

Legal pluralism, transitional justice, and ethnic justice systems: the story of the strengthening of racialized legal pluralism in the Colombian transitional justice process

Yuri Alexander Romaña-Rivas*

DOI: 10.26433/glsars.v2i1.190

Abstract

Colombian law recognizes that traditional Indigenous and Black authorities can exercise legal jurisdiction and apply their laws and traditions in their ancestral territories. This acknowledgement of racialized communities¹ legal traditions is what I call racialized legal pluralism. Despite the formal recognition of legal pluralism's existence, the legal system does not operate in a way that genuinely guarantees legal pluralism. In practice, higher courts repeatedly overturn or dismiss decisions by Indigenous legal authorities.

As a result of the 2016 Peace Agreement between the Colombian Government and the former guerilla of the Revolutionary Armed Forces of Colombia – The People's Army (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*, or FARC-EP, in Spanish), a transitional justice tribunal was established: the Special Jurisdiction for Peace (SJP or the Special Jurisdiction; *La Jurisdicción Especial para la Paz*, or JEP, in Spanish). The Special Jurisdiction's main task is to investigate and try the most serious crimes committed during the armed conflict, a conflict that has disproportionately impacted racialized communities. The SJP, unlike other tribunals in Colombia, has sought to adapt its work to meet the reality of legal pluralism by: 1) negotiating protocols for inter-jurisdictional interaction between the SJP and ethnic authorities, 2) consulting with Indigenous and Black communities on the adoption of some legal instruments, and 3) having a dialogue between equals with ethnic authorities when potential jurisdictional conflicts arise. This paper seeks to analyze this interaction and how it has allowed the Special Jurisdiction, as a transitional justice mechanism, to work closely with Indigenous and Black communities in Colombia within a legal pluralist context.

* Yuri Alexander Romaña-Rivas, DCL student, O'Brien Fellow, Vanier Scholar, Humphrey Fellow, McGill University. Contact: yuri.romana-rivas@mail.mcgill.ca. The jury of the Scotiabank seminar awarded this paper with the second prize.

¹ Eduardo Bonilla-Silva, "Rethinking Racism: Toward a Structural Interpretation" (1997) 62:3 American Sociological Review 465–480, online: <<https://www.jstor.org/stable/2657316>> at 474–476. In this paper, Eduardo Bonilla-Silva states the following on the notion of racialization and racialized societies: "I suggest that racism should be studied from the viewpoint of racialization. I contend that after a society becomes racialized, racialization develops a life of its own. Although it interacts with class and gender structururations in the social system, it becomes an organizing principle of social relations in itself (Essed 1991; Omi and Winant 1986; Robinson 1983; van Dijk 1987). Race, as most analysts suggest, is a social construct, but that construct, like class and gender, has independent effects in social life. After racial stratification is established, race becomes an independent criterion for vertical hierarchy in society. Therefore different races experience positions of subordination and superordination in society and develop different interests." For the purpose of this paper, the terms "racialized communities," or "ethnic communities" are used to refer to Indigenous and Black communities because they are subordinated and distinctive racial groups within the Colombian society.

As discussed throughout this paper, through the lens of the legal pluralism framework, such interaction has strengthened the legitimacy and recognition of Indigenous and Black communities' legal authorities as parallel legal orders that can operate side-by-side with the State judicial system. Since the armed conflict has disproportionately impacted these racialized communities through phenomena such as internal forced displacement, this has weakened these communities' ancestral legal practices. Therefore, the interaction between the SJP and racialized communities through the adoption of Protocols to coordinate their work together, for instance, can contribute to revitalizing and strengthening these communities' legal practices and, thus, nourishing legal pluralism. This dynamic, in turn, has created an important precedent that can be emulated by other court jurisdictions in Colombia and elsewhere.

Keywords: *legal pluralism, armed conflict, transitional justice, special jurisdiction for peace, Indigenous communities, and Black communities.*

Résumé

Le droit colombien reconnaît la juridiction des autorités autochtones et afro-colombiennes et leur permet d'appliquer leurs lois et leurs traditions au sein de leurs territoires ancestraux. Cette légitimation des traditions juridiques issues des communautés ethniques représente ce que j'appelle le pluralisme juridique racialisé. Malgré la reconnaissance formelle de l'existence du pluralisme juridique, le système judiciaire n'opère pas d'une manière garantissant réellement ce pluralisme. En pratique, les cours d'appel annulent ou rejettent régulièrement les décisions des autorités judiciaires autochtones.

À la suite de l'accord de paix conclu en 2016 entre le gouvernement colombien et l'ancienne guérilla des Forces armées révolutionnaires de Colombie – l'Armée du peuple (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*, FARC-EP, en espagnol), un tribunal de justice transitionnelle a été établi : la Juridiction spéciale pour la paix (JSP ou la Juridiction spéciale; *La Jurisdicción Especial para la Paz*, ou JEP, en espagnol). La mission principale de la Juridiction spéciale est de documenter et de juger les crimes les plus graves commis lors du conflit armé, conflit qui a impacté de manière disproportionnée les communautés racialisées. La JSP, contrairement à d'autres tribunaux en Colombie, a tenté d'adapter son travail aux réalités du pluralisme juridique (i) en négociant des protocoles de coopération inter-juridictionnelle entre la JSP et les autorités ethniques, (ii) en consultant les communautés autochtones et afro-colombiennes sur l'adoption de certains instruments juridiques, et (iii) en établissant un dialogue d'égal à égal avec les autorités ethniques lorsque de potentiels conflits de juridiction apparaissaient. Cet article vise à analyser cette interaction, et la manière dont elle a permis à la JSP, en tant que mécanisme de justice transitionnelle, de travailler étroitement avec les communautés autochtones et afro-colombiennes en Colombie dans le cadre d'un contexte de pluralité juridique.

Ainsi que le montre l'article, à travers l'angle du pluralisme juridique, cette interaction a renforcé la légitimité et la reconnaissance des autorités des communautés autochtones et afro-colombiennes en tant qu'ordre juridique parallèle pouvant travailler main dans la main avec le système judiciaire de l'État. Le conflit armé a affaibli les pratiques juridiques ancestrales de ces communautés racialisées, puisqu'il les a impactées de manière disproportionnée par des phénomènes tels que le déplacement forcé. Par conséquent, l'interaction entre la JSP et ces communautés à travers, par exemple, l'adoption de protocoles de coordination, peut contribuer à revitaliser et à renforcer leurs pratiques juridiques et, ainsi, nourrir le pluralisme. Cette dynamique a, en retour, créé un modèle important qui peut être imité par d'autres juridictions en Colombie et ailleurs.

Mots-clés : *Pluralisme juridique, conflit armé, justice transitionnelle, Juridiction spéciale pour la paix, communautés autochtones, communautés afro-colombiennes.*

Introduction

Legal pluralism's existence is not contingent on the State's recognition of its presence in a given society.² However, in this paper, I will argue that for racialized communities, whose own legal systems operating outside State law are still impacted or influenced by State law and by situations of severe violence on a daily basis, recognition by the State of legal pluralism can be a strengthening and revitalizing factor. This is particularly so for communities that, due to massive violence or armed conflicts, for example, have seen their traditional legal systems or practices weakened. I will make my case by drawing on Colombia's experience of the Special Jurisdiction's interaction with Indigenous and Black communities in the current and ongoing transitional justice process in that country.

In the movie *Adaptation*,³ which inspired the 2022 Graduate Law Student Association (GLSA) conference, there is an exchange between the characters of John Laroche and Susan Orlean that I find pertinent to highlight for this paper. The exchange takes place in the following terms:

“John Laroche: You know why I like plants?

Susan Orlean: Nuh uh.

² Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press, 2021) at 9.

³ *Adaptation* (Amazon, 2002).

John Laroche: Because they're so mutable. Adaptation is a profound process. Means you figure out how to thrive in the world.”⁴

I appreciate this reminder of the idea that “adaptation is a profound process”⁵ and that it is mutable. In this paper, as already suggested, I want to discuss a profound adaptation process in the legal realm: the adaptation process of the Colombian transitional justice process to the reality of legal pluralism in Colombia.⁶ The *Colombian Constitution of 1991* recognizes that Colombia is a multiethnic and multicultural nation.⁷ However, living up to that commitment has been a challenge in practice. Indigenous and Black communities continue to struggle to achieve the recognition and realization of their Constitutional and human rights.⁸ This is especially true regarding the recognition and treatment of their traditional legal practices and authorities.⁹ The Special Jurisdiction for Peace is a transitional justice tribunal, working side-by-side with Indigenous and Black communities within a transitional justice framework, that seeks to guarantee the rights, among others, of racialized communities and their members who are victims of the armed conflict. This has not been and will not be a simple process, but the steps taken until now are more constructive than what the ordinary and permanent State court system has adopted in Colombia. It is important to emphasize that the SJP is a transitional justice tribunal that will not extend its existence beyond 2038.¹⁰ However, the work between the SJP and the ethnic communities’ authorities has the potential to become an example for other transitional

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Asamblea Nacional Constituyente, “Colombian Constitution of 1991”, online: <http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html> at Article 246.

⁷ *Ibid* at Articles 7 and 8.

⁸ Inter-American Commission on Human Rights, “IACHR Calls on Colombia to Take Urgent Measures to Protect the Rights of Indigenous Peoples and Black, Afro-Colombian, Raizal, and Palenquero Communities”, (2021), online: <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/354.asp>; Rebecca Bratspies, “‘Territory is Everything’: Afro-Colombian Communities, Human Rights and Illegal Land Grabs – Columbia Human Rights Law Review”, online: <<https://hrlr.law.columbia.edu/hrlr-online/territory-is-everything-afro-colombian-communities-human-rights-and-illegal-land-grabs/>>.

⁹ Laetitia Braconnier Moreno, “El diálogo entre la Jurisdicción Especial para la Paz y la jurisdicción especial indígena en Colombia: ¿la fábrica de una justicia transicional intercultural?” in Marcela Gutiérrez Quevedo & Ángela Marcela Olarte Delgado, eds, *Pluralismo jurídico y derechos humanos: perspectivas críticas desde la política criminal: Cátedra de Investigación Científica del Centro de Investigación en Política Criminal N°11 Derecho* (Bogotá: Universidad externado de Colombia, 2021) 189 at Par. 9 container-title: Pluralismo jurídico y derechos humanos: perspectivas críticas desde la política criminal: Cátedra de Investigación Científica del Centro de Investigación en Política Criminal N°11; Gloria Amparo Rodríguez & Nidia Catherine Gonzalez, *La jurisdicción especial indígena y los retos del acceso a la justicia ambiental* (Universidad Libre de Colombia, 2019) Accepted: 2020-09-11T21:07:10Z; Eliana Fernanda Antonio Rosero, “Justicia étnica afrocolombiana :cuando la justicia ancestral es más que un mito” (2017) instname: Universidad de los Andes, online: <<https://repositorio.uniandes.edu.co/handle/1992/38689>> Accepted: 2020-06-10T14:27:53Z.

¹⁰ Colombian Constitutional Court, *Judgement C-674*, 2017.

justice processes in Colombia and elsewhere about how State legal systems can work with racialized communities' traditional legal systems or institutions within a legal pluralist framework.

In this paper, which is the result of my presentation at the 2022 Graduate Law Student Association (GLSA) Conference at McGill University, I will discuss how a specialized tribunal, the SJP, has adapted to the reality of legal pluralism. First, I will briefly explore the notion of legal pluralism. Second, I will examine Colombian recognition of legal pluralism and the challenges of living up to it in practice. Third, I will briefly discuss the Colombian armed conflict, its impact on racialized communities, and its negotiated resolution through the *2016 Peace Agreement*. Fourth, I will analyze the SJP and its interaction with Indigenous and Black communities under the legal pluralism framework. Fifth, I will share some concrete examples that show how the JEP and the ethnic justice authorities work together towards a transitional justice process observant of legal pluralism. And finally, I will draw some lessons relevant to legal pluralism, International Human Rights Law, and other transitional justice experiences elsewhere.

Defining Legal Pluralism

For the purpose of this paper, I rely on the legal pluralism framework to analyze the adaptation of the current transitional justice process in Colombia to the reality of Indigenous and Black communities' legal traditions. Brian Z. Tamanaha indicates that legal pluralism is everywhere in the form, for example, of complementing or competing legal regimes, customs, or religious traditions, and it is essential to acknowledge that reality to understand different societies and their complexities.¹¹ However, he states that legal pluralism “is a conceptual mess” because there is a challenge in defining with precision what “law” and “pluralism” are.¹² Tamanaha articulates that a way to define legal pluralism is by “opposition to the widely held image of monistic state law.”¹³ He encourages jurists “to set aside the vision of the monist law state and be open to new ways of conceiving of law that recognizes the pervasiveness of legal pluralism and the variety of ways law exists within, across, and outside of state systems.”¹⁴ This broader conception of law would provide for a more comprehensive understanding of legal regimes and their intertwining in a given societal context.

¹¹ Tamanaha, *supra* note 2 at 1–2.

¹² *Ibid* 3–4.

¹³ *Ibid* 4.

¹⁴ *Ibid* 9.

Further, Tamanaha “articulates and applies social-historical folk legal pluralism,”¹⁵ a version of legal pluralism that “focuses on forms of law collectively recognized by people in society, which vary and change over time.”¹⁶ For instance, “Sharia and Halakhah *are law* because Muslims and Jews, respectively, recognize that as law.”¹⁷ This version of legal pluralism differs from what Professor Tamanaha terms “abstract legal pluralism,” which “is the product of social scientists and legal theorists whose aim is to provide a scientific or philosophical theory of law.”¹⁸ Tamanaha highlights that folk legal pluralism can be found present in three categories of law: 1) *community law*, which regulates interactions within communities and deals with legal issues such as marriage and property rights; 2) *regime law*, which seeks to implement state law through taxation laws, border control, and military services, among others; and 3) *cross-polity law*, which is mainly concerned with national laws, international law, and transnational law.¹⁹ Therefore, when analyzed from a bottom-up perspective, as proposed in the notion of folk legal pluralism, legal pluralism opens immense possibilities to analyze comprehensively and transversally different legal systems.

Similarly, Martha-Marie Kleinhans and Roderick A. Macdonald recognize that contemporary legal pluralism rejects the notion of a monist/central State exclusivity in creating law.²⁰ Instead, they argue that “social-scientific legal pluralists have hypothesized a variety of interacting, competing normative orders – each mutually influencing the emergence and operation of each other’s rules, processes and institutions.”²¹ These authors underscore that critics of legal pluralism will state that “legal pluralism undermines respect for the Rule of Law,” because societies need a comprehensive and structured legal system and understanding of law to avoid “normative confusions,” and State authority should not be subjected to scrutiny by non-state authorities with specific normative power within a given jurisdiction.²² Another criticism of legal pluralism is of methodological nature, inasmuch as “legal pluralism lacks a criterion for distinguishing non-State law from anything else that has a

¹⁵ Ibid 11.

¹⁶ Ibid.

¹⁷ Ibid 12.

¹⁸ Ibid 11.

¹⁹ Ibid 13.

²⁰ Martha-Marie Kleinhans & Roderick A Macdonald, “What is a Critical Legal Pluralism?*” [1997] 12:02 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 25, 30.

²¹ Ibid 31.

²² Ibid 32.

normative dimension (e.g. social practice, economic forces, religion, etc.).”²³ But, Kleinhans and Macdonald question the seriousness of this last critique because one could reverse the logic and say that law is everywhere, “and that the relationships between its different forms, processes, sites and orders can best be explored through ‘ideal-type’ formal and functional taxonomies.”²⁴ They answer those criticisms by highlighting that the purpose of legal pluralism is to challenge the image of State centrality in the creation of law and recognize the existence of other sources of law that have been suppressed.²⁵ In fact, they argue that, by acknowledging those realities, the rule of law can be strengthened.²⁶ The authors propose a notion of critical legal pluralism, by which, contrary to traditional legal pluralism, legal positivism and law as a social fact are rejected,²⁷ and instead the capacity of individuals to participate in the creation and recognition of their own “legal subjectivity”²⁸ is recognized, meaning that they are “law inventing.”²⁹ This notion goes beyond an understanding of individuals as subjects without content that are the object of the external creation of law,³⁰ treating them as simply “law abiding.”³¹ In short, the authors argue that critical legal pluralism conceives the idea of law as autobiographical.³²

For his part, Boaventura de Sousa Santos introduces the idea that law, similar to maps and poets, distorts social realities to prove its exclusivity. In other words, law regimes tend to disregard different legal or customary regimes that exist within a particular society at a specific given time to monopolize regulatory powers over social subjects and their activities.³³ This arbitrariness allows for the constant struggle between regulators and emancipators.³⁴

René Provost conceives legal pluralism as a framework that allows for exploring “the limits of our conception of law to encompass forms of normativity beyond those connected to the state in any

²³ Ibid.

²⁴ Ibid 33.

²⁵ Ibid 34.

²⁶ Ibid.

²⁷ Ibid 39.

²⁸ Ibid 38.

²⁹ Ibid 39.

³⁰ Ibid 37.

³¹ Ibid 39.

³² Ibid 46.

³³ Boaventura de Sousa Santos, ed, “Law: A Map of Misreading” in *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* Law in Context, 3d ed (Cambridge: Cambridge University Press, 2020), 499.

³⁴ Ibid 496.

way.”³⁵ Provost underscores that more than recognizing the existence of different legal regimes operating simultaneously, legal pluralism is more concerned with understanding how “the different legal regimes intersect and interact.”³⁶

Finally, Maxime St-Hilaire points out that legal anthropology and sociology of law have developed an important literature “based on the idea that to a plurality of social groups there can correspond a plurality of legal orders.”³⁷ However, like Tamanaha, he questions that the definition of a legal system from a legal pluralist perspective is complex and providing the necessary clarity is still a pending task.³⁸ Accordingly, St-Hilaire claims that one criticism is the confusion around “what is law or legal order,” which can lead to poor formulations of the existence of legal pluralism in a given context.³⁹

The debate around how legal pluralism can define law or legal systems is compelling, but it is beyond the scope of this paper. For this paper, one would be on safe terrain to argue that in the Colombian context, as will be discussed later, it is well-established that some Indigenous communities have discernable and distinguishable legal systems. For instance, the *Wayúu*⁴⁰ and *Nasa*⁴¹ people in Colombia have forms of law that people in society collectively recognize. These communities have thus demonstrated their capacity to insert themselves into and interact with the State legal system. In short, the notion of legal pluralism opens the door for an understanding of law and legal systems beyond the idea that law and legal orders are only those created by the State. In other words, legal pluralism is a profound process because it can allow us to expand our understanding of law and legal systems by providing conceptual and analytical tools to question the State centrality in the creation of law or legal orders. The Colombian State has formally recognized in its *Constitution* that it has no monopoly in creating law and legal orders. Despite all the challenges, including operating in the

³⁵ René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (New York: Oxford University Press, 2021) at 12.

³⁶ *Ibid.*

³⁷ Maxime St-Hilaire, “The Study of Legal Plurality outside ‘Legal Pluralism’: The Future of the Discipline?” in *Stateless Law: Evolving Boundaries of a Discipline*, ed by Helge Dedek & Shauna Van Praagh (London: Routledge, 2016), 116.

³⁸ *Ibid.*

³⁹ *Ibid* at 115.

⁴⁰ Nicolás Polo Figueroa, *El sistema normativo wayúu: módulo intercultural: (línea de investigación indigenista)*, Serie Investigación (Bogotá, Colombia: Universidad Sergio Arboleda, 2018).

⁴¹ “Autoridades Indígenas Pueblo Nasa Archives”, online: *Çxhab Wala Kive* <<https://nasaacin.org/tag/autoridades-indigenas-pueblo-nasa/>>.

context of an armed conflict, Indigenous and Black communities have demonstrated their capacity and resilience to continue preserving their traditional legal systems or practices.

As it will be examined throughout this piece, the question is how the SJP has approached the reality of legal pluralism from a normative standpoint and legal interaction with Indigenous and Black communities.

Legal Pluralism in Colombia

The Colombian *Constitution* recognizes Colombia as a multiethnic and multicultural nation.⁴² Article 246 of the 1991 *Colombian Constitution* expressly acknowledges the existence of legal pluralism in the country in the following terms:

The authorities of indigenous peoples may exercise their jurisdictional functions within their territorial jurisdictions in accordance with their own laws and procedures as long as they are not contrary to the Constitution and the laws of the Republic. A law shall establish the forms of coordination between this Special Jurisdiction and the national judicial system.⁴³

In addition to the national *Constitution*, Colombia's international law commitment under the International Labor Organization (ILO)'s *Convention 169 of 1989* also confirms the pluralistic nature of the Colombian legal system. Article 8 of such *Convention* establishes that Indigenous and Tribal people “shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. [...]”⁴⁴ Colombia incorporated this treaty into its domestic legislation through Law 21 of 1991.⁴⁵ Under Colombia's legal system, based on a decision by the Colombian Constitutional Court, the 1989's ILO *Convention* applies to Black communities.⁴⁶ This legal acknowledgement has served as

⁴² Asamblea Nacional Constituyente, *supra* note 6 at Articles 7, 8, and 10.

⁴³ *Ibid* at Article 246.

⁴⁴ International Labour Organization, *Convention C-169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 1989 at Article 8; Congress of the Republic of Colombia, *Ley 21*, 1991; Xiomara Cecilia Balanta-Moreno et al, “El enfoque étnico-racial en la Jurisdicción Especial para la Paz: una mirada desde el estudio de casos de la Sala de Amnistía o Indulto” in Danilo Rojas-Betancourth, ed, *La JEP vista por sus jueces (2018-2019)* (Bogotá, Colombia: Special Jurisdiction for Peace, 2020).

⁴⁵ *Ley 21*, *supra* note 44.

⁴⁶ Colombian Constitutional Court, *Judgement C-169*, 2001.

the basis for the recognition of Black communities' authority to exercise legal jurisdiction to resolve disputes within their communities.

Similarly, *Law 70 of 1993* (or the *Law regarding Black communities*)⁴⁷ and the *Presidential Decree 1745 of 1995*⁴⁸ recognize the jurisdiction of traditional authorities within Black communities to administer justice to a certain degree, including the amicable resolution of disputes within the communities. Hence, legal pluralism's recognition and its legal basis are not in doubt in the Colombian context. This recognition is indeed a meaningful and essential step to safeguard the legal jurisdiction rights of Indigenous and Black communities.

Importantly, this acknowledgement of legal pluralism's existence is relevant because not all countries, including Canada,⁴⁹ recognize the traditional legal system of Indigenous communities or other ethnic or racial groups as a part of a legal pluralist system. Colombia's recognition of legal pluralism cannot be emphasized enough, but the practical implementation and observance of legal pluralism by Colombia's court system is a pending task. Indeed, the Colombian *Constitution* establishes that a specific law regulating the interaction between the Special Indigenous Jurisdiction and the State court system should be adopted. Still, such a law is yet to be adopted.⁵⁰

The Colombian Armed Conflict, its impact on Racialized Communities, and its Negotiated Resolution

Experiences of inequality and marginalization have created structural circumstances for armed confrontations in Colombia.⁵¹ In fact, the armed conflict between the Colombian government and the People's Army (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*, or FARC-EP, in Spanish) lasted more than half a century, the longest in the history of the Western Hemisphere.⁵² Colombia

⁴⁷ Congress of the Republic of Colombia, *Ley 70*, 1993.

⁴⁸ Presidency of the Republic of Colombia, *Decreto 1745*, 1995.

⁴⁹ Gary F Bell, "Multiculturalism in Law is Legal Pluralism—Lessons from Indonesia, Singapore and Canada" (2006) *Singapore Journal of Legal Studies* 315–330, online: <<https://www.jstor.org/stable/24869083>> at 316.

⁵⁰ Colombian Supreme Court, judgement CP036-2018 Radicación n.º 49006 of 2018, in the case of José Martín Yama Guacanes, P. 34.

⁵¹ Daire McGill, "Tackling structural violence through the transformative justice framework" in Matthew Evans, ed, *Transitional and Transformative Justice: Critical and International Perspectives*, 1st edition ed (Abingdon New York, NY: Routledge, 2020) at 11.

⁵² Jorge Luis Fabra-Zamora, Andres Molina-Ochoa & Nancy C Doubleday, eds, *The Colombian Peace Agreement: A Multidisciplinary Assessment* (New York: Routledge, 2021) at 1.

“has experienced one of the most protracted civil conflicts,”⁵³ which has resulted in approximately 220.000 people being killed.⁵⁴ 180.000 out of those 220.000 killed have been non-combatant civilians, which constitutes 81% of those killed.⁵⁵ In addition, more than seven million people have been victims of internal forced displacement,⁵⁶ including more than 1.2 millions of racialized persons.⁵⁷ The Colombian Constitutional Court has recognized that the acute impact of the internal forced displacement on racialized communities threatens their cultural and physical existence.⁵⁸

According to the 2018 national census, Colombia is a country of 48 million people.⁵⁹ The Colombian armed conflict has victimized more than nine million people (18.7% of the country’s population).⁶⁰ The Indigenous population is 1.9 million, representing 4.4% of the Colombian population.⁶¹ Of this number, 250.000 and 255.661 are Indigenous victims, amounting to 13% of the overall Indigenous population being a victim of the armed conflict.⁶² This is a high number, but it is 5% less than the national percentage of victims. Black People in Colombia are 4.6 million people, and

⁵³ Maria Paula Saffon-Sanin, “The Colombian Peace Agreement: A lost opportunity for social transformation” in Jorge Luis Fabra-Zamora, Andres Molina-Ochoa & Nancy Doubleday, eds, *The Colombian Peace Agreement: A Multidisciplinary Assessment*, 1st edition ed (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2021) at 70.

⁵⁴ *¡Basta ya! Colombia: memorias de guerra y dignidad*, by Centro Nacional de Memoria Historica (Bogotá, Colombia, 2013) at 32; Santiago Rodríguez, “A Second Chance on Earth: Understanding the Selection Process of the Judges of the Colombian Special Jurisdiction for Peace” (2020) 10:2 Notre Dame Journal of International & Comparative Law 209, online: <<https://scholarship.law.nd.edu/ndjicl/vol10/iss2/6>> at 215–216.

⁵⁵ Centro Nacional de Memoria Historica, *supra* note 54 at 32; Rodríguez, “A Second Chance on Earth”, *supra* note 54 at 215–216.

⁵⁶ Sandra Milena González Díaz & Sandra Milena González Díaz, “El desplazamiento forzado interno. Una comparación entre Colombia y Perú (Forced Internal Displacement. A Comparison Between Colombia and Peru)” (2018) 53 Estudios Políticos 100–125, online: <http://www.scielo.org.co/scielo.php?script=sci_abstract&pid=S0121-51672018000200100&lng=en&nrm=iso&tlng=es>.

⁵⁷ Unidad de Víctimas, “Más de 1,2 millones de víctimas étnicas dejó el conflicto armado en Colombia”, *Unidad para las Víctimas* (10 October 2017), online: <<https://www.unidadvictimas.gov.co/es/asuntos-etnicos/mas-de-12-millones-de-victimas-etnicas-dejo-el-conflicto-armado-en-colombia/39543>> at 2.

⁵⁸ Colombian Constitutional Court, *Judgement* T-025, 2004; Colombian Constitutional Court, *Judgement/Order* A004, 2009; Colombian Constitutional Court, *Judgement/Order* A005, 2009; Colombian Constitutional Court, *Judgement/Order* A894, 2022.

⁵⁹ Departamento Administrativo Nacional de Estadística, Censo de 2018, <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos>.

⁶⁰ Unidad de Víctimas, Registro Único de Víctimas, <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394>.

⁶¹ International Work Group for Indigenous Affairs, “Indigenous World 2020: Colombia - IWGIA - International Work Group for Indigenous Affairs”, online: <<https://www.iwgia.org/en/colombia/3618-iw-2020-colombia.html>>.

⁶² Unidad de Víctimas, “Registro Único de Víctimas (RUV)”, (10 July 2017), online: *Unidad para las Víctimas* <<https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394>>; *supra* note 61.

represent almost 10% of the population.⁶³ The number of Afro-Colombian victims is close to 1.2 million, amounting to 26% of all Afro-Colombians being victims of the armed conflict.⁶⁴ This is almost 8% more than the national percentage of victims. These ciphers demonstrate the severe impact of the armed conflict on ethnic or racialized communities, which explains or justifies why, if the Colombian transitional justice process aims to be successful, it needs to be responsive to the particular needs of justice of racialized communities.

The current transitional justice process is the result of the *2016 Peace Agreement*. In 2016, after four years of negotiation, the Colombian Government and the FARC-EP reached a *Peace Agreement*, intending to achieve a lasting and stable peace in the country.⁶⁵ As a part of this agreement, the parties agreed to six points: 1) rural and agrarian reform; 2) political participation; 3) measures towards the materialization of a ceasefire and the laying down of arms; 4) measures to deal with the problem of illicit drugs; 5) measures to guarantee the rights of the victims of the armed conflict, by the creation of a “Comprehensive System for Truth, Justice, Reparations, and Non-Recurrence” (“SIVJRNR” for its Spanish acronym, of the Comprehensive System); and 6) measures to make the follow-up to the *Peace Agreement*’s implementation process.⁶⁶ Remarkably, the *Peace Agreement* contains an “Ethnic Chapter” (Point 6.2 of the Agreement) that recognizes the historical injustices that Black and Indigenous people have suffered as a result of enslavement and colonialism.⁶⁷ This Ethnic Chapter also acknowledges the disproportionate impact of the armed conflict on racialized communities and seeks to guarantee that the *Peace Agreement*’s implementation takes into consideration the particular and differentiated needs of racialized communities.⁶⁸

⁶³ Departamento Administrativo Nacional de Estadística, Censo de 2018, Grupos étnicos - Información técnica <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/grupos-etnicos/informacion-tecnica>.

⁶⁴ *Unidad de Víctimas*, *supra* note 62.

⁶⁵ United Nations High Commissioner for Human Rights, “Colombia: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (2016)”, (2016), online: *Refworld* <<https://www.refworld.org/docid/5b68465c4.html>>.

⁶⁶ Xiomara Cecilia Balanta-Moreno & Yuri Alexander Román-Rivas, “The rights of Afro-Colombian communities in the Final Agreement and its mechanisms of implementation” in *The Colombian Peace Agreement* (Routledge, 2021) at 221.

⁶⁷ Lisa Davis, “Third Party at the Table: Afro-Colombian Women’s Struggle for Peace and Inclusion – Columbia Human Rights Law Review” (2020) HRLR 364–381, online: <<https://hrlr.law.columbia.edu/hrlr-online/third-party-at-the-table-afro-colombian-womens-struggle-for-peace-and-inclusion/>> at 369.

⁶⁸ *Ibid.*

For the purpose of this paper, it is relevant to underscore that, as a part of the implementation of point 5 and the Comprehensive System to guarantee victims' rights, the SJP was created in 2017.⁶⁹ Taking into account the severe impact of the armed conflict on racialized communities, the SJP has established mechanisms to guarantee victims' rights. These mechanisms, including the interaction with Indigenous and Black communities' legal systems and authorities, have signalled that the Special Jurisdiction is committed to working with racialized communities in observance of these communities' traditional legal systems and authorities, to guarantee their enjoyment of rights.⁷⁰ In the next section, I will further discuss the role of the SJP in interacting with racialized communities.

The Special Jurisdiction for Peace and Indigenous and Black communities: Working towards Adaptation and Furthering Colombian legal pluralism

As already indicated, in 2016, the Colombian Government and the former guerilla group of the FARC-EP signed a *Peace Agreement*.⁷¹ This agreement paved the way for Colombia's current transitional justice process. As a part of the Agreement, the parties agreed to establish the Special Jurisdiction for Peace; a tribunal tasked with investigating and prosecuting the most serious crimes committed in the more than half-century of armed conflict.⁷² As stated earlier, legal pluralism has been formally recognized in Colombia since 1991, but it has not been effectively implemented or honoured by State authorities, especially the judicial system. For instance, tensions have existed in cases where indigenous legal authorities have asserted legal authority to investigate, prosecute, and sanction indigenous persons accused of drug trafficking. Yet, State authorities have resisted allowing those individuals to be tried by Indigenous legal authorities and instead have extradited them, as provided for in State law.⁷³ Another issue of contention has been certain corporal punishment imposed by indigenous legal authorities, based on their traditions, on individuals who have violated community rules. These punishments can be seen as being at odds with some constitutional and human rights guarantees to

⁶⁹ Congress of the Republic of Colombia, "Acto Legislativo 01 del 4 de Abril de 2017", online: <<https://jepvisible.com/observatorio/que-es-observatorio/73-normatividad/127-acto-legislativo-01-del-4-de-abril-de-2017>>.

⁷⁰ Balanta-Moreno & Romaña-Rivas, *supra* note 66 at 228–237.

⁷¹ United Nations High Commissioner for Human Rights, *supra* note 65.

⁷² Congress of the Republic of Colombia, *supra* note 69.

⁷³ Redacción Justicia, "Justicia indígena no puede usarse para evadir casos de extradición - Cortes - Justicia - ELTIEMPO.COM", (2021), online: <<https://www.eltiempo.com/justicia/cortes/justicia-indigena-no-puede-usarse-para-evadir-casos-de-extradicion-637953>>.

prevent cruel and inhumane treatment.⁷⁴ However, a new paradigm of interaction between the State legal order and racialized communities' legal traditions is emerging under the current transitional justice process.

Considering that many of the most serious crimes committed in the Colombian armed conflict have occurred in the territories of Indigenous Peoples and Black communities, it was unavoidable that the SJP had to interact with Indigenous and Black communities. The terms of interaction started to be set in the 2016 *Peace Agreement* itself, which establishes, as a part of point 6.2.3, the following: "In the framework of the implementation of the Special Jurisdiction for Peace, mechanisms will be created for liaison and coordination with the Special Indigenous Jurisdiction according to the mandate of Article 246 of the Constitution and, when appropriate, with the Afro-Colombian ancestral authorities."⁷⁵

Similarly, the *Constitutional amendment 01 of 2017*, by which the SJP was created, establishes that the Special Jurisdiction's legal framework needs to include measures to guarantee an ethnically or racially differentiated approach and an intersectional one.⁷⁶ In 2017, through judgement C-674, the Colombian Constitutional Court analyzed the constitutionality of this amendment. It ruled that specific laws regarding the creation and functioning of the SJP had to be consulted with Indigenous and Black communities because those legal instruments would impact them.⁷⁷ The *1957 Statutory Law of 2019* ("*Ley Estatutaria de la JEP*" in Spanish), by which the Colombian Government delineated the SJP's jurisdictional functions, establishes that the Special Jurisdiction must emphasize the implementation of a differentiated ethnic approach regarding racialized communities "to identify the differentiated impact of the armed conflict on these ethnic communities and the enjoyment of their fundamental rights."⁷⁸

In the same vein, *Law 1922 of 2018*, which enshrines the SJP's rules of procedures, indicates that the SJP must apply an ethnically differentiated approach regarding racialized communities.⁷⁹ This *Law*

⁷⁴ Colombian Constitutional Court, *Judgement SU-510*, 1998 at Par. 54-57.

⁷⁵ United Nations High Commissioner for Human Rights, *supra* note 65 at Point 6.2.3 (e).

⁷⁶ Congress of the Republic of Colombia, *supra* note 69 at Articles 1 and 12.

⁷⁷ Colombian Constitutional Court, *Judgement C-674*, 2017 *supra* note 10.

⁷⁸ Congress of the Republic of Colombia, *Ley 1957 (Statutory Law for the functioning of the Special Jurisdiction for Peace)*, 2019 at Article 18.

⁷⁹ Congress of the Republic of Colombia, *Ley 1922 (The Special Jurisdiction for Peace's Rules of procedures)*, 2018 at Article 1.C.

also establishes that the SJP and the authorities of racialized communities can develop the mechanisms for their interaction.⁸⁰ In this sense, the 2018 and then the 2020 SJP's internal rules of proceedings ("*Reglamento General de la JEP*" in Spanish) contain a whole chapter (Chapter 15) by which the general principles that guide the interaction between the SJP and racialized communities are established, underscoring the importance of an interaction based on equal footing, observant of cultural differences, and acknowledgement of differentiated legal practices.⁸¹ Chapter 15 is thus a prominent and concrete example of the profound adaptation process of the transitional justice process to the reality of racialized communities and legal pluralism in Colombia.

Based on the Colombian Constitutional Court's judgement C-674 of 2017, *Law 1922 of 2018* concerning the rules of procedure and the 2018 internal rules of proceedings were subjected to consultation with Indigenous and Black communities.⁸² These consultations guaranteed that these legal instruments, especially the internal rules of proceedings, incorporated the obligation for the Special Jurisdiction to adopt an approach of equals when interacting with Indigenous and Black communities' authorities.

Within the Special Jurisdiction, in line with the internal rules of proceedings, an Ethnic Commission composed mainly of justices who belong to Indigenous and Black communities was established.⁸³ This Ethnic Commission has two main functions: 1) to serve as a consultation body within the Special Jurisdiction for Peace on issues that can impact Indigenous or Black communities so that the Special Jurisdiction for Peace can advance the proceedings involving Indigenous and Black communities being observant and respectful of their rights and worldviews, and 2) to coordinate the Special Jurisdiction for Peace's outreach efforts to or interaction with Indigenous and Black communities.

The Ethnic Commission, on behalf of the Special Jurisdiction, has deepened the legal pluralist interaction with Indigenous and Black communities by adopting two specific protocols that regulate

⁸⁰ *Ibid* at Article 70.

⁸¹ Special Jurisdiction for Peace, *Acuerdo ASP No. 001 (SJP's Internal Rules of Proceedings)*, 2020 at Articles 98-103.

⁸² Xiomara Balanta-Moreno et al "El enfoque étnico-racial en la Jurisdicción Especial para la Paz: una mirada desde el estudio de casos de la Sala de Amnistía o Indulto," in "La JEP vista por sus jueces (2018-2019)," ed by Danilo Rojas Betancourth (Bogota: JEP, 2020), 517, online: *Scribd* <<https://es.scribd.com/document/455787698/Libro-La-JEP-vista-por-sus-jueces-2018-2019-WEB-pdf>>.

⁸³ *Acuerdo ASP No. 001 (SJP's Internal Rules of Proceedings)*, *supra* note 81 at Articles 107 and 108.

the dialogue and cooperation between the Special Jurisdiction for Peace and the ethnic justice systems. The first protocol was adopted in 2019 regarding Indigenous communities, and the second was adopted in 2021 regarding Black communities. I will discuss these two protocols in further detail below.⁸⁴

The Special Jurisdiction for Peace and the protocol for interaction with Indigenous communities

The *Protocol for “Ethnic and Cultural Diversity, Legal Pluralism, and Prior Consultation”* contains 45 Articles describing how the Special Jurisdiction for Peace will interact with Indigenous legal authorities.⁸⁵ Article 1 recognizes that Colombia has a pluralist legal system and indicates that the Special Jurisdiction will respect the traditional Indigenous legal systems and guarantee that such respect is implemented in the proceedings involving Indigenous communities or their members. Article 2 of the *Protocol* establishes that the Special Jurisdiction needs to aim to strengthen the Indigenous legal authorities’ jurisdictional capacities. The SJP also needs to prioritize verbal or oral communications over written ones to interact or communicate with indigenous communities (Article 7).

Furthermore, the *Protocol* indicates that the Indigenous communities and the Special Jurisdiction can agree on using Indigenous languages to interact and guarantee adequate access to information for Indigenous communities (Article 8). This *Protocol* contains a provision that calls for the SJP to grant transformative reparations favouring Indigenous communities. Reparations ordered by the Special Jurisdiction should aim to re-establish the balance among the communities, their culture, territories, and spirituality (Article 5). The *Protocol* acknowledges that the Indigenous communities have a right to justice, meaning that the crimes they were victims of in the armed conflict need to be investigated and prosecuted, and sanctions shall be imposed (Article 9). In other words, the Special Jurisdiction for Peace must fight impunity in favour of Indigenous communities. It is worth highlighting that, in

⁸⁴ Special Jurisdiction for Peace, *Lineamiento 02 de 2019 adoptado por la Comisión Étnica de la Jurisdicción Especial para la Paz para implementar la coordinación, articulación y diálogo intercultural entre el Pueblo Rrom (Gitano) y la Jurisdicción Especial para la Paz*, 2019. It is worth mentioning that this is a third protocol adopted in 2019 concerning the interaction between the SJP and the Rrom People, but that community is not the focus of this paper.

⁸⁵ Special jurisdiction for Peace, *Diversidad Étnica y Cultural, Pluralismo Jurídico y Consulta Previa: Protocolo 001 de 2019 adoptado por la Comisión Étnica de la Jurisdicción Especial para la Paz para la coordinación, articulación interjurisdiccional y diálogo intercultural entre la Jurisdicción Especial Indígena y la Jurisdicción Especial para la Paz*, 2019.

September of 2022, the Special Jurisdiction opened a macro-case to investigate crimes committed against ethnic or racialized communities in the context of the armed conflict.⁸⁶ According to the *Protocol*, the Special Jurisdiction's actions need to consider an ethnically or racially differentiated approach, meaning that the SJP needs to factor in its work and activities the regional, cultural, context, and worldview of Indigenous communities (Article 12). In investigating criminal cases, the Special Jurisdiction needs to take note of the crimes' unique or particular cultural, spiritual, and territorial impacts on these communities (17).

The Special Jurisdiction also needs to coordinate with Indigenous authorities the conditions, circumstances, and places where they can get together to discuss and advance matters of common interests (Articles 14 and 15). In cases of sexual violence investigated by the Special Jurisdiction for Peace, the *Protocol* indicates that the Indigenous victims have, among others, the right to be accompanied and supported by their Indigenous authorities, interpreters or trusted persons of their communities (Article 25).

The above shows that the Special Jurisdiction and Indigenous communities have engaged in an essential process of implementing the notion of legal pluralism in the context of a transitional justice process. This approach is indicative that an adaptation of the SPJ's processes to the realities of racialized communities has been advanced. A relevant aspect of this process is that it has been conducted as a dialogue of equals in which both the Special Jurisdiction, through its Ethnic Commission, and Indigenous communities, through their representatives, have negotiated how the justice component of the transitional justice process and the Indigenous communities will cooperate and interact with each other to live up to the promise of legal pluralism in Colombia. This interaction with a State institution is meaningful for Indigenous communities because it is further proof of social recognition of their differentiated legal system. While I worked as a lawyer at the Special jurisdiction, I remember discussing this topic with an SJP's Justice who told me that she once had visited an Indigenous territory to carry out a hearing with the Indigenous community's legal authorities' participation. These Indigenous authorities expressed that they were pleased to have State authorities

⁸⁶ Special Jurisdiction for Peace, "La JEP abre Caso 09 para investigar los crímenes cometidos en contra de pueblos y territorios étnicos", (2022), online: <<https://www.jep.gov.co:443/Sala-de-Prensa/Paginas/JEP-abre-caso-09-investigar-crimenes-contra-pueblos-etnicos.aspx>>; Silvia Corredor-Rodríguez, "Así se está construyendo el caso sobre afectación a los pueblos étnicos en la JEP | EL ESPECTADOR" (2022), online: <<https://www.elspectador.com/colombia-20/jep-y-desaparecidos/asi-se-esta-construyendo-el-caso-sobre-afectacion-a-los-pueblos-etnicos-en-la-jep/>>.

coming to their territories in observance of their community's rules and protection measures. For that community, such a visit was further evidence of an interaction between State authorities and Indigenous authorities on equal footing.

The Special Jurisdiction for Peace and the protocol for interaction with Black Communities

The 2021 *Protocol for Interaction Between the Special Jurisdiction for Peace and Black, Afro-Colombian, Raizal People, and Palenque People* contains 47 Articles, which mirror most of the provisions enshrined in the 2019 *Indigenous communities' Protocol*.⁸⁷ Article 1 establishes that in line with the notion of legal pluralism in Colombia, in the context of its jurisdictional competence and proceedings, the Special Jurisdiction will respect Black communities' traditional forms of justice. In this respect, the *Protocol* indicates that the SJP will support Black communities in their efforts to guarantee justice for victims and the guarantee of non-repetition (Article 3). In addition, the Special Jurisdiction needs to ensure the participation of Black communities' authorities in legal proceedings when the cases warrant such participation (Article 4). The Special Jurisdiction must also support the quest for transformative reparations favouring Black communities by adopting reparation measures to re-establish the balance among the communities, their territories, and their worldviews (Article 7). This *Protocol* additionally contemplates that verbal or oral communications should be prioritized as a means of communication and interaction with Black communities (Article 8). In this respect, the *Protocol* recognizes that the Special Jurisdiction and Black communities can agree to have communications or interactions in the local language of a Black community when deemed necessary (Article 9).

According to the *Protocol*, as a measure to fight impunity, the Special Jurisdiction for Peace must investigate, prosecute, and impose sanctions for the crimes committed against Black communities and their members (Article 10). The criminal cases that the Special Jurisdiction for Peace investigates need to include an analysis of the differentiated impact of those crimes on Black communities (Articles 18 and 19). In cases of sexual violence, women belonging to Black communities have the right, among others, to be accompanied to proceedings before the Special jurisdiction by authorities of their communities (Article 26). The SJP needs to consider an ethnically or racially differentiated approach to its actions when interacting with Black communities, meaning that it is necessary to consider the

⁸⁷ Special Jurisdiction for Peace, *Protocolo de Relacionamento entre la JEP y los pueblos Negros, Afrodescendientes, Raizal, y Palenquero*, 2021.

history, geography, identities, and worldviews of Black communities (Article 13). Indeed, in the case of former combatants who belong to Black communities, the Special Jurisdiction and the communities can coordinate to determine how an ethnic or racially differentiated approach can be implemented towards them (Article 29).

In Colombia, there has been questioning about the existence of an effective justice system within Black communities, but the documentation of such ancestral practices has dissipated such doubts.⁸⁸ Thus, recognizing Afro-Colombian communities' justice systems in the context of the current transitional justice process is of the utmost importance. The *Protocol for the interaction between the Special Jurisdiction for Peace and Black communities* is particularly relevant because it provides Black communities' traditional authorities with an opportunity to continue consolidating and strengthening their traditional justice systems to regulate their communal lives while simultaneously engaging with the Colombian State court system. Fundamentally, given the disproportionate impact of the armed conflict on Black communities and their cultural practices, the current transitional process, through the implementation of a legal pluralistic approach to engage with Black communities' legal orders, is revitalizing Black communities' ancestral practices of justice and is contributing to those traditional justice systems to gain strength and be more visible to society at large.

Examples of interaction between the Special Jurisdiction for Peace and Indigenous and Black communities' traditional authorities

As discussed earlier, the Special Jurisdiction submitted its internal rules of proceedings to consultation with Indigenous and Black communities. Moreover, the SJP and the racialized communities' legal authorities negotiated and adopted two protocols, in 2019 and 2021, respectively, to regulate how the SJP engages with ethnic traditional authorities in the exercise of its legal jurisdiction to investigate and prosecute crimes against or with impact on racialized communities, particularly, when: 1) the crimes were committed on these communities' territories, 2) Indigenous or Black communities or their members are victims of crimes, and 3) the alleged perpetrator belongs to Indigenous or Black communities.⁸⁹

⁸⁸ Antonio Rosero, "Justicia étnica afrocolombiana", *supra* note 9.

⁸⁹ *Acuerdo ASP No. 001 (SJP's Internal Rules of Proceedings)*, *supra* note 81 at Article 99.

There are, at least, two concrete examples where this approach to the reality of legal pluralism is taking place. First, the Special Jurisdiction has the legal authority to grant amnesties and other legal benefits to former combatants of the armed conflicts.⁹⁰ The recipients of these legal benefits must sign documents by which they commit themselves to honour the *Peace Agreement* by not committing crimes, striving to tell the truth, and offering reparations to their victims.⁹¹ In the case of former combatants who belong to Indigenous communities and Black communities, the SJP has agreed with the authorities of these communities to include – as a part of the former combatants’ commitments to honouring the *Peace Agreement* – their obligation to observe their community duties or responsibilities with the ethnic communities they belong to.⁹² Similarly, the Indigenous and Black communities’ authorities have assumed the responsibility to inform the Special Jurisdiction if these individuals breach their commitment to the *Peace Agreement*. Such a breach could lead to them losing legal benefits such as amenities and having an arrest warrant issued against them.⁹³

The second example of this adaptation process is the resolution of jurisdictional disputes between the Special Jurisdiction and Indigenous legal authorities.⁹⁴ This can occur when the SJP and the Indigenous authorities simultaneously claim to have the legal authority to investigate and prosecute an individual who allegedly committed crimes in the context of the armed conflict.⁹⁵ The legal instruments referred to above and the jurisprudence of the Colombian Constitutional Court have established that the Special Jurisdiction for Peace and the Indigenous authorities need to formally discuss the specific case to try to resolve who has ultimate legal jurisdiction over the particular matter.⁹⁶

⁹⁰ Congress of the Republic of Colombia, *Ley 1820 (Law of amnesty and pardon)*, 2016.

⁹¹ Reinere de los Angeles Jaramillo-Chaverra, “Reflexiones sobre el régimen de condicionalidad en el marco del Acuerdo de Paz” in Danilo Rojas-Betancourth, ed, *La JEP visita por sus jueces (2018-2019)* (Bogotá, Colombia: Special Jurisdiction for Peace, 2020) at 421–436.

⁹² *Resolution SAI-LC-D-ASM-034-2019 (In the matter of Duberney Tróchez Mestizo)*, Special Jurisdiction for Peace at Par. 79-85; *Resolution SAI-SUBA-AOI-D-088-2021 (In the matter of Esnoraldito Patiño-Bonilla, Norberto Ramírez-López, Arley Patiño-Bonilla, y Graciela Narvaez)*, 2021 Special Jurisdiction for Peace at 192–197.

⁹³ *Ley 1957 (Statutory Law for the functioning of the Special Jurisdiction for Peace)*, *supra* note 78 at Articles 20 and 62; TeleSUR, “Colombia’s JEP Orders Capture of Former FARC, ‘El Paisa’”, (2019), online: <<https://www.telesurenglish.net/news/Colombias-JEP-Orders-Capture-of-Former-FARC-El-Paisa-20190427-0012.html>>; Special Jurisdiction for Peace, *Resolution SAI-LC-D-ASM-034-2019 (In the matter of Duberney Tróchez Mestizo)*, *supra* note 92; Special Jurisdiction for Peace, 2021 *Resolution SAI-SUBA-AOI-D-088-2021 (In the matter of Esnoraldito Patiño-Bonilla, Norberto Ramírez-López, Arley Patiño-Bonilla, y Graciela Narvaez)*, *supra* note 92.

⁹⁴ Congress of the Republic of Colombia, *supra* note 69 at Article 9; Colombian Constitutional Court, *Judgement C-674*, 2017, *supra* note 10; Ana María Zuleta Zuleta & Roberto Romero-Cárdenas, “Coordinación entre la JEP y la JEI: rol de las autoridades indígenas en la justicia aplicada durante el posacuerdo” (2020) 19:39 *Opin jurídica* 167–185, online: <<https://revistas.udem.edu.co/index.php/opinion/article/view/3546>>.

⁹⁵ Colombian Constitutional Court, *Judgement T-365*, 2018.

⁹⁶ Congress of the Republic of Colombia, *supra* note 69 at Article 9; Colombian Constitutional Court, *Judgement C-674*, 2017, *supra* note 10; Colombian Constitutional Court, *Judgement T-365*, 2018, *supra* note 95.

If the jurisdictional dispute is not resolved, the case must be sent to the Colombian Constitutional Court for it to render a final decision.⁹⁷ However, the practice indicates that in most cases, the Special Jurisdiction and the Indigenous authorities have resolved jurisdictional disputes. In fact, in May of 2022, the Special Jurisdiction and Indigenous authorities held a joint hearing where nine former FARC-EP combatants who belong to Indigenous communities gave testimonies to provide the truth about their involvement and participation in the armed conflict.⁹⁸

As Lisa Davis has stated, the Colombian case has been recognized as a positive example of the notion of racial and gender intersectionality being enshrined in a peace agreement and a transitional justice process.⁹⁹ Therefore, transitional justice can be conceived as a legal framework that allows for racial justice issues to be debated and developed, as the Colombian experience with strengthening and revitalizing racialized communities' traditional justice practices shows. The Colombian case has established an important precedent for other potential peace agreements in Colombia and elsewhere worldwide. Notably, regarding the administration of justice, one could argue that racial intersectionality needs to acknowledge the existence of long-standing legal practices and traditions by racialized groups in a given society, to strengthen those racialized communities' legal practices.

The Colombian example demonstrates that a fluid and deferential communication and interaction between State legal orders and Indigenous and Black communities' legal authorities can lead to a legal pluralistic strengthening of the rule of law. Indeed, the strengthening of the rule of law in the Colombian context is illustrated by the cooperation between the Special Jurisdiction and the ethnic justice systems to guarantee that, for instance, former combatants who belong to racialized communities fulfill their legal obligations towards the *Peace Agreement* and their respective communities.

Conclusion

The movie “Adaptation” teaches us that adaptation is a profound process with real-life implications. Armed conflicts have real-life implications for societies at large, but for victims in

⁹⁷ Colombian Constitutional Court, *Judgement T-365*, 2018, *supra* note 95.

⁹⁸ Special Jurisdiction for Peace, “La JEP Y la JEI llevaron a cabo la primera diligencia de versión voluntaria colectiva con excombatientes indígenas”, (2022), online: <<https://www.jep.gov.co/443/Sala-de-Prensa/Paginas/La-JEP-y-la-JEI-llevaron-a-cabo-la-primera-diligencia-de-verdad-con-excombatientes-ind%C3%ADgenas.aspx>>.

⁹⁹ Davis, *supra* note 67 at 369.

particular, and societies have to reimagine and reinvent themselves to address the causes and effects of such conflicts. Based on the understanding that the armed conflict has weakened the social fabric and ancestral legal practices of racialized communities, Colombia has developed the first transitional justice legal framework in the world aimed at strengthening and revitalizing the ancestral and traditional legal practices of Indigenous and Black communities. This approach has made Colombia a pioneer of what I call the strengthening and revitalization of racialized legal pluralism in the context of a transitional justice process.

The Colombian experience of the SJP adapting to the realities of legal pluralism and racialized communities has already had important implications at the domestic level by showcasing the possibility that the State legal order as a whole must adopt an approach closer to the one being adopted by the Special Jurisdiction. Although legal pluralism is not dependent on formal recognition, this recognition can strengthen the legal systems of racialized communities, which, at times, operate at the periphery and margins of society. And, in the context of massive violence, the continued existence of those ancestral legal practices can even be at risk, above all in an armed conflict situation where over a million people belonging to racialized communities have been victims of different crimes, including being forcibly displaced from their ancestral territories.¹⁰⁰ Such a massive forced displacement seriously impacts the preservation and continuity of traditional legal practices and traditions.

In the current context of a transitional justice process in Colombia, the recognition of legal pluralism regarding Black communities has allowed these communities to coalesce around the adoption process of the *2021 Protocol for the interaction between Black communities and the SJP*. This has highlighted these communities' resilience and efforts to maintain their ancestral legal traditions while facing challenges and risks to their lives and personal integrity. Importantly, the current transitional justice process has provided an extraordinary opportunity for these communities to come together to nourish and revitalize some of their ancestral practices of justice. I can see the potential for this process to have ramifications beyond the Colombian borders, and to strengthen the arguments by Indigenous communities and Black communities with distinguishable and discernable legal systems, for a legal and/or *de facto* recognition of legal pluralism. This could include Latin-American countries, but even countries such as Canada could explore moving from bijuralism to formal recognition of indigenous

¹⁰⁰ Luis Alberto Arias Barrero, "Indígenas y afrocolombianos en situación de desplazamiento en Bogotá" (2011) 13 Trab Soc 61–76, online: <<https://revistas.unal.edu.co/index.php/tsocial/article/view/28365>>.

legal traditions as an expression of legal pluralism¹⁰¹ as a part of the reconciliation process with indigenous communities. Notwithstanding, special attention needs to be given to the potential risk that Indigenous and Black communities' legal traditions be co-opted and domesticated by State authorities to the detriment of ethnic or racialized communities.

The Special Jurisdiction for Peace and the ethnic authorities have demonstrated that, through interaction and respectful dialogue, it is possible to coordinate actions to strengthen the State court system and ethnic communities' legal orders for society's benefit. Within a legal pluralistic framework, this mutual understanding also means that the legitimacy of ethnic communities' traditional authorities be socially recognized and strengthened instead of being undermined by State authorities.

Therefore, the Colombian transitional justice process has been instrumental in deepening the notion of legal pluralism in practice by acknowledging and treating Indigenous and Black communities' traditional authorities as equals. By making an effort to achieve harmonious cooperation and mutual respect between the SJP and ethnic justice authorities, Colombia is deepening the idea of legal pluralism and advancing human rights standards of non-discrimination and the right of Indigenous and tribal people "to retain their own customs and institutions," as envisioned in Article 8 of the ILO's 1989 *Convention*.

Within Colombia, at least since 2018, other State judicial authorities have started to undertake measures to establish similar dynamics of interaction and coordination with ethnic authorities.¹⁰² This shows that the realization of legal pluralism is a vehicle that has no reverse. I consider that the work with the SPJ will continue empowering Indigenous and Black communities' authorities to demand that other State courts live up to the promise of legal pluralism. Simultaneously, the SPJ's willingness and openness to interact with Indigenous and Black communities' traditional authorities within a legal pluralist framework can inspire other State legal authorities to follow that good practice to further *de facto* legal pluralism in Colombia. The SPJ can be seen as a catalyst for fostering bottom-up legal pluralism in Colombia, the observance of international law obligations to guarantee that ethnic or racial minority groups enjoy their recognized human rights, and as an example for the world of legal

¹⁰¹ Bell, *supra* note 49 at 316.

¹⁰² Misión de Apoyo al Proceso de Paz en Colombia (MAPP-OEA), "Especial: Retos actuales entre la justicia indígena y la justicia ordinaria", (2018), online: <<https://www.mapp-oea.org/especial-retos-actuales-entre-la-justicia-indigena-y-la-justicia-ordinaria/>>.

pluralism good practices. Still, it remains to be seen the scope of how deep, transformational, and beneficial this effort to further legal pluralism within the context of a temporary transitional justice process¹⁰³ can be in the long term. But the current efforts give me cause to hope for a future in which legal pluralism is not a formal declaration but a true feature of the administration of justice in Colombia.

In conclusion, I believe that the Colombian context of transitional justice offers a unique paradigm that allows for the understanding that, even if not necessary in theory, State recognition of legal pluralism for racialized communities, who have been disproportionately impacted by armed conflicts, can be catalytic to strengthen and revitalize those communities' ancestral legal practices that have been undermined by such situations of violence.

¹⁰³ Colombian Constitutional Court, *Judgement C-674*, 2017, *supra* note 10.