Many of these definitions are of an open texture, which seems reasonable in a field of constant change that must react to different legacies of human rights abuses, contexts and periods. In addition, these definitions do not

[1] Ernest C. Stiefel 'Transitional Justice Genealogy: Ruti G. Teitel' (2003) 66 Harvard Human Rights Journal, 70.

[2] Anne-Marie La Rosa, Xavier Philippe 'Transitional Justice' in Vincent Chetal (ed) *Post-conflict peacebuilding: a lexicon* (OUP, 2009) 368.

[3] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies': Report of the Secretary-General, S/2004/616 (23 August 2004) para 5.

[4] Ibid, para 8; Ernest C. Stiefel 'Transitional Justice Genealogy: Ruti G. Teitel' (n 1) 69; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2008-2009) 49 Virginia Journal of International Law, 921; Roger Duthie, 'Introduction' in Roger Duthie and Paul Seils (eds) *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ, 2017) 10, 11.

describe the human rights violations that should be dealt with through TJ mechanisms. However, historically, all these conceptions of TJ have been linked to massive and systematic violations of civil and political rights (CPR), such as forced disappearance, torture, unlawful killing and arbitrary detention.[5]

Yet, in the last decade, some scholars and practitioners have pointed out the need to address other issues in TJ processes, such as the socioeconomic distribution of power and inequality, economic crimes, structural causes of conflict and economic, social and cultural rights (ESCR) violations, in order to truly accomplish the purposes pursued by TJ.[6] It has been pointed out that the traditional approach to TJ leaves out some massive and systematic human rights violations and damages, by only describing them in the context or as elements of commission of massive and systematic CPR violations, making many victims invisible and perpetuating conditions of violence.[7] Moreover, some scholars and practitioners also claim that it is important to deal with these issues to avoid future social explosions and a permanent state of social disconformity.[8] In addition, it has been stated that an approach to TJ that does not include these issues properly can cause the maintenance of public policies that thwart development, prevent poverty reduction and increase inequality.[9] Moreover, it has been pointed out that

[5] Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2(3) IJTJ, 390; Sabine Michalowski, Lisa Hecht, 'The Economic and Social Dimensions of Transitional Justice' (2012) Essex Transitional Justice Network, Concept Paper, 8 <www1.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf> accessed 25 August 2018.

[6] E.g. IJTJ (2008) 2 (3), first number of the journal where different authors considered the issues of development and social justice in transitional justice processes.

[7] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2(3) IJTJ, 268, 275-277; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP, 2015) 7-14.

[8] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 IJTJ, 339, 355.

[9] Aisling Walsh, 'The Legacy of Dictatorship and Persistent Socio-Economic Inequalities in Chile's Educational Policy' (2013) 2(4) The online postgraduate journal of the College of Arts, Celtic Studies

this is the case in some countries in Latin America, where there have been many street protests and riots caused by socioeconomic claims in different countries that had a similar experience of a violent period and TJ processes[10], as for example Chile, Brazil or Guatemala.

Regarding the ESCR dimension of TJ, the development of this approach started to be promoted by the former UN High Commissioner for Human Rights, Louise Arbour and it has been included in the recent UN guidelines on TJ.[11] This is a relatively new area of research, not exhibiting a clear, unified and harmonized set of rules or enough development in the analysis of the potential, challenges or best ways to address ESCR through TJ.[12] Moreover, some argue against the inclusion of an ESCR approach in TJ, considering it as an overloaded field that has already limited capacity.[13] In addition, on many occasions, when the ESCR approach is included, the language of rights is not used, or it is done in a way that has maintained many misconceptions about the nature of ESCR.[14]

This thesis focuses on this new approach to TJ, which stresses the need of including ESCR in TJ theory and practice. The purpose of this thesis is therefore to search for ESCR approaches to TJ in the work of TJ mechanisms in Latin America.

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and Social Sciences (Aigne) 98 <www.ucc.ie/en/media/electronicjournals/aigne/.../06-Walsh-2013-02-en.pdf> accessed 10 October 2015.

[10] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 8) 331; Aisling Walsh (n 9) 98.

[11] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (March 2010) A.9; OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5; Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) NYUJIntlL&Pol, 1-27.

[12] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 11) 59.

[13] E.g. Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2(3) 253-265; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Social and Legal Studies, 1-16.

[14] Evelyn Schmid, Aoife Nolan, 'Do Not Harm?: Economic and Social Dimensions of Transitional Justice' (2014) 8 IJTJ 364, 370-378.

Once these approaches are found, this thesis focuses on analysing the way in which the ESCR dimension of TJ is developed in Latin America, based on the normative framework of TJ and the nature of ESCR obligations in this region.

The notion of TJ used in this thesis is the one adopted by the UN, which defines TJ as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. This may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[15] This definition was chosen due its relatively broad scope,[16] encompassing the main mechanisms and purposes of TJ processes. In addition, the UN has been involved for a long time in the reconstruction of societies devastated after an armed conflict or repressive rule, collaborating with many Latin American countries who were facing TJ processes.[17] Moreover, this notion has influenced the reasoning of the Inter-American Human Rights System, examined throughout this thesis.[18]

This research focuses on the most recognized TJ mechanisms by the UN, which are the judiciary, reparations programmes, truth commissions, institutional reforms, national consultations and peace agreements.[19] This thesis recognizes

[15] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) para 8.

[16] Anne-Marie La Rosa, Xavier Philippe (n 2) 360.

[17] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) para 11.

[18] *Almonacid-Arellano et al v Chile*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 154 (26 September 2006) para 107; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 219 (24 November 2010) para 150; *Gelman v. Uruguay,* Merits and Reparations Judgment (IACtHR) Series C No. 221 (24 February 2011) para 198.

[19] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) para 8.

other mechanisms individually identified, such as commemorative practices, educational reforms or reconciliation initiatives,[20] but it considers that all of them can be ascribed to the mechanisms proposed in this research. Moreover, this thesis does not deny the importance of non-official activities led by civil society in TJ processes in Latin America; however it focuses on institutional responses, mentioning in some cases the influence of these groups in the implementation of TJ mechanisms, but not going deeper in their parallel activities.

Regarding the purposes examined, this thesis realizes that there are diverse approaches,[21] but as a common element it considers the aim to deal with massive and systematic human rights violations. This thesis focuses on ESCR and, therefore, takes the human rights approach to TJ purposes, which according to the UN and the Inter-American Human Rights System includes the investigation, prosecution and punishment of serious human rights and humanitarian law violations, truth-telling, reparations, addressing the root causes of conflict and re-establishing the rule of law.[22] This approach does not ignore the reference made by the UN to accountability, justice and reconciliation; however, following the practice of TJ mechanisms in Latin America, it considers them as broader aims that should inform TJ processes,[23] and therefore, this thesis tackles these goals through a cross-examination of TJ mechanisms, purposes and legal principles.

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[20] Paul Gready, The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond (Glashouse, 2011) 7.

[21] E.g. UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) para 7; Paul Gready (n 22) 6, 7.

[22] *Velásquez Rodríguez v Honduras,* Merits (IACtHR) Series C No 4 (29 July 1988) paras 166-174; UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) para 8; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 11) Section A.8; UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff', A/HRC/21/46 (09 August 2012) paras 26, 37; OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 11) 1,5.

[23] E.g. 'Informe Final', Comisión de la Verdad y Reconciliación (Peru, 2003) Volume I, First Part, Introduction, section 5.2, Volume IX, Chapter 1 [34, 93] Chapter 2, para 231; UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', E/CN.4/2005/102/Add.1 (08 February 2005) Preamble; 'Nuevo Acuerdo General Para La

This thesis recognizes current scholarly debate about reforming the TJ framework to allow the inclusion of ESCR,[24] but it follows the idea that the current framework does not need to be radically changed to include an ESCR approach.[25] In addition, the purpose of this thesis is to explore the current normative framework used in Latin America, which could be usefully developed for future research.

Regarding massive and systematic human rights violations, this thesis uses the language of serious human rights and humanitarian law violations addressed by transitional countries, recognizing that there are different ways to refer to these violations, for example as "gross" or "grave". At the UN level, there is sometimes a distinction between gross violations of human rights and serious violations of humanitarian law.[26] It has been argued that the first ones are graver than serious violations, and that they include more systematic and "worst" human rights violations, which coincide with the international crimes established in the Rome Statute of the International Criminal Court (Rome Statute).[27] Despite this claim, it is noticeable in the literature and the review of practice that there is very little

Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera', Gobierno de la República de Colombia (Gobierno Nacional) and Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) (Colombia, 12 November 2016) Section 5; Priscilla Hayner, *Unspeakable Truths* (Routledge 2001); Carsten Stahn, 'United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?' (2002) 84(845) International Review of the Red Cross, 191, 192; Anne-Marie La Rosa, Xavier Philippe (n 2) 370.

[24] Paul Gready, Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 IJTJ, 340.

[25] Evelyn Schmid, Aoife Nolan (n 14) 380.

[26] UNCommHR, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Theodor van Boven, Special Repporteur', E/CN.4/Sub.2/1993/8 (2 July 1993) para 8.

[27] UNCommHR, 'Introductory Note: The United Nations Basic Principles and Guidelines in the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Theodor van Boven A/RES/60/147 (21 March 2006) 2(c); Geneva Academy of International Humanitarian Law and Human Rights, 'What Amounts 'a Serious Violation of International Human Rights Law'?: An Analysis of the Practice and Expert Opinion for the Purpose of the 2013 Arm Trade Treaty' (2014) 10.

clarity about the existence of a real distinction between these notions, because on many occasions the terms are used interchangeably.[28] The IACtHR avoids this confusion in many of its judgments in Spanish, considering the Spanish word "grave" as including the notions of "grave", "gross" and "serious".[29] This thesis follows the approach of the Inter-American Human Rights System, considering that these notions can be interchangeable, yet choosing the notion of serious human rights violations, due to the frequency of its use in the English language.

Regarding the examination of the inclusion of ESCR in TJ, this thesis recognizes that this approach has political, economic, psychosocial and legal dimensions, including issues such as inequality, distributive and social justice. This thesis focuses on the legal dimensions of this approach, referring to the ESCR enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESC), the American Convention on Human Rights (ACHR) and the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador), as the main international and regional treaties that apply ESCR in Latin America. Hence, this thesis examines the references made by the TJ mechanisms in Latin America to the right to work, to the enjoyment of just and favourable conditions of work, to join and form trade unions and to strike, to social security, to protection

[28] E.g. UNCommHR, Joinet Louise: 'Set of Principles for the Prosecution and Promotion of Human Rights Through Action to Combat Impunity' UN Doc E/CN.4/Sub.2/1997/20/Rev.I, Annex II (02 October 1997); UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 3) paras 10, 32, 38, 40, 46; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 11) B.1; UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' (n 26) paras 15, 21; IACommHR, 'The Right to Truth in the Americas', OEA/Ser.L/V/II.152. Doc. 2 (13 August 2014) paras 4, 13, 28, 33, 39(3) (9), 63, 81; Diane F Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1990) 100 Yale Law Journal, 2537; Ximena Medellín, 'Toward the Consolidation of Justice for International Crimes in Latin America: From Constitutional Debate to Criminal Cases' (2013) Aportes DPLF: Magazine of the Due Process of Law Foundation; Jens Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) IJTJ 423.

[29] E.g. *Barrios Altos v Peru,* Merits (IACtHR) Series C No. 75 (14 March 2001) paras 4, 7, 13; *Ituango Massacres v Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C, No. 148 (01 July 2006) paras 334, 402; *La Cantuta v Peru,* Merits, Reparations and Costs (IACtHR) Series C No. 162 (29 November 2006) paras 90, 92, 106; Gelman v. Uruguay (n 20) paras 64, 194, 195, 243; Geneva Academy of International Humanitarian Law and Human Rights (n 27) 13.

and assistance to family, to an adequate standard of living (including adequate food, clothing and housing), to the highest attainable standard of physical and mental health, the right to education and the right of everybody to participate in cultural life. This thesis does not examine the right to enjoy the benefits of scientific progress and the right to protection of authors' moral and material interests**,** including the role forensic science, due to particular challenges faced in comparison with the previous ESCR.[30]

This research focuses on the Latin American region, defining it as the parts of the American continent where the main languages are Spanish or Portuguese.[31] This thesis focuses on the TJ mechanisms implemented to deal with the last violent periods that occurred in Argentina, Brazil, Chile, Colombia, Guatemala and Peru, as those countries have had a clear TJ policy and a bigger impact in the development of the normative framework of TJ and ESCR. It also considers some specific contributions of TJ mechanisms in Ecuador, El Salvador, Honduras, Panama, Paraguay and Uruguay since these countries have had less influence on the development of a normative framework of TJ and ESCR, but their specific contributions are considered to avoid a skewed picture of the inclusion of ESCR approaches in TJ in Latin America. Other countries which have not implemented a clear TJ policy or which have not had any relevant contribution, such as Bolivia, Mexico or Venezuela, are excluded from this study.

[30] International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (16 December 1966) article 15.1 (b) (c); CESCR, General Comment No. 17 'The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (c), of the Covenant)' E/C.12/GC/17 (12 January 2006); Evelyn Schmid, Aoife Nolan (n 14) 363.

[31] Collins English Dictionary <https://www.collinsdictionary.com/dictionary/english/latin-america>; Oxford English Dicionary <https://en.oxforddictionaries.com/definition/latin_america>; accessed 29 August 2018.

The focus on Latin America was chosen for its influence in the development of TJ theory and practice.[32] The region was also chosen for its contribution to the normative development of ESCR, which has been done on some occasions from a TJ perspective, which is not easy to find at the global level.[33] Hence, the Latin American approach to the inclusion of ESCR in TJ processes should be an interesting perspective on the development of this relatively new area of law.

2. METHODOLOGY OF THE RESEARCH

This thesis conducts mainly a doctrinal research, complemented with a case study and comparative research of sources of law. This research engages with a doctrinal analysis of the law, expecting to contribute to an area of recent development, helping to identify, analyse and evaluate a set of legal rules and general principles in TJ and ESCR in Latin America.[34]

This thesis therefore focuses on seeking evidence for the inclusion of an ESCR approach in TJ mechanisms. The main primary and secondary sources of law examined in this thesis include international, regional and national sources. Hence, it examines regional and international treaties and soft law, especially the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions, the ICESCR, the American Declaration of the Rights and Duties of Man (ADHR), ACHR and the "Protocol of San Salvador", which are the main and more influential treaties in the area of TJ and ESCR in Latin America. To explore the normative content of these treaties, this thesis uses soft law, such as the Inter-American Human Rights System

[32] Anne-Marie La Rosa, Xavier Philippe (n 2) 363.

[33] E.g. 'Guatemala: Memoria Del Silencio', Reporte de la Comisión para el Esclarecimiento Histórico (Guatemala, 25 February 1999).

[34] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 11) 59.

reports; the Committee on Economic, Social and Cultural Rights (CESCR) general comments, concluding observations and documents; and the resolutions of the UN Security Council (UNSC), the General Assembly (UNGA) and the Human Rights Council (UNHRC) in the area of TJ.

Moreover, this thesis examines the most relevant jurisprudence of the Inter-American Court of Human Rights (IACtHR) and the resolutions of the Inter-American Commission on Human Rights (IACommHR) in the areas of TJ and ESCR. This research also examines the legal sources enacted at the national level to implement TJ mechanisms and pursue TJ purposes. To that end, national laws, rules, reports of truth commissions and the most relevant domestic jurisprudence for the purposes of this research are also scrutinized.

In addition, customary international law and general principles of national and international law are studied, as important sources of law applicable to TJ to deal with serious human rights and humanitarian law violations. These sources of law are relevant in Latin America, especially in cases where there was not domestic law or treaties ratified at the time of the commission of these violations, as is examined through the thesis.

This thesis focuses mainly on primary sources of law, including the exploration of the work of preeminent scholars to critically analyse this type sources. It needs to be emphasised, though, that it is not the purpose of this thesis to engage in philosophical discussions in the area of TJ and ESCR obligations, but to analyse the practice of TJ mechanisms in Latin America. The examination of the primary sources is conducted from a Latin American perspective; therefore, many of these sources are only in Spanish. For this reason, this thesis hopes to contribute to the research made in this area by widening the scope of jurisprudential discussion.

This thesis also conducts a case study research of the TJ process in Chile, taking into consideration the specific social, political and historical context of the

country studied. Since the scope of this research study is not interdisciplinary, these issues are examined from a legal perspective, to explain the enactment or content of primary sources of law. Chile was chosen for being a typical example of an authoritarian dictatorship in Latin America, influencing the implementation of other TJ mechanisms in the region and worldwide.[35] Moreover, TJ mechanisms have been implemented in this country for more than twenty years, which allows for a deeper examination of TJ processes and evaluation of the inclusion of ESCR in the implementation of TJ mechanisms.

In a more limited way this thesis also conducts comparative research, especially in relation to the case study, with the purpose of examining similar problems faced and lessons learn from other Latin American experiences. This approach is taken having in consideration that Latin American countries have some legal and cultural differences, but from a more general perspective, these differences are considered minor. Latin American countries have a similar legal culture, have relatively similar ESCR violations committed during their violent periods, have addressed these violations through similar TJ mechanisms and have similar current problems inherited from the violations of ESCR during their violent period.

3. STRUCTURE OF THE RESEARCH

This thesis examines the interaction of two frameworks, which are TJ and ESCR. These fields of study have been studied by scholars for a long time in a separate way and they have been mostly unrelated to each other, with a relatively recent inclusion of an ESCR approach to TJ. For this reason, this thesis first examines separately the fields of TJ (Chapter II) and ESCR (Chapter III) while the

[35] Edgardo Riveros Marín, 'Normativa Internacional de Los Derechos Humanos y El Sistema Democrático: El Caso Chileno' No 5 (Fundación Konrad Adenauer, 2011) 51.

following substantive chapters tackle the inclusion of ESCR in TJ processes in Latin America (Chapters IV and V).

Chapter II attempts to construct a legal framework of TJ in Latin America, which is the one that is going to be used in the entire thesis. To accomplish this, the research first examines the main TJ mechanisms implemented in Latin America, including peace agreements, national consultations, truth commissions, reparation programmes, judicial measures, and institutional reforms. Then, it looks at the purposes pursued by these TJ mechanisms, focusing on truth-telling; reparations; addressing the root causes of conflict; the investigation, prosecution and punishment of serious human rights and humanitarian law violations and re-establishing the rule of law. Finally, this chapter attempts to identify the national and international principles used by these mechanisms, considering that these principles could be useful to evaluate the practice of TJ mechanisms in Latin America.[36] The examination of the mechanisms, purposes and principles of the TJ framework focuses on the relevant practice of the Latin American countries, having in consideration the ESCR approach that will be developed in the next chapters.

Later, Chapter III examines the ESCR framework in the studied Latin American countries, to understand the extent of these obligations during the violent period and during their transition. To accomplish this, the chapter first scrutinises the States' obligations under the ICESCR, including general obligations, the tripartite typology of obligations, limitations and derogations. Then, it considers the States' obligations under the Inter-American Human Rights System, analysing the main instruments that deal with ESCR and the approaches taken by the IACommHR and the IACtHR regarding ESCR. Finally, an examination of the ESCR enshrined at the domestic level, focusing on its constitutional recognition, is

[36] Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7 IJTJ, 234, 235.

presented. This chapter does not aspire to do an exhaustive examination of all the aspects of International Human Rights Law and Domestic Law in the area of ESCR, but to examine the main obligations in this area, relevant to Latin American countries during their violent period and transitions.

In Chapter IV, the thesis focuses on the inclusion of ESCR in TJ processes in Latin America, using the legal frameworks established in Chapters II and III. Following the structure of chapter II, this chapter first examines TJ mechanisms that have addressed ESCR. Then it examines the TJ purposes pursued by these mechanisms when including an ESCR approach. This chapter aims to explore the way in which ESCR have been included in TJ processes in Latin America and critically analyse this inclusion, considering elements already examined in previous chapters.

With the purpose of considering the conclusions reached in Chapter IV, Chapter V focuses on the case study of Chile. First, this chapter provides a brief background of the social, historical and political context in which the violent period and the human rights violations were committed during the dictatorship. Then, it examines the particularities of the inclusion of ESCR in TJ mechanisms and purposes pursued in Chile, making comparisons with the rest of the Latin American practice, examined in the previous chapter. The aim of this chapter is to understand how TJ mechanisms have been implemented, in isolation and in a combined way, taking into consideration the specific context of Chile, providing examples of inclusion and omission of an ESCR approach in the TJ mechanisms implemented in this country, comparing it with other Latin American experiences.

Finally, in Chapter VI, this thesis hopes to confirm the hypothesis that there is at least a marginal inclusion of an ESCR approach in the implementation of some TJ mechanisms in Latin America. Moreover, it attempts to draw some conclusions in the way in which this inclusion has been conducted. Even though this research focuses mainly in Latin America, and therefore, the conclusions and suggestions

can be primarily applied to Latin American countries, this study could be also useful for other TJ experiences. In this way, this thesis is expected to contribute to the development of future research in the field.

CHAPTER II

THE NORMATIVE FRAMEWORK OF TRANSITIONAL JUSTICE IN LATIN AMERICA

1. INTRODUCTION

For a long time, Latin America has been known for the continuous dictatorships and armed conflicts in the region, where massive and systematic human rights violations have been committed.[1] However, from the democratic movements starting in the 1980s, the region has been also considered an example of the implementation of TJ mechanisms, influencing the theorization and practice of TJ at a global level.[2]

To accomplish the purpose of this thesis, which is to examine the ESCR approaches of TJ in Latin America, first it is important to establish the normative framework of TJ in the region. To accomplish this aim, this chapter examines relevant international and national law implemented to launch TJ mechanisms and pursue TJ purposes, including national laws, rules, reports of truth commissions and the most relevant domestic jurisprudence. The examination of these sources is done considering the inclusion of an ESCR approach, which is developed with more detail in Chapters IV and V.

This chapter first focuses on the main TJ mechanisms implemented in the examined Latin American countries. Then, it reviews the TJ purposes pursued by these mechanisms. Finally, this chapter attempts to identify the national and

[1] For a more detailed account of the dates and the kind of violent periods examined in this thesis, see Annex.

[2] Elin Skaar, Jemima García-Godos, Cath Collins, 'Introduction: the accountability challenge'' in Elin Skaar, Jemima García-Godos, Cath Collins (eds) *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge 2016) 1.

international principles used by TJ mechanisms implemented in Latin America, as valuable for the evaluation of TJ processes in Latin America.

2. TRANSITIONAL JUSTICE MECHANISMS

TJ is understood and defined on many occasions by its mechanisms, even though there is not a closed enumeration of TJ mechanisms.[3] This section focuses on the ones implemented in Latin America, recognized by the UN and the Inter-American Human Rights System. These are peace agreements, national consultations, truth commissions, reparation programmes, judicial measures and institutional reforms. This thesis focuses on the TJ mechanisms implemented to deal with the last violent periods that occurred in Argentina, Brazil, Chile, Colombia, Guatemala and Peru, as countries that have had a clear TJ policy and a bigger impact in the development of the normative framework of TJ and ESCR. It also considers some specific contributions of TJ mechanisms in Ecuador, El Salvador, Honduras, Nicaragua, Panama, Paraguay and Uruguay. These countries have had less influence on the development of a normative framework of TJ and ESCR, but their specific contributions are considered to avoid a skewed picture of the inclusion of ESCR approaches in TJ in Latin America. Other countries which have not implemented a clear TJ policy or which have not had any relevant contribution, such as Bolivia, Mexico or Venezuela, are omitted in this study.

This section examines first Latin American peace agreements, then national consultations, truth commissions, reparation programmes, judicial measures and finally institutional reforms. The order of the TJ mechanisms was selected considering the way they have generally been implemented in Latin America.

[3] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50(3) Politorbis, 18; Alexandra Barahona de Brito, Laurance Whitehead, 'Transitional Justice: Reframing the Debate', in *After Oppression: Transitional Justice in Latin America and Eastern Europe* (UN University Press 2012) 77.

2.1. Peace Agreements

Peace Agreements have been reached in Latin America to cease the internal armed conflicts in Nicaragua in 1990, El Salvador in 1992, Guatemala in 1996 and Colombia in 2016.[4] These peace agreements have been discussed and implemented on collaboration with the UN and/or the IACommHR.[5] They are extensive, suggesting the future implementation of TJ mechanisms, such as truth commissions, reparation programmes and institutional reforms.[6] This is coherent with the UN approach to peace agreements, which suggested to consider the inclusion of a human rights perspective and the pursuit of TJ purposes during peace processes.[7]

Moreover, these peace agreements have been claimed to be focused on the most vulnerable groups, which were the most affected and discriminated ones during the armed conflict, as indigenous people, *campesinos*,[8] women and

[4] In the case of Colombia, this thesis focuses in the Peace Agreement between the Government with the FARC-EP in 2016. However, it recognizes that there are other peace agreements signed by the Colombian Government with other armed groups, with M-19 in 1990, the Ejército Popular de Liberación (EPL), the indigenous group Quintín Lame and the Partido Revolucionario de los Trabajadores (PRT) in 1991. Moreover, it recognizes that the conflict continues with other armed groups. Helen Murphy, Luis Jaime Acosta, 'Special Report: A fractured peace – violent rivals rush into FARC void in Colombia' (26 April 2018) <www.reuters.com/investigates/special-report/colombia-peace/> accessed 31 August 2018.

[5] 'Chapultepec Peace Agreement' (El Salvador, 16 January 1992) chapter VIII; 'Agreement on the definitive ceasefire', Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 12 April 1996) ; Gobierno de la República de Colombia (Gobierno Nacional) and Fuerzas Armadas Revolucionarias de Colombia-Ejercito del Pueblo (FARC-EP) Acuerdo de cooperación entre la Secretaría General de la Organización de los Estados americanos y la República de Colombia para la aplicación y difusión de los instrumentos internacionales de derechos humanos (22 February 2018) <www.oas.org/es/cidh/mandato/docs/AcuerdoCIDH-Colombia-2018.pdf> accessed 31 August 2018; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera', Gobierno de la República de Colombia (Gobierno Nacional) and Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) (Colombia, 12 November 2016) Section 6.3.3.

[6] Mexico Agreements (El Salvador, 24 April 1991); 'Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer' (Guatemala, 23 June 1994) Anex II; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 4) Section 5.

[7] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (March 2010) C.2.

[8] *Campesinos* refer to natives of the Latin American rural area. This term is used in the thesis, as a broader term than 'farmers'. Merriam-Webster Dictionary <www.merriam-webster.com/dictionary/campesino> accessed 18 September 2018.

children.[9] This approach has been recommended by the UN, which stressed the need of including non-discrimination measures in these mechanisms.[10] However, as reviewed in this thesis, the focus of the peace agreements on the most vulnerable groups has not been necessarily translated into reality. These countries have maintained many of the CPR and ESCR violations that initiated and worsened the conflict, which continuous affecting especially the most vulnerable groups.[11]

Despite these issues, Latin American peace agreements have influenced the implementation other TJ mechanisms and the pursuit of TJ purposes, dealing with the serious human rights and humanitarian law violations committed during internal armed conflicts.[12] Moreover, Latin American peace agreements have not only tackle CPR violations, but have also included an ESCR approach in different ways -with the exception of Nicaragua- to address the sources, means and consequences of the internal armed conflicts, as it is examined in Chapter IV.[13]

2.2. National Consultations

National consultations have been considered as TJ mechanisms designed to engage with the population and to understand the real needs of communities affected by a conflict or repressive rule, allowing States to design and implement an appropriate context-specific TJ programme.[14] Despite this, in Latin America the

[9] Jérémie Gilbert 'Indigenous Peoples and Peace Agreements: Transforming Relationships or Empty Rhetoric?' in *Rethinking transitions. Equality and social justice in societies emerging from conflict* (Intersentia, 2011) 225.

[10] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) C.

[11] Jérémie Gilbert (n 8) 225-227; Roland Paris, 'Nicaragua, El Salvador, Guatemala. Reproducing the Sources of Conflict' in *At War's End: Building Peace after Civil Conflict* (CUP, 2016) 132–134. See Chapter IV, section 2.1.

[12] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) NYUJIntlL&Pol, 23.

[13] See Chapter IV, section 2.1.

[14] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.5; OHCHR, 'Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice (2009) HR/PUB/09/2,

selection and implementation of TJ mechanisms have been generally decided by a group of experts and political authorities, with few or non-direct consultation to the population. There has been employed a more "conservative" approach to national consultations, which includes ensuring the participation of victims in the design and/or implementation of TJ mechanisms, such as truth commissions and reparation programmes, but not having the results of this participation a mandatory effect.[15]

However, there are some examples of direct implementation of national consultations with binding effects in Chile, Uruguay, Guatemala and Colombia, which in general have had negative effects on the pursuit of TJ purposes. In Uruguay, the derogation of the amnesty law was rejected in the referendum of 1989 and 2009.[16] The Guatemalan referendum rejected the constitutional reforms proposed by the peace agreements, which included the constitutional recognition of indigenous communities and changes to the armed forces, among others.[17] The Colombian national consultation of 2016 rejected the peace agreement between the government and the FARC-EP, which forced the modification of some

I; UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' A/HRC/12/18 (2009) para 43; Anne-Marie La Rosa, Xavier Philippe 'Transitional Justice' in Vincent Chetal (ed) *Post-conflict peacebuilding: a lexicon* (OUP, 2009) 366, 367.

[15] E.g. Law No 975, 'Ley de Justicia y Paz' (Colombia, 25 July 2005) articles 31, 51; Decree No 015-2006-JUS, 'Reglamento de la Ley que crea la Ley Integral de Reparaciones' (Peru, 25 January 2006) Title II.e.

[16] Constanza Moreira, 'El itinerario y su freno: itinerarios de la lucha contra la impunidad' in Gabriela Fried, Francesca Lessa (eds), *Luchas contra la Impunidad: Uruguay 1985-2011* (Ediciones Trilce, 2011) 14, 15; Francesca Lessa, Elin Skaar, 'Uruguay: Halfway towards accountability', in Elin Skaar, Jemima García-Godos, Cath Collins (eds), *Transitional Justice in Latin America: The uneven road from impunity towards accountability (*Routladge, 2016) 81.

[17] Graham Brown, Corinne Caumartin, 'Horizontal Inequalities in Post-Conflict Reconstruction: Guatemala and Nepal' in Gaby Oré Aguilar, Felipe Gómez Isa (eds) *Rethinking transitions. Equality and social justice in societies emerging from conflict* (Intersentia, 2011) 109; 'Agreement on Constitutional Reforms and the Electoral Regime', Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 12 July 1996).

provisions, especially the ones regarding a proposed integral rural reform.[18] A case of exception was the national consultation in Chile, which had positive results for the pursuit of TJ purposes, considering that the population voted "No" against the continuation of the dictatorship, and was the starting point for the TJ process in Chile.[19]

However, in general, national consultations have not been prevalent in Latin America. This could be understandable considering the economic and social costs of implementing these mechanisms and the unpredictability of the results. Moreover, as explored in the cases of Colombia and Guatemala, national consultations about measures designed to change structural economic, social and cultural inequalities can face certain challenges.[20] Nonetheless, it is important to consider that the UN and TJ scholars have recommended that victims' opinions and needs have to be taken into consideration when choosing different TJ mechanisms, to legitimize the process, avoid the inactivity of the mechanisms and ensure a human rights approach and the representation of the victims and vulnerable groups.[21] In cases when national consultations are not implemented, it is necessary that states take other extra measures to ensure victims' participation, which has not been acted on coherently in Latin America.

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[18] Gina Paola Rodríguez, ¿Cesó la Horrible Noche? Marchas y contramarchas de la paz en Colombia (2016) 3 Revista Política Latinoamericana, 10, 11.

[19] See Chapter V, section 3.1.

[20] See Chapter IV, section 2.2.

[21] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies': Report of the Secretary-General, S/2004/616 (23 August 2004) para 16; UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' (n 14) para 43; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.5; IACommHR, 'The Right to Truth in the Americas', OEA/Ser.L/V/II.152. Doc. 2 (13 August 2014) para 236; Anne-Marie La Rosa, Xavier Philippe (n 13) 366, 367; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2008-2009) 49 Virginia Journal of International Law, 931; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 IJTJ, 35; Mariana Pena, Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 IJTJ, 523.

2.3. Truth commissions

Truth commissions have been considered as official, temporary, non-judicial bodies that aim to accomplish a broad picture of the serious human rights and humanitarian law violations committed during the period.[22] Truth commissions make it possible for the victims to tell their stories, helping to provide a comprehensive account of the "social truth" of the society's experience and facilitating public debate about how to come to terms with the violent period.[23] Furthermore, truth commissions have also been considered a proper mechanism to examine the political, social, cultural and economic root causes of the conflict, to recommend reparations for the victims of serious human rights and humanitarian law violations and to suggest institutional reforms, as guarantees of non-recurrence.[24]

TJ processes in Latin America have been known for their truth commissions,[25] which started to be implemented at the beginning of the 1980s, influencing truth commissions in Africa, Asia, Central America and Eastern Europe.[26] Truth commissions have been implemented in at least 12 countries in Latin America, with plans to create one in Colombia and in Nicaragua.[27]

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[22] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 50; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 917.

[23] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 50; UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', E/CN.4/2005/102/Add.1 (08 February 2005) Principle 6; Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010) 37.

[24] Priscilla Hayner, *Unspeakable Truths* (Routledge 2001) 29; Hakeem O. Yusuf (n 23) 14, 24, 37.

[25] These TJ mechanisms have been also called "truth and reconciliation commissions" (e.g. Chile) or "commissions of truth and justice" (e.g. Paraguay). The notion of "truth commission" is used in this thesis, as the most common and comprehensive term.

[26] Anne-Marie La Rosa, Xavier Philippe (n 14) 372.

[27] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 5.1.1.1; Press Release: Preliminary observations on the IACHR working visit

The mandates of truth commissions of Latin America have changed their approach from very limited to a broader one. Truth commissions from the 1980s and early 1990s dealt mainly with the commission of some serious CPR violations committed during the dictatorships in the Southern Cone, focusing on forced disappearance, torture, unlawful killing and political detention. This is the case of the truth commissions in Chile, Argentina and Uruguay, which described other serious human rights violations, including ESCR violations such as housing destitution and unfair dismissal, mainly as elements of the commission of CPR violations which were part of their mandate.[28]

A broader mandate was attempted in the reports of the Guatemalan and Peruvian truth commissions in 1999 and 2001, respectively. The Peruvian Truth Commission enumerated a larger list of human rights violations that had to be investigated, such as collective violations against indigenous communities. Moreover, it established the possibility of investigating "other serious human rights violations", which was also done in the mandate of the Guatemalan Truth Commission.[29] This open clause allowed these truth commissions to examine in more depth situations of violence against women[30] and "sexual rape" [violación sexual] in the context of the armed conflicts.[31] It has been pointed out that broad

to Nicaragua (21 May 2018) <www.oas.org/en/iachr/media_center/PReleases/2018/113.asp> accessed 06 September 2018.

[28] See Chapter IV, section 2.3; Chapter V, section 3.2.

[29] 'Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer' (n 6) Anex II; Decree No 065-2001-PCM (Peru, 31 August 2001) article 2.

[30] 'Informe Final', Comisión de la Verdad y Reconciliación (2003) Volume I, First Part, Introduction, 23, Volume VI, Section 4, Chapter 1.5, Volume VIII, Section 2, Chapter 3.

[31] Guatemala: 'Memoria Del Silencio', Reporte de la Comisión para el Esclarecimiento Histórico (25 February 1999) paras 2350-2355, 2374, 2381-2391.

mandates would enable a complete picture of the period.[32] However, despite the broad mandates, in practice, these truth commissions continued focusing mainly on serious CPR and humanitarian law violations, examining ESCR violations in a more indirect way, as is examined in Chapter IV.[33]

Some consider that in practice it is impossible to establish a broad picture of the period, considering the subjective nature of history and the economic cost of implementing truth commissions.[34] For this reason, limited mandates would be acceptable if the report specified this limitation and the reasons for it, as in the first Chilean truth commission that investigated only forced disappearance and torture that resulted in death, pointing out that this limited approach does not deny the importance of all rights, including CPR and ESCR.[35] However, these measures in general have not been sufficient to prevent the impression that human rights violations incorporated in the mandates of truth commissions are the only serious ones committed during the violent period, providing a partial historical awareness about the serious human rights violations that were committed.[36]

Among the issues faced by Latin American truth commissions is a possible lack of independence of these mechanisms, as in the case of the proposed

[32] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Devide* (Hart Publishing 2008) 198.

[33] See Chapter IV, section 2.3.

[34] Louise Mallinder (n 32) 198; Hakeem O. Yusuf (n 23) 35.

[35] Decree No 355 'Crea la Comisión de Verdad y Reconciliación' (Chile, 25 April 1990) article 1; 'Informe de La Comisión Nacional de Verdad y Reconciliación (Rettig Report)', Comisión Nacional de Verdad y Reconciliación, 08 February 1991 (Chile) Volume I, Chapter II, section A.1.

[36] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5, 54; Víctor Espinoza Cuevas, María Luisa Ortiz Rojas, Paz Rojas Baeza (eds) *Comisiones de La Verdad: ¿Un Camino Incierto?: Estudio Comparativo de Comisiones de La Verdad En Argentina, Chile, El Salvador, Guatemala y Sudáfrica Desde Las Víctimas y Las Organizaciones de Derechos Humanos* (CODEPU, 2003) 167-171.

Nicaraguan truth commission.[37] Not only participation of civil society, but also the engagement of international organizations, such as the UN, could help to ensure the independence of truth commissions.[38] Moreover, on some occasions there is a lack of impact of the reports of truth commissions, as in the case of Guatemala.[39] This could be due the lack of political willingness, lack of publicity or complicated language of the reports.[40] This is different from the Argentinian truth commission, whose report was a best seller.[41] To improve the impact of the reports of truth commissions, these not only have to be published, but they have to be complemented with other TJ measures, such as the inclusion of these reports in educational curricula and educational training programmes, for example.[42]

Despite these issues, Latin American truth commissions have been valuable TJ mechanism for a better historical account of the violent period by revealing the patterns, causes, and contexts of abuse, challenging the prevailing understanding regarding former regimes and suggesting recommendations for the future.[43] For

[37] IACommHR, Press Release: IACHR to Set up a Coordination Unit to Monitor Events in Nicaragua (03 May 2018) <http://www.oas.org/en/iachr/media_center/PReleases/2018/094.asp> accessed 06 September 2018.

[38] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 51.

[39] Mónica Leonardo Segura, 'Guatemala' in *Las Víctimas y La Justicia Transicional ¿Están Cumpliendo Los Estados Latinoamericanos Con Los Estándares Internacionales?* (Fundación para el Debido Proceso Legal, 2010) 184.

[40] Hakeem O. Yusuf (n 23) 36; Mónica Leonardo Segura (n 39) 184; Paul Gready (n 25) 34.

[41] Alexandra Barahona De Brito, 'Truth, Justice, memory, and Democratization in the Southern Cone' in Alexandra Barahona De Brito, Carmen González Henríquez, Paloma Aguilar (eds) *The Politics Of Memory: Transitional Justice in Democratizing Societie*s (OUP, 2001) 156.

[42] UNCHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 13; See Chapter IV, section 2.3.

[43] Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 927, 928.

this reason, the implementation of truth commissions has been recommended and supported by the Inter-American Human Rights System on several occasions.[44]

2.4. Reparation programmes

Reparations programmes seek to accomplish reparative justice by providing a range of reparations to victims of serious human rights law or humanitarian law violations attributed to the State.[45] Moreover, reparation programmes should assist victims of these violations committed by individuals in the context of the violent period, in case the individuals liable for the harm suffered are unable or unwilling to meet their obligations.[46] These benefits extend also to the families of the victims of these violations.[47] Reparation programmes can also pursue other aims, such as truth-telling purposes, including memorializing victims, educating society and preserving historical memory.[48]

Reparation programmes are, together with truth commissions, common mechanisms suggested and/or implemented in transitional countries in Latin America. Countries such as Argentina, Brazil, Chile, Colombia and Peru have

[44] *Zambrano Vélez et al. v. Ecuador,* Merits, Reparations and Costs (IACtHR) Series C No. 166 (04 July 2007) para 128; *Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs (IACtHR) Series C No. 202 (22 September 2009) para 119; *Dos Erres Massacre v Guatemala,* Preliminary Objection*,* Merits, Reparations and Costs (IACtHR) Series C N° 211 (24 November 2009) para 232; *Chitay Nech et al v Guatemala,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series *C No 212* (25 May 2010) para 234; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 219 (24 November 2010) para 297; *Contreras et al. v. El Salvador*, Merits, Reparations and Costs (IACtHR) Series C No. 232 (31 August 2011) para 135; *Massacres of El Mozote and nearby places v. El Salvador*, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) para 298; IACommHR, 'The Right to Truth in the Americas' (n 21) paras 127, 130.

[45] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) A/RES/60/147, para 15; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.3.

[46] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (n 45) para 16.

[47] Ibid, para 8.

[48] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 6) B.3.

implemented different reparation programmes over the years, while countries such as El Salvador and Guatemala have not been able to implement them effectively.[49] Most of the reparation programmes have been implemented following recommendations of truth commissions, with some exceptions, such as Brazil and Colombia, which started to implement reparation programmes before the creation of truth commissions.[50] For this reason, reparation programmes have been focused on repairing those serious CPR violations that were part of the mandate of the truth commissions, including forced disappearance, exile, unlawful killing, torture and political imprisonment. However, some of these reparation programmes have repaired victims of serious human rights violations that were not part of the mandate of truth commissions, including serious ESCR, such as unfair dismissal, contributing to truth-telling purposes, as further examined.[51]

Reparations programmes implemented in Latin America have been focused on granting mainly individual compensation, but also on restitution and rehabilitation measures for victims of these serious human rights and humanitarian law violations. These reparations programmes have been designed to take into consideration the dignified life and life project of the victims and their families, including pensions, bonuses, restoration of employment, return of property, creation of medical and psychological programmes and programmes of

[49] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 35) 40; Francisca Garretón Kreft, Marianne González Le Saux, Silvana Lauzán, *Políticas Públicas de Verdad y Memoria En 7 Países de América Latina: Argentina, Bolivia, Brasil, Chile, Paraguay, Perú y Uruguay* (Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, 2011)

[50] OHCHR, 'Rule of Law Tools for Post-Conflict States: Reparations programmes' (2008) HR/PUB/08/1, 11.

[51] E.g. Governmental Agreement 258-2003 and its reforms, 'Programa Nacional de Resarcimiento' (Guatemala, 07 May 2003) article 2; See Chapter IV, section 2.4; Chapter V, section 3.3.2.

return for victims of internal or external forced displacement,[52] which has had a positive impact on the enjoyment of CPR and ESCR of victims and their families.[53]

Many of the reparation programmes implemented in Latin America have been used as an example of good practice, such as the Chilean reparation programmes, for making an important effort to address some of the consequences of human rights violations committed during the dictatorship.[54] In addition, Colombia has been well known for their reparation programmes implemented during the armed conflict, which have been designed to accomplish demobilization of armed groups and implementing social, economic and land restitution measures for victims of the violence.[55] Similarly, Peru has been noted for including collective reparations for the victims of violence, targeting especially rural areas.[56]

On the other hand, other reparations programmes have not been so successful, as the National Program for Reparation in Guatemala, which was designed following the recommendations of the truth commission, in favour of victims of forced disappearance, unlawful killing, torture, forced child recruitment, sexual violence, rape, violations against children, massacres, forced displacement and other human rights violations included by the National Commission for Reparation.[57] This is a very ambitious programme if compared to other reparation

[52] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (Chile, 2016) 286; Dinah Shelton, *Remedies in International Human Rights Law* (OUP, 2005) 426.

[53] See Chapter IV, section 2.4; Chapter V, section 3.3.

[54] Elisabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile' in *The Handbook of Reparations* (OUP, 2006) 56, 92.

[55] E.g. Law No 975 (n 14); Law No 1448, 'Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones' [Victims and Land Restitution Law] (Colombia, 10 June 2011).

[56] UNCommHR, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Theodor van Boven, Special Repporteur', E/CN.4/Sub.2/1993/8 (2 July 1993) para 53; Dinah Shelton (n 52) 426.

[57] Governmental Agreement No 258-2003 and its reforms (n 51) article 2; Guatemala: 'Texto El Libro Azul: Política Pública de Resarcimiento' (2003) 25, 26.

programmes designed in Latin America. However, its implementation has faced many issues, including lack of political will, progressive funding cuts, the implementation of only part of the reparations recommended and the progressive restriction of the range of victims that have benefited from this programme.[58]

Still, even in the success cases in Latin America, the implementation of these reparations programmes has been challenging. In these cases, the State has to make decisions regarding who the beneficiaries are, the amount of reparation, kinds of harm are to be covered, the quantification of harm, the ways of comparing and repairing different kinds of harm and the distribution and period of implementation of reparations.[59] This is justified by economic constraints of the transitional country; however it could leave some victims with less or without benefits, resulting in the feeling among some victims that their suffering was lesser than the one of others.[60]

Moreover, there is the risk that in granting reparations, the State could try to avoid its responsibility in the commission of serious human rights and humanitarian law violations, as in the case of Peru, where the State has not been able to recognize the responsibility of state agents in the conflict, having a unilateral approach to victims.[61] To avoid misinterpretations, it has been recommended that reparation programmes should be implemented on the understanding that the State assumes its responsibility and will not avert the

[58] IACommHR, 'Situation of Human Rights in Guatemala: Country report' (31 December 2017) (OAS. Official records; OEA/Ser.L/V/II) paras 138-143; Naomi Roth-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer, 2014) 120.

[59] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 54; OHCHR, 'Rule of Law Tools for Post-Conflict States: Reparations programmes' (n 50) 15-39; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 52) 279.

[60] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 51) 286. See Chapter V, section 2.4.

[61] Cristián Correa, 'Reparaciones En Perú: El Largo Camino Entre Las Recomendaciones y La Implementación' (ICTJ, 2003) 13, 14, 29; Pablo de Greiff (n 3) 19, 20.

victims and their families from pursuing justice and truth.[62] Moreover, it has been recommended to states to implement reparation programmes in consultation with affected communities, particularly the victims,[63] which has not necessarily been conducted in Latin America.

In this way, and despite the difficulties faced, Latin America has offered examples of how reparation programmes can be implemented and how they interact with other TJ mechanisms in pursuing diverse TJ purposes.

2.5. Judicial mechanisms

The judiciary has been considered an essential mechanism to accomplish TJ purposes, not only retributive justice, but also as a guarantee of non-repetition, securing truth seeking, reparation and the re-establishing of the rule of law.[64] Moreover, the judiciary has been used as a platform for legal mobilization, to generate national and international attention and to impulse changes in the system.[65] This has been the case in Latin America, where judicial measures have included international, regional and domestic courts. This is further explored in the following sections.

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[62] UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' (n 14) para 28; Elisabeth Lira (n 52) 58.

[63] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 32.

[64] María Clara Galvis, 'Informe Comparativo' in *Las Víctimas y La Justicia Transicional ¿Están Cumpliendo Los Estados Latinoamericanos Con Los Estándares Internacionales?* (Fundación para el Debido Proceso Legal, 2010) 25, 26; Mayra Feddersen, 'Chile' in *Las Víctimas y La Justicia Transicional ¿Están Cumpliendo Los Estados Latinoamericanos Con Los Estándares Internacionales?* (Fundación para el Debido Proceso Legal, 2010) 88.

[65] Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (2010) 4 IJTJ, 69; Pilar Domingo, 'Accountability, the Rule of Law, and Transitional Justice in Latin America' in *After Oppression: Transitional Justice in Latin America and Eastern Europe* (United Nations University Press 2012) 55.

2.5.1. Judicial Mechanisms at the regional and international level

The International Criminal Court (ICC) and temporary ad-hoc courts have been key international judicial mechanisms in States emerging from conflict, which are unable or unwilling to investigate, prosecute and punish perpetrators of serious human rights and humanitarian law violations.[66] However, they have not been relevant international judicial actors in Latin America. There is currently only one case in the ICC against Colombia, which is still in its preliminary examination.[67] There is also the International Commission against Impunity in Guatemala, constituted to help fighting criminal groups that could have infiltrated state institutions after the armed conflict in Guatemala,[68] which has had a low impact on the investigation, prosecution and punishment of serious human rights and humanitarian law violations.[69]

At the Latin American level, the Inter-American Human Rights System has been a fundamental actor in the pursuit of TJ purposes, condemning amnesty laws, granting reparations and encouraging the prosecution, investigation and punishment of serious human rights violations through national courts.[70] However,

[66] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 38; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law, 481, 483; Hakeem O. Yusuf (n 23) 23, 70; Pilar Domingo (n 65) 23, 70.

[67] International Criminal Court, Preliminary Examination Colombia <www.icc-cpi.int/colombia> accessed 04 April 2018.

[68] UNDPA 'Agreement between United Nations and the State of Guatemala on the Establishment of an International Commission against Impunity in Guatemala ("CICIG") (12 December 2006); UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 38.

[69] The mandate of this commission finishes this year. Press Release, 'IACHR Expresses its Concern over Guatemala's Decision to not Renew the Mandate of the International Commission against Impunity in Guatemala (CICIG)' (04 September 2018) <www.oas.org/en/iachr/media_center/PReleases/2018/196.asp> accessed 07 September 2018.

[70] *Velásquez Rodríguez v. Honduras,* Compensatory Damages (IACtHR) Ser C No 7 (21 July 1989); *Barrios Altos v Peru,* Merits (IACtHR) Series C No. 75 (14 March 2001) para 48; *Myrna Mack Chang v. Guatemala*, Merit, Reparations and Costs (IACtHR) Series C No 101 (25 November 2003) paras 271-277; *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 154 (26 September 2006) para 145; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* (n 44) paras 137-181; *Gelman v. Uruguay,* Merits and Reparations Judgment (IACtHR) Series C No.

it is important to remember that regional and international courts cannot replace the primary role of the State to investigate, prosecute and punish human rights violations.[71] Having this in consideration, the next section examines judicial measures implemented at the national level to pursue TJ purposes.

2.5.2. Judicial Measures at the national level

In earlier stages of transition, Latin American countries focused on truth commissions and reparation programmes, avoiding the implementation of judicial measures,[72] with the exception of Argentina, where judiciary measures started to be implemented in the first years of transition.[73] The continuous application of amnesty laws, the referral of cases to military courts, which in general abandoned any investigation, the permanence of judges that collaborated with the previous regime, political interference, issues with the collection and presentation of proof, economic and social costs of litigation, the absence or inadequacy of legal aid and the lack of judicial precedent have had a negative impact in the implementation of judicial measures in Latin America.[74] This has been criticized by the Inter-

221 (24 February 2011) paras 250-256; Hakeem O. Yusuf (n 23) 122, 129; María Clara Galvis (n 64) 20; See Chapter III, section 3.2.3.

[71] American Convention on Human Rights (ACHR) 1144 UNTS 123 (22 November 1969) article 46; Rome Statute of the International Criminal Court, 'Rome Statute', 2187 UNTS 90 (17 July 1998) article 1; UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 20; David P. Forsythe, 'Human Rights and Mass Atrocities: Revisiting Transitional Justice' (2011) 3 International Studies Review, 85, 91.

[72] Eg. Patricio Aylwin Azócar, 'Presidential Message, 320th Legislature, Regular Session of the Plenary Congress' (Chile, 21 May 1990).

[73] María Clara Galvis (n 64) 24; Paloma Aguilar, 'Jueces, Represión y Justicia Transicional En España, Chile y Argentina' (2013) 71 Revista Internacional de Sociología, 281-308.

[74] Carsten Stahn, 'United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?' (2002) 84 (845) International Review of the Red Cross, 191, 192; Elin Skaar, 'Independencia Judicial y Política de Derechos Humanos en Argentina y Chile' in Germán Burgos S. (ed) *Independencia Judicial en América Latina: ¿De quién? ¿Para qué? ¿Cómo?* (ILSA, 2003) 274; Cath Collins, 'Prosecuting Pinochet: Late Accountability in Chile and the Role of the "Pinochet Case"' (Center for Global Studies, 2009) 5; María Clara Galvis (n 64) 10; Mayra Feddersen (n 100) 79; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 65) 16, 68, 80, 90; Pilar Domingo (n 65) 52; Jo-Marie Burt, 'Desafiando la impunidad en tribunales nacionales: Juicios por derechos humanos en América Latina' in *Justicia transicional: Manual para América Latina* (Comisión de

American Human Rights System as being against truth-telling, justice, due process and other guarantees enshrined in the ACHR.[75]

Despite all these issues, Latin America is the region with the largest number of human rights trials in domestic courts,[76] with the notorious exceptions of Uruguay, Brazil and in Central American countries, where the involvement of the judiciary has been precarious.[77] Argentina, Chile and in a smaller way Peru are the countries with more advances in prosecuting perpetrators of serious CPR and humanitarian law violations, including forced disappearance, unlawful killing, political imprisonment and torture, and granting reparations in civil or criminal courts, with unequal results.[78] Moreover, Colombia has been known for the role the judiciary plays in dealing with the implementation of reparations programmes and the enjoyment of ESCR of victims of forced displacement.[79] Furthermore, the Colombian peace agreement has established the Special Jurisdiction for Peace Tribunal, with the competence to investigate serious human rights and

Amnistía, Ministerio de Justicia de Brasil, 2011) 311, 314, 334; Marny A. Requa, ¿A Human Rights Triumph? Dictatorship-Era Crimes and the Chilean Supreme Court' (2012) 12 Human Rights Law Review 82; Paloma Aguilar (n 73) 288, 297.

[75] *Castillo Petruzzi et al v. Peru,* Merits, Reparations and Costs (IACtHR) Series C No 52 (30 May 1999) paras 86, 128-130, 161; *Durand and Ugarte v. Peru,* Merits (IACtHR) Series C No 68 (16 August 2000), paras 117, 118, 125; *Lori Berenson Mejia V. Peru,* Merits, Reparations and Costs (IACtHR) Series C n 119 (25 November 2004) para 142; *La Cantuta v. Peru,* Interpretation of the Judgment on Merits, Reparations and Costs (IACtHR) Series C No. 173 (30 November 2007) paras 222-228; IACommHR, 'The Right to Truth in the Americas' (n 21) para 133; Hakeem O. Yusuf (n 23) 15; María Clara Galvis (n 64) 14; Jo-Marie Burt (n 74) 333; Marny A. Requa (n 74) 99, 100.

[76] Elin Skaar, Jemima García-Godos, Cath Collins, 'Introduction: the accountability challenge' in Elin Skaar, Jemima García-Godos, Cath Collins (eds), *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge 2016) 7

[77] IACommHR, 'Situation of Human Rights in Guatemala: Country report' (n 58) para 135; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2014' (Chile, 2014) 44-50; Glenda Mezorobba, 'Brazil: The tortuous path to truth and justice' in Elin Skaar, Jemima García-Godos, Cath Collins (eds) *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge, 2016) 88.

[78] INDH 'Informe Anual Situación de Los Derechos Humanos En Chile 2014' (n 77) 44–50; María Clara Galvis (n 64) 26; Mayra Feddersen (n 100) 89.

[79] See Chapter IV, section 2.5.2.

humanitarian law violations committed during the armed conflict by the government and the FARC-EP.[80]

In addition, third states courts have pushed the investigation of human rights violations in countries where amnesty is still the rule, through the application of the universality principle,[81] as in the Pinochet case in the House of Lords, the extradition of Fujimori by the Chilean Supreme Court and the 'Operation Condor' trial conducted by Argentinian Courts.[82]

It is evident, therefore, that judicial measures at the international, regional and national level have played an important role in pursuing various TJ purposes, despite their uneven implementation.

2.6. Institutional Reforms

Institutional Reforms have been considered by the UN as essential for re-establishing the rule of law, sustaining peace, protecting human rights and preventing the recurrence of future human rights violations.[83] Institutional reforms recommended by the UN include structural reforms, legal reforms and educational training.[84] In Latin America, many of these reforms have been implemented

[80] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 5.1.2.

[81] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 48; Darryl Robinson (n 66) 54; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 934; Paloma Aguilar (n 73) 298; Marny A. Requa (n 74) 82, 100; Francesca Lessa, 'Justice beyond Borders: The Operation Condor Trial and Accountability for Transnational Crimes in South America' 9 (2015) IJTJ, 494, 505, 506.

[82] R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.1) [1998] 1 A.C. 61; Operación Cóndor, Tribunal Oral Federal N° 1 de la Capital Federal (Argentina, 27 May 2016); Rol 70009-2017, Corte Suprema (Chile, 06 June 2017).

[83] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principles 35, 36; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.4; Anne-Marie La Rosa, Xavier Philippe (n 14) 369, 371, 375; Hakeem O. Yusuf (n 23) 23, 81; Pilar Domingo (n 65) 57.

[84] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat

following the recommendations of peace agreements and truth commissions.[85] This section examines these institutional reforms, with the exception of educational training that involves ESCR issues as it is examined in Chapter IV.[86]

2.6.1. Legal Reforms

According to the UN, legal reforms could include constitutional reforms and ratification of treaties.[87] These legal reforms are key to Latin America, where repressive regimes have continuously implemented permanent states of emergency, enacting executive decrees and creating a legislative framework that contains discriminatory elements for the enjoyment of not only CPR, but also ESCR, as explored in the Chilean case study.[88] This practice rarely reflects the requirements of international human rights and humanitarian law standards while, its lack of reform imposes important obstacles to achieving the purposes pursued by transitional societies.[89]

Latin America has ratified many regional and international human rights treaties as an important part of the TJ process in the region, on many occasions following the recommendations of truth commissions.[90] Regarding constitution-making processes, these have been considered key in TJ to strengthen and

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Impunity, Diane Orentlicher' (n 23) principles 36-38; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.4.

[85] See Chapter II, sections 2.1, 2.3; Chapter IV, sections 2.1, 2.3.3; Chapter V, section 3.2.3.

[86] See Chapter IV, section 2.6.3.

[87] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.4.

[88] See Chapter V, section 2.

[89] Cath Collins, 'Human Rights Trials in Chile 15 Years after the Pinochet Case' (2013) 18 Aportes DPLF: Magazine of the Due Process of Law Foundation, 72; Fernando Basil, 'Editorial: Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice' (2014) 8 IJTJ, 188.

[90] See Chapter II, section 2.3; Chapter III, sections 2, 3.1; Chapter IV, section 2.3.3; Chapter V, section 3.5.1.1.

legitimise the new regime, stretching the rule of law and basic human rights, allowing to take a broader view on the past circumstances and to debate about the political foundations of the society.[91] In Latin America, new constitutions have been enacted or main constitutional reforms have been implemented, including a new catalogue of CPR and ESCR, as in the cases of Colombia and Paraguay, or new forms of constitutional subordination to international and regional human rights law, as in the case of Argentina and Chile.[92]

In terms of legal reforms, from a TJ perspective these have been focused on the enactment of domestic law to allow the investigation, prosecution and punishment of serious human rights and humanitarian law violations, including the codification of international crimes and reforms of criminal codes.[93] However, these measures have not always triggered prosecutions in Latin America, because of the application of amnesty laws and legal principles as non-retroactivity, due process and legality.[94]

Thus, the implementation of legal reforms should be integral, including not only ratification of human rights treaties, but also constitutional and legal reforms

[91] Derek Powell, 'The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition' (2010) 4 IJTJ, 230.

[92] Constitución de la Nación Argentina [Constitution of the Argentinian Nation] 01 May 1853 (last consolidated text enacted through Law No 24430, 03 January 1995) article 75(22); Constitución Nacional de la República de Paraguay [National Constitution of the Paraguayan Republic] 20 June 1992 (reformed through Constitutional Amendment No 1, 17 October 2011) First Part, Title II, Chapters II-VIII, IX, X; Constitución Política de Colombia [Political Constitution of Colombia] 27 October 1991 (reformed through Legislative Act No 1, 16 December 1997) articles 1, 42-77; Constituição da República Federativa do Brasil [Constitution of the Federal Republic of Brazil] 5 October 1988 (last Constitutional Amendment No 99, 14 December 2017); Pilar Domingo (n 65) 51; See Chapter III, section 4; Chapter V, section 3.5.1.2.

[93] E.g. Law No 20357, 'tipifica crímenes de lesa humanidad, genocidio y crímenes de guerra' (Chile, 18 July 2009); 'Relatório, Volume I', Comissão Nacional da Verdade, (Brazil, 10 December 2014) Part V, Conclusions and Recommendations; María Clara Galvis (n 64) 10; Benjamín Cuéllar, 'El Salvador' in *Las Víctimas y La Justicia Transicional ¿Están Cumpliendo Los Estados Latinoamericanos Con Los Estándares Internacionales?* (Fundación para el Debido Proceso Legal, 2010) 135; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 65) 79; Jo-Marie Burt (n 74) 319; Pilar Domingo (n 65) 51, 52; Marny A. Requa (n 74) 96, 97; Paloma Aguilar (n 73) 298.

[94] See Chapter II, sections 2.5.2, 3.4, 4.1.1, 4.1.2, 4.1.3; Chapter V, section 3.4.2.

that effectively implement the rights and guarantees established in these instruments, including legal and constitutional reforms.

2.6.2. Structural Reforms

According to the UN, structural reforms involve restructuring institutions, public policies and lustration or vetting of public employees involved in the serious human rights and humanitarian law violations.[95] These measures are especially relevant regarding security units and the judiciary in the Latin American countries involved in the violent periods, but they have not been necessarily implemented, which makes the pursuit of a TJ agenda difficult.[96] Still, some truth commissions in Latin America have suggested structural reforms of the institutions linked to the violent period, especially the judiciary, considering the constant complicity of this institution with repressive regimes.[97] These reforms, which have included changes in appointment mechanisms, establishment of new constitutional courts, creation of human rights ombudsmen, specialization of judicial branches, etc., have proved to be effective in the shift to a more progressive human rights approach from the judiciary, as in the case of Chile.[98] On the contrary, the lack of a judiciary reform

[95] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 36 a); UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.4; Priscilla Hayner, *Unspeakable Truths* (n 24) 13.

[96] Hakeem O. Yusuf (n 23) 27, 92; María Clara Galvis (n 64) 9, 10; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 65) 79; Jo-Marie Burt (n 74) 319; Pilar Domingo (n 65) 51, 52; Marny A. Requa (n 74) 96, 97; Paloma Aguilar (n 73) 298.

[97] 'Rettig Report' (n 35) Volume I, Chapter II, section B. 1.3; Guatemala: Memory of Silence', Report of the Commission for Historical Clarification, Conclusions and Recommendations (25 February 1999). Conclusions, para 10; Peru: 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2.1, 110, 111, 116, 127; Hakeem O. Yusuf (n 23) 12, 24, 33, 35, 37; Valeria Barbuto, 'Argentina', in *Las Víctimas y La Justicia Transicional ¿Están Cumpliendo Los Estados Latinoamericanos Con Los Estándares Internacionales?* (Fundación para el Debido Proceso Legal, 2010) 43; Benjamín Cuéllar (n 93) 135; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 65) 68; Paloma Aguilar (n 73) 228, 292, 295, 299.

[98] María Clara Galvis (n 64) 9, 10; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 65) 79; Jo-Marie Burt (n 73) 319; Pilar Domingo (n 66) 42, 51, 52; Marny A. Requa (n 74) 96, 97; Paloma Aguilar (n 73) 298; See Chapter V, section 2.5.2.

in many countries in Central America coincides with the lack of prosecution of serious human rights violations in these countries.[99]

Structural reforms also involve the creation of National Human Rights Institutions and Programmes, which have been implemented by many Latin American countries after the violent periods, to pursue truth-telling, to promote human rights education and monitor the respect, protection and fulfilment of human rights.[100] Moreover, structural reforms include the reform of public policies, as land and housing reform policies that could perpetuate substantive injustices and human rights violations committed during the violent period.[101] These structural reforms can have an important role in the incorporation of an ESCR approach, and therefore, they are explored in Chapters IV and V.[102]

In this way, institutional reforms are not only important mechanisms to pursue TJ purposes, but they also have been considered a precondition for the effective and efficient implementation of other TJ mechanisms. However, despite its importance, this is probably the TJ mechanism less studied by scholars. Moreover, in some Latin American countries the institutional conditions that allowed the massive abuses to take place have remained unchanged, even with the change of the regime to a more democratic one.[103] The success of institutional reforms can be very difficult to achieve for transitional states, because it is a long-term process. What plays an important role in its implementation is the correlation

[99] Hakeem O. Yusuf (n 23) 54.

[100] E.g. Law No 20405, 'crea Instituto Nacional de Derechos Humanos y reabre la calificación de víctimas' (Chile, 10 December 2009); Global Alliance of Human Rights Institutions, Chart of National Institutions acredited <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%288%20August%202018.pdf> accessed 08 August 2018.

[101] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 9) 349.

[102] See Chapter IV, sections 2.62, 2.63; Chapter V, section 3.5.2.

[103] Priscilla Hayner, *Unspeakable Truths* (n 24) 11

of political and economic powers, the residual legitimacy of the previous regime, political will, international human rights law and the pressure of the victims and civil society.[104] These issues in particular have affected the successful implementation of structural reforms to deal with structural economic, social and cultural injustices and discriminatory measures, as examined in the following chapters.[105]

The TJ mechanisms implemented in Latin America, and examined in this section, have pursued different TJ purposes. This is further explored in the following sections.

3. PURPOSES OF TRANSITIONAL JUSTICE

Even though there are different views on the purposes of TJ, what they have in common is the main aim to address serious human rights and humanitarian law violations committed during a violent period.[106] Because this thesis focuses on ESCR, the human rights approach to TJ is taken. This approach includes the TJ purposes recognized by the UN and the Inter-American Human Rights System, which are the State's obligation to investigate, prosecute and punish perpetrators of serious human rights and humanitarian law violations; truth-telling; the right to reparations for victims of serious human rights and humanitarian law violations and the State obligation to prevent, through different measures, including addressing the root causes of conflict and strengthening the

[104] María Clara Galvis (n 64) 19; Jo-Marie Burt (n 74) 332; Pilar Domingo (n 65) 53, 56; Paloma Aguilar (n 73) 281.

[105] See Chapter IV, sections 2.62, 2.63; Chapter V, section 3.5.2.

[106] UNHRC 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff', A/HRC/21/46 (9 August 2012) paras 26, 27; Kora Andrieu, 'Political Liberalism after Mass Violence: John Rawls and a "Theory" of Transitional Justice', in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, Friederike Mieth (eds) *Transitional Justice Theories* (Routledge 2014) 90.

rule of law, the reoccurrence of such atrocities in the future.[107] These TJ purposes will be examined, starting from reparations as the broader TJ purpose where the rest of TJ aims can be subsumed, to deal then with truth-telling; tackling the root causes of conflict; investigation, prosecution and punishment of serious human rights and humanitarian law violations; and finally the reestablishment of the rule of law.

3.1. Reparation to the victims and their beneficiaries

The obligation of the State of granting reparation for its wrongdoings is a well-established obligation in international law.[108] This obligation has been endorsed in its different senses in human rights treaties.[109] In its stricter concept, reparation in *strictu sensu* refers only to restitution in kind and compensation as the payment of money as a "valuation" of the wrong-doing.[110] In its broader notion, reparation *lato sensu* includes different ways by which a State could repair the consequences of a breach of international law for which it is responsible and it includes restitution in kind, compensation, rehabilitation, satisfaction and guarantees of non-repetition, depending on the nature of the violation and its

[107] This thesis uses the notion serious human rights and humanitarian law violations as including the notions of "gross" and "grave". See Chapter I, section 1.

[108] Anne-Marie La Rosa, Xavier Philippe (n 14) 372; See Chapter II, section 2.4.

[109] E.g. Universal Declaration of Human Rights (UDHR) GA Res 217 (A) III (10 December 1948) article 8; Convention on the Elimination of Racial Discrimination, 660 UNTS 195 (07 March 1966) article 6; ACHR (n 70) article 10; International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (16 December 1996) article 2; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (10 December 1984) article 14; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Law Organization (ILO) C No 169 (27 June 1989) article 15; 'Rome Statute' (n 71) articles 75, 78. The International Covenant in Economic, Social and Cultural rights does not include the right to reparation in its articles.

[110] S. Haasduk, 'The Lack of Uniformity in the Terminology of the International Law of Remedies' (1992) 5 Leiden Journal of International Law, 248, 249.

gravity.[111] This thesis uses the notion of reparation in its broad sense, as this is the most used one in TJ and international human rights law organs.[112]

The UN has given examples of the different kinds of reparations with a positive effect in the enjoyment of CPR and ESCR of the victims and their families. Restitution in kind can include the restitution of victims' legal rights, as the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. Compensation can include pensions and bonuses for victims and their families. Rehabilitation can include medical and psychological programmes for victims, as well as legal and social services. Satisfaction includes symbolic measures, such as official declarations or a judicial decision restoring the dignity, reputation and the rights of the victim, public apologies, commemorations and tributes to the victims. Finally, guarantees of non-repetition can include ensuring effective civilian control of military and security forces; and that all civilian and military proceedings abide by international standards of due process, fairness and impartiality and the independence of the judiciary.[113]

Moreover, the UN and the IACtHR have pointed out that guarantees of non-repetition coincides with other purposes of TJ, including changes in relevant laws and practices, prosecution of the perpetrators of human rights violations, truth-

[111] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (n 45) para 18; S. Haasduk (n 110) 246; Dinah Shelton (n 50) 16.

[112] E.g. ACHR (n 71) article 63.1; CESCR, 'General Comment No. 3: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 16; *Mapiripán Massacre v. Colombia,* Merits, Reparations and Costs (IACtHR) Series C No 134 (15 September 2005) para 214; *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C, No. 148 (01 July 2006) para 341; Law N° 18596, 'Reparación a las víctimas de la actuación ilegítima del Estado en el periodo comprendido entre el 13 de junio de 1968 y el 28 de febrero de 1985' (Uruguay, 19 October 2009) article 3; Gina Donoso, 'Inter-American Court of Human Rights' Reparation Judgments: Strengths and Challenges for a Comprehensive Approach' (2003) 49 Revista IIDH, 41, 42, 58.

[113] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 54; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) B.3; Dinah Shelton (n 50) 426.

telling, addressing the root causes of conflict and institutional reforms.[114] At the Inter-American level, this kind of reparations have been the less complied one by the State, especially judicial investigations, the creation or amendment of laws, structural changes or provision of health care.[115] This is a concern, considering that this form or reparation is to benefit the whole society, not only direct victims.[116] The IACtHR has recognized that these reparations are difficult to implement, but this has not been considered as an excuse for the lack of compliance.[117]

Moreover, at the national level, truth commissions and reparation programmes have also generally considered reparations in a broad way, taking into account the improvement of the living conditions of the victims of serious human rights and humanitarian law violations and their families.[118] However, Latin American countries have been less successful in implementing guarantees of non-repetition linked to structural reforms, as pointed out by the IACtHR.[119] There are some accomplishments, such as the creation of Museums of Memory, which have been considered important to accomplish truth-seeking, preserving historical

[114] UNCommHR, 'Introductory Note: The United Nations Basic Principles and Guidelines in the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Theodor van Boven A/RES/60/147 (21 March 2006) para 56; CESCR, 'General Comment No. 3: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (n 112) para 16; UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (n 44) para 56; International Commission of Jurist, 'The Right to a Remedy and to Reparations for Gross Human Rights Violations: Practitioners' Guide No 2' (01 January 2006) Chapters III-V; IACtHR, 'Annual Report 2012' <http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf> accessed 09 September 2018, 13; Gina Donoso (n 112) 41, 44.

[115] ICtHR, 'Annual Report 2012' (n 114) 13.

[116] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 36) 44.

[117] *Plan de Sánchez Massacre v Guatemala*, Monitoring Compliance with Judgment (IACtHR) (21 February 2011) paras 9, 10; Gina Donoso (n 112) 29, 41, 42, 58.

[118] Lisa J. Laplante, 'The Plural Justice Aims of Reparations', *Transitional Justice Theories* (Routledge; 2014) 66, 67; See Chapter IV, sections 2.3, 2.4.

[119] IACtHR, 'Annual Report 2012' (n 114) 13.

memory, as a measure of satisfaction and as a guarantee of non-repetition, informing new generations about the serious human rights violations committed during the violent period, as in the cases of Argentina, Chile, Colombia, Paraguay, and Uruguay.[120]

In this sense, reparations for the victims and their families have been considered essential for transitional countries, despite some issues in their implementation. These countries have recognized the strong link of reparation with the ideas of truth and corrective justice. Then, reparations in a broad sense should be present in the implementation of all TJ mechanisms, including the pursuit of other TJ purposes, as examined in the following sections.

3.2. Truth-telling

The origins of truth-telling can be found in the Additional Protocol I of the Geneva Conventions, which enshrined the right of the family of the missing victims to know what happened to the individuals during armed conflicts.[121] The UN broadened the scope of truth-telling to the right to know the identity of the perpetrators of serious human rights and humanitarian law violations and to the State' duty to preserve the memory and historical record concerning these serious violations.[122] Nowadays, truth-telling is considered as one of the principles to

[120] Francisca Garretón Kreft, Marianne González Le Saux, Silvana Lauzán (n 49) 125-425.

[121] Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (08 June 1977) article 32.

[122] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 2; UNHRC, 'The Right to the Truth', A/HRC/RES/12/12 (12 October 2009) para 2.

combat impunity and to avoid any recurrence of serious violations of human rights and humanitarian law in the future.[123]

In the Inter-American Human Rights System, truth-telling started to be developed through the jurisprudence on forced disappearance in the context of repressive regimes in Latin America as the right of the relatives of the disappeared victim to know "the victim's fate and, if the victim was killed, the location of his/her remains."[124] Truth-telling was linked to other human rights obligations enshrined in the ACHR, including the right to humane treatment,[125] the right to judicial guarantees, the right to access to information[126] and the right to reparation.[127] Nowadays, the Inter-American Human Rights System considers truth-telling as a right that imposes positive obligations to the States.[128] Its content includes not only the right to know the identity of those who played a role in those violations, but also as a right of the whole society to know about the past violations of human rights, which helps to prevent such kinds of violations from reoccurring.[129]

[123] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principles 2-5.

[124] *Velásquez Rodríguez v. Honduras,* Merits (IACtHR) Series C No 4 (29 July 1988) paras 137-146, 181, 253-263; *Barrios Altos v. Peru* (n 70) para 43; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* (n 44) para 201; *Anzualdo Castro v. Peru* (n 44) para 118; *Gelman v. Uruguay* (n 70) paras 186-188, 225; IACommHR, 'The Right to Truth in the Americas' (n 20) paras 63, 66.

[125] ACHR (n 71) article 1(1); IACommHR, 'The Right to Truth in the Americas' (n 21) para 66.

[126] American Declaration of the Rights and Duties of Man, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949) (2 May 1948) articles IV, XVII*; Myrna Mack Chang v Guatemala* (n 70) paras 64-70; ACHR (n 71) articles 8, 13.

[127] *Velásquez Rodríguez v. Honduras,* Merits (n 124) para 181; *Rochela Massacre v. Colombia,* Merits and Reparations (IACtHR) Series C No 163 (11 May 2007) para 220; Kawas *Hernández v. Honduras,* Preliminary Objections, Merits and Reparations (IACtHR) *Series C No. 196* (03 April 2009) para 190; *Anzualdo Castro v. Peru* (n 44) para 118.

[128] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2014' (n 77) 276.

[129] IACommHR, 'Annual Report 1985-1986', OEA/Ser.L/V/II.68, Doc. 8 Rev. 1 (26 September 1986) chapter V, para 70; *Velásquez Rodríguez v Honduras,* Merits (n 124) para 181; *Kawas Hernández v. Honduras* (n 127) para 117; *Anzualdo Castro v Peru* (n 44) para 118; IACommHR, 'The Right to Truth in the Americas' (n 21) para 81.

Therefore, the right to truth is considered not only as an individual but also collective right.

Then, the right to truth has been considered as a right itself at the international and regional law,[130] as a right of the victims, their families and the society in general when dealing with a violent period. At the national level, Latin American truth commissions are considered the main TJ mechanism used to accomplish the right to truth, using different language and focus about the kinds of situations that were investigated, which did not help to build a coherent theory about the content of the right to truth.[131] According to the Inter-American Human Rights System, the right to truth should include at least the investigation of the serious human rights violations.[132] In any case, to accomplish the right to truth, the mechanisms should consider the specific context and the character of massive or systematic violations of human rights and the national, regional and international human rights and humanitarian law obligations in force, not prioritizing CPR over ESCR, which seems to be the case in Latin American truth commissions, as examined in this thesis.[133] The decision about which human rights and humanitarian law violations to investigate should include the participation of the population, to avoid the perception that only a part of the truth was unveiled, excluding an important part.[134]

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[130] International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (20 December 2006) articles 24, 70; UNHRC, 'The Right to the Truth' (n 122) Preamble; UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' (n 14) para 52; OAS, 'El Derecho a La Verdad', AG/RES. 2725, XLII-O/12 (04 June 2012) Preamble; IACommHR, 'The Right to Truth in the Americas' (n 21) para 66.

[131] See Chapter II, section 2.3; Chapter IV, section 2.3; Chapter V, section 3.2.

[132] IACommHR, 'The Right to Truth in the Americas' (n 21) paras 113, 114.

[133] See Chapter IV, section 2.3; Chapter V, section 3.2.

[134] Víctor Espinoza Cuevas, María Luisa Ortiz Rojas, Paz Rojas Baeza (eds) (n 35) 167-171. See Chapter II, section 2.3.

Moreover, truth-telling is also related to other TJ purposes, such as the reestablishment of the rule of law and reparations for the victims and their families.[135] Furthermore, truth-telling has been pursued by other TJ mechanisms. For example, Latin American reparation programmes have helped to accomplish this purpose when granting reparations for human rights violations that were not part of the mandate of the truth commissions, such as unfair dismissal and land destitution.[136] The judiciary, when investigating, prosecuting and punishing serious human rights and humanitarian law violations has led to the knowledge of truth about the facts that are part of the trial.[137] Moreover, institutional reforms, including the creation of Museums of Memory and reforms of the schools' curricula and educational training of public officers and security forces can also help to pursue this purpose.[138]

3.3. Tackling the root causes of the conflict or repressive rule

Tackling the root causes of the conflict or repressive rule has been historically considered as an important part of the accomplishment of truth-telling. However, in recent years started to be addressed by the UN as an independent TJ purpose, as the need to consider the "nature and causes of any recent conflict or any history of human rights abuse, and construct its assistance accordingly".[139] From this notion, it can be asserted that tackling the root causes of conflict is a

[135] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (n 45) paras 22, 24; IACommHR, 'The Right to Truth in the Americas' (n 21) para 204; Anne-Marie La Rosa, Xavier Philippe (n 14) 378.

[136] See Chapter II, section 2.4.

[137] Jaime Malamud-Goti, 'Dignidad, Venganza y Fomento de La Democracia' (2005) 7 Revista Estudios Socio-Jurídicos, 113, 116.

[138] See Chapter IV, section 2.6.3; Chapter V, section 3.5.2.1.

[139] UNSG, 'Guidance Note: United Nations Approach to Rule of Law Assistance' (14 April 2008) 3.

guarantee of non-recurrence, because knowing the reasons of conflict could help the State to implement measures to prevent the recurrence of the violence,[140] such as institutional reforms. Then, this purpose can help to create not only palliative but also preventive measures.[141]

Moreover, the UN has pointed out that addressing the root causes of conflict is essential to accomplish peace and stability, stressing the need to deal in a legitimate and fair manner with root causes such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes between States.[142] From a human rights perspective, this TJ purpose seems to be developed in a more integral and interdependent manner than other TJ purposes, focusing on violations of not only CPR, but also ESCR, which is explored in Chapter IV.[143]

In Latin America, latest truth commissions have dealt with the political, social and economic root causes of conflict, as in the case of Peru,[144] despite the fact that the first truth commissions were reluctant to analyse the root causes of conflict, as in the case of Chile.[145] Still, TJ mechanisms have not tackled these

[140] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 36) 56; Graham K. Brown, Frances Stewart, 'Economic and Political Causes of Conflict: An Overview and Some Policy Implications', Working Paper No 81 (Centre for Research on Inequality, Human Security and Ethnicity, 2015) 14.

[141] Gaby Oré Aguilar, 'Asserting Women's Economic and Social Rights in Transitions' in Gaby Oré Aguilar, Felipe Gómez Isa (eds) *Rethinking transitions. Equality and social justice in contries emerging from conflict* (Intersentia, 2011) 166.

[142] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 4.

[143] UNSG 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) A.9. See Chapter IV, section 2.3.1, 3.3.

[144] Peru: 'Informe Final' (n 30) Volume VIII, Section 2, Chapter 1.

[145] 'Rettig Report' (n 35) Volume I, 27.

issues in a systematic way, referring to structural issues and not to human rights violations, as examined in more detail in Chapter IV.[146]

3.4. Investigation, prosecution and punishment of serious human rights and humanitarian law violations

The investigation, prosecution and punishment of perpetrators of serious human rights and humanitarian law violations has been developed as a TJ purpose since the Nuremberg Trials.[147] There is a relative agreement that the serious human rights and humanitarian law violations that should be investigated, prosecuted and punished by the State include at least international crimes, such as genocide, war crimes and crimes against humanity, all of which are enshrined in diverse instruments.[148] Despite this, Latin American TJ theory and practice during the end of the 1980s and the 1990s developed the idea of a possible "clash" between this purpose and truth-seeking, applying self-amnesty or blank amnesty laws and postponing the investigation, prosecution and punishment of serious human rights and humanitarian law violations.[149]

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[146] See Chapter IV, section 2.3.1. See also Chapter II, section 2.4; Chapter V, section 3.2.1.

[147] Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal (1950) U.N. Doc. A/CN.4/SER.A/1950/Add.1, Principle I.

[148] E.g. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (9 December 1948); Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (12 August 1949); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (12 August 1949); Geneva Convention III Relative to the Treatment of Prisoners of War, 75 UNTS 135 (12 August 1949); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (12 August 1949); Convention on the Elimination of Racial Discrimination (n 109); Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, A/RES/2391(XXIII); International Convention for the Protection of All Persons from Enforced Disappearance (n 134) CAT (n 110); 'Rome Statute' (n 71) articles 6-8; UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) paras 5-58; UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' (n 14) paras 52-55; UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 7) A.1,2.

[149] Víctor Espinoza Cuevas, María Luisa Ortiz Rojas, Paz Rojas Baeza (eds) (n 36) 17; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 922, 923.

The IACtHR has continuously stressed the duty of member states to investigate, prosecute and punish serious human rights violations[150] as an obligation that subsist in cases where these violations were committed by a previous regime[151] or during an armed conflict.[152] These decisions of the ICtHR seem to be represented in the Guatemalan amnesty law and the Colombian peace agreement, which have limited the application of amnesties, not allowing the release from penal responsibility for international crimes.[153] Moreover, some Latin American national courts started to change their approach by the middle of the 1990s, developing creative ways to avoid the application of self-amnesty laws and the lack of criminalization of the serious human rights and humanitarian violations at the national level, arguing, for example, that at the time these violations were committed, they were forbidden under conventional or customary international law.[154] This allowed the investigation, prosecution and punishment of State's agents and paramilitary groups for the commission of serious CPR and humanitarian law violations, including forced disappearance, unlawful killing and torture, as explored in the Chilean case study.[155] There have been attempts, though still marginal, to prosecute private actors that have committed or

[150] ACHR (n 71) articles 1(1), 2, 8, 25; *Barrios Altos v Peru* (n 70) para 49; *Serrano Cruz Sisters v El Salvador*, Merits, Reparations and Costs (IACtHR) Series C No 13 (11 March 2005) paras 170, 171; *Almonacid-Arellano et al v Chile* (n 70) paras 151-153; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 175; *Gelman v. Uruguay* (n 70) para 229; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 917, 936, 937, 939, 940.

[151] *Velásquez Rodríguez v. Honduras,* Merits (n 124) paras 166, 170-172, 174, 176, 181, 184; See Chapter II, section 4.2.2.

[152] Ituango Massacres v. Colombia (n 112) para 300.

[153] Decree No 145/96, 'Ley de Reconciliación Nacional' (Guatemala, 27 December 1996) article 88; Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) 5.1.2.

[154] Ximena Medellín, 'Toward the Consolidation of Justice for International Crimes in Latin America: From Constitutional Debate to Criminal Cases' (2013) Aportes DPLF: Magazine of the Due Process of Law Foundation, 4; See Chapter V, section 3.4.2.

[155] Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 919; Cath Collins, 'Human Rights Trials in Chile 15 Years after the Pinochet Case' (n 125) 22.

collaborated with these kind of violations during the violent periods in Latin America.[156] Despite these advances, in general, there are many cases of contradictory or non-existent jurisprudence.[157]

Still, based on international and regional law instruments, the judgments and practice of TJ mechanisms, it can be asserted that the investigation, prosecution and punishment of serious human rights and humanitarian law violations is a well-established TJ purpose.[158] Moreover, its pursuit has been related to other TJ purposes, such as truth seeking and the reestablishment of the rule of law.[159] This does not mean that the States are obliged to investigate, prosecute and punish all serious human rights violations committed during the violent period, but there is an agreement that in the cases in which amnesties are applied, they should be conditional to the accomplishment of other TJ purposes pursued by the transitional society.[160] In addition, the judgments of the IACtHR and the recent practice of Latin American TJ mechanisms seem to indicate that the release of penal responsibility does not apply to international crimes, which is coherent with the UN reports.[161] Regarding other serious human rights violations, it is important to remember that human rights violations must have legal

[156] See Chapter IV, section 2.5.2.

[157] See Chapter II, section 2.5.2; Chapter V, section 3.4.2.

[158] Diane F Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1990) 100 Yale Law Journal, , 2540, 2542, 2560, 2592-96; Juan E. Méndez, 'Leasons Lerned' in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Due Process of Law Foundation, 2007) 202; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 918, 939; Oskar N.T. Thoms, James Ron, Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 IJTJ, 329.

[159] *Plan de Sánchez Massacre v. Guatemala,* Reparations (IACtHR) Series C No. 105 (19 November 2004) paras 48(18), 81, 83, 98; UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 38; Jaime Malamud-Goti (n 138) 116; See Chapter IV, section 3.4.

[160] Louise Mallinder (n 32) 406-408.

[161] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) paras 10, 32.

consequences,[162] and therefore, in cases where it is not possible to pursue the investigation, prosecution and punishment of these violations, they should be repaired by the State, according to national and international law norms.

3.5. Reestablishment of the rule of law or reestablishment of democracy

The reestablishment of the rule of law has been considered an important TJ purpose by the UN,[163] which has engaged mainly with a liberal conception of the rule of law, as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[164] The Inter-American Human Rights System also engages with this conception of the rule of law, as a traditional and liberal notion that put limits to the power of the State, avoid arbitrariness and accomplish legal certainty.[165]

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[162] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (n 45) para 26.

[163] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 8; UNHRC, 'Human rights, democracy and the rule of law' (19 March 2012) A/HRC/19/L.27; UNGA, 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels', A/Res/67/1 (30 Nov. 2012); David Tolbert, Andrew Solomon, 'United Nations Reform and Supporting the Rule of Law in Post- Conflict Societies' (2006) 19 Harvard Human Rights Journal, 29; Anne-Marie La Rosa, Xavier Philippe (n 14) 369; Vera Gowland-Debbas, Vassilis Pergantis, 'Rule of Law' in Vincent Chetal (ed), *Post-conflict peacebuilding: a lexicon* (OUP, 2009).

[164] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 6.

[165] *Baena Ricardo et.all v. Panama,* Merits, Reparations and Costs (IACtHR) Series C No 72 (02 February 2001) para 107*; Ricardo Canese v. Paraguay,* Merits, Reparations and Costs (IACtHR) Series C No 11 (31 August 2004) para 177; *de la Cruz Flores v. Peru,* Merits, Reparations and Costs (IACtHR) Series C No 115 (19 November 2004) para 80; *Serrano Cruz Sisters v. El Salvador* (n 150) para 75; *Acosta Calderón v. Ecuador,* Merits, Reparations and Costs (IACtHR) Series C No 129 (24 June 2005) para 93; *Palamara Iribarne v. Chile*, Merits, Reparations and Costs (IACtHR) Series C No. 135 (22 November

Moreover, the reestablishment of the rule of law has been considered by the UN as helping to enhance human rights, protecting persons from fear and want, addressing property disputes, encouraging economic development, promoting accountable governance and peacefully resolution of the conflict.[166] From this conception of rule of law, it can be claimed that one of its foundations is the respect, protection and fulfilment of all human rights. However, in practice, the references to human rights are mainly focused on CPR,[167] linking them to the development and promotion of market oriented economic policies as important for re-establishing the rule of law.[168]

These liberal notions of rule of law have influenced Latin American transitional countries in the late 1980s and 1990s, which considered the re-establishment of the rule of law mainly as including the promotion of liberal, representative democracies and liberal market economy, marginalising other conceptions of political and economic systems, which put stronger emphasis on democratic control of the economy and/or social equality, such as social democracy.[169]

2005) para 184; *Lori Berenson Mejia Vs Peru* (n 75) para 126; *Anzualdo Castro v Peru* (n 44) para 81; Vera Gowlland-Debbas, Vassilis Pergantis (n 163) 320, 321.

[166] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 5.

[167] Vera Gowlland-Debbas, Vassilis Pergantis (n 163) 321.

[168] UN, '2005 World Summit Outcome Document', A/RES/60/1 (16 September 2005) paras 22, 24, 29, 39, 46; UNGA, 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (N 165) paras 7, 8, 11, 21, 24(b); Roland Paris 'International Peacebuilding and the "Mission Civilisatrice"' (2002) 28 Review of International Studies, 644-648; Simon Chesterman, 'An International Rule of Law?' (2008) 56 American Journal of Comparative Law, 346.

[169] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2007) 113, 193, 208, 239; Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals* (Bloomsbury Academic, 2013) 26, 29-31; Hanna Franzki, Maria Carolina Olarte, 'Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective', in Buckley-Zistel Susanne, Koloma Beck Teresa, Braun Christian, Mieth Friederike (eds) *Transitional Justice Theories* (Routledge 2014) 20.

Moreover, the democratic movements in Latin America have also influenced the language of TJ, introducing the purpose of reestablishment of the rule of law as the reestablishment of democracy or "democratic transitions", or talking indistinctly about the rule of law and democracy.[170] Moreover, the Inter-American Human Rights System has not only promoted democracy in Latin American states facing violent periods, but it has enshrined democracy as a human right.[171] Some scholars prefer to use the notion of democracy, as the solution to many problems in the process of reconstruction of a society, providing security and civil liberties to citizens.[172] However, the notion of re-establishment of democracy creates distrust in others, as a term that has been used to justify interventionist activities, as in the case of U.S intervention in Latin America during the Cold War.[173]

This thesis uses the notion of the rule of law for its substantial support at the national and international levels. Moreover, democracy has been considered as one of the bases of the rule of law,[174] linking it to components of a democratic regime, such as free and fair elections, local participation, access to information about public affairs and the right to due process in public administration, etc.[175] Furthermore, this term is chosen because it is an open-texture term,[176] and

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[170] Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) article 1; Jean d'Aspremont, 'Post-Conflict Administrations as Democracy Building Instruments' (2008) 9(1) Chicago Journal of International Law, 1.

[171] OAS, 'Fifth Meeting of Consultation of Ministers of Foreign Affairs, Declaration of Santiago' Res I, VIII (1959); ACHR (n 70) article 1; Charter of the Organization of American States, (OAS 1994) O.A.S.T.S. No. l-F, OEA/Ser.A/2/ Rev. 4 at 4-6, OEA/Ser.C/Il.5; Article 2; Christina M. Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West' (1995) 27 NYUJIntlL&Pol, 305–326; Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law, 46.

[172] Rama Mani, Jana Krause, 'Democratic Governance' in Vincent Chetal (ed), *Post-conflict peacebuilding: a lexicon* (OUP, 2009) 106.

[173] See Thomas Carothers, 'Backlash against Democracy Promotion' (2006) 85 Foreign Affairs, 55-68.

[174] Inter-American Democratic Charter (n 170) article 2.

[175] Vera Gowlland-Debbas, Vassilis Pergantis (n 163) 328.

[176] Simon Chesterman (n 168) 331, 340.

despite its liberal reference by the UN and the Inter-American Human Rights System, some Latin American countries have recently engaged with a conception of the rule of law where the State must assume a dynamic role in the economic and social field, called the Social Rule of Law ['Estado Social de Derecho'] as it is examined in the following chapters.[177]

Hence, this section shows that TJ purposes have been pursued in Latin America. When pursuing these TJ purposes, TJ mechanisms have referred to different legal principles, as examined in the following section.

4. LEGAL PRINCIPLES OF TRANSITIONAL JUSTICE

One of the conclusions that can be derived from the previous examination of TJ mechanisms implemented and TJ purposes pursued in Latin America is that there is not uniformity in the transitional processes. Moreover, countries can have diverse notions about the scope of TJ, as regarding the serious human rights and humanitarian law violations that the mechanisms should deal with, the duration of the process and the TJ purposes that should be pursued, among others.[178]

For all these reasons, developing appropriate standards for assessing different TJ mechanisms could be an extremely challenging exercise.[179] However, it seems important to establish a principled conception of transitional processes to "provide criteria for critically evaluating the practice of TJ."[180] This has been considered by the Truth Commission of El Salvador, which recognized that the

[177] See Chapter III, section 4; Chapter IV, section 3.5.

[178] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 5; UNHRC 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' (n 106) paras 26, 27; Anne-Marie La Rosa, Xavier Philippe (n 13) 369, 379; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 921; Paul Gready (n 25) 6-9; David P. Forsythe (n 71) 85, 90; Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7 IJTJ, 234.

[179] Darryl Robinson (n 66) 504, 505.

[180] Stephen Winter (n 178) 234, 235.

analysis of serious acts of violence could not be achieved in a normative vacuum, but based on certain relevant principles of law.[181] In this way, and considering the changing nature of TJ, principles of national and international law can help filling the gaps in new approaches in this area.[182]

The identification of general principles of law in TJ processes is not an easy task. There is not an agreement about which are the legal principles and which ones should be applied to TJ societies.[183] Having this in consideration, this section examines the references to national and international legal principles by the TJ mechanisms reviewed in this study. This thesis considers general principles of national law as the ones common to most national systems of law, assuming that even though specific rules of law usually vary in each country, the basic principles are often very similar in the national legal systems in Latin America.[184] In the case of the general principles of international law, this thesis focuses on the ones derived from international conventional and customary law.[185] The references to legal principles are based in the language used by the Latin American TJ mechanisms.

4.1. General Principles of National Law

[181] 'From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador', Commission on the Truth for El Salvador (El Salvador, 1993) Section II.B.

[182] Peter Malanczuk*, Akehurst's Modern Introduction to International Law* (7th edn, Routledge, 1997) 48, 49; Antonio Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in Sienho Yee, Tieya Wang, *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (Routledge, 2001) 46; Karen Knop, *Diversity and Self-Determination in International Law* (CUP, 2004) 39.

[183] Antonio Cassese (n 188) 54; Louise Mallinder (n 31) 8.

[184] Peter Malanczuk (n 185) 48, 49; Cristine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, 2010) 288, 289.

[185] Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press, 1998) 18, 19; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers, 2008) 42; Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP, 2014) 85.

TJ mechanisms have referred to national principles of law mainly as complementing other sources of law.[186] This section examines some national legal principles with more references in the work of TJ mechanisms in Latin America, which are the principles of legality, non-retroactivity of the law, due process and fair trial, non-discrimination and equality before the law, human dignity, human rights and constitutional principles.

4.1.1. Principles of legality and non-retroactivity of the law

These principles are among the most frequently mentioned ones by TJ mechanisms when dealing with the investigation, prosecution and punishment of serious human rights and humanitarian law violations, with varied results. The principle of legality has been recognized as a non-derogable one, and as inseparable to democratic institutions and the rule of law,[187] following the ICCPR and the ACHR.[188]

For a long time, the principles of legality and non-retroactivity of the law have been used by the State to establish that serious human rights and humanitarian law violations should be typified as crimes in national law at the time to their commission to allow the investigation, prosecution and punishment of those responsible.[189] However, the principle of legality and non-retroactivity of the law started to be implemented by TJ mechanisms with the opposite purpose, i.e.

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[186] *Episodio Parral,* Rol 3.587-2005, Corte Suprema de Justicia (Chile, 27 December 2007) para 1; *Jacqueline Binfa Contreras*, Rol 4329-2008, Corte Suprema de Justicia (Chile, 22 January 2009) para 6; *Hermanos Vergara Toledo*, Rol 7089-2009, Corte Suprema de Justicia (Chile, 04 August 2010) para 17.

[187] *Castillo Petruzzi et al v. Peru* (n 75) paras 114, 121. *Hugo Vásquez Y Mario Superby*, Rol 559-2004, Corte Suprema de Justicia (Chile, 13 December 2006) para 9; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion (IACtHR) OC-14/94 (09 December 1994) para 31.

[188] 'Informe Final' (n 30) Volume I, Section 1, Chapter 4.2.5.

[189] *Jacqueline Binfa Contreras* (n 186) paras 8, 9; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 84.

to condemn the serious human rights and humanitarian law violations committed during the violent period[190] and to allow their investigation, prosecution and punishment, pointing out that the conduct must be typified considering not only valid national law but also international law, including customary international law.[191] This last reasoning is coherent with the ICCPR, which established that the principle of legality incorporates national and international law.[192]

Moreover, the principle of legality has been considered as one of the basic principles for the interpretation of "The Victims and Land Restitution Law" in Colombia, in favour of those forcibly displaced for the armed conflict.[193] In addition, the Colombian Constitutional Court used this principle to stress the importance of considering in the Annual Public Expenditure a budget that would accomplish the full realization of the rights of the victims who benefited from reparation programmes.[194]

In this way, the principle of legality has played a fundamental part in the implementation of TJ mechanisms in Latin America, with diverse consequences. This shows that the intention of legal operators to pursue TJ purposes influences the way legal principles are interpreted and applied.

4.1.2. Due Process Principles

[190] *Castillo Petruzzi et al v. Peru* (n 75) para 121; 0010-2002-AI/TC, Tribunal Constitucional de Peru (Peru, 04 January 2003); 'Informe Final' (n 30) Volume I, Part I, Section I, Chapter 4.2.5; *Lori Berenson Mejia Vs Peru* (n 75) para 197; 'Guatemala: Memoria Del Silencio' (n 31) para 2652; 'Informe de la Comisión Nacional sobre Prisión Política y Tortura ('Valech I Report') Comisión Nacional Sobre Prisión Política y Tortura (Chile, 28 November 2004) Chapter III, 187; *Anzualdo Castro v. Peru* (n 44) para 133; 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación, Comisión de Verdad y Reconciliación (Honduras, 2011) 202.

[191] *Caravana de La Muerte*, Rol 2182-98, Corte Suprema de Justicia (Chile, 28 January 1998) para 15; 'Informe Final' (n 30) Volume I, Section 1, Chapter 4.2.5; *Lori Berenson Mejia v. Peru* (n 75) para 230; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* (n 44) para 179.

[192] ICCPR (n 109) article 15.

[193] Law No 1448 (n 55) article 103. See Chapter IV, section 2.4.2.

[194] *T-025/2004*, Corte Constitucional de Colombia (Colombia, 22 January 2004) section 6.3.2.

Due process principles have been recognised as principles that cannot be suspended in states of emergency or armed conflict.[195] These principles have been used for some national courts to block the investigation of serious human rights and humanitarian law violations, as investigations that were already conducted by military courts.[196] On the other hand, due process principles have been considered by the IACtHR to condemn these investigations conducted by military courts.[197]

Moreover, due process principles have been useful to condemn the serious human rights and humanitarian law violations committed during the violent period and urged for their prosecutions.[198] Furthermore, other due process principles and rules have been used with this purpose, including the principles of impartiality and publicity,[199] the principle of immediacy,[200] the *in dubio pro reo* principle,[201] the principle of not being condemned *in absentio*,[202] the principle of proportionality,[203]

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[195] Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) Advisory Opinion OC-9/87 (IACtHR) Serie A No. 9 (06 October 1987) para 30; Castillo Petruzzi et al Peru (n 75) para 161; Lori Berenson Mejia Vs Peru (n 75) paras 143, 192.

[196] *Almonacid Arellano*, Segundo Juzgado Militar de Santiago (Chile, 28 January 1997) in Almonacid-Arellano et al v Chile (n 69) para 82.20.

[197] *Myrna Mack Chang v. Guatemala* (n 70) para 215; *Ituango Massacres v. Colombia* (n 112) para 289; *Lori Berenson Mejia v. Peru* (n 75) para 223 a); *Almonacid-Arellano et al v. Chile* (n 70) paras 48, 151, 154; *La Cantuta v. Peru*, Merits, Reparations and Costs (IACtHR) Series C No. 162 (29 November 2006) paras 149, 153, 182, 226; *Anzualdo Castro v. Peru* (n 44) para 182; *Gelman v. Uruguay* (n 70) para 242.

[198] 'Guatemala: Memory of Silence' (n 132) Conclusions, paras 95, 96, 133; Peru: 'Informe Final' (n 29) Volume I, Section 1, Introduction, Volume VI, Section 4, Chapter 1.6.2.3.1, 1.6.2.5.1; *Myrna Mack Chang v Guatemala* (n 70) Concurring Opinion J. Cancado Trindade (para 10); *Almonacid-Arellano et al v Chile* (n 70) Separate Opinion Judge Cancado Trindade, 10.

[199] 'Guatemala: Memoria Del Silencio' (n 31) para 2742; 'Informe Final' (n 30) Volume I, Section 1, Chapter 4.2.5, Volume VI, Section 4, Chapter 1.6.2.5.1.

[200] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.2.5.5; Law No 975 (n 15) article 39.

[201] *Pedro Poblete Córdova,* Rol 469-1998, Corte Suprema de Justicia (Chile, 09 September 1998) para 13; 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.2.5.5; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) 5.1.2, 6.3.1, Annex A (Chapter III).

[202] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.2.5.5.

[203] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.1.1., 1.6.2.5.1., 1.6.5.4; *Palamara Iribarne v Chile* (n 165) paras 197, 215, 216.

the principle that no one may be judged without having had the assistance of interpretation into his own language,[204] the right to defence[205] and the independence, impartiality and immovability of the judiciary,[206] among others. Additionally, due process principles have also been viewed as inspiring for the administrative actions when implementing reparation programmes in Colombia.[207]

4.1.3. Principle of non-discrimination and equality before the law

Principles of non-discrimination and equality before the law have also been recognized in international law as non-derogable principles.[208] These principles have been considered by TJ mechanisms when examining the serious human rights and humanitarian law violations committed during the violent period, including the discriminatory application of terrorist laws and the cases of targeted massacres and forced displacement that affected especially vulnerable groups, such as indigenous communities, *campesinos*, women and children.[209] In addition, the principles of non-discrimination and equality before the law have been considered when suggesting guarantees of non-repetition, as the human rights

[204] 'Agreement on Identity and Rights of Indigenous Peoples', Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 31 March 1995) section IV.E.5.5.

[205] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.2.5.5.; *Almonacid-Arellano et al v Chile* (n 70) para 67; *Dos Erres Massacre v Guatemala* (n 44) para 223; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 6.1.9.

[206] *Castillo Petruzzi et al v. Peru* (n 75) para 129; 'Guatemala: Memoria Del Silencio' (n 31) paras 2637, 2668, 2675, 2733; *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (IACtHR) Serie C No. 63 (26 May 2001) para 67; Peru: 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.2.3.4, 1.6.2.5.5; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo', Comisión de la Verdad (Ecuador, 2010) Recommendations, para 153; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 5.1.2 (III).

[207] Law No 1448 (n 55) article 3.1.

[208] International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (16 December 1966) article 2.2; ICCPR (n 109) article 1.

[209] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1, 285, 300, Chapter 2.2; *Anzualdo Castro v Peru* (n 44) para 89; *Mapiripán Massacre v. Colombia* (n 112) para 178.

training for the operators of justice, the inclusion of indigenous community in the communications media.[210] In addition, the principle of equality has been considered by the Honduran Truth Commission when suggesting institutional reforms to guarantee equality in work conditions for men and women.[211]

The principles of equality and non-discrimination are also considered as informing the Colombian Peace Agreement, to accomplish peace and the socio-economic progress.[212] Furthermore, under these principles there is recommended implementation of specific measures to reconstruct family bonds that were affected by the conflict, considering their specific religious, ethnics and cultural characteristics; support to the creation and strengthening of organizations and social movements composed by women, young people and historically discriminated groups, including indigenous and LGBT communities.[213] Moreover, these principles have also informed the Victims and Land Restitution Law in Colombia, which emphasised that authorities should give the same treatment and protection of people and institutions that intervene in the acts under their knowledge, with the exception of those that for their economic, physic or mental conditions need a special treatment and protection.[214]

However, the principles of non-discrimination and equality have not been always considered by TJ mechanisms, as the Chilean and Peruvian reparation programmes, which have been criticised for excluding as beneficiaries some victims of serious human rights and humanitarian law violations and their

[210] 'Agreement on Identity and Rights of Indigenous Peoples' (n 204) section III.h.2.b.; 'Guatemala: Memory of Silence' (n 132) Recommendations, paras 73, 75, 78; *Gelman v. Uruguay* (n 70) para 277.

[211] 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación' (n 190) 68.

[212] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) Preamble.

[213] Ibid, sections 2.2.1, 5.1.3.4.2, 6.2.3.

[214] Law No 1448 (n 55) Article 3.2.

families.[215] Despite this, the principles of non-discrimination and equality have been used by a variety of TJ mechanisms, having in consideration the most vulnerable groups affected by the violent period and allowing the inclusion of a human rights approach that considers not only CPR, but also ESCR.

4.1.4. Human Dignity, human rights and constitutional principles

Human dignity has been essential to justify the inclusion of a human rights approach to TJ, existing references to this principle to condemn regimes that legitimized human rights violations,[216] the commission of torture and the impunity of perpetrators of serious human rights and humanitarian law violations.[217] In addition, human rights principles have also been important for supporting the implementation of the Guatemalan Truth Commission and the Peace Agreement in El Salvador, Guatemala and Colombia.[218] In the latter, human dignity has played an important role in the incorporation of an ESCR approach. Human dignity has been considered as a founding principle that has to be respected by the State when complying with its obligation to fulfil the ESCR of the victims of forced displacement and granting social security and health reparations for these victims.[219] In addition, the Colombian peace agreement established that the implementation of participatory measures, security measures and social

[215] Law No 28592, 'Ley que crea el Plan Integral de Reparaciones' (Peru, 20 July 2005) article 4; Cristián Correa (n 61) 6; See Chapter IV, section 2.4; Chapter V, section 3.3.

[216] 'Rettig Report' (n 35) Volume I, Chapter II, B.1; *Bárbara Uribe y Edwin Van Juric,* Rol 38.638-1994, Corte de Apelaciones Chile, Segunda Instancia (Chile, 30 September 1994) para 7 g); 'Informe Final' (n 30) Volume I, Section 1, Introduction.

[217] 'Guatemala: Memory of Silence' (n 132) Conclusions, paras 49, 53, 54, 77, 91, 100; 'Informe Final' (n 30) Volume I, Section 1, Introduction.

[218] 'Chapultepec Peace Agreement' (n 41) chapter I.1.B; 'Guatemala: Memory of Silence' (n 132) Conclusions (para 99); 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) 3.4.1.

[219] Decree No 2131 (Colombia, 30 July 2003) Preamble; *T-025/2004* (n 194) section 8.1.

programmes had to be implemented with the consideration of the principle of dignity.[220]

Moreover, human rights principles have informed the recommendation of educational measures, including truth-telling, educational curricula, educational campaigns on human rights principles and norms and educational training of security forces.[221] Moreover, human dignity was also considered by the Chilean truth commission in its recommendation for the creation of a National Institute for Human Rights (INDH).[222]

Special emphasis deserves also the principle of the best interest of the child, which has been particularly considered when examining serious human rights violations committed against children in the context of a massacres, forced displacement[223] and prosecution of subversive groups.[224] Moreover, the Ecuadorian Truth Commission considered this principle when recommending filiation reforms to allow the recognition of paternity of those who could not do it for political motives or as a consequence of the human rights violations committed during the violent period.[225]

Constitutional principles have also been linked to democracy, human dignity and human rights principles.[226] For example, the principle of separation of powers

[220] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) 1.3.3.5, 2.2.3, 3.1.5.

[221] 'Guatemala: Memory of Silence' (n 132) Recommendations, para 37; Guatemala: 'Texto El Libro Azul: Política Pública de Resarcimiento' (n 57) 41; *Mapiripán Massacre v. Colombia* (n 112) para 316; *Ituango Massacres v. Colombia* (n 112) para 409; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 283; 'Relatório, Volume I' (n 93) paras 20.5, 21, 22.

[222] 'Rettig Report' (n 36) Volume II, Section 4, Chapter II, D.4.

[223] *Mapiripán Massacre v. Colombia* (n 112) para 152; *Ituango Massacres v Colombia* (n 112) para 244.

[224] 'Informe Final' (n 30) Volume VI, Section 4, Introduction

[225] Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 206) 436, Recommendations, para 137.

[226] Peru: 'Informe Final' (n 30) Volume I, Section 1, Introduction, 20, 28, Volume VI, 353; 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación' (n 190) 395-401; 'Nuevo

was used to stress that the Honduran Armed Forces could not intervene in the functions of other State' powers,[227] and to state the impossibility of the Peruvian and Chilean truth commissions to accomplish the functions of the judiciary.[228] TJ mechanisms have also referred to the principles of constitutional supremacy and constitutional democracy to push the investigation, prosecution and punishment of serious human rights and humanitarian law violations, considering constitutional law and human rights treaties.[229] In addition, constitutional principles have informed land restitution, housing and socio-economic benefits for victims of forced displacement in Colombia.[230]

In this way, human dignity, human rights and constitutional principles have been referred to by various TJ mechanisms, allowing a broader approach of TJ and the inclusion of an ESCR approach. These principles, together with the other principles of national law examined in this section have influenced the pursuit of TJ purposes by Latin American TJ mechanisms. Many of these principles have been considered as non-derogable, as in the cases of legality, non-retroactivity, non-discrimination, equality, fair trial and due process. In addition, principles of national law have been interpreted in a different way depending on the willingness of the legal operators to pursue TJ purposes, as in the cases of legality, non-retroactivity, fair trial and due process. It is also evident that the same principles

Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) sections 2.3.5, 4.1.1, 6.

[227] 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación' (n 190) 191.

[228] 'Rettig Report' (n 35) Volume I, Chapter I, C.2; 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.6.2.

[229] *Bárbara Uribe y Edwin Van Juric* (n 216) paras 7 b), 15; 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.6.2; *T-025/2004* (n 194) section 6.3.2; *Jacqueline Binfa Contreras* (n 186) para 8; *Hugo Vásquez Y Mario Superby* (n 187) para 9.

[230] Decree No 951, 'Por el cual se reglamentan parcialmente las Leyes 3ª de 1991 y 387 de 1997, en lo relacionado con la vivienda y el subsidio de vivienda para la población desplazada' (Colombia, 24 May 2001) Preamble; Law No 1448 (n 55) articles 3, 103.

quoted to pursue TJ purposes focused on serious CPR violations have also been adopted to include ESCR approaches.

4.2. General Principles of International Law

International law has influenced the work of TJ mechanisms in Latin America, especially in cases in which domestic law was not sufficient to give normative support to the pursuit of TJ purposes.[231] TJ mechanisms have incorporated notions of "principles of international law"[232] and "*ius cogens* principles"[233] in some of their reasoning, in a complementary way to other sources of national or international law, as statutes, constitution, customary law or treaties. The following are the principles of international law more frequently mentioned in the work of TJ mechanisms in Latin America.

4.2.1. *Pacta sunt servanda* and *bona fide*

These principles have supported the pursuit of TJ purposes, including the investigation, prosecution and punishment of serious human rights violations and the reestablishment of the rule of law.[234] Moreover, it has been pointed out by TJ mechanisms that according to *pacta sunt servanda* and *bona fide* principles,

[231] 'Guatemala: Memoria Del Silencio' (n 31) paras 1677, 1678.

[232] *Bárbara Uribe y Edwin Van Juric* (n 216) para 14; *Pedro Poblete Córdova* (n 201) para 10; 'Guatemala: Memoria Del Silencio' (n 31) paras 69, 77, 1655, 1677, 1678, 3609; 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.1, 1.2.1.2, 1.2.10, 1.6.4.2.2, Volume IX, Section 4, Chapter 2; '*Jacqueline Binfa Contreras* (n 186) para 9; *Hugo Vásquez Y Mario Superby* (n 186) paras 2, 5, 21; *Hermanos Vergara Toledo* (n 186) para 2; *Rudy Cárcamo,* Rol 288-2012, Corte Suprema de Justicia (Chile, 24 May 2012) para 3; 'Relatório, Volume I' (n 93) para 7; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) Preamble, 5.1.2(I).

[233] *Hermanos Vergara Toledo* (n 186) para 3.

[234] Bárbara *Uribe y Edwin Van Juric* (n 216) para 6 k); *Pedro Poblete Córdova* (n 201) para 10; 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2; *T-025/2004* (n 194) section 4; *Mapiripán Massacre v. Colombia* (n 112) para 133; *Hugo Vásquez Y Mario Superby* (n 187) par 11; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 177; *Fernando Laureani Maturana y Miguel Krassnoff Marchenko v. Miguel Ángel Sandoval Rodríguez,* Rol 517-2004, Corte Suprema de Justicia (Chile, 05 January 2014) para 50.

domestic law cannot be invoked for the un-fulfilment of international obligations, following the Vienna Convention on the Law of the Treaties (VCLT).[235] In addition, these principles have been used in conjunction with the *effet utile* principle, regarding the States' obligation to adopt legislative or other measures as may be necessary to give effect to norms and principles of International Human Rights Law.[236]

Furthermore, it has been pointed out by TJ mechanisms that even in the cases where treaties were not ratified at the time of the violations, the State must comply with customary law or legal principles already recognized by the international community.[237]

4.2.2. Continuity of the state responsibility

This basic principles of international law involves the responsibility of the successor government for the illicit acts committed by an organ of a State or by a person or entity empowered to exercise elements of the governmental authority, in the cases where the person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[238]

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[235] Vienna Convention on the Law of the Treaties (VCLT) UN Doc A/Conf.39/27 (23 May 1969) articles 26, 27, 31; *Pedro Poblete Córdova* (n 201) para 10; 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2; *Hugo Vásquez Y Mario Superby* (n 186) para 11; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 177; *Fernando Laureani Maturana y Miguel Krassnoff Marchenko v. Miguel Ángel Sandoval Rodríguez* (n 234) para 50.

[236] ACHR (n 71) article 2; *Barrios Altos v. Peru* (n 70) para 17; *Durand and Ugarte v. Peru* (n 75) para 136; *Lori Berenson Mejia v. Peru* (n 75) para 220; 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2.2; *Almonacid-Arellano et al v Chile* (n 70) para 117; *La Cantuta v Peru*, Merits, Reparations and Costs (n 201) paras 170, 171; *Anzualdo Castro v. Peru* (n 44) paras 77, 89; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* (n 44) para 177; *Gelman v. Uruguay* (n 70) para 194; *Contreras et al v. El Salvador* (n 44) para 157.

[237] E.g. 'Guatemala: Memoria Del Silencio' (n 31) para 1678.

[238] *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (n 206) para 220; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), Article 7. *Velásquez Rodríguez v. Honduras. Compensatory Damages* (n 70) para 170; *La Cantuta v. Peru,* Interpretation of the Judgment on Merits, Reparations and Costs (n 75) para 173.

The principle of continuity of state responsibility has given competence to the IACtHR to urge Latin American countries to deal with serious human rights violations committed during the violent period. Hence, the IACtHR has pointed out that the successor government is obliged to investigate and repair the victims of serious human rights and humanitarian law violations, as forced disappearance.[239]

The principle of continuity of state responsibility does not allow transitional governments to ignore past violations and therefore, international obligations continue to be the same. Nonetheless, the practice shows that there is more flexibility in transitions, considering the difficulties that the States face where dealing with past serious human rights and humanitarian law violations. In those cases, the political decisions taken by transitional countries should take into consideration other principles, such as feasibility and needs-based prioritisation and *bona fide.*[240]

4.2.3. Principle of Self-Determination

This principle has not been mentioned equally frequently in the work of the TJ mechanisms, despite being considered a fundamental political and legal principle of international law and a basic human right.[241] The exceptions are the

[239] *Velásquez Rodríguez v. Honduras.* Merits (n 127) paras 170, 171, 184; Peru: 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2.2; *Almonacid-Arellano et al v Chile* (n 70) paras 126, 144, 145; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) paras 121, 179; *Gelman v. Uruguay* (n 70) paras 19, 233.

[240] Louise Arbour (n 12) 7; Javier Chinchón Álvarez, 'Justicia Transicional, "Memoria Histórica", y Responsabilidad Internacional Del Estado: Un Análisis General a Propósito Del Cumplimiento de Ciertas Obligaciones Internacionales En Juego Después de Más de Tres Décadas Del Inicio Formal de La Transición Política Española' (2009) 4 Revista de Derecho de Extremadura, 53; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP, 2015) 9.

[241] Charter of the United Nations, 1 UNTS XVI (24 October 1945) article 1; ICESCR (n 212) Article 1; ICCPR (n 109) Article 1; Thomas M. Franck (n 170) 53, 60; Thomas D. Musgrave, *Self-Determination and National Minorities* (OUP, 1997) 99; CM van Walt and W van Praag, 'Self-Determination in a World of Conflict-a Source of Instability or Instrument of Peace?' in Terry D. Gill, Wybo P. Heere, *Reflections on Principles and Practice of International Law: essays in honour of Leo J. Bounches (*Martinus Nijhoff Publishers, 2000) 270; Karen Knop (n 188) 32; Vera Gowland-Debbas, Vassilis Pergantis (n 163) 329; Siobhán McInerney-Lankford 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 Journal of Human Rights Practice, 51-53; Olivier De Schutter, International Human Rights Law: Cases, Materials, Comments (CUP, 2010) 68.

Colombian peace agreement, which refers to self-determination as a principle in the inclusion of an ethnic approach and when including guarantees to political participation.[242] Also, the decree that creates the Honduran truth commission included self-determination as an important principle of public international law, which inspires this TJ mechanism.[243] Furthermore, there is an indirect reference to this principle by the Guatemalan and Paraguayan truth commissions, in cases when the armed conflict involved indigenous communities, in terms of the right of indigenous communities to keep their customs and own institutions, recognized in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169).[244]

Hence, the principle of self-determination has been referred to by truth commissions dealing with armed conflicts in Latin America, with a focus on indigenous communities directly affected by the conflict.

4.2.4. Principles on reparations

In a broad sense, the IACtHR has recognized reparations as a fundamental principle of contemporary international law regarding State's responsibility, supporting its reasoning in international law and jurisprudence.[245] The principle of

[242] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) sections 2.1.2, 6.2.2.

[243] Executive Decree No 001-2010 (Honduras, 30 April 2010).

[244] 'Guatemala: Memoria Del Silencio' (n 31) paras 1719, 2856, 2869, 2870, 2878, 2883; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres', Conclusiones y Recomendaciones', Comisión de Verdad y Justicia (Paraguay, 28 August 2008) 155.

[245] E.g. *Factory at Chorzów,* Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9 (26 July 1927) 21; *Factory at Chorzów*, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17 (21 November 1927) 29; *Velásquez Rodríguez v. Honduras.* Compensatory Damages (n 70) para 25; *Myrna Mack Chang v. Guatemala* (n 69) paras 234, 235; *Plan de Sánchez Massacre v. Guatemala,* Reparations (n 158) para 52; *Lori Berenson Mejia v. Peru* (n 75) para 230; *Mapiripán Massacre v. Colombia* (n 112) para 243; *Ituango Massacres v. Colombia* (n 112) para 346; *Palamara Iribarne v. Chile* (n 165) paras 232, 233; *Almonacid-Arellano et al v. Chile* (n 70) paras 144-162; *La Cantuta v. Peru*, Merits, Reparations and Costs (n 197) paras 115, 199, 200, 207; *Anzualdo Castro v. Peru* (n 44) paras 170; *Dos Erres Massacre v. Guatemala* (n 44) para 233; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* (n 44) para 245.

reparations has allowed the IACtHR to grant reparations in a broad sense.[246] The Chilean and Honduran truth Commissions also recognized reparation as a principle of international public law, also recommending reparations in a broad sense.[247] Hence, reparations have been recognised not only as a TJ purpose but as an international legal principle in TJ mechanisms in Latin America.

4.2.5. Principles of International Human Rights and Humanitarian Law

TJ mechanisms have made many references to "principles of international human rights law and humanitarian law" and "general principles of international criminal law" to pursue a variety of TJ purposes.[248] Moreover, the IACtHR has pointed out the existence of "fundamental principles of the Inter-American System" to condemn forced disappearance and massacres.[249] Furthermore, the Guatemalan truth commission recognized the applicability of customary law and general principles of international law during the armed conflict, based on the prominence of human rights treaties on internal law.[250] In cases where this prominence is not so clear in the Constitutions, as in the case of Chile, courts have

[246] See Chapter II, section 3.1.

[247] 'Valech I Report' (n 190) Chapter IX, 518; 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación' (n 190) 48.

[248] *Caravana de La Muerte* (n 191) par 16; 'Guatemala: Memory of Silence' (n 132) Conclusions [103, 127, 141]; 'Guatemala: Memoria Del Silencio' (n 31) paras 76, 202, 1651, 1661, 1662, 1679, 1685, 169, 1698, 1699, 1693, 1696, 1700, 2368, 2370, 2964, 3768; Peru: 'Informe Final' (n 30) Volume IX, Section 4, Chapter 2; *Myrna Mack Chang v. Guatemala* (n 105) paras 282, 292; 'Valech I Report' (n 190) Chapter II, 27, 29; *Fernando Laureani Maturana y Miguel Krassnoff Marchenko v. Miguel Ángel Sandoval Rodríguez* (n 234) paras 50, 51; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) Preamble, 5.1.2 (I).

[249] *Velásquez Rodríguez v. Honduras,* Merits (n 127) para 158; *Gomes Lund et al (Guerrilha do Araguaia) v Brazil* (n 44) para 105; *Gelman v. Uruguay* (n 70) para 75; *Contreras et al v El Salvador* (n 44) para 83.

[250] 'Guatemala: Memoria Del Silencio' (n 31) para 1692.

recognized the preferential applicability of norms of international human rights law.[251]

Moreover, TJ mechanisms have included specific humanitarian law principles in their reasoning, including the automatic applicability of norms of humanitarian law, the principle of non-applicability of statutory limitations to war crimes and crimes against humanity and universal jurisdiction.[252] In addition, the *pro homine* principle and the dynamic interpretation of human rights principles have been considered by Latin American TJ mechanisms as international human rights principles to limit to the application of amnesty laws,[253] even though these are also principles of national law.

Furthermore, Latin American TJ mechanisms refer to international human rights principles to include ESCR approaches. The Peruvian Truth Commission, when examining international human rights obligations, refers to the principles of interdependence, indivisibility and universality of human rights,[254] which would support the idea of including all human rights violations in the work of TJ mechanisms, disabling the scrutiny of past abuses without looking at the spectrum of rights violations.[255] In the case of the Colombian peace agreement, the principles of universality, equality and progressivity of human rights have been enshrined to consider the impact of the conflict in ESCR, when implementing

[251] *Bárbara Uribe y Edwin Van Juric* (n 216) para 6 i).

[252] From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador' (n 181) s II. B.2. ; 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.1, 1.2.1.3, 1.3.1, 1.4.1.1, 1.4.2.1, 1.5.3; *Hugo Vásquez Y Mario Superby* (n 187) paras 2, 12,14-17, 27; *Hermanos Vergara Toledo* (n 186) para 9; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia. Resumen Ejecutivo' (n 206) 418; 'Relatório, Volume I' (n 93) para 14.

[253] *Bárbara Uribe y Edwin Van Juric* (n 216) para 12; Informe Final' (n 30) Volume VI, Section 4, Chapter 1.6.5.10

[254] 'Informe Final' (n 30) Volume VI, Section 4, Chapter 1.9.1.2.3.

[255] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 9) 346.

reparations.[256] Moreover, the principle of non-implementation of retrogressive measures, which is part of the general obligations enshrined in the ICESCR,[257] is explicitly considered for the interpretation and implementation of all parts of the Colombian peace agreement, as a principle enshrined in the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination, UN Declaration on the Rights of Indigenous People and the ILO Convention No 169.[258]

Hence, TJ mechanisms have referred to national and international principles to justify the pursuit of TJ purposes examined in this thesis, contributing at the same time to the formation of international law.[259] Latin American TJ mechanisms have showed a strong support for human rights principles. Therefore, the inclusion of a human rights approach to the work of these mechanisms cannot be denied. Moreover, there are proper principles of TJ, such as feasibility and needs-based prioritisation that are not referred directly by the mechanisms. However, State practice show the constant application of this principle, which would allow TJ mechanisms to prioritize the focus of their mandate in some serious human rights and humanitarian law violations, leaving others outside the scope.[260] Yet, the use of these principles should not allow the inactivity of the State or the creation of an non-existent hierarchy between human rights violated. It should instead help to progressively implement TJ mechanisms to achieve the aims of the

[256] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 5.

[257] See Chapter III, section 2.1.2.

[258] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 5) section 6.2.

[259] Antony Anghie (n 169) 237; Cristine Bell (n 184) 289.

[260] Evelyne Schmid (n 239) 9.

transitional society, considering the type of violations committed during the violent period and the legal principles of national and international law.

5. CONCLUDING REMARKS

This chapter demonstrates that Latin American countries have implemented diverse TJ mechanisms in different periods, facing in some cases periods of inertia. This could be due to, for example, the lack of willingness of the political leadership and society or the application of amnesty laws,[261] a situation that can change once there is a more stable and democratic government.

The most frequently implemented TJ mechanisms in Latin America include truth commissions and reparation programmes. These mechanisms have pursued several TJ purposes, which coincides with the notion of reparations in a broad sense. Furthermore, these TJ processes have been mainly focused on dealing with some serious CPR and humanitarian law violations, following the historical approach to TJ taken at the international level.

Moreover, the Latin American experience shows that even though each TJ mechanism helps to fulfil more than one TJ purpose, the pursuit of TJ purposes should occur with the complementary implementation of TJ mechanisms, to compensate for their limitations and to better accomplish the TJ purposes pursued by the transitional society.[262]

[261] Anne-Marie La Rosa, Xavier Philippe (n 14) 376; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 935.

[262] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (n 23) principle 8; Darryl Robinson (n 66) 484; Louise Mallinder (n 32) 198; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (n 21) 981; Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, Eric Wiebelhaus-Brahm, 'When Truth Commissions Improve Human Rights' (2010) 4 IJTJ, 476; Pablo de Greiff (n 3) 19, 20; Paul Gready (n 25) 21.

Furthermore, it is important to consider that not all TJ processes are the same and it is difficult to propose one formula to address all of them,[263] especially considering the different circumstances of each country, the violations of human rights committed and the needs of the victims.[264] Furthermore, the Latin American experience show that developments in regional and international human rights and humanitarian law have impacted on the implementation of TJ mechanisms and the TJ purposes pursued in transitional societies.[265] For this reason, and recognizing that the development of appropriate standards for assessing different TJ mechanisms could be an extremely challenging exercise[266] when implementing TJ mechanisms, transitional countries should have clarity not only about the TJ purposes pursued[267] but also about the principles of national and international law applicable in the transitional context, always adopting a human rights and victims' perspective.[268] Then, national and international legal principles can play an important role, especially considering that at the Latin American level seems to be in agreement about the legal principles that should inform TJ processes with regard to the most serious CPR violations, but also with some references to ESCR.

[263] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 17; Anne-Marie La Rosa, Xavier Philippe (n 14) 376; Hakeem O. Yusuf (n 22) 69; Alexandra Barahona de Brito, Laurance Whitehead (n 41) 488.

[264] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) para 14; Anne-Marie La Rosa, Xavier Philippe (n 14) 376; Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, Eric Wiebelhaus-Brahm (n 274) 457; David P. Forsythe (n 71) 85.

[265] Pilar Domingo (n 65) 50.

[266] Darryl Robinson (n 66) 504, 505.

[267] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 21) Summary; Anne- Marie La Rosa, Xavier Philippe (n 13) 378.

[268] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (n 39) 18; Alexandra Barahona de Brito, Laurance Whitehead (n 41) 490, 491.

Then, it is possible to distinguish some legal basis for the implementation of the TJ mechanisms and the pursuit of TJ purposes, based on States' obligations under national and international law.

CHAPTER III

ECONOMIC, SOCIAL AND CULTURAL RIGHTS OBLIGATIONS IN LATIN AMERICA: THE INTERNATIONAL AND INTER-AMERICAN HUMAN RIGHTS SYSTEM

1. INTRODUCTION

After reviewing the normative framework of TJ in Latin America, and before analysing the inclusion of ESCR approaches in the work of TJ mechanisms in the region, it is important to examine the main ESCR obligations in force in Latin American countries during the violent period and during the implementation of their TJ mechanisms. To accomplish this purpose, the chapter reviews the international, regional and domestic ESCR framework of the Latin American countries selected. In the case of the international regulation, this chapter focuses on the obligations derived from ICESCR as the main human rights instrument that contain ESCR. Then, this chapter explores the ESCR obligations of the Latin American States under the Inter-American Human Rights System, focusing on the instruments and approaches relevant for this thesis. After that, this chapter examines the ESCR enshrined at the domestic level, focusing on its constitutional recognition. The analysis of the ESCR obligations in this chapter is conducted from a TJ perspective, with a focus on the relevant provisions for the Latin American countries examined in this thesis, to understand the extent of ESCR obligations during the violent period and during the transition.

2. STATE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

This section concentrates on the ICESCR, as the main international treaty that enshrines ESCR. It also examines the work of the CESCR, as the organ

responsible for the interpretation and supervision of the ICESCR. It focuses on the general comments, concluding observations and reports of the CESCR about the Latin American countries examined.

Through these instruments, this section examines the general obligations enshrined in article 2(1) of the ICESCR, the typology of obligations and the limitations and derogations of ESCR. This thesis does not include the Optional Protocol to the ICESCR, because its ratification by Latin American countries has been limited.[1] Moreover, the focus on the ICESCR does not deny that other international law instruments contain ESCR.[2] However, because the ESCR obligations derived from these instruments can be contained in the general obligations enshrined on the ICESCR, this chapter focuses on this instrument.

The ICESCR has been considered one of the basic instruments of International Human Rights Law.[3] The discussion process of the ICESCR was complex, with the creation of two blocs, one supporting the socialist approach, led by the Soviet Union, which stressed the importance of ESCR; and the other, the capitalist, liberal and political democratic west, led by the United States, which denied the existence of ESCR.[4] At the time of the discussion of the ICESCR, many Latin American countries were influenced by socialist ideas, mainly connected with

[1] From the States examined, only Argentina, Uruguay, Ecuador and Honduras have ratified it, while Guatemala, Paraguay and Chile have just signed it. Currently there are two pending cases against Ecuador, regarding social security rights. OHCHR, Jurisprudence Database <http://juris.ohchr.org/en/search/results?Bodies=9&sortOrder=Date> accessed 27 August 2018; OHCHR, Status of Ratification: Interactive Dashboard <http://indicators.ohchr.org/> accessed 27 August 2018.

[2] E.g. Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989); Convention on the Elimination of Racial Discrimination 660 UNTS 195 (07 March 1966); Convention on the Rights of Persons with Disabilities, A/RES/61/106 (24 January 2007); Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (08 December 1979).

[3] Matthew C. R. Craven, 'The International Covenant on Economic, Social and Cultural Rights – A Perspective on Its Development' (PhD Thesis, University of Nottingham 1992) 1

[4] Jo M. Pasqualucci, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings International and Comparative Law Review, 10, 11; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd Edition, Hart Publishing 2016) 18.

the Social Doctrine of the Church, and therefore, they intersected with many of the views from within the Soviet Block.[5]

The ICESCR entered into force on 3rd January 1976 and it has been ratified since then by 169 states, while the ICCPR has 172 ratifications.[6] In this way, the complex political context of the Cold War did not affect the number of states that ratified the ICESCR.[7] It caused, however, a persistent idea that ESCR are attached to political ideologies inherently incompatible with a free market economy, while CPR would be less politically charged and more compatible with most systems of government.[8] However, the CESCR has explicitly stated that that the ICESCR does not require any form of government or economic system, provided that it is a democratic system where all human rights are respected.[9] This does not differ from the requirements of the ICCPR and the Inter-American Human Rights System.[10]

All the Latin American countries examined in this thesis have ratified the ICESCR,[11] with only one reservation from Argentina, which is not a substantive

[5] Álvaro Paúl Díaz, 'La Génesis de La Declaración Americana de Los Derechos y Deberes Del Hombre y La Relevancia Actual de Sus Trabajos Preparatorios' (2016) XLVII Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 371.

[6] OHCHR, Status of Ratification: Interactive Dashboard (n 1).

[7] Jo M. Pasqualucci (n 4) 11.

[8] Philip Alston, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HumRtsQ, 160. For a dissenting perspective, see Michael J Dennis, David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanisms to Adjudicate the Rights to Food, Water, Housing, and Health? (2004) 98(3) The American Journal of International Law, 462-515.

[9] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' CCPR/C/21/Rev.1/Add.13 (14 December 1990) para 8.

[10] IACommHR, 'Annual Report 1979-80' OAS Soc OEA/Ser.G/CP/Doc. 110/780, at 152 (1980); Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) article 13; Philip Alston (n 8) 181.

[11] OHCHR, Status of Ratification: Interactive Dashboard (n 1).

one.[12] Regarding the time of the ratification of the ICESCR, a majority of Latin American countries, such as Chile, Ecuador, El Salvador, Peru or Uruguay, signed or ratified the ICESCR before the beginning of the dictatorships and armed conflicts. In the cases of Colombia, Guatemala, Honduras and Panama, they ratified the ICESCR during their violent period. Argentina signed the ICESCR before the dictatorship began, but it ratified it during the transition. Brazil and Paraguay are the only of the examined Latin American countries that ratified the ICESCR after the violent period.[13] In this way, the CESCR has had the opportunity to review the compliance with the ICESCR in most of the examined Latin American States, not only during their transitions, but also during their dictatorships and armed conflicts. This allows tracking what are the ESCR violations found by the CESCR during dictatorships and armed conflicts in Latin America, and how these violations were linked with the obligations that States must assume during their transitions.

2.1. General Obligations

The nature of the general states obligations under the ICESCR are enshrined in article 2(1), establishing the States general obligations to take steps by all appropriate means, the progressive realization of ESCR and the use of the maximum of available resources.[14] These obligations have been considered by the CESCR when examining the reports of Latin American countries facing a violent period or transition, as it is examined.

[12] [The Government of Argentina makes a] formal objection to the [declaration] of territorial extension issued by the United Kingdom with regard to the Malvinas Islands (and dependencies), which that country is illegally occupying and refers to as the "Falkland Islands". 'The United Nations Human Rights Treaties' <www.bayefsky.com/pdf/argentina_t2_cescr.pdf> accessed 10 September 2017.

[13] OHCHR, Status of Ratification: Interactive Dashboard (n 1).

[14] International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (16 December 1966) article 2(1).

2.1.1. The obligation to take steps by all appropriate means

The obligation to take steps by all appropriate means is an immediate obligation for the full realization of ESCR, which includes the adoption of legislative measures. The CESCR has established that the adoption of legislative measures is not the only way to comply with this obligation, and that each state party should determine which measures are needed.[15] However, in a later general comment, the CESCR has stressed that the formal incorporation of the provisions of the ICESCR in domestic law would be desirable or even indispensable.[16] Moreover, according to the CESCR the incorporation of ESCR at the constitutional level would seem to be the most secure -and elevated- manner of legal implementation,[17] recommending Chile to include the recognition and necessary protection of ESCR in its Constitution,[18] and congratulating Ecuador and Paraguay for including ESCR in their new Constitution.[19]

Moreover, in cases where specific ESCR have been enshrined at the constitutional level or where the provisions of the ICESCR has been incorporated directly into national law, the CESCR could request the countries' information as to the extent to which these rights are justiciable.[20] Considering this, in one of the reports to the CESCR, the representative of Colombia pointed out that a vague legal and constitutional recognition of ESCR does not allow these violations to be

[15] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) paras 4-7.

[16] CESCR, 'General Comment No 9: The Domestic Application of the Covenant', E/C.12/1998/24 (03 December 1998) paras 8, 3.

[17] Ibid, para 9.

[18] Concluding Observations-Chile, E/C.12/1/Add.105, 01 Dec 2004, section D; CESCR, Concluding Observations-Chile, E/C.12/CHL/CO/4, 06 July 2015, section C.

[19] CESCR, Concluding Observations-Paraguay, E/C.12/1/Add.1, 28 May 1996, para 3; CESCR, Concluding Observations-Ecuador, E/C.12/ECU/CO/3, 13 December 2012, para 6.

[20] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 6.

subject of criminal proceedings.[21] Following this comment, it is important to stress that that legislation criminalizing genocide, crimes against humanity or torture would also allow the prosecution of at least serious ESCR violations, such as starvation, destruction of property, schools and health centres, genocide by deliberately affecting conditions of life, etc.,[22] providing that the elements to become an international crime are satisfied.[23]

In addition, constitutional and legal measures are not sufficient if they are not accompanied by other administrative, financial, social and cultural measures, especially where there are structural ESCR issues, as it is the case in Colombia.[24] In Latin America, the CESCR has considered other appropriate means, such as the promotion of ESCR through media, the improvement of the macroeconomic performance, lowering inflation, fiscal or monetary policies, reduction of taxes on nutritious food, agrarian reforms, etc.[25] Moreover, the CESCR has pointed out that measures for economic growth do not lead by themselves to the best protection of ESCR. On the contrary, structural adjustment programmes and economic liberalization policies introduced by the State can have a negative effect in the

[21] The Spanish version extends the effect to the vague recognition of ESCR as affecting "judicial actions" instead of "criminal proceedings". CESCR, 'Report of the 4th Period of Sessions', E/1990/23-E/C.12/1990/3, 15 January-02 February 1990, Chapter V (Colombia) para 182.

[22] Rome Statute of the International Criminal Court, 2187 UNTS 90 (17 July 1998), articles 8(2)(a)(iii), Art 8(2)(a)(iv), Art 8(2)(b), Art 8(2)(b)(ii), Art.8(c), Art.7(1)(b), 7(2)(b), 7(2)(g), 7(1)(h); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 85.

[23] See Chapter IV, section 3.4.

[24] UNHRC, 'Annual Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia', A/HRC/37/3/Add.3 (02 March 2018) paras 21, 27, 41, Recommendations (B).

[25] CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3, 28 May 1996, paras 23-25; CESCR, Concluding Observations-Peru, E/C.12/1/Add.14, 20 May 1997, para 12; CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74, 06 December 2001, para 44; CESCR, Concluding Observations-Chile, E/C.12/1/Add.105 (n 18) para 5; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5, 07 June 2010, para 22; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 89.

enjoyment of ESCR of the society.[26] This is important in Latin American Countries, where the democratization processes were frequently accompanied by the imposition or permanence of a liberal market economy.[27]

Moreover, the CESCR has linked the obligation of taking all necessary steps with TJ purposes in the case of Colombia, urging the State to "take effective measures to provide for the personal security of trade union representatives, to try and punish the persons responsible for murdering trade union members and to provide for appropriate compensation for the victims' families".[28] Moreover, the CESCR asked Colombia to take all the legislative and administrative measures to ensure that all workers can exercise their trade union rights.[29] This is an important recommendation from a TJ perspective, considering that the persecution and killing of trade union leaders have been serious human rights violations committed in Colombia during the armed conflict.[30] These concluding observations of the CESCR show the strong connection between CPR and ESCR violations in the context of the armed conflict in Colombia.

2.1.2. The progressive realization of economic, social and cultural rights

The general obligation of progressive realization of ESCR is a distinctive obligation enshrined in the ICESCR, as a similar clause is non-existent in the ICCPR. The inclusion of the notion of progressive realization generated a debate when the ICESCR was drafted due to the concern that this obligation would be

[26] CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) para 9.

[27] See Chapter II, section 3.5.

[28] CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) para 38.

[29] Idem.

[30] Comisión Histórica del Conflicto y sus Víctimas, 'Contribución al entendimiento del conflicto armado en Colombia (Colombia, February 2015) 89.

used by States to avoid their responsibilities under the ICESCR.[31] It was agreed that progressive realization is an obligation possible to identify and that it cannot be used by the State as an excuse to refuse to comply with its obligations under ICESCR.[32]

The inclusion of the clause on progressive realization of ESCR has created the idea that ESCR obligations are always progressive, while CPR obligations are immediate.[33] However, the CESCR has pointed out that the general obligations enshrined in the ICESCR include the immediate obligations of non-discrimination, taking steps by all appropriate means and the prohibition of taking any deliberately retrogressive measures. These immediate obligations of ESCR should be considered when examining the compliance with the progressive realization of ESCR.[34]

In addition, many specific ESCR include not only progressive but also immediate obligations.[35] The right to housing, for example, includes the immediate duty to refrain from forced evictions and the duty of legal protection against forced evictions.[36] The right to education includes freedom of education and the

[31] UNGA, 'Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General)', Document A/29291 (01 July 1995) chapters V, 10; Philip Alston (n 8) 175.

[32] Philip Alston (n 8) 174-177; Ben Saul, David Kinley, Jaqueline Mowbray (eds) *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP, 2014) 2.

[33] Philip Alston (n 8) 159; Javaid Rehman, *International Human Rights Law* (2nd edition, Pearson, 2010) 142; Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 1.

[34] International Covenant on Economic, Social and Cultural Rights (n 14) articles 2(2) ; CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) paras 5, 9; CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)', E/C.12/2000/4 (11 August 2000) para 30, 32, 48, 50; CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3 (n 25) para 24; Philip Alston (n 8) 173; Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP, 2014) 28; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 93.

[35] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 5; CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 10; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 180.

[36] CESCR, 'General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' E/1992/23 (13 December 1991) para 8; CESCR, 'General Comment No. 7: The Right to Adequate

immediate obligation of providing compulsory and free primary education and the liberty of parents to choose schools.[37] The right to work contains the immediate right to fair wages, equal remuneration for work of equal value without distinction of any kind and the right of create and join trade unions.[38] The CESCR also considers as immediate rights the special measures of protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.[39]

The CESCR has found violations of some of these immediate obligations in Latin American transitional countries or countries facing armed conflict. It found that Colombia violated the right to join trade unions of workers and trade union representatives, who were threatened or forced to become displaced for fear of their personal security.[40] The CESCR also found a violation of the immediate obligation of the State to refrain from forced evictions, committed against *campesinos* by the armed forces and private security in Honduras.[41]

Moreover, it is not possible to find any sign of approval by the CESCR about the imposition of deliberately retrogressive measures without justification solely for the existence of an armed conflict in Latin America.[42] The prohibition of taking

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Housing (Art.11.1) Forced Evictions', E/1998/22 (20 May 1997) para 9; Magdalena Sepúlveda (n 36) 176, 177.

[37] ICESCR (n 14) articles 13, 14; CESCR, 'General Comment No 11: Plans of Action for Primary Education (Art. 14 of the Covenant)' E/1992/23 (10 May 1999) paras 6, 7; CESCR, 'General Comment No 13: The Right to Education (Art. 13 of the Covenant)', E/C.12/1999/10 (8 December 1999) para 42; Magdalena Sepúlveda (n 36) 177, 178.

[38] UNGA, 'Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General)' (n 31) chapters 8, 13.

[39] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 5.

[40] CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) para 17; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/6, 19 October 2017, para 39.

[41] CESCR, Concluding Observations-Honduras, E/C.12/HND/CO/2, 10 July 2016, para 41.

[42] Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review, 587.

retrogressive measures has been also reviewed by the Colombian Constitutional Court, stressing the prohibition of regressive taxation and unjustified reductions in public investment in ESCR.[43] However, the UN has established that retrogressive measures can be allowed in some exceptional cases, but complying with strict requirements. These include the existence of a compelling State interest; the necessity, reasonableness, temporariness and proportionality of the austerity measures; the exhaustion of alternative and less restrictive measures; the non-discriminatory nature of the proposed measures; protection of a minimum core content of the rights and the genuine participation of affected groups and individuals in the decision-making processes.[44] There is not any general agreement about the content of the minimum core or core obligations, but in the few cases where retrogressive measures have been included in the CESCR reports in Latin American countries, they have been linked with survival rights and with the immediate obligations examined before, including the duty of non-discrimination.[45]

Hence, ESCR do not always contain progressive obligations, but also immediate ones, which has been stressed by the CESCR in countries facing conflict or transitions. In the case when the obligations are progressive, States have to carefully prove that they have taken all necessary action to comply with these obligations, which persist even in cases when countries face violence.

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[43] *T-025/2004*, Corte Constitucional de Colombia (Colombia, 22 January 2004) section 8.1.

[44] UNCommHR, 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', E/CN.4/1987/17 (08 January 1987) para 47; CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 10; CESCR, 'General Comment No 18: The Right to Work (Art. 6 of the Covenant)' E/C.12/GC/18, 6 February 2006, para 31; CESCR, Letter from the Chairperson of the Committee to State Representatives, CESCR/48th/SP/MAB/SW (16 May 2012); Katherine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law, 156; Gilles Giacca (n 34) 31; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 55, 94.

[45] CESCR, Third Periodic Report-Chile, E/1995/104/Add.26, 14 July 2003, para 142; CESCR, Second Periodic Report-Brazil, E/C.12/BRA/2, 28 January 2008, para 170; Amrei Müller (n 43) 579-583.

2.1.3. The maximum of available resources

The general obligation to use the maximum of the resources available for the full realization of the rights enshrined in the ICESCR was intended by the drafters to refer both the resources existing within a state and those available from the international community through international cooperation and assistance.[46] It has been pointed out that it is the responsibility of the State to request or allow the opportunities for assistance, rather than a specific obligation in other countries or international organizations to make such assistance available.[47] For this reason, when evaluating Argentina's compliance with the ICESCR, the CESCR inquired about the manifestations of international solidarity from the restoration of democracy and the role of the Government in requesting and receiving them.[48]

The CESCR has considered the role of the private sector when assessing the maximum available resources, including taxation as a vital source of revenue, as in the case of Colombia.[49] Corruption has also been considered as an obstacle to access all available resources, as in the report of Argentina, where the government recognized the existence of unscrupulous financial activities that began to develop under the dictatorship, causing the enrichment of a small part of the society in detriment of the rest.[50] This is important when considering the State's general obligations under the ICESCR, because State practice has shown

[46] UNGA, 'Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General)' (n 31) para 24; CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 13.

[47] Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 139.

[48] CESCR, Concluding Observations-Argentina, E/C.12/1990/3, 01 January 1990, paras 237, 240.

[49] CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/6 (n 41) paras 19, 20.

[50] CESCR, Concluding Observations-Argentina, E/C.12/1990/3 (n 49) para 240.

that regressive taxation, weakness of tax authorities, tax evasion and the size of the informal sector can stop the State from accessing all available resources.[51] It is a common problem that transitional countries have had to face in Latin America, where there are many ex-military rulers or collaborators, including the private sector, who acquired substantial control of the economy during the violent period,[52] with many cases of illicit enrichment, corruption and usufruct of economic groups from the violent era.[53] However, transitional countries in Latin America have not necessary dealt with these issues in a comprehensive way, as examined in chapters IV and V. This can have a negative effect not only on the full realization of ESCR, but also CPR, as the right to a fair trial, which depends as well on the availability of resources.[54]

Therefore, there are fewer possibilities for a State to argue that there are not enough resources available, even if it is a developing country or a country transitioning from a violent period. However, some transitional countries have argued this way, which has not been considered by the CESCR in its concluding observations.[55] In this way, the CESCR has not allowed countries facing a violent period or transitional countries to use these special contexts to avoid their general obligations under the ICESCR. Moreover, the CESCR has also reviewed the obligations of the Latin American countries examined through a typology of

[51] Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 143, 144.

[52] Yusuf (n 56) 92.

[53] Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010) 92.

[54] Philip Alston (n 8) 172; Cécile Fabre, 'Constitutionalizing Social Rights' (1998) 6 Journal of Political Philosophy, 268; Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights' in Roberto Gargarella, Pilar Domingo, Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 257.

[55] CESCR, 'Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports submitted by States parties under article 16 and 17 of the Covenant (Addendum)', E/1990/5/Add.29, 17 June 1996 (Peru); CESCR, Concluding Observations-Peru (n 25) para 12.

obligations, to explain the general nature of the obligations under the ICESCR,[56] as explored on the following pages.

2.2. The typology of obligations

The existence of two different covenants and nature of the general obligations established in article 2(1) ICESCR have led to certain interpretations that ESCR are of a different nature in comparison to CPR, as vague, positive, structural, progressive and non-justiciable rights.[57] The misconceptions about the nature of ESCR have caused a generalized assumption of superiority of CPR and a neglect of ESCR,[58] which, as explored in chapters IV and V, has permeated the field of TJ.

These misconceptions have been challenged by the CESCR in different ways.[59] It has been claimed that differentiating between typologies of obligations could be serve the purpose of avoiding the fake distinction between CPR and ESCR.[60] There are different kinds of typologies,[61] which can be applied to ESCR and CPR.[62] This thesis focuses on the typologies proposed by the CESCR, as the organ responsible to interpret the ICESCR. The CESCR has distinguished between

[56] Matthew C. R. Craven (n 3) 107, 109.

[57] Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights' (n 55) 257; Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) NYUJIntlL&Pol, 6, 10; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (n 4) 8; Javaid Rehman (n 33) 141, 143.

[58] Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 HumRtsQ, 82; Javaid Rehman (n 33) 142; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 21.

[59] See Chapter III, section 2.1.2.

[60] Magdalena Sepúlveda (n 36) 157.

[61] Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide, Catarina Krause, Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Edition, Martinus Nijhoff Publishers, 2001) 9–28; Magdalena Sepúlveda (n 36) 158-160, 163, 164;

[62] OHCHR, Inter-Parliamentary Union, 'Human Rights Handbook for Parliamentarians', No 26, HR/PUB/14/4 (Inter-Parliamentary Union, 2016) 31-34.

immediate and progressive obligations,[63] obligations of conduct and obligations of result[64] and the obligations to respect, protect and fulfil.[65] This thesis engages with this last tripartite typology, because is one most frequently used by the CESCR,[66] including its reports regarding Latin American countries.[67]

2.2.1. Obligation to Respect

The obligation to respect is a negative obligation consisting of the duty of States parties of not taking any measures that result in denying or limiting access to the enjoyment of the rights enshrined in the ICESCR.[68] This obligation includes the obligation to abstain from enforcing discriminatory practices as a state policy,[69] which is also an immediate obligation of the State.[70] The CESCR has examined the principle of non-discrimination many times in Latin America, linking it to the right to education and work, when examining cases of unfair dismissal of students, academics and workers as common practices in dictatorships in Chile and

[63] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 5; CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (n 35) para 30; Magdalena Sepúlveda (n 36) 174.

[64] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 9; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 31, 82, 83.

[65] 'Maastricht Principles on Extraterritorial Obligations (ETOs) of States in the Area of Economic, Social and Cultural Rights' (28 September 2011) para 3; CESCR, 'Fact Sheet No.16 (Rev.1): Frequently Asked Questions on Economic, Social and Cultural Rights' (08 December 2008) 11, 12, 17, 27.

[66] Evelyn Schmid, Aoife Nolan, 'Do Not Harm?: Economic and Social Dimensions of Transitional Justice' (2014) 8 IJTJ, 366.

[67] Eg. CESCR, 'Report of the 2nd Period of Sesions', E/C.12/1988/4, 08-25 February 1988 (Chile) para 212; CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3 (n 25) paras 25, 33; CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) para 6.

[68] ICESCR (n 32) Articles 1.3, 13, 15.3; CESCR, 'General Comment No. 7: The Right to Adequate Housing (Art.11.1) Forced Evictions' (n 37) para 9; Magdalena Sepúlveda (n 36) 197.

[69] Magdalena Sepúlveda (n 36) 188.

[70] See Chapter III, section 2.1.2.

Paraguay.[71] Moreover, the CESCR has requested from Argentina to give account of the measures taken during its transition to encourage the admission of people generally discriminated in the military academies and other victims of unfair dismissal committed during its past dictatorship.[72]

In this way, the obligation to respect ESCR is very similar to what it is assumed to be the negative nature of CPR. Hence, the lack of compliance of the obligation to respect ESCR is difficult to sustain under the arguments of lack of resources or progressive realization.

2.2.2. Obligation to Protect

The obligation to protect requires States to take all necessary measures to ensure that individuals under their jurisdiction are protected from ICESCR's violations committed by third parties, such as individuals, groups and corporations.[73] It also includes the adoption of measures to prosecute perpetrators of ESCR violations.[74] This obligation is relevant to Latin America, where many of the ESCR violations have been committed as a means for the commission of serious CPR, with the collaboration of third parties, especially companies, which benefited from the repression.[75] This has been recognized by the CESCR, which has urged Colombia to take effective measures to provide personal security to trade union representatives, to try and punish those responsible for violating their

[71] CESCR, 'Report of the 2nd Period of Sesions' (n 68) paras 202-206; CESCR, Concluding Observations-Paraguay (n 19) para 12.

[72] CESCR, Concluding Observations-Argentina (n 49) para 242.

[73] 'Maastricht Principles on Extraterritorial Obligations (ETOs) of States in the Area of Economic, Social and Cultural Rights' (n 66) para 24; Magdalena Sepúlveda (n 36) 197.

[74] Magdalena Sepúlveda (n 36) 198.

[75] See Nelson Camilo Sánchez, 'Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies' in Sabine Michalowski, *Corporate Accountability in the Context of Transitional Justice* (Routledge, 2013).

rights.[76] However, pursing the responsibility of third parties for the violation of ESCR has proved to be challenging in a transitional context.[77]

2.2.3. Obligation to Fulfil

The obligation to fulfil consists of adopting legislative, administrative, judicial, promotional and other measures for the full realization of ESCR. This obligation can be subdivided into the obligations to facilitate, promote and provide.[78] The obligation to facilitate consist in the obligation of the State to create the appropriate circumstances in which individuals can successfully pursue the enjoyment of ESCR, for instance, developing agrarian systems.[79] The obligation to promote consist in implementing measures in education, public awareness, access to knowledge, information and other means to create awareness and acceptance of human rights.[80] The obligation to provide consist in the direct provision of services if the right(s) concerned cannot be realized otherwise.[81]

The CESCR has dealt in particular with the duty to promote human rights education in transitional countries in Latin America. It has stressed the duty to promote human rights training of armed forces, police and judiciary;[82] the reform

[76] CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) para 38.

[77] See Chapter IV, section 2.5.2; Chapter V, section 3.4.2.

[78] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 35.

[79] OHCHR, 'Frequently asked questions on a Human Rights-based approach to development cooperation', HR/PUB/06/8 (2006) 2; Michael J. Dennis, David P. Stewart (n 8) 491.

[80] See UNHRC, 'United Nations Declaration on Human Rights Education and Training', A/HTC/RES/16/1, 08 April 2011; <www.escr-net.org/resources/obligation-promote> accessed 12 September 2018.

[81] OHCHR, 'Frequently asked questions on a Human Rights-based approach to development cooperation' (n 80) 2; Michael J. Dennis, David P. Stewart (n 8) 491.

[82] CESCR, Concluding Observations-Argentina (n 49) paras 242, 245; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 25) para 242.

of the school curricula to include human rights values[83] and the truth-telling about the human rights violations committed during the violent period, through the creation of Museums of Memory, etc.[84] The obligations to facilitate and provide have not been generally examined by the CESCR from a TJ perspective, except in the implementation of reparation programmes in Colombia.[85]

Hence, the ICESCR contains clear ESCR general obligations, which have been complemented by the tripartite typology established by the CESCR. These obligations are nowadays mandatory for all the examined Latin American countries, which are all part of the ICESCR. Moreover, in the context of the armed conflict, the CESCR has reviewed the compliance of Colombia and Guatemala with the ICESCR when implementing its TJ mechanisms during the conflict, as the peace agreement and reparation programmes.[86] These TJ mechanisms have had among their purposes the obligations to respect, protect and fulfil the ESCR of the most affected by the armed conflict, as examined in the next chapter.

Considering that the ICESCR applies during these violent periods, it would be important to understand under what circumstances these countries facing a violent period or transitions, can limit or derogate their ESCR obligations, which is examined in the following section.

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[83] CESCR, Concluding Observations-Argentina, E/C.12/1990/3 (n 49) paras 242, 244; CESCR, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Sixth Periodic Reports of States Parties Due in 2015', E/C.12/COL/6, 21 July 2017 (Colombia) paras 198, 199; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/6 (n 41).

[84] CESCR, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Sixth Periodic Reports of States Parties Due in 2015' (n 84) para 205.

[85] CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 25) para 12.

[86] CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3 (n 25) paras 24, 25, 33; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 25) paras 12, 16; CESCR, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Sixth Periodic Reports of States Parties Due in 2015' (n 84) paras 29, 273; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/6 (n 41) paras 4-8, 25, 26, 49, 50, 54.

2.3. Limitations and derogations to economic, social and cultural rights

The ICESCR includes a general limitation clause for ESCR and specific limitations for some rights. The specific limitations include developing countries' right to limit the economic rights of non-nationals; the limitation of trade union rights for members of the armed forces, police or the administration of the State; the establishment of minimum educational standards by the State and the possibility for the State to take restrictive measures necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.[87] This is different to the ICCPR, which does not have a general limitation clause. It only has specific limitation clauses for certain rights.[88]

The general limitations clause in the ICESCR requires that the imposition of a restrictive measure must be compatible with the nature of the right, it must be legal and it must be for the general welfare "in a democratic society".[89] The CESCR has not explicitly reviewed the requirement of the general welfare "in a democratic society" in the application of general limitations clause.[90] However, it is foreseeable that for a country facing armed conflict or a repressive government, it would be difficult to prove the compliance with democratic requirements, such as participation, transparency and accountability, which are limited or non-existent in these countries.[91]

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[87] ICESCR (n 14) Article 12(c); CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC/20 (02 July 2009) para 2.

[88] Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 240.

[89] ICESCR (n 14) article 4.

[90] Richard Burchill, 'Democracy and the Promotion and Protection of Socio-Economic Rights', in Mashood Baderin, Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (OUP, 2007) 372, 373.

[91] Richard Burchill (n 90) 372; Amrei Müller (n 43) 577; Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 253, 257.

The ICESCR does not contain a derogation clause, differing again from the ICCPR.[92] This has been interpreted at times that derogation of ESCR is not permitted,[93] stressing that the CESCR has pointed out in different general comments the non-derogability of the core obligations of specific ESCR, such as the right to a highest standard of health and the right to water.[94] Other interpretations conclude that, since those derogations are not explicitly prohibited, they may be permissible for non-core obligations, if the measures taken in respect to public emergency or crisis are "strictly required by the exigencies of the situation and consistent with a state's obligations under treaty or customary international law."[95] This also means that the minimum core of the rights cannot be derogated, which has been linked to human dignity and minimum conditions of survival by the few State reports in Latin America dealing with limitations and derogations of ICESCR, as already explored.[96] Moreover, derogations, as in the case of limitations, should be compatible with the nature of the right, be legal and for the general welfare "in a democratic society", which would be difficult to argue for repressive regimes, where derogations of ESCR could not be justified to restore democracy, for example.[97]

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[92] International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (16 December 1996) article 4.

[93] UNCommHR, 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', para 47; Gaby Oré Aguilar, 'Asserting Women's Economic and Social Rights in Transitions' in Gaby Oré Aguilar, Felipe Gómez Isa (eds) *Rethinking transitions. Equality and social justice in countries emerging from conflict* (Intersentia, 2011) 143; Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 258, 259; Gilles Giacca (n 34) 2, 31; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 54, 55.

[94] CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (n 35) para 47; CESCR, 'General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)' E/C.12/2002/11 (20 January 2003) para 40.

[95] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 55.

[96] CESCR, Third Periodic Report-Chile (n 46) para 142; CESCR, Second Periodic Report-Brazil (n 46) para 170; Amrei Müller (n 43) 579-583. See Chapter III, section 2.1.2.

[97] Amrei Müller (n 43) 598.

Despite these strict requirements, the Latin American State' practice has shown a tendency to limit and derogate labour rights during states of emergency, including the right to work, the right to join trade unions and the right to strike,[98] regardless of what domestic law or the ICESCR allows. In addition, States reports about limitations or derogations of ICESCR are very limited, not only in Latin America, but also worldwide.[99]

The CESCR has never explicitly considered the question of derogation from any right of the ICESCR in any examined Latin American country just for experiencing a dictatorship or armed conflict, despite recognizing the difficulties that countries face during a violent period.[100] Moreover, the CESCR has explicitly urged Argentina during its transition to deal with the situations of discrimination at enrolment with military academies committed during the dictatorship, at the time that the ICESCR was not even ratified, but just signed by this country.[101] This is coherent with the principle of continuity of State responsibility[102] and the considerations of the CESCR about the negative impact of retrogressive measures, permanent states of emergency and armed conflicts on the enjoyment and protection of ESCR, particularly the most marginalised and disadvantaged groups in the society, as in the case of Colombia.[103]

In this way, ESCR obligations under the ICESCR were valid in most of the Latin American countries during the times of conflict and dictatorship, having the

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[98] Ibid 597.

[99] Idem.

[100] CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.93, 12 December 2003, para 9.

[101] CESCR, Concluding Observations-Argentina (n 49) para 242.

[102] See Chapter II, section 4.2.2.

[103] CESCR, Concluding Observations-Colombia, E/C.12/1995/12, 28 December 1995, paras 7-10; CESCR, Concluding Observations-Colombia, E/E/C.12/1/Add.74 (n 25) paras 6, 8, 11, 20, 30; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 25) para 7; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 53, 57.

States the obligation to comply with their obligations and to justify the implementation of any limitation or derogation of ESCR.[104] These ESCR obligations have to be considered in the implementation of TJ mechanisms. In the case of Argentina, who signed the ICESCR during the dictatorship, or Brazil and Paraguay, who ratified the ICESCR during democracy, the principle of continuity of state responsibility applies. This is proven by the fact that the CESCR reviewed Argentina's compliance with the ICESCR when dealing during democracy with situations of discrimination in ESCR committed during the dictatorship, as reviewed in the previous paragraph. Moreover, these obligations under the ICESCR are complemented by the ESCR enshrined at the regional and domestic level, as examined in the following sections.

3. STATE OBLIGATIONS UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American Human Rights System was conceived in the frame of the Organization of American States (OAS), a regional organization created under the terms of article 52 of the UN Charter.[105] This system was designed to help accomplishing the purposes and principles enshrined in the Charter of the Organization of American States (OAS Charter), including the promotion and protection of human rights in the Americas.[106] It is based in the OAS Charter, the

[104] CESCR, 'Statement on Poverty and the ICESCR', E/C.12/1/Add.59 (21 May 2001) para 18; Gilles Giacca (n 34) 35.

[105] Charter of the United Nations, 1 UNTS XVI (24 October 1945) article 53(1); "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

[106] OAS, 'Purpose' <www.oas.org/en/about/purpose.asp> accessed 12 September 2018.

ADHR and the ACHR.[107] Other specific human rights treaties have been created with the time, complementing the rights enshrined in these two instruments.[108]

The main organs of the Inter-American Human Rights System are the IACommHR and the IACtHR. The IACommHR was created to promote the observance and defence of human rights in all State members of OAS, through an individual petition system, monitoring of the human rights situation in the member States and in priority thematic areas.[109] The IACtHR has authority over the State Members of the OAS that ratified the ACHR in the form of a contentious and an advisory jurisdiction.[110]

This section examines the main instruments and approaches taken by the IACommHR and IACtHR that include ESCR, which are relevant from a TJ perspective.

3.1. The Inter-American Human Rights Instruments and their recognition of economic, social and cultural rights

The OAS Charter, that created the OAS, enshrined ESCR as part of the essential rights of man, including the right to work, decent standard of living, right to housing, right to join associations of workers, right to participation and due

[107] Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (San José, 2008) 78.

[108] Inter-American Convention to Prevent and Punish Torture, A-49 (09 December 1985); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', A-52 (17 November 1988); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, A-53 (08 June 1990); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, A-61 (09 June 1994); Inter-American Convention on Forced Disappearance of Persons, A-60 (09 June 1994); Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, A-65 (07 June 1999); IACommHR, 'The Declaration of Principles on Freedom of Expression' (24 October 2000); Inter-American Democratic Charter (n 10); IACommHR, 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' No 1/08 (13 March 2008); Inter-American Convention on Protecting the Human Rights of Older Person, A-70 (15 June 2015).

[109] 'Statute of the Inter-American Commission on Human Rights', Resolution No 447, October 1979, article 1.

[110] 'Statute of the Inter-American Court of Human Rights', Resolution No 448, October 1979, article 2.

legal aid to ensure those rights, the right to education and the State's obligation to harmonize the social legislation.[111] These rights are considered, together with CPR, as essential to accomplish social order, social justice, economic development and true peace.[112]

The recognition of ESCR in OAS is reflected in the Inter-American Human Rights instruments. This section focuses on the main instrument that enshrines ESCR, i.e. the ADHR, the ACHR and the Protocol of San Salvador. This thesis does not deny that other instruments also include ESCR approaches;[113] however, it recognises that the ACHR and the ADHR are the main and most frequently applied human rights instruments, since only seven states have ratified all the Inter-American Human Rights instruments.[114]

3.1.1. The American Declaration of the Rights and Duties of Man

This is the first international human rights instrument of a general nature, adopted just a few months before the UDHR. The discussion of ADHR was carried out in an instable period in Latin America, with the existence of *coup d'états* and revolutions, tensions caused by the advance of Marxism and serious disturbances experienced in the host city of the Conference where the ADHR was discussed.[115]

[111] Charter of the Organization of American States, (OAS 1994) O.A.S.T.S. No. l-F, OEA/Ser.A/2/ Rev. 4 at 4-6, OEA/Ser.C/Il.5, articles 45-49.

[112] Ibid, articles 2, 3, 17, 30, 34, 36, 37, 45-52.

[113] E.g. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (n 108) article 5; Inter-American Convention on Protecting the Human Rights of Older Person (n 108) article 24.

[114] IACommHR, 'Considerations Related to the Universal Ratification of the American Convention and Other Inter-American Human Rights Treaties', OAS/Ser.L/V/II.152 Doc. 21 (14 August 2014) para 17.

[115] Paúl Díaz (n 5) 362, 366-369.

Despite all these issues, the ADHR was adopted in 1948, enshrining an important number of ESCR and CPR.[116]

The economic, social and political conditions in which the ADHR was discussed did not seem to affect in a negative way the equal recognition of all rights. The ADHR includes a catalogue of ESCR, such as the right to special protection, care and aid of mothers and children; the right to the preservation of health and well-being (including food, clothing, housing and medical care); the right to education; the right to work and to fair remuneration and the right to social security.[117] Moreover, as the UDHR, the ADHR protects ESCR together and in the same way as CPR, not establishing conditions of progressive development or availability of resources.[118]

The ADHR was not created with the intention of being legally binding; however, as with the UDHR, its legal status has been a matter of discussion.[119] The IACtHR has considered all the ADHR as binding, for having an authoritative interpretation of the OAS Charter.[120] This latter has been confirmed by some OAS

[116] OAS, 'What is the IACHR?' <www.oas.org/en/iachr/mandate/what.asp> accessed 12 September 2018.

[117] American Declaration of the Rights and Duties of Man (ADHR) OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949) (2 May 1948) articles VII, XI, XII, XIV, XVI.

[118] Verónica Gómez, 'Economic, Social and Cultural Rights in the Inter-American System' in Mashood Baderin, Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (OUP, 2007) 171; Oswaldo R. Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties' (2013) 31 Netherlands Quarterly of Human Rights, 160.

[119] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 (IACtHR) Ser A No 10 (14 July 1989) paras 12, 24 (United States´s position); Pedro Nikken, 'La Declaración Universal y La Declaración Americana. La Formación Del Moderno Derecho Internacional de Los Derechos Humanos' (1989) Revista Instituto Interamericano de Derechos Humanos, 374; James L. Cavallaro, Emily J. Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' (2004) 56 Hastings Law Journal 230; Tara Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' in Malcom Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008) 345; Javaid Rehman (n 33) 274, 275; Paúl Díaz (n 5) 373.

[120] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (n 119) paras 43-46.

countries, such as Argentina, which recognized the ADHR as an instrument with constitutional hierarchy.[121]

In any case, the ADHR is applicable to all OAS Member States, but in different ways. For the OAS Members that are not a part of the ACHR, each of the rights guaranteed in the ADHR can be invoked directly by the IACommHR.[122] During many dictatorships in Latin America, the serious human rights violations were addressed by the IACommHR in this manner.[123] For the remaining member states that are party of the ACHR, the ADHR cannot be invoked directly in the individual petition process, remaining only applicable for the purposes of interpreting the norms in the ACHR.[124] For the Latin American States examined in this thesis, the role of the ADHR as interpreting the norms of the ACHR has been essential in the individual petition process, as explored in the following sections.

3.1.2. The American Convention on Human Rights

The ACHR was created more than twenty years after the ADHR, as a binding comprehensive instrument that protects human rights. This treaty has been ratified by the largest number of OAS members, which include all the Latin

[121] Constitución de la Nación Argentina [Constitution of the Argentinian Nation] 01 May 1853 (last consolidated text enacted through Law 24430, 03 January 1995) article 75(22).

[122] These States are Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia, Trinidad and Tobago, and the United States. IACommHR, 'B-32: American Convention on Human Rights. "Pact of San Jose, Costa Rica"' <www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm> accessed 12 September 2018.

[123] E.g. IACommHR, 'Annual Report 1980-1981', OEA/Ser.L/V/II.54 Doc. 9 rev. 1 (16 October 1981) Chapter V.

[124] American Convention on Human Rights (ACHR)1144 UNTS 123 (22 November 1969) article 29; *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (n 119) paras 43, 45; Centro por la Justicia y el Derecho Internacional, 'La Protección de Los Derechos Económicos, Sociales y Culturales y El Sitema Interamericano' (CEJIL, 2005) 70, 71; Tara Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' (n 119) 346; Thomas Antkowiak, 'Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads' in Haeck Yves; Ruiz-Chiriboga Oswaldo; Burbano Herrera Clara (eds) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 264, 265.

American countries examined in this thesis. Nonetheless, not all States ratified the ACHR before the conflict started, with the exception of Ecuador, El Salvador, Honduras and Peru. In the cases of Colombia, Guatemala, Panama and Uruguay, they ratified the ACHR during the violent period. Chile and Paraguay signed the ACHR before and during the dictatorship respectively, but they ratified it during the transition. Argentina, Brazil and Uruguay signed and ratified the ACHR with the return of the democracy.[125] The fact that some countries ratified the ACHR after the violent period has not been an obstacle to deal with serious violations of human rights through the principle of continuity of State responsibility.[126]

The ACHR is one of the first treaties that explicitly incorporates ESCR.[127] The preamble of the ACHR recognizes the interdependence and indivisibility of human rights and the importance of social justice. Moreover, it points out that the "freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights".[128] Despite of this, the ACHR has been commonly characterized as a CPR instrument.[129] One reason for this is that the ACHR has been used as an essential instrument to deal with serious CPR violations committed during dictatorships and armed conflicts in Latin America.[130] Other reason is that the ACHR established a number of CPR in different articles of Chapter II while it enshrines ESCR in only one article in Chapter III, 'Economic,

[125] IACommHR, 'B-32: American Convention on Human Rights. "Pact of San Jose, Costa Rica" (n 123).

[126] See Chapter II, section 4.2.2.

[127] Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcom Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008) 376; Javaid Rehman (n 33) 286.

[128] ACHR (n 124) Preamble.

[129] Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 376; Javaid Rehman (n 33) 286.

[130] See Chapter II, section 2.5.1.

Social and Cultural Rights'. This article establishes the State's obligation to adopt measures, both internally and through international cooperation to progressively achieve, by legislation or other appropriate means, "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires".[131]

In this way, the ACHR differs from the ADHR, which protected ESCR and CPR in the same way.[132] This separate treatment of ESCR has been considered as reflecting the ideologically divided time in which it was drafted, the middle of the Cold War,[133] as it happened in the case of the ICESCR and the ICCPR.[134]

The different treatment of ESCR in the ACHR has caused a great discussion. For a long time it has been believed that article 26 of the ACHR is ambiguous, establishing standards, general principles and objectives of public policies, more than human rights *per se*.[135] On the other hand, some claim that article 26 is not ambiguous, establishing concrete ESCR obligations.[136] This thesis engages with the interpretation of article 26 as enshrining ESCR, which is coherent with a better protection of ESCR and with the last judgments of the IACtHR.[137]

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[131] The Buenos Aires Protocol included important reforms to the OAS Charter, including social and economic norms. ACHR (n 124) Preamble.

[132] ADHR (n 118) Chapter One.

[133] James L. Cavallaro, Emily J. Schaffer (n 120) 224; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2006) 39 NYUJIntlL&Pol, 222; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 376.

[134] See Chapter III, section 2.

[135] Oswaldo R. Ruiz-Chiriboga (n 118) 160; James L. Cavallaro, Emily J. Schaffer (n 120) 225, 260.

[136] Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 222.

[137] See Chapter III, section 3.2.1.

Considering that the ACHR contains ESCR obligations for the examined Latin American countries, it is important to point out that there are not any direct limitations and derogations to article 26 contained in the ACHR, but only the prohibition to derogate some of CPR, including the right to life, human treatment and prohibition of discrimination.[138] In the case of limitations, the ACHR require their enactment by law, for reasons of general interest and in accordance with their *raison d'etre*.[139] It could be derived from these articles that the obligation of progressive development of ESCR enshrined in article 26 of the ACHR can be derogated or limited. However, these limitations and derogations should follow the same requirements and prohibitions established in the ICESCR, as the prohibition of discrimination in the enjoyment of ESCR, for example.[140] Moreover, the prohibition of restricting judicial guarantees has not been explicitly limited to CPR, and therefore, it should include ESCR.[141]

Hence, the ACHR can be considered a treaty than enshrines ESCR. However, the examined States have mainly interpreted the ACHR as protecting CPR, omitting article 26.[142] On different occasions, The IACommHR has stressed the obligation to effectively protect ESCR.[143] In response to those issues, the Protocol of San Salvador was created and ESCR were defined, as it is explicated in the following section.

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[138] ACHR (n 124) article 27.

[139] Ibid, article 30.

[140] See Chapter III, section 2.3.

[141] Aziz Tuffi Saliba, Tainá Garcia Maia, 'Judicial Protection in States of Emergency: An Analysis of the Amplitude of Judicial Protection of Fundamental Rights During the Application of Derogations' in Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano Herrera (eds) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) 2234-2236.

[142] Instituto Interamericano de Derechos Humanos, 'La Justiciabilidad Directa de los Derechos Económicos, Sociales y Culturales (San José, 2009) 156.

[143] IACommHR, 'Annual Report 1980-1981' (n 123) para 10; IACommHR, 'Annual Report 1983-1984', OEA/Ser.L/V/II.63 Doc. 10 (24 September 1984) Chapter V.

3.1.3. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights: 'Protocol of San Salvador'

The Protocol of San Salvador was adopted in 1988 and entered into force more than a decade later. The majority of Latin American countries examined in this thesis ratified this treaty after the end of conflict, as in the cases of Argentina, Brazil, Ecuador, El Salvador, Honduras, Guatemala, Panama, Paraguay and Uruguay. The only exceptions are Colombia and Peru, who ratified the Protocol of San Salvador during their armed conflicts.[144]

The San Salvador Protocol has been considered as an extension of norms and principles set forth in the ADHR, ACHR and OAS Charter. Moreover, it has been considered as the instrument that gave content to ESCR.[145] Its preamble, as in the OAS Charter and the ACHR, stresses the link between democracy and social justice. It also recognizes the interdependence and indivisibility between ESCR and CPR as essential for the protection of all human rights.[146] This treaty enshrines an important number of ESCR, including the right to work, trade union rights, social security, health, food, education, cultural rights and special protection for the family, children, the elderly and person with disabilities.[147]

The Protocol of San Salvador has three general obligation clauses, including the obligation to adopt the necessary measures to progressively achieve the full

[144] OAS, 'Signatories and ratifications: A-52: Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural rights "Protocol of San Salvador" <www.oas.org/juridico/english/sigs/a-52.html> accessed 12 September 2018.

[145] IACommHR, 'Annual Report 1993', OEA/Ser.L/V.85 doc 9 rev ch V.II (11 February 1994) Chapter V, 'The Realization of Economic, Social and Cultural Rights'.

[146] 'Protocol of San Salvador' (n 108) Preamble.

[147] Ibid, articles 7-18.

observance of the rights recognized in the Protocol, to the extent allowed by their available resources and the obligation to guarantee the exercise of the rights enshrined without discrimination of any kind.[148] These obligations seem to be coherent with the general obligation clauses established in the ACHR and the specific progressive obligation of article 26 and the ICESCR.[149]

As pointed out in the case of the ICESCR,[150] even though the Protocol of San Salvador established an obligation of "progressive realization" that is not absolute and immediate, this is not the only obligation established for ESCR. Therefore, immediate and absolute are the obligation to enact domestic legislation for implementing the ESCR enshrined in the Protocol of San Salvador, the duty of taking all measures needed to ensure the realization of ESCR, the obligation of not taking retrogressive measures and to guarantee the exercise of rights without any discrimination.[151] Moreover, before the creation of the Protocol of San Salvador, the IACommHR challenged the notion that CPR are always immediate, while ESCR are always progressive, stressing that the progressive development of rights is applicable to and inherent to all human rights instruments, not only ESCR.[152]

Similar is the situation regarding the use of the maximum of available resources as before the creation of the Protocol of San Salvador the IACommHR reviewed this requirement in the context of the armed conflict in Colombia,

[148] Ibid, articles 1-3.

[149] See Chapter III, sections 2.1.2, 3.1.2.

[150] See Chapter III, section 2.1.2.

[151] 'Protocol of San Salvador' (n 108) articles 1,2; IACommHR, 'Third Report on the Situation of Human Rights in Colombia', OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (26 February 1999) Chapter III, 'Economic, Social and Cultural Rights,' para 6; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 262; Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (n 108) 91.

[152] IACommHR, 'Annual Report 1993' (n 146) Chapter V, 'The Realization of Economic, Social and Cultural Rights in the Region', section II.

pointing out that it is not justifiable to decrease the spending in social issues when increasing the spending in defence, especially considering the connection between violence and socio-economic issues in that country.[153]

The limitations and derogations to ESCR are regulated in the Protocol of San Salvador in a similar way than in the ICESCR.[154] The Protocol of San Salvador has a general limitation clause that include that the limitations enshrined in this instrument can only be implemented by means of laws promulgated for preserving the general welfare in a democratic society, only to the extent that they are not incompatible with the purpose and reason underlying those rights.[155] In addition, there is a specific limitation clause, regarding trade union rights of Members of the armed forces and the police and other essential public services, as in the ICESCR.[156] There is not any derogation clause of ESCR. Since the Inter-American Organs have been silent on this issue, it can be claimed that derogations in this area should follow the requirements discussed with regard to ICESCR.[157]

Nonetheless, the Protocol of San Salvador has some important limitations. One of them is the omitted right to housing. This has been interpreted as a lack of consensus of the OAS member states regarding this right or as an omission justified by the explicit recognition of this right in the OAS Charter.[158] Another obstacle is the limitation of the norms that may be adjudicated in the individual

[153] IACommHR, 'Third Report on the Situation of Human Rights in Colombia' (n 152) paras. 20, 21.

[154] See Chapter III, section 2.3.

[155] 'Protocol of San Salvador' (n 108) article 5.

[156] Ibid, article 7(2); See Chapter III, section 2.3.

[157] See Chapter III, section 2.3.

[158] Charter of the Organization of American States (n 112) article 34 (k); *Yarce and others v. Colombia,* Excepción Preliminar, Fondo, Reparaciones y Costas (IACtHR) Series C No. 325, 22 November 2016, Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, paras 98-105; Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (n 108) 205; Oswaldo R. Ruiz-Chiriboga (n 118) 176.

petitions process to the rights to education and unionization.[159] The rest of the rights enshrined in the Protocol of San Salvador are protected only through the periodic reporting procedure. Moreover, they can assist the IACommHR and the IACtHR in the interpretation of the scope and content of ESCR, particularly those guaranteed in article 26 of the ACHR,[160] as reviewed in the following sections.[161] The reason for the limited direct justiciability of ESCR can be found in the *travaux preparatoires* of the Protocol of San Salvador, especially in the visions expressed by the IACommHR and the IACtHR. The first one was of the opinion that the right to education and unionization would constitute direct obligations for the states, while the other ones were considered indirect obligations and therefore, non-justiciable.[162] On the other hand, the IACtHR proposed that the justiciability of ESCR should be inversely proportional to the degree of progressive realization of the right.[163] This last approach seems more coherent with the typology of obligations established by the CESCR.[164] However, the proposal of the IACommHR was the one accepted, limiting the scope of the individual complaints to only two ESCR.

In any case, it is important to remember that the application of the Protocol of San Salvador cannot generate a level of protection inferior to the one that

[159] 'Protocol of San Salvador' (n 108) articles 8.1, 13, 19.6.

[160] 'Protocol of San Salvador' (n 108) article 19; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 262; Tara Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' (n 119) 348; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 379; Thomas Antkowiak (n 124) 263.

[161] See Chapter III, section 3.2.

[162] The Commission also incorporated a directly justiciable the right to strike, which was not incorporated in the final draft. IACommHR, 'Annual Report 1983-1984' (n 144) para 9 C; IACommHR, 'Annual Report 1985-1986', OEA/Ser.L/V/II.68, Doc. 8 Rev. 1 (26 September 1986) Chapter V, section II, article 21.

[163] ICtHR, 'Annual Report 1985' OEA/Ser.L/V/III.12 doc (15 August 1985) para 18; ICtHR, 'Annual Report 1986', OEA/Ser. L/III.15 Doc. 13 (29 August 1986) para 11.

[164] See Chapter III, section 2.2.

already exist in the State, including the instruments ratified by these states and their domestic law.[165] Moreover, the interpretation in good faith of this treaty leads to the conclusion that the purpose of this instrument is not to limit the scope of the ACHR, following the prohibition of interpreting this instrument to supress, preclude, restrict, exclude or limit the enjoyment or exercise of rights included in different instruments.[166]

Therefore, the Protocol of San Salvador could be an important instrument, giving content and filling some previous gaps regarding ESCR.[167] However, due to its limitations, its direct application is more limited than the ADHR and the ACHR.[168] Despite this, the IACommHR has reviewed State compliance with the ESCR obligations under the Protocol of San Salvador when examining the implementation of TJ mechanisms after the ratification of the treaty, as in the case of Guatemala.[169] In dealing with serious human rights violations committed during a violent period, the Protocol of San Salvador has mainly helped a broad interpretation of the CPR under the ACHR.[170]

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[165] 'Protocol of San Salvador' (n 108) article 5; Instituto Interamericano de Derechos Humanos, 'La Justiciabilidad Directa de los Derechos Económicos, Sociales y Culturales (n 143) 171.

[166] 'Protocol of San Salvador' (n 108) articles 4, 29; *Yarce and others v. Colombia* (n 159) Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, 29; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 232; Instituto Interamericano de Derechos Humanos, 'La Justiciabilidad Directa de los Derechos Económicos, Sociales y Culturales (n 143) 168, 196, 197; Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (n 108) 84, 85.

[167] Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 233; Thomas Antkowiak (n 124) 176.

[168] IACommHR, 'Annual Report 1993' (n 146) Chapter V, 'The Realization of Economic, Social and Cultural Rights in the Region,' Recommendations; IACommHR, 'Considerations Related to the Universal Ratification of the American Convention and Other Inter-American Human Rights Treaties' (n 115) paras 1(a), 7.

[169] IACommHR, 'Fifth Report on the Situation of Human Rights in Guatemala', OEA/Ser.L/V/II.111 doc. 21 rev (06 April 2001) Chapter III, 'Economic, Social and Cultural Rights'; IACommHR, 'Justicia e Inclusion Social: Los Desafios de La Democracia En Guatemala', OEA/Ser.L/V/II.118, Doc. 5 rev. 1 (29 December 2003) para 337.

[170] See Chapter III, section 3.2.2.

Overall, it is evident that ESCR are recognized in the Inter-American Human Rights System; however, these rights have been constantly neglected by the petitioners, the IACommHR and the IACtHR, as examined in the following section.

3.2. Approaches to Economic, Social and Cultural Rights in the Inter-American Human Rights System

For a long time, the Inter-American Human Rights System has tackled serious CPR violations committed in the context of dictatorships and armed conflicts, which was influenced by the political context in the region.[171] However, the Inter-American Human Rights System has also considered ESCR in some reports of the IACommHR and emphasised the relation of ESCR with the essential dignity of man, the inalienable nature of human rights and the rule of law.[172] Moreover, the IACommHR has stressed the connection between the disregard of ESCR and poverty.[173]

This recognition of ESCR done by the IACommHR is not reflected in the individual petition system, in which both the IACommHR and the IACtHR have been generally reticent in finding ESCR violations. This section examines the two main approaches developed by these organs when dealing with ESCR, namely a direct approach and an indirect approach to ESCR. It also separately examines the

[171] Centro por la Justicia y el Derecho Internacional (n 124) 67; See Chapter II, section 2.5.1.

[172] IACommHR, 'Annual Report 1982-1983' OEA/Ser.L/V/II.61 Doc. 22 rev. 1 (27 September 1983); ICtHR, 'Annual Report 1986' (n 157) para 14; IACommHR, 'Annual Report 1993' (n 146) Chapter V, 'The Realization of Economic, Social and Cultural Rights in the Region'; IACommHR, 'Third Report on the Situation of Human Rights in Colombia' (n 152) Chapter III, 'Economic, Social and Cultural Rights'; IACommHR, 'Considerations Related to the Universal Ratification of the American Convention and Other Inter-American Human Rights Treaties' (n 115) para 41; IACommHR, 'Third Report on the Situation of Human Rights in Paraguay' OEA/Ser.L/V/II.110 Doc.52 (09 March 2001; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 222.

[173] IACommHR, 'Third Report on the Situation of Human Rights in Paraguay' (n 173) Chapter V; IACommHR, 'Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights' OEA/Ser.L/V/II 19 July 2008) para 24; IACommHR, 'Informe Sobre Pobreza y Derechos Humanos En Las Américas', OEA/Ser.L/V/II.164 Doc. 147 (07 September 2017).

approach taken by these organs regarding reparations, for its unique features. Considering that many of the cases referred to the IACtHR have similar reasoning to the ones in the IACommHR, this thesis focuses on the judgments of the IACtHR, examining the decisions of the IACommHR that have not been referred to the IACtHR, or those in which reasoning is diverse to the one of the IACtHR.

3.2.1. A Direct Approach to Economic, Social and Cultural Rights

This approach consists on the recognition of the direct enforceability of ESCR, applying the instruments that explicitly enshrine these rights.[174] The Inter-American Human Rights instruments examined show an explicit recognition of ESCR; however their direct enforceability in practice has been limited.[175]

In the individual petition process of the IACommHR, the direct approach has been used in few cases.[176] Moreover, the IACommHR[177] or the petitioners[178] have claimed the violation of article 26 of the ACHR in some of the cases submitted to the IACtHR, while the IACtHR has historically not found a direct violation to this

[174] James L. Cavallaro, Emily J. Schaffer (n 120) 263.

[175] Idem.

[176] E.g. *Jehovah's Witnesses v. Argentina* (IACommHR) Case No 2137 (18 November 1978); *Yanomi v. Brazil* (IACommHR) Nº 12/85, Case No 7615 (05 March 1985); IACommHR, 'Third Report on the Situation of Human Rights in Colombia' (n 152) Chapter III, 'Economic, Social and Cultural Rights'; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 220.

[177] E.g. *Five Pensioners v. Peru,* Merits, Reparations and Costs (IACtHR) Ser C No 98 (28 February 2003) paras 142-148, Concurring Opinion Judge Sergio Garcia Ramirez (3); *Yakye Axa Indigenous Community v. Paraguay,* Merits, Reparations and Costs (IACtHR) Series C No 125 (17 June 2005) para 157.

[178] E.g. *Acevedo Buendía et.al v. Perú* ('*Discharged and Retired Employees of the Comptroller*') Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No 198 (01 July 2009) paras 92–107; *Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Serie C No 112 (02 September 2004) para 252-255; *Acevedo Jaramillo et al v. Peru,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No 144 (07 February 2006) para 283; *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No 158 (23 November 2017) para 134.

article.[179] The lack of application of a direct approach was evident in the *Yarce* case about internally forced displacement in the context of the armed conflict in Colombia and in the *Suárez Peralta* case about lack of access to justice for medical negligence. In these cases, the IACtHR examined the ESCR violations in its reasoning but it did not find a direct violation of ESCR despite existing sufficient basis to declare the violation of these ESCR under article 26 of the ACHR.[180]

Regarding the Protocol of San Salvador, there is one case in which the IACtHR found a direct violation of the right to education, *Gonzales Lluy at all v. Ecuador*, about a girl who was infected with HIV through a blood infusion, facing subsequent discrimination from school officials and teachers and multiple evictions of the family when the landlords discovered the girl's condition. The IACtHR did not find a violation of article 26, despite describing violations of the right to health and dignified housing.[181]

The reasoning of the IACtHR regarding article 26 of the ACHR changed dramatically in August of 2017 in the *Lagos del Campo v. Peru* case, where for the first time in forty years the IACtHR recognized a direct violation of article 26 of the ACHR while examining freedom of expression and association in the context of labour relations in Peru.[182] This case was followed by the *Dismissed Employees of Petroperú v. Peru* case, in which the IACtHR found a violation of Article 26 of the

[179] Jo M. Pasqualucci (n 4) 4; Tara Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' (n 119) 356; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 396.

[180] *Suárez Peralta v. Ecuador,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 261 (21 may 2013), Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, paras 1-12; *Yarce and others v. Colombia* (n 159) Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, 10, 115, 143-150.

[181] *Gonzales Lluy at all v. Ecuador,* Preliminary exceptions, Merits, Reparations and Costs (IACtHR) Serie C No. 298 (01 September 2015) paras 156-291.

[182] *Lagos del Campo v. Peru,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 340 (31 August 2017) Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

ACHR, specifically, the right to work.[183] The latest case of *Poblete Vilches et al. v. Chile* confirms a tendency of the IACtHR to include a direct ESCR approach, referring to the right to health as an autonomous right protected under article 26 of the ACHR.[184] In these cases, it was stressed that the justiciability of ESCR under article 26, which has to be interpreted together with article 1(1) and 2 of the ACHR, as in the case of the rest of ESCR.[185] Moreover, to provide content to the right to work and right to health enshrined in article 26 of the ACHR, the IACtHR referred to other human rights treaties and soft law, as the ICESCR, the UDHR, the Protocol of San Salvador, etc.[186]

The direct approach to ESCR seems to be more coherent with the preamble of the ACHR,[187] which has to be considered when interpreting the ACHR, following the VCLT.[188] This change of approach does not seems to be linked to a change in the human rights instrument enshrining these rights, but more to a different interpretation of the scope of article 26 of the ACHR. The IACtHR could be influenced by the development of international law in the area of ESCR; however, the composition of the IACtHR also plays an important role. For example, the inclusion of a direct approach by the IACtHR coincides with the appointment of judge Eduardo Ferrer Mac-Gregor Poisot, who has campaigned for a direct approach to ESCR, as it can be seen in his separate opinions in this matter.[189]

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[183] *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru* (n 179) paras 189-193.

[184] *Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs (IACtHR) Series C No. 349 (08 May 2018) paras 174-176.

[185] *Lagos del Campo v. Peru* (n 183) para 142; *Poblete Vilches et al. V. Chile* (n 185) para 176.

[186] *Lagos del Campo v. Peru* (n 183) paras 145-148; *Poblete Vilches et al. V. Chile* (n 185) paras 114-115, 126-128.

[187] See Chapter III, section 3.1.2.

[188] Vienna Convention on the Law of the Treaties (VCLT) UN Doc A/Conf.39/27 (23 May 1969) article 31.

[189] E.g. *Suárez Peralta v. Ecuador* (n 181) Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, paras 1-12; *Yarce and others v. Colombia* (n 159) Separate Opinion Judge Eduardo Ferrer MacGregor

Regarding the connection of these cases with TJ issues, in the *Lagos del Campo v. Peru* and the *Dismissed Employees of Petroperú v. Peru* case, the suspension and later intervention of the Constitutional Court in Peru as a result of the state of emergency imposed by the authoritarian regime of Alberto Fujimori was considered by the IACtHR when examining the requirement of exhaustion of domestic remedies and when establishing the lack of impartiality and independence of the judiciary.[190] The cases against Chile and Ecuador are not related to TJ issues. Hence, despite the inclusion of a direct approach of ESCR in recent years, there are still no cases in the IACtHR in which the direct approach has been adopted regarding the commission of serious human rights violations linked to armed conflicts or dictatorships in Latin America. Moreover, this approach continues to be marginal in comparison with the indirect approach, which is considered next.

3.2.2. An Indirect Approach to Economic, Social and Cultural Rights

This approach to ESCR is the most used by the IACommHR and the IACtHR in the individual petition system and consists of the interpretation of CPR in a broad way to include ESCR.[191] The CPR interpreted in a broad way by the IACtHR to comprise ESCR have included the rights to a fair trial and judicial protection (to

Poisot, 29; *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru* (n 179) Voto Razonado del Juez Roberto F. Caldas. Voto Concurrente Juez Eduardo Ferrer Mac-Gregor Poisot; *Lagos del Campo v. Peru* (n 183) Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

[190] *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru* (n 179) paras 159-162, 168-172; *Lagos del Campo v. Peru* (n 183) paras 186-191.

[191] IACommHR, 'Annual Report 1993' (n 146) Chapter V, 'The Realization of Economic, Social and Cultural Rights in the Region', section I; Verónica Gómez (n 118) 187; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 376; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 218; Manuel E. Ventura Robles, 'Impact of the Reparations Ordered by the Inter-American Court of Human Rights and Contributions to the Justiciable Nature of Economic, Social and Cultural Rights' in Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano Herrera (eds) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) 299.

comprise the rights to social security and the right to work),[192] right to life (with the development of notions of "dignified life" and "project of life" to protect a variety of ESCR),[193] right to property (to comprise traditional lands, right to housing, preservation of culture and social security),[194] prohibition of forced labour and personal liberty (right to work),[195] personal integrity (to comprise the right to health)[196] and freedom of association (to comprise freedom of labour unionisation).[197] The prohibition of discrimination as an indirect way to protect ESCR has been less used in the Inter-American Human Rights System than the other regional systems.[198]

The rights to life and property are the ones more commonly interpreted in a broad way by the Inter-American Organs when dealing with serious human rights violations committed during a violent period, especially in cases of massacres and

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[192] *Baena Ricardo et.all v. Panama,* Merits, Reparations and Costs (IACtHR) Series C No 72 (02 February 2001) paras 124, 125; *Constitutional Court v. Peru*, Merits, Reparations and Cost (IACtHR) Series C No. 71 (31 January 2001) paras 70, 71; IACommHR, 'Access to Justice as a Guarantee of Economic, Social and Cultural Rights : A Review of the Standards Adopted by the Inter-American System of Human Rights' OEA/Ser.L/V/II (2007).

[193] *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (n 206) paras 194, 195; *Juvenile Re-education Institute v. Paraguay* (n 179) paras 147-193; *Mapiripán Massacre v. Colombia,* Merits, Reparations and Costs (IACtHR) Series C No 134 (15 September 2005) para 96*; Yakye Axa Indigenous Community v. Paraguay* (n 178) paras 161-178; *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C, No. 148 (01 July 2006) Separate Opinion Judge Cancado Trindade, para 12; Jo M. Pasqualucci (n 4) 2, 3; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 400; Thomas Antkowiak (n 124) 272.

[194] *Five Pensioners v. Peru* (n 178) paras 114-121; *Mapiripán Massacre v. Colombia* (n 194) para *96; Yakye Axa Indigenous Community v. Paraguay* (n 178) paras 124-156; *Ituango Massacres v. Colombia* (n 194) paras 181-200; *Yarce and others v. Colombia* (n 159) paras 256-261; Thomas Antkowiak (n 124) 273; Manuel E. Ventura Robles (n 192) 286.

[195] *Plan de Sánchez Massacre v. Guatemala,* Merits (IACtHR) Series C No. 105 (29 April 2004) paras 42(26) (27); *Ituango Massacres v. Colombia* (n 194) paras 164-178.

[196] *Suárez Peralta v. Ecuador* (n 181) paras 131, 152.

[197] *Huilca Tecse v. Peru,* Merits, Reparations and Costs (IACtHR) *Series C No 121* (03 March 2005) paras 70, 71; *Acevedo Jaramillo et al v. Peru* (n 179) paras 287-290; Thomas Antkowiak (n 124) 273.

[198] See Rory O'Connel, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29(2) Legal Studies: The Journal of the Society of American Scholars, 211-229; Manisuli Ssenyonjo, 'The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights' (2015) 4(2) International Human Rights Law Review, 147-193.

forced displacement in the context of an armed conflict.[199] Regarding the right to life, the notion of "dignified life" has been developed to impose the State' duty not only to refrain from preventing or obstructing ESCR, but also to take positive and concrete measures towards the fulfilment of ESCR.[200] This interpretation of the right to life has allowed the IACtHR and IACommHR to recognize the rights to health, education, food, access to clean water and cultural identity in favour of marginalized and vulnerable sectors, including indigenous communities, forcefully displaced and in general, victims of armed conflicts.[201]

Regarding to the broad interpretation of the right to property, the IACtHR has followed the notion of property developed in the context of the protection of rights of indigenous communities. In this way, property encompasses all movable, immovable, corporeal and incorporeal elements, and any other immaterial object that may be of value, including any right that can form part of a person's patrimony. This interpretation has allowed the IACtHR to consider land, villages, houses and farming tools not only as material possessions, but also as the social frame of reference of the inhabitants.[202] Moreover, both the right to life and the right to property have been linked to the massive violations of ESCR as means to commit genocide against the Maya population in Guatemala, which was a common practice during the armed conflict.[203]

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[199] *Plan de Sánchez Massacre v. Guatemala,* Merits (n 196) para 42; *Mapiripán Massacre v. Colombia* (n 194) para 192; *Ituango Massacres v. Colombia* (n 194) paras 181-200.

[200] Jo M. Pasqualucci (n 4) 2, 3.

[201] *Loayza Tamayo v. Peru,* Merits (IACtHR) Series C No 33 (17 September 1997) para 153; *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (IACtHR) Serie C No. 63 (26 May 2001) Joint Concurring Opinion of Judges Cancado Trindade and A. Abreu-Burelli (para 4); *Juvenile Re-education Institute v. Paraguay* (n 179) paras 148, 149, 161, 172-174; *Mapiripán Massacre v. Colombia* (n 194) para 192; *Yakye Axa Indigenous Community v. Paraguay* (n 178) paras 190, 205, 211-222; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 401.

[202] *Yakye Axa Indigenous Community v. Paraguay* (n 178) para 137; *Ituango Massacres v. Colombia* (n 194) para 182; *Sawhoyamaxa Indigenous Community v. Paraguay,* Merits, Reparations and Costs (IACtHR) Series C No 146 (19 March 2006) para 102.

[203] *Plan de Sánchez Massacre v. Guatemala,* Merits (n 196) paras 42(7), 51.

In addition, the IACtHR has examined how forced displacement of indigenous communities and *campesinos*, committed either in democracy or during an armed conflict, caused multiple damages, affecting the enjoyment of CPR and ESCR. These damages include the loss of land and housing, marginalization, serious psychological consequences, unemployment, increased poverty and the deterioration of living conditions, an increase in illnesses and mortality, loss of access to communal property lack of food security and social disintegration.[204] In the cases in which forced displacement was committed in the context of an armed conflict, the IACtHR referred to the Protocol II of the 1949 Geneva Conventions. This treaty prohibits ordering the displacement of civilian population for reasons related to the conflict, unless this is required for the safety of civilians or for imperative military reasons, and in the latter case all possible measures shall be taken to ensure that the civilian population receives, under satisfactory conditions, shelter, hygiene, health, safety and nutrition.[205]

The IACommHR and the IACtHR have referred to article 26 of the ACHR, the ADHR and the Protocol of San Salvador to give content to ESCR recognized through a broad interpretation of CPR.[206] The IACtHR has also referred to the ILO Convention No 169, the Convention on the Rights of the Children and the General Comment 14 of the CESCR.[207] This practice has been justified by the IACtHR for

[204] Ibid, paras 42 (7) (24) (25); *Yakye Axa Indigenous Community v. Paraguay* (n 178) paras 161-178; *Ituango Massacres v. Colombia* (n 194) para 213; *Sawhoyamaxa Indigenous Community v. Paraguay* (n 197) para 102.

[205] *Mapiripán Massacre v. Colombia* (n 194) para 171.

[206] *Baena Ricardo et.all v. Panama* (n 193) paras 99, 159; *Juvenile Re-education Institute v. Paraguay* (n 179) para 148; *Huilca Tecse v. Peru* (n 198) para 74; *Yakye Axa Indigenous Community v. Paraguay* (n 178) para 163.

[207] *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (n 197) paras 194, 195; *Baena Ricardo et.all v. Panama* (n 193) paras 157-173; *Juvenile Re-education Institute v. Paraguay* (n 179) paras 148, 149; *Yakye Axa Indigenous Community v. Paraguay* (n 178) paras 163-171; Verónica Gómez (n 118) 174; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) paras 194, 195; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 381; Thomas Antkowiak (n 124) 263,

its approach to the ACHR as a "living instrument" and the importance of an "evolutionary" and a "dynamic interpretation" of the rights enshrined in the ACHR.[208] Hence, the IACtHR has pointed out that the interpretation of the clauses of the ACHR has to consider the development of the Inter-American and International Human Rights Law, which would be coherent with the ACHR and the *pro homine* principle.[209]

An apparent progressive inclusion of ESCR by the IACommHR and the IACtHR,[210] recognizing the lack of hierarchy between rights, stressing the indivisibility and interdependence of human rights, seems to be identifiable in the indirect approach.[211] However, some also criticise the lack of a more direct application of ESCR in the Inter-American Human Rights System, ignoring article 26 of the ACHR and the Protocol of San Salvador without any specific reason,[212] causing vagueness in the content of CPR through their broad interpretation and perpetuating an apparent hierarchy between rights, enforcing the idea that CPR are more important than ESCR.[213] It cannot be denied that in many of the cases

265; Scott McKenzie, 'Yakye Axa. v. Paraguay: Upholding and Framing the Human Right to Water' (Intersentia, 2015) 251-257.

[208] *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (n 197) Concurring Opinion Judges Cancado Trindade and Abreu-Burelli (5); Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 382.

[209] *Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru* (n 179) Voto Razonado del Juez Roberto F. Caldas. Voto Concurrente Juez Eduardo Ferrer Mac-Gregor Poisot

[210] Verónica Gómez (n 118) 173; Mónica Feria-Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 HumRtsQ 459; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 374.

[211] *Villagrán-Morales et al v. Guatemala, 'Street Children',* Merits (n 197) Concurring Opinion Judges Cancado Trindade and Abreu-Burelli (30); *Suárez Peralta v. Ecuador* (n 181) para 130; Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (n 108) 30; Javaid Rehman (n 33) 173; Manuel E. Ventura Robles (n 192) 299, 302.

[212] Oswaldo R. Ruiz-Chiriboga (n 118) 163; Thomas Antkowiak (n 124) 259.

[213] Verónica Gómez (n 118) 173; Jo M. Pasqualucci (n 4) 5; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 397, 434; Thomas Antkowiak (n 124) 26, 275.

presented in the Inter-American Human Rights System, the committed ESCR violations have constituted elements of commission of serious CPR violations.[214] However, it is important to consider that not all CPR can be extended to embrace ESCR.[215] For example, many of these cases include the commission of serious CPR violations that led to the victims' deaths, which would require a person has to die before any remedy could be pursue for violation of ESCR, as the right to health and food, limiting the possibility of litigation.[216] In addition, as already pointed out in a concurrent opinion in the *Yarce* Case each ESCR and CPR has its own legal content that should not be confused.[217] However, as explained above, the trend has started to change in the last year, with two new judgments using a direct approach of ESCR.[218]

In this way, and despite its limitations, the indirect approach has been the most used in the Inter-American Human Rights System to protect ESCR. This approach seems rather conservative if it is considered that ESCR are enshrined in the Inter-American Human Rights instruments. However, the IACommHR and the IACtHR have not been conservative in their approach to reparations, as it is examined in the following sections.

[214] Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 325.

[215] Instituto Interamericano de Derechos Humanos, 'Protección internacional de los derechos económicos, sociales y culturales: Sistema Universal y Sistema Interamericano' (n 108) 89; Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 325.

[216] Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (n 134) 315.

[217] *Yarce and others v. Colombia* (n 159) Separate Opinion Judge Eduardo Ferrer MacGregor Poisot, paras 4, 70.

[218] See Chapter III, section 3.2.1.

3.2.3. Approach to Reparations in the area of Economic, Social and Cultural Rights

The IACommHR and IACtHR seem more keen to address ESCR when dealing with reparations, especially regarding restitution and guarantees of non-repetition.[219] These reparations include the implementation of housing programmes, medical and psychological treatment, educational measures, human rights education and training, land demarcation, installation of a sewage system and potable water supply, investment in community projects, development funds and modification of legal provisions, etc.[220] Through these reparations and by adopting an indirect approach to these rights, the IACommHR and the IACtHR have pursued the improvement of the ESCR conditions of victims mainly of CPR violations, but also ESCR violations.[221] The notion of "life project" [proyecto de vida] developed by the Inter-American Human Rights System has allowed compensation for the survivors of these violations, for their lost opportunities.[222] In this way, even though the IACtHR and the IACommHR have generally not develop the content of ESCR, using an indirect approach, they have granted remedies to attend these rights.[223]

Many of these reparations involve violations committed in countries facing an armed conflict and dictatorships. In the *Plan de Sanchez* case, the existence of

[219] *Baena Ricardo et.all v. Panama* (n 193) paras *214, 170; Acevedo Jaramillo et al v. Peru* (n 179) para 296; Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 423.

[220] *Ituango Massacres v. Colombia* (n 194) paras 407-409; *La Cantuta v. Peru*, Merits, Reparations and Costs (n 31) paras 240–242; *Mapiripán Massacre v. Colombia* (n 194) paras 312, 316, 317; *Yarce and others v. Colombia* (n 159) para 178; *Lagos del Campo v. Peru* (n 183) para 205; Manuel E. Ventura Robles (n 186) 143, 294.

[221] Manuel E. Ventura Robles (n 192) 215.

[222] *Loayza Tamayo v. Peru,* Reparations and Costs (IACtHR) Series C No. 42 (27 November 1998) para 147; Naomi Roth-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer, 2014) 116.

[223] Naomi Roth-Arriaza (n 217) 115; Thomas Antkowiak (n 124) 275.

violence was considered by the IACtHR when examining the pecuniary and non-pecuniary damages caused to the victims of an armed conflict, pointing out how the violence deteriorated their living conditions, causing poverty, marginalization and loss of land, unemployment, illness and higher mortality, food insecurity, social disintegration, etc.[224] In addition, the IACtHR linked the situation of impunity and the lack of knowledge about the serious human rights violations committed to the intensity of the suffering caused to the victims and the alterations in their living conditions, granting psychological treatment, among others, to address these damages.[225] In this way, the IACtHR recognized that the lack of truth-telling, investigation, prosecution and punishment of serious human rights violations as TJ purposes have negative consequences in the lives of victims.

Furthermore, in the *Plan de Sanchez* case, the IACtHR asserted that the massive human rights violations were targeted to destroy the cultural heritage of Maya communities, affecting the reproduction of social relations, the formation of family relationships, the facilitation of financial practices, and fragmented the sense of belonging to a group.[226] Considering these damages, the IACtHR granted reparations that included the training for the teaching personnel in intercultural and bilingual teaching, comprehensive schooling in these communities, study and dissemination of the indigenous culture in the affected areas, etc.[227]

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[224] *Plan de Sánchez Massacre v. Guatemala,* Reparations (IACtHR) Series C No. 105 (19 November 2004) paras 96.58, 162, 175.

[225] Ibid, para 83.

[226] *Plan de Sánchez Massacre v. Guatemala,* Merits (n 196) paras 42(7) Separate Opinion Judge A.A. Cancado Trindade*; Plan de Sánchez Massacre v. Guatemala,* Reparations (n 225) para 81.

[227] *Plan de Sánchez Massacre v. Guatemala,* Reparations (n 225) paras 49(4) (11), 87, 105–11, 117, 125.

In this way, the IACtHR has included an ESCR approach in their decisions, encompassing countries facing a violent period or transitional countries.[228] As pointed out, the most common approach has been the indirect one under chapter II of the ACHR. However, the trend has started to change in the last year, with two new judgments using a direct approach to ESCR. In granting reparations, the IACtHR has been more progressive, seeking to improve the ESCR conditions of victims mainly of CPR violations, but also ESCR violations, through an indirect approach to these rights. The existence of an armed conflict, dictatorship or transitional process does not seem to influence the approaches taken by the IACtHR, except when granting reparations, where the existence of violence is considered by the IACtHR to assess damages.

In any case, the Inter-American Human Rights organs have not been consistent over the years, due to a non-existing consensus among authors regarding the reason for the lack of a direct application of ESCR.[229] A lack of normative framework to declare direct violations of ESCR can be the reason;[230] however, after reviewing the Inter-American Human Rights instruments, it can be sustained that the obstacles to the application of ESCR in the Inter-American Human Rights System cannot be found in the human rights instruments.

It is true that on many occasions these ESCR violations are not invoked by the petitioners, which have been more focused on the violations of serious CPR violations committed during the violent period.[231] However, also on many

[228] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5, 38.

[229] Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 432; Oswaldo R. Ruiz-Chiriboga (n 118) 162; Manuel E. Ventura Robles (n 192) 143.

[230] James L. Cavallaro, Emily J. Schaffer (n 120) 225, 226, 271, 274; Manuel E. Ventura Robles (n 192) 303.

[231] Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' (n 127) 439.

occasions, the IACtHR articulates the content of ESCR in the reasoning, but it does not find a direct violation of ESCR in its decisions.[232] It has been claimed that the IACommHR and the IACtHR have avoided dealing directly with ESCR for the continuing vacillation around the legal obligations derived from these rights, based on deeply internalized stereotypes about the nature of ESCR, including their justiciability, as examined in the case of the ICESCR.[233] Therefore, challenging misconceptions would be the way to include a more direct approach o ESCR.

Therefore, it can be established that Latin American countries have international and regional ESCR obligations that were valid during their dictatorships and armed conflicts, as well as during their transitions. Considering this, it is relevant to review the domestic recognition of ESCR at the constitutional level in the examined Latin American countries, to see if they had any ESCR provisions enacted during their violent periods, which is examined in the next section.

4. STATE OBLIGATIONS AT THE DOMESTIC LEVEL

Latin American constitutions have been considered among the firsts in the world to have incorporated ESCR.[234] Many of the ESCR were enacted, at least to a limited extent, before the violent periods started.[235] During the violent periods, new enacted constitutions and constitutional reforms were more restrictive

[232] James L. Cavallaro, Emily J. Schaffer (n 120) 263.

[233] Tara Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions' (n 119) 341, 345, 355, 356; See Chapter III, section 2.2.

[234] Roberto Gargarella, 'Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights', *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015) 103.

[235] Javier A. Couso, 'The Changing Role of Laws and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity' in Roberto Gargarella, Pilar Domingo, Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 68; Roberto Gargarella (n 230) 105.

regarding the recognition of ESCR, as in the case of Chile.[236] An important exception to this is the case of Colombia, where the Constitution of 1991, which was enacted during the conflict, substantially improved the protection of ESCR.[237] In general, transitional countries improved the catalogue of ESCR, as in the case of Argentina, Brazil, Ecuador and Paraguay.[238] Hence, nowadays there exists an important catalogue of ESCR in the Latin American Constitutions.[239]

In addition, some Latin American countries have given priority to the provisions of human rights treaties at the domestic level. This has been done explicitly, as in Argentina that includes the ICESCR, the ADHR, the ACHR and the Protocol of San Salvador as treaties with constitutional hierarchy.[240] It can also be done implicitly, as in the case of Chile, who recognizes as a duty of the State to respect and promote the essential rights derived from the human nature, including human rights treaties ratified by Chile.[241]

Moreover, Colombia, Ecuador and Paraguay enshrined in their new constitutions a notion of rule of law called Social Rule of Law, as a notion of the

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[236] Constitución Política de la República de Chile [Political Constitution of the Republic of Chile (original text) enacted through Decreto Supremo 1150 (Chile, 21 October 1980); Natalia Angel-Cabo, Domingo Lovera, 'Latin American Social Constitution: Courts and Popular Participation' in Helena Alviar García, Karl Klare, Lucy A. Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015) 96.

[237] Constitución Política de Colombia [Political Constitution of Colombia] 27 October 1991 (reformed through Legislative Act No 1, 16 December 1997) articles 1, 42-77; Natalia Angel-Cabo, Domingo Lovera (n 237) 96.

[238] Constitución de la Nación Argentina (n 122) articles 5, 14, 42; CESCR, Concluding Observations- Paraguay, E/C.12/1/Add.1, 28 May 1996, para 3; Constituição da República Federativa do Brasil [Constitution of the Federal Republic of Brazil] 5 October 1988 (includes Constitutional Amendment No 99, 14 December 2017) Section II, Chapter 2; CESCR, Concluding Observations- Ecuador, E/C.12/ECU/CO/3, 13 December 2012, para 6.

[239] Javier A. Couso (n 236) 68; Roberto Gargarella (n 230) 105. For information about ESCR enshrined in the constitutions, see Georgetown University, 'Political Database of the Americas' <http://pdba.georgetown.edu/Constitutions/constudies.html> accessed 14 September 2018.

[240] Constitución de la Nación Argentina (n 121) article 77(22).

[241] Constitución Política de la República de Chile [Political Constitution of the Republic of Chile] last consolidated text enacted through Decree 100 (Chile, 17 September 2005) article 5.

State that includes ESCR.[242] Moreover, the Peruvian Constitutional Courts recognized the Social Rule of Law as inspiring the democratic regimes, even though this notion has not been explicitly enshrined in its Constitution.[243] In this conception of Rule of Law, the State must assume a dynamic role in the economic and social field, with the commitment to ensure a minimum of well-being, through the respect, protection and fulfilment of ESCR enshrined in the Constitution.[244] This notion of Social Rule of Law has been distinctive from Latin America, influenced by the work of Hermann Heller, who consolidated and united the notions of social state and the rule of law, considering one of the obligations of the State obtaining a material and social justice.[245] It is important to emphasise that the notion of Social Rule of Law was developed in Latin American countries facing armed conflicts or transitions. Moreover, Colombia has used this notion of the rule of law for a better respect, protection and fulfilment of specific ESCR of direct victims of the armed conflict.[246]

The notions of Social Rule of Law and Welfare State have been used in some cases interchangeably, because in both notions the State assumes the

[242] Constitución Nacional de la República de Paraguay [National Constitution of the Paraguayan Republic] 20 June 1992 (reformed through Constitutional Amendment No 1, 17 October 2011) article 1; Constitución de La República de Ecuador [Constitution of the Republic of Ecuador] 20 October 2008 (includes reforms 07 May 2011 and 21 December 2015, Official Register No 653) article 1.

[243] *2945-2003-AA/TC*, Tribunal Constitucional de Peru (Peru, 20 April 2004); *0008-2003-AI/TC,* Tribunal Constitucional de Peru (Peru, 11 November 2003); *2016-2004-AA/TC,* Tribunal Constitucional de Peru (Peru, 5 November 2004).

[244] Luis Villar Borda, 'Estado de Derecho y Estado Social de Derecho' (2007) 20 Revista Derecho del Estado, 73, 84; Natalia Angel-Cabo, Domingo Lovera (n 237) 85; María Pía Silva Gallinato, 'El Estado Social de Derecho en la Constitución Chilena' in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el Orden Constitucional Chileno* (Librotecnia, 2012) 31, 32.

[245] Francisco Cumplido, Humberto Nogueira, *Instituciones Políticas y Teoría Constitucional* (Editorial Universidad de Talca, 2001) 231.

[246] See Chapter IV, section 3.5.

responsibility to offer adequate benefits and services to satisfy the basic needs.[247] However, Latin American scholars have pointed out that the Welfare State focusses on social and economic policies, while the Social Rule of Law would be a broader notion, which would look for the material concretion of the values of liberty and equality in an effective way in society, respecting, protecting and fulfilling not only the CPR, but also ESCR, in search for social justice.[248] This distinction has been also explained by the Constitutional Court of Colombia, which has considered the Social Rule of Law as a socio-political organization that can be viewed from a quantitative and qualitative perspective. In its quantitative aspect, the Social Rule of Law would be a State that guarantees the minimum standards of education, salary, health, food and housing to all its citizens, as rights, not as charity, which could be equivalent to the Welfare State.[249] In its qualitative perspective, a Social Rule of Law is the political and legal response from the interventionist activity of the State, as a Democratic and Constitutional State.[250]

In this way, it can be claimed that Latin American countries enshrine ESCR at the domestic level. However, despite an existing normative recognition of ESCR, national courts have not necessarily recognized their justiciability, as observed by the IACommHR.[251] The lack of justiciability of ESCR could represent a wide assumption about the progressive and positive nature of ESCR, together with the

[247] Luis Villar Borda (n 245) 73, 85-88; Christian Viera, *Libre Iniciativa Económica y Estado Social: Análisis Al Estatuto de La Libertad de Empresa En La Constitución Chilena* (Legal Publishing, 2013) 25, 31.

[248] Francisco Cumplido, Humberto Nogueira (n 246) 232, 233.

[249] *T-406/92*, Corte Constitucional de Colombia (Colombia, 05 June 1992) para 2.

[250] Idem.

[251] IACommHR, 'Access to Justice as a Guarantee of Economic, Social and Cultural Rights : A Review of the Standards Adopted by the Inter-American System of Human Rights' (n 193) para 27.

belief that the involvement of the judiciary would and affect the principle of separation of powers, including allocation of resources by the government.[252]

Regarding the issue of allocation of resources, the Colombian Constitutional Court has been criticized for ordering millions of dollars of public expenditure to improve the situation of the forced displaced during armed conflict.[253] However, courts are already involved in allocating resources when dealing not only with violations of ESCR, but also with violations of CPR,[254] for example, when granting remedies for State responsibility for wrongdoings of the police, etc.[255] Moreover, and linked to the strict vision of the separation of powers, the fact that courts are involved in cases that have an impact on the allocation of resources does not mean that the judiciary should draft policies, but that they can request the Government to allocate resources or implement policies that allow to comply with its ESCR obligations.[256] This is the case of Colombia, where the judgments involved the correct implementation of public policies in favour of forcefully displaced already enacted by the government.[257]

In addition, regarding the separation of powers, the application of this principle has never been entirely strict and it has to be considered together with

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[252] Philip Alston (n 8) 159; Cécile Fabre (n 55) 264, 281; Roberto Gargarella, Pilar Domingo, Theunis Roux, 'Courts, Rights and Social Transformation: Concluding Reflections' in Roberto Gargarella, Pilar Domingo, Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 259; Jo M. Pasqualucci (n 4) 13; Katherine Young (n 45) 159; Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 1.

[253] Data from the General Budgetaru Direction of the Ministery of Treasure (2004), in Rodrigo Uprimny-Yepes, 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in Roberto Gargarella, Pilar Domingo, Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 134, 135.

[254] CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 10; Cécile Fabre (n 55) 281, 282; Roberto Gargarella, Pilar Domingo, Theunis Roux, 'Courts, Rights and Social Transformation: Concluding Reflections' (n 253) 258.

[255] Cécile Fabre (n 55) 269.

[256] Ibid, 280, 281; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (JUTA, 2010) 434.

[257] See Chapter IV, section 2.5.2.

the "checks and balances systems" to avoid the abuse of power of the different branches of the government.[258] For example, many civil law countries include an *a priori* or *a posteriori* judicial revision of constitutionality of laws,[259] including those laws that regulate or implement ESCR enshrined at the constitutional level. In this way, the doctrine of the separation of powers is not strict and it has exceptions regulated by law.

Moreover, some domestic courts in Latin America are already recognizing the justiciability of ESCR, as in Argentina and Colombia.[260] Moreover, the IACommHR has insisted on the importance of adequate access to justice to comply with ESCR obligations.[261] Moreover, the CESCR has explicitly pointed out the justiciability of some specific ESCR,[262] stressing that the neglect by the courts of their responsibility under the ICESCR is incompatible with the principle of the rule of law.[263] To prevent this issue, the CESCR has recommended that judicial training

[258] Roberto Gargarella, Pilar Domingo, Theunis Roux, 'Courts, Rights and Social Transformation: Concluding Reflections' (n 253) 260; Sandra Liebenberg, 'Revisiting the Reasonableness Review / Minimum Core Debate' in Stu Woolman, Michael Bishop (eds) *Constitutional Conversations* (PULP Press, 2008) 313.

[259] As in the case of Chile. See Constitución Política de la República de Chile, last consolidated text enacted through Decree 100 (n 242) article 93 (1) (6) (7).

[260] Christian Courtis, 'Socio-Economic Rights before the Courts in Argentina' in Fons Coomans, *Justiciability of Economic and Social Rights. Expreciences from Domestic Systems* (Intersentia, 2006) 309-354; José Reinaldo de Lima López, 'Brazilian Courts and Social Rights: A Case Study Revisited' in Roberto Gargarella, Pilar Domingo, Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 196–200; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (n 257) 120; Alicia Ely Yamin, 'Power, Suffering and Courts: Reflections on Promoting Health Rights through Judicialization' in Alicia Ely Yamin, Siri Gloppen (eds) *Litigating Health Rights: Can Courts bring more justice to health?* (Harvard University Press, 2011) 336.

[261] IACommHR, 'Access to Justice as a Guarantee of Economic, Social and Cultural Rights : A Review of the Standards Adopted by the Inter-American System of Human Rights' (n 193) para 328.

[262] CESCR, 'General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (n 37) para 17; CESCR, 'General Comment No 12: The Right to Adequate Food (Art. 11)', E/C.12/1999/5 (12 May 1999) para 33; CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (n 35) para 59; CESCR, 'General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (n 95) para 55; CESCR, 'General Comment No 18: The Right to Work (Art. 6 of the Covenant)' (n 45) para 48.

[263] CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 14.

should include the justiciability of the ICESCR.[264] The CESCR has taken a broader approach to the notion of justiciability, pointing out that the best way to give domestic legal effect to ESCR and the right to remedy is ensuring their judicial and administrative justiciability.[265]

Hence, the examined Latin American countries have enshrined ESCR at the domestic level before, during and after armed conflicts and dictatorships. Despite this, it is possible to see a limited justiciability of ESCR at the domestic level. These practices regarding ESCR at the domestic level have influenced the inclusion of an ESCR in the work of TJ mechanisms, as reviewed in the next chapter.

5. CONCLUDING REMARKS

This chapter has demonstrated that the Latin American countries examined in this thesis have a number of ESCR obligations under international, regional and domestic law, which were in force not only during the transition, but also during the dictatorships and armed conflicts. Moreover, ESCR obligations at the UN and Inter-American Human Rights System do not differ, and therefore, they should not create a confusion in the States regarding their obligations. Despite of this, CPR have been more considered by states, scholars and practitioners than ESCR, which do not find support in norms or principles. Moreover, as reflected throughout the chapter, the neglect of ESCR can be ascribed more to a lack of political will, to widely internalised stereotypes about ESCR and to the assumption of superiority of CPR in relation to ESCR. In this way, there is an idea of a different nature of ESCR in comparison with CPR.[266]

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[264] Ibid, paras 7, 11.

[265] CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 9; CESCR, Concluding Observations- Chile, E/C.12/1/Add.105, 01 December 2004 (n 25) section D; CESCR, Concluding Observations –Chile, E/C.12/CHL/CO/4 (n 18) para C; Philip Alston, Ryan Goodman, Henry J. Steiner, *International Human Rights in Context: Law, Politics, Morals* (OUP, 2008) 313.

[266] Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (n 4) 8; Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of

This chapter challenged some of these misconceptions about ESCR, showing the existence of specific obligations under international, regional and national law. This chapter also contested the conception of ESCR as always imposing positive obligations to the State, which implies a greater state action and the use of public resources.[267] The positive or the negative nature of a right depends more on the content of a specific rights and the imposed obligation that impose than on categorisation whether it is an ESCR or CPR.[268]

Moreover, as reviewed, ESCR contain a number of immediate obligations, which cannot be avoided during armed conflicts and dictatorships. Therefore, the argument that ESCR approaches cannot be included in TJ for including always-progressive obligations does not find support in international and regional instruments and practice.

Regarding the justiciability of rights, the already reviewed immediate obligations enshrined in the ICESCR should be directly applicable to the judiciary and other organs in many national systems,[269] as the immediate obligation of non-

Economic, Social and Cultural Rights' (n 59) 82, Louise Arbour (n 58) 6; Javaid Rehman (n 33) 141, 142; Roberto Gargarella, Pilar Domingo, Theunis Roux, 'Courts, Rights and Social Transformation: Concluding Reflections' (n 253) 257; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 21.

[267] UNGA, Third Committee A/C.3/SR.1203 (5 December 1962) 342; Philip Alston (n 8) 142, 183, 184; Roberto Gargarella, Pilar Domingo, Theunis Roux, 'Courts, Rights and Social Transformation: Concluding Reflections' (n 253) 258; Jo M. Pasqualucci (n 4) 9; Ben Saul, David Kinley, Jaqueline Mowbray (n 32) 142.

[268] Paul Alston (n 8) 184; Magdalena Sepúlveda (n 36) 158.

[269] CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para.1 of the Covenant)' (n 9) para 5; CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 10.

discrimination established in the ICESCR,[270] together with the minimum core of ESCR.[271]

Hence, the separation between ESCR and CPR is not apparent, especially in cases of serious human rights violations. This seems coherent with the notions of universality, indivisibility, interdependence and similar nature of all human rights.[272] However, the idea of a different nature of ESCR have on many occasions influenced the lack of recognition of massive and direct violations of ESCR,[273] as examined in the next chapter.

[270] ICESCR (n 14) Article 2.2; CESCR, 'General Comment No 9: The Domestic Application of the Covenant' (n 16) para 9.

[271] CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (n 35) para 60; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (n 4) 30; Katherine Young (n 45) 115, 158.

[272] 'The Proclamation of Teheran', Final Act of the International Conference on Human Rights, Tehran (13 May 1968); CESCR, 'Report of the 2nd Period of Sesions' (n 68) paras 211, 212; 'Vienna Declaration and Programme of Action', World Conference on Human Rights, Vienna (25 June 1993); IACommHR, 'Annual Report 1993' (n 146) Chapter V, 'The Realization of Economic, Social and Cultural Rights in the Region', section I; IACommHR, 'Third Report on the Situation of Human Rights in Colombia' (n 152) Chapter III, 'Economic, Social and Cultural Rights' para 19; IACommHR, 'Third Report on the Situation of Human Rights in Paraguay' (n 173) para 2; IACommHR, 'Considerations Related to the Universal Ratification of the American Convention and Other Inter-American Human Rights Treaties' (n 115) para 7; IACommHR, 'Fifth Report on the Situation of Human Rights in Guatemala' (n 170) para 2; *Acevedo Jaramillo et al v Peru* (n 179) para 101; *Lagos del Campo v Peru* (n 183) para 141; Magdalena Sepúlveda (n 36) 157; Louise Arbour (n 58) 7, 8.

[273] Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (n 59) 82; Javaid Rehman (n 33) 142; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (n 4) 20, 21.

CHAPTER IV

THE INCLUSION OF AN ECONOMIC, SOCIAL AND CULTURAL RIGHTS APPROACH IN TRANSITIONAL JUSTICE PROCESSES IN LATIN AMERICA

1. INTRODUCTION

In Chapter II, when examining TJ mechanisms and TJ purposes in Latin America, it was possible to observe a focus on massive and systematic CPR violations that coincide with the traditional conceptualisations of TJ. Moreover, it was also possible to find some cases of inclusion of ESCR approaches. This coincides with the development of TJ theory in the last decade, which started to emphasise the need for inclusion of an ESCR dimension to TJ to accomplish TJ purposes.[1] It also coincides with the ESCR obligations in force in Latin American countries, as reviewed in Chapter III.

This chapter aims to explore the cases in which ESCR have been included in transitional processes in Latin America and critically analyse this inclusion, considering the normative framework of TJ and in the nature of ESCR obligations in this region, which were reviewed in chapters II and III. Following the structure of Chapter II, this chapter first examines TJ mechanisms that have dealt with ESCR, to then review the TJ purposes pursue by these mechanisms when including ESCR approaches.

2. THE INCLUSION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS THROUGH TRANSITIONAL JUSTICE MECHANISMS

[1] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (March 2010) A.9, C.1; OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5, 57-59; ; Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) NYUJIntlL&Pol, 1-27.

As reviewed in Chapter II, Latin American countries have implemented different TJ mechanisms, including peace agreements, national consultations, truth commissions, reparation programmes, judicial measures and institutional reforms.[2] This section explores the TJ mechanisms that have incorporated ESCR approaches, focusing on how they are included in pursuit of TJ purposes, on the language used in the mechanisms and on the recognition of ESCR obligations or lack thereof at the national, regional or international level.

2.1. Peace Agreements

At the Latin American Level, the countries that have included ESCR approaches in their peace agreements are El Salvador, Guatemala and Colombia. As a way to accomplish peace, the inclusion of this approach has been strongly related to the need to deal with unequal land distribution, poverty and social and economic discrimination.[3]

However, the inclusion of ESCR has been conducted in different ways. The Peace Agreements of El Salvador do not include the language of ESCR. Instead, they refer to development when dealing with the agrarian situation and recommending the reconstruction of physical infrastructure, including schools and clinics as part of the National Reconstruction Plan.[4] Similarly, the peace agreements in Guatemala have maintained the focus on development, but they

[2] See Chapter II, section 2.

[3] 'Chapultepec Peace Agreement' (El Salvador, 16 January 1992) Chapter V; 'Agreement on Social and Economic Aspects and Agrarian Situation, Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 6 May 1996) Preamble; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera', Gobierno de la República de Colombia (Gobierno Nacional) and Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) (Colombia, 12 November 2016) Section 1.

[4] 'Chapultepec Peace Agreement' (n 3) Chapter V; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (OHCHR Women's Rights and Gender Uni, 2008) 7; Paris Roland, 'Nicaragua, El Salvador, Guatemala. Reproducing the Sources of Conflict' in *At War's End: Building Peace after Civil Conflict* (CUP, 2016) 122.

have also been recognized as an example of the inclusion of an ESCR approach, dealing with ESCR in a more direct way.[5] The Colombian peace agreement, the latest to be implemented in Latin America, incorporates an ESCR approach in a more integral way, enshrining as one of the purposes of the agreement the contribution to the satisfaction of fundamental rights, including ESCR.[6] This section explores the cases in which the Guatemalan and Colombian peace agreements made direct reference to ESCR.

In the case of the peace agreements in Guatemala, there are two main instruments that enshrine ESCR, which are the Agreement on Social and Economic Aspects and Agrarian Situation and the Agreement on Identity and Rights of Indigenous People. The inclusion of ESCR was focused on tackling the systematic discrimination in the enjoyment of ESCR suffered by some groups,[7] which was considered among the main causes of conflict.[8] The Agreement on Social and Economic Aspects and Agrarian Situation explicitly links measures of democratization with the State's obligation to comply with the ESCR obligations enshrined in the Guatemalan Constitution and with the State's obligation to ensure participatory development, implementation of special measures to guarantee women's rights to work, education, housing and health.[9] The Guatemalan Peace Agreement on Identity and the Rights of Indigenous is also explicit about ESCR of the indigenous communities, in stressing the respect, protection and fulfilment of

[5] Louise Arbour (n 1) 23, 24.

[6] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) section 1, 5.1.3.4, 5.2.

[7] 'Agreement on Social and Economic Aspects and Agrarian Situation' (n 3) para 55.

[8] See Chapter IV, section 2.3.1.

[9] 'Agreement on Social and Economic Aspects and Agrarian Situation' (n 3) paras 13-16.

their cultural rights, and recognizing the systematic discrimination that these communities have suffered in the enjoyment of ESCR.[10]

Moreover, the Guatemalan Peace Agreements propose institutional reforms to guarantee ESCR, including the implementation of a civil education programme that considers democracy, peace and promoting the protection of human rights; provision of bilingual education in rural communities; health, social security, housing, labour, land, agrarian reforms and legal and constitutional reforms, among others.[11] A constitutional reform is also proposed to include a better recognition of indigenous communities and to a land reform designed with consideration of the needs of indigenous communities.[12] In this way, the Guatemalan Peace agreement recognizes the importance of guarantee ESCR to accomplish the transition to democracy, especially in the case of some vulnerable groups. However, these recommendations have not been effectively implemented.[13] This has been spotted by the CESCR, which stressed that the implementation of the peace agreement should improve the respect for all human rights, including ESCR.[14]

The Colombian peace agreement incorporates an ESCR approach in a more integral and explicit way, stressing the importance of accomplishing social inclusion, with measures to eradicate land concentration and tackle poverty to reach reconciliation and accomplish social development.[15] Having this in

[10] 'Agreement on Identity and Rights of Indigenous Peoples', Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 31 March 1995) sections I-III.

[11] 'Agreement on Social and Economic Aspects and Agrarian Situation' (n 3) paras 15, 23-42, 50.

[12] Ibid, section 4.

[13] See Chapter IV, sections 2.2, 2.6.2.

[14] CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3, 28 May 1996, para 25.

[15] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) section 1.

consideration, the agreement proposes the implementation of national plans promoted and financed by the State destined to fulfil ESCR[16] and the implementation of social programmes and funding projects, among others, to encourage private initiatives of *campesinos*, women, families and ex-members of FARC-EP who were reincorporated to the social and economic life.[17] Moreover, many of these measures were recommended having in consideration a gender approach as part of the principle of equality and non-discrimination that should influence the implementation of the peace agreement.[18] The gender approach used by the peace agreement includes not only the importance of guaranteeing women as autonomous citizens and as rights-holders, but also the LGBT community, which has been identified as one of the reasons for the peace agreement having be rejected in the referendum, as it is examined.[19]

In suggesting these measures, the Colombian peace agreement has mainly used the language of public goods and services,[20] except when referring to the obligation to guarantee in a progressive way the right to healthy, nutritive and culturally adequate food;[21] the obligation of guarantee a dignified work having in consideration State obligations under the ILO;[22] and including the National Human Rights Plan and a National Plan of Human Rights Education when proposing

[16] Ibid, sections 1.3.2.2, 1.3.2.3, 1.3.3.1, 1.3.3.2.

[17] Ibid, sections 1, 3.2.2.

[18] Ibid, Introduction, sections 1, 1.3.2.1, 1.3.2.2, 3.4.1, 4.1.1, 5.1, 5.2, 6, 6.2.3.

[19] See Chapter IV, sections 2.2, 4.1.3.

[20] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) section 1.

[21] Ibid, sections 1, 1.3.4.

[22] Ibid, section 1.3.4.

mechanisms to strength the promotion of human rights.[23] Moreover, the Colombian peace agreement points out that the implementation of all these initiatives should be conducted under the principles and norms of the Social Rule of Law enshrined in the Colombian constitution, the ICESCR and the ICCPR.[24] In addition, the peace agreement explicitly establishes that in its implementation, the State has to take into account its duty to promote, protect, respect and guarantee human rights, including ESCR, having in consideration the universality, interdependence and indivisibility of all human rights.[25] Moreover, the peace agreements refers at various places to the principles of non-discrimination, equality before the law, international human rights principles and self-determination when including an ESCR approach.[26] In this way, even though the language of rights is not used in a systematic way through the peace agreement, their treatment as ESCR can be inferred from the explicit recognition of principles and laws of national and international human rights law in the implementation of this instrument.

In this way, when examining the different peace agreements, from the oldest in 1992 (El Salvador) to the newest in 2016 (Colombia), a progressive inclusion of ESCR can be observed. This is particularly applicable in countries where systematic ESCR violations were part of the violent period. Moreover, this is coherent with the existing ESCR obligations in the countries that implemented these agreements, as it was recognized in such peace agreements, the CESCR and

[23] Ibid, section 5.2.1.

[24] Ibid, sections 3.1.4.1, 4, 4.1.1, 4.1.2, 5.2, 6

[25] Ibid, section 5.2

[26] See Chapter II, sections 4.1.3, 4.2.3, 4.2.5.

the UN approach to TJ, which recommends enshrining ESCR protection in these instruments.[27]

2.2. National Consultations.

National consultations have not been generally examined as an independent mechanism in TJ. Moreover, when they were implemented in Latin America, in general they had a negative impact on pursuing TJ purposes.[28] The same applies from an ESCR perspective, where national consultations have not been as scrupulously examined as other TJ mechanisms.[29] Moreover, at the Latin American level, the national consultations that involved ESCR issues, which were the referendums about the peace agreements in Guatemala and Colombia, had a negative impact on the enjoyment of ESCR.[30]

In the case of Guatemala, the 1999 Constitutional Referendum rejected the constitutional reforms proposed by the peace agreement, having a negative effect on the enjoyment of ESCR, maintaining the socio-economic inequalities of the groups more affected by the conflict, including women and indigenous communities.[31] It has been pointed out that the negative results of the referendum were for the lack of information about the process and the aggressive campaign

[27] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 1) C.1; See Chapter III, section 2.2.

[28] See Chapter II, section 2.2.

[29] For example, this mechanism is not examined as an independent TJ mechanism in OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1).

[30] The national consultations in Chile and Uruguay did not involved ESCR issues. See Chapter II, section 2.2.

[31] 'Agreement on Constitutional Reforms and the Electoral Regime', Presidential Peace Commission of the Government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (Guatemala, 12 July 1996); Graham Brown, Corinne Caumartin, 'Horizontal Inequalities in Post-Conflict Reconstruction: Guatemala and Nepal' in Gaby Oré Aguilar, Felipe Gómez Isa (eds) *Rethinking transitions. Equality and social justice in societies emerging from conflict* (Intersentia, 2011) 109.

of conservative forces who were against the structural economic, social and cultural modifications proposed in the constitutional reform.[32]

In the case of the 2016 Colombian Plebiscite, it has been pointed out that among the reasons for the rejection of the peace agreement were the proposed integral rural reform and the inclusion of a gender perspective.[33] Moreover, it has been pointed out that the rejection of the peace agreement was urged by a sector of society who were afraid that the integral rural reform would diminish their rights over land in the areas of conflict.[34] This referendum triggered the writing of a new peace agreement that included relevant modifications, especially in the case of the integral rural reform, including explicitly the obligation of the State to respect the constitutional right to property, the elimination of the rural property registry and facilities for the regularization of properties.[35] It has been claimed by some that these reforms, which strengthened the right to property, ultimately affected the realization of the real structural rural reform pursued by the FARC in this peace agreement, including deconcentrating and distributing the land in the area of conflict.[36]

Hence, the economic and social conflict present in Colombia and Guatemala led to the negative results of the national consultations. This was particularly detrimental, considering that the measures rejected were designed to change

[32] Jérémie Gilbert 'Indigenous Peoples and Peace Agreements: Transforming Relationships or Empty Rhetoric?' in *Rethinking transitions. Equality and social justice in societies emerging from conflict* (Intersentia, 2011) 225; Graham Brown, Corinne Caumartin (n 31) 104.

[33] See Chapter IV, section 2.1; Gina Paola Rodríguez, ¿Cesó la Horrible Noche? Marchas y contramarchas de la paz en Colombia (2016) 3 Revista Política Latinoamericana, 10, 11; <www.nytimes.com/2016/10/09/world/americas/colombian-opposition-to-peace-deal-feeds-off-gay-rights-backlash.html?ref=nyt-es&mcid=nyt-es&subid=article> accessed 05 September 2018.

[34] Gina Paola Rodríguez (n 33) 10, 11.

[35] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) Section 1.

[36] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) Section 1, 1.1.1; Gina Paola Rodríguez (n 33) 10, 11.

structural and historical economic, social and cultural inequalities, considering the ESCR obligations of these States. Moreover, it gives the impression that the inclusion of direct forms of participation could prevent the realisation of ESCR. It is important to consider that a majority of the population would not necessarily support the implementation of measures to respect, protect and fulfil human rights of marginalised groups, privileging their own advantages or needs, particularly in cases when they are designed to challenge structural inequalities, power-asymmetries and bias in the decision making process.[37]

Still, the failure in the national consultations for the guarantee of ESCR should not lead to the idea that national consultations should not be implemented, but to the conclusion that these mechanisms have to be implemented carefully, ensuring the participation of all groups, the inclusion of the most vulnerable ones and the respect, protection and fulfilment of human rights. Moreover, it has to consider possible campaigns of misinformation, historical distrust from the oppressed sectors and groups who retained the power in the socio-economic sectors, particularly in countries that are still in conflict or have recently transited to democracy.

2.3. Truth Commissions

Truth Commissions have been some of the most common TJ mechanisms implemented in Latin America.[38] Many of these truth commissions have included in some extent ESCR approaches, such as the truth commissions in Argentina, Brazil, Chile, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay and Peru. This approach can be found in truth commissions when addressing the root

[37] Sandra Liebenberg, Katharine G. Young. 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015) 253, 254.

[38] See Chapter II, section 2.3.

causes of conflict, telling the truth about the violent period and in recommendations of reparations, which are examined in this section.

2.3.1. Addressing the Economic, Social and Cultural Root Causes of Conflict

This TJ purpose has been one of the less contested ways to include an ESCR perspective[39] because it deals with ESCR as background, structural, complex and long term issues, which correspond to the generalize conception of ESCR adopted by TJ scholars.[40] Despite this, the first truth commissions in Latin America were reluctant to analyse the ESCR root causes of conflict, as in the cases of Argentina, Chile and El Salvador, ignoring the important role that ESCR abuses played in the initiation of conflict.[41]

Later truth commissions have analysed the root causes of conflict, having common references to poverty, land concentration, socio-economic inequality and discrimination.[42] The Brazilian, Guatemalan, Peruvian and Honduran Truth Commissions recognized the link between socio-economic "issues" or "conditions", including social and economic exclusion, misery and poverty, with social explosions and the creation of violent groups, which had as response repression and *coup d'état*.[43] Moreover, the Guatemalan and Brazilian truth commissions

[39] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 54, 55; Louise Arbour (n 1) 26, 27.

[40] Misconceptions addressed by Evelyn Schmid, Aoife Nolan, 'Do Not Harm?: Economic and Social Dimensions of Transitional Justice' (2014) 8 IJTJ, 362-382.

[41] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 IJTJ, 333; See Chapter V, section 3.2.1.

[42] 'Guatemala: Memoria Del Silencio', Reporte de la Comisión para el Esclarecimiento Histórico (Guatemala, 25 February 1999) paras 214–369; 'Informe Final', Comisión de la Verdad y Reconciliación (Peru, 2003) Volume VIII, Section 2, Chapter 2; 'Relatório, Volume I', Comissão Nacional da Verdade (Brazil, 10 December 2014) paras 2-74; Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2(3) IJTJ, 276.

[43] Guatemala: Memoria Del Silencio' (n 41) paras 229, 239, 240, 261, 266, 368; 'Informe Final' (n 41) Volume VIII, Section 2, Chapter 1; 'Para que los hechos no se repitan: Informe de la Comisión de

tracked the existence of these economic and social abuses from colonial times, having a bigger impact on *campesinos*, poor mestizos and indigenous population.[44] The Guatemalan truth commission also stressed that the economic, social and cultural exclusion against the indigenous community was a source of violence.[45]

From the truth commissions that examined the root causes of conflict, only the Peruvian one had explicitly under its mandate to analyse the political, social and cultural conditions that contributed to the conflict.[46] This could imply that there are factors other than the mandates that led some commissions to tackling the ESCR root causes of conflict and others not.[47] International law could be one of the factors that influenced this inclusion, considering that the analysis of the root causes of conflict in the newest truth commissions in Latin America coincides with the recent international recognition of the root causes of conflict as a TJ purpose.[48]

When comparing the way these truth commissions have addressed the root causes of conflict, it is noticeable that the language of rights it is not used, but is more linked to broader socio-economic "issues" or "conditions" that generated the violence. Moreover, they seem to be examined in a contextual way, for a better

Verdad y Reconciliación', Comisión de Verdad y Reconciliación (Honduras, 2011) 57; 'Relatório, Volume I' (n 41) paras 2-78.

[44] 'Guatemala: Memoria Del Silencio' (n 41) paras 229, 275; 'Relatório, Volume II- Textos Temáticos', Comissão Nacional da Verdade (Brazil, 10 December 2014) section 3.A.

[45] 'Guatemala: Memoria Del Silencio' (n 41) para 261.

[46] Decree No 065-2001-PCM (Peru, 31 August 2001) article 2.

[47] Louise Arbour (n 1) 14, 15; Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 40) 335.

[48] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 1) A.9, C.1; OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1); Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 40) 343.

explanation of ulterior serious CPR violations.[49] This approach ignores ESCR obligations existing at that time at the national and international level. It also ignores the fact that in many cases the commission of serious ESCR violations started to occur before the violent period and that these violations could have an important role in igniting the conflict.

2.3.2. Truth-seeking about economic, social and cultural rights violations committed during the violent period

As was examined in Chapter II, most of the mandates of Latin American truth commissions were limited to examine specific serious CPR violations committed during the violent period, while some truth commissions with a broader mandate, as in the ones of Guatemala and Peru, allowed examining other serious human rights violations committed in the violent period.[50] The only case where there is a more direct mention of ESCR in the mandate is in the truth commission proposed in the Colombian Peace Agreement, which includes among its objectives the elucidation of the social and human impact of the conflict on the society, including its impact in ESCR.[51] However, the wordings of the mandate seems to indicate that the truth commission will not necessarily deal with direct ESCR violations, but more the ESCR damages caused by CPR violations. Still, despite the existence of either limited or more extensive mandates, Latin American truth commissions have examined the serious ESCR violations mainly in an indirect way, when describing serious CPR violations, as it is examined in this section.

[49] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 17, 54.

[50] See Chapter II, section 2.3.

[51] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) Section 5.1.1.1.2.

In the cases of armed conflict, as in Guatemala and Peru, truth commissions included an ESCR approach in dealing with issues of structural inequality in the context of the commission of serious CPR violations against indigenous groups and *campesinos*. Using this approach allowed truth commissions to show the role that land distribution and economic and social inequalities played in the violence and the ways in which this violence affected especially rural areas.[52] Moreover, these truth commissions, together with the one in El Salvador, examined ESCR violations committed during an armed conflict mainly in the context of torture, massacres, forced displacement and genocide.[53] In this context, the Guatemalan and Peruvian truth commissions tackled forced labour, destruction of houses and villages, fields, clothes and basic amenities, means of survival, and crimes such as rape targeted mainly at *campesinos* and indigenous communities, which were the military's strategies deployed to destroy these communities and their conditions of existence.[54] The Guatemalan truth commission dedicated a section of its report in reviewing the violations against the rights of existence, integrity and cultural identity against indigenous communities,[55] which were systematic violations committed to destroy these communities in Guatemala, as it was recognized also by the IACtHR.[56] Moreover, the Guatemalan truth commission also identified the

[52] 'Guatemala: Memoria Del Silencio' (n 41) paras 1742–1745; 'Informe Final' (n 41) Volume VIII, Section 3, Chapter 3, 2.

[53] 'Guatemala: Memoria Del Silencio' (n 41) paras 3–11, 17, 21–25, 58, 136, 144, 202, 1723, 1731, 2004, 2103, 2504, 2519–2533, 2888, 2901–2910, 2952–2954, 2976, 3025, 3086, 3102, 3317, 3395, 3461–3465, 3593; 'Informe Final' (n 41) Volume I, Section 1, Chapter 4, 9.2.6.2; 'From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador', Commission on the Truth for El Salvador (El Salvador, 1993) paras 2004, 2102, 2504, 28888, 2901, 2904–2910, 2952–2954, 2976, 3461–3465 .

[54] 'Guatemala: Memoria Del Silencio' (n 41) paras 2004, 2102, 2504, 2888, 2901, 2904–2910, 2952–2954, 2976, 3461-3465; 'Guatemala: Memory of Silence', Report of the Commission for Historical Clarification, Conclusions and Recommendations, (Guatemala, 25 February 1999) Conclusions [86].

[55] 'Guatemala: Memoria Del Silencio' (n 41) paras 2533, 2857.

[56] See Chapter III, sections 3.2.2, 3.2.3.

situation of forced labour against indigenous communities, women, children as sexual slaves in military detentions centres, domestic slavery in those centres or in the private houses of the military and forced recruitment.[57] In addition, the Peruvian and Guatemalan truth commission recognized the ESCR damages caused by sexual violence.[58]

In addition, the deterioration of living conditions is considered a motive of forced displacement in the Guatemalan and Peruvian truth commissions. Forced displacement at the same time was considered as causing hunger, cold, diseases, poverty, destruction of human and social capital, agricultural production and alteration of collective forms of work organisations.[59] These damages are later considered by these truth commission when suggesting reparations.[60]

In the case of repressive regimes, such as in Argentina, Brazil, Chile, Paraguay and Ecuador, truth commissions identified ESCR violations mainly in the context of the commission of serious CPR violations against social sectors linked to left wing parties, so related to groups such as workers, *campesinos* and students. The described ESCR violations included the control and intervention of unions,[61] violation of economic and labour rights,[62] destruction of houses and

[57] 'Guatemala: Memoria Del Silencio' (n 41) paras 2446, 2451, 2519, 2520, 2533.

[58] Ibid, paras 3998-4003; 'Informe Final' (n 41) Volume VI, Section 4, Chapter 1.5.

[59] Guatemala: Memoria Del Silencio' (n 41) paras 2004, 2103, 2504, 2952–2954, 2976, 3025, 3086, 3102, 3317, 3395; 'Informe Final' (n 41) Volume VI, Section 4, Chapter 1.5.4.1.

[60] See Chapter IV, section 2.3.3

[61] 'Informe de La Comisión Nacional de Verdad y Reconciliación ('Rettig Report') Comisión Nacional de Verdad y Reconciliación, 08 February 1991 (Chile) Volume II, Chapter I, 2.B; 'Informe Final de La Comisión de La Verdad de Panamá', Comisión de La Verdad de Panamá (Panama, 2002) paras 96, 115; 'Valech I Report' Comisión Nacional Sobre Prisión Política y Tortura (Chile, 28 November 2004) Chapter VII, 473-479; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo', Comisión de la Verdad (Ecuador, 2010) 32; 'Relatório, Volume II- Textos Temáticos' (n 43) section 2.C.

[62] 'Rettig Report' (n 60) Volume II, Chapter I, B; 'Relatório, Volume II- Textos Temáticos' (n 43) section 2.

fields,[63] unlawful acquisition of the properties of political detainees and indigenous lands by members of the security forces,[64] dismissal of professors and students, control and elimination of modules and research projects, cultural rights violations against journalists[65] and control of the publishing industry and censorship policies.[66] The Paraguayan truth commission makes a more direct reference to ESCR when examining the irregular implementation of the agrarian reform during the dictatorship and the beginning of the transition, establishing that the State violated its duty to respect the right of housing and to respect, protect and fulfil the right to food of *campesinos* and indigenous communities through forced eviction and neglecting the implementation of legal measures and activities to guarantee these rights.[67]

Indigenous communities were also recognized as targeted groups in the Brazilian and Paraguayan truth commissions, suffering land destitution, forced eviction, forced labour and forced displacement.[68] In the case of the Paraguayan truth commission, it directly recognized the commission of forced eviction and irregular appropriation of ancestral lands by the State as a violation of the right to food and indigenous rights under the ILO Convention No 169.[69] Moreover, there is an indirect recognition of the violation of cultural rights of indigenous children who

[63] 'Relatório, Volume I' (n 41) section 5.2; 'Relatório, Volume II- Textos Temáticos' (n 43) Chapter IV.

[64] 'Informe Nunca Más', Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina, September 1984) Chapter I(M).

[65] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres', Conclusiones y Recomendaciones', Comisión de Verdad y Justicia (Paraguay, 28 August 2008) para 8.

[66] 'Rettig Report' (n 60) Volume II, Chapter I, B; 'Informe Final de La Comisión de La Verdad de Panamá' (n 60) para 96.

[67] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) paras 192-203.

[68] Ibid, paras 158-167, 202; 'Relatório, Volume I' (n 41) Chapter 14; 'Relatório, Volume II- Textos Temáticos' (n 43) section 5.2.

[69] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) para 202.

were exiled or were born in exile, when pointing out their separation from their indigenous culture and language.[70]

Truth commissions in general have recognized torture as a common human right violation committed during the violent periods in Latin America. Truth commissions also recognized as means of torture acts such as deprivation of food, water or sleep; forced feeding of excrements; use of psychotropic medication; and sexual torture to men and women, including rape, sexual abuse, forced pregnancy and abortion, which caused ill health and the spread of all kinds of diseases.[71] These means of torture could constitute a violation to the right to health not only by themselves, but they could also be means of commission of international crimes.[72]

In other cases, ESCR violations are mentioned as part of the economic projects pursued by repressive regimes. In this way, the Brazilian truth commission pointed out that the persecution of people belonging to certain social classes and groups, as union leaders, indigenous communities and *campesinos*, had its origins in the contrasting economic and political projects of these groups and the ones promoted by the dictatorship.[73] The Ecuadorian Truth Commission explicitly recognized that Neoliberalism, not only in Ecuador but in Latin America was a permanent factor in the violation of ESCR, pointing out that in general

[70] Ibid, para 120.

[71] 'Informe Nunca Más' (n 63) Chapter I(D); 'Guatemala: Memoria Del Silencio' (n 41) paras 1905, 221, 225–228, 2232, 2234; 'Informe Final' (n 41) Volume VI, Section 4, Chapter 1.5; 'Valech I Report' (n 60) Chapters V, VI, 240-513; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) paras 94-96, 137-154; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 100; 'Relatório, Volume I' (n 41) Chapter 10.

[72] See Chapter IV, section 3.4.

[73] 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 32; 'Relatório, Volume II- Textos Temáticos' (n 43) sections 2(A), 3.

serious violations of human rights committed in Ecuador were part of the political, economic and cultural plan imposed by the State.[74]

Moreover, the Brazilian and Guatemalan truth commissions recognized the role of private actors, including economic and social powers, in economic crimes and in the commission of serious CPR violations, describing also ESCR violations in a contextual way. Hence, these truth commissions acknowledged that economic sectors themselves benefited from the Governmental fight against communism, dismissing workers and repressing trade unions organizations that were defending the labour rights.[75]

The reports of the truth commissions omitted, however, some serious ESCR violations committed in a systematic way during the violent periods. For example, censorship on the media and the arts has been recognized as part of a standard strategy of repressive regimes in Latin America,[76] but there are few mentions of these violations by truth commissions, as it was examined previously.[77] Similarly, in the case of Peru, the truth commission did not deal with the massive, compulsory and systematic government policy of sterilization of indigenous and *campesino* women, which was committed during the armed conflict and authoritarian government in Peru.[78] The lack of address of these serious ESCR violations has been denounced to the IACommHR as a clear violation of the right to personal integrity and the right to health of those women, existing friendly

[74] 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 32.

[75] 'Guatemala: Memoria Del Silencio' (n 41) para 2605; 'Guatemala: Memory of Silence' (n 53) Conclusions, para 144; 'Relatório, Volume II- Textos Temáticos' (n 43) Section 2(C).

[76] Marjorie Agosín, 'Art under Dictatorship' in (1990) 31/32 Agni, 33-36; Kathryn Sikkink, 'A cautionary note about the frame of peril and crisis in human rights activism' in *Rising to the Populist Challenge: A new Playbook for Human Rights Actors* (De Justicia, 2018) 177; See Chapter V, section 2.

[77] See Chapter IV, section 2.3.2.

[78] See Colleen Duggan, Claudia Paz, Paz Bailey, Julie Guillero, 'Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru' (2008) 2 IJTJ, 192-213..

settlements between the petitioners and the States, but not decisions on the merits in this area.[79]

Regarding the language of ESCR, in general truth commissions in Latin America did not used this language when describing serious human rights violations committed during a violent period. There are some exceptions when the language of ESCR is explicitly used regarding specific rights. For example, the Guatemalan truth commission used this language explicitly when describing violations committed against indigenous communities,[80] while the Brazilian and Chilean truth commissions included the language of ESCR when dealing with labour rights violations[81] and the Peruvian Truth Commission when examining forced displacement as violating multiple rights, including ESCR.[82] In the rest of the cases, even though the language of ESCR is not used, their treatment as human rights can be inferred on some occasions from the way truth commissions deal with these rights, as in the case of Guatemala that explicitly refers to the ICESCR as an instrument to consider in the report; or the case of Peru, which refers to the principles of interdependence, invisibility and universality of human rights when referring to international human rights obligations.[83]

Hence, the language of ESCR is not systematic and there is little clarity on the reasons why it is used in some cases, but not in others. It is possible to see that truth commissions refer to and emphasises different types of ESCR violations.

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[79] As in the María Mestanza Chávez case -about a *campesino* woman who was forced to a surgical sterilization procedure, which resulted in her death-, which concluded with a friendly settlement in the IACommHR, not recognizing the government a violation to the right to health. *María Chávez v Per*u, Nº 71/03, Case No 12191*,* IACommHR (22 October 2003) paras 9, 24.

[80] 'Guatemala: Memoria Del Silencio' (n 41) paras 1720, 2924.

[81] 'Rettig Report' (n 60) Volume II, Chapter I, B; 'Relatório, Volume I' (n 41) chapter 10; 'Relatório, Volume II- Textos Temáticos' (n 43) section 2.

[82] 'Informe Final' (n 41) Volume VI, Section 4, Chapter 1.9.1.2.3.

[83] Idem; 'Guatemala: Memoria Del Silencio' (n 41) paras 1676, 2485.

One reason for this could be the differences in types of experienced violence, but as examined, the serious human rights violations reported by the different truth commissions have many similarities. Another reason could be normative, but as it was examined, these countries had already some ESCR enshrined at the domestic, regional and international level before or during the violent period.[84] Moreover, in the case of Guatemala, even if the ICESCR was ratified during the armed conflict, and therefore it does not cover all the human rights violations committed during the armed conflict, the truth commission referred to the ICESCR in its considerations. The argument used by this truth commission emphasise the State's obligation to respect human rights recognized as customary law and as principles of international law, which compelled to the State to respect individuals and groups' essential rights, including ICESCR.[85] Therefore, normative restraints cannot be the only reason behind the limited inclusion of ESCR.

Yet a different reason could be the application of derogations and limitations during the violent period. When examining these restrictions, truth commissions have not included ESCR in the list of non-derogable rights, which, according to some, could suggest the idea of hierarchy between rights.[86] However, it is important to consider the requirements and restrictions to limitations and derogations of ESCR, which should be followed in times of a repressive regime and during an armed conflict.[87] Therefore, the limitations and derogations regime would not be an obstacle to deal with ESCR violations.

[84] See Chapter III.

[85] Guatemala: Memoria Del Silencio' (n 41) paras 1676, 1677; Zinaida Miller (n 41) 277.

[86] Guatemala: Memoria Del Silencio' (n 41) para 1677; Zinaida Miller (n 41) 277.

[87] See Chapter III, section 2.3.

Hence, it can be claimed that truth commissions in Latin America took a decision to privilege CPR violations, dealing with serious ESCR violations mainly in an indirect way, in the context of the commission of serious CPR violations.

2.3.3. Recommendations of reparations

Latin American truth commissions have considered the social, familiar and economic damages that victims and their families have faced as a consequence of the commission of serious human rights violations, mainly CPR violations,[88] emphasising how these violations have affected their life projects and their right to a dignified life.[89] Considering these damages, truth commissions have recommended reparation measures with some positive impact on the enjoyment of ESCR. The reparation measures suggested have included scholarships,[90] training programmes and jobs opportunities,[91] social security,[92] housing benefits[93] and health assistance, including medical and psychosocial treatment.[94] The

[88] 'Informe Nunca Más' (n 63) Recommendations (c); 'Informe Final de La Comisión de La Verdad de Panamá' (n 60) paras 183-191; 'Informe Final' (n 41) Volume VIII, Section 3, Chapter 3; 'Valech I Report' (n 60) Chapter IX, 520; 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación (n 42) 29; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) paras 164, 178-191.

[89] 'Rettig Report' (n 60) Volume II, Section 4, Chapter I, D; 'Informe Final de La Comisión de La Verdad de Panamá' (n 60) para 182; 'Informe Final' (n 41) Volume IX, Section 4, Chapter 2; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 33, 186-189, 316.

[90] 'Informe Nunca Más' (n 63) Chapter IV(C); 'Rettig Report' (n 60) II, Section 4, Chapter I, D.4; 'Informe Final' (n 41) Volume IX, Section 4, 2.2.4.3.3; 'Valech I Report' (n 60) Chapter IX, 525; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, para 84; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 69) 408, 411, 412.

[91] 'Informe Nunca Más' (n 63) Chapter IV(C); 'Informe Final' (n 41) Volume IX, Section IV. 2.2.3.5, 2.2.3.6; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, paras 67-71; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 412.

[92] 'Informe Nunca Más' (n 63) Chapter IV(C); 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, para 71.

[93] 'Rettig Report' (n 60) Volume II, Section 4, Chapter I, D.4; 'Informe Final' (n 41) Volume IX, Section IV, 2.2.3.5; 'Valech I Report' (n 60) Chapter IX, 526; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, para 85.

[94] 'Informe Nunca Más' (n 63) Chapter IV; 'Guatemala: Memory of Silence' (n 53) Recommendations [9]; 'Informe Final' (n 41) IX, Section 4, 2.3.2; 'Valech I Report' (n 60) Chapter IX, 524, 525; 'Informe

majority of the reparations recommended are individual reparations, with some exceptions of collective reparations in the cases of Peru and Guatemala, which included a health reparation programme, recuperation and extension of basic services and work and income generation for the communities affected by human rights violations such as forced displacement, massacres and others.[95]

Moreover, many of the recommendations included guarantees of non-repetition and institutional reforms with ESCR approaches applied. Truth commissions, when suggesting ESCR reforms could indirectly recognize the important role of ESCR in the reestablishment of the rule of law and democracy.[96] For example, as a guarantee of non-repetition, the Brazilian truth commission recommended a transformation of institutions and new State policies in the economic, social, political and cultural areas. Moreover, many of the suggested guarantees of non-repetition are education-related, including curricula reform to include the promotion of human rights in schools, the military and police educational establishments,[97] human rights training for the operators of justice,[98] the implementation of education in multiculturalism and multicultural integration in public security services to promote the participation of indigenous people in

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de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, paras 87-89; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) Recommendations, paras 21-30; 'Relatório, Volume I' (n 41) section V.

[95] 'Guatemala: Memory of Silence' (n 53) Recommendations, paras 10, 11; 'Informe Final' (n 41) Volume IX, Section 4, 2.2.3.2, 2.2.3.6.

[96] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Social and Legal Studies, 6.

[97] Informe Nunca Más' (n 63) Chapters IV(D) 3'Rettig Report' (n 60) Volume II, Section 4, Chapter II, B.3; 'Guatemala: Memory of Silence' (n 53) Recommendations, paras 36-38, 62-65; 'Informe Final de La Comisión de La Verdad de Panamá' (n 60) Recommendations, 6; 'Informe Final' (n 41) Volume IX, Section 4, Chapter 2 (B) (D); 'Informe Final de la Comisión para la Paz' Comisión para la Paz (Uruguay, 10 April 2003) 81 a) b); 'Valech I Report' (n 60) Chapter IX, 529; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, paras 107-137; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 414–416, 420, 427; 'Relatório, Volume I' (n 41) section V 6(21).

[98] 'Agreement on Identity and Rights of Indigenous Peoples' (n 10) section III.h.2.b; 'Guatemala: Memory of Silence' (n 53) Recommendations, paras 62-65, 72; *Gelman v. Uruguay,* Merits and Reparations Judgment (IACtHR) Series C No. 221 (24 February 2011) para 277 Section I, 60.

these services,[99] adaptation of schools to ethno-linguistic, cultural and geographic differences[100] and the promotion of alphabetization plans.[101]

The ratification of treaties as the ICESCR and the Protocol of San Salvador has also been considered as important measure to take during the transitions by the Brazilian, Ecuadorian, Paraguayan and Guatemalan truth commissions.[102] Moreover, the Ecuadorian truth commission suggested constitutional and legal reforms, including regulation of the right to strike enshrined in the Ecuadorian Constitution and following the parameters of ILO.[103] In addition, it suggested to typify the crimes of sexual violence, including forced pregnancy and sterilization, and to decriminalize abortion in the cases where the health of the woman is at risk or in the cases of lack of fetal viability.[104] The Honduran truth commission suggested institutional reforms to guarantee equality in work conditions between men and women; while the Ecuadorian Truth Commission suggested filiation reforms to allow the recognition of paternity of those who could not do it for political motives or as a consequence of the human rights violations committed during the violent period.[105] The Guatemalan Truth Commission suggested a fiscal reform to implement the Agrarian Reforms, social development and the

[99] 'Guatemala: Memory of Silence' (n 53) Recommendations, para 75(c).

[100] Ibid, Recommendation, paras 51, 52; 'Informe Final' (n 41) Volume IX, Section IV, Chapter 2.1

[101] 'Informe Final' (n 41) Volume IX, Section 4, Chapter 2 (D).

[102] 'Guatemala: Memory of Silence' (n 53) Recommendations, para 39; 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 41, 42, 427; 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) para 50; Relatório, Volume I' (n 41) 60.

[103] 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 421, 424, 427.

[104] Ibid, 425.

[105] 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo' (n 60) 426. Recommendations, 137; 'Para que los hechos no se repitan: Informe de la Comisión de Verdad y Reconciliación' (n 42) 68; 'Relatório, Volume I' (n 41) section 3.

improvement of public services.[106] The Paraguayan Truth Commission recommended the regulation of the work conditions and contracts of the indigenous people working in private companies, to criminalize discrimination in any base, including economic and social and to abolish any anti-terrorist laws that criminalize social vindications.[107] The Peruvian Truth Commission recommended the improvement of the conditions of the penitentiary population, including food and health.[108] It is also noteworthy that not all the reparations recommended were translated in the effective implementation of reparation programmes and institutional reforms, which are examined as separate mechanisms.[109]

The language of rights is sometimes explicit in the reparations recommended, but the language more frequently used is the one of needs or benefits. In any case, wherever they are named, they seem to be linked with the purpose of fulfilling to a greater or lesser degree the ESCR of the victims and their families as a way to repair mainly serious CPR violations. In addition, truth commissions with a limited mandate implemented in the 1980s and at the beginning of the 1990s seem to be less conservative in the inclusion of ESCR approaches when suggesting reparations than when dealing with the root causes of conflict and the truth-telling about the serious human rights and humanitarian law violations committed during the violent period. There is hardly any clear explanation of this different approach, but for some reason, while omitting the direct recognition of serious ESCR violations, Latin American truth commissions seem to detect the negative impact of serious CPR violations in the enjoyment of

[106] 'Guatemala: Memory of Silence' (n 53) Recommendations, para 83.

[107] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) Recommendations, paras 141-158, 172.

[108] 'Informe Final' (n 41) Volume IX, Section 4, Chapter 2 (C).

[109] See Chapter IV, sections 2.4, 2.6.

ESCR of the victims. Among the reasons, there could be the recognition by these commissions of the notions of dignified life and life project, which include the enjoyment of ESCR, and the direct reference to the legal principles of non-discrimination, equality and human rights principles to justify these recommendations.[110]

In conclusion, while examining the root causes of conflict, truth-seeking or reparations, truth commissions have included ESCR approaches, not necessarily using the language of rights and in a marginal and not exhaustive way in comparison to serious CPR violations, which is similar to approach of truth commissions in other regions of the world.[111] It is important to consider the time in which the truth commissions were created, the political context, the kind of human rights violations committed and the approach of these countries to ESCR. Furthermore, there is not any normative obstacle for the inclusion of ESCR approaches in reparation programmes. In this way, it is important to recognize that these truth commissions took a political decision to privilege the investigation of some serious human rights violations over others.[112] These decisions correspond with moves towards democracy in Latin America in the 1980s and 1990s, which had a marked liberal approach to the TJ process theory and practice, with a clear focus on serious CPR rights. As it was explored in this section, this approach has proven to be insufficient for dealing with the violent period in Latin America, during which ESCR violations were committed. This approach has also been insufficient to deal with the causes and consequences of conflict and the repressive regime.

[110] See Chapter II, sections 4.1.3, 4.1.4.

[111] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 17 A).

[112] Ibid 54.

2.4. Reparation Programmes

Different reparation programmes have been implemented in Latin American countries.[113] Most of them have been focused on repairing serious CPR violations, which in many cases had a positive impact on the enjoyment of ESCR.[114] Moreover, in some exceptional cases some reparation programmes have been implemented to repair ESCR violations. This section examines these two ways in which reparations programmes have included the ESCR approaches.

2.4.1. Reparations for serious civil and political rights violations

Reparation programmes with a positive ESCR impact have been granted in Latin America to victims of forced disappearance, illegal killing, political imprisonment and forced displacement, with the explicit purpose to reconstruct their life projects.[115] These reparations include psychological and physical rehabilitation, medical social security and social benefits.[116] In addition, victims of ESCR as means to commit serious CPR violations have been also repaired, as the victims of sexual violence, which have been repaired with compensation, medical assistance and in other forms, considering victims' health, considering survivors that present damages to body or health, permanent health debilitation and a mental or physical disorder.[117]

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[113] See Chapter II, section 2.4.

[114] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 38.

[115] E.g. Decree No 015-2006-JUS, 'Reglamento de la Ley que crea la Ley Integral de Reparaciones' (Peru, 25 January 2006) article 6.

[116] Law No 19123, Crea Comisión Nacional de Reparación y Reconciliación y otorga beneficios en favor de personas que señala (Chile, 8 February 1992); Law No 19992 establece pensión de reparación y otorga otros beneficios a favor de las personas que indica (Chile, 24 December 2004) section II; Law No 28592, 'Ley que crea el Plan Integral de Reparaciones' (Peru, 20 July 2005) articles 19, 20, 112-115; Law No 975, 'Ley de Justicia y Paz' (Colombia, 25 July 2005) articles 8, 42-55; Decree No 015-2006-JUS (n 114) articles 4, 24, 32.

[117] Law No 24043 (Argentina, 27 November 1991); 'Texto El Libro Azul: Política Pública de Resarcimiento' (Guatemala, 2003) section 14; Law No 975 (n 115) articles 5, 38, 39.

Moreover, Special Health Reparation Programmes have been implemented, as the ones to repair the victims of the armed conflict in Colombia (Programme of Psychosocial Attention and Integral Health)[118] and in Peru (Integral Programme of Reparations in Mental Health), and to repair the victims of different human rights violations committed during the dictatorship in Chile (Programme of Reparation and Integral Health Care (PRAIS).[119]

Reparations with a positive effect in education have included scholarships for food and accommodation fees and free higher education for victims and their children.[120] In connection with the right to work, reparation programmes also include the authorization of exercise of exiled professionals who obtained their degrees abroad.[121] Reparations with a positive effect in the right to housing include subsidies for the victims of serious CPR violations.[122] These reparations also include social security benefits.[123]

Moreover, collective reparations have been included in the reparation programmes in Peru, Guatemala and Colombia and have had a positive impact on

[118] Law No 1448, 'Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones' [Victims and Land Restitution Law] (Colombia, 10 June 2011) articles 137, 138; Oficina de Promoción Social, Programa de Atención Psicosocial y Salud Integral a Víctimas del Conflicto Armado (PAPSIVI) Documento Marco (Colombia, 2017) 11-13.

[119] Law No 19980 modifica la ley nº 19123, ley de reparación, ampliando o estableciendo beneficios en favor de las personas que indica y formaliza la creación del Programa de Reparación y Atención Integral de Salud (PRAIS) (Chile, 9 November 2004).

[120] Law No 19123 (n 115); Law No 19992 (n 115); Law No 28592 (n 115); Decree No 015-2006-JUS (n 114) artices 17-21; 'Texto El Libro Azul: Política Pública de Resarcimiento' (n 116) 21; Law No 20255 (Chile, 17 March 2008).

[121] Law No 19074 'Autoriza ejercicio profesional a personas que señala que obtuvieron títulos o grados en el extranjero' (Chile, 8 August 1991).

[122] Ministerio de Vivienda y Urbanismo, Decree No 176 (Chile, 23 December 2004); Ministerio de Vivienda y Urbanismo, Decree No 48 (Chile, 11 May 2005); Law No 28592 (n 115); Decree No 015-2006-JUS (n 114) articles 33-35; Ministerio de Vivienda y Urbanismo, Oficio N°341 (Chile, 25 July 2012).

[123] Law No 19234, 'establece beneficios previsionales por gracia para personas exoneradas por motivos políticos en lapso que indica y autoriza al instituto de normalización previsional para transigir extrajudicialmente en situaciones que señala' (Chile, 12 August 1993); Law No 20255 (n 119).

the enjoyment of ESC. These collective measures include not only the recuperation and extension of infrastructure of basic services in education, health and sanitation. They also involve the recuperation and reconstruction of commercial, productive and economic infrastructure in general, to develop human capacities and improve access to economic opportunities, comprising the creation of a fund of productive investment and programme support for agriculture and farming, to repair the victims who lost their means production.[124]

In this way, it is observable that even though these reparation programmes were designed to repair serious CPR violations, they considered the ways in which these violations have had a negative impact on the enjoyment of ESCR. The reason for this can be found in the reports of truth commissions, which elaborated the notions of dignified life and life project when considering the ESCR damages done to victims of serious CPR violations, as examined before.[125]

2.4.2. Reparations for serious economic, social and cultural rights violations

Reparation programmes in Latin America have exceptionally repaired victims of ESCR violations in the case of unfair dismissal and land deprivation, which were practiced on a mass scale in Latin America during their violent periods.

In the case of unfair dismissal, these violations have been committed under dictatorships and armed conflicts in Latin America, targeting especially workers that were considered members or sympathizers of the communist party, on many occasions in the context of commission of other serious human rights violations, such as political imprisonment, torture and unlawful killing. This link has been

[124] 'Texto El Libro Azul: Política Pública de Resarcimiento' (n 116) 16, 19; Decree No 015-2006-JUS (n 114) articles 16, 17; Law No 975 (n 115) article 49.

[125] See Chapter IV, section 2.2.3.

recognized by the CESCR, which stressed out the need to repair Colombian trade union leaders as targets of violence and threats and their families with charge to the Fund of Reparation for the Victims. The latter was created for the victims of the armed conflict.[126]

The implementation of reparation programmes in favour of victims of unfair dismissal has been characteristic of post-dictatorship transitions in the Southern Cone. Moreover, many of these reparations have had a positive impact on the enjoyment of ESCR. These measures include the reintegration to work of public employees,[127] teachers of public schools,[128] workers of State' companies[129] and bank employees.[130] They also include social security benefits for teachers and public employees.[131] Other reparation programmes in favour of returnees include the recognition of degrees obtained overseas, health assistance, free primary and secondary education for exiles and social security benefits.[132] States have also implemented reparation programmes in favour of students unfairly dismissed, including the reintegration of these students to schools, universities and institutes.[133]

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[126] CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5, 07 June 2010, para 12. Gobierno de Colombia, Unidad para las Víctimas <www.unidadvictimas.gov.co/es/atencion-asistencia-y-reparacion-integral/fondo-para-la-reparacion-las-victimas/80> accessed 12 September 2018.

[127] Law No 23238 (Argentina, 10 September 1985); Law No 23278 (Argentina, 28 September 1985); Law No 10559 (Brazil, 13 November 2012).

[128] Law No 23053 (Argentina, 22 February 1984).

[129] Law No 23117 (Argentina, 30 September 1984).

[130] Law No 23523 (Argentina, 24 June 1988).

[131] Law No 19234 (n 114); Law No 23238 (n 117).

[132] Law No 18994, 'Crea Oficina Nacional de Retorno' (Chile, 20 August 1990); Law No 19234 (n 114); Law No 18033 (Uruguay, 19 October 2006); OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 42.

[133] Law No 10559 (n 119).

Forced evictions and land destitutions are also another serious human right violation that has been committed on a massive scale during violent periods in Latin America. In the case of Chile, it was implemented to counteract land reforms executed during the previous democratic regimes.[134] To repair these violations, the Land Restitution or Compensation Programme was created in favour of individuals, unions and political parties that lost their real estates for an act of authority during the dictatorship.[135]

Similarly, in the case of Colombia, a Land Restitution Programme has been implemented, which deals with the victims of forced displacement as a consequence of the armed conflict. This reparation programme recognizes the double vulnerability of forced displaced regarding human rights violations and the lack of favourable socio-economic conditions. Land restitution is considered as a right that looks to return the land with it respective property and improve socioeconomic conditions of victims to a more dignified life.[136] The law that implements land restitution also includes some public policies for socio-economic stabilization and reintegration, housing benefits, preferential measures of assistance in health and education,[137] considering the principles due process, non-discrimination, equality before the law, human dignity and constitutional

[134] See Chapter V, section 2.

[135] Law No 19568, 'dispone la restitución o indemnización por bienes confiscados y adquiridos por el estado a través de los decretos leyes nºs 12, 77 y 133, de 1973; 1.697, de 1977, y 2.346, de 1978' (Chile, 23 July 1998.)

[136] Decree No 2131 (Colombia, 30 July 2003) Preamble; Decree No 170 (Colombia, 05 February 2001); Law No 1448 (n 111) Chapter III; Decree No 2569 (Colombia, 12 December 2014); Decree No 440 (Colombia, 11 March 2016).

[137] Law No 387, 'por la cual se adoptan medidas para la prevención del desplazamiento forzado; la atención, protección, consolidación y esta estabilización socioeconómica de los desplazados internos por la violencia en la República de Colombia' (Colombia, 18 July 1997); Decree No 951, 'Por el cual se reglamentan parcialmente las Leyes 3ª de 1991 y 387 de 1997, en lo relacionado con la vivienda y el subsidio de vivienda para la población desplazada' (Colombia, 24 May 2001); Law No 1448 (n 111) articles 51, 53-57, 123-125, 137, 138, 145, 189.

supremacy as guidelines for the implementation of these reparations.[138] These measures benefit not only victims of land destitution, but also other victims of violations of humanitarian law, including victims of rape.[139] The implementation of the Land Restitution Programme was celebrated by the CESCR as an important measure to promote ESCR in Colombia.[140]

Hence, reparation programmes for serious ESCR violations have been implemented in Latin America, having a more direct recognition of the existence of these violations than in truth commissions. In general, the language of ESCR is not used in the reparation programmes in Latin America, though exceptions exist. For example, a reparation law in Colombia explicitly established as its purpose to ensure social security and the right to health in Colombia in favour of victims of forced displacement, following the Social Rule of Law enshrined in the Constitution and the principles of human dignity, solidarity and general interest of prevalence.[141] In the case of education, the reparation programme of Peru uses the language of rights regarding the right to primary education.[142] Moreover, the Victims and Land Restitution Law in Colombia includes the language of rights regarding to the right of children and teenagers to enjoy all rights, including ESCR and CPR.[143]

One issue that reparations programmes could face when including ESCR approaches is the implementation of differentiated programmes to guarantee ESCR of the victims and their families and the ones implemented for the general

[138] See Chapter II, section 3.

[139] Law No 1448 (n 111) article 3.

[140] CESCR, Concluding Observations -Colombia, E/C.12/COL/CO/6, 19 October 2017, para 5.

[141] Decree No 2131 (n 125) Preamble.

[142] Decree No 015-2006-JUS (n 114) articles 17-21.

[143] Law No 1448 (n 111) article 181.

population. This issue was dealt by the Colombian Constitutional Court, which established that the obligation of granting medical and psychosocial support for the victims and their families cannot be considered fulfilled just with providing them access to the basic plans provided by the general healthcare system.[144] Therefore, the State should design specialized programmes, with professionals trained to deal with the specific issues of the victims of massive and systematic human rights violations.[145]

This issue is also present when granting collective reparations, which has proved to be very challenging.[146] It has been pointed out that on many occasions States confuse their general obligations under international, regional and national law in the area of ESCR with their obligations of granting collective reparations that positively impact the enjoyment of ESCR by a community affected by this type of violence.[147] For example, as pointed out in the previous page, the reparation programme in Peru includes the duty of the State to guarantee primary education,[148] which is already an obligation under ESCR law and therefore it should not be considered only as a reparation targeted at victims of violence and their families.[149] This, however, differs from the need to implement especial

[144] T-045/10, Corte Constitucional de Colombia (Colombia, 02 February 2010).

[145] Norma Técnica No 88 Para La Atención En Salud de Personas Afectadas Por La Represión Política Ejercida Por El Estado En El Periodo 1973-1990', Ministerio de Salud de Chile, Unidad de Salud Mental (2000) section 6.6.

[146] Cristián Correa, 'Reparaciones En Perú: El Largo Camino Entre Las Recomendaciones y La Implementación' (ICTJ, 2003) 13, 14, 29.

[147] Louise Arbour (n 1) 19, 20; Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 40) 352; Naomi Roth-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer, 2014) 119; Clara Ramírez-Barat, Roger Duthie, 'Education and Transitional Justice: Opportunities and Challenges for Peacebuilding' (UNICEF, ICTJ, 2015) 30.

[148] Decree No 015-2006-JUS (n 114) articles 17-21.

[149] Clara Ramírez-Barat, Roger Duthie (n 137) 12.

measures in favour of groups that have not had proper access to ESCR, which could include victims of violence.

In conclusion, reparation programmes in Latin America have been implemented mainly to repair serious CPR violations; however, there exist some exceptional cases when reparations for direct ESCR violations are considered, such as unfair dismissal. In this way, reparation programmes go further than truth commissions, identifying them as independent violations which have to be repaired, instead of reviewing them merely as contextual or as means of commission of serious CPR violations. In any case, many of the reparation programmes for victims of serious CPR violations include measures with a positive effect on the enjoyment of ESCR for the victims and their families. In all these cases, the treatment of ESCR does not seem to be consistent while there are observable problems with its implementation. However, these problems do not differ from general problems faced by the reparations programmes implemented in Latin America, especially regarding collective reparations, the classification of beneficiaries, etc.[150] Hence, the issues do not seem to derive from the nature of ESCR, but from the complexity of the implementation of reparation programmes.

2.5. Judicial measures

Judicial measures have been harder to implement in Latin America than other TJ mechanisms.[151] In the case of ESCR violations, the difficulties in the implementation of judicial measures continues, adding the problem of the persistent idea of lack of justiciability of ESCR.[152] Despite this issue, some

[150] See Chapter II, section 2.4.

[151] See Chapter II, section 2.5.2.

[152] See Chapter III, sections 2.2, 3.2.2, 4, 5.

international and domestic courts have included ESCR approaches.[153] This section reviews some relevant examples of the inclusion of ESCR approaches by the judiciary at the international, regional and national level in Latin America.

2.5.1. Judicial measures at the international level

From an international perspective, it is the Inter-American Human Rights System that has played a more important role in pursuing TJ purposes in Latin America. This system has dealt with ESCR violations, many of those committed during armed conflicts.[154] When reviewing the decisions of the IACtHR about ESCR violations in these specific contexts, differences in the adopted approaches are not noticeable as there exists mainly an indirect approach to ESCR violations committed in the context of massacres and forced displacement during an armed conflict, which uses the broad interpretation of CPR enshrined in the ACHR.[155]

In general, the IACtHR has not directly dealt with ESCR violations committed during dictatorship, but it has referred to them when dealing with serious CPR violations committed against targeted victims, including workers, trade unionists and students.[156] However, this is not reserved exclusively for dictatorships, but it is a practice also implemented during armed conflicts, as in the case of Colombia, where the IACommHR already accepted precautionary measures in favour of unionists and workers associations for prosecution and

[153] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 24; Louise Arbour (n 1) 15.

[154] See Chapter II, section 2.5.1; Chapter III, section 3.2.

[155] The most emblematic cases, reviewed in the previous chapter, are *Ituango Massacres v. Colombia, Mapiripán Massacre v. Colombia* and *Plan de Sánchez Massacre v. Guatemala*. See Chapter III, section 3.2.

[156] E.g. *Goiburú et al. v. Paraguay,* Merit*,* Reparations and Costs (IACtHR) Series C N° 153 (22 September 2006) para 61(9); *Miguel Castro Castro v. Perú,* Merit*,* Reparations and Costs (IACtHR) Series C No 160 (02 August 2008) paras 301-313.

intimidation committed by corporations in collaboration with paramilitary groups.[157]

In the area of reparations the IACtHR found distinctive and inventive ways to include ESCR approaches in TJ contexts.[158] The IACtHR has ordered pursuing TJ purposes as guarantees of non-repetition, linking for example the situation of impunity of the serious human rights violations committed to the intensity of the suffering caused to the victims and the alterations in their living conditions.[159] Moreover, the IACtHR has recognized the right of knowing the truth about all the human rights violations committed in the context and as a consequence of the massacres as a right of the victims and the society in general,[160] which could include ESCR violations.

In any case, it is difficult to establish the existence of any trends towards reparation for certain kinds of ESCR violations committed during a violent period, because reparations in general are granted to repair serious CPR violations.[161] Therefore, the Inter-American Human Rights System has taken a similar approach to ESCR in all the cases, not making a distinction between human rights violation committed during democracy, transitions, armed conflicts or dictatorships, except when considering the damages caused to the victims of the violence. For this

[157] IACommHR, 'Precautionary Measures 2006' <www.cidh.org/medidas/2006.eng.htm> accessed 24 July 2016.

[158] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 38; See Chapter III, section 3.2.3.

[159] *Plan de Sánchez Massacre v. Guatemala,* Reparations (IACtHR) Series C No. 105 (19 November 2004) para 83. See Chapter III, section 3.2.3.

[160] *Plan de Sánchez Massacre v. Guatemala,* Reparations (n 158) paras 96-98; *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C, No. 148, paras 296, 399-401.

[161] *Rochela Massacre v. Colombia,* Merits and Reparations (IACtHR) Series C No 163 (11 May 2007) paras 298-303; *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil,* Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 219 (24 November 2010) paras 235, 264-269, 281-283.

reason, this section remits to what was examined in Chapter III.[162] However, in TJ contexts and during a violent period, the guarantees of non-repetition ordered have been distinctive in terms of including ESCR approaches.

2.5.2. Judicial measures at the national level

Domestic courts started to be implemented in general in the late transitions in Latin American countries, playing in any case a relevant role in pursuing TJ purposes.[163] However, regarding ESCR, in general its involvement is limited. In cases of investigation, prosecution and punishment of serious ESCR violations, domestic courts have mainly addressed these violations in an indirect way in the context of the commission of serious CPR violations against unions and workers during dictatorships and armed conflicts.[164] In this situation, not only state agents have been investigated, but also private actors for being accomplices or collaborators of the repression. For example, there exist cases against national and transnational corporations (including Ford, Mercedes Benz and Coca-Cola, among others) for their involvement in the repression against workers, committed in Colombia and Argentina.[165] In any case, the serious ESCR violations against workers were not part of the claims as those focused on serious CPR violations

[162] See Chapter III, section 3.2.

[163] See Chapter II, section 2.5.2.

[164] CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 125) para 12.

[165] Sinaltrainal v. Coca-Cola Company, 256 US F. Supp.2d 1345 (2003); Daimler AG v. Bauman, 134 US S. Ct. 746 (2014); *Müller, Pedro y otros*, FSM 27004012/2003/TO4, Tribunal Oral en lo Criminal Federal N° 1 de San Martín (Argentina, 11 December 2018); Ministerio de Justicia y Derechos Humanos de la Nación, 'Responsabilidad Empresarial En Delitos de Lesa Humanidad. Tomo I: Represión a Trabajadores Durante El Terrorismo de Estado' (Argentina, November 2015); Nelson Camilo Sánchez, 'Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies' in Sabine Michalowski, *Corporate Accountability in the Context of Transitional Justice* (Routledge, 2013); Wolfgang Kaleck, 'International Criminal Law and Transnational Business: Cases Form Argentina and Colombia' in Sabine Michalowski (ed) *Corporate Accountability in the Context of Transitional Justice* (Routledge, 2013); Uki Goñi, 'Argentina: two ex-Ford executives convicted in torture case (11 December 2018) <www.theguardian.com/world/2018/dec/11/pedro-muller-hedro-sibilla-ford-executives-argentina-torture-case> accessed 12 December 2018.

committed against the workers and unions. In this sense, it is important not to confuse corporate responsibility for their collaboration with the repressive authorities and the conflict with the commission of ESCR violations, which in the literature are sometimes examined through the same lens.[166] Similar concerns regard the role that the judiciary has played in the investigations of cases of corruption and illicit enrichment of former military officers who held political power during the authoritarian period, as in Chile and Argentina.[167]

Colombia is a country that has been prominent in the inclusion of ESCR approaches by the judiciary when pursuing TJ purposes. Commonly, this inclusion has not been done by ordinary courts, but by a specialized court created by the Victims and Land Restitution Law in Colombia, to tackle cases where a third party opposes a land restitution.[168] This is a special case in the Latin American context, constituting an effective collaboration between a reparation programme and the judiciary.

Moreover, the Colombian Constitutional Court has also played an important role in ensuring the ESCR of forced displaced for the armed conflict by issuing several judgments in assessing the protection of their right to housing, food, health, education, work, minimum wage, social security and dignified life.[169] The most emblematic judgment in this area is the T-025 of 2004, in which the Colombian Constitutional Court declared that internal forced displacement in Colombia constituted a violation of multiple human rights, including ESCR, which

[166] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 22.

[167] Rol 1649-2004, Chilean Jurisdictional Judge Manuel Valderrama Rebolledo (Chile, 07 May 2015); Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010) 92; Gastón Chillier, Lorena Balardini, 'New Challenges in the Process of Justice for Crimes against Humanity in Argentina: Civilian Complicity and Crimes against Sexual Integrity' (2013) 6 Aportes DPLF: Magazine of the Due Process of Law Foundation, 16.

[168] Law No 1448 (n 111) articles 79, 80, 119.

[169] *T-406/92*, Corte Constitucional de Colombia (Colombia, 05 June 1992); *T-025/2004*, Corte Constitucional de Colombia (Colombia, 22 January 2004) section 5.1.

represents an unconstitutional state of affairs.[170] The Colombian Constitutional Court rejected the argument of ordinary courts of the right to housing as one without constitutional protection.[171] In this way, it ruled against public institutions in charge of implementing the reparation programmes for forced displacement, for not taking sufficient measures to overcome the gravity of the humanitarian crisis and life conditions of the displaced population.[172] The Colombian Constitutional Court pointed out that the measures taken have to consider the obligation of the State to fulfil at least a certain minimum of constitutional ESCR, which includes essential food, potable water, medical and sanitary services, basic housing and appropriate clothing.[173] To issue this judgment, the Colombian Constitutional Court linked the notion of Social Rule of law enshrined in the Colombian Constitution with international human rights law and soft-law (including the ICESCR and the general comments of the CESCR).[174] Therefore, the argument used by the public institutions in this case of not having enough resources to implement the social services and policies in favour of forced displacement would go against the progressive realization of ESCR and the prohibition of the implementation of retrogressive measures on ESCR, aimed at preventing the worsening of the situation of injustice, exclusion or marginalization of victims of forced displacement.[175] Moreover, as it was pointed out when reviewing reparation programmes, the Colombian Constitutional Court established that the provision of

[170] *T-025/2004* (n 168) section 5.1; OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 29.

[171] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (JUTA, 2010) 129.

[172] *T-025/2004* (n 168) section 1.

[173] Ibid, section 9.

[174] Idem.

[175] Ibid, sections 8.1, 8.3.2.

basic benefits for the victims of the armed conflict could not be limited to the basic plans that are offered in for the general population.[176] It is hence visible that the rules of the ICESCR are fully considered in the implementation of a reparation programme.

In addition, the Colombian Constitutional Court still has the competence to monitor the compliance of the implementation of this judgment.[177] The ruling of the Colombian Constitutional Court and its subsequent monitoring is highly relevant, due to using the language of ESCR, challenging classic misconceptions against their justiciability and influencing the implementation of reparation programmes in Colombia.[178]

Despite examples offered by Colombia, the involvement of domestic courts in serious ESCR violations in Latin America have paled in comparison with the gravity that is attributable to serious CPR violations.[179] The lack of inclusion of an ESCR approach in the judiciary as TJ mechanisms could result from the misconceptions about ESCR already existing in the transitional countries, including the idea of presumed hierarchy within human rights and the lack of justiciability of ESCR.[180] Perhaps for the reasons mentioned, the few examples where there are references to ESCR are in the Inter-American Human Rights System and in the Colombian context, which enshrined the Social Rule of Law and a strong catalogue

[176] *T-045/10* (n 136).

[177] Corte Constitucional de Colombia, Seguimiento al cumplimiento de la sentencia T-025 de 2004/Año 2015 <www.corteconstitucional.gov.co/T-025-04/A2015.php> accessed 14 September 2018.

[178] Unidad para la Atención y Reparación Integral a las Víctimas, 'Plan de Trabajo: Para superar el atraso a la respuesta de peticiones y acciones de tutela de víctimas que influye en que se altere la protección de las más vulnerables' (Colombia, June 2016) <www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/plandetrabajo-auto206y224de2016.pdf> accessed 14 September 2018.

[179] Scott Leckie, 'Violations of ESCR' (1998) 20 HumRtsQ, 82; Louise Arbour (n 1) 10, 11.

[180] Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP, 2014) 4; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP, 2015) 23; See Chapter III, section 5.

of ESCR in its Constitution. In these cases, the inclusion of an ESCR approach was mainly linked to truth, reparations and institutional reforms more than investigation, prosecution and punishment of ESCR violations. Moreover, the inclusion of an ESCR approach in the judiciary can also be influenced by the current development of the serious human rights violations that should be prosecuted in a TJ context, as it is examined.[181]

2.6. Institutional Reforms

Institutional reforms can be considered as platforms where new societies can include ESCR approaches, promoting public sector reforms with a direct impact on the protection of ESCR as well as to amend related legislation and transform society.[182] Different institutional reforms have been implemented in transitional countries in Latin America, having some of them explicitly in consideration ESCR issues. Others, despite not explicitly recognizing this approach, they have positively impacted the enjoyment of ESCR. This section analyses these legal, structural and educational reforms implemented in a TJ context, with the inclusion of ESCR approaches.

2.6.1. Reform of Legal frameworks

The ratification of human rights treaties and/or the implementation of constitutional reforms to increase the hierarchy of these treaties have been important legal reforms implemented in transitional countries in Latin America.[183]

[181] See Chapter IV, section 3.4.

[182] Louise Arbour (n 1) 25, 26; Sabine Michalowski, Lisa Hecht, 'The Economic and Social Dimensions of Transitional Justice' (2012) Essex Transitional Justice Network, Concept Paper, 1 <www1.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf> accessed 25 August 2018.

[183] See Chapter II, section 2.6.1.

These involve ESCR treaties, as the ICESCR and the Protocol of San Salvador, which were ratified before and during the Latin American transitions.[184] However, the ratification of these treaties has not been necessarily considered as a TJ measure, with few exceptions, as in the case of Ecuador, Guatemala or Paraguay.[185] This could be for the idea that TJ measures have to tackle CPR, not ESCR issues, but in general, there is hardly any clear reason for this.

Constitutional reforms have been considered essential to re-establishing the rule of law and to guaranteeing human rights, including ESCR, as in the case of South Africa, where the constitutional making process was designed to remedy the socio-economic injustices of the apartheid.[186] This approach has been taken in different ways at the Latin American level, where it is possible to find that new constitutions were enacted or that there were important constitutional reforms after armed conflicts or dictatorships (or during the armed conflict, as in the case of Colombia), expanding the catalogue of ESCR.[187] Moreover, the Colombian, Ecuadorian and Paraguayan constitutions incorporated ESCR and/or enshrined the notion of the Social Rule of Law as a notion of State that assume a dynamic role in the economic and social field.[188] Furthermore, important constitutional reforms were also proposed by the Guatemalan Peace Agreement, which incorporated an ESCR approach, but was rejected in a referendum.[189] An exception is the case of Chile, which has not successfully implemented ESCR reforms during its transition

[184] See Chapter III, sections 3.1.2, 3.1.3.

[185] See Chapter IV, section 2.3.3.

[186] Derek Powell, 'The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition' (2010) 4 IJTJ, 231.

[187] See Chapter II, section 2.6.1; Chapter III, section 4.

[188] Idem.

[189] See Chapter IV, section 2.2.

despite the adoption of measures restricting ESCR being one of the biggest legacies of the dictatorship.[190]

In this way, legal reforms can be essential to establishing the new political order, which protects human rights, including ESCR. This has occurred in some countries in Latin America, but in a less symbolic way than in other cases of countries transitioning from a violent period, such as South Africa.

2.6.2. Structural Reforms

Structural reforms can include reforms of public policies with a positive impact on the enjoyment of ESCR.[191] These reforms could be especially important in countries where economic neoliberal and liberal reforms were implemented during the violent period, fuelling social and economic inequalities that were the causes of the conflict,[192] as it was recognized by the Brazilian and Ecuadorian truth commissions.[193] However, Latin American countries in general have not dealt with public policies from a TJ and ESCR perspective,[194] which have led to social instability, as examined in Chapter V,[195] and the maintenance of situations of structural discrimination, such as the marginalization of the indigenous

[190] See Chapter V, section 3.5.1.2.

[191] Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2(3) IJTJ, 391

[192] Ibid 331, 332, 339, 340.

[193] See Chapter IV, section 2.3.3.

[194] Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7 IJTJ, 227.

[195] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 38) 331, 3312, 339, 340; See Chapter V, section 3.5.2.2.

communities in Guatemala for the lack of implementation of the reforms proposed in the peace agreements.[196]

In Latin America, there have been proposals for structural land reforms with a positive impact on ESCR, which is of an special importance in countries where land issues have been considered as one of the main root causes of conflict, as in the case of Guatemala and Colombia.[197] Furthermore, the Brazilian third Human Rights Programme also proposed a land reform as a measure linked to the strengthening of democracy.[198] Similar is the case of Paraguay, where an agrarian reform was enshrined at the constitutional level, with the purpose of fighting poverty, accomplishing economic and social development and guaranteeing a dignified life for the population.[199] Such land reforms aim to benefit the society in general and are not meant as measures of reparation for specific victims of violence, as the ones was examined above.[200] They aim to change deeply rooted inequalities and land concentration that affect economic powers. For these reasons, Latin American countries have so far failed to achieve the necessary legal and constitutional measures to implement these structural land reforms.[201] Moreover, in the case of Paraguay, the truth commission recognized that the agrarian reform was implemented irregularly, granting lands to economic and

[196] IACommHR, 'Justicia e Inclusion Social: Los Desafios de La Democracia En Guatemala', OEA/Ser.L/V/II.118, Doc. 5 rev. 1 (29 December 2003) paras 223, 224; See Chapter IV, section 2.2.

[197] FONTIERRAS, created through Decree No 24-99 (Guatemala, 16 June 1999). Tafadzwa Pasipanodya (n 190) 390. See Chapter IV, section 2.1.

[198] Decree No 7037 (Brazil, 21 December 2009) actualized through Decree No 7177, 12 May 2010.

[199] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) para 198.

[200] See Chapter IV, section 2.4.

[201] Graham Brown, Corinne Caumartin (n 31) 109-113, 122.

political powers instead of poor *campesinos*.[202] The lack of implementation of the agrarian reform has been criticized by the CESCR in the case of Guatemala, with an emphasis on the fact that the failure in the implementation of the land reform resulted in a situation when the provisions of the ESCR cannot be ensured.[203]

Other important institutional reforms implemented in Latin America included the creation of National Human Rights Institutions, Ombudsmen and Programmes.[204] In general, these mechanisms have tackled ESCR without any clear connection to TJ. There are, however, some exceptions, such as the Third National Programme of Human Rights in Brazil, which establishes that the focus on ESCR is part of the process of the post-dictatorship human rights' promotion, stressing the importance of this programme for consolidating the bases of democracy, which includes the universality, indivisibility and interdependence of CPR and ESCR, among others.[205] Furthermore, the IACommHR has also recognized the importance of the Ombudsmen in Colombia in encouraging the discussion about social policies in favour of forcibly displaced for the armed conflict.[206]

Moreover, structural reforms require the investment of resources, in need on many occasions of the implementation of fiscal reforms, as it was recognized by the Guatemalan truth commission, which emphasised the need of implementing a just, equitable and globally progressive fiscal reform to contribute to the social

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[202] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) paras 199-201.

[203] CESCR, Concluding Observations-Guatemala (n 12) para 23; CESCR, Concluding Observations-Paraguay (n 19) para 7; IACommHR, 'Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion' OEA/Ser.L/V/II.Doc. 43/15 (31 December 2015) paras 454-456.

[204] See Chapter II, section 2.6.2.

[205] Decree No 7037 (n 197) sections 11, 15.

[206] IACommHR, 'Access to Justice as a Guarantee of Economic, Social and Cultural Rights : A Review of the Standards Adopted by the Inter-American System of Human Rights' OEA/Ser.L/V/II (2007) para 237.

development and the improvement of public social service.[207] It has been pointed out that in general Latin American countries have not implemented comprehensive fiscal reforms designed with the purpose of combating poverty, inequality and the denial of human rights.[208] This lack of implementation affects not only the implementation of institutional reforms in the ESCR, but also the implementation of TJ mechanisms in general, because resources are necessary to launch reforms to consolidate the rule of law, which can bring positive effects not only to ESCR but also to CPR.[209] In the case of Guatemala, the IACommHR pointed out that the implementation of a real fiscal reform in Guatemala has been blocked by economic powers,[210] a situation that, similarly to the lack of implementation of significant land reforms, could be extrapolated to the rest of the Latin American countries.

Nonetheless, there are some examples of structural reforms with the inclusion of ESCR approaches. However, in general there is not any clear distinction between the institutional reforms implemented to pursue TJ purposes and those implemented to comply with the State's general obligations under international and regional law. Moreover, the implementation of these measures has not been generally successful, especially when implementing measures aimed at tackling structural ESCR issues that either resulted from or in the conflict and that could affect economic powers.

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[207] 'Guatemala: Memory of Silence' (n 53) Recommendations, paras 82, 83.

[208] Center for Economic and Social Rights, DeJusticia, FUNDAR Centro de Análisis e Investigación, Oxfam, 'Fiscal Policy and Human Rights in the Americas: Mobilizing resources to secure rights', Thematic report, Executive summary (October 2015)<www.cesr.org/sites/default/files/downloads/cidh_ddhh_fiscalidad_exec_summary_eng.pdf> accessed 15 September 2018.

[209] IACommHR, 'Justicia e Inclusion Social: Los Desafios de La Democracia En Guatemala' (n 195) para 64; IACommHR, 'Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion' (n 202) para 53.

[210] Idem.

2.6.3. Creation of Educational Programmes

This institutional reform has been the most considered one in a TJ context in Latin America. The reform of the education curricula and the training of the armed forces and security agents has been linked to the principles of democracy and rule of law by the Brazilian, Guatemalan, Peruvian and El Salvadorian truth commissions.[211] The CESCR has also stressed the importance of educational trainings, requesting from Argentina and Colombia to include human rights teaching in accordance with the developments of international law in training programmes for armed forces and the police.[212] This is coherent with the UN guidelines on TJ that establish the need of implementing comprehensive training programmes for public officials and employees in line with applicable human rights and international humanitarian law standards.[213]

Moreover, curricula reform, including the creation of pedagogic material to inform about human rights violations and to promote human rights and democratic values, has been considered an important educational measure in a TJ context.[214] These reforms have been implemented in Latin America, as in the cases of Argentina, Brazil, Chile, Guatemala, Peru and Paraguay.[215] In addition, museums

[211] 'Chapultepec Peace Agreement' (n 3) Chapter II.2.A; 'Guatemala: Memory of Silence' (n 53) Recommendations, paras 37, 73; 'Informe Final' (n 41) Volume IX, Section 4, Chapter 2.1; 'Relatório, Volume I' (n 41) 20.5, 21, 22.

[212] CESCR, Concluding Observations-Argentina, E/C.12/1990/3, 01 January 1990, paras 242-245; CESCR, Concluding Observations-Colombia, E/C.12/COL/CO/5 (n 125) para 242.

[213] UNCommHR, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', E/CN.4/2005/102/Add.1 (08 February 2005) principle 36 a); UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 1) B.4.

[214] IACommHR, 'Justicia e Inclusion Social: Los Desafios de La Democracia En Guatemala' (n 195) para 226; Julia Paulson, '(Re)Creating Education in Postconflict Contexts: Transitional Justice, Education, and Human Development' (ICTJ, 2009); Elizabeth A. Cole, Katherine Murphy, 'History Education Reform, Transitional Justice and Transformation of Identities' in Paige Arthur, *Identities in Transitions. Challenges for Transitional Justice in Divided Societies* (ICTJ, 2010).

[215] 'Informe de la Comisión de Verdad y Justicia de Paraguay: La verdad os hará libres' (n 64) paras 57-63; Francisca Garretón Kreft, Marianne González Le Saux, Silvana Lauzán, *Políticas Públicas de Verdad y Memoria En 7 Países de América Latina: Argentina, Bolivia, Brasil, Chile, Paraguay, Perú y*

of Memory have also played an important role in the design and implementation of educational programmes and projects in collaboration with schools and universities, as in the case of Chile.[216] These reforms have been connected with truth-telling and strengthening of democratic institutions.[217] However, the CESCR has considered that human rights teaching cannot be effective in a country that continuously implements amnesties.[218] This stresses the importance of implementing different TJ mechanisms, in a complementary way, to pursue TJ purposes.

Thus, institutional reforms can play an important role in the incorporation of ESCR approaches in TJ. The language of ESCR is incorporated when implementing legal reforms and, in a less systematic way, when implementing structural reforms. However, in many of these cases, the link between the implementation of an ESCR approach and the pursuit of TJ purposes is not explicitly done. Moreover, institutional reforms are the less implemented TJ mechanism[219] and in the cases when institutional reforms are implemented, their focus on ESCR is limited. This happens even though this mechanism can have a major impact not only regarding the victims of the violent period, but the society in general.

In general, TJ mechanisms have included ESCR approaches, language and results to varying degrees. The work of TJ mechanisms also show that several ESCR violations have been committed during the violent periods in Latin America,

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Uruguay (Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, 2011) Anex, 110-436.

[216] Museo de la Memoria y Los Derechos Humanos, 'Educación en Memoria y Derechos Humanos' <http://ww3.museodelamemoria.cl/educacion-en-ddhh-y-memoria/> accessed 11 January 2017.

[217] Francisca Garretón Kreft, Marianne González Le Saux, Silvana Lauzán (n 204) 417.

[218] CESCR, Concluding Observations-Argentina, E/C.12/1990/3 (n 211) para 242.

[219] See Chapter II, section 2.6.

by State agents or individuals. In these cases, Latin American States facing a violent period, violated their obligations to respect and protect ESCR. Moreover, the inclusion of an ESCR approach in the work of TJ mechanisms in Latin America is coherent with the pursuit of different TJ purposes,[220] as examined in the following section.

3. PURPOSES OF TRANSITIONAL JUSTICE AND THE INCLUSION OF AN ECONOMIC, SOCIAL AND CULTURAL RIGHTS APPROACH

This section examines the broader approach of the TJ purposes pursue by TJ mechanisms, which would allow the inclusion of ESCR approaches. Moreover, this section examines if there is a real obstacle for a more systematic or generalized inclusion of an ESCR perspective in pursuing TJ purposes, having in consideration what it was examined in Chapter II.

3.1. Reparations

TJ theory and practice engage with a broad approach of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[221] From a broad perspective of reparations, the inclusion of ESCR is not only possible, but also necessary. In the case of restitution, the return of employment and the return to one's residence are directly linked with repairing the wrongdoing of the State in the form of not respecting and protecting the right to work and housing during the violent period. In the case of compensation, the pensions granted to the victims and their families are directly linked with their dignified life and certain repair of the negative impact of the violence in their life project. Furthermore, these pensions have a positive effect in the enjoyment of

[220] See Chapter II, section 3.

[221] Idem.

ESCR. Rehabilitation includes medical and psychological programmes for victims, together with social services, which are also related to the State obligations to fulfil ESCR of victims and their families. Satisfaction can be linked with educational measures, especially the launch of museums of memory, among others, which play an important role in the promotion of human rights. Similarly, guarantees of non-repetition can include changes in relevant laws and due process measures that positively impact on ESCR.[222]

As examined in this chapter, Latin American TJ mechanisms have included in different ways ESCR approaches when granting reparations. Peace agreements and truth commissions have had a relatively broad approach to ESCR when suggesting reparations. Likewise, reparation programmes in Latin America have had in general a positive impact on the enjoyment of ESCR. Institutional reforms as guarantees of non-repetition with ESCR approaches have been included in education programmes in particular. Judicial measures have taken a more restrictive approach to reparations.[223] The reparations suggested and granted by TJ mechanisms have been based on several legal principles, especially national and international human rights principles and the principles of non-discrimination and equality, which have allowed and justified the inclusion of an ESCR approach.[224]

As explored before, the IACtHR suggested reparations in a broader way, including an ESCR approach.[225] The reparation measures that are the most complied with by the States are the ones of compensation, while guarantees of non-repetition that included the investigation, prosecution and punishment of

[222] See Chapter II, section 3.1.

[223] See Chapter IV, section 2.

[224] See Chapter II, sections 4.1.3, 4.1.4, 4.2.5.

[225] See Chapter III, section 3.2.3.

those responsible and the adaptation of domestic law provisions are the less implemented.[226] This shows that it is not the inclusion of ESCR approaches that could affect the compliance of States with the reparations recommended by the IACtHR, but other factors, such as the complexity and long-term nature of the reparations.

The lack of implementation of guarantees of non-repetition in comparison with other forms, such as compensation and rehabilitation is a concern, because this is the kind of reparation that benefits and trigger changes in society in general,[227] pushing for the reestablishment of the rule of law. This applies not only to the ESCR perspective, but to the CPR one as well. Moreover, when granting guarantees of non-repetition, measures can be taken to deal with structural situation of discrimination, poverty or lack of services in which most victims find themselves. This, however, can also benefit the general population. In these cases, it is vital for the State to have clarity about general obligations under ESCR international, regional and national law and its obligations to repair for serious human rights and humanitarian law violations.[228] Moreover, it is important to be clear that reparations are not granted with giving victims access to general public services, or implementing development measures.[229] Hence, when the State does not design specific ESCR reparations for victims and their families, they would not fulfil the purposes of truth, corrective justice and the reestablishment of the victim's dignity.[230] Furthermore, it is important to be clear about the limits of

[226] See Chapter II, section 3.1.

[227] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 56.

[228] See Chapter IV, section 2.4.

[229] Idem.

[230] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 53; Zinaida Miller (n 41) 285; Colleen Duggan, Claudia Paz, Paz Bailey, Julie Guillero (n 77) 199.

reparations as to improve the enjoyment of ESCR in general, as pointed out by the UN.[231]

As in Chapter II, the following sections examine the other main TJ purposes, which are, at the same time, guarantees of non-repetition.

3.2. Truth-telling

Truth-telling is a TJ purpose widely recognized at the regional and international level.[232] It has been developed mainly regard to serious CPR violations, especially forced disappearance. When examining the content of this purpose, it is virtually not possible to find in the sources any legal objection to the possibility of understanding truth-telling in a broader way, including knowing the truth about all serious human rights violations committed during the armed conflict or violent regime, including ESCR. Moreover, it would be coherent with the development of truth-telling, which has broadened during the time. Furthermore, it would be coherent with the legal principles examined, including the interdependence, indivisibility and interrelation of CPR and ESCR, as it has been recognized by the OAS in its resolution regarding the right to truth.[233]

It is still difficult to find evidence of the above affirmation in judicial decisions in relation to the right to truth. At the Inter-American Human Rights System, the IACtHR argued that whenever there has been a human right violation, the State has a duty to investigate the facts, as an important measure of reparation, which could be extended to ESCR. However, even though the IACtHR has identified ESCR violations committed in the context of massacres in the

[231] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 56.

[232] See Chapter II, section 3.2.

[233] OAS, 'El Derecho a La Verdad', AG/RES. 2725, XLII-O/12 (04 June 2012) Preamble.

reasoning of the judgment, it has not found a direct violation of ESCR; therefore, it has not directly linked truth-telling with ESCR violations.[234]

In the case of TJ mechanisms implemented at the national level, truth commissions have told the truth about the serious ESCR violations mainly in the context or as an element of commission of serious CPR violations.[235] Moreover, ESCR violations have been on some occasions left outside their scope. It is for this reason that it is important to remember that truth commissions are not the only TJ mechanisms that can be used for truth-telling. For example, reparation programmes in Latin America have granted reparations for serious ESCR violations as unfair dismissal and land destitution, helping to reveal the truth of a violation that was not considered a priority for investigation by the truth commissions.[236]

Moreover, truth-telling has been linked to the right to education, when implementing guarantees of non-repetition, regarding educational training of public officials and employees, reform of history curricula in schools, or the creation of the Museums of Memory. These measures have been more linked to truth-telling about CPR violations. However, the educational training for public officials and employees includes also human rights training, which should involve ESCR.[237]

The inclusion of ESCR approaches in truth-telling has been one of the most examined by the literature. However, the approach to ESCR in the literature has been mainly focused on structural violations, linked to issues of poverty and deep-rooted socio-economic injustices and inequalities,[238] which is similar to the

[234] See Chapter III, section 3.2; Chapter IV, section 2.5.1.

[235] See Chapter IV, section 2.3.2.

[236] See Chapter IV, section 2.4.2.

[237] See Chapter IV, section 2.6.3.

[238] E.g. Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) IJTJ 2(3) 253-265; Lars Waldorf (n 95) 1-16; Sunila

approach adopted by TJ mechanisms in Latin America. These are important issues that should be tackled during the transition; however, focusing only on these issues could be problematic as it could show limited understanding of the content of ESCR obligations, which can be also direct.[239] Therefore, it is not possible to find a legal objection to the inclusion of ESCR approaches in truth-seeking. Moreover, it is possible to find some examples at the Latin American level that show the possibility and the benefits of using ESCR approaches in accomplishing this purpose.

3.3. Tackling the Root Causes of the Conflict or Repressive Rule

Tackling the root causes of the conflict is one of the most examined TJ purpose through ESCR approaches.[240] From the UN perspective, this has been the TJ purpose which has included in a more direct and consistent way an ESCR approach, including the recognition that the violations of ESCR "exacerbate or spark social or political tensions resulting in conflict or repression"[241] and that "the failure to realize ESCR as well as violations of these rights can be—and usually are—part of the root causes of conflict."[242]

Tackling the root causes of the conflict is essential for the implementation of other TJ mechanisms. However, this TJ purpose has not been systematically

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Abeysekera, 'Gender Equality and Women´s Human Rights in Conflict Situations: Evolving Perspectives' in Oré Aguilar Gaby, Gómez Isa Felipe (eds) *Rethinking transitions. Equality and social justice in societies emerging from conflict* (Intersentia, 2011) 48.

[239] See Chapter III, sections 2.1.2, 2.2.1; Chapter IV, section 2.3.2.

[240] E.g. UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 1) A.9, C.1; Louise Arbour (n 1) 26, 27; Tafadzwa Pasipanodya (n 190) 378; Zinaida Miller (n 39) 267, 286, 288; Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 38); Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3(2) IJTJ, 177.

[241] UNSG, 'Guidance Note: United Nations Approach to Transitional Justice' (n 1) A.9.

[242] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 1.

dealt with by transitional countries as there exist some examples of the inclusion of ESCR approaches when examining the root causes of conflict in the newest truth commissions, for example, in Brazil, Peru and Guatemala.[243] Moreover, the new Peace Agreement in Colombia states that, according to the FARC-EP, among the root causes of conflict are the unsolved issues of ownership of the land and particularly its concentration, which affects especially women, girls and boys in rural areas.[244]

In addition, it has been argued that the failure or limited consideration of the root causes of conflict for institutional reform can cause social instability. Therefore, in those countries where the violence was caused by ESCR problems, neglecting this approach would not allow "to revert previous patterns that allowed the conflict".[245] It has been pointed out that this is the case in countries such as Chile, El Salvador and even Peru, where the lack of a holistic approach that includes economic, political and social structural issues has caused the continued underlying socioeconomic inequalities that fuelled that country's conflict.[246]

The Latin American practice coincides with the international practice, where when the examination of the root causes of conflict has been done, it has not been exhaustive and it has not been done using the language of rights.[247] Moreover, as in the case of truth-telling, in the cases this purpose has been tackled, it has been

[243] See Chapter IV, section 3.3.1.

[244] 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) Preamble.

[245] Eirin Mobekk, 'Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation' in Anja H. Ebnöther Philipp H. Fluri (eds) *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (PfP Consortium Working Group 'Security Sector Reform', August 2005) 263.

[246] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 38) 331, 332, 339-342.

[247] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 17(A); Priscilla Hayner, *Unspeakable Truths* (n 23) 77; Louise Arbour (n 1) 14; See Chapter IV, section 2.3.1.

generally linked to structural issues, which could perpetuate the impression that ESCR violations are always structural and therefore they could not be violations themselves.[248] It is important to clarify the narrative, because inaccurate use of the language could affect not only ESCR, but also CPR, hiding the existence of CPR structural violations or direct violations of ESCR.[249] Moreover, the lack of use of an ESCR language could affect a real protection of ESCR. As Laplante points out, if socioeconomic roots of violence are presented in terms of human rights violations, it could help transitional societies to view underlying socioeconomic conditions not as unchangeable facts but as consequences of conscious policy decisions that fail to protect fundamental rights.[250] In addition, it can cause a diagnosis of human rights violations that are "abstracted" from the dynamics of social power and conflict.[251] This can also be said regarding the inclusion of an ESCR language in other TJ purposes.[252]

3.4. Investigation, prosecution and punishment of serious human rights and humanitarian law violations

The investigation, prosecution and punishment of serious ESCR violations has been considered mainly as elements for the configuration of international crimes, such as genocide, crimes against humanity and war crimes.[253] There is a

[248] E.g. Louise Arbour (n 1) 26, 27; Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 IJTJ, 313–315; Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 38) 333; See Chapter IV, section 3.2.

[249] Evelyne Schmid (n 179) 28-30; Evelyn Schmid, Aoife Nolan (n 34) 371-374.

[250] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (n 38) 342.

[251] Ibid, 337, 355.

[252] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 58.

[253] Rome Statute of the International Criminal Court, 2187 UNTS 90 (17 July 1998) articles 6-8; *Ituango Massacres v. Colombia* (n 159) Separate Opinion Judge Cancado Trindade, para 38.

persistent resistance in fully accepting the justiciability of ESCR.[254] The situation gets even less clear when discussing the obligation of investigate, prosecute and punish serious ESCR violations committed during the violent period. This section reviews if there is a real obstacle for the investigation, prosecution and punishment of these types of violations.

There is a recognition of States' obligation to investigate, prosecute and punish at least those violations identified as international crimes, which are the ones enshrined in the Rome Statute.[255] This instrument includes ESCR violations as means of commission of the international crimes enshrined in the instrument. In the case of crimes against humanity, the Rome Statute includes enslavement, deportation or forcible transfer of population, forced pregnancy, enforced sterilization and serious bodily injury or to mental or physical health. These ESCR violations must be committed as part of a widespread and systematic attack directed against any civilian population.[256]

In the case of genocide, the offences committed must be with the intention of destroying, in whole or in part, a national, ethnical, racial or religious group. In this case, the Rome Statute includes "causing serious bodily or mental harm to members of the group, […] deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, […] imposing measures intended to prevent births within the group."[257]

Finally, the commission of war crimes included offences such as subjecting persons to physical mutilation or to medical or scientific experiments that cause death or seriously endanger the health of such a person or persons, transfer or

[254] See Chapter III, sections 2.2, 3.2.2, 4, 5.

[255] See Chapter II, section 3.4.

[256] 'Rome Statute' (n 252) article 7 (d) (g) (h) (k)

[257] Ibid, article 6

displacement, attacking civilian and protected objects, destroying or appropriation of the enemy's property, using poison (e.g., in water sources) and starvation as a method of warfare, forced pregnancy, etc.[258]

These offences described in the context of crimes against humanity, genocide and war crimes can by themselves cause the violation of ESCR. However, in this context, they are subsumed as elements of commission of international crimes.[259] This perspective is similar to the IACtHR, which when examining the obligation to investigate, prosecute and punish serious human rights and humanitarian law violations, does not distinguish what kind of violation had to be prosecuted, referring to massacres in general. In doing so, the IACtHR included not only torture, rape and murder, but also ESCR violations, such as destruction of houses, forced labour, etc.[260]

Hence, it can be asserted that in a TJ context, courts should deal with ESCR violations committed in the context of commission of international crimes.[261] What is more challenging to assert, though, at the regional and international level is the possibility to prosecute serious ESCR violations by themselves, not only when they are part of serious CPR violations or international crimes, e.g. forced sterilization as crime against humanity and as a violation to the right to health.[262]

In the cases where the ESCR violations do not satisfy the elements to become an international crime, it is noteworthy that there is not a derogation

[258] Ibid, article 8.

[259] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 1) 24, 38; Evelyne Schmid (n 179) 206, 238.

[260] See Chapter III, section 3.2.

[261] Louise Arbour (n 1) 16.

[262] Evelyne Schmid (n 179) 43, 44, 73.

clause in the ICESCR, so ESCR also apply in the context of armed conflicts.[263] The same argument can be used in the case of dictatorships, because the change of government, in a legitimate or illegitimate way, does not modify the obligations acquired by the State, which continues being responsible at the international level.[264] Yet, this does not imply that the State, during a TJ process, is obliged to investigate, prosecute and punish those responsible for ESCR violations which do not constitute by themselves international crimes. However, it is important to remember that the impunity of serious human rights violations can be an obstacle for the enjoyment of ESCR.[265] The debate about the State's obligation to prosecute only serious human rights violations during TJ processes is an issue for all human rights violations, CPR and ESCR. If a decision must be taken about given priority to the prosecution of certain type of human rights violations, it should be based not on an inexistent hierarchy of rights, but on consideration of the types of violations committed and linked to the armed conflict or repressive regime.[266] Moreover, it is important to remember that there exists an international obligation of the State to repair the violations of the human rights that were not lawfully suspended or derogated during the violent period, according to the norms of ratified treaties, customary law and principles of international law.[267]

3.5. Reestablishment of the Rule of Law

[263] See Chapter III, section 2.3.

[264] See Chapter II, section 4.2.2.

[265] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd Edition, Hart Publishing 2016) 59.

[266] See Chapter II, section 3.5.

[267] See Chapter II, sections 3.4, 4.2.4; Chapter III, section 2.3.

Democratization movements in Latin America engaged with the conception of reestablishment of democracy, which has been replaced for the most common use of the notion of the reestablishment of the rule of law. Regarding the notion of democracy, this concept has been conceived mainly from a liberal perspective, for historical and political reasons, including the Cold War. However, there has been some inclusion of an ESCR approach, which is consistent with the current narrative of democracy, which includes the respect, protection and fulfilment of human rights.[268] It is also consistent with the Inter-American Democratic Charter, which firmly established the need for the promotion and observance of ESCR for the consolidation of democracy.[269] This approach was also adopted by the CESCR in the review of the case of Guatemala and emphasised that impunity and the uneven distribution of economic resources led to a loss of confidence on the part of the civilian population which needs to be addressed in order to secure ESCR, and a return to the rule of law in the country.[270] This is also recognized in TJ countries in Latin America, as in the case of the Peruvian Truth Commission and the Guatemalan Peace Agreement, which recognized social justice as an important element for democracy.[271] According to the Peruvian Truth Commission, democracy includes the solution of economic inequality and provision of services to the population to reintegrate those who have been formally marginalized.[272]

Regarding the reestablishment of the rule of law, the UN and the Inter-American Human Rights System have engaged with a liberal conception of rule of

[268] UNHRC, 'Human rights, democracy and the rule of law' (19 March 2012) A/HRC/19/L.27; Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals* (Bloomsbury Academic 2013) Chapter three.

[269] Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) article 13.

[270] CESCR, Concluding Observations-Guatemala, E/C.12/1/Add.3 (n 14) para 12.

[271] 'Agreement on Social and Economic Aspects and Agrarian Situation (n 3) Preamble, paras 14, 26, 39; Preamble. 'Informe Final' (n 41) Volume IX, Section 4, Chapter 1.2.3, 4.2.7.

[272] 'Informe Final' (n 41) Volume IX, Section 4, Chapter 1.2.3, 4.2.7

law,[273] focusing on avoiding the interference of the conflict in development and market oriented economic policies.[274] This has been criticized by those who support an inclusion of ESCR approaches. They have pointed out that the focus on development is limited and does not recognize the obligation of the State of dealing with ESCR violations committed during the violent period and the State's obligation to respect, protect and fulfil these rights.[275] Moreover, the CESCR has stressed the dangers of implementing liberalization policies for the enjoyment of ESCR of the population.[276] Yet, it has also been pointed out that the formulation of development as a right can assume a greater recognition of ESCR approaches, as being more focused on individuals' adequate standard of living.[277]

However, the liberal conception of the rule of law promoted by these institutions have not been necessarily been replicated at the national level. The notion of the Social Rule of Law has been enshrined at the constitutional level in Latin American countries facing conflict or transitions.[278] This is the case of Colombia, which has used this notion of the rule of law for a better respect, protection and fulfilment of specific ESCR of direct victims of the armed conflict.[279] This notion was enshrined in the reparation programmes and in the peace

[273] See Chapter II, section 3.5.

[274] Simon Chesterman, 'An International Rule of Law?' (2008) 56 American Journal of Comparative Law, 331, 346

[275] Siobhán McInerney-Lankford, 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 Journal of Human Rights Practice, 51-80.

[276] See Chapter III, section 2.1.1.

[277] Inter-American Democratic Charter (n 259) article 13; UNHRC, 'Human rights, democracy and the rule of law' (n 267) 190.

[278] See Chapter III, section 4.

[279] *T-772/2003*, Corte Constitucional de Colombia (Colombia, 04 September 2003) para 3.1; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (n 170) 129.

agreement.[280] The Colombian Constitutional Court also refers to both democracy and the Social Rule of Law as principles that inform Colombia's legal system. It uses these principles to define the specific duties of the authorities to accomplish the effective enjoyment of fundamental rights of the victims of forced displacement, including the right to life, basic freedoms and economic and social rights.[281]

The implementation of the Social Rule of Law in transitional countries in Latin America has been occasionally questioned, being linked to socialist regimes, as regimes where there is no recognition of individual liberties, and therefore, not real accomplishment of the Rule of Law.[282] However, the Social Rule of Law does not deny individual liberties, but enshrines ESCR in a way that complement rather than exclude them.[283] This conception has been developed in Latin America in a context of countries facing conflict or transitional countries as a Social and Democratic Rule of Law, with the purpose of strengthening the human rights catalogue.[284] Moreover, the Colombian Constitutional Court has pointed out that the application of the Social Rule of Law obliges to authorities to facilitate the inclusion and participation of the population in the economic and social life of the nation, and to ensure the rights and liberties of the whole society, including the most marginalized.[285] These purposes are coherent with the principles that should

[280] Decree No 2131 (n 125) Preamble; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera' (n 3) section 4.

[281] *T-025/2004* (n 168) sections 8.2, 17.

[282] María Pía Silva Gallinato, 'El Estado Social de Derecho en la Constitución Chilena' in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el Orden Constitucional Chileno* (Librotecnia, 2012) 33.

[283] See Chapter III, section 4.

[284] Claudio Nash, 'Estado Social y Democrático de derechos en Chile: Tan lejos, tan cerca' (2011) 18 Derecho y Humanidades, 75.

[285] *T-025/2004* (n 168) section 8.

inform the reestablishment of democracy and the rule of law[286] and therefore, it would be difficult to sustain that the notion of the Social Rule of Law would go against democratic values.[287]

This research supports this broader notion of the rule of law that include the promotion and protection of all human rights, including ESCR. In this sense, human rights law helps to give substantive content to the rule of law.[288] Then, after an armed conflict or a repressive regime, if the reestablishment of the rule of law is considered as one of the goals of TJ, it is necessary consider all aspects involved, not just some of them. It has been seen that this conception of the rule of law could have a positive impact on the enjoyment of ESCR, helping to build a new state with a stronger protection of all human rights. The persistent problem at the national, regional and international level is compliance, but this is a common problem in human rights law, affecting CPR and ESCR.[289]

In this way, TJ purposes seem to embody ESCR approaches, to a greater or lesser degree. However, the inclusion of this approach is still marginal, though more developed regarding reparations and addressing the root causes of conflict. One of the purposes that have developed in a smaller way an ESCR approach is the investigation, prosecution and punishment of serious human rights and humanitarian law violations, which is coherent with the current debate about the justiciability of ESCR.

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[286] See Chapter II, sections 3.5, 4.1.4.

[287] Gregorio Peces-Barba, 'Los Derechos Sociales: Apuntes Políticos Y Jurídicos', *Los derechos sociales como una exigencia de la justicia: Cuadernos democracia y derechos humanos*, vol 19 (Universidad de Alcalá, 2009) 19; María Beatriz Arriagada, 'Los Derechos Sociales: Los Únicos Derechos Fundamentales' in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el Orden Constitucional Chileno* (Librotecnia, 2012) 66.

[288] UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies': Report of the Secretary-General, S/2004/616 (23 August 2004) para 9.

[289] Lutz Oette, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) 16(2) INTERIGHTS Bulletin, 51-54.

4. CONCLUDING REMARKS

Most of the countries in Latin America have implemented one or more TJ mechanism after armed conflicts or dictatorships. As it was examined through the chapter, some of these TJ mechanisms have included ESCR approaches, having in consideration the systematic commission of multiple CPR and ESCR violations, which are difficult to separate. TJ mechanisms have linked TJ purposes with ESCR obligations through the broadening of legal notions already incorporated in the TJ framework and elaborating concepts such as dignified life, life project, Social Rule of Law and the broader interpretation of CPR.

Moreover, TJ mechanisms have referred to international law to justify the inclusion of ESCR, including treaties, legal principles and soft-law. Legal principles not only allow the inclusion of ESCR to TJ, but they have been used to support this approach.[290] The examination of the TJ mechanisms in this chapter allows to see that the most referred principles to include ESCR approaches are the ones of non-discrimination, equality and national and international human rights principles. Special references have been made to universality, interdependence and indivisibility of all human rights and the principle of non-implementation of retrogressive measures when referring to ESCR. The application of these principles is coherent with the Latin American States' obligations under TJ and ESCR. These legal principles are generally referred to by truth commissions, reparation programmes and institutional reforms, in order to pursue reparations in a broad sense, with the exception of prosecution and punishment of serious ESCR violations. Moreover, it is noticeable that the lack of application of these principles coincides with the lack of inclusion of ESCR approaches, as in the case of

[290] See Chapter II, section 4.

investigation, prosecution and punishment of serious human rights and humanitarian law violations.

Regarding the ESCR included in the TJ mechanisms, and following the tripartite typology,[291] the approach taken by the TJ mechanisms coincides with the obligations to respect, protect and fulfil. Regarding ESCR obligations to respect, the prohibition of discrimination and prohibition of forced evictions, they were massively violated during violent periods, which have been dealt with by TJ mechanisms mainly through reparation programmes for victims of unfair dismissal and land destitution. Moreover, TJ mechanisms have dealt with the duty to fulfil, especially promoting human rights education, with the implementation of educational training for members of the security forces and public sectors in general, together with the modification of the educational curricula. Similarly, rehabilitation measures, collective reparations and institutional reforms have been designed to fulfil ESCR of the victims and their families and the population in general.

TJ mechanisms have dealt to a lesser degree with the obligation to protect, which was continuously violated by Latin American countries during the violent period, especially considering the direct intervention and collaboration of private sectors in the violence in ESCR violations such as unfair dismissal, violation of trade union rights and land destitution. Dealing with the obligation of protect is also linked to TJ purposes as reparations in a broader way, including the investigation, prosecution and punishment of serious human rights violations and truth-telling, which pursue has been limited in transitional countries of Latin America.

The treatment of ESCR in the TJ mechanisms in Latin America is diverse, for example, in some cases the language of rights is used, especially in the cases

[291] See Chapter III, section 2.2.

of the right to food, work, education, in others, the idea of rights should be inferred from the content. It is also noticeable that cultural rights are mentioned by the TJ mechanisms in general to shed light to the socio-economic rights issues described. Most of the inclusion of ESCR is irregular and indirect, dealing with serious ESCR violations as an element of commission, as context or as consequences of serious CPR violations. This can lead to misconceptions about the nature of ESCR and the invisibility of serious ESCR.

It was already established that there is not a normative reason for the different treatment of ESCR, because the ICESCR, ADHR and the ACHR were valid in a majority of Latin American countries during the violent period.[292] Therefore, the lack of a coherent approach to ESCR could be due to several reasons, from the idea that ESCR violations were not committed during the violent period, to the belief that TJ mechanisms should not deal with this kind of violations.[293] This can also be for the misconceptions between rights, consisting in the idea that the CPR have a different nature in comparison to ESCR, i.e. they would be vague, positive, structural, progressive and non-justiciable rights.[294] Political factors can also play a role, as change of government. Also, in these cases it is important to consider the role of the legal operators.[295] This shows the importance of human rights training in TJ processes.

Moreover, Latin American TJ started to implement ESCR approaches before scholars and international organizations, including the UN, began to deal with these issues more systematically. The lack of existence of a clear guideline of how ESCR should be include in TJ mechanisms and how the inclusion of these rights

[292] See Chapter III, sections 2, 3.1.

[293] Lars Waldorf (n 95) 9-11.

[294] See Chapter III, section 5.

[295] See Chapter III, section 3.2.

helps pursuing TJ purposes could also be a factor that affects a more direct, clear and systematic incorporation of ESCR in TJ mechanisms in Latin America.

Therefore, it is evident that there is some inclusion of ESCR approaches in TJ mechanisms and TJ purposes in Latin America, though it still marginal. There is not a coherent agreement or effort in implementing measures that include an ESCR perspective. However, it is possible to see that international, regional and national law can play an important role in the incorporation of ESCR approaches in TJ processes in Latin America.

CHAPTER V

CASE STUDY: CHILE

1. INTRODUCTION

This chapter focuses on the implementation of TJ mechanisms in Chile, considering the previously examined Latin American practice in the field of TJ and ESCR and the specific obligations of the country in this area. This chapter does not pretend to present an exhaustive analysis of all the TJ process in Chile, but it focuses on the critical examination of the inclusion or omission of ESCR approaches in TJ mechanisms, considering the normative framework existing in the country.

The Chilean case was chosen for being an important representation of the TJ processes implemented in the 1990s, after dictatorships in Latin America ended, influencing transitions in many countries, not only in the region –including the peace agreement in Colombia and the truth commissions in El Salvador, Guatemala and Peru-[1] but also around the world, including the Truth Commission in South Africa.[2] In addition, this case study helps the accomplishment of the purpose of this thesis by examining a specific context where TJ mechanisms with ESCR approaches have been implemented. Moreover, the Chilean TJ process has being implemented for almost 30 years, allowing evaluation of the possible influence – or lack of thereof - of this relatively new approach of TJ.

[1] Guatemala: Memoria Del Silencio', Reporte de la Comisión para el Esclarecimiento Histórico (Guatemala, 25 February 1999) paras 27, 248, 282, 289, 1037, 1070, 1073; 'Informe Final', Comisión de la Verdad y Reconciliación (Peru, 2003) Volume I, Section 1, Introduction; 'Nuevo Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera', Gobierno de la República de Colombia (Gobierno Nacional) and Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) (Colombia, 12 November 2016) Preamble; Priscilla Hayner, 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study' (1994) 16 HumRtsQ, 599.

[2] Edgardo Riveros Marín, 'Normativa Internacional de Los Derechos Humanos y El Sistema Democrático: El Caso Chileno' No 5 (Fundación Konrad Adenauer, 2011) 51.

This chapter first briefly describes the context of the violent period and the human rights violations committed during the Chilean dictatorship, concentrating on ESCR. Then, it studies the implementation of different TJ mechanisms, focusing on primary sources as laws, judgments and reports of truth commissions. When examining these TJ mechanisms, this thesis considers the TJ purposes, TJ principles and ESCR obligations examined in the previous chapters, to evaluate the way in which TJ mechanisms have been implemented in Chile. In addition, this chapter examines the reports of international organizations about the TJ process in Chile, together with the reports of the Chilean National Institute for Human Rights (INDH) and the work of relevant scholars that explore the Chilean case.

2. BACKGROUND

Before the *coup d'état*, Chile was considered one of the most stable democracies in Latin America. Moreover, in the 20th century, the country was considered in its way to become a welfare state, or even a Social Rule of Law.[3] With the election of Salvador Allende in 1970 -head of one of the first socialist Governments democratically elected in the world- the country faced enormous structural changes, including expropriation of large estates to fight historical land concentration, together with important economic, social and cultural reforms.[4] However, the government was not well received by important international actors, such as the US, which in its battle against communism perceived the success of this government as dangerous. For this reason, the US started an aggressive strategy against the government, with the strong support of the Chilean

[3] Law No 17398, 'Estatuto de Garantías' (Chile, 09 January 1971); María Pía Silva Gallinato, 'El Estado Social de Derecho en la Constitución Chilena' in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el Orden Constitucional Chileno* (Librotecnia, 2012) 34.

[4] Antonius C.G.M. Robben, 'Testimonies, Truths, and Transitions of Justice in Argentina and Chile' in Alexander Laban Hinton, *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 192.

conservative and economic powers. The economy started to deteriorate and the political polarization became stronger and more violent.[5]

The *coup d'état* occurred on 11 September of 1973. After the *coup d'état*, a military junta was created by Augusto Pinochet, the Former Commander in Chief of the Army during the overthrown Government of Salvador Allende. The Military Junta assumed the legislative power on 12th November of 1973, dissolved the parliament and enacted decree laws to establish the repressive apparatus. Among the latter was Decree Law N° 5 of the same year, which declared a state of siege for internal commotion as "times of war".[6] This decree had a negative impact in the protection of human rights, including the increased penalty applied to the detainees, fewer restrictions for the treatment of detainees and the extension of the competence of Military Courts, among others.[7] In 1981, Augusto Pinochet was named President of the Country.[8]

During the dictatorship, serious and systematic human rights violations were massively committed, including forced disappearance, unlawful killing, political imprisonment, torture, unfair dismissal, forced evictions and internal and external forced displacement. Most of the victims were male under 30 years of age, of left wing political affiliation or active in trade unions or others forms of

[5] Idem.

[6] Decree-Law No 5, 'Declara que el estado de sitio decretado por conmoción interna debe entenderse "estado o tiempo de guerra": Otras disposiciones' (Chile, 22 September 1973) article 1.

[7] Idem; Decree-Law No 521 (Chile, 18 June 1974) Decree-Law No 1009 (Chile, 08 May 1975); Decree-Supreme No 504 (Chile, 10 May 1975), among others.

[8] Constitución Política de la República de Chile [Political Constitution of the Republic of Chile (original text) enacted through Decreto Supremo 1150 (Chile, 21 October 1980) transitory article; Biblioteca Nacional de Chile, Memoria Chilena, 'Junta Militar de Gobierno' <www.memoriachilena.cl/602/w3-article-92407.html> accessed 14 September 2018.

social resistance.[9] The international community constantly condemned these serious human rights violations.[10]

Moreover, the UN also condemned the commission of serious ESCR violations under the ICESCR, which was ratified by Chile before the dictatorship was imposed.[11] The UN General Assembly emphasised the State's incompliance in adopting measures to ensure the full enjoyment and exercise of ESCR.[12] Moreover, it also condemned direct violations of specific ESCR, including the prohibition to strike and the elimination of trade unions as direct violations of labour and trade union rights.[13] In addition, the CESCR considered the appointment of military officers as rectors of public universities and the unfair dismissal of academics as a direct violation of the duty to respect the right to education.[14] Furthermore, censorship, harassment and arrest of writers, actors and other persons were considered a direct violation of cultural rights.[15] Moreover, the criminalization of therapeutic abortion was considered as a violation of the highest attainable standard of health by the CESCR.[16]

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[9] Cath Collins, Boris Hau, 'Incremental truth, late justice' in Elin Skaar, Jemima García-Godos, Cath Collins (eds) *Transitional Justice in Latin America: The uneven road from impunity towards accountability* (Routledge, 2016) 127.

[10] E.g. UNGA Resolution No 3219 (XXIX) 'Protection and Human Rights in Chile' (06 November 1974); UNGA Resolution No 3248 (XXX) 'Protection and Human Rights in Chile' (09 December 1975); UNGA Resolution No 34/179, 'Protection and Human Rights in Chile' (17 December 1979); UNGA Resolution No 39/121, 'Protection and Human Rights in Chile' (14 December 1984); UNGA Resolution No 46/161, 'Protection and Human Rights in Chile' (04 December 1986).

[11] However, this treaty was not published in the Official Gazette, which made it it impossible for the victims to invoke it at the domestic level. OHCHR, 'Ratification Status for Chile' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx> accessed 14 September 2018.

[12] UNGA Resolution No 46/161 (n 10) 3, 9.k; UNGA Resolution No 34/179 (n 10) 4.h.

[13] UNGA Resolution No 34/179 (n 10) 4.d; UNGA Resolution No 46/161 (n 10) 9.k.

[14] CESCR, 'Report of the 2nd Period of Sesions', E/C.12/1988/4, 08-25 February 1988 (Chile) para 202.

[15] Ibid, para 206.

[16] Law No 18826 (Chile, 15 September 1989); CESCR 'Concluding Observations-Chile, E /C.12/1/Add.105, 01 December 2004, paras 26, 53.

In the case of the Inter-American Human Rights System, the authoritarian regime reported that measures were taken to comply with economic and social rights under the ADHR, including health, labour and social security rights.[17] Despite this, the IACommHR not only condemned the serious human rights violations committed during the dictatorships, but it also found indirect violations to ESCR through the examination of CPR, examining trade union violations when declaring violations of rights to association and freedom of expression.[18] Hence, international organization condemned not only the commission of serious CPR violations during the Chilean dictatorship, but also the commission of indirect, direct, serious and systematic ESCR violations.

Moreover, the Chilean Dictatorship was characterized not only by repression and massive human rights violations committed, but also by the strong normative and institutional system imposed to support the authoritarian and economic regime. The regime enacted decree laws and established institutions to implement a pure neoliberal system, designed by the so called "Chicago Boys", a group of economists trained at the University of Chicago, a bastion of the diffusion of neoliberal theories in Latin America.[19] The measures implemented to establish the new economic system were called the "Seven Modernizations", which included the deregulation of work and modification of labour laws, reform and privatization of a group of social services, affecting the enjoyment of the rights to health,

[17] IACommHR, 'Informe Anual 1974', OEA/Ser.L/V/II.34doc.31rev.1 (30 December 1974) D; IACommHR, Annual Report 1978, OEA/Ser.L/V/II.47 Doc.13rev.1 (29 June 1979) VII; IACommHR, 'Annual Report 1979-80', OAS Soc OEA/Ser.G/CP/Doc.110/780, at 152 (02 October 1980) C.

[18] IACommHR, 'Annual Report 1981-1982, OEA/Ser.L/V/II.54 Doc.9rev.1 (16 October 1981) Chapter V, para 6.

[19] Alejandro Portes, 'Neoliberalism and the Sociology of Development: Emerging Trends and Unanticipated Facts' (1997) 23(2) Population and Development Review, 241; Peter Winn, 'The Pinochet Era' in Peter Winn, *Victims of the Chilean Miracle: Workers and Neoliberalism in the Pinochet era, 1973-2002* (Duke University Press, 2004), 25-29; Tomás Undurraga, 'Transformaciones sociales y fuentes del poder del empresariado chileno (1975-2010)' (2012) 41 Ensayos de Economía, 205. Karina Narbona, 'Para Una Historia Del Tiempo Presente: Lo Que Cambió El Plan Laboral de La Dictadura' (Fundación SOL, 2015) 10. Cath Collins, Boris Hau, (n 9) 127.

education and social security rights, among others.[20] The implementation of this new economic system included unjustified retrogressive and discriminatory measures affecting ESCR, with complete disregard of human rights obligations[21] and under a strict authoritarian control,[22] which are examined in the following pages.

In the area of labour law, the regime implemented a "Labour Plan", enacting a new Labour Code;[23] reshaping labour contracts; decreasing job security - workers could be dismissed for "business needs"-[24]; limiting collective barging;[25] establishing obstacles to trade unions,[26] which included the prohibition of funding unions and paying salaries to union leaders,[27] prohibiting general strikes, among others.[28] Moreover, special labour courts were abolished, forcing workers to sue in regular courts where litigants and defendants were presumed to be equal.[29]

[20] Tomás Undurraga (n 19) 205; Karina Narbona (n 19) 11, 12.

[21] Aisling Walsh, 'The Legacy of Dictatorship and Persistent Socio-Economic Inequalities in Chile's Educational Policy' (2013) 2(4) The online postgraduate journal of the College of Arts, Celtic Studies and Social Sciences (Aigne) 98 <www.ucc.ie/en/media/electronicjournals/aigne/.../06-Walsh-2013-02-en.pdf> accessed 10 October 2015, 99.

[22] Peter Winn (n 19) 25-29; Valencia Palacios Marco, 'El desmontaje de la planeación urbana en Chile. 1975-1985 (segunda parte) La nueva política de desarrollo urbano y transformaciones en la cultura metropolitana' (2008) V(15) Revista Electrónica Diseño Urbano y Paisaje, 20.

[23] Law No 18620, 'Código de Trabajo' (Chile, 06 July 1987).

[24] Decree-Law No 2200 (Chile, 15 June 1978); Law No 18018 (Chile, 14 August 1981); Peter Winn (n 19) 32, 33.

[25] UDP, 'Informe Anual sobre Derechos Humanos en Chile 2015' (Centro de Derechos Humanos, 2015) 79.

[26] Tomás Undurraga (n 19) 205.

[27] Decree-Law No 2756 (Chile, 03 July 1979); Decree-Law No 3355 (17 May 1980); Peter Winn (n 20) 33.

[28] Decree-Law No 2758 (Chile, 06 July 1979).

[29] Decree-Law No 3648 (Chile 10 March 1981); Peter Winn (n 19) 35.

These measures heavily restricted workers' rights in relation to the 1931 labour code.[30]

Regarding social security, the regime established a new social pension system, called "Pension Fund Administrators" (AFPs), which was based on individual capitalization. This pension system eliminated the principle of solidarity established in the previous pension system, maintaining only some limited State Social Assistance pensions,[31] but keeping the old regime in terms of high benefits for members of the marine, air force, army and police. [32]

In the case of the health system, the military regime created a dual system that did not guaranteed universal rights,[33] with a public national health-care fund (FONASA) and private health-insurance institutions (ISAPREs).[34] The contracts of the latter included discriminatory clauses, such as a payment of a higher fee by women of reproductive age and a fee increasing along with the insured person's age.[35]

In the case of educational system, the regime implemented the privatization of schools and higher education, with the purpose to incentivise private initiative and to grant liberty to parents regarding the choice of the educational institution at which they enrol their children.[36] The implemented

[30] Peter Winn (n 19) 34.

[31] Carmelo Mesa-Lago, 'Social protection in Chile: Reforms to improve equity' (2008) 147(4) International Labour Review, 397.

[32] Wolfgang Kaleck, 'International Criminal Law and Transnational Business: Cases Form Argentina and Colombia' in Sabine Michalowski (ed) *Corporate Accountability in the Context of Transitional Justice* (Routledge, 2013) 178; Tomás Undurraga (n 19) 205; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (Chile, 2016) 208.

[33] Carmelo Mesa-Lago (n 31) 396.

[34] Ministerio de Salud, Decreto con Fuerza de Ley N°3, 'Crea ISAPRE' (Chile, 27 April 1981); Ministerio de Salud, Decree-Law No 1 (Chile, 24 April 2016).

[35] Carmelo Mesa-Lago (n 31) 396.

[36] Aisling Walsh (n 21) 108.

measures limited the powers of the Ministry of Education, reduced public spending, decentralised the management of public education, weakened teachers' contracts and their working conditions and abolished their trade unions.[37] These modifications dismantled the public education system and intervened its social role,[38] shaping education as a profitable business, and establishing big differences in the quality of education in different areas of the country, affecting specially the poorer districts[39] and making Chilean higher education the second most expensive among OECD countries, just overcome by the US.[40]

In the area of housing, the dictatorship committed forced eviction of complete neighbourhoods that were built as social housing during the previous government, selling these lands to private individuals or granting them to the military.[41] Moreover, the dictatorship reversed land redistribution policies implemented under previous democratic regimes, causing the dispossession of many of *campesinos*.[42] Furthermore, numerous forestlands, many of which were situated in indigenous areas, were auctioned off, which led to the accumulation of large parcels of land in the hands of companies.[43] In addition, there was created a new Code of Water, changing the previous regime that protected the public

[37] Law No 18962 (Chile, 10 March 1990); Aisling Walsh (n 21) 109.

[38] Clara Ramírez-Barat, Roger Duthie, 'Education and Transitional Justice: Opportunities and Challenges for Peacebuilding' (UNICEF, ICTJ, 2015) 4, 5.

[39] Aisling Walsh (n 21) 109.

[40] OECD, 'Education at a Glance 2018' (11 September 2018) <www.oecd.org/edu/education-at-a-glance-19991487.htm> accessed 15 September 2018.

[41] Valencia Palacios Marco (n 22) 1-23; Marco Fajardo, 'Investigación Revela el real valor simbólico de la Villa San Luis: la expulsión con lo puesto de sus pobladores durante la dictadura (El Mostrador, 02 August 2018) <www.elmostrador.cl/cultura/2018/08/02/investigacion-revela-el-real-valor-simbolico-de-la-villa-san-luis-la-expulsion-con-lo-puesto-de-sus-pobladores-en-dictadura/> accessed 15 September 2018.

[42] Aisling Walsh (n 21) 103

[43] Decree-Law No 701 (Chile, 18 October 1974).

function of water and its role for the general welfare, to a system where rights over water could be freely acquired in the market, causing the concentration of water and affecting its access for traditional users.[44] Finally, there was also a process of privatization of public companies in charge of transportation, communications, electricity, pharmaceutical medicines and others, with very little regulation.[45]

All these legal and economic reforms were endorsed by the enactment of a new Constitution in 1980. The constitutional text was discussed by the Ortúzar Commission -constituted by members or supporters of the regime- and approved through a referendum, which legitimacy was questioned for not complying with the minimum requirements for free elections.[46] The Constitution had an authoritarian character,[47] including a restrictive list of constitutional CPR and ESCR, with an emphasis in liberties. The right to property is the exception, which is widely protected.[48] The justiciability of constitutional guarantees was restricted to the enshrined liberties more than rights.[49] In addition, these constitutional guarantees had a high possibility of been restricted and suspended in states of emergency.[50] Important ESCR were not enshrined in the Constitution, as the right

[44] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2013' (Chile, 2013) 211, 212.

[45] Valencia Palacios Marco (n 22) 14; Gloria de la Fuente, 'Continuidades y cambios de la Matriz Sociopolítica en Chile desde la reinauguración democrática' (2010) 24 Revista de Sociología, 1184.

[46] Peter Winn (n 20) 30.

[47] E.g. Excluding left wing from political participation, giving extensive powers to the President and ensuring the military regime continuity in the parliament with the implementation of a binomial electoral system and the creation of designated senators, which were ex ministers of the government, Supreme Court, ex-commandant in chief army, navy, air forces and police. See Constitución Política de la República de Chile (original text) (n. 8).

[48] Ibid, article 19 No 24; Claudio Nash, 'Estado Social y Democrático de derechos en Chile: Tan lejos, tan cerca' (2011) 18 Derecho y Humanidades, 78.

[49] Constitución Política de la República de Chile (original text) (n 8) article 20; María Pía Silva Gallinato (n 3) 43.

[50] Claudio Nash (n 48) 78.

to adequate housing, food and an adequate standard of living. This constitution stopped the progressive inclusion that the country was experiencing in the area of constitutional rights, since the first constitution until the constitution of 1925, except for the case of a right of an environment free of pollution and the right to free primary education, which were for the first time recognized as constitutional rights.[51]

In sum, the Chilean dictatorship was characterised not only by the commission of serious CPR violations, but also by the reforms imposed during the dictatorship that not only changed the economic, social and normative structure of the country, but also ensured the continuity of this new system.[52] These reforms had a direct impact in the enjoyment of ESCR, establishing retrogressive and discriminatory measures, which go against the general obligations under the ICESCR, already ratified by the country.[53] These obligations were mandatory for the country during the dictatorship, despite of the lack of publication of ICESCR in the Official Gazette, as the State already manifested its consent at the international level.[54]

It has been considered that the transition to democracy started in 1988, with the National Referendum, in which Chileans had to decide about the continuity of the Military Government ("Yes") or the establishment of concrete date for democratic elections ("No"). Surprisingly for the members of the Military Regime, the "No" won, and in December 1989 there were Presidential and Parliamentary

[51] María Pía Silva Gallinato (n 3) 34-36, 43.

[52] Peter Winn (n 20) 31; Aisling Walsh (n 21) 104.

[53] Gaby Oré Aguilar, 'Asserting Women's Economic and Social Rights in Transitions' in Gaby Oré Aguilar, Felipe Gómez Isa (eds) *Rethinking transitions. Equality and social justice in contries emerging from conflict* (Intersentia, 2011) 135; See Chapter III, section 2.1.2.

[54] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 33) 275. See Chapter II, section 4.2.1; Chapter III, section 2.1.1; Chapter V, sections 2, 3.5.1.1.

Elections. Patricio Aylwin, member of the coalition against the dictatorship ("Concertación"), assumed the Presidency in March 1990, after seventeen years of dictatorship.

This negotiated return to democracy ceased the existence of the systematic commission of serious human rights violations committed during repression, but also brought permanence and strengthened the economic and institutional system implemented by the dictatorship, with very few changes. Moreover, many members and collaborators of the military regime stayed in power, including Parliament, Government and Judiciary.[55] In addition, the transition found the Chilean society deeply divided about the period.[56] This special path to transition marked the implementation of TJ mechanisms, as the following section examines.

3. TRANSITIONAL JUSTICE MECHANISMS

This section examines the different TJ mechanisms implemented in Chile, including national consultations, truth commissions, reparation programmes, judicial measures and institutional reforms. The examination is done with a stronger focus on the inclusion of ESCR approaches.

3.1. National consultations

National consultations have not been a mechanism widely implemented in Latin American transitions, and in the cases where they have been implemented, they have not had positive results in pursuing TJ purposes.[57] The case of Chile is distinctive, because the National Referendum about the continuity of the Military

[55] E.g., Pinochet, which keep as the Commander in Chief of the Army. Rebecca Evans, 'Pinochet in London-Pinochet in Chile: International and Domestic Politics in Human Rights Policy' (2007) 28 HumRtsQ, 220; Peter Winn (n 20) 49.

[56] Antonius C.G.M. Robben (n 4) 191.

[57] See Chapter II, section 2.2; Chapter IV, section 2.2.

Government ("Yes") or the establishment of concrete date for democratic elections ("No") had positive results in the pursue of TJ purposes, because citizens decided the reestablishment of formal democracy.

Even though the referendum did not tackle ESCR issues, ESCR considerations played an important role in the implementation of this mechanism. The dissolution of labour and social organizations, the control of mass media and the economic bonanza that Chile was experiencing by the time of the referendum, gave the military regime the confidence that the results would be favourable for them.[58] These factors, together with some internal and international pressure, such as the reorganization of some social movements and political opposition, the abandonment of the support of the US and the constant condemnation of international organizations allowed for the implementation of a referendum.[59]

This national consultation had mandatory effects and it has been considered as a unique case in Latin America, starting the TJ process in Chile. This referendum did not deal with ESCR considerations, focusing on democratic elections. Moreover, the ESCR reforms implemented by the dictatorship were not criticized in the opposition's campaign. It seems reasonable, considering the historical moment and the need to convince the military regime of the importance of implementing this mechanism to legitimize this government.

In this way, the National Referendum was an essential participatory mechanism that started the TJ process in Chile. Despite its success, the rest of the TJ mechanisms implemented in Chile have not included national consultations with mandatory effects. A reason for this is that the Constitution enacted during the dictatorship limited the possibilities of direct participation, which influenced the

[58] IACommHR, 'Annual Report 1987-1988' OEA/Ser.L/V/II.71Doc. 9 rev. 1 (22 September 1987); Peter Winn (n 20) 44-46.

[59] Peter Winn (n 20) 37, 38, 44.

approach and implementation of later TJ mechanisms. This follows the Latin American tendency of not implementing national consultations in general.[60]

3.2. Truth commissions

Chile has implemented different truth commissions, which are the Commission of Truth and Reconciliation of 1991 ('Rettig'), the National Commission on Political Imprisonment and Torture of 2004 ('Valech I') and the Advisory Commission for the Legal Category of Detain Disappeared, Political Executed and Victims of Political Imprisonment and Torture in 2011 ('Valech II'). These commissions gathered evidence through the testimonies of the victims, their families, representatives or successors; NGOs; and reports and documents of State's institutions.[61]

The TJ process in Chile has been largely identified with the implementation of these truth commissions, as an example of how TJ was theorized at the beginning of the 1990s, with a strong focus on restorative justice.[62] Similarly to the rest of Latin America, the main purpose of these commissions has been to enable truth-telling and offer recommendations for reparations, as a way to re-establish democracy, accomplish reconciliation and restore the dignity of victims and families.[63]

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[60] See Chapter II, section 2.2.

[61] Decree No 355, 'Crea la Comisión de Verdad y Reconciliación' (Chile, 25 April 1990) article 4; Law No 20405, 'crea Instituto Nacional de Derechos Humanos y reabre la calificación de víctimas' (Chile, 10 December 2009) normas transitorias, article 3 a).

[62] Mark Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment' (1994) 16 HumRtsQ, 656-659; Priscilla Hayner, 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study' (n 1) 599, 621-623.

[63] Supreme-Decree No 1040, 'Crea Comisión Nacional sobre prisión política y tortura, para el esclarecimiento de la verdad acerca de las violaciones de derechos humanos en Chile' (Chile, 26 September 2003), complemented by Decree-Supreme No 1086 (03 November 2004); Decree No 355 (n 61) paras 2, 4–7, articles 1, 2; 'Informe de la Comisión Nacional sobre Prisión Política y Tortura (Valech I Report)' Comisión Nacional Sobre Prisión Política y Tortura (Chile, 28 November 2004), Prologue; See Chapter II, section 2.3.

The following subsection examines the purposes of truth-telling regarding the root causes of the conflict and the human rights violations committed during the dictatorship, to finally review the suggestions of reparations, with a focus on ESCR.

3.2.1. Tackling the Causes of Conflict

The purpose of addressing the root causes of conflict is one of the most explored in TJ through an ESCR lens, existing examples in Latin American truth commissions.[64] This is not the case in Chile, where truth commissions have mentioned, but not properly tackled the root causes of conflict. The Rettig Commission recognized that the crisis that preceded the *coup d'état* had deep socio-economic roots, but it also stated that explore these roots in depth was beyond their mandate.[65] Moreover, the Rettig Commission seems to have explained the *coup d'état* as a natural consequence of the political climate, establishing that the human rights violations could never been justified, but that the political climate "enabled such violations to take place."[66] This same approach is taken in the Valech I Commission, while the Valech II Commission does not refer to the root causes of conflict.[67]

This subtle justification of the *coup d'état* as an inevitable consequence of the violent period reflects the negotiated transition of Chile, [68] but makes invisible the historical and deep economic, social and cultural reasons that allowed for the

[64] See Chapter IV, section 2.3.1.

[65] 'Informe de La Comisión Nacional de Verdad y Reconciliación ('Rettig Report'), Comisión Nacional de Verdad y Reconciliación, 08 February 1991 (Chile) Volume I, Section II, Chapter I, 27.

[66] Ibid, Volume II, Chapter I, A.1.

[67] 'Valech I Report' (n 63); Chapter III, 161.

[68] Greg Grandin, 'The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala' (2005) 110(1) The American Historical Review, 56, 60, 64.

existence of the described violence. This is similar to the approach taken by other truth commissions at the end of the 1980s and the beginning of the 1990s in the Southern Cone, which differs from subsequent Latin American truth commissions that were more open to tackling the root causes of conflict, such as the ones in Peru and Guatemala.[69] The causes of conflict in those countries had an important racial element, which is not the main cause of the Chilean conflict, which seems to be more socio-economic and political. However, the violence in Chile had also as causes of conflict historical and structural inequality, intolerance and social discrimination.[70] Moreover, the Chilean Truth Commission ignored the heavy influence of international and private actors in the root causes of conflict despite the fact that they played an important role in igniting violence.[71] The omission of this TJ purpose by the truth commission does not allow to explain the later serious human rights violations committed during the dictatorship, limiting as well the possibility to effectively suggest adequate guarantees of non-repetition.[72]

3.2.2. Truth-telling about the human rights violations committed during the violent period

The Rettig Commission was the first TJ mechanism implemented in Chile with the return of the democracy and focused on examining the cases of unlawful

[69] See Chapter IV, section 2.3.1.

[70] Lisa J. Laplante 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 IJTJ, 334, 335.

[71] Paul Francis Llewellyn, 'The attitude of the Chilean newspaper 'El Mercurio' towards the main economic policies of the Popular Unity government of Salvador Allende (1970-73)' (PhD Thesis, University of Oslo, 2002), 53, 110; Kristian Gustafson, *Hostile Intent: U.S. Covert Operations in Chile, 1964-1974* (Potomac Books Inc., 2007) 179-226.

[72] See Chapter IV, section 3.3.

killing and forced disappearance committed during the dictatorship[73] while the Valech I and Valech II Commissions concentrated on political imprisonment and torture.[74] These commissions recognized repression as part of the State apparatus, with the systematic and massive practice of human rights violations in the whole country and with the help of civilians, including companies and the media, on some occasions, which brought more than three thousand victims of forced disappearance and unlawful killing and almost forty thousand victims of torture and political imprisonment.[75] Moreover, it has been pointed out the collective responsibility of the country, for the tolerance and acceptance of repression and human rights violations during the dictatorship.[76]

These truth commissions had limited mandates, as the rest of South American truth commissions created in the 1980s and the beginning of the 1990s, causing many issues from a human rights perspective, including the implication that other human rights violations committed during the dictatorship are not as serious as the ones examined by these commissions.[77] This happened in the Chilean case, where after the Rettig Commission, the Valech commissions had to be implemented, to deal with the systematic practice of torture and political imprisonment. Probably to avoid this assumption, the law that created the Rettig Commission clarified that its limited mandate was a consequence of time restrictions,[78] and that it did not deny the importance of all rights, including CPR

[73] Decree No 355 (n 61) para 9, article 1; 'Rettig Report' (n 65) Volume I, Chapter I, B.2; Law No 19123, 'Crea Comisión Nacional de Reparación y Reconciliación y otorga beneficios en favor de personas que señala' (Chile, 8 February 1992).

[74] Valech I Report' (n 63) Chapter II, 21, 22; Law No 20405 (n 61) article 3.

[75] 'Rettig Report' (n 65) Volume I, Chapter II, A.1; 'Valech I Report' (n 63) Chapter III, 186-192.

[76] 'Rettig Report' (n 65) Volume I, Chapter I, C; Antonius C.G.M. Robben (n 4) 192.

[77] See Chapter IV, section 2.3.2.

[78] Decree No 355 (n 61) article 1.

and ESCR.[79] The same kind of declaration cannot be found in the Valech Commissions. These declarations do not seem useful when in practice other serious CPR and ESCR violations committed during the dictatorship, such as unfair dismissals or forced evictions, were treated as elements or consequences of the commission of unlawful killing, forced disappearance, torture and political imprisonment.

Despite this, there are some direct mentions to ESCR violations in the reports of the Chilean truth commissions. In this way, the control and intervention of unions and the systematic violation of constitutional and labour rights was recognized as a generalized practice,[80] including the massive dismissal of judges considered as supporters of left wing parties.[81] Regarding the right to education and cultural rights, truth commissions recognized violations such as the dismissal of professors and students linked to trade unions or left-wing parties, the control and elimination of modules and research projects, control of publications and the imposition of censorship on media and arts.[82]

There is even a more indirect recognition of ESCR violations in the case of crimes such as rape and sexual abuse, forced abortion and physical and psychological violations, which were considered simply as mere elements of the commission of torture.[83] Forced entrance to family houses, affecting their sleep, family life and mental wellbeing; companies; settlements; *campesino* villages;

[79] 'Rettig Report' (n 65) Volume I, Chapter II, A. 1.

[80] Ibid, Volume I, Chapter II, A.3.b); 'Valech I Report' (n 63) Chapter III, 169.

[81] 'Valech I Report' (n 63) Chapter III, 170-174.

[82] 'Rettig Report' (n 65) Volume I, Chapter II, A.3.b.

[83] Ibid, Volume I, Chapter II, B.1; 'Valech I Report' (n 63) 21, 22, 240-503.

miner centres and universities were considered as elements of the commission of unlawful detention.[84]

Furthermore, in the cases where truth commissions refer to ESCR, it occurs mainly in a contextual way or as means of commission of CPR, which coincides with the approach taken in general by Latin American truth commissions, in particular the ones with a limited mandate.[85] In the indirect recognition of ESCR, the truth commissions do not use the language of rights, except in the case of labour rights, which is similar to the approach of other truth commissions, which were keener to explicitly refer to labour rights.[86] Moreover, the Chilean truth commissions refer to the ICESCR, ratified by Chile before the *coup d'état* and mandatory at the international level, as it was pointed out before.[87] This is different to the case of the Guatemalan and Peruvian truth commissions, which used in more occasions the language of rights and international human rights instruments, even though it was not systematic.[88]

In addition, the Valech II Commission recognized some limitation in documenting the human rights violations committed in some parts of the country, for example in the rural areas.[89] This affected truth-telling of the massive violations committed in rural sectors, which also included targeted violations against *campesinos* and indigenous groups, whose experiences are clearly invisible

[84] 'Valech I Report' (n 63) Chapter III, 184, 185, 207.

[85] See Chapter IV, section 2.3.2.

[86] Idem.

[87] See Chapter V, section 2.

[88] See Chapter IV, section 2.3.2.

[89] Informe de la Comisión Asesora para la Calificación de Detenidos Desaparecidos y Ejecutados Políticos y Víctimas de Prisión Política y Tortura ('Valech II Report') Comisión Asesora para la Calificación de Detenidos Desaparecidos y Ejecutados Políticos y Víctimas de Prisión Política y Tortura (Chile, 17 August 2010) Conclusion, 53.

in comparison to the other victims of violations, such as those who lived in cities and more populated areas. Furthermore, as it was pointed out when examining the reports of the truth commissions in Guatemala, Peru and Brazil, these populations could be the more vulnerable to the commission of systematic and serious ESCR violations.[90] This lack of documentation could have an impact on the invisibility of ESCR.

The Brazilian and Ecuadorian truth commissions referred to the role of neoliberalism, economic powers and the economic project pursued by the repressive regimes in the commission of serious human rights violations.[91] This is missed in the Chilean truth commissions, which only briefly refer to the collaboration of civilians, including companies and the media in the serious human rights and humanitarian law violations.[92] This happens even though these factors were an important part of the serious human rights violations committed during the dictatorship in Chile, as explored before.[93] The invisibility of these factors correspond with the omission of the root causes of conflict, which are also connected.[94] This shows how not dealing with the root causes of conflict can affect the way in which the truth commissions deal with the serious human rights and humanitarian law violations committed during the violent period. Moreover, it could also be an example of how the Chilean truth commissions could been influenced by the marked liberal approach of TJ processes, which, as pointed out before, made some serious human rights violations invisible.[95]

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[90] See Chapter IV, section 2.3.2.

[91] Idem.

[92] 'Rettig Report' (n 65) Volume I, Chapter I, B.2; 'Valech I Report' (n 63) Chaper III, 186-193.

[93] See Chapter IV, section 2.3.2; Chapter V, section 2.

[94] Chapter V, section 3.2.1.

[95] See Chaper IV, sections 2.3.2, 3.5.

Therefore, it can be claimed that Chilean truth commissions insufficiently dealt with ESCR violations committed during the dictatorship. When having a restricted approach to the serious human rights and humanitarian law violations committed during the dictatorship, Chilean truth commissions are telling only a partial truth.[96] This can cause the need for the implementation of future truth commissions or official mechanisms that allow the autonomous recognition of other systematic serious human rights violations, such as sexual violence, already recognized in an indirect way. Victims of this kind of serious human rights violations have already claimed the promotion of the autonomous recognition of sexual violence as a systematic human rights violation committed during the dictatorship,[97] as in the case of Guatemala.[98]

3.2.3. Recommendations of Reparations

Chilean truth commissions have considered reparations not only to compensate damage to the victims and their families, but also as a guarantee of non-repetition and the preferred way to pursue truth-telling and to accomplish reconciliation, justice for the victims and society in general.[99] Moreover, reparations have been recognized as a principle of public international law, following the parameters of the ACHR in this area.[100] Reparations recommended by the Chilean truth commissions, such as restitution, compensation, rehabilitation and guarantees of non-repetition, are considered in a broader way as essential to

[96] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5, 54.

[97] As the social movement "Collective of Survivors Women, always resisting". See UDP, 'Informe Anual sobre Derechos Humanos en Chile 2016' (Centro de Derechos Humanos, 2016) 46.

[98] See Chapter IV, section 2.3.2.

[99] 'Valech I Report' (n 63) Chapter IX, 519, 618.

[100] Ibid, 518.

facing systematic and massive violation of human rights in the processes of transition to democracy.[101]

When recommending individual reparations, the Chilean truth commissions considered victims and their families' life project and quality of life.[102] In relation to torture and political imprisonment, the Valech Commission stated that it has destroyed victims' life project and reaffirmation of social identity, affecting their mental and physical health, perturbation of social, affective and sexual relations and on many occasions connection with their family members and partners.[103] Moreover, it was affirmed that the majority of the victims lost their jobs, means of subsistence, minimum conditions to survive and housing,[104] affecting specially workers and *campesinos*, who wanted to improve their living conditions and were expelled from universities, jobs, etc.[105] It has also been recognised that these issues continued after the end of the dictatorship, making victims and their families face numerous social, familial and economic problems.[106]

Considering these damages, the truth commissions have recommended integral social, legal and economic reparations for the victims and their families, including pensions, social security and housing benefits, mental and physical preferential support and scholarships.[107] These recommendations were regarded as part of the State's obligation to repair for the serious human rights violations

[101] Ibid, 518-520.

[102] Decree No 355 (n 61) article 1; 'Rettig Report' (n 65) Volume II, Section IV, Chapter I, D; 'Valech I Report' (n 63) Prologue, Chapter VIII, 496.

[103] 'Valech I Report' (n 63) Chapter VII, 477, Chapter VIII, 495-512.

[104] Ibid, Chapter VII, 477, Chapter VIII, 495; 'Valech II Report' (n 89) 28, 29.

[105] 'Valech I Report' (n 63) Chapter VIII, 495, 496.

[106] Ibid, 520.

[107] 'Rettig Report' (n 65) Volume II, Chapter I, Section IV, D.4; 'Valech I Report' (n 63) Chapter IX, 520, 525, 526.

committed during the dictatorship and in consideration of the consequences of these violations on the victims and their families.[108]

The Chilean truth commissions also considered guarantees of non-repetition,[109] with many education-related recommendations. They have established the responsibility of States to guarantee education in human rights, not only in the state educational systems, but also in the military and police training systems.[110] Moreover, the truth commissions suggested measures such as the creation of an Editorial Fund for publications that contribute to truth-telling about the dictatorship and curricula reform.[111] They also recommended the creation of institutions dedicated to the promotion and protection of human rights.[112]

In this way, as many of the truth commissions in Latin America, the recommendations of reparations of the Chilean truth commissions had the purpose to repair serious CPR violations, having a positive impact on the enjoyment of ESCR. However, these were focused on individual rather than collective reparations. In the recommendations for institutional reforms, the Chilean Truth Commissions focused on educational reforms, being less ambitious than the other previously examined truth commissions that suggested economic, social and cultural reforms.[113]

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[108] Idem.

[109] Decree No 355 (n 61) paras 4-7, article 1; Law No 19123 (n 73) article 5; 'Rettig Report' (n 65) Volume II, Section IV, Chapter I, D; 'Valech I Report' (n 63) Prologue 8, Chapter IX, 527, 528.

[110] 'Rettig Report' (n 65) Volume II, Section IV, Chapter II, B, C, D; 'Valech I Report' (n 63) Chapter IX, 502, 528-530.

[111] 'Rettig Report' (n 65) Volume II, Section IV, Chapter II, B, C, D; 'Valech I Report' (n 63) Chapter IX, 502, 528-530.

[112] 'Rettig Report' (n 65) Volume II, Section IV, Chapter II, D.4.

[113] See Chapter IV, section 2.3.3.

Thus, reparations programmes recommended by the Chilean truth commissions are strongly linked with the enjoyment of ESCR. However, as in the case of other Latin American truth commissions, the language of rights is not used.[114] There are some exceptions, for example in the Rettig report, which pointed out that the right to social security and other rights and needs should be repaired and re-established.[115] There is no justification of why in some cases the language of ESCR is used and in others not, as in the other Latin American truth commissions. However, the lack of inclusion of the language of rights has not affected the granting of reparations with positive ESCR consequences, which could be attributed to the early recognition of the notions of life project or quality of life, as in the case of the IACtHR when ordering reparations with a positive effect on the enjoyment of ESCR.[116]

As already pointed out, the Chilean truth commissions have inspired the implementation of other truth commissions and the regional and international level.[117] However, these TJ mechanisms are far from being a model of the implementation of ESCR approaches, except in their recommendation of reparations, which has been recognized by the UN as an example of the inclusion of this approach.[118] The period of implementation of the truth commissions is hardly an excuse, considering that the Valech reports were issued after the movement of the inclusion of ESCR approaches in TJ started. This seems to be related more to the limited mandate of the truth commissions and to a political decision to privilege truth-telling of some serious human rights violations. This

[114] See Chapter IV, section 2.3.2.

[115] 'Rettig Report' (n 65) Volume II, Section IV, Chapter I D.2.

[116] See Chapter III, section 3.2.3.

[117] See Chapter V, section 1.

[118] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 96) 41.

could have negative consequences for a country that continues to be profoundly divided and unequal.[119]

3.3. Reparation programmes

The Chilean reparation programmes have been well known as successful examples of the implementation of ESCR approaches at the regional and international level.[120] They have been continuously implemented through different laws throughout the transition period. These reparation laws have been launched not only to repair the victims recognized under the mandates of the truth commission, i.e. the victims of forced disappearance, unlawful killing, political imprisonment and torture, but also victims of exile, unfair dismissal and land destitution, which were not part of the mandate of the truth commissions.

This section examines first the reparation programmes for the victims of serious CPR violations, implemented following the recommendations of the truth commissions. Then, it examines the reparation programmes repairing serious ESCR violations that were not part of the mandates of the truth commissions. This section focuses on the reparations programmes linked to ESCR, without denying the existence of reparation programmes with a positive effect on CPR, as the elimination of criminal records of people condemned by military or civil courts during the dictatorship, among others.[121]

3.3.1. Reparations measures for victims of serious civil and political rights violations

[119] See Chapter V, sections 3.5.1.2, 3.5.2.2.

[120] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 96) 41.

[121] Law No 19123 (n 73); Law No 20200 (Chile, 20 July 2007); Law No 20377, 'sobre declaración de ausencia por desaparición forzada de personas' (10 September 2009).

Reparation programmes have been implemented to repair forced disappearance, unlawful killing, political imprisonment and torture. They grant reparations in a broad way, including compensation, restitution and rehabilitation. Monetary compensation includes pensions and bonuses for the victims and their families.[122] The bonuses were aimed at supporting the immediate needs of the victims and their families, while the pensions were considered as a way of social security.[123] These compensation measures have been criticized for their austere and symbolic character,[124] but they can be interpreted as providing basic minimum subsistence.[125] Moreover, these measures are complemented with reparations that have a positive impact on the enjoyment of ESCR, such as scholarships and exclusion of debts contracted for fees of universities and technical colleges[126] and housing benefits in the form of special measures that favour house acquisition for non-house owners or for those owners of social housing who want to improve their houses.[127]

[122] Law No 19123 (n 73) article 5; Law No 20405 (n 61) normas transitorias, articles 3-14; INDH, 'Cartilla Informativa: Beneficios Establecidos Por Ley a Las Víctimas y Familiares de Violaciones Ocurridas Durante La Dictadura' (26 August 2011) <www.indh.cl/beneficios-establecidos-por-ley-a-las-victimas-y-familiares-de-violaciones-ocurridas-durante-la-dictadura> accessed 15 September 2018.

[123] Supreme-Decree No 1040 (n 63).

[124] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2017' (Chile, 2017) 221.

[125] Naomi Roth-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer, 2014) 117.

[126] Law No 19123 (n 73); Law No 19980, 'modifica la ley nº 19123, ley de reparación, ampliando o estableciendo beneficios en favor de las personas que indica y formaliza la creación del Programa de Reparación y Atención Integral de Salud (PRAIS)' (Chile, 9 November 2004); Law No 19992 establece pensión de reparación y otorga otros beneficios a favor de las personas que indica (Chile, 24 December 2004) articles 11-14; Law No 19287, 'modifica ley 18.591 y establece normas sobre fondos solidarios de crédito universitario' (Chile, 04 February 1994); Ministerio Educación, Regulation to Decree-Supreme No 407, (Chile, 28 December 2007); Law No 20405 (n 61) normas transitorias, articles 3-14.

[127] Ministerio de Vivienda y Urbanismo, Decree No 176 (Chile, 23 December 2004); Ministerio de Vivienda y Urbanismo, Decree No 48 (Chile, 11 May 2005); Law No 28592 (n 115); Decree No 015-2006-JUS (n 114) articles 33-35; Ministerio de Vivienda y Urbanismo, Oficio No 341 (Chile, 25 July 2012).

Moreover, a special Programme for the Rehabilitation and Health Integral Attention (PRAIS) was created with the purpose of giving continuing free physical and mental health attention to the victims and their families in public health centres, improving their quality of life.[128] This programme also fulfils truth-telling purposes by recognizing the existence of a State of Terror during the dictatorship, which damaged and/or increased the risk of damage to victims' health, by making them and their families more vulnerable.[129] Moreover, PRAIS recognized the existence of direct and indirect repressions, social and individual marginalization as direct and structural ESCR violations.[130] Among the instruments of indirect repression, PRAIS recognized deprivation of food, housing, health and unfair dismissal. In relation to social marginalization, PRAIS referred to the exclusion of economic production, the enjoyment of social benefits and services (such as pensions, health and educational services) and participation in social, labour and/or communal associations.[131]

The implementation of PRAIS has faced some problems. It is provided through the public health system; therefore, it faces problems such as long waiting queue, lack of specialists in some areas of the country, which are issues that affect the public system in general.[132] Moreover, it has been pointed out that there are insufficient resources and lack of information for the victims about how to access

[128] Law No 19980 (n 126); 'Norma Técnica No 88 Para La Atención En Salud de Personas Afectadas Por La Represión Política Ejercida Por El Estado En El Periodo 1973-1990', Ministerio de Salud de Chile, Unidad de Salud Mental (2000) 7.

[129] Norma Técnica No 88 Para La Atención En Salud de Personas Afectadas Por La Represión Política Ejercida Por El Estado En El Periodo 1973-1990' (n 128) 7-33.

[130] Ibid, 30.

[131] Ibid, 30, 31.

[132] Naomi Roth-Arriaza (n 125) 118.

to this programme and that there is a lack of an official systematic evaluation of the programme.[133]

These reparation programmes included some unjustified distinctions that have been considered discriminatory, such as unjustified different amounts of pension for different victims of different types of violations, which led to a hunger strike of victims of torture and the enactment of a new reparatory law that granted an extra bonus.[134] Moreover, the bonus for victims recognized in the Valech Commissions excluded male spouses as its beneficiaries.[135] Such an exclusion is not justified by law, and it has been pointed out that it could be based on the presumption that the female spouses are more vulnerable and in need.[136] The benefits in the area of education include an unjustified different treatment to the family of the victims recognized in Rettig and Valech, as the latter includes the grandchildren of the victims, while the Rettig is limited to the children.[137]

It is evident, therefore, that there is a comprehensive reparation programme system in place for victims of forced disappearance, unlawful killing, torture and political imprisonment. However, it includes some unjustified discriminatory distinctions that are against the principles of non-discrimination and equality before the law, which should inform the implementation of TJ

[133] Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile' in Pablo de Greiff (ed) *The Handbook of Reparations* (OUP, 2006) 55-94; Unión de ex Presos Políticos de Chile, <https://unexpp.cl/2016/08/08/prais-no-es-gratis-para-todos-sus-beneficiarios/> accessed 15 September 2018.

[134] Law No 20874, 'otorga un aporte único, de carácter reparatorio, a las víctimas de prisión política y tortura, reconocidas por el Estado de Chile' (Chile, 29 October 2015); INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 273; INDH, 'Cartilla Informativa: Beneficios Establecidos Por Ley a Las Víctimas y Familiares de Violaciones Ocurridas Durante La Dictadura' (n 122).

[135] Law No 20874 (n 134); UDP, 'Informe Anual sobre Derechos Humanos en Chile 2016' (n 97) 78

[136] UDP, 'Informe Anual sobre Derechos Humanos en Chile 2016' (n 97) 78.

[137] INDH, 'Cartilla Informativa: Beneficios Establecidos Por Ley a Las Víctimas y Familiares de Violaciones Ocurridas Durante La Dictadura' (n 122).

mechanisms.[138] Moreover, the language of rights is not used, but the one of benefits, which has not been an obstacle for considering the Chilean reparation programme as successful in including the enjoyment of ESCR for the victims serious CPR violations, especially when comparing these programmes with others in Latin America, which have been very ambitious on paper, but not implemented properly, as in the case of Guatemala.[139]

3.3.2. Reparations measures for victims of serious economic, social and cultural rights violations

Reparation programmes are not limited to the victims included in the mandates of the Chilean truth commissions. The State could not ignore the massive and systematic practice of forced evictions, unfair dismissal and exile, designing administrative measures for these victims, including compensation, restitution and rehabilitation. These reparation programmes are different to the ones of the previous section, but they include some reparations common to the Valech and Rettig commissions, such as access to PRAIS.[140]

In the case of unfair dismissal, which was one of the most systematic human rights violations committed during the dictatorship, reparation programmes included pensions, social security benefits and credits to compensate the lack of contributions as consequence of the forced unemployment.[141] These

[138] See Chapter II, section 4.1.3.

[139] Ibid, section 2.4.

[140] Law No 18994, 'Crea Oficina Nacional de Retorno' (Chile, 20 august 1990); Law No 19980 (n 126); Norma Técnica No 88 Para La Atención En Salud de Personas Afectadas Por La Represión Política Ejercida Por El Estado En El Periodo 1973-1990' (n 128) Chapter I, section 3.4.

[141] Law No 19234, 'establece beneficios previsionales por gracia para personas exoneradas por motivos políticos en lapso que indica y autoriza al instituto de normalización previsional para transigir extrajudicialmente en situaciones que señala' (Chile, 12 August 1993); Law No 19582, 'Modifica ley nº 19234, que establece beneficios previsionales para exonerados por motivos políticos' (Chile, 31 August 1998); Law No 19740, 'beneficios en créditos de chilenos retornados' (Chile, 30 June 2001); Law No

measures had a profound impact on the amount of the pensions, considering that the Social Security System in Chile is based on individual capitalization, as examined before.[142] Moreover, university debts were excluded for those students who were unfairly dismissed.[143] However, it has been established that there is certain incompatibility between these reparations and pensions for the victims of torture,[144] which has been criticized, because these programmes were created with an intention to repair different violations,[145] so it would not count as double reparation.

In the case of forced evictions, there was also implemented a property restitution or compensation reparation programme for individuals, trade unions and political parties that lost their property for act of authority during the dictatorship.[146] This programme, as in the case of the Office of Return, it was established for a limited time. Even though this reparation programme was focused on repairing the unlawful deprivation of the right to property during the dictatorship, in many cases the violation of this right was linked to ESCR violations, including among others the right to housing - individuals who were forcefully evicted from their homes-, the right to food and work - *campesinos* who were deprived from their lands. Therefore, as already pointed out before, property destitution usually involves the violation of CPR and ESCR, allowing other

19881, 'Establece un nuevo plazo para acogerse a la ley nº 19234, que otorga beneficios previsionales para exonerados por motivos políticos' (Chile, 27 June 2003).

[142] See Chapter V, section 2.

[143] Law No 19287 (n 126) article 6.

[144] Law No 19992 (n 126) article 2.

[145] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2017' (n 124) 221.

[146] Law No 19568 (n 127).

reparation programmes in Latin America to include ESCR approaches, as in the case of Colombia, which it has a more explicit approach to ESCR.[147]

In the case of forced displacement, violation of CPR and ESCR are involved, as examined in the previous chapter.[148] The Chilean case considers this in the terms of external forced displacement, creating National Office of Return for those who abandoned the country after being dismissed from their jobs and denied permission to re-enter, forced by the authorities to leave the country, etc. In this way, this reparation programme includes as exiles those who left the country for the violation of not only serious CPR, but also a violation of serious ESCR, which is unfair dismissal. The reparation programme for victims of exile included measures such as social and labour reinsertion, homologation of titles, reintegration of free elementary and secondary education,[149] recognition of foreign degrees[150] and custom duties exemptions for those who want to import some materials from abroad in their return to Chile.[151] The purpose of all these measures was to incentive the return and reinsertion of the victims of exile to the country.

The National Office of Return recognized 52.557 victims, even though other organizations documented more than 200.000 victims.[152] One of the reasons for its restricted impact could be the limited time of its implementation, just until

[147] See Chapter IV, section 2.4.2.

[148] Ibid, section 2.3.2.

[149] Law No 18994 (n 140).

[150] Law No 19074, 'Autoriza ejercicio profesional a personas que señala que obtuvieron títulos o grados en el extranjero' (Chile, 8 August 1991).

[151] Law No 19128, 'otorga franquicias a exiliados políticos exonerados' (Chile, 07 December 1992).

[152] UNHCR, 'The State of The World's Refugees 2000: Fifty Years of Humanitarian Action' (01 January 2000) Chapter V, 'Proxy Wars in Africa, Asia and Central America', 126; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 279.

2004.[153] In any case, this reparation programme has had a fundamental role in truth-telling, recognizing the damage done to all the victims on exile. This measure is relevant after years of belittling the consequences of exile in the life of victims, who were called by many Chileans as "beneficiaries of the Pinochet Scholarship" or "the Golden Exile", ironizing about the supposed comfortable life than exiles were having.[154]

In this way, there is a recognition that the physical and psychological damages caused by the human rights violations should be repaired. Overall, Chile has integral reparation programmes designed for repairing victims of serious human rights violations during the dictatorship, which include not only reparations with a positive effect in the enjoyment of ESCR, but also reparations for direct violations of ESCR, such as unfair dismissal.

However, these reparation programmes have categorised different kinds of victims, granting them different reparations, which can be seen as if one kind of suffering was less important than others. Moreover, the short period of implementation of some reparation programmes, such as the one for exile and land restitution, has left some victims without benefits.[155] In addition, reparation programmes have been in general implemented by administrative bodies specialized in ESCR but not in TJ, such as Institute of Social Security Normalization or the Ministry of Education.[156] For this reason, suggestions have been put forward

[153] Ley No 18994 (n 140) article 11; UNHCR, 'The State of The World's Refugees 2000: Fifty Years of Humanitarian Action' (n 152); INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 279; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2017' (n 124).

[154] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 282.

[155] Ibid, 286.

[156] Cath Collins, 'Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the 'Valech Commission' in Chile' (2016) 49 Journal of Latin American Studies, 77.

to create a permanent agency of qualification of victims of dictatorship and a specialized mechanism to monitor the implementation of the reparations.[157]

As in the case of truth commissions, these Chilean reparation programmes do not use the language of rights, but more the discourse of benefits.[158] This is in line with the generalized practice in Latin America, which, except for Colombia, imposes caution on the use of the language of rights.[159] In addition, Chile has a limited recognition of ESCR at the constitutional level, so it could not be expected that the State would use the language of rights in a broader way when granting reparations than in its general obligations in the area of ESCR.[160] This lack of the use of the language of rights has not seem to have an impact on the implementation of reparations with a positive effect in the enjoyment of ESCR. However, discriminatory measures could perhaps be avoided if the human rights framework were more explicit.

In any case, it is it is noteworthy that many of the reparations granted to victims coincide with basic ESCR of the state. It is therefore important to remember that the Chilean State does not confuse its general obligations under international, regional and national law in the area of ESCR with its obligation of granting reparations that positively affect the enjoyment of ESCR of victims of violence.[161] This issue is especially important considering the impact of

[157] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 273.

[158] Cath Collins, 'Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the 'Valech Commission' (n 156) 77.

[159] See Chapter IV, section 2.4.

[160] See Chapter V, sections 2, 3.5.1.2.

[161] See Chapter IV, sections 2.4, 3.1.

dictatorship in the limited recognition and justiciability of ESCR, as it is examined when reviewing institutional reforms.[162]

Despite all these issues, the reparation programmes in Chile have been considered a history of success in pursuing reparations in a broad sense, with an inclusion of ESCR approaches.[163] This is especially impressive considering the time when the reparation programmes started to be implemented, before the beginning of the development of ESCR approaches in TJ theories.[164] Moreover, in granting these reparations, the Chilean programmes extended the focus of the truth commissions, which had a limited mandate, repairing for ESCR violations and accomplishing purposes of truth-telling.[165] This therefore is an exception in the TJ practice, where so far serious ESCR violations have been considered as notoriously subsidiary to serious CPR violations and existing reparations for both kinds of violations.

3.4. Judicial measures

This section examines the work of international and national courts in accomplishing TJ purposes in Chile, with a focus on ESCR, which has been very limited in the Chilean case. At the international level, this section reviews the Inter-American Human Rights System, focusing on the main judgments of the IACtHR and the pending cases accepted in the IACommHR that had or could have an impact on ESCR and the TJ process in Chile.

[162] See Chapter V, section 3.5.

[163] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 96) 40-42; Elisabeth Lira (n 127) 92.

[164] See Chapter I, section 1.

[165] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (n 96) 54.

In the case of national courts, this section examines the judgments of the Constitutional Court and ordinary courts. This chapter does not pretend to examine the totality of the judgments tackling TJ issues; instead, it focuses on the most relevant ones that represent the general reasoning of the judiciary to engage with TJ and ESCR.

3.4.1. Inter-American Human Rights System

The State ratified the ACHR in 1990, even though it signed it in 1969. The Chilean Government has declared that the competence of the IACtHR was limited to the facts that started to be committed after the ratification of the ACHR. Despite this, the Inter-American Human Rights System has dealt with human rights violations committed before the ratification of the ACHR, stressing the continuity of state responsibility of the successor government for the illicit acts committed by the predecessor.[166] The Protocol of San Salvador, the main treaty that enshrines ESCR at the Inter-American Human Rights System, has not been ratified by Chile.[167]

Most of the petitions regarding serious CPR violations committed during the dictatorship presented to the IACommHR and the judgments of the IACtHR against Chile that are relevant to TJ do not include a direct or indirect approach to ESCR.[168] The nearest approach to ESCR violations when examining other serious CPR violations has been the recognition that the Chilean dictatorship targeted trade

[166] *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs (IACtHR) Series C No. 154 (26 September 2006) paras 48, 67, 135, 151–154; See Chapter II, section 4.2.2.

[167] See Chapter V, section 3.5.1.1.

[168] E.g. *Almonacid-Arellano et al v. Chile* (n 166); *García Lucero et.al v. Chile,* Merits, Reparations, Costs (IACtHR) Series C No. 267 (28 August 2013) paras 24, 183, 192; *Omar Humberto Maldonado Vargas et.al v. Chile*, Merits, Reparations, Costs (IACtHR) Serie C No 300 (02 September 2015) paras 75, 104, 142, 156, 170, 175; *Mario Galetovic Sapunar et al v. Chile*, Report on admissibility (IACommHR) Report No. 53/15, Petition 706-04 (17 October 2015); *Juan Alberto Contreras González, Jorge Edilio Contreras González and family v. Chile*, Report on admissibility (IACommHR) Report No. 59/16, Petition 89-07 (06 December 2016).

unions, students, indigenous leaders and small landholders, including many "people that were not politically active but participated to some degree in the activities of trade unions or student organizations"[169] when examining other serious CPR violations, which is a similar approach as the one taken in the *Goiburu et al. v Paraguay* case.[170] This recognition is important in the Chilean case, where TJ mechanisms have dealt in a limited way with the serious human rights violations against small landholders,[171] while they have not properly dealt with the possible targeted human rights violations against indigenous communities during the dictatorship, despite being recognized as a generalized practice by the UN.[172]

3.4.2. Domestic Courts

The Chilean Constitutional Court has not generally pursued TJ purposes. For example, it did not applied the ICCPR during the dictatorship for an apparent prevalence of constitutional law over human rights treaties,[173] and it postponed the ratification of the Rome Statute during the transition for an apparent clash between this treaty and constitutional norms.[174] This approach differs to the

[169] *Juan Luis Rivera Matus et al. v. Chile* (IACommHR) Report No. 58/16, Petitions 1275-04B and 1566-08 (06 December 2016) paras 23, 30, 38, 59, 69, 90); *Omar Humberto Maldonado Vargas et.al v. Chile* (n 168) para 22.

[170] See Chapter IV, sections 2.5.1.

[171] See Chapter V, section 3.3.2.

[172] UNGA Resolution No 34/179 (n 10) 5.g.

[173] *Requerimiento en contra del señor C.A.M.F. por el señor Ministro del Interior por infraccion al artículo 8° de la Constitución Política de la República*, Rol N° 46, Tribunal Constitucional de Chile (Chile, 21 December de 1987).

[174] The Chilean Constitutional Court carries out *a priori* review of treaties before their ratification, in the cases where the treaty involves constitutional matters or in the cases where the Congress requires this review. In this case, the Constitutional Court declared the Rome Statute 'unconstitutional' and a constitutional reform had to be carried out to allow its ratification in 2009. *Requerimiento de treinta y cinco diputados con el objeto de que se declare la inconstitucionalidad del Estatuto de Roma, que establece la Corte Penal Internacional*, Rol N° 346, Tribunal Constitucional de Chile, (Chile, 08 April 2002); Constitución Política de la República de Chile [Political Constitution of the Republic of Chile] last consolidated text enacted through Decree 100 (Chile, 17 September 2005) Article 93 nro 1, 2); Cámara de Diputados de Chile, 'Reforma Constitucional permitió al Estado de Chile reconocer el Estatuto de

Colombian Constitutional Court, which has played an important role in the implementation of reparation programmes and the fulfilment of ESCR of victims of armed conflict.[175]

In Chile, ordinary courts have been more the protagonist of the TJ process than constitutional courts, even though the judiciary was an active collaborator and accomplice of the dictatorship, rejecting hundreds of *habeas corpus*.[176] Moreover, at the beginning of the transition period, the judiciary rejected the possibility of prosecuting serious human rights and humanitarian law violations for the prolonged application of the Amnesty Law, stressing that these crimes were not defined in the national law at the time of their commission.[177] In these cases the judiciary interpreted the principles of legality, non-retroactivity of the law and due process in a restrictive way, without considering international obligations, which has been a common practice in Latin American countries to avoid prosecutions.[178]

The implementation of prosecutions started in a later transition, in 1998, which coincides with the implementation of reforms to the judiciary.[179] The

Roma que crea la Corte Penal Internacional' (01 February 2010) <www.camara.cl/prensa/noticias_detalle.aspx?prmid=36767> accesed 21 January 2019.

[175] See Chapter IV, section 2.5.2.

[176] Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (2010) 4 IJTJ, 68. Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010) 12, 130; Paloma Aguilar, 'Jueces, Represión y Justicia Transicional En España, Chile y Argentina' (2013) 71 Revista Internacional de Sociología, 288.

[177] Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 176) 16; Marny A. Requa, ¿A Human Rights Triumph? Dictatorship-Era Crimes and the Chilean Supreme Court' (2012) 12 Human Rights Law Review, 82; Paloma Aguilar (n 176) 297.

[178] See Chapter II, sections 4.1.1, 4.1.2.

[179] At the year 2014, more than 900 states agents have been investigated. INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2014' (Chile, 2014) 44–50; Observatorio de Derechos Humanos, 'Principales Hitos Jurisprudenciales En Causas DDHH En Chile (1990-2013): Fallos y Otros Hechos Significativos En Causas Seguidas Por Los Tribunales Chilenos Después de 1990 Por Graves Violaciones Cometidas Durante La Dictadura Militar de 1973 a 1990' (UDP, 2014) 8, 11, 13; Rebecca Evans 'Pinochet in London-Pinochet in Chile: International and Domestic Politics in Human Rights Policy' (2007) 28 HumRtsQ, 12; Claudio Nash (n 48) 81; Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 176) 86; Marny A. Requa (n 177) 82, 102; Ximena Medellín, 'Toward the Consolidation of Justice for International Crimes in Latin America: From Constitutional Debate to

judiciary started implementing some important strategies, including the use of crimes as "permanent or continued kidnapping", "illicit association" and "unlawful coercion", which were already typified in the Chilean domestic law.[180] In addition, the Supreme Court has pointed out that for the continuous application of the state of siege during the dictatorship as "war times",[181] the Geneva Conventions and customary law were applicable, which already typified international crimes, declaring them imprescriptible.[182] Together with these strategies, the judiciary has applied general principles of national and international law, including constitutional democracy and supremacy, human dignity, *pacta sunt servanda*, *bona fide*, due process and legality to stress the preferential applicability of human rights enshrined at the constitutional level and in treaties ratified and in force.[183] This is a coherent part of the Latin American practice in the cases where the investigation, prosecution and punishment of serious human rights violations have been pursued.[184]

However, it is important to remember that legal principles, such as legality, non-retroactivity and due process have also been used in a restrictive way to block

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Criminal Cases' (2013) Aportes DPLF: Magazine of the Due Process of Law Foundation, 3, 4; Valeria Barbuto (n 130) 43.

[180] *Pedro Poblete Córdova*, Rol 469-1998, Corte Suprema de Justicia (09 September 1998); *Miguel Ángel Sandoval Rodríguez*, Rol 517-2004, Corte Suprema de Justicia (Chile, 17 November 2004); *Episodio Parral*, Rol 3.587-2005, Corte Suprema de Justicia (Chile, 27 December 2007); *Ejecuciones Sofía Cuthbert Chiarleoni y Carlos Prats González, 'Episodio Carlos Prats'*, Rol 2596-2009, Corte Suprema de Justicia (Chile, 08 July 2010); *Rudy Cárcamo,* Rol 288-2012, Corte Suprema de Justicia (Chile, 24 May 2012); Rol 14.312-2016, Corte Suprema de Justicia (Chile, 30 December 2016); Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (n 176) 81, 82.

[181] See Chapter V, section 2.

[182] *Caravana de La Muerte*, Rol 2182-98, Corte Suprema de Justicia (Chile, 28 January 1998) para 15; *Miguel Ángel Sandoval Rodríguez* (n 180); *Tejas Verdes,* Auto de Procesamiento Rol 2182-1998, Ministro de Fuero Alejandro Solís (Chile, 07 February 2005).

[183] *Tejas Verdes,* Auto de Procesamiento Rol 2182-1998 (n 182); *Bárbara Uribe y Edwin Van Juric,* Rol 38.638-1994, Corte de Apelaciones Chile, Segunda Instancia (Chile, 30 September 1994) paras 7, 9; *Pedro Poblete Córdova* (n 180) para 10; *Caravana de La Muerte* (n 182) para 16; *Hugo Vásquez Y Mario Superby*, Rol 559-2004, Corte Suprema de Justicia (Chile, 13 December 2006) para 11; *Miguel Ángel Sandoval Rodríguez* (n 180) para 50.

[184] See Chapter II, sections 4.1.1, 4.1.2, 4.14, 4.2.1, 4.2.5.

prosecutions, causing a lack of uniformity of decisions.[185] This shows how these principles can be malleable by legal operators,[186] causing uncertainty. It further shows the importance that judges are trained in international human rights law, to avoid restrictive interpretations of legal principles, which would be against the general national and international law principles that have informed the pursuit of TJ purposes, as examined before.[187]

In the case of serious ESCR violations committed during the dictatorship, even though unfair dismissal and forced evictions were common serious and direct violations to the obligation to respect ESCR, there are not any relevant judgments of the judiciary tackling these issues. Moreover, the cases that have dealt with serious CPR, such as torture, did not examine in depth ESCR violations, but the judiciary mainly described them as elements or in the context of the commission of these crimes.[188] The closest to an ESCR approach by the judiciary are the investigations of economic crimes during the dictatorship, including corruption and illicit enrichment of former military officers, as in the case of Pinochet and Riggs Bank in Chile,[189] which are not directly related to ESCR violations.

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[185] Moreover, for the application of inter-penitentiary benefits only 50% of the people condemned to prison complied with the totality of the prison sentence. *Episodio Rio Negro*, Rol 3925-05, Corte Suprema de Chile (Chile, 12 November 2007); *Luis Vidal Riquelme Norambuena con Claudio Abdón Lecaros y otros*, Rol 6626-2005, Corte Suprema de Chile, (Chile, 12 November 2007); *Jacqueline Binfa Contreras*, Rol 4329-2008, Corte Suprema de Justicia (Chile, 22 January 2009); *Ejecuciones Sofía Cuthbert Chiarleoni y Carlos Prats González, 'Episodio Carlos Prats'*, (n 180); *Murder of Gloria Stockle Poblete,* Rol 2200-2012, Corte Suprema de Justicia (Chile, 21 November 2012) para 34; *Caso Salvador Allende*, Rol 77-2011, Ministro Carroza, sobreseimiento definitivo (Chile, 13 september 2012); Onur Bakiner, 'From Denial to Reluctant Dialogue: The Chilean Military's Confrontation with Human Rights (1990–2006)' (2010) 4 IJTJ, 66; Cath Collins, Boris Hau, 'Incremental truth, late justice' (n 9) 140; UDP, 'Informe Anual sobre Derechos Humanos en Chile 2016' (n 97) 29; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2017' (n 124) 200.

[186] See Chapter V, sections 2, 3.5.1.2.

[187] See Chapter II, section 4.

[188] UDP, Informe Anual sobre Derechos Humanos en Chile 2017' (Centro de Derechos Humanos, 2017) 82.

[189] Rol 1649-2004, Chilean Jurisdictional Judge Manuel Valderrama Rebolledo (Chile, 07 May 2015); Hakeem O. Yusuf (n 176) 92.

In the area of civil reparations in the judiciary, there is a persistent application of prescription for civil reparations for the commission of war crimes and crimes against humanity[190] and the claim of incompatibility of judicial and administrative reparations.[191] This has been challenged, considering that the obligation to repair is one of the main obligations of the State when it is responsible at the international level.[192] These reparations have been focused on granting mainly compensation for the commission of forced disappearance, unlawful killing and torture. There are some exceptions, as two recent judgments ordering reparations for victims of sexual abuse committed during the dictatorship, which included the adjudication of properties that were part of Villa Baviera (or Colonia Dignidad), a German Colony used as a detention and torture centre.[193] Also, from a truth-telling approach, the judiciary has recommended the construction of a Memorial Museum in honour of the victims of Villa Baviera -including victims of torture, sexual abuse, political imprisonment, forced disappearance, unlawful killing- as a form of reparation.[194] In this way, even though the judicial decisions have only inter-party effects, these reparations can have a positive effect in the whole society, as a guarantee of non-repetition.

In comparison with other Latin American countries, especially Central American countries, Brazil and Uruguay, the judiciary has played an important role in Chile, but not as significant as in Argentina, which has implemented this

[190] *Neira y Poupin con Fisco*, rol 1133-2006, Corte Suprema de Chile (Chile, 24 July 2007); Cath Collins, Boris Hau, 'Incremental truth, late justice' (n 9) 141, 142.

[191] *Llanquilef Velásquez*, rol 2370-2007, Corte Suprema de Chile (Chile, 11 October 2007); Cath Collins, Boris Hau, 'Incremental truth, late justice' (n 9) 141, 142.

[192] *Episodio Tejas Verdes,* autos rol No 1424-13, sentencia única de reemplazo, Corte Suprema de Chile (Chile, 01 April 2014); *Torturas José Domingo Canas*, rol 62.211-16 (Chile, 23 January 2017).

[193] Rol 35542-2016, Corte Suprema de Chile (Chile, 16 March 2017); *Lara vs Fisco,* Rol 31711-17 (Chile, 23 January 2018).

[194] Rol 1051-2015, Corte de Apelaciones de Santiago (Chile, 11 April 2017).

mechanism from the beginning of the transition.[195] Moreover, the Chilean case depicts a lack of engagement of the judiciary in ESCR approaches, even though ESCR violations were committed during the dictatorship. This differs from the cases of Colombia, which has created specialized courts to tackle land destitution issues.[196] The Chilean case also shows how the recognition or lack of recognition of ESCR at the domestic level can influence its approach from a TJ perspective.

The limited inclusion of ESCR approaches by the judiciary could be justified for the existence of comprehensive reparation programmes in that area.[197] It could also be for the limited possibility of justiciability of ESCR in Chile in general, which has been considered by the CESCR as a failure of the State to its obligation to give legal effects to ESCR.[198] Consequently, if the State has a limited approach to justiciability of these rights in democratic conditions, it would be difficult to expect a broader approach from the judiciary regarding the possibilities of prosecuting serious ESCR violations committed during a violent period, which, as it was examined in the previous chapter, it is still very contested.[199]

3.5. Institutional reform

As examined at the beginning of this chapter, structural and normative reforms were among the main tools to sustain the Chilean dictatorship.[200] For this reason, it could be assumed that institutional reforms, such as TJ mechanism

[195] Informe Anual Situación de Los Derechos Humanos En Chile 2014' (n 179) 44-50; Cath Collins, Boris Hau, 'Incremental truth, late justice' (n 9) 126; See Chapter II, section 2.5.2.

[196] See Chapter IV, section 2.5.2.

[197] See Chapter V, section 3.3.2.

[198] CESCR, Concluding Observations-Chile, E/C.12/1/Add.105 (n 18) para D; CESCR, Concluding Observations-Chile, E/C.12/CHL/CO/4 (n 18) para C.

[199] See Chapter IV, section 3.4.

[200] See Chapter V, section 2.

would have a protagonist role. However, institutional reforms have received little attention in Chile from a TJ perspective, in comparison to truth commissions and reparation programmes. This is similar to the approach taken in the rest of Latin America, where institutional reforms have been one of the less implemented and studied TJ mechanisms.[201] Moreover, the first years of the transition were characterized by the maintenance of the normative and economic system implemented by the dictatorship, with small modifications.[202] It has been pointed out that one of the reasons for this is the special characteristic of the negotiated Chilean transition, where important members of the dictatorship stayed in power because of the institutional reforms implemented during the dictatorship.[203] Among other reasons could be the moment the transition started, when the country was experiencing a macroeconomic bonanza –known as "The Chilean Miracle"-,[204] an existing fear of making any important reform that could affect the economic growth,[205] or a potentially violent response of the military, supported by the economic elite.[206] Moreover, the TJ agenda of the time of the Chilean transition had a strong focus on development and market economy as part of the reconstruction of the rule of law,[207] which is coherent with the TJ agenda during that period, which resulted in institutional reforms with ESCR approaches being

[201] See Chapter II, section 2.5; Chapter IV, section 2.6.

[202] Rebecca Evans (n 179) 217; Aisling Walsh (n 21) 106.

[203] Peter Winn (n 20) 49, 50.

[204] Aisling Walsh (n 21) 103.

[205] Peter Winn (n 20) x; Carmelo Mesa-Lago (n 31) 377; Cath Collins, Boris Hau, 'Incremental truth, late justice' (n 9) 126.

[206] Gloria de la Fuente (n 45) 189.

[207] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2(3) IJTJ, 270, 272; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Social and Legal Studies, 3.

not a priority.[208] For this reason, the social and economic reforms implemented during the dictatorship stayed almost unquestioned at the international level.

In a later stage of the transition, the State started to implement institutional reforms.[209] This section examines the main reforms of the legal and structural reforms conducted to tackle the legacy of the dictatorship in ESCR.

3.5.1. Reform of legal frameworks

As pointed out in previous chapters, legal reforms are essential for the pursuit of TJ purposes, as the reestablishment and strengthening of the rule of law, guarantees of non-repetition and reconciliation. This section focuses on the ratification of human rights treaties and constitutional reforms, which have had an impact on ESCR in Chile.

3.5.1.1. Ratification of Human Rights Treaties

The ratification of human rights treaties has been one of the first legal reforms implemented continuously from the early transition in Chile, which has been relevant to increase the catalogue of human rights protected in this country, considering the insufficient substantive reforms in the area of constitutional guarantees.[210] During the transition, Chile has lifted the reservations and ratified most of the UN and Inter-American treaties, including the ACHR, which was signed in 1969.[211] One of the most relevant omissions for the purposes of this section is

[208] See Chapter II, section 4.5; Chapter IV, section 3.5.

[209] Peter Winn (n 20) 50.

[210] See Chapter V, section 3.5.1.2.

[211] Ministerio de Relaciones Exteriores, Decree No 873, 'Aprueba Convencion Americana sobre Derechos Humanos, denominada "Pacto de San Jose de Costa Rica' (Chile, 05 January 1991). List of the treaties ratified by Chile in Biblioteca del Congreso Nacional de Chile 'Tratados firmados entre Chile y' <www.leychile.cl/Consulta/tratados_por_pais> accessd 29 September 2018.

the lack of ratification of the Protocol of San Salvador, which is one of the main instruments for the protection of ESCR in the Inter-American Human Rights System.[212] This treaty was signed by Chile in 2001, but the discussion about its ratification has been suspended in the Chilean parliament.[213] It has been pointed out that the reason for this has been that it would demand the country to implement important constitutional reforms, including the justiciability of some ESCR, [214] which it is limited in the current constitution.[215] However, the lack of legislation was overcome in other cases, as with the constitutional reform and the codification of international crimes after the ratification of the Rome Statute.[216] In this way, the lack of ratification of this treaty represents the insufficient priority that the country has given to guarantee ESCR.[217]

Another important measure taken in an earlier transitional period was the publication of the ICESCR and the ICCPR in the Official Gazette, a measure that was postponed by the dictatorship, even though these treaties were ratified during democracy, in 1972.[218] Similarly, the Additional Protocols I and II of the Geneva Convention were adopted by the country during the dictatorship, but published

[212] See Chapter III, section 3.1.3.

[213] Bulletin No 4087-10, Protocolo Adicional a la Convención Americana sobre Derechos humanos en materia de Derechos Económicos, Sociales y Culturales, denominado Protocolo de San Salvador (Senado de la República de Chile, 08 August 2006).

[214] Jaime Gajardo Falcón, El protocolo de San Salvador y la discusión constitucional chilena, Instituto de Ciencias Alejandro Lipschutz, 09 April 2014, <http://ical.cl/old/2014/04/el-protocolo-de-san-salvador-y-la-discusion-constitucional-chilena/> accessed 15 September 2018.

[215] See Chapter V, section 2.

[216] Law No 20357, 'tipifica crímenes de lesa humanidad, genocidio y crímenes de guerra' (Chile, 18 July 2009).

[217] See Chapter V, sections 3.5.1.2, 3.5.2.2.

[218] Ministerio de Relaciones Exteriores, Decree No 778, 'Promulga Pacto Internacional de Derechos Económicos, Sociales y Culturales' (Chile, 29 April 1989); Ministerio de Relaciones Exteriores, Decree No 326, 'Promulga Pacto Internacional de Derechos Civiles y Políticos' (Chile, 27 May 1989).

only in 1991.[219] The lack of publication made it impossible to invoke these treaties at the domestic level. The Valech Commission recognized the delays of the ratification of the ICCPR and the Additional Protocols I and II of the Geneva Convention as a violation of the principle of *pacta sunt servanda* and recommended their ratification, making no reference to the ICESCR.[220] The reference to the *pacta sunt servanda* principle in this case is coherent with the references made by TJ mechanisms in Latin America to general principles of international law.[221]

In this way, the ratification of treaties has been a consistent measure implemented by the Chilean State. Its relevance to strengthening the rule of law and pursuing TJ purposes cannot be denied, considering that the lack of publication in the official gazette and ratification of the main human rights and humanitarian law treaties during the dictatorship was linked to the massive commission of human rights violations during that period. However, there is not a clear recognition of the ratification of treaties in the area of ESCR as a TJ mechanism in Chile, as it is the case in most of the Latin American countries, with the exceptions of Brazil or Paraguay.[222]

3.5.1.2. Constitutional Reform

The Chilean case differs from other cases in Latin America, such as Brazil and Paraguay, whose constitutional reforms were important measures to re-establish the rule of law a few years after the conflict, or Colombia, where a

[219] Ministerio de Relaciones Exteriores, Decree No 752, 'Promulga los Protocolos Adicionales I y II a la Convención de Ginebra de 1949' (Chile, 28 October 1991).

[220] 'Valech I Report' (n 63) Chapter III, 199-200.

[221] See Chapter II, section 4.2.1.

[222] See Chapter IV, sections 2.3.3, 2.6.1.

constitution was enshrined during the conflict, with a broad protection of ESCR.[223] In the case of Chile, even though the Constitution of 1980 is one of the pillars of the economic and institutional changes implemented during the dictatorship, the transition to democracy was not accompanied by a new constitution and it therefore blurs the link between constitutional reforms and TJ. However, as it is examined, the constitutional discussion in Chile has been embodied by a TJ demand.

The authoritarian constitution was subjected to two important reforms, in 1989 and 2005. The reform of 1989, carried out during the last year of the dictatorship, has one main reform relevant for ESCR, which is the inclusion of the duty of the State' organs to respect and promote human rights, guaranteed in the Constitution and in the international treaties ratified by and in force in Chile.[224] This reform allows the recognition of the State' obligation to guarantee human rights recognized at the domestic and international level, which broadened the scope of protection of human rights, including human rights treaties ratified in this area, as the ICESCR.

The other big constitutional reform, which included substantive changes in the content of the constitution of 1980, was conducted in 2005. It included, among others, the inclusion of several guarantees linked to due process, and the limitation of the rights that could be suspended or derogated under states of exception. It also eliminated the designated senators, giving a more democratic structure to the parliament.[225] This reform did not affect ESCR, which continued to be considered more as liberties than rights, not directly justiciable as such. The

[223] See Chapter II, section 2.6.1; Chapter III, section 4; Chapter IV, section 2.6.1.

[224] Ley 18885, 'Modifica la Constitución Política República de Chile, article 1°, modifies article 5' (Chile, (17 August 1989).

[225] Law No 20005, 'Reforma constitucional que introduce diversas modificaciones a la Constitución Política de la República (Chile, 26 August 2005) article 1.

possibility of including a notion of a Social and Democratic Rule of Law, probably influenced by the experience of the other Latin American countries, such as Colombia, was discussed.[226] This proposal was rejected by the right-wing parliamentarians, who argued that "it would give the Government a non-acceptable inclination or brand".[227] It seems that the Chilean parliament linked this notion of State to communist regimes, which was not the case, as examined previously, considering that this conception included the idea of full respect to all human rights, including CPR. Therefore, this constitutional reform did not include an approach of the State that would facilitate the justiciability and better protection of ESCR, which has been already recognized and successfully applied in other jurisdictions in Latin America.

There was a general belief that the reform of 2005 would be sufficient to change the authoritarian nature of the constitution, giving it more legitimacy.[228] The President of the Republic at that time, Ricardo Lagos, even claimed that with the constitutional reform of 2005 "the transition was finally over."[229] However, that claim proved to be too optimistic and the lack of constitutional recognition of ESCR had an important role in this. Social movements, such as the "Penguin Revolution" of 2008- student protests against the educational model stablished during the dictatorship- started to incorporate the undemocratic origin of the Constitutional Law of Education as a "bargain tool",[230] discourse that it has been

[226] Biblioteca del Congreso Nacional de Chile, Historia de la Ley No 20005, <www.bcn.cl/historiadelaley/nc/historia-de-la-ley/6131/> accessed 26 September 2018.

[227] Claudio Nash (n 48) 77.

[228] Law No 20005 (n 225) article 1.

[229] Radio Cooperativa, 'Presidente Lagos Reformas Constitucionales marcan el fin de la transición' (14 July 2005) <www.cooperativa.cl/noticias/pais/politica/reformas-constitucionales/presidente-lagos-reformas-constitucionales-marcan-el-fin-de-la-transicion/2005-07-14/100948.html> accessed 26 September 2018.

[230] Aisling Walsh (n 21) 116; See Chapter V, section II.

adopted by different social movements, partially blaming the illegitimate origin of many laws -including the Constitution- for many of the social issues and inequality prevailing in the country.[231] In addition, reports of different human rights institutions and scholars continue to point out the illegitimate origin of the constitution when examining CPR and ESCR protection in Chile.[232]

All these claims had consequences. In 2015, the President Michelle Bachelet announced the beginning of the constitutional process, declaring that "the current constitution had its origin in dictatorship and does not respond to the needs of our time or favour democracy. It was imposed for a few over the majority. For this reason, it was born without legitimacy and it has not been able to be accepted as their own by the citizens."[233]

The proposed constitutional process included a stage of civic and constitutional education that included a campaign of information about civil-constitutional contents and about the constitutional process.[234] Then, there was a participatory stage, which included individual consultations, local meetings, provincial and regional councils. In this participatory process all citizens residents in Chile and abroad and non-national residents in Chile over 14 years of age could participate.[235] Individual consultations consisted of a questionnaire that could be

[231] Aisling Walsh (n 21) 116. Other important social movement was "Marca tu Voto" (Mark your Vote) that claimed the illegitimate origin of the constitution and the need to have a new democratic constitution through a Constitutional Assembly < www.marcaac.cl/site/2016/10/marca-tu-voto-con-los-candidatos-por-ac/> accessed 15 September 2018.

[232] Bulletin No 11617-07, Proyecto de reforma constitucional, iniciado en mensaje de S.E. la Presidenta de la República, para modificar la Constitución Política de la República, Mensaje Nº 407-365 (Senado de la República de Chile, 10 August 2017) 1; UDP, Informe Anual sobre Derechos Humanos en Chile 2017' (n 174) 338.

[233] Discurso de la Presidenta de la República al anunciar el proceso constituyente (13 October 2015) <www.gob.cl/noticias/discurso-de-la-presidenta-de-la-republica-al-anunciar-el-proceso-constituyente/> accessed 15 September 2018.

[234] ChileAtiende, Proceso Constituyente (12 March 2018)<www.chileatiende.gob.cl/fichas/ver/42037>; 'Constitucionario' <www.constitucionario.cl/> accessed 11 September 2018.

[235] Idem.

answered on the official website.[236] Local meetings were self-summoned groups, composed of any groups of 10 to 30 people with the same residence. Finally, provincial and regional councils consisted in bigger meetings of open dialogue organized in different provinces of the country.[237]

In the participatory process, which happened between April and June 2016, individuals discussed and voted for the values, principles, rights, duties, responsibilities and institutions of the Sate that should be part in the new constitution.[238] The participatory stage had a high participation rate in comparison with the experiences of other countries,[239] showing important results for ESCR. The three most voted values and principles were justice, including judicial, distributive and redistributive justice; formal and substantive equality and democracy.[240] The three most voted rights were the rights to education, health and equality before the law, with high votes in the recognition of right to social security and dignified housing (which is not enshrined in the current Constitution).[241] Among the three most voted duties and responsibilities include the protection, promotion and respect of human rights -including its incorporation in educational curricula for civil society and the armed forces- the promotion and

[236] ChileAtiende (n 234).

[237] Idem.

[238] Other steps of the constitutional process include the discussion and approval of the constitution through a mechanism decided by the Congress –which includes bicameral commission, mix constituent convention, constitutional assembly o referendum- and the referendum where people would decide if accept or deny the project. ChileAtiende (n 234).

[239] OECD, 'Chile: Citizen Participation in the Constitutional Process' (Public Governance Reviews, 2017) 24, 25, 34.

[240] Consejo de Ciudadanos Observadores, 'Síntesis de Resultados Cuantitativos de La Etapa Participativa Del Proceso Constituyente Abierto a La Ciudadanía: Informe Final Sobre El Proceso de Participación y Diálogos Constitucionales a Que Convocó El Gobierno de Chile Durante 2016' (2017) 61, 65.

[241] Ibid, 90-134.

respect of human rights, the conservation and protection of nature, respect for the constitution.[242]

The results show an undeniable impact of dictatorship and transition on Chileans and the link between ESCR and TJ processes, stressing measures already examined in the previous chapter, such as the inclusion of human rights in school curricula and human rights training of public officers and security forces.[243] Moreover, the results show the connection that a large sector of the population makes between ESCR, democracy, justice and equality, which is similar to the Latin American cases where the ESCR approach has been included.[244] All of these occur despite the fact that the link between ESCR and TJ has not been clearly made by the TJ mechanisms implemented in Chile.

The bill sent to the Congress seems representative of the claims of the citizens, including the notion of a Democratic and Social Rule of Law, as a continuation of the idea of State that the country was developing before the imposition of the authoritarian constitution.[245] Under this umbrella, the bill includes for the first time the right to a dignified housing, gratuity of higher education, right to dignified social security, the recognition of water as a public good, the justiciability of all rights, including ESCR, and the parliamentary legal initiative in labour, social security and social services matters,[246] etc. These changes coincide with the reports of the CESCR about Chile, which have established that the most effective way to give domestic effect to ESCR is ensuring

[242] Ibid, 70.

[243] See Chapter IV, section 2.6.3.

[244] See Chapter II, section 4.1.3.

[245] Bulletin No 11617-07 (n 210) Article 2.

[246] Ibid, articles 19(12) (14) (25) (30), 20, 64, pp. 23, 24.

the justiciability of these rights.[247] This has been also stressed from a TJ perspective.[248]

Despite all the progress, the future of the constitutional process in uncertain, with the election of a new right wing Government, supported with a strong composition of right wing parliamentarians, who do not necessarily agree with the constitutional process.[249]

After reviewing the different constitutional reforms, the involvement of social movements and the current constitutional process, it cannot be denied that TJ discourse has played an important role not only in enforcing these changes, but also in human rights demands in general in Chile.[250] However, despite the efforts of civil society and human rights advocates to push a constitutional agenda from the beginning of the transition, the Chilean case stills differs from a broader Latin American practice, where new constitutions have been enacted or important constitutional reforms have been implemented, expanding the human rights catalogue.[251] Still, the current constitutional process seems to contain important participatory elements that were not included to the same extend in other Latin American experiences. Moreover, this is a case of a constitutional process implemented in a later stage of transition, which differs from the international

[247] CESCR, Concluding Observations–Chile, E/C.12/CHL/CO/4 (n 183) section C.

[248] UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary- General: Analytical Study on Human Rights and Transitional Justice' A/HRC/12/18 (2009) para 63; Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) NYUJIntlL&Pol, 21, 22.

[249] Congreso Nacional Quincuagésimo Quinto Período Legislativo (11 March 2018- 10 March 2022) <www.bcn.cl/historiapolitica/congreso_nacional/periodo_detalle?inicio=2018-03-11&fin=2022-03-10&periodo=1990-2026&cam=Senado> accessed 11 September 2018.

[250] E.g. the derogation of the criminalization of therapeutic abortion. Bulletin No 9895-11, 'Regula la despenalización de la interrupción voluntaria del embarazo en tres causales': Mensaje Nº 1230-362 (Senado de la República de Chile, 31 January 2015).

[251] See Chapter II, section 2.61; Chapter III, section 4; Chapter IV, section 2.6.1.

practice, which has considered constitutional processes as the beginning of a new democratic system, as in the case of South-Africa.[252]

3.5.2. Structural Reforms

Some important structural reforms have been implemented in Chile in the later transition, including the derogation of the binominal system and the approval of the presidential vote for Chileans who live abroad.[253] This section focuses on the reforms that include ESCR approaches in Chile, which, as it is examined, include the creation of human rights and educational programmes -directly linked with TJ processes- and reforms of the economic and social institutions implemented during the dictatorship.

3.5.2.1. Creation of educational programmes

The Government has implemented specific educational programmes as a guarantee of non-recurrence, as the "Education and Cultural Promotion Programme", implemented after the Rettig Commission, with the purpose of training educational actors, producing didactic materials to teach about human rights, supporting research projects, etc.[254] Also, the return of Civic Education as a mandatory module in the last two years of secondary education has been considered an important step to promote democracy and participation.[255] Moreover, in 2009 there was created the INDH which aims at spreading human rights knowledge and favour human rights education at all levels of the educational

[252] See Chapter IV, section 2.6.1.

[253] Law No 20840 (Chile, 05 May 2015); Law No 20960 (Chile, 18 October 2016).

[254] Clara Ramírez-Barat, Roger Duthie (n 38) 11.

[255] The module of Civic Education was eliminated from the curricula in 1998, during democracy, to privilege scientific modules. Clara Ramírez-Barat, Roger Duthie (n 38) 15, 16; Consejo Nacional de Educación <www.cned.cl> accessed 11 September 2018.

system, including the army, navy, air and police forces training.[256] There has also been created a National Plan of Human Rights,[257] which includes the promotion of a human rights culture, involving human rights education and reform of the curricula, among others.[258]

The Museum of Memory also has educational purposes as it works in direct collaboration with schools and universities, aiming to make the population know about the systematic violations of human rights committed by the Chilean State during the dictatorship and emphasise the importance of human rights, as measures to ensure that the country will never again experience situations that affect human rights dignity.[259]

The curricula of the police and the military training also underwent important reforms, including a deeper national and international human rights formation.[260] Moreover, there was created a specialized module of investigation of human rights violations and crimes against humanity in the training of "Policía de Investigaciones", the Chilean INTERPOL.[261] These educational measures implemented in Chile have been examined by the CESCR in the case of Colombia as a guarantee of non-repetition and as part of the State obligation to promote human rights.[262] They are of a great importance for the TJ purpose of truth-telling, as a guarantee of non-repetition and for the promotion of human rights in the

[256] Law No 20405 (n 61) article 3.

[257] Created by a Sub-secretary of Human Rights after public participation, depending from the Ministry of Justice and Human Rights. Law No 20885, 'Crea la Subsecretaría de Derechos Humanos y adecúa la ley orgánica del Ministerio de Justicia' (Chile, 05 January 2016).

[258] Subsecretaría de Derechos Humanos, Plan Nacional de Derechos Humanos <http://planderechoshumanos.cl/buscador> accessed 11 September 2018.

[259] Museo de la Memoria y Los Derechos Humanos (n 215).

[260] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2011' (Chile, 2011) 266, 265.

[261] Subsecretaría de Derechos Humanos (n 258).

[262] See Chapter IV, section 2.6.3.

country. Moreover, they seem coherent with the recommendations of the UN and with Latin American practice.[263]

However, there is a debt in human rights education in the curricula, especially as a TJ measure. Until now, scholarly publications tackle the examination of the serious human rights violations committed during the dictatorship very briefly and there have been numerous instances of reluctance from school administrators to implement this approach.[264] This is particularly serious in the Chilean case, when the reports of the truth commissions lacked promotion and access, affecting its function as a tool for human rights education.[265] This differs from Argentina, where the report of the Truth Commission was a best seller for years. However, in the Chilean case, it is the media which has played a more important role in promoting truth-telling, through the creation, with some financial support of the State at times, of TV programmes, movies and books that commemorate the *coup d'état*, revel victims' stories of serious human rights violations to the Chilean truth commissions.[266] Even though the promotion of human rights through the media is an important step, as it was recognized by the CESCR,[267] the State should not minimise the role of the effective promotion of human rights and truth-telling in formal education, as it has been recommended by the UN and the IACommHR.[268]

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[263] Idem.

[264] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2011' (n 237) 264, 265; Clara Ramírez-Barat, Roger Duthie (n 38) 28.

[265] UDP, 'Informe Anual sobre Derechos Humanos en Chile 2012' (Centro de Derechos Humanos, 2012) Chapter VII, paras 260-262.

[266] E.g. Results Winners Funds 2017 from the National Television Council <www.cntv.cl/ganadores-2017/cntv/2017-09-04/175839.html> accessed 11 September 2009; Lorena Antezana Barrios, 'Televisión y memoria: a 40 años del golpe de estado en Chile', (2015) 6(1) ComHumanitas: Revista Científica de Comunicación, 188-204.

[267] See Chapter III, section 2.1.1.

[268] See Chapter IV, section 2.6.3.

3.5.2.2. Reforms of economic and social institutions implemented during the dictatorship

The first democratic governments continued and even consolidated Pinochet's economic and social system (including the "Seven Pillars") rather than revert it, just including some minor measures to fight poverty, funded by the Tax Reform of 1990.[269] These measures were coherent with the existing TJ agenda in that period, which was focused on development. The most important reforms started to be implemented in a later transition, as examined in the following pages.

In the area of education, the dissatisfaction with the education model inherited from the dictatorship created the biggest social movements and protests since the return of democracy.[270] The Student's movements were supported by a large proportion of the Chilean society, including those affected by debts caused by the high costs of education in Chile and those who advocated the elimination of the educational system that was designed and implemented during the dictatorship.[271] This movement urged the reform of the educational system. The claims of the movement included gratuity of education as a right at kindergarten, primary and secondary level, respect for cultural and social diversity, prohibition to expel a student during the school year for failure to pay fees, prohibition of profits in educational institutions financed by the State, a progressive gratuity in higher education, among others.[272] Moreover, the students' movement went beyond just questioning the educational system as it opened the window for

[269] Tomás Undurraga (n 19) 206; Peter Winn (n 19) 51-53; Gloria de la Fuente (n 46) 190.

[270] See Chapter V, section 3.5.1.2.

[271] Cristián Bellei, Cristian Cabalin, 'Chilean Student Movements: Sustained Struggle to Transform a Market-oriented Educational System' (2013) 15(2) Current Issues in Comparative Education, 112.

[272] Ibid, 110; Law No 20845 Art. 1 N° 5 a); Law No 21091, 'sobre Educación Superior' (Chile, 29 May 2018) Chapter V.

examining the measures taken in the transition to democracy regarding equality and social justice versus the initial approach of economic growth and political stability.[273]

In the case of labour rights, one of the biggest reforms has been the creation of specialized labour courts that has a worker oriented approach and the reform of the Labour Code to improve in areas such as severance pay, collective barging and union organizations.[274] However, the State is still far from complying with the collective rights of workers, including the right to strike.[275]

In the area of social security, the AFP system is still valid, despite all the critique, including its illegitimate origin and its accentuation of unequal and insufficient pensions for women and the poorer part of the population.[276] There have been some modifications in response to these issues, including some solidarity-based "top-up" benefits for lower-income groups and universal maternity benefits for all mothers, irrespective of income and the mandatory affiliation of self-employed workers.[277] Despite these reforms, it is estimated that from the period 2025-2035, 86% of all pensions will be over the line of poverty but below the minimum salary, which is not the case of the military, who kept the previous social security system.[278] For these reasons, it has been suggested that

[273] Aisling Walsh (n 21) 99.

[274] Peter Winn (n 20) 50.

[275] UDP, 'Informe Anual sobre Derechos Humanos en Chile 2015' (n 26) 115.

[276] Decree-Law No 3500 (Chile, 13 November 1980); Decree-Law No 3501, 'Crea AFP' (Chile, 18 November 1980); INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 214, 220; Rodrigo Pica Flores, 'El Derecho a la Seguridad Social en el Sistema Constitucional Chileno' in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el orden constitucional chileno* (Librotecnia, 2012) 263; Carmelo Mesa-Lago (n 31) 378, 379.

[277] Carmelo Mesa-Lago (n 31) 396

[278] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 214. See Chapter V, section 2.

these systems should be integrated,[279] partially modified, including a solidarity fund for example,[280] or completely changed.[281]

In the case of the right to health, the ISAPRES System continues, with some important modifications, including the creation of a regulatory body[282] and the creation of free health benefits with the purpose of progressive covering all high-mortality and handicapping pathologies, regardless of the income level, age, gender and risk factor of the person insured.[283] Even though health cover is almost universal, there are still important inequalities between the public and private health systems and the private system continues to be discriminatory, for a full maternity coverage, a woman of reproductive age has to pay between two and three times more than men.[284]

Other measures implemented by the dictatorship, such as land reforms and privatization of water, electricity and others supplies have not undergone relevant reforms. Moreover, in the case of water, the privatization was even strengthened during democracy. Chile is nowadays a country with the most privatised water and sanitation services in the world. The privatization of this basic service has caused contradictory opinions from a human rights perspective. While the UN has not found this privatization as damaging *per se* for the enjoyment of the human rights

[279] Comisión Asesora Presidencial sobre el Sistema de Pensiones, 'Informe Final 2015' (September 2015) 148; INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 220.

[280] Bulletin No 11372-13 (Cámara de Diputados de Chile, 14 August 2017).

[281] As the collective movements "No more AFP", which has convoked a transversal part of the population. <www.nomasafp.cl/inicio> accessed 02 February 2018.

[282] As the Superintendence of ISAPRES and the subsequent Superintendence of Health. Law No 19937 (Chile, 24 February 2004) article 6.

[283] Plan of Universal Access and Explicit Guarantees (AUGE), between 2005 and 2013, and Health Explicit Guarantees Plan (GES), in operation since 2013. Law No 19888 (Chile, 13 August 2003); Law No 19966 (Chile, 03 September 2004); Law No 19937 (n 263); Law No 20015 (Chile, 17 may 2005); Ministerio de Salud, Decree No 1 (Chile, 21 February 2010); Ministerio de Salud, Decree No 4 (Chile, 22 February 2013); Carmelo Mesa-Lago (n 31) 385.

[284] Carmelo Mesa-Lago (n 31) 281.

to water, other organizations have found that this high level of privatization does not guarantee water as a human right.[285]

The measures implemented to reform the "Seven Pillars" imposed during the dictatorship have not been necessarily implemented from a TJ perspective. However, social movements have used the language of TJ, especially in relation to the undemocratic origin of the structural reforms, to claim for their ESCR. This approach has not been fully represented by the Government and human rights institutions such as the INDH, which just introduced the notion of TJ and their link to the systematic denial of ESCR during the dictatorship for the first time in its last report of 2017.[286] This chapter sustains that in the Chilean case, structural reforms to the "Seven Pillars" must be conducted through both a TJ and an ESCR lens, to address obligations of the State in an integral way, recognizing that the retrogressive and discriminatory economic and social measures implemented by the dictatorship affected not only individual victims, but the generality of the society.

The Chilean case illustrates that structural reforms in the area of ESCR can be linked not only to issues such as inequality and poverty and the deepening of democracy,[287] but to direct ESCR obligations.[288] Moreover, they illustrate the role that social movements have played in showing the interdependence and interrelation of CPR and ESCR violations committed during the dictatorship, and the dangers of continuing with the economic and institutional system enacted

[285] Juan Bautista Justo, 'El Derecho Humano al Agua y Saneamiento frente a los Objetivos de Desarrollo del Milenio (ODM)', Documento de Proyecto Comisión Económica para América Latina y el Caribe (CEPAL, 2013); UDP, Informe Anual sobre Derechos Humanos en Chile 2017' (n 174) 99-162.

[286] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2017' (n 124) 132, 133.

[287] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2011' (n 237) 8; UNHRC, 'Human rights, democracy and the rule of law' (19 March 2012) A/HRC/19/L.27, Preamble.

[288] Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2(3) IJTJ, 383-385.

during the dictatorship.[289] However, the Chilean case also shows the importance of handling the expectations when dealing with institutional reforms, which are mechanisms that should be implemented in the long term, and not as a short-term response to satisfy immediate popular demands.

4. CONCLUDING REMARKS

The Chilean case exemplifies the liberal model of TJ in the practice of Latin American States transitioning from dictatorship, especially at the end of the 1980s and beginning of the 1990s. Moreover, the long period of transition has allowed to show the limitations of these approaches and the benefits and challenges of including an ESCR approach, as in the case of reparations, which they have been considered a successful example, comparing with the Latin American reparation programmes reviewed previously.[290] The Chilean case also give examples of the omission of this approach, as in the case of the judiciary, where this omission remains unchallenged; or in the case of institutional reforms, where ESCR claims have been one of the core struggle of social movements for major reforms.

Also, the Chilean case shows how TJ mechanisms have to be considered in a holistic way when dealing with massive violations of ESCR and CPR, which it is not necessarily done, especially when a State have diverse organisms and laws to pursue different TJ purposes. It is suggested that to avoid these issues, there should be created a TJ institution, in charge of supervising and for coordination of different TJ purposes.[291]

[289] Aisling Walsh (n 21) 98.

[290] See Chapter IV, section 2.4.

[291] Cath Collins, 'Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the 'Valech Commission' (n 156) 78.

Moreover, the Chilean case shows the difficulties of using feasibility and needs-based prioritisation approaches. These are necessary in TJ process, but they had caused the lack of representation or invisibility of some victims of serious human rights violations, as internal forced displacement, especially against trade union leaders, students and social leaders;[292] the sons and daughters of the exiled and returnees;[293] *campesinos* and indigenous communities.[294] Moreover, there are still human rights perpetrators that keep invisible, for example, companies that collaborated with the repressive authorities on many occasion.[295]

Furthermore, the Chilean case shows a connection between direct violation of human rights and structural reforms and the limitations of a notion of TJ that included the promotion of market economy and maintenance of the neoliberal system,[296] without any consideration of ESCR obligations. This allowed the strengthening of laws and policies implemented during the dictatorship, which included retrogressive and discriminatory measures in the ESCR obligations. It also caused social discontent and a generalized impression of a continuity of the injustices imposed by the dictatorship, showing how in this case the lack of inclusion of ESCR approaches in institutional reforms caused the prolongation of the TJ process. Chile could take a similar approach to the ones adopted by the Ecuadorian and Brazilian Truth commissions, which recognized the role played by the imposition of an economic system by the repressive regimes in the ESCR violations.[297]

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[292] INDH, 'Informe Anual Situación de Los Derechos Humanos En Chile 2016' (n 32) 279.

[293] Ibid, 288.

[294] UDP, 'Informe Anual sobre Derechos Humanos en Chile 2016' (n 97) 32.

[295] Ibid, 42.

[296] Lars Waldorf (n 191) 3, 4.

[297] See Chapter IV, section 2.3.2.

Moreover, the Chilean case shows the difficulties of including the language of ESCR in TJ mechanisms in a country where these rights are not appropriately enshrined. In addition, the Chilean case shows how the lack of the language of rights is at times not an obstacle to pursue reparations with a positive effect on the enjoyment of ESCR, after examining the reparation programmes. However, in general, the Chilean transition has omitted to deal with ESCR violations, despite the fact that these violations were systematically and directly committed. The inclusion of discriminatory clauses in social services, forced evictions, elimination and prohibition to join the trade unions and unfair dismissal were violations to the negative obligation to respect ESCR. The collaboration of privates with the authoritarian regime in the commission of unfair dismissal, forced evictions and right to join trade unions is a violation to the obligation to respect and protect ESCR. Moreover, the imposition of retrogressive measures in social services is a violation of the obligation to progressive realization and fulfilment of ESCR. These rights were protected by the ICESCR at the time of the dictatorship and therefore they caused State responsibility for violation of its international obligations and their subsequent obligation to repair, which in this case is linked with reparations as a TJ process.

The Chilean case also shows the difficulties of establishing time constraining to TJ periods, especially when implementing guarantees of not-repetition and ESCR approaches, which takes not only time, but also political will and financial investment, as in the case of the modification of the educational system.[298] Moreover, the Chilean case exemplifies what it was discussed in Chapter II, i.e. existing periods of inertia, progress and setbacks in TJ processes in Latin America.[299] Furthermore, in the case of the judiciary, it shows how legal principles

[298] Clara Ramírez-Barat, Roger Duthie (n 38) 22.

[299] See Chapter II, section 5.

have been interpreted in different ways, accomplishing purposes beneficial, but also detrimental to the pursuit of TJ purposes.[300] This stresses the importance of recognizing that each process is unique and that the TJ framework has to deal with the particularities of the case, considering that the TJ process could take time. However, these considerations should be undertaken respecting the legal principles of national and international law, which have informed the pursuit of TJ purposes and the inclusion of an ESCR in Latin American TJ processes, as examined through this thesis. Moreover, it has to be done considering the human rights obligations already in force in the country, which includes ESCR, examined in Chapter III.[301]

[300] See Chapter V, section 3.2.

[301] See Chapter III, sections 2, 3.1.

CHAPTER VI

CONCLUSIONS

TJ theory and practice has played an important role in countries emerging from armed conflicts and dictatorships since the middle of the 20th century. This is a field of constant transformation, influenced by different TJ experiences all over the world. Latin American countries have influenced and at the same time, contributed to the development of this field, as can be seen in this thesis.

One of the recent developments of TJ is the inclusion of ESCR approaches. In this way, it has been pointed out that transitional countries have to consider ESCR obligations when dealing with serious human rights violations committed during a violent period. The purpose of this thesis was to search for this inclusion of ESCR approaches in the work of TJ mechanisms in Latin America. Once this approach was found, this thesis aimed to examine the way in which the ESCR dimension of TJ is developed in Latin America, based in the normative framework of TJ and in the nature of ESCR obligations in this region. To accomplish this purpose, this thesis first separately examined the fields of TJ (Chapter II) and ESCR (Chapter III) as the legal frameworks used in the chapters that followed. The following substantive chapters dealt with the inclusion of ESCR in TJ processes in Latin America (Chapters IV and V).

Chapter II examined the normative TJ framework in Latin America, confirming the implementation of the TJ mechanisms recognized by the UN and the Inter-American Human Rights System in different periods. The most common TJ mechanisms implemented in Latin America include truth commissions and reparation programmes. These mechanisms have pursued a number of TJ purposes, which coincides with the notion of reparations in a broad sense. These TJ processes have been mainly focused on dealing with some serious CPR and

humanitarian law violations, following the historical approach to TJ taken at the international level.

Moreover, Chapter II has shown that Latin American countries have faced periods of inertia during the transition, influenced by not only legal factors, but also political and social ones. Furthermore, it there seems to be no complete coherence, coordination or clarity about how TJ mechanisms will be implemented and how they interact and collaborate in pursuing different TJ purposes. Considering these issues and the fact that each TJ process is unique, it was possible to identify some constant legal principles influencing TJ mechanisms and TJ purposes, which were considered coherent with State' obligations under international law, human rights and humanitarian law. However, Chapter II has also shown that transitional countries have choose and interpret legal principles in a way that is more convenient to justify their approach of TJ, which in some cases omits the pursue of important TJ purposes, as the investigation, prosecution and punishment of serious human rights violations.

Despite these issues, Chapter II has presented the impact of regional and international human rights and humanitarian law in transitional societies in Latin America. In this way, transitional countries should have clarity about the TJ purposes pursued and the principles of national and international law applicable in the transitional context, having in consideration always a human rights' and a victim's perspective. Hence, the Latin American experience shows that TJ is a field in constant change and adaptation. However, and recognizing the important role of politics in the approach taken by transitional societies, it is possible to distinguish some legal basis for the implementation of the TJ mechanisms and the pursuit of TJ purposes, based on the obligations of the States under national and international law.

Chapter III confirmed that Latin American countries facing conflict or transition had a number of ESCR obligations under international, regional and

domestic law. These obligations include respect, protection and fulfilment. The CESCR and the Inter-American Human Rights System have examined these obligations when reviewing the compliance with ESCR of Latin American countries facing a violent period or a transition. In this way, Chapter III showed that the neglect of ESCR cannot be attributable to legal reasons, but to other reasons, including political ones.

In addition, in the case of the IACtHR, it is possible to see that ESCR have been tackled mainly through a broad interpretation of CPR, while reparations with positive effects in the enjoyment of ESCR have been granted for the commission of mainly serious CPR violations. However, it is possible to see the development of a more direct approach to ESCR by the IACtHR, which has not been directly applied to cases regarding TJ issues yet.

Moreover, Chapter III has shown that even though CESCR and the Inter-American Human Rights System have recognized the difficulties faced by States facing a violent period or transitions, these situations have not been sufficiently considered to justify the incompliance with ESCR obligations. For this reason, in cases where limitations or derogations of ESCR are implemented, these restrictions have to be justified by States facing a violent period.

After examining the normative framework of TJ and ESCR in Latin America, Chapter IV verifies that Latin American TJ processes have included ESCR approaches. This inclusion is still marginal and relatively recent; therefore, it is difficult to verify if it is progressive. Moreover, in the majority of cases, the inclusion of ESCR has been secondary to CPR. Despite this, the Latin American experience can offer important examples of how the inclusion of ESCR in TJ processes can be done. The conclusions reached in Chapter IV were tested in Chapter V, taking into consideration the specific context of Chile, providing examples of inclusion or omission of ESCR approaches in the TJ mechanisms

implemented in this country, and comparing it with other Latin American experiences.

Hence, chapters IV and V allow the claim that even though each TJ process is unique, it is possible to identify some factors that have influenced the incorporation of an ESCR in TJ mechanisms and purposes in Latin America. These factors include the nature of the human rights violations committed during the violent past, basic principles of international law, human rights and humanitarian law and the broadening of legal notions already incorporated in TJ and in the human rights law framework.

In the case of the nature of the serious human rights violations committed during the violent past, Latin American violent periods have been characterized by massive and systematic commission of multiple CPR and ESCR violations, which are difficult to separate. For example, as examined before, unfair dismissal is connected with political imprisonment, torture and exile. Also, forced displacement is connected to multiple violations of ESCR and CPR. In these cases, the interconnection of multiple rights opened the door for the direct or indirect recognition of ESCR.

Moreover, it is possible to identify that the legal principles examined in Chapter II have influenced TJ mechanisms and purposes are the same used in the inclusion of ESCR in TJ processes in Latin America. The most referred ones are non-discrimination, equality and international human rights principles. This follows the generalized practice in ESCR, where practitioners have used these principles for the inclusion of ESCR, especially at the judicial level. Moreover, it is also possible to find references to the principles of legality, human rights and constitutional principles, international law and humanitarian law principles. Special references have been made to universality, interdependence and indivisibility of all human rights and the principle of non-implementation of retrogressive measures when referring to ESCR. These legal principles are generally referred by

truth commissions, reparation programmes and institutional reforms, in order to pursue reparations in a broad sense, with the exception of prosecution and punishment of serious ESCR violations. This coincides with the lack of inclusion of ESCR approaches when pursuing this purpose, especially through TJ mechanisms.

In addition, TJ mechanisms have broadened legal notions already incorporated in the TJ framework and human rights law to include ESCR approaches, developing notions as the Social Rule of Law, dignified life, life project and a broad interpretation of CPR. These notions have not necessarily been developed with a TJ purpose, but they have been a useful way to deal with ESCR violations and damages committed during the violent period.

There is a number of types of violence and legal factors that have influenced TJ processes in Latin America, together with the inclusion of ESCR approaches. This thesis has shown in Chapters II and III that there are not legal obstacles in the Latin American context for the inclusion of an ESCR perspective in TJ processes. Moreover, the TJ framework does not need to be entirely changed to include ESCR approaches.

However, legal factors are not the only ones influencing TJ implementation in Latin American countries. Even though this thesis focuses on the legal aspects of TJ, it recognizes the important role that politics has played not only in TJ but also in the development of ESCR obligations, influencing how TJ has dealt with ESCR violations. Through the thesis, it is visible that the Cold War has played an important role in the beginning of the violent periods and in the transitions in Latin America, with the imposition of a liberal agenda of TJ. The latter, which is common in Latin American countries, obscured some ESCR violations committed during the violent past. This was explicit in the Chilean case, examined in Chapter V, which showed how the ESCR reforms implemented during the dictatorship included some retrogressive and discriminatory measures that started to be dealt with in Chile just in a later transition, due to the constant pressure from the civil society.

Moreover, the Cold War has also played an important role in the cases of acceptance or rejection of the recognition of ESCR in Latin America. These political factors could influence the lack of clarity and consistency in the language of ESCR used by TJ mechanisms. Furthermore, these political factors could have had some influence on certain misconceptions about the nature of ESCR, perceived as vague, positive, structural, progressive and non-justiciable rights, which could result in a lack of a systematic treatment in TJ contexts.

In addition, the fact that ESCR approaches in Latin American TJ mechanisms started to be implemented before the development of this area by scholars and international organizations could be a factor to consider in terms of the lack of a more direct, clear and systematic incorporation of ESCR in TJ mechanisms in Latin America. In any case, national, regional and international recognition of ESCR have played a relevant role in the cases where the ESCR language is incorporated, but it is difficult to assess the extent to which ESCR obligations have influenced this approach to ESCR, considering the recent and marginal inclusion of an ESCR language. This inconsistency is problematic when considering ESCR obligations under international and regional laws, as it was examined through the reports of the CESCR and the IACommHR and the judgments of the IACtHR in Chapter III.

In any case, it is possible to see that in some cases that the lack of language of rights has not been an obstacle for the inclusion of ESCR approaches, as in the case of the reparation programmes in Chile that have been more focused on the language of benefits when granting reparations. This research does not claim that the human rights approach is the only or the best way to deal with all economic, social and cultural issues, including inequality, poverty, etc. However, the practice and theory in Latin America show the incorporation of ESCR approaches when dealing with these issues. For the mentioned reasons and accepting that the inclusion of ESCR approaches happens in TJ processes, this inclusion should be

conducted in an appropriate manner to avoid misconceptions about ESCR obligations. Moreover, if this inclusion is done properly, the language of ESCR can help TJ operators to take decisions about which human rights violations need to be addressed and to correctly argue in the cases where ESCR violations stay aside of the focus of TJ mechanisms. In this way, it would be difficult to argue in favour or against the inclusion of ESCR in TJ if there is limited clarity about their content.

Moreover, this thesis has shown that the obligations to respect, protect and fulfil are common not only to ESCR, but also to CPR. Furthermore, the approach taken by TJ mechanisms in Latin America coincides with the obligations to respect, protect and fulfil human rights. Having this consideration in mind, it is noticeable that the problems that face the inclusion of ESCR approaches are the same ones that face the inclusion of a human rights approach to TJ in general. This is the case of guarantees of non-repetition, which include the obligation to implement positive measures that involve economic costs and reform of institutions, which could then affect civil, political and economic powers.

The same can be said regarding the lack of investigation, prosecution and punishment of serious human rights and humanitarian law violations, which has affected serious CPR and made some serious ESCR violations invisible. This is not only against the pursuit of TJ purposes, but also against the obligation to protect from serious human rights violations. This has caused the lack of prosecution of responsibility of private sectors in CPR and ESCR violations. It also caused issues in implementing institutional reforms in Latin American countries, including anticorruption, tax evasion and agrarian reforms.

It is important to remember that transitional States in Latin America have taken the decision to leave some human rights violations out of the scope of TJ, especially in the cases that involve ESCR. As indicated in the thesis, the State is not obliged to deal with all human rights violations committed during a violent period, and therefore, it can take a decision about which human rights violation it

is going to address, according to the principle of feasibility and prioritization. However, instead of focusing on the distinction between ESCR and CPR, the decision should be made taking into consideration the systematic and massive commission of human rights violations committed in the violent period and the national, regional and international human rights and humanitarian law obligations in force in these countries. Moreover, it important to bear in mind that the rule of law includes the respect, protection and fulfilment of all human rights, and therefore a different treatment of ESCR in human rights law and in TJ could be problematic, creating lack of coherence in the framework. In addition, the omission of ESCR in TJ process can cause the invisibility of some ESCR violations committed during the violent period and cause social tension, as exemplified in the Chilean case, where the language of TJ has helped civil society to push for structural and legal ESCR reforms.

This thesis gives a broad account of Latin American practice about the inclusion ESCR in TJ. Moreover, it shows that TJ practice is not necessarily coherent both at the regional and national level. However, considering the existence of common legal principles that should be respected by the countries in transition in Latin American, it is important to reflect if a flexible approach to TJ is better. In this way, it is important to consider different political necessities of the countries, having in consideration victims of the serious human rights violations. The Chilean case epitomises the importance of counting on these factors, giving time to the country to pursue all TJ purposes by different TJ mechanisms implemented in different periods. This does not mean that transitional states should be allowed to be inactive or take arbitrary or retrogressive measures, having the responsibility to prove that they are taking progressive measures to achieve TJ purposes. In this way, the TJ theory and practice can learn from the development of State obligations under ESCR. Progressive realization as an obligation seems coherent not only with ESCR, but also with TJ, including the

obligation to take steps, not take retrogressive measures, immediate obligations and the prohibition of non-discrimination. This approach would also facilitate the examination of the incorporation of ESCR approaches to TJ mechanisms. Having this in consideration would help to understand TJ not only as a process depending on political considerations, but also as following certain legal standards.

This thesis gave a broad overview of the Latin American practice regarding the inclusion of ESCR in TJ processes, highlighting some contributions and challenges faced in this region, and is expected to contribute to the discussion in the field and to the development of future research, especially regarding a more detailed exploration of the potential, best ways, criteria, obstacles, challenges of the inclusion of ESCR in TJ, as it has been suggested by the OHCHR.[1] The publication of guidelines about the interaction between these two areas by the UN or the Inter-American Human Rights System could also prove useful for a more coherent implementation of ESCR in TJ in Latin America and consistency with international obligations.

Moreover, considering that this thesis has shown the lack of coordination and dialogue between different branches of the State that implement TJ measures, this research suggests the creation at the national level of a specialised TJ institution which coordinates different TJ mechanisms, with the collaboration of diverse TJ, CPR and ESCR experts, to understand in a better way all State obligations in these areas. Similarly, a more direct dialogue between TJ, CPR and ESCR experts is also encouraged, to avoid misconceptions and the invisibility of some serious human rights issues. In addition, a holistic approach to human rights training of the legal operators in charge of pursuing TJ purposes is recommended, making the link between ESCR and TJ more explicit.

[1] OHCHR, 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) HR/PUB/13/5, 59.

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ANNEX

Armed conflicts and Repressive Regimes in Latin America*

Country	Kind of violent period	Duration
Argentina	Dictatorship	1976-1983
Brazil	Dictatorship	1964-1985
Chile	Dictatorship	1973-1989
Colombia	Armed Conflict	1958-undergoing
Ecuador	Dictatorship	1972-1979
	Authoritarian Government[1]	1984-1988
El Salvador	Armed Conflict	1980-1992
Guatemala	Armed Conflict	1960-1996
Honduras	Dictatorship	1980-1993
Panama	Dictatorship	1968-1989
Paraguay	Dictatorship	1954-1989
Peru	Armed Conflict-	1980-2000
	Authoritarian Government[2]	1990-2001
Uruguay	Dictatorship	1973-1985

* This table includes only the armed conflicts and repressive regimes examined by the TJ mechanisms reviewed in this thesis. For more information about these violent periods, see United States Institute of Peace, `Truth Commissions Digital Collection' (16 March 2011) <www.usip.org/publications/2011/03/truth-commission-digital-collection> accessed 22 January 2019.

[1] The authoritarian government refers to the repressive campaigns against student and social movements led by President León Febres Cordero's government between 1984 and 1988, which included arbitrary detentions, torture, extrajudicial killings and forced disappearances. See 'Informe de La Comisión de La Verdad: Sin Verdad No Hay Justicia: Resumen Ejecutivo', Comisión de la Verdad (Ecuador, 2010), 29-31.

[2] It refers to the authoritarian Government of Alberto Fujimori. During his first period, he organized a "self-*coup d'état*" in 1992 and changed the constitution, being successfully able to run for re-election in 1995. He ran again for re-election in 2000, presenting his resignation for scandals of corruption the same year. See John Crabtree, 'The Collapse of Fujimorismo: Authoritarianism and Its Limits (2001) 20(3) Bulletin of Latin American Research, 291.