INDIGENOUS PEOPLES' PARTICIPATION IN TRANSITIONAL JUSTICE – OPPORTUNITY FOR CHANGE?

Lessons from Colombia

ACRONYMS

ANT	National Land Agency
ARN	Reincorporation and Normalisation Agency
ART	Territorial Renewal Agency
CEJ	Collective Ethnic Justice
CEV	Commission for the Clarification of Truth, Coexistence and Non-Recurrence
CIV	International Verification Component
CONPES	National Council on Social and Economic Policy
CSIVI	Commission for Monitoring, Promoting and Verifying the Implementation of the Final Agreement
CSO	Civil Society Organisation
DANE	National Administrative Department of Statistics
ELN	National Liberation Army
EPL	People's Liberation Army
FARC-EP	Revolutionary Armed Forces of Colombia
MPC	Permanent Forum for Concertation with Indigenous Peoples
OHCHR	Office of the United Nations High Commissioner for Human Rights
ONIC	National Indigenous Organisation of Colombia
PDET	Development Plans with Territorial Focus
PMI	Framework Plan for Implementation
PNIS	National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes
RRI	Comprehensive Rural Reform
RUV	Unique Victims Register
SIVJRNR	Comprehensive System for Truth, Justice, Reparations and Guarantees for Non-Recurrence
UARIV	Unit for Attention and Comprehensive Reparations to Victims
UBPD	Special Unit for the Search for Persons Deemed as Missing in Context of and Due to the Armed Conflict
UN	United Nations
URT	Land Restitution Unit
WHO	World Health Organisation
WPS	Women, Peace and Security
ZVTN	Transitional Local Zones for Normalisation

CONTENT

"Count on us for peace, never for war"

National Indigenous Organisation of Colombia (ONIC).

EXECUTIVE SUMMARY

The present study elaborates on participation of indigenous peoples in transitional justice processes, with the aim of understanding if and how these processes can serve as a vehicle for advancing the effective rights of indigenous peoples in a given territory. The ongoing transitional justice process in Colombia – product of the 2016 peace accords between the FARC-EP and the Colombian Government – is studied in order to better understand the dynamics and possibilities presented within the framework of a current process. As a guiding framework for analysis, a model product of a symposium hosted by the International Centre for Transitional Justice, is used.

Looking at the Colombian context, stakeholders of different kinds all agree that indigenous peoples and other ethnic minorities have suffered disproportionally by the conflict – both when it comes to direct effects of the conflict as well as the more indirect. As a consequence of these affections, as well as other factors, at least about half of the more than one hundred indigenous peoples in Colombia, face the risk of extinction. The study presents a number of proof pointing to the fact that the Colombian State has been unable to protect indigenous peoples, but what is worse, it also finds overwhelming evidence pointing to the unwillingness of the State to protect the peoples.

Indigenous peoples have been victims of a number of negative factors directly and indirectly caused by the conflict, including but not exhausting: killings and massacres, forced recruitment, false positives and forced disappearances, threats, forced displacement, confinement, sexual violence, child recruitment and land grabbing. Apart from these factors of the armed conflict they also struggle with other conflicts which in some cases are aggravated by the internal armed conflict, including megaprojects, legal and illegal mining and logging, agro-industry, drug production and trafficking, and colonisers. In addition to this, their survival is also dependent on the management and adaptation to global phenomena such as climate change and pandemics – as at the time of writing – the COVID-19.

As for violent conflicts, peoples also suffer from the on-going conflicts with the remaining guerrilla groups – ELN and EPL, neo-paramilitary forces, FARC-EP dissidents and criminal gangs. All boils down to a picture including multiple conflicts affecting the wellbeing and survival of peoples – some directly derived from the armed conflicts, some indirectly and aggravated by the conflicts, and still some of other nature. Considering this complex context, what can a transitional justice process stemming from a peace agreement with one of the actors – FARC-EP – mean for the advancement of indigenous peoples' rights in Colombia?

Firstly, while the peace negotiations lacked the involvement of ethnic minorities until the very last moment, when the Ethnic chapter was included, the system created for the transitional justice process counts with the elements and structures for an inclusive and culturally adapted process. The Comprehensive System for Truth, Justice, Reparations and Non-Recurrence (SIVJRNR) by means of its three institutions; the Commission for Truth, Coexistence and Non-Recurrence (CEV); the Special Jurisdiction for Peace (JEP); and the Special Unit for the Search for Persons Deemed as Missing in the Context of and Due to the Armed Conflict (UBPD); all most certainly will make important contributions to the satisfaction of the right to truth, justice and reparations for indigenous peoples and individuals belonging to the peoples. The question is whether they can contribute to a transformative type of transitional justice, advancing the respect for the rights of indigenous peoples in Colombia?

Supposing that the implementation of the SIVJRNR follows the path taken during its inception phase, the possibilities for the Colombian process to be transformative in regards to indigenous peoples' rights should be promising, relying on the accuracy of the ICTJ recommendations. However, not only the SIVJRNR is decisive in this respect – also other programmes and institutions, as for example the land restitution

programme, the reincorporation programme, the Development Plans with Territorial Focus, the Program for Substitution of Illegal Crops, and the Comprehensive Rural Reform – will have implications for the realisation of indigenous peoples' rights. And, maybe above all, the security situation in the territories is decisive, affecting the wellbeing of indigenous peoples, threatened by legal and illegal activities that continue and even accelerate in the post peace-accords era in the form of extractive industries, agri-business, colonisation by small farmers, drug production and trafficking, illegal armed groups and criminal gangs; causing displacement, confinement, land grabbing, killings and other human rights violations, leading to a veritable ethnocide or cultural genocide and in some cases ethnic cleansing of indigenous peoples.

One of many challenges in the Colombian case is the large number of indigenous peoples. The process is of course made more manageable through the interaction with organisations that represent several or even a large number of peoples, such as in the case of the National Indigenous Organisation of Colombia (ONIC). However, it seems reasonable to be concerned whether the peoples that are smaller in numbers and at the verge of being extinct, have a say and real influence. ONIC claims to represent these peoples and in effect draws attention to the special situation faced by them, but still, in a process like this, it must be of great importance seeing to that not only the stronger peoples are heard and benefit from the process, but also the ones lacking resources and their own political platform. Otherwise the process risk worsening inequalities and dividends between peoples.

While the research framework rightfully points to the importance of respecting indigenous peoples' representative institutions, it might be valuable to keep in mind the basic principles of a human rights-based approach, including participation, non-discrimination, empowerment and transparency.

The question whether indigenous peoples' participation in transitional justice represents an opportunity for change is not easily answered, and the answer will necessarily vary from one case to the other. Further, this case study is made relating to transition from an internal armed conflict, why the question is how much can be translated to a situation where the transition at hand is one of authoritarian rule to democracy or from colonisation to self-determination and self-governance. The Colombian peace and transitional justice process complies to a large degree with the conditions set forth in the research framework, conditions that are supposed to give fertile ground for the participation of indigenous peoples and for advancing indigenous peoples' rights. The exception is the peace negotiations process where indigenous peoples were invited only at the very last moment.

Now, what would be reasonable and achievable looking at the context and its different actors? Although it would be important to disclose and make widely known all injustices committed by the Spanish Crown during colonial times – especially less known practices – maybe from a justice perspective it would be wiser and more reasonable to focus on more recent times, say from the independence from Spain. This would probably also make for better chances in terms of justice as it would be possible to claim the continuity of the Colombian State from that point in time. Nevertheless, the mandate of the Colombian Truth Commission does not go as far back as independence from Spain, it does however cover a relatively wide time-frame within which there should be a good potential for finding and exposing the patterns of gross human rights violations and serious infractions of international humanitarian law, committed against indigenous peoples, albeit only in the context of the internal armed conflict. The findings could be used as an advocacy resource for indigenous peoples at a more general level. When it comes to the JEP, cases will probably be of more recent nature, but on the other hand provide more detailed evidence on specific events and situations compared to the Truth Commission.

Looking outside of the SIVJRNR, there are also other mechanisms with potential to advancing indigenous peoples' rights on the ground. The land restitution programme is such a component having the potential of securing much needed land rights for the peoples. However, the capacity shortage for its implementation needs to be addressed for effective change on the ground. Other components include the Development Plans with Territorial Focus, the National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes and the Comprehensive Rural Reform – also these facing difficulties of adequate implementation, especially in relation to indigenous peoples.

Reflecting on the genuinely disturbing conditions for the incredibly rich variety of indigenous peoples living within and across Colombian national borders, it might actually be an advantage to concentrate efforts on disclosing the recent history of injustices, including on-going injustices. This since resolving a situation where the majority of peoples face serious threats of being extinguished as peoples, cultures and individuals, needs urgent attention, resources and effective action from the Colombian Government and its branches.

Looking at the scope of justice that can be expected from the SIVJRNR in terms of collective justice for indigenous peoples, the aim of justice within the framework of JEP is to be restorative – i.e. to repair what was broken through the conflict. What we can expect is for truth to be delivered at a more general level by the Truth Commission while the JEP will bring clarity on collective and individual cases, including sanctions and reparations. Thus we can expect truth, justice and reparations. However for the system in itself to be transformative in terms of indigenous peoples' rights might be hoping for much. It definitely can lay a fertile ground and provide tools that can be used for carving out those rights in a transformative manner in the near future. Then, of course, as pointed out in the previous section, several of the components laying outside of the SIVJRNR, but being part of the package resulting from the peace accords, are important building blocks for the realisation of indigenous peoples' rights on the ground.

Perhaps the most important aspect for bringing transformative justice to the indigenous peoples of Colombia is converting words into action. The Colombian State and its branches has a mediocre record when it comes to make effective the promotion, protection and implementation of indigenous peoples' rights. The right to life and survival is a central and basic part of all human rights covenants which is not being guaranteed by the Colombian state in relation to indigenous peoples, as has been shown and continuously criticised by the Colombian Constitutional Court. Moreover, indigenous organisations witness the generally poor implementation record of agreements made with the State and the excessive responding time by different government agencies, due to lack of resources and specialised knowledge on indigenous peoples, which makes implementation slow and inadequate.

In general, it is striking how the peace accords have been praised for their focus on the territories, gender approach and focus on ethnic groups, and how at the same time, these parts of the accords are lagging behind in terms of implementation.

Essential for a transformative process to take place – and even for a restorative process to thrive – is the effective non-recurrence of past events and avoiding re-lapsing into conflict. Unfortunately, apart from the fact that the internal armed conflict is only one of the multidimensional conflicts that indigenous peoples of Colombia face, if not re-lapsing into conflict, at least the conflict is transforming, involving other patterns and actors. The security situation for human rights defenders and indigenous peoples' leaders has been aggravated after the signing of the peace accords as the vacuum left by the FARC-EP is claimed by other armed groups. In some cases the vacuum created means access to geographic areas rich in natural resources which also attract other actors – both legal and illegal – leaving the indigenous peoples with many fronts to cover. From this perspective – interpreting the provision of non-recurrence in a wider manner – recurrence, even if not being a carbon copy of the past, is already happening in certain contexts. All the above is of course dependant on the

exact reality of each people and location just as it has been before – not all peoples were affected in the same manner and magnitude by the internal armed conflict.

For transitional justice to contribute to a transformative process when it comes to indigenous peoples' rights, the strengthening of indigenous peoples' organisations and the movement as a whole, can be an important result of the transitional justice process, as seen in Guatemala.

Looking at reconciliation as a part of non-recurrence, a common way of interpreting the reconciliation part of a truth commission is the re-establishing of trust between citizens and between citizens and the State as well as the repairing of national unity and identity. However, while reconciliation is an important goal, it should not mean the strengthening of a particular national identity at the expense of others. This would, apart from ignoring the right for indigenous peoples to define their own nationhood as provided by the UN Declaration on Indigenous Peoples, also ignore the fact that many conflicts stem from and develop patterns of ethnic dominance and failure to embrace a multi-ethnic environment. Instead of a mono-national reconciliation, there is a need for a multi-national, multi-cultural and multi-ethnic reconciliation approach, which requires dialogue across these dimensions. In the Colombian case, the transitional justice system makes a serious attempt to include a differentiated approach also in relation to reconciliation, however, this process must be wider than the transitional justice system, longer in time and transformative in order to ensure a multi-national, multi-cultural and multi-ethnic reconciliation and the building of a platform for co-existence which embraces the multi-national, multi-cultural and multi-ethnic dimensions.

Just a few concluding words on the potential of transitional justice to be transformative. No doubt transitional justice should aim at reaching beyond its restorative basis and nature. But, how much can we expect from transitional justice itself? Looking at the Colombian process and its different components, what can be expected from these is mostly restorative measures, although some of these might have effects that to a certain extent change the life of individuals and collectives. The Truth Commission will deliver truth, the JEP will deliver truth, verdicts, sanctions and reparations and the UBPD will deliver the right for relatives to know the truth about the fate of their loved ones and the right to care for their remains. Moreover, the framework provides for victims to be at the centre of these processes and non-recurrence is the overarching goal. However, to what degree can we expect this process to amount to a level of being transformative? Perhaps it is not from the proper SIVJRNR that we can expect transformative justice but rather the long-term use of its products and the processes that are connected to and inspired by the SIVJRNR and the implementation of the peace accords that can add up to transformative justice. As elaborated upon above, several components of the peace accords and on-going processes originating from the demobilisation of the paramilitary, also add to restitution and hopefully also to a transformative process of Colombian society.

So, can transitional justice in itself be transformative? It all boils down to a question of where and when transitional justice starts and ends. The transition from armed conflict to peace or from authoritarian rule to democracy in itself must be said to be of transformative nature and certainly needs to be transformative also in its different parts and details in order to be sustainable. It entails processes that pertains to the proper transitional justice process but can also include other processes, for example those provided by a peace treaty. This while the seeds sown in a transitional justice process, also have been known to grow and prosper long after the official process ends, nurtured by the fertilisers produced by the process and the rain that suddenly make them grow and give fruit. Turning to indigenous peoples, to say that transitional justice processes so far to any significant degree have been transformative, would be to say too much. Transformative processes include so much more than a verdict on gross human rights violations against indigenous peoples and non-repetition of the past. It means changing structures and creating opportunities, ensuring that the new generations of indigenous peoples can lead a life in

peace, counting on the full enjoyment of rights and freedoms as peoples and individuals. It means the recognition of ways of life, not only on paper, but in practice. And it means turning the development of peoples slowly dying, to creating the preconditions for cultures to flourish. The potential is there for transitional justice processes to – at least – serve as tools that can be used for advocating change in this direction.

INTRODUCTION

The nexus between human rights and peace and security occupies a central position in the work of the Swedish Foundation for Human Rights, as one of its pillars is the redress for grave human rights violations and transitional justice. This work has been realised during many years of interaction with the Inter-American System for Human Rights as well as through supporting partner organisations in Latin America and other regions. The present study is a continuation of this work – taking stock of accumulated experience from transitional justice and from working with partners in Colombia.

The study aims at filling a vacuum related to the effective use of transitional justice in advancing and assuring the rights of indigenous peoples. It takes stock of some work already done in the area while studying an ongoing process – the transitional justice process in Colombia.

At the global level, during the process of writing, the UN Expert Mechanism on the Rights of Indigenous Peoples, released a report on best practice and lessons learned regarding recognition, reparation and reconciliation initiatives.[1]

On a more general level, the UN Peacebuilding Architecture Review is planned to be submitted to the General Assembly and the Security Council in 2020. This coincides with 2020 marking the 20th anniversary of the adoption of the United Nations Security Council Resolution 1325 (UNSCR 1325) which champions women's involvement in peace and security. Additionally, in 2020, the UN Secretary General is planning to report on the progress made by UN Member States, regional organisations, civil society and youth-led organisations, on increasing youth inclusion in peacebuilding.

In a wider perspective, the Agenda 2030 through its Sustainable Development Goal 16 "Peace, justice and strong institutions" makes for a clear nexus between human rights and peace and security.

Hopefully, this study brings some important contributions to the general question of how to best involve indigenous peoples in transitional justice processes as well as to how these processes can serve to advance and secure the rights of indigenous peoples. This while also shedding light on the different aspects of the situation of indigenous peoples in Colombia and their interaction with the ongoing transitional justice process.

RESEARCH FRAMEWORK

Background and previous research

The research framework applied in the present paper was inspired by previous work done by the International Center for Transitional Justice (ICTJ) available in their publication "Strengthening Indigenous Rights through Truth Commissions". This publication was the result of a workshop held in 2011, counting the participation of prominent practitioners, scholars and activists in the field. One of the outputs of the workshop was a set of recommendations on how truth commissions could better address indigenous experiences and better serve their rights. This is one of few research efforts that have been broadly publicised on the subject matter. The objective of this paper is not to test the model but to use it as a tool for analysis of the transitional justice process in Colombia, placing indigenous peoples' rights at the centre of analysis. For practical and budgetary reasons this is a desk-study, with the limitations such an approach entails, including the lack of first-hand information and opinions from representatives of the different peoples. As a measure to include as much as possible, an indigenous peoples' perspective, written materials produced by the peoples have been used as sources. Further, acknowledging the weakness of not counting with indigenous peoples' voices, the focus is rather an *indigenous peoples' rights perspective* than a perspective departing from the views of indigenous peoples. At the initial stages of the research process some interviews with key persons knowledgeable of the process were made, in order to direct the study.

The framework outlined by ICTJ addresses the broad areas to take into consideration specifically for truth commissions, however the current paper is based on the assumption that these areas of consideration are valid also for the other components of transitional justice and for the negotiation of peace accords. There might be some variations in terms of areas of consideration and their applicability in all components of the transitional

justice framework. However, the general assumption made here is that they serve as a tool for analysing each component of the framework and provided that one can easily foresee that what goes for securing the better address of indigenous experiences and rights in the design of and implementation of truth commissions' work also goes for the negotiation of peace accords and for securing the right to justice, reparations and non-recurrence. During the research phase, the UN Expert Mechanism on the Rights of Indigenous Peoples released a report examining the good practices and lessons learned regarding the efforts to achieve the ends of the UN Declaration on the Rights of Indigenous Peoples, focusing on recognition, reparation and reconciliation initiatives. The findings of this more recent report is very much in line with and supports the ICTJ framework.[2]

The framework

Transitional justice

ICTJ: *"Transitional justice measures have potential to help realize the rights of indigenous peoples, but to do so, some assumptions must be rethought."*[3]

Rethinking the work of truth commissions, ICTJ came up with a set of broad areas for consideration when engaging in indigenous peoples' rights. In order to comply with these, truth commissions need to:

- go beyond the state-centric view of transitional justice;
- go beyond an individualistic form of analysis;
- go beyond recent violations; and
- go beyond archival and written sources.

On a second level, ICTJ states that "truth commissions should involve indigenous peoples at all stages. Some areas that could be examined include:

- ensuring consultation to obtain free, prior and informed consent;
- respecting indigenous peoples' representative institutions;
- providing attention to the specific needs of indigenous witnesses."

These two levels of recommendations are used as the model for analysing and explaining the case study on Colombia.

Defining the conflict

Rodríguez and Lam, in the same ICTJ-publication, examine the concept of collective ethnic justice (CEJ) as compared to transitional justice and social justice. The authors hold that "collective ethnic justice is especially significant for addressing violations of indigenous peoples' rights to territory, land, and resources during conflicts and in contexts of transition".[4] This since frequently "…indigenous groups' rights to territory, land and resources have been affected not only by illegal groups, but also by a set of complex hybrid factors, which include activities that are legally endorsed by the state". Besides this, the State itself might incur in such activities as in the case of mega-projects or fumigation of illicit crops.[5] Furthermore, the authors state that "The overarching objective of CEJ is to use the past to understand and assess the present situation, in order to formulate measures to guarantee rights in the future."[6]

Rodríguez and Lam find two main differences and one overlapping characteristic between CEJ and transitional justice:[7]

- CEJ, in contrast to transitional justice seeks to compensate for historic violations of human rights that generated current inequalities among ethnic groups.
- CEJ, as opposed to transitional justice seeks to *transform* rather than *restore* the historical relationships between ethnic groups. It looks towards the future.
- The concepts overlap in the interest in repairing the harms caused by forced displacement and dispossession of collective territories as a result of the *recent past*.

For the present analysis this model is helpful in two ways:

1. The notion that for transitional justice to be fully beneficial to indigenous peoples it needs to strive to be transformative.
2. In order to analyse the conflict from indigenous peoples' perspective we need to take into count both legal and illegal origins of violations, while applying a perspective that is historic as well as recent.

However, even though the essence of (traditional) transitional justice is restorative, there are elements that can be considered transformative. One is institutional reform which not necessarily only aims at returning to a functioning system of institutions at a given time in the past but looks at best possible system fit for today. Another is the component of non-recurrence which necessarily needs to aim at transformation in order to be effective. One could also think of agrarian reform in the context of transitional justice that goes well beyond re-claiming land lost during the conflict, as a transformative measure[8]. In line with this, Rodríguez and Lam also noted a certain shift in transitional justice trends, moving towards the CEJ framework.[9]

THE INTERNAL ARMED CONFLICT FROM AN INDIGENOUS PEOPLES' RIGHTS PERSPECTIVE

Indigenous peoples in Colombia

Colombia is one of the richest countries in the world when it comes to ethnic diversity, counting indigenous peoples, afro-Colombians, palenqueros, raizales, and roma. Colombia counts more than a hundred different peoples, encompassing a great variety of cultures, languages, social structures and ways of life. Some are larger and some smaller – the majority of them facing the risk of ethnic and cultural extinction. Since the previous general census in 2005, there has been some controversy over how many peoples actually exist – partly due to different standards, partly as a result of what seems to be inconsistency among Government branches. The National Indigenous Organisation of Colombia (ONIC) has been recognising 102 peoples – only 87 of them were recognised by the State while 12 were recognised by indigenous organisations and another 3 by means of auto-recognition. [10]

Returning to the State's recognition of peoples, its different branches has historically recognised different numbers of nations. As an example of inconsistency, the Ministry of Culture in one document recognised 81 indigenous peoples while in another document 93 peoples were recognised (referring to the same 2005 census). This while the National Planning Department recognised 84 peoples (still referring to the 2005 census).[11] Thus, it is easy to conclude that when different actors refer to "indigenous peoples" we cannot be sure which of the by ONIC recognised 102 nations are included. Even ONIC has not been totally consistent on the matter – they themselves admitting having used different numbers in different publications even though overall there is a logic relating to an increase in numbers over time.[12] Besides counting contacted peoples it also seems reasonable to assume that there still are some peoples

who are not in contact with the outside world. Interestingly enough, the Government agency for victims of the armed conflict – the Victims' Unit – notes that the 2005 census recognised 87 nations but itself establishes the existence of 102 nations as of today[13]. However, what is Government policy and not, is hard to tell. Hopefully, the 2018 census can somewhat change the picture and contribute to a more comprehensive Government policy in terms of the recognition of indigenous peoples.

In the general census of 2005, 87 nations were recognised and the indigenous population total was set to 3.4 per cent of national population. This equals close to 1.4 million individuals auto- identified as indigenous people. According to the same census, 27 per cent of the indigenous population didn't have access to collective lands in form of indigenous reservations.[14]

The 2018 census recognises 115 peoples[15] – the addition corresponds to the inclusion of more ethnic groups and peoples living across national borders. Adding to the confusion on the 2005 survey, DANE holds that 93 peoples were recognised at that point in time. Nevertheless, the new census counts 1.9 million individuals auto-identified as indigenous people which makes for a 4.4 per cent share of total national population – up one per cent from 2005. This means an increase by 37 per cent of individuals auto-identified as indigenous. The change cannot be explained only by fecundity – DANE estimates that the change also has to do with increased coverage of indigenous territories in the 2018 census as well as an increased will to auto-identify as belonging to an indigenous people.

Turning to geography, indigenous population is present in all of Colombia's 32 departments even though concentration varies greatly. According to the 2018 census, the ones counting the highest concentration of indigenous people are: Vaupés (82 per cent), Guainía (75 per cent), Vichada (58 per cent), Amazonas (58 per cent), La Guajira (48 per cent), Cauca (25 per cent) and Putumayo (18 per cent). This while the departments of La Guajira, Cauca, Nariño, and Córdoba, account for 58 per cent of total indigenous population.

Looking at the different peoples, the four most populous peoples – Wayuu, Zenú, Nasa and Pastos – concentrate 58 per cent of total indigenous population in Colombia. This while looking at the other end, the census finds 50 peoples counting less than a thousand individuals, 34 counting less than five hundred and 26 counting less than two hundred individuals. Added to this the three peoples in voluntary isolation – Yuri, Passe and Jurumi – which also might count less than a thousand or even fewer members. [16] Comparing data for the different peoples between the census of 2005 and the 2018 census – as in the case of the difference recorded in terms of the total indigenous population between the two years – data for each people in quite a few cases vary greatly. As a result of this, one has to question to what extent data give a true picture of the membership of each people. There is reason to believe that data of the 2018 census give a better picture compared to the 2005 census but data should probably still be used with care and be interpreted at an individual level.

Impact of the armed conflict on indigenous peoples

After more than half a century of internal armed conflict, the Colombian Government and the FARC-EP guerrilla signed a peace treaty in 2016 which includes agreements on measures of transitional justice. This followed about ten years after the demobilisation of the paramilitary groups under the umbrella of the United Self-Defence Forces of Colombia (AUC) and leaves the remnant National Liberation Army (ELN) guerrilla a process to solve. This while offspring to the AUC – new paramilitary groups and criminal gangs – and pockets of non-demobilised FARC-EP-members and deserters of the peace process, constitute a real and growing threat to peace and security. Unfortunately more former FARC-EP combatants might leave the process as numerous attacks against reintegrated combatants had caused the death of around 85 ex-FARC-EP members until the end of 2018[17]. In August 2019, two senior FARC commanders who participated in the peace negotiations in Havana decided to take up arms again, allegedly as a result of the non-compliance with the peace

accords on part of the Government. Of the two, Iván Márquez was the one leading the FARC peace negotiations and Jesús Santrich assisted.

The internal armed conflict has caused over 280,000 deaths, more than seven million internally displaced persons, half a million refugees and people in exile around the world, 84,000 missing persons, 37,000 abductees, 15,000 victims of sexual and gender based violence, and 9,000 victims of land mines, among others.[18]

Indigenous peoples have been severely affected in a number of ways – some of them directly impacted and others indirectly – i.e. aggravating threats not directly pertaining to the armed conflict itself. The Constitutional Court in its Order 004 of 2009, found that the country's internal armed conflict disproportionately affected indigenous peoples and endangered their physical and cultural survival. It identified three types of factors responsible for the disintegration, extermination and forced displacement of the indigenous population: (i) factors directly related to the conflict, for example, militarisation or armed confrontations occurring within indigenous territories, massacres, and false charges of rebellion or terrorism brought against indigenous people; (ii) factors related to the conflict but not directly caused by it, as in the cases of territorial dispossession caused by economic actors, acting illegally or legally, interested in the land's natural resources or other actors interested in the territory's strategic location; and finally, (iii) factors that are aggravated by the conflict and that increase vulnerability, such as poverty.

The Court emphasised that forced displacement has especially devastating consequences not only for the individual, but also for the indigenous group. The change of environment, conditions of poverty, and threats to the group's leaders that often accompany forced displacement, all contribute to the cultural, social and physical destruction of indigenous peoples. The Court further found that the Colombian Government's response to this situation was inadequate, being restricted mostly to the expedition of norms, documents and other statements that were seldom applied in practice.

The Court decreed two principal measures:

1. With the participation of the indigenous organisations, the Government should design a Program of Guarantees, directed at attending all displaced indigenous persons and preventing further acts of forced displacement. The Government should also determine a timeline for the Program's implementation and follow-up.
2. The Government was ordered to design and implement a Plan for Ethnic Preservation and Protection (Planes de Salvaguarda Etnica) for each of the 34 indigenous peoples identified by the Court to be in serious danger of extinction. These individual Plans should be agreed upon with the corresponding indigenous group and include mechanisms for strengthening territorial rights and cultural integrity, among other aspects. Later on, the constitutional court added 2 more indigenous peoples to the list – making for a total of 36 peoples in serious danger of extinction.

However, also here opinions vary on the numbers – ONIC in 2010 announced a total of 64 peoples in serious danger of extinction – parting from the fact that there were some 30 more nations that count less than five hundred members – most of them concentrated to Amazonia and Orinoquía. Of these, 18 counted less than two hundred members and 10 less than a hundred members. In their report to the third Universal Periodic Review (UPR) of Colombia in 2018, ONIC claimed 65 people in risk of physical and cultural extinction. According to the Government agency for victims of the armed conflict, 46 peoples count less than a thousand members, 32 less than five hundred and 18 less than a hundred.[19] Finally, according to the 2018 census, 50 peoples count less than a thousand individuals, 34 peoples less than five hundred and 26 less than two hundred.[20] In conclusion, no matter what source used or what the exact reality looks like, at least about half of the today known and existing indigenous peoples of Colombia face serious threats of being extinguished as peoples, cultures and individuals. Elaborating on this fact, even though the requisites for genocide would not be met, what is occurring and has been going on for a long time, is a form of ethnocide or cultural genocide and in some cases ethnic cleansing,

which could be interpreted as a slow version of genocide – having much the same effect for the ethnic group and the individuals belonging to it.[21] Even though, in most cases, there is no actor actively targeting the ethnic group in order to extinguish it, adding all negative impact of different actors add up to this situation. In addition, the State has not been able or willing to protect the indigenous peoples from the different threats leading up to this precarious situation.

Among the more than 8 million victims inscribed in the Unique Victims Register (RUV) some 186,000 or 2.3 per cent identify themselves as indigenous people. Of these, it's striking that 97 per cent of indigenous victims suffered displacement while the figure of the total victims' population in this category is 86 per cent.[22] More than 60 per cent of displacements are connected to areas important for mining, agriculture and other economic projects.[23] As of 2010, while indigenous peoples made up around 3.4 per cent of the population, they accounted for 7 per cent of Colombia's total displaced population.[24]

When it comes to indigenous women, the armed conflict affected them differently from men in two important ways: women experienced higher levels of sexual violence and displacement. Sexual violence, including rape, forced prostitution, involuntary pregnancies and forced abortions was common in areas counting presence of the different armed actors. Women and girls subject to sexual violence often suffered stigmatisation and rejection from their communities, which in some cases led them to move to other regions. Internal displacement also added to insecurity and vulnerability of indigenous women and forced them to perform different roles from what they were used to. The links to their culture were ruptured and they also lost the connection to their traditional lands. The two are closely interlinked as most indigenous customs are practiced in relation to the territory.[25]

Amnesty International, in a 2010 report, concluded that indigenous communities continued to suffer from killings, kidnappings, enforced disappearances, threats, recruitment of minors and forced displacement. This while the restrictions on freedom of movement imposed by the conflict also had severe effects on indigenous peoples. Entire communities being confined, unable to access supplies and medical care due to fighting and the planting of landmines by armed groups. Furthermore, access to food and medicines was blocked by warring parties, arguing that the goods would be destined for the enemy. Fighting also affected access to fishing, hunting, gathering and agricultural activities, leading to food shortage and malnutrition. Moreover, all warrying parties occupied schools and used them as military bases.[26]

Leaders have been targets of attacks, sometimes in order to terrorise the local population and make them flee the area, sometimes in reprisal for communities' refusal to become involved in the conflict, or for reporting abuses or seeking justice. In other cases attacks were made in order to stop efforts to campaign for land rights. All with the aim to silence indigenous leaders and their efforts to secure and advance indigenous peoples' rights. As an example, in 2008, paramilitary groups declared indigenous peoples in the Cauca department as "military targets". Also the Government has been responsible for putting indigenous leaders at risk by accusing them of having links to the guerrillas. An example of this was the 2008 Minga – during which the Government sought to undermine the protests by claiming that the FARC-EP had infiltrated the march. Such accusations have often lead to the killing of leaders by paramilitary groups. Also the FARC-EP has killed indigenous leaders, accusing them for collaborating with Government or paramilitary forces. In conclusion, indigenous peoples and their leaders have been caught between the different combatants parties, suffering attacks on the right to life, livelihood and culture, among other rights.[27]

As further discussed below, these different forms of negative impact on indigenous peoples and their possibilities to self-determination, preservation of culture and survival as individuals and collectives have not ceased after the peace accords. Some negative impacts remain quite the same, while some have changed in terms of exact characteristics and others in terms of actors responsible.

Impact of the wider conflict on indigenous peoples' rights

Land rights and free prior and informed consent

A key element for indigenous peoples' survival is access to ancestral lands. Land is a physical resource that secures livelihood in terms of food, supplies and living – but it's so much more than that. The spiritual and historical connection to land is equally important. The peoples have been guardians of their lands and possess unique knowledge of it after having lived in harmony with nature for centuries. Where outsiders only see wetlands, forest or desert, indigenous peoples see ancestral burial grounds, holy places and the signs of mother earth. This is why land is at the heart of cultures and why access to land is essential in securing the survival of peoples.

In the Colombian context, as in other parts of Latin America, land disputes began after the arrival and establishment of European settlements. In general, more remote areas – thanks to geography and difficult access – were protected for longer time. This is to say that the indigenous peoples' conflict with the Colombian state and its citizens began already five hundred years ago. The conflict with citizens typically stems from invading and colonising ancestral lands while the conflict with the State stems from facilitating colonisation and failing to protect indigenous lands and rights, while also itself taking indigenous lands into use for its own projects.

On the legal side, there are a number of examples of how the right to free, prior and informed consent contained in the UN Declaration on the Rights of Indigenous Peoples, is not adhered to or that the processes do not live up to standards. Additional to this, lately decisions taken in favour of ethnic groups when it comes to concessions for extractive industry, are being challenged by foreign companies, using free-trade agreements arguments.

On the other side, illegal logging, mining, farming, drug production and trafficking all add to the problem, whether performed by individuals or at bigger scale through criminal gangs, paramilitary forces or guerrillas.

The Office of the UN High Commissioner for Human Rights in their 2019 report on Colombia concluded that:

"Guaranteeing the right to free, prior and informed consent for indigenous peoples and Afro-Colombian communities remained a challenge, in particular as the implementation of the relevant procedures of the Ministry of Interior did not meet international standards. […] Illegal economic activities of criminal groups and other violent groups negatively affected the use of traditional lands."[28]

Both legal and illegal initiatives threaten land and livelihood, while also, as another negative factor, creating the need for indigenous peoples to devote considerable resources in order to defend themselves and their territories. In either case, defence often leads to threats and killings of indigenous peoples and their leaders and to forced displacement of individuals and collectives.

Discrimination

Discrimination against indigenous peoples and ethnic minorities is structural, widespread and has a long history. One consequence is the large disparities in terms of health indicators between the general population and indigenous peoples. Child and maternal mortality rates are higher among indigenous peoples as well as for afro-descendants.[29] The same goes for literacy rate which is lower among indigenous peoples than the other ethnic minorities, which in turn show lower rates than the general population.[30]

Discrimination is rooted in the historical exclusion of indigenous peoples in terms of political, legal and cultural recognition. The formal barriers to participation include the institutional impediments to political

participation, and limited financial resources and capacity building support directed at indigenous peoples. This while the political culture does not allow for full participation of indigenous leaders and communities in the formal political system. Lastly, communities' access to formal education and economic systems is also limited, adding to poverty and restraining development.

Indigenous women face multiple forms of discrimination, including at the customary level as well as at the national and local levels. This ongoing discrimination has been challenging for women wanting to play a role in conflict prevention, political debate and in the governance and monitoring processes after the peace accords. Indigenous women are also especially vulnerable when it comes to access to legal systems, healthcare and psychological support for survivors of conflict-related violence. State institutions are not equipped to ensure adequate support to indigenous women. In 2008 the Constitutional Court in its Auto 092 acknowledged sexual violence against women as a widespread systematic and invisible practice within the framework of the armed conflict. This while also recognising that indigenous women are subject to a number of gender-specific risks. However, in line with other formal measures, this ruling has not lead to any substantial change for indigenous women on the ground, experiencing violence and displacement.

The level of impunity for conflict-related violence is high – many indigenous victims choose not to report to the authorities out of fear for retaliation from armed groups and for lack of confidence in the state. Added to this is the general lack of knowledge within the judicial system on indigenous cultures and traditional structures of justice as well as shortage of interpreters for non-Spanish speakers.[31]

One agreement – multiple conflicts

External conflicts

The peace agreement and its resulting framework for transitional justice is only relating to one of multiple conflicts impacting the rights and survival of indigenous peoples in Colombia. It regulates the end of the armed conflict between FARC-EP and the Colombian state and provides mechanisms for the transition and measures for truth, justice, reparation and guarantees of non-recurrence. The ethnic chapter provides for special measures when it comes to indigenous peoples and minorities, it does not however take a comprehensive approach to historic and contemporary injustice that indigenous peoples and minorities have been and continue being subject to. To a certain degree, negotiations between FARC-EP and the Colombian Government did take into account a central factor for the creation of FARC-EP and root cause of the conflict – land distribution and the conditions for small-scale farmers. One result of that is the land-distribution programme which is part of the peace accords, the so called Comprehensive Rural Reform (RRI).

Apart from the ethnic groups' access to the Comprehensive Rural Reform, the Land Fund and the Development Plans with Territorial Focus (PDET), the ethnic chapter of the peace accords also makes special mention of settlement, return, devolution and restitution of territories belonging to the Nunak people and the Embera Katío people of Alto San Jorge. This as a resource under the sub-chapter on illicit drugs.

However, as discussed above, indigenous peoples face multiple conflicts that threaten their mere survival as individuals, cultures and peoples. Even though statistics are insufficient it seems safe to hold that more than half of the one hundred plus peoples living in Colombia, are facing threats of extinction. Conflicts of different kinds and levels must be seen as the mayor contributor to this vulnerability.

The conflict with the State began about five hundred years ago, after the arrival of the Spaniards, the conflict with settlers shortly after that – depending on the region – and the conflict with companies with the introduction of extensive farming, mining and other extractive projects – some legal and some illegal. These conflicts are not part of the peace accords, nor can we expect them to be resolved by means of favourable externalities of the accords. Recent Governments have a record of supporting the establishment of extractive industries, agro-industries and mega-projects and the current President has promised even better conditions for these actors. This extractive model means that indigenous peoples need to devote even more resources to constantly defending land and rights. It also means high risks in terms of loss of life of members and leaders as well as loss of land and displacement.

Colombia was in fourth place in terms of countries losing the most tropical prime forest in 2018 and saw an increase of 9 per cent in the size of area lost between 2017 and 2018. It follows a dramatic upward trend since 2016 which ironically enough can be attributed to the peace process, as forest areas previously occupied by the FARC-EP have been opened up to development. One sad example is the Tinigua National Park in the Meta region which lost around 12,000 hectares of forest in 2018, equivalent to 6 per cent of its total forest area.[32]

On top of that it is likely – we can already see it – that criminal gangs, neo-paramilitaries and remaining and deserting FARC-EP-members, fill the vacuum created by the FARC-EP demobilisation when the State fails to fill these pockets. This means a prompt return to violence and a fertile ground for illegal mining, illegal logging, drug production and trafficking. As shown above, this situation affects indigenous peoples in a disproportionate manner, revitalising patterns of threats and killing of leaders, land intrusion, confinement and displacement.

Internal conflicts

There is an inbuilt tension between collective rights and individual rights of indigenous peoples. This does not mean that rights are at all incompatible but the collective rights are usually getting more attention and risk shadowing individual rights. One central aspect brought to discussion during the peace process is the rights of indigenous women. A reason for the attention to the subject is that indigenous women had two ways of participating in the peace talks – through the indigenous peoples' movement and through the women's movement. Indigenous women built alliances with other women's networks while also creating their own spaces. The common ground that was found magnified advocacy and encouraged indigenous women to participate in traditionally male spaces. This was however not without internal resistance or tensions. Rules, norms and values on gender, combined with patriarchal structures, constitute layers of discrimination. In part this is the result of the introduction of patriarchal institutions in indigenous communities in order to subjugate the peoples to the Spanish crown and the Catholic Church in colonial times. No matter the origin, the patterns of discrimination are complex.

The weak representation of women in formal decision-making has not been payed enough attention due to the tension between collective cultural rights and women's rights. Women's rights are seen by some as the imposition of the international community. Indigenous women also at times feels that when claiming their individual rights, they are disrespecting their culture and betraying the collective goal of self-determination. However, overcoming discrimination of indigenous women both within and outside their communities should be central for Colombian society as well as for indigenous peoples.[33]

THE PEACE PROCESS FROM AN INDIGENOUS PEOPLES' RIGHTS PERSPECTIVE

Bilateral peace agreements between indigenous peoples and FARC-EP[34]

Responding to daily needs and local conditions, more and less formal peace agreements and practical arrangements have been negotiated directly between local communities and the FARC-EP over the years. One example of these is the 1996 peace agreement negotiated by the Nasa people of the indigenous reserve Páez de Gaitana in the south of Tolima. This community has its roots in Cauca, but was displaced during the Spanish colonisation, and found new land in the departments of Huila and Tolima. They were affected by the violence between liberals and conservatives and yet again with the birth of the FARC-EP – since one of its strongholds was in the area. Soon, the community found itself trapped in the middle of the conflict between the FARC-EP and the Government.

As a response to the growth of the guerrilla in the eighties, the army convinced the community that the only way of defending themselves was through an armed auto-defence group. With the help of the army, the group began operating from 1980. This more direct role in the conflict almost made the community disappear. It lost the authority and autonomy of its territory and saw its members die in combat. This is when the leaders of the community began negotiating what was to become a peace agreement with the local FARC-EP commander. As with the Colombian society today, the community was divided as many feared that negotiations with the FARC-EP – including the laying down of arms by the self-defence group – was a trick by the FARC-EP in order to gain control. When leaders asked for the community's permission to continue negotiations, it was the women who insisted to proceed as they were tired of losing their men and sons to the conflict.

Negotiations took place over two years and included the eradication of coca and poppy plantations. Finally, in July 1996 – after thirty years of conflict – the parties signed a treaty of ten points, including the following agreements: the guerrilla would not threaten the community; the community members would not carry arms; community members found to be collaborating with any legal or illegal armed actor would be expulsed; the crimes committed within the reserve would be treated under indigenous law; the community impeded the intrusion of any armed actor into their territory; the guerrilla would not recruit members of the community, and; the community would not pay "taxes" to armed groups.

The parties agreed that the treaty would be monitored by the church, the Red Cross, the local ombudsperson[35], delegates working human rights and indigenous peoples' issues, as well as ONIC. According to Chief Álvaro Ovidio Paya, one of the negotiators, the treaty had its moments of tensions – especially after the breakdown of the peace talks in Caguán in 2002 – but worked out well at large and in many ways saved the community.

Participation in the peace process between the Government and the FARC-EP[36]

From the very outset of peace negotiations between FARC-EP and the Colombian Government in 2012, the indigenous peoples' organisations demanded direct participation in the process. This in order to guarantee that the peace accords would reflect and take account of indigenous peoples' rights. However, the negotiating parties turned down this petition. Advocacy by indigenous organisations continued at the national and international levels, accompanied by the OHCHR who in an official communication in 2015 exhorted the invitation of the ethnic groups to the negotiations table. However it was not until the end of June 2016 that a delegation was invited to a first of two dialogues – the second one just before the signing of the peace accords on the 24 August 2016. The result was the incorporation of an additional chapter to the accords at the very

last minute – the Ethnic Chapter. These negotiations were also the starting point for the body charged with the follow-up of the implementation of the peace accords on part of the ethnic groups – the Special High Level Instance with Ethnic Peoples (IEANPE), officially created in January 2017. IEANPE, as a first step after the signing of the peace accords, elaborated suggestions for the Framework Plan for Implementation (PMI) of the peace accords. After negotiations, 37 goals and 98 indicators for the follow-up on the implementation of the ethnic dimensions of the different chapters of the peace accords, were agreed upon. Some goals and indicators suggested by the IEANPE could not be agreed upon – most of them being connected to the Comprehensive Rural Reform. [37]

National peace agenda of the indigenous peoples[38]

The Ethnic Chapter of the peace accords is neither the beginning nor the end of indigenous peoples' engagement in peace efforts in Colombia. There had been many efforts leading up to the National Forum for Peace of the Indigenous Peoples in 2014. The national forum consisted of five regional events counting at total of 300 indigenous leaders and was organised by ONIC. A central outcome of these forums was the National Peace Agenda of the Indigenous Peoples (the Agenda), published in 2015. The Agenda includes important proposals and is a key document in order to understand indigenous peoples' take and expectations on the peace process. The document is divided into six subject areas; land and territory; ethnic and intercultural political participation; guarantees for human rights and international humanitarian law for indigenous peoples and territories; drug trafficking, anti-drugs policy and cultural rights of indigenous peoples; truth, justice and integral reparations for indigenous peoples; and referendum on the peace accords.

The document highlights as a general recurring aspect in the forums, the massive and generalised violations of indigenous peoples' rights that have been recognised at the national and international level and the failure of the State in guaranteeing the effective enjoyment of these rights. As examples are mentioned the effective recognition of land titles from the colonial and republican eras, the rights gained in the 1991 constitution, and international instruments such as the Convention 169 of the ILO. The document claims as a fundamental problem the regression in the effective enjoyment of rights both at the collective, social and individual level. As a result, the Agenda and its proposals are centred at reaffirming the acquired rights, halting the regression of rights, aiming at progression.

Land and territory: This is deemed as the most important chapter of the Agenda and transversal for the other chapters. Besides the devolution of ancestral lands it implies the cease of aggression on territory in the form of extractivism and war, own governance over land and territory, indigenous guard, territorial autonomy and self-determination according to their own original laws, natural laws, traditional law and indigenous peoples' law as well as life plans. This means the protection from a market model based on extractive industries, latifundios, agro-business and tourism. The peoples without access to their ancestral lands claim them to be restored and returned, peoples without sufficient land claim the lands possessed under colonial and republican eras, and the peoples with land that is protected for conservation claim fertile lands suitable for farming (especially in the Amazon). This means, according to the document, a necessary change for the "improductive latifundio". For the peoples that are living across national borders it also necessarily implies interstate accords.

Guarantees for human rights and international humanitarian law for indigenous peoples and territories: The Agenda attributes the victimisation in terms of violation of rights to two main factors. One is the internal armed conflict which means serious infringements on human rights and international humanitarian law on part of legal and illegal armed actors. The other factor is the effects of the economic model and the extractive industries affecting land, territory and peoples – including legal and illegal activities – violating territorial autonomy and self-determination. The document also highlights the challenge of the reintegration of ex-guerrilla members, including child soldiers which could constitute a threat to collective harmony of the peoples if not handled in a cultural sensitive way.

Truth, justice and integral reparations for indigenous peoples: Reparations must be ethnically differentiated and imply a sanitation and harmonisation of ancestral territories. They should not be limited to economic reparations and must avoid inciting internal division, but to the contrary, part from a collective vision in order to reach integral reparation. When it comes to truth, it should not only clarify victimising events but also visualise history from an indigenous peoples' view – the truth told from the peoples. This requires a participatory approach.

As for justice, the preoccupation described regards the question of to whom the victimiser will respond for violations committed against indigenous peoples. The Agenda proposes tribunals that might be of indigenous nature or inter-culturally composed, counting indigenous representation and state judges. The process should also imply a spiritual sanitation and harmonisation of victims and victimisers.

Regarding individual economic reparations, the Agenda describes a concern for potential fragmentation of the peoples as it goes against the cultural survival and collective identity of the peoples. It makes emphasis on the necessary differentiated reparations according to different peoples as well as different groups within a people – as for example peoples that have been harder hit by conflict than others and differentiated approach for women victims and child victims.

A number of more detailed proposals regarding truth, justice and reparations are put forward in the annex of the Agenda. Some of these are:

Truth and justice:

- The creation of an Indigenous Peoples' Tribunal charged with handling cases of human rights violations and violations of international humanitarian law against indigenous peoples. The armed actors would have to respond to such a tribunal which would be of symbolic nature in order to get to know how indigenous peoples have been affected and to participate in a process of spiritual harmonisation.
- Coordination between State justice and indigenous justice when the accused is of indigenous origin.
- The conformation of a truth commission for indigenous peoples lead by traditional authorities. The truth commission would be charged with clarifying the truth regarding crimes against humanity, war crimes and grave violations of human rights committed against indigenous peoples during the last fifty years. The commission would also determine, from a victim's perspective, the causes, macro-dynamics and determining factors of violence. Finally, it would make recommendations on reparations and reconciliation.
- Creation of an Indigenous Centre for Historic Memory which would be charged with recuperating historic memory, reconstruct the truth of victims and the fabric of resistance and reconciliation on part of local communities affected by the conflict.
- Creation of a museum and archive that would reconstruct and store ancient wisdom, traditions and cultures of the indigenous peoples.

Guarantees of non-recurrence

- The Agenda also makes a proposal as to guarantees of non-recurrence in which national authorities would be responsible for rendering periodic reports to a National Indigenous Peace Commission, including the ongoing prosecutions of elements within the armed forces that have committed serious violations of human rights against indigenous peoples or maintain links with organised crime and paramilitary groups. Reports should also include advances made in the implementation of decree law 4633[39].
- As another measure on guarantees for non-repetition, the Agenda suggests the strengthening of the follow-up commission and international accompaniment to the implementation of decree law 4633.

Reparations

- The development of the ethnic component of the Unique Victims Register and simplification of the procedure in order to facilitate

the recognition and inclusion of indigenous victims, guaranteeing the ethnic dimension of the register.
- Creation of a special fund for collective reparations and land restitution, for lands belonging to indigenous peoples.
- Promotion of the transformation of historic asymmetries which made indigenous peoples more vulnerable to the armed conflict (physical, spiritual, economic and socio-cultural).
- Reparations and spiritual restauration of mother earth as victim of the armed conflict. As for example through the execution of the recognitions established in article three of decree-law 4633, the extension and sanitising of territories, guaranteeing food security and the physical and spiritual cleaning of infrastructure pertaining to the armed conflict and drug trafficking.

Conflict, sustainable peace and transitional justice according to the National peace agenda of the indigenous peoples

The Agenda indicates some central elements for the appreciation of how the leading indigenous organisations understand the conflict(s), sustainable peace and transitional justice.

When it comes to the understanding of conflict, the Agenda points out the same root causes as handled above. It departs from the peoples and the traditional land and territory they are intertwined with. Threats breaking the peace comes from legal and illegal armed actors as well and legal and illegal commercial activities. There is no literal translation of the word peace in the different languages. Peace is understood as the natural state of mode, which is ruptured by conflicts.

It is also clear that the different measures that can be included in the peace accords are signalled as potential threats to the survival of peoples and cultures if not differentiated and designed from a do-no-harm perspective. One of these is the view on victims. The Agenda clearly points to the fact that there are individual victims within the communities of different kinds that need individual attention; differentiated according to group-belonging and ethnicity. It also points to the indigenous peoples as collective victims and the importance of understanding this perspective of victimisation. This while also saying that some peoples and communities have been harder hit than others. Finally, it also highlights a victim without voice – mother earth.

Closely connected is the issue of reparations. One concern is that individual reparations easily could lead to division within peoples and communities. The recommendation is therefore that reparations should be of collective nature. The Agenda also talks about "transformative reparations" in which reparations related to the wellbeing of the peoples and the recuperation of ancient land and territory as well as customs and traditions, are at the heart of reparations.

This while reparations also must include spiritual reparations, sanitation and harmonisation – including in relation to mother earth.

The agenda makes a number of recommendations in terms of truth – departing from telling the truth from and by the indigenous peoples and in spirit of also documenting and recuperating ancestral customs and traditions.

Finally, when it comes to justice, the Agenda suggests the intertwining of national justice with traditional justice. There is a central concern that conflicts and divisions will be triggered by the integration of indigenous ex-combatants into the communities and differentiated processes are needed for this integration as well as for the return of indigenous child-soldiers. But, the Agenda not only proposes a differentiated process for their own people – it also suggests that those responsible for grave violations of human rights and international humanitarian law against indigenous communities, should be responsible for engaging in a process of reconciliation and spiritual harmonisation with the communities. This in order for victimisers to understand the damage made and its consequences. It would entail the creation of a Tribunal of Indigenous Justice.

Reaching beyond restitution and do-no-harm

The measures proposed in the Agenda can be said to contribute to the physical, spiritual and cultural survival and wellbeing of peoples. In terms of right to land and territory it stretches beyond the armed conflict – referring to agreements from the colonial and republican eras. Also regarding governance it stretches beyond the time limits of the conflict. This while when it comes to reparations, most aspects are connected to the conflict and the spirit of the combined integral measures is transformative rather than restoring the situation to the time before the armed conflict. The approach is forward-looking, progressive and can be summarised as the effective enjoyment of indigenous peoples' rights in order to lead a life in harmony with nature and other peoples, under self-determination and governance, free from legal and illegal intrusion on land and territory, culture and intellectual property. It requires much more than a do-no-harm perspective in the implementation of the peace accords – implementation must reach a transformative level.

Conflicting cosmovisions[40]

Even though resolving the armed conflict is seen as necessary for Colombia and its indigenous peoples, and a vital step for peace – according to ONIC – it does not mean that peace is reached only by means of the political negotiation of peace accords. Peace necessarily entails the full and effective respect for territorial rights of the indigenous peoples – an issue that has worsened under the armed conflict, but started long before. The war against the indigenous peoples started with the Spanish invasion which has until now meant the non-respect of territories, Governments, cultures and identities. This is why an integral peace approach must include the end of this extermination, guaranteeing ancestral territories.

ONIC also calls for the State to reaffirm the territories occupied by the afro-descendants and the farmers' reservations as well as to resolving the superpositions that exist between afro- descendants', indigenous peoples' and farmers' territories and national parks. This could entail generating a new juridical form of "interethnic territories" which would allow for co-existence and co-governance of certain areas.

When it comes the relationship with the territory, the clash between cosmovisions is evident. The state, according to ONIC, sees the territory merely as a factor for planning which needs to respond to the economic dynamics that determines decisions on its use. The most important being its role as production unit and the capacity to maximise profit. Humans are also part of the same dynamics. This while for the indigenous peoples, the centre should be in the people that lead their lives in the territories and make part of the territories. The objective is for people to be able to lead a sustainable life, guaranteeing their economic, social and cultural rights. Additionally, when it comes to the indigenous peoples, the territory is the very base of their cultures, their identity, their history and future.

ONIC sees the model of high concentration of land ownership as a result of the violence between liberals and conservatives and the following armed conflict. During the armed conflict about nine million hectares of farm-lands were forcefully abandoned. This while the indigenous peoples, afro-descendants and small scale farmers, representing roughly twenty-five per cent of the population, only count with about ten per cent of farmlands divided into hundreds of thousands micro-farms.

Turning to intellectual property rights and self-determination, ONIC demands that the territories of indigenous peoples, afro-descendants and farmers' reserves be declared transgenic free zones and that the seeds be declared patrimony of the peoples and subject to free exchange.

Colombia, as a multi-ethnic and pluri-cultural nation, harbours different understandings of development which should be recognised and respected according to each culture and cosmovision. ONIC also holds that the Constitutional Court has made it clear that the current development model, supposedly based on the best interest of the nation, should not be imposed upon the ethnic groups as it threatens the millennia old existence of peoples.

The peace agreement from an indigenous peoples' rights perspective

The peace accords between the Government and the FARC-EP finally got a touch of ethnic perspective through the last minute participation of ethnic groups in Havana. The resulting "Ethnic chapter" sets the ethnic and cultural adaptation as a crosscutter to be taken into consideration in the interpretation and implementation of all provisions of the accords. In particular, the principle of non-regression should be respected together with provisions in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Durban Declaration of Action, the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169. Also, as a central principle, in no case, the implementation of the accords should be detrimental to the rights of ethnic groups.

The preamble not only confirms the serious effect of the internal armed conflict on indigenous peoples but goes beyond the conflict, confirming historic injustice, product of colonialism, slavery, exclusion and the dispossession of land, territories and resources. This while also recognising the contributions of ethnic groups to sustainable and lasting peace, progress, and economic and social development.

The principles for the interpretation and implementation of the accords includes self-determination, autonomy and self-governance, consultation and free, prior and informed consent; social, economic and cultural identity and integrity; rights to land, territories and resources, which implies the recognition of ancestral territorial practice, right to restitution and strengthening of territoriality and existing mechanisms for the protection and legal security of lands and territories occupied or possessed ancestrally and/or traditionally.

A central and non-subsidiary principle for the implementation of the accords is the right to free, prior and informed consultation[41] and the right to cultural objection as a guarantee for non-repetition.

Apart from the crosscutting approach for the interpretation and implementation of the accords, the ethnic chapter also provides some specific agreements for the different chapters of the accords (Comprehensive Rural Reform, Participation, Guarantees for security, Illicit drugs, Victims of the conflict and Implementation and verification).

Comprehensive rural reform

The implementation of the comprehensive rural reform must respect the legal conditions regarding collective property and the mechanisms for the legal protection and legal security of land and territories occupied or possessed ancestrally and/or traditionally including the integral dimensions of territoriality and the spiritual and cultural dimensions. The Development Plans with Territorial Focus should include a special consultation mechanism for their implementation, incorporating the ethnic and cultural perspective in the territorial approach oriented to the implementation of life plans, ethno-development, environmental management plans, territorial code or the equivalent of ethnic peoples.

Participation

The agreement guarantees the full and effective participation of the representatives of ethnic authorities and their organisations in the different mechanisms established in the framework of the implementation of the accords.

Guarantees for security

Ethic and cultural perspectives shall be applied in the design and implementation of the security and protection programme for communities and organisations in the territories. Also, the strengthening of security systems proper to ethnic groups shall be guaranteed.

Illicit drugs

The agreement provides for the effective participation and consultation of communities and organisations of ethnic groups in the design and implementation of the National Comprehensive Programme for the Substitution of Crops used for Illicit Purposes (PNIS). This also includes the respect and protection of cultural uses and consumption. In no case shall policies governing the use of territory and its natural resources be unilaterally imposed.

When it comes to the program for demining and clearance, it shall be developed with the ethnic groups – some geographic areas of priority are mentioned.

Finally, this section also includes a promise of a program of settlement, return and restitution of territories of the Nukak people, the Embera Katio community of Alto San Jorge Resguardo Cañaveral as well as the territory of the Alto Mira and Frontera Community Council and the Curvaradó and Jiguamandió Community Council.

Victims of the conflict

On victims and the Comprehensive System for Truth, Justice, Reparations, and Non- Recurrence (SIVJRNR), the accords states that the design of the system is to respect the jurisdictional functions of the traditional authorities within their territories according to national and international standards and the inclusion of an ethnic and cultural perspective. The ethnic groups should also be participating and consulted in the definition of the mechanisms whenever relevant.

In the implementation of the Special Jurisdiction for Peace (JEP), mechanisms for articulation and coordination with the Indigenous Special Jurisdiction shall be created in accordance with the mandate of article 246 of the Constitution.

Finally, for the reintegration of ex-combatants belonging to the ethnic groups, a special programme of harmonisation shall be set up in coordination with the ethnic groups to ensure the restoration of territorial harmony.

Implementation and verification

A High Level Special Body with Ethnic Peoples for monitoring the implementation of the peace accords shall be created. This body shall act as a consultant, representative and first-order interlocutor to the Commission for Monitoring Promoting and Verifying the Implementation of the Final Agreement (CSIVI).

The ethnic chapter ends by stating that funding for the implementation of the accords should not include funding agreements that have been realised between the national Government and the ethnic groups pertaining to other processes.

Comparing the peace agreement to the agenda for peace of the indigenous peoples

In making a comparative analysis of the contents of the National Agenda for Peace of the Indigenous Peoples and the ethnic chapter of the peace accords, the different formats of the documents is an evident feature that separates one from the other. The Agenda makes a wide range of quite detailed proposals not fully represented in the peace accords – it amounts to about fifty pages while the ethnic chapter is limited to four. At the same time though, the provisions of the ethnic chapter is meant to be transversal in the interpretation and implementation of all articles in the peace agreement. Below a comparison between the two documents focusing on the main chapters of the Agenda.

The wider conflict: The preamble of the ethnic chapter opens up to recognise both ingredients of the wider conflict as well as historic injustice that goes well beyond the time-frame of the internal armed conflict.

Self-determination and self-governance: The preamble also goes quite far in this field stating that the ethnic groups should be provided maximum guarantees for the full enjoyment of human rights within the framework of their own aspirations, interests and cosmovisions.

Land and territory: The ethnic chapter deals with land and territory under the sub-chapter "Comprehensive Rural Reform". The implementation of the Comprehensive Rural Reform, shall include the protection and judicial security of land and territories occupied or possessed ancestrally and/or traditionally. It should also observe the integral aspects of territoriality and the cultural and spiritual dimensions as well as the special protection of peoples at risk of extinction and their "planes de salvaguardas"[42]. It does not however, compared to the Agenda, include the claim for fertile lands suitable for farming for peoples living on land that is protected for conservation, nor does it include provisions for peoples living across national borders. At the same time it promises the inclusion of ethic peoples as beneficiaries as to the access to land without regression in already acquired rights. In terms of "protection from the market model", the sub-chapter recognises the ecological approach to property and that the inherent and ancestral relationships with territory are preceded to the notion of non-exploitation. It also recognises the right to participation and to being consulted in the implementation of the different mechanisms related to the subject area and there is also a special sub-chapter that recognises this right across the peace agreement.

Ethnic and intercultural political participation: The peace agreement includes a paragraph on the adoption of measures for the inclusion of candidates from the ethnic peoples in the Special Peace Electoral Constituencies (CTEP). This while the Agenda makes a whole range of proposals for the participation and representation of indigenous peoples in politics and public administration at all levels, as for example the creation of a ministry for indigenous issues and the inclusion of indigenous judges in the higher national courts.

Guarantees for human rights and international humanitarian law: There is no equivalent sub-chapter in the ethnic chapter but some provisions can be found in different parts of the document. This includes the principle of non-regression and the reference to central international covenants. Further, the right to free, prior and informed consent is set as a transversal component for the implementation of the accords. The ethnic chapter also states that in no case shall the implementation of the accords lead to a detriment of the rights of ethnic peoples. Also, in terms of economic, social and cultural rights, the right to land and territory, respecting cultural and spiritual values as well as self-governance, are important. So is the provisions for peoples at risk of extinction and the special plans for their survival, even though – as in contrast to the Agenda – the "Auto 004" of the Supreme Court is not mentioned in the accords. Also in the sub-chapter on illicit drugs, important provisions are made in terms of demining and clearance of territories – including some named geographical areas of priority. This is also where the return, devolution and restitution of some specifically named indigenous territories is specified.

Drug trafficking, anti-drugs policy and cultural rights: This sub-chapter is much in line with the Agenda and includes the essence of its proposals. The central lines here is the participation in the design of the National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes and the protection of the use and cultural consumption of traditional plants. As for all sub-chapters, the Agenda makes a much richer analysis of the subject area from an indigenous peoples' perspective – including the proposals for solutions. The Agenda criticises the focus on the reduction of production of drugs instead of going after the merchants and intermediaries and the ones benefitting economically from the business, as well as failing to address the demand side. It also states the necessity to prohibit fumigation and forced eradication.

Truth, justice and reparations: The sub-chapter refers to the design and implementation of the Comprehensive System of Truth, Justice, Reparations and Non-Repetition. Also here the central concepts of the Agenda

are present, including the respect for traditional jurisdictional functions and the inclusion of an ethnic perspective in the design of judicial and extrajudicial mechanisms, as well as in the reintegration of ex-combatants. However, the peace agreement does not explicitly in this part handle the issue of non-repetition and does not go into detail in the much sensitive issue of individual and collective reparations. Furthermore, the Agenda makes a rich contribution in terms of explicit and detailed proposals regarding the four pillars of the SIVJNR, which are not reflected in the accords.

Implementation and verification: This part is quite in line with the Agenda, stating the creation of a High Level Special Body with Ethnic Peoples for monitoring the implementation of the peace accords. This body shall act as a consultant, representative and first-order interlocutor to the Commission for Monitoring, Promoting and Verifying the Implementation of the Final Agreement (CSIVI). It is important also to note that this sub-chapter ends by stating that the funding for the implementation of the accords should not include funding agreements that have been realised between the national Government and the ethnic groups pertaining to other processes.

Implementation of the peace agreement from an indigenous peoples' rights perspective

A quantitative and procedural perspective

Implementation in general[43]

The Kroc Institute who has the official role of monitoring the implementation of the peace accords, reporting to the Commission for Monitoring, Promoting and Verifying of the Final Agreement (CSIVI), in its second report[44], concluded that the degree of progress in the implementation of the Colombian peace accords was equivalent to the pace of other peace accords at the 18-month mark. At the same time, the report highlighted a number of problems impeding the process that could lead to setbacks in the near future.

Many of the short-term measures related to ending the conflict and establishing verification and monitoring mechanisms have been completed. However, the process has now entered a phase of more difficult and long-term tasks, including achieving rural reform, advancing economic development, enhancing citizen participation, reintegration of ex-combatants, illicit crops substitution, addressing concerns of victims and providing mechanisms for transitional justice. The report emphasises that these changes will need structural transformations and "deep-seated institutional reform". Relating to the implementation of other peace accords, the experience says that the long-term development and rural reform typically takes a decade to accomplish.

The areas lagging behind, according to the report, are key areas critical to the construction of quality peace. Four areas are pinpointed – the same as in the first Kroc report:

1. Inadequate guarantees of security and community protection
2. The slow processes of long-term political, social and economic reincorporation for ex-combatants
3. Pending regulatory and institutional adjustments
4. The need for more attention to peace efforts at the local level and to the two cross-cutting focus areas: gender and ethnic groups.

The third Kroc Institute report, covering the first two years of implementation, while celebrating the achievements regarding the end of the armed conflict between the Government and the FARC-EP, the transformation of this armed group into a political party and the development of an institutional framework for the implementation of the peace agreement, also confirms the challenges still remaining in the four areas found to be lagging behind in its two first reports.[45]

Turning to the situation for indigenous peoples, all four areas lagging behind have implications for the development of the situation for communities vis-a-vis the peace accords.

The report confirms the voices of many others, alerting of the dangerous dynamics of insecurity in the territories – making emphasis on the increase and persistence of murders of human rights defenders and social leaders, especially community-based leaders, indigenous and Afro-Colombian authorities, the deteriorating humanitarian situation and the killings of FARC-EP ex-combatants and their families. This due to the fighting for control of drug trafficking and other illicit economies between various armed groups, criminal gangs, paramilitary groups, ELN and FARC-EP dissidents. Furthermore, there are reports of an increase in sexual violence and gender-based violence. The Kroc Institute confirms that addressing these dynamics will need sustained concrete actions in the territories, better inter-agency coordination and continued financial commitments. It recommends the security forces to adopt strategies and methods of human security and community protection.

On the second area lagging behind, the report recommends that the recently adopted National Policy for Reincorporation be implemented as soon as possible, giving ex-combatants and their families a clear long-term horizon for the integration into civilian life. Failing implementation would make the peace process vulnerable and risk the return of ex-combatants to armed violence. This second area is also highly relevant to indigenous peoples as it needs to respond to the reintegration of ex-combatants pertaining to the different indigenous peoples. Failing to do so would threaten the right to life and survival of individuals and collectives as well as result in the return of ex-combatants to armed violence.

Turning to the third area of concern, the report points to some aspects still lacking legislative and regulatory measures. These include the political representation of historically marginalised areas, the centrality of victims, and improvement of the quality of democratic participation at large. The report especially pinpoints the need for legislation and regulation related to strengthening the policy for democratic and participatory planning, guarantees and promotion of citizen participation and guarantees for social protest and mobilisation. In addition to this, the Institute also raises concerns about adjustments made in legislation for the Special Jurisdiction for Peace and delays in regulatory measures for the Comprehensive Rural Reform. On this last point of concern, for indigenous peoples, quality participation and guarantees for social protest and mobilisation are key elements for the movement as a whole and for the parts of it.

On the fourth area of concern, the report emphasises the spirit of the peace accords of focussing on coming to terms with the root causes of the conflict through a constructive transformation at the local level and the inclusion of marginalised groups – especially women and ethnic groups. The focus on territories includes rural development, agrarian reform, increased citizen participation, crops substitution, and, what is deemed to be most important, the end of violence in the rural communities and the end of illegal economies. The report finds that the advance in these matters has been slow. This also goes for the implementation of provisions for gender equality and participation of ethnic groups. Particularly concerning ethnic groups, the report finds that the opportunities that the accords provides for overcoming structural and historic injustices, have not been taken advantage of in implementation. The report asks for more resources in order to respond to the needs of the territories through building state capacity to deliver public goods and service and to facilitate the participation of women, ethnic groups and other minorities.

The illegal armed actors not only exercise power by means of violence. As of today, in many areas, the illegal armed actors are more effective than the state in resolving everyday necessities of communities. The Kroc Institute holds that there are about 200 municipalities counting null or very low state presence and points to the importance of making the substantial investments necessary, taking adaptation to different contexts and sustainability over time into count.

The Kroc Institute concludes that the Government needs to work on the heart of the peace accords as in the promise of institutional and structural reform, especially in the territories, together with greater social inclusion,

public participation, respect for human rights, and Government accountability. This in order to assure sustainable peace and development and to create a more democratic an equitable society.

It is striking how the peace accords have been praised for their focus on the territories, gender approach and focus on ethnic groups, and how at the same time, these parts of the accords are lagging behind in terms of implementation.

Implementation of the ethnic chapter

As discussed above, one of the main concerns in the implementation of the peace accords is the slow pace of implementation when it comes to the ethnic chapter. Unfortunately, as shall be exposed in the present section, the Colombian state has a weak record when it comes to quality implementation of different accords and provisions made in favour of the rights of ethnic groups and indigenous peoples.

A Government report to the congress in 2015, elaborating on the implementation of the Victims and Land Restitution Law (law 1448) holds that one of the greatest advances is the inclusion of collective subjects in the Unique Victims Register. It goes on to highlight the prior consultation as a guarantee for collective reparations when it comes to ethnic groups referring to decree law 4633 (indigenous peoples), 4634 (roma) and 4635 (afro-colombians, palenqueros, "negras" and raizales). In terms of work done, it reports 40 subjects of collective reparations pertaining to indigenous peoples identified, 8 of which had initiated or concluded prior consultation.[46]

However, precisely law 1448[47] on victims and land restitution and decree law 4633 on reparations, effective from 2011, are key examples of how implementation of measures directed at indigenous peoples fail. A commission set to monitor and investigate implementation found that only in 2014 the process of receiving declarations of ethnic groups was initiated, three years after its entry into force. Furthermore that, by May 2017, only four plans of collective reparations were in the phase of implementation, twenty-three in the process of defining damage and impacts and twelve in the phase of formulation, of a total of three-hundred and seventeen plans included in the Unique Victims Register.[48] CODHES on their hand highlight that the situation is even more complex when it comes to ethnic groups who represents 60 per cent of the subjects of collective reparations. In June 2018 only twelve plans for ethnic groups had been approved – representing 3 per cent of inscribed ethnic subjects.[49]

In a December 2017 press note, the same commission expressed its concern regarding the delay in implementing the law and decree laws – especially when it comes to ethnic minorities and indigenous peoples.[50] The Defensoría del Pueblo[51] (which is part of the commission) concluded that only four years before the end of validity of these laws, the degree of implementation in terms of attention, assistance and integral reparations as well as the right to participation and restitution of land rights is preoccupying. The panorama is even worse for ethnic minorities and indigenous peoples as the institutional structures do not respond to geographical, quantitative, cultural and population needs. One explaining factor would be the absence of a special financial plan (CONPES) directed at meeting the needs of reparation for ethnic minorities and indigenous peoples. This, among other factors, translates into the fact that only 4 per cent of the investment budget of the Land Restitution Unit (URT) in the fiscal year 2016 was set aside for restitution of land rights. This while the National Land Agency (ANT) has informed that with the current budget assignation, it would take seventy-eight years to resolve pending ethnic and agrarian cases. According to the Organisation of Ibero-American States, in 2018, more than 700 applications for constitution, amplification and restructuring of indigenous reserves were stuck with the ANT[52]. Furthermore, the budget for the programme for the legalisation of indigenous territory and rural development for indigenous communities dropped by 19 per cent from 2014 to 2018. This is preoccupying since this is the single most important contributor to the implementation of the first chapter of the peace accords – Comprehensive Rural Reform.[53]

On top of that, a process for re-elaborating collective reparation plans was initiated due to the material incapacity of meeting the obligations included in original plans. There has also been critics due to the fact that implementation measures do not adequately consider de facto needs of victims and local conditions and that they do not correspond to damages.

Protection and prevention measures lack a special ethnic focus as risk assessments, measures adopted and lead times do not respond to the complexity of different territories. The commission has repeatedly declared its preoccupation for the situation of threats and murders of human rights defenders and social leaders.[54]

Following a ruling of the Constitutional Court, the Land Restitution Unit elaborated a strategic plan for the restitution of lost land. However, the commission finds that the strategic plan does not explicitly include land rights of ethnic minorities and indigenous peoples. Finding this, and the preoccupying back log of land restitution, the commission recommends the elaboration of a special strategic plan for the restitution of collective land rights.[55]

Recalling that the collective reparations, putting victims at the centre of the process, as the peace accords says, aims at being integral and transformative, the NGO Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), on basis of the accompaniment of forty communities, expresses doubts regarding the success of implementation. CODHES finds that collective reparations have failed to reconstruct the social fabric, reactivate political projects and life projects (planes de vida). Overall the reparative effect is deemed to be weak owing to few measures implemented in a disarticulated manner. CODHES highlights that collective reparations implies the strengthening of political capacity, regaining spaces for participation and strengthening of identity and organisations in order to have the capacity to influence in the development of local and national politics that contribute to peaceful coexistence, reconciliation and non-repetition.[56]

The Kroc Institute in its third report finds that comparing the provisions in the peace agreement that needs to be implemented with an ethnic approach to the general provisions, the implementation of the former is lagging behind. When it comes to the provisions related to Comprehensive Rural Reform, 54 per cent of the provisions having an ethnic focus had not been implemented while 42 per cent had reached a minimum level of implementation. The picture on Political Participation is much the same, even if the rate of provisions that had reached an intermediate level of implementation was higher. When it comes to End of Conflict, the majority of provisions – 57 per cent – were at minimum level while 29 per cent not had been initiated. Looking at the Solution to the Illicit Drugs Problem, implementation of two thirds of provisions had not been initiated while the remaining part was at a minimum stage of implementation. This while the Victims part of the peace agreement counted 60 per cent minimum implementation, 10 per cent intermediate and 30 per cent not initiated. [57] The Kroc Institute summarised the situation of implementation of the Ethic Chapter by stating: "Until November 2018, the provisions in the Ethnic Chapter shows low levels of implementation and this has eroded much of the faith in the peace process."[58]

On a more qualitative level, the report concludes that the significant divide between the level of implementation of ethnic and non-ethnic focus is even more evident in the territories. This owes to the fact that much of the process in the first two years of implementation has been related to normative and administrative measures at the national level, which not necessarily implies a substantial practical change in the territories. The Kroc Institute recommends an urgent implementation of guarantees for security and protection that takes account of indigenous peoples' own systems. Furthermore, guarantees for the proper functioning of the Special High Level Instance with Ethnic Peoples, re-establishing the respect for free, prior and informed consent, and the guarantee for non-regression in territorial rights. Additional to this, the report recommends a push for the wide dissemination and communication of the contents in the peace agreement and the ethnic chapter.[59] In terms of advances of the SIVJRNR,

the report is generally positive, however there is one important piece not properly belonging to the SIVJRNR, but playing a significant role for the comprehensive system, that is lagging behind; the special programme for reincorporation of demobilised persons belonging to ethnic minorities and the pedagogic and communications strategy for the dissemination of the principles of racial and ethnic non-discrimination of demobilised women, youth and children.[60]

Principal challenges to implementation according to indigenous peoples

The Indigenous Peoples' Human Rights Commission, in addition to the continuous victimisation of members of their communities discussed above, highlights a few central challenges embedded in the peace accords and the implementation of the same.

1. The majority of norms consulted with indigenous peoples under the previous consultation of the "Fast Track" process have remained paper products or were substantially altered after the consultations.
2. The Development Plans with Territorial Focus (PDET) – the mechanism for integral rural reform – lacked a process of free, prior and informed consent and was developed at high speed. This has allegedly led to the exclusion of some cases and the participation of indigenous authorities without the necessary beforehand information. It is worth noting that the 170 municipalities prioritised for the PDET, holds 452 indigenous reserves[61]. In spite of these facts and agreements, the Territorial Renewal Agency seems to have sub estimated the relevance of the ethnic groups in the development of the PDET. There are also reports on the non-compliance with and ignorance regarding the special route for concertation of the PDET decided upon by the Territorial Renewal Agency and the IEANPE. This while there is lack of coordination between the different state agencies and the national and territorial levels.[62] Additionally, looking at the land registry system – pointed out as central in the peace accords – 60 municipalities lacking basic land registry data contain 81 per cent of Colombia's indigenous reserves. This while 79 per cent of the municipalities historically most affected by the armed conflict lack basic land registry data.[63]
3. The National Comprehensive Programme for the Substitution of Crops used for Illicit Purposes also lacked a process of free, prior and informed consent. Here it is important to consider that about 45 per cent of illicit drugs plantations are situated in ethnic territories. There is a rise in the threats against leaders that are associated to the substitution programme and a deficient security system for resolving this. The use of glyphosate for eradication constitutes a health risk for the peoples and there are signs of not respecting the differentiated approach towards indigenous peoples, acknowledging their right to grow and use illicit plants according to ancestral traditions[64]. At the time of writing, the Government has plans on reinitiating the use of glyphosate for plant eradication.
4. The problem of antipersonnel mines is closely related to illicit crops as the illegal armed groups protect intrusion by planting mines. This has led to enforced confinement of indigenous groups, not only blocking access to basic food and services but also access to sacred and holy places, necessary for the exercise of customs and rituals. The latter causing the loss of ancient knowledge and as a sum greatly contributing to the large amount of peoples living on the verge of cultural and physical extermination. The de-mining plan identifies 140 indigenous reserves where action is needed. However, by the end of 2018, work had not been initiated in any of the eight communities of priority.[65]
5. The strategies for the protection of indigenous peoples as groups and individuals lack a differentiated focus respecting indigenous peoples own protection mechanisms, which in some cases leads to the increment of risk of individuals and collectives. This also stems from the lack of consultations during the "Fast Track" process where the proposal brought forward by the indigenous peoples was not regarded.

6. The same fate was met by a proposal put forward by the indigenous peoples on the reincorporation of forcibly recruited individuals as well as the attention to recruited minors.
7. Looking at the territories for disarmament, demobilisation and reintegration "Zonas Veredales de Normalización Transitorias" (ZVTN) and "Espacios Territoriales de Capacitación y Reintegración" (ETCR) – a part of them were located close to ethnic communities without their consent. Their presence has generated conflicts and tension between indigenous peoples and ex-combatants, militarisation of indigenous areas and occupation of indigenous lands.[66]
8. The preoccupying security situation also generates new waves of displacements and in 2018 indigenous peoples accounted for 12 per cent of the population of newly displaced – a high rate considering that they only amount to about 4 per cent of the Colombian population.[67]
9. A new preoccupation that goes beyond the peace agreement is the on-going discussions on reforming the land law (law 160) from 1994 – fearing that this would interfere with the right to free, prior and informed consent – favouring extractive projects within indigenous territories.[68] A multitude of actors, among them the Colombian Commission of Jurists, alerts that the law project would mean even greater land concentration, favouring agroindustry and extractive industries, make some illegal appropriation of lands legal and put at risk indigenous communities.[69] This would interfere with the principle of non-regression of acquired rights.

Effective enjoyment of human rights

Guarantees for non-recurrence

Made up by the sum of the components in the SIVJRNR, guarantees for non-recurrence is one of the central outcomes of the transitional justice process. Even tough non-repetition must be seen on a long-term horizon, the current development, as discussed below, is posing serious challenges to the guarantees for non-recurrence.

The UN Office of the High Commissioner for Human Rights (OHCHR) – in contrast to the Kroc Institute's mandate of mainly applying *a quantitative and procedural perspective* to implementation – has a mandate to monitor *the effective enjoyment of human rights* by the people living in the areas most affected by the conflict. The OHCHR, referring to the peace agreement, affirms that "Its full implementation can greatly improve the human rights situation, especially in rural areas."[70]

Even though the exact figures vary from source to source, there is no doubt that there has been an increase in violence against human rights defenders since the Peace Agreement was signed in 2016. In particular those who oppose extractive projects and defend land and victims' rights have been attacked, threatened and killed. In 2017, the OHCHR registered 441 attacks, including 121 killings of human rights defenders in Colombia.[71] In fact, about one in every three human rights defenders killed globally in 2017 was Colombian.[72] In 2018 OHCHR registered 110 killings of human rights defenders. A striking 16 per cent of them were indigenous while 11 per cent were Afro-Colombian, demonstrating that these ethnic communities are disproportionately affected by deadly violence[73]. This while 2018 also saw an increase in other types of attacks such as threats, murder attempts and violations of the rights to privacy and property.[74] Attacks targeted at human rights defenders continued in 2019 as OHCHR reported 108 defenders killed during the year – much in line with the figures for the last two years.[75] The UN Verification Mission in Colombia also highlighted sexual violence as a driver of forced displacement.[76] The NGO Somos Defensores reported an increase in individual threats of 146 per cent in the first trimester of 2019 compared to 2018. The share of threats directed at persons from the indigenous peoples amounted to 24 per cent of total cases.[77] In the first half of 2020, the negative spiral continued and showed signs of aggravation as Indepaz reported 157 human rights defenders and social leaders murdered only in the first six months of the year – a third of them being indigenous.[78] All these crimes still enjoy high levels of impunity.

Fourteen of murdered defenders in 2017 were women – doubling the rate compared to 2016. 62 per cent of killings occurred in rural areas while 64 per cent of killings coincided with the areas most affected by the conflict (ZOMAC[79]) and where the FARC-EP were historically present. The OHCHR, as other analysts, links this pattern to the power vacuum following the demobilisation of FARC-EP, the lack of state presence and the delay in the implementation of the peace agreement, allowing illegal armed groups and criminal groups taking over illicit economies that had yet not been transformed, resulting in increased violence. The OHCHR also notes that several victims were killed due to their support for provisions of the peace agreement such as the substitution of illegal crops and the Comprehensive Rural Reform. This means a changing tendency where support of Government policies is a motive for killings as opposed to previous motives of opposition to Government policies. OHCHR estimates that as much as 66 per cent of the alleged motives for murders in 2018 related to opposition to criminal activity and violence or support to the implementation of the peace agreement, specifically the illicit crops substitution activities.[80]

While 57 per cent of killings in 2017 were attributed to contract killers, the alleged material authors was dominated by paramilitary structures counting fifty-four cases (45 per cent), this while the ELN was responsible for four cases (3.3 per cent) and ex-FARC-EP groups three cases (2.5 per cent). Also, members of police and military were being investigated for fourteen killings committed during social protests in 2017. These patterns continued in 2018, although seeing an increase in ELN responsibility to 8 per cent and also of ex-FARC-EP groups to 8 per cent. This while killings attributed to People's Liberation Army (EPL) accounted to 4 per cent – EPL killings in 2017 were not accounted for in the 2018 OHCHR report.[81]

Violence is also reflected in the continuing situation of forced displacements and confinements. From January to June 2019, 35 massive displacements occurred – Nariño stood out as the most affected department counting 43 per cent of internally displaced persons. In the same period, 63 communities were victims of confinement – 54 of these in the Chocó department.[82] The Ombudsman in his 2018 report stated that he did not see any effective measures in action in order to deal with the crimes of enforced displacement and the use of indigenous reserves by armed actors.[83]

Regions with structural causes linked to lack of access to rights – primarily access to justice, and to economic, social, cultural and environmental rights – counted for 93 per cent of killings in 2018 and 59 per cent of killings were committed at the community level. According to OHCHR, these structural causes derive largely from weak or lack of State presence in some rural areas. This while also the substantial delays in implementation of the peace agreement, particularly concerning the rural reform and substitution of illicit crops, adds to the picture.

The OHCHR held that some of the killings of human rights defenders could have been prevented by a timely and coordinated implementation of the peace agreement, including state presence and materialising the possibilities for communities to integrate into the legal economy. OHCHR noted that the context where most killings occur share three characteristics: the presence of illicit economies, a homicide rate classified as endemic according to WHO standards, and a multidimensional poverty rate higher than the national average. The recommendation is to maintain State presence, including civilian authorities, recognise and promote civil society participation, guaranteeing the freedoms of association, assembly and expression. This while also accelerating the implementation of the peace accords in the regions. These measures would support the work of civil society and human rights defenders by expanding civic space.[84] The alarming situation of indigenous human rights defenders continues and the OHCHR in August 2019 made a special call for the state to agree on preventive and protective measures for the Nasa people after thirty-six members of the Nasa community had been murdered in 2019, six of which OHCHR defined as human rights defenders.[85]

On the positive side, OHCHR commended the decision of the Office of the Attorney General to prioritise investigations of killings of human rights defenders and the announcement of the Office of the National Procurator to use its administrative and disciplinary powers to address the stigmatisation of human rights defenders and the insufficient action by municipal, departmental and national authorities to protect them. This while on the negative side, the identification of the material authors of crimes had not been successful in most cases – having negative consequences for protection and non-repetition.

The OHCHR found it critical to strengthen gender analysis in relation to threats against human rights defenders as well as the analysis of threats in rural settings as the vast majority of killings occur in rural areas. Also, of greatest importance is the modification of protection measures in rural areas and the strengthening of collective protection measures such as the indigenous guards.[86]

The development described by different sources follows a similar pattern to what happened after the disarmament, demobilisation and reintegration of the paramilitary forces, the subsequent land restitution processes and the adoption of the Victims and Land Restitution Law (law 1448) of 2011. Attacks on human rights defenders increased from an average of around 100 attacks per year between 2004 and 2007, to around 170 per year 2008-2010 and peaked at 239 attacks in 2011 – the same year law 1448 was adopted.[87]

A 2018 press note from the UN reflects the negative development in this field and refers to it as a threat to durable peace:

"The United Nations Organization in Colombia vehemently rejects and condemns the killings of human rights defenders and community and social leaders.

The upsurge in violence imperils the conditions for a true stable and lasting peace. The inhabitants of the regions most affected by the armed conflict are those who today are vulnerable to multiple violations of their collective and individual rights, mainly in the departments of Antioquia, Arauca, Cauca, Chocó, Córdoba, Nariño, Norte de Santander and Valle del Cauca, while also acknowledging that other regions are being seriously impacted.

The UN urges the Colombian Government to strengthen prevention, protection and investigation measures to guarantee the right to life and integrity of all Colombians."[88]

The regions included in the list of the most affected account for 45 per cent of total indigenous population, using data from the 2018 census.

Ever since the signing of the peace accords in 2016, one human rights defender has been killed every three days. Social leaders and human rights defenders working on issues related to the implementation of the peace accord, land restitution and those opposing large-scale economic development projects face a particularly high risk.[89] This is also the view of the Inter-American Commission for Human Rights which in March 2018 released a press note urging Colombia to adopt urgent measures to protect human rights defenders and social leaders[90]:

"The Commission observes that since the implementation of the peace agreements, the murders of human rights defenders have increased persistently. According to an Ombudsperson's report, between January 2017 to February 2018, there have been 121 murders of human rights defenders. The Commission observes with concern that plenty of those murdered human rights defenders carried out actions aimed at implementing the peace agreements related to land distribution. In addition, the Commission has received consistent reports indicating that indigenous and Afro-Colombians human rights defenders are exposed to aggravated violence."

This picture was confirmed by a 2019 report on human rights defenders and social leaders in Colombia, based on an in-loco visit by the Commission in November 2018.[91]

In 2018, a number of civil society organisations joined together to produce a report highlighting the systematic nature of violence against human rights defenders in Colombia called Defender la Vida (Defending Life). This report was presented to the Prosecutor's Office at the International Criminal Court in April 2018, and to the Colombian Truth Commission, calling for an end to impunity for those responsible of violence against human rights defenders.[92]

Also the UN Assistant Secretary-General (SG) for human rights on his visit to Colombia in October 2017, expressed his concern about problems in the implementation of the accords which relate to the continued attacks against human rights defenders and community leaders.

The Assistant SG acknowledged the Government's efforts to adopt policies aimed at preventing such attacks, but said the efforts had yet to produce significant results.

"The armed conflict with the FARC-EP may be over, but the country's incredibly brave human rights defenders continue to be threatened and killed at an alarming rate".[93]

The negative spiral continues, as is highlighted in a March 2020 report of the United Nations Verification Mission in Colombia:

"Indigenous and Afro-Colombian communities continue to be affected by pervasive violence, including attacks, mass displacements, confinement and recruitment of children, in several departments, in particular Cauca, Chocó, Nariño and Antioquia."[94]

A possible example of how indigenous peoples and their leaders continue being signalised as insurgents even by Government forces, is reported by Proyecto Nasa. In their report to the UPR-examination of Colombia in 2018, the Proyecto Nasa exposes the alleged human rights violations occurred in the frame of the Encuentro Internacional Liberadoras y Liberadores de la Madre Tierra held in August 2017. According to the report, the national Government would have sent two hundred of the national police riot control unit (ESMAD) to the rural area of Corinto, Cauca, which during two hours destroyed, looted and set fire to the installations of the event. Allegedly they used teargas and shot pellets in order to displace the community in charge of receiving the guests for the event. The riot control unit is reported to have been accompanied by men wearing hoods and set fire to eighteen shacks, destroyed the central auditorium, damaged crops and robbed the food for the event.[95]

Another example is the declarations of the Minister of Defence, in September 2018. The minister declared that the social protests would be financed by illegal armed groups. He made special mention of the protests that had been cutting-off the Pan-American highway from time to time – and by doing so also pinpointed the "mingas"[96] of the indigenous peoples, being financed and incentivised by illegal armed groups. Doing so, he repeated the unfortunate historic criminalisation of social protest and put human rights defenders and social leaders at risk by targeting them as insurgents.[97] However, the later declarations in support of the right to social protests by the President and instructions by the Minister of Interior to all mayors and governors in the same line, were positive developments in this field.[98]

Concerning the security situation for indigenous peoples, after the killing of six indigenous leaders in April 2017, Amnesty International seriously questioned the implementation of the peace agreement and highlighted the grave situation of risk faced by leaders:

"The situation of extreme risk which Indigenous communities in Colombia face is alarming. These crimes highlight one of the main challenges in the implementation of the peace process: the protection of the communities living in the areas which have been most affected by the armed conflict and the need to guarantee that these deplorable acts do not go unpunished" said Erika Guevara-Rosas, Americas Director at Amnesty International.[99]

According to reports from the Indigenous Peoples' Commission on Human Rights, from the signing of the peace accords in November 2016, until May 2018, about 11,000 individuals from these groups were forcefully displaced, 1,200 received threats, 65 leaders were murdered, 20 suffered sexual abuse, 13 were forcefully disappeared, 8 tortured and 7 kidnapped. These figures at large coincide with Government data from the Ministry of Interior.[100] In the first six months of 2018, the Indigenous Peoples' Commission on Human Rights reported 1,047 individuals forcefully displaced, 9,422 individuals subject to confinement, 50 cases of threats, 22 murders, 20 cases of forced recruitment, 19 violent attacks and 3 cases of torture.[101]

According to the Antioquia Indigenous Organisation, parents send their children to live with family in safer parts of the country in order for children to be safeguarded from recruitment of armed groups. This picture is also supported by the OHCHR[102] and the UN Verification Mission in Colombia[103], among others.

A reason for death threats against leaders in the aftermath to the 2018 presidential elections was the Águilas Negras declaring military target anyone supporting the presidential campaign of Gustavo Petro. Nine indigenous leaders in Valle del Cauca had up to July 2018 received threats for supposed support to the Petro campaign. According to ONIC, this type of threats were also frequent in other parts of the country.

The authors of crimes against indigenous peoples in their vast majority, are to be found in the different groups that are the continuity of paramilitarism, FARC-EP-dissidents, ELN and criminal gangs. However, there are also some examples of violations on part of Government forces.

This unfortunate situation continues and in its report on 2019, the Office of the UN High Commissioner for Human Rights raises a general concern on the killings and threats against indigenous leaders, specifically focusing on the Cauca department:

"OHCHR is deeply concerned by the high number of killings of indigenous people in Cauca. In 2019, the National Institute of Forensic Medicine registered an increase of almost 52 per cent in homicides of indigenous people in Cauca compared to 2018. Between January and November 2019, OHCHR registered the killing of 66 members of the indigenous Nasa people in northern Cauca, including 13 indigenous authorities and other Nasa leaders. Urgent, effective and culturally appropriate prevention and protection measures for these communities need to be taken in consultation with the indigenous authorities."[104]

This while the OHCHR, at the end of April 2020, alerted over the continued killings of human rights defenders in Cauca, counting thirteen defenders killed so far in 2020.[105]

A central explaining model to the vulnerability of indigenous peoples during the internal conflict, as well as in the post-agreement phase, can be found in the fighting between these different actors on the control of land, territory and natural resources. Indigenous peoples, present in the territories are resisting in front of these dynamics and are therefore victims of threats, assassinations and forced displacements, even in the post-agreement phase. As discussed, not that much has changed on the ground for indigenous peoples with the incomplete implementation of the peace accords. The absence of the State in many areas also means that the indigenous peoples continue practicing self-defence and negotiations with armed actors in order to solve everyday problems and security of their people – just as in the above mentioned case of the local peace treaty between the Páez de Gaitania and the FARC-EP in 1996. One difference though, is that there are new groups and a plurality of actors to relate to, which in some areas makes for an even more complex situation today.[106]

An example of these dynamics and their effects is given in the 2019 report on Colombia by the UN Office of the Highs Commissioner for Human Rights:

"The killing of an Embera indigenous defender in April in Riosucio, Chocó, was emblematic. This municipality was marked by a high level of multidimensional poverty, endemic violence and the presence of ELN and criminal groups fighting to control drug trafficking, illegal mining and smuggling of migrants. The defender was killed because his advocacy on behalf of his community clashed with the interests of these groups. His killing exacerbated the marginalization of his community and decreased the likelihood of a new leadership stepping forward."[107]

Forcefully displaced indigenous peoples – an example

In an Ombudsman's report[108], the situation for displaced communities belonging to the Embera Katio, Embera Chaní and Zenú is examined. The report focuses on the situation of these peoples in the Magdalena Medio and the response by the municipalities of the region. The report concludes that public policy in response to attention to forcefully displaced indigenous peoples does not include the differentiated focus according to the characteristics of each people as stipulated by decree law 4633. One explanation is the low level of knowledge of attention to indigenous peoples forcefully displaced and the different legal instruments that are to guarantee their rights. In essence, this means the absence of effective policy measures for the resettlement and return of individuals and families, victims of forceful displacement. The Ombudsman also notes the poor coordination between municipalities and regions as a reason for non-compliance of differentiated attention.

In the same report, the Unit for Attention and Comprehensive Reparations to Victims (UARIV) is said to fail in coordinating the reinitiating of the process of complying with the provisions in Auto 004 of 2009, ensuring the survival of individuals pertaining to indigenous peoples in situation of forced displacement. There is no coordination across the different national, regional and local levels in terms of subsidiarity, concurrence and complementarity. For the three peoples visited by the Ombudsman there was no implementation of the Plan for Survival (Plan de Salvaguarda) nor of guarantees in order to secure the survival of these peoples as provided by Auto 004. The Ombudsman concludes that this constitutes a re-victimisation and repeated violation of fundamental collective rights and could constitute conduct of omission by responsible civil servants. The report finds that there is a repeated non-compliance in attending the most pressing needs of humanitarian assistance with an emphasis on health, nutrition, food security, temporary lodging, ethno-education and other measures, needed for securing the survival of individuals belonging to forcefully displaced indigenous communities. One of the recommendations of the report is to conduct capacity building at the municipality level on Auto 004 and decree law 4633. The report also underlines the urgency in providing assistance in the preservation of customs and culture as communities have a long history of displacement.

Economic, social and cultural rights[109]

OHCHR highlights as one of the main obstacles to the guarantee of economic, social and cultural rights in the rural areas, the tendency to prioritise investment in population centres in order to obtain votes. They see serious challenges to equal access to health services, clean drinking water and sewage systems, but also that children are deprived of their rights to healthcare for lack of birth certificates. The situation of access to basic healthcare and culturally sensitive public health policy is especially worrying for indigenous peoples at risk of extinction. The infant mortality rate for indigenous peoples is five points higher (20.9 per every 1,000 children born alive) than the rate for the non-indigenous population (15.9). The rights to water, health and food for indigenous peoples are also negatively impacted by legal and illegal mining, polluting rivers in different parts of the country. One example is the Miraña and Bora communities in the Amazonas department where concentration of mercury in the people are 15 to 20 times the limit set by WHO – rates that threaten the survival of affected communities.[110]

The right to quality education in rural areas is affected by the lack of continuity in the contracting of teachers, precarious school facilitates and pedagogic materials, which also contribute to dropout rates.

When it comes to land rights, as touched upon earlier, the existence of illegal economies means criminal activities that put at risk individuals and communities claiming land restitution as well as for state agents attached to the process. OHCHR observes that the process is "seriously hampered" in the areas of interest for agro-industrial, mining and energy companies. An example of the worrying development is the loss off thousands of case files related to land conflicts in the transfer from one state entity to others.[111]

OHCHR also observes a lack of commitment among some civil servants in terms of improving the level of rights enjoyed by communities imposing personal interests over the rights of the population. They therefore suggest the creation of indicators at township level visualising problems of access to and realisation of economic, social and cultural rights as these are not captured by statistics at municipal and department levels.

When it comes to the implementation of the peace agreement, OHCHR highlights the difficulties in implementing the local development plans, mainly due to violence and lack of institutional coordination. This while also noting the lack of implementation of the ethnic approach, specifically in Cauca, Nariño, Norte de Santander and Valle del Cauca. Finally OHCHR expresses concern over the deteriorating security conditions in several regions where the National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes, is being implemented. Families and leaders participating in the programme are being targeted by criminal groups, ex-FARC-EP groups and the ELN. There has also been a lack of incorporation of the ethnic approach in the programme.[112]

Participation and social dialogue[113]
OHCHR highlights the unequal access to polling stations, restricting the possibility to exercise the right of voting in rural areas. Lack of infrastructure can mean travelling from hours, up to days, which implies an expense for the voter. This also opens up for pressure by candidates and parties backed by different economic sectors – including the illicit ones – offering trips to polling stations, influencing voting. OHCHR regrets the obstacles to the implementation of the political participation chapter of the peace accords due to moves by political sectors interested in a political status quo. Especially the non-approval by congress regarding the Special Transitory Peace Voting Districts, which were included in the peace agreement as a measure to increase the political participation of people living in conflict-affected areas.

On social protests, OHCHR urges the Government to implement guarantees for mobilisation and social protests as stipulated by the peace agreement and to adapt domestic protocols on the use of force related to social protests to international standards. Furthermore, to effectively monitor and fulfil agreements to avoid future protests derived from the non-compliance of accords.

Discrimination
The UN Committee on Economic, Social and Cultural Rights in its concluding observations on the sixth periodic report of Colombia, expresses its concerns regarding the "persistent structural discrimination against indigenous peoples and Afro-Colombians, which is reflected in the high levels of poverty and exclusion that affect them disproportionately". The Committee goes on to recommend the state to "step up its efforts to prevent and eliminate the conditions and attitudes that perpetuate structural discrimination against indigenous and Afro-Colombian peoples. To that end it urges the State to adopt special measures in order to improve their socioeconomic situation and guarantee their effective enjoyment of economic, social and cultural rights. It also encourages the State to conduct public awareness-raising campaigns to counter discrimination against them."[114]

Human security and the security sector[115]
The OHCHR is concerned about the plans developed by the military which justify their active participation in public safety – going against national, regional and international human rights law, which reserves this

right to the police forces. Only in exceptional cases the police may require and ask for military support. As for 2017, OHCHR documented eleven cases of alleged extrajudicial executions of which eight allegedly can be attributed to the military and three to the police. The same number was recorded for 2018, attributing five to the military and six to the police. As contributing factors behind these extrajudicial executions, OHCHR lists the possible absence of command and control, lack of operational planning and lack of tactical discipline. The OHCHR therefore urges the state to strengthen the operative capacity of civilian institutions in rural areas in order to avoid that the military performs tasks outside of their responsibilities, including providing the necessary budgetary resources for the police to fully assume its tasks in the implementation of the peace agreement.

Transitional justice and victims' rights[116]

The Comprehensive System for Truth, Justice, Reparations and Guarantees for Non-Recurrence (SIVJRNR) if fully implemented would, according to the OHCHR, "generally conform to international standards". However, the OHCHR put forward some concerns. The first is the difficulty for the system to operate in many areas due to security reasons and the continuing human rights violations. The second is that the expectations for the system to reduce impunity has been undermined by the exclusion of non-military state agents and private individuals from the scope of mandatory application of the system. The third concern has to do with the definition of penal responsibility of military superiors which does not comply with international standards and, according to OHCHR "makes it virtually impossible to prove responsibility by omission of military commanders". As a result, the guarantee of accountability for the most responsible is seriously in danger. The fourth concern has to do with the decision of congress to prohibit the appointment of some of the selected judges to serve in the system on basis of their previous involvement in human rights litigation against the State. This goes against national and international standards in terms of the independence of the judiciary as well as against the profiles and competences for judges set forth in the peace agreement. Additionally, this decision risks to add on to the stigmatisation of human rights defenders in a context where the security situation for defenders is deteriorating and deeply concerning.

Structural factors affecting the enjoyment of human rights

OHCHR highlights the interconnectivity of problems faced by rural communities and the need for coordinated and multidimensional solutions. One key aspect is the Comprehensive Rural Reform where partnerships with the rural communities is provided for in the ethnic chapter of the peace agreement. However, communities express their frustration regarding the model of participation which has been reduced to meetings lacking material impact.

Furthermore, the weak integral and effective state presence, lacking state service and the provision of security, justice, the empowerment of leaders and authorities, and the stimulation of economic development, opens up for armed groups that struggle for the control of illegal economies. An expression of this is that homicide rates in some of these regions[117] registered by the national police during 2017 surpassed the numbers registered in 2016 by about 1,000 per cent. This while the number of massacres increased from 11 cases in 2017 to 29 cases in 2018[118.] This situation also led some civilians to seek support from illegal groups as a form of protection.

Elaborating on the substitution of illegal crops, much indicates that the State and the international community place too much focus on eradication as opposed to long-term substitution and sustainable incorporation into the legal economies – including capacity building and the access to markets. There is a historic opportunity of over a hundred thousand coca growers ready for change that cannot go missed, but runs the risk of doing so by focussing on eradication instead of substitution. Communities interested in substitution have been subject to forced eradication pushing some of them back into the hands of illegal armed groups and criminal gangs. Also, communities, Government officials and staff of international organisations supporting substitution, have suffered threats, kidnappings and

killings on part of these groups. OHCHR recommends a shift from measuring the area of eradicated coca plantations to measuring successful substitution. This would also be in line with the peace agreement as it relates to successful substitution and not eradication.[119] Unfortunately, international pressure pushes the agenda in the other direction as the US Office of National Drug Control Policy's director, Jim Carroll, in his visit to Colombia in September 2018 called cocaine production in Colombia "unacceptable" and blamed the rise in domestic demand in the US on the supply side. Colombian president Iván Duque, is satisfying his ally by adopting this focus on eradication, differing himself to his predecessor who's position was the need for working both on the supply and demand side and that the supply side needs to focus on substitution and creating fruitful environment in the countryside for alternative forms of subsistence.[120]

This trend has continued as US President Donald Trump has pushed the Duque administration to act against cocoa production which also has led to an expansion of its manual eradication teams from 25 in 2017 to nearly 150 in 2020. This rapid expansion appears to have a negative effect on any instruction in use-of-force protocols that the security forces accompanying the eradicators were receiving. Results show that there is an evident risk that when these teams go into rural communities, the resulting confrontations involve excessive or even lethal force and the lack of free, prior and informed consent when it comes to indigenous peoples. In an event on 22 April 2020, in an operation for manual eradication, members of the police eradication team fired into a group of Awa indigenous people, who were attempting to talk to them about why indigenous authorities had not been consulted about the planned eradication, as required by law. One indigenous community member was killed and three others wounded.[121]

Turning to the issue of development and wellbeing in the countryside, especially in areas most affected by the internal conflict, the tool at hand are the Development Plans with Territorial Focus. While there is need in all conflict-affected communities, OHCHR recommends the programme to implement gradually, focussing more deeply in the areas, ensuring tangible results before moving to the next area. They also note that the possibilities of success for the programme diminishes in areas counting illicit economies and criminal groups.

Attached to local development in the countryside are the issues of governance and local justice. Unfortunately these are also, in areas counting presence of illicit economies, intertwined with Township Councils as some members of Councils are also part of the illegal economies. Firstly it affects the ability, credibility and legitimacy of local authorities, and secondly, provides the possibility for illegal economic interests to receive favours in support of economic and private interests.

When it comes to indigenous authorities, while recognised in the Colombian constitution, this does not fully translate into practice. As some State actors are beginning to accept self-governance, high-level State officials point in a regressive direction by questioning the principle of free, prior and informed consultation as self-governance is seen as an obstacle to agro-industrial and mining projects.[122]

Corruption and the realisation of human rights

Corruption has a clear link to the non-realisation of human rights as it deprives communities of social investments and undermines State capacity and efforts to guarantee universal human rights. This is seen at the national, regional and local levels. Corruption is estimated to amount to 21 per cent of the national budget[123]. The UN Committee on Economic, social and cultural rights therefore recommended the Colombian Government to address the root causes of corruption.[124]

Official statistics from the Government shows a significant impunity as only 1.6 per cent of the 64,095 complaints of corruption made between 2012 and 2016 were resolved. OHCHR calls for urgent action and intensification of actions against corruption in the framework of the implementation of the peace agreement – a central action being the coming to terms with impunity.[125]

As for corruption within the framework of the implementation of the peace agreement, the Office of the Attorney General in 2018 initiated an investigation into the contracts executed with post-conflict resources which is to clarify the alleged irregularities.[126]

Collective reparations and land restitution

While the Unit for Attention and Comprehensive Reparations to Victims has recognised 634 collective reparation beneficiary groups, only six cases count significant progress in the implementation of the plans. When it comes to land restitution for ethnic peoples, sentences ordering the restitution of ethnic territories have been finalised in 14 of the 203 registered requests for restitution.[127] These processes are central to reverse the concentration of land which was accentuated due to the internal armed conflict. This while protection for claimants is essential, since they face threats from the different armed actors.

TRANSITIONAL JUSTICE

The Colombian transitional justice system

The Comprehensive System for Truth, Justice, Reparation and Non-Recurrence (SIVJRNR) was created as a part of the peace accords. The SIVJRNR is composed of the following institutions: the Special Jurisdiction for Peace (JEP), the Commission for the Clarification of Truth, Coexistence and Non-Recurrence (CEV); the Special Unit for the Search for Persons Deemed as Missing in the Context of and Due to the Armed Conflict (UBPD) as well as of comprehensive reparation measures for peacebuilding and guarantees for non-recurrence. The SIVJRNR was incorporated in the Political Constitution of Colombia through the Legislative Act 01 of 2017. Each of its components counts with its own regulatory framework.

The different parts of the system will be examined below, focusing on the Truth Commission and the Special Jurisdiction for Peace.

Truth commissions

The limits of what truth commissions can achieve

Experience says that the high expectations on a truth commission probably is one of its worst enemies. This is why it is important to be aware of the possibilities and limitations of truth commissions. What can one expect from them?

One limit when it comes to the inclusion of indigenous peoples in the process is that truth commissions typically have been set up in order to reaffirm goals of unity and reconciliation within the framework of a nation-state. In this model, the state is represented by the central Government and the focus is on relatively recent human rights violations where

individual witnesses and survivors contribute to a truth that is recorded in writing. Indigenous communities that can contribute a more long-term perspective told by means of oral tradition, might find this traditional model quite limiting. Different ways of countering these diverse realities and expectations have been elaborated on above.

According to Arthur, expecting that truth commissions would be able to deliver self-determination and political rights instantly would be asking too much. What they can do is to enhance the political legitimacy of indigenous peoples. This while also creating a record of how the erosion of self-determination and political rights has been detrimental to fulfilling the rights of indigenous peoples. By doing this, truth commissions can serve as a vehicle for positive change in society that contribute to the recognition of indigenous peoples as equal partners with distinctive rights.[128]

While a Government in general would use transitional justice as a means to break with the past, indigenous peoples can use the process and the historic moment to use the past as a way to shed light to current conditions.[129]

Experiences from other countries

In Guatemala the indigenous peoples are in majority and represented the bulk of victims in the internal armed conflict, being severely hit by the war that in its nature was rural and "dirty". Also in Peru the indigenous peoples were the ones hardest affected by the armed conflict which also was characterised as mainly rural and "dirty". Even though the truth commissions in these counties did not have an explicit mandate to examine violations of the rights of indigenous peoples, the final reports included specific conclusions regarding indigenous peoples. This also goes for the commissions in Paraguay and Brazil. These are all examples of commissions that have dealt with transition from armed conflict to peace (Guatemala and Peru) and from dictatorship to democracy (Paraguay and Brazil). The continuation of processes in Peru and Guatemala led to the trials of the former presidents Alberto Fujimori and Efrain Rios Montt, among others, including cases of atrocities committed against indigenous peoples.

Now, the other category of truth commissions are those that exclusively deal with the human rights violations committed towards indigenous peoples in the framework of colonisation. These commissions are not restricted to the narrow time-frame and events connected to an internal armed conflict or to a period of authoritarian rule. To the contrary they focus exclusively on the violations of the rights of indigenous peoples and have better possibilities to display the full story. The two most relevant experiences is the Truth and Reconciliation Commission of Canada and the Maine Wabanaki-State Welfare Truth and Reconciliation Commission. What is encouraging when it comes to the truth commissions in Canada and Maine is that they were established by indigenous peoples in cooperation with Governments. However, the mandates of both commissions were quite restricted – in the case of the Canadian commission it focused on the church-run residential schools for indigenous children, while in Maine the focus was the state child-welfare system and its impact on indigenous peoples. Both commissions in practice reached further than their restricted mandate but the fact remains that a full-fledged truth commission and even more so a complete transitional justice process handling all aspects of colonisation affecting indigenous peoples, yet is to be seen. Some would argue that transitional justice strictly speaking is not applicable as there is no transition at hand. However, firstly the tools provided by transitional justice certainly can provide a good ground for these processes as long as they are culturally adapted, and secondly you could argue that there is a transition at hand – being the one from colonisation to self-governance and self-determination.

It is yet too early to tell what the outcome of the Truth and Reconciliation Commission in Norway investigating the "Norwegianisation" and injustices against the Sámi people and the Kven Norwegian Finnish minority will be, but the set-up promises a more comprehensive result. This while in Sweden, the national Government has responded positively to a request by the Sámi Parliament on a joint truth commission that probably will develop along the same lines.

Connecting these developments, in the case of Colombia, the Truth Commission and the whole SIVJRNR is set around the internal armed conflict, and in that respect similar to the experiences in Guatemala and Peru, even though the emphasis on indigenous peoples and the inclusion and cultural adaptation of processes and practices, is aiming at higher standards. There are also many initiatives parallel to and connected to the Truth Commission that have more flexible mandates for exposing and analysing the history of indigenous peoples in Colombia and acts and effects of colonisation. One example of this is the "Tiempos de vida y muerte" developed by ONIC in cooperation with the National Centre for Historic Memory, which is a website product within the project of the National Report of the Indigenous Peoples that in itself brings more flesh to the bones.

The question is though how far the Colombian Truth Commission will be able to reach in terms of five hundred years of colonisation. It is most probably far too much to ask for it to deliver the contents of a full-fledged truth commission on colonisation, but it would be important to come as close as possible. This as, unfortunately, the prospects for a truth commission focusing exclusively on indigenous peoples to materialise in the near future, are very small.

Eduardo Gonzalez, in an interview with ICTJ noted that transitional justice over the years has interlinked with cross-cutting thematic areas such as gender, youth and development. Now, it's time for transitional justice to "provide indigenous activists with an additional tool to claim further rights".[130] Can transitional justice in Colombia bring these tools?

The Colombian truth commission

The Commission for the Clarification of Truth, Coexistence and Non-Recurrence (the Commission) was created by means of the peace accords between the Colombian State and the FARC-EP. The Commission is a State institution at constitutional level, independent from the Government and autonomous, with a three year mandate, effective from 28 November 2018.

Article 4 of Decree 588 of 2017, provides that the Commission is an extra-judicial mechanism. The activities will not be of judicial nature, nor will its findings serve for criminal charges before any judicial authority. Information received or produced by the Commission may not be transferred to the judicial authorities to be used in order to assign responsibilities in judicial proceedings or to have probative value, nor will the judicial authorities have the faculty to request information produced by the Commission. For the sharing of information within the SIVJRNR this means that the Commission can retrieve information from the JEP in order to comply with its objectives. This while the Commission cannot transfer information to the JEP. Between the Commission and the Search Unit for Disappeared however, the interchange of information in both directions, from an extra-judicial perspective, is permitted and encouraged.

The objectives of the Commission is fourfold:

1. The clarification of truth regarding the internal armed conflict;
2. The recognition of victims and the impact and violation of their rights; the voluntary recognition of individual and collective responsibilities; and the recognition on part of the society about what happened.
3. The promotion of coexistence in the territories;
4. The contribution to non-recurrence of the armed conflict.

The Commission counts at least nine million victims living within and outside de borders of the country. It will concentrate its work where the suffering has been worst and also where silence has been dominant. The work of the Commission is divided into nine geographical zones within the country. Added to these is a tenth "zone" consisting the indigenous reservations, the afro-Colombian communities, the palenqueros, raizales and roma. Finally, there is also a special "zone" amounting to about 28 countries counting Colombian diaspora that had to flee the country because of the armed conflict – the extraterritorial part of the Commission.

The Commission, according to its instructions, will have to contribute to the clarification and recognition of thirteen different thematic areas that are to explain the origin and persistence of the internal armed conflict. Among these, while all can be said to be relevant for the indigenous peoples, one of them explicitly name the ethnic peoples; *the human and social impact of the conflict*, particularly in the groups that suffered the most and that require special protection, as the children, ethnic peoples and women. Another thematic area of importance is the historic context and the causes and origins of the conflict in light of the report from the Commission on the History of the Conflict and its Victims – this commission presented its report in 2015[131]. Finally, yet another thematic area of high importance to the indigenous peoples is the area of *displacement and dispossession of land in the framework of the armed conflict*. The Commission states that even though there exist other types of violence and conflicts in Colombia, the Commission will need to circumscribe to the thirteen thematic areas. Further, taking into account its wide mandate, only the most important moments and events of each region can be prioritised. This will be done in cooperation with the organisations, communities and sectors involved.

In terms of responsibilities, the Commission is mandated to determine the collective responsibilities that are derived from the clarification of violations of human rights and international humanitarian law.

When it comes to the Commission's contribution to the peaceful coexistence in the territories there is a range of proposed lines of action. These include dialogues and accords between different groups, conflict management and the strengthening of processes that unites the communities with nature, rivers and forests.

The Commission parts from the year 1958 as its departure of reference, as it was a breaking point when the political violence between conservatives and liberals gave place for another type of violence; insurgency and contra insurgency which resulted in what internationally is known as an internal armed conflict. However, the Commission will also have in mind the historical political violence as a factor of analysis through available secondary material. This also encompasses taking account of the fact that the ethnic peoples have suffered violence during the armed conflict for reasons that traces way beyond the twentieth century. The Commission also departs from a socio-historic dimension understanding the armed conflict as a complex and changing process which is deeply rooted in the Colombian culture, its economic order and its political structures and dynamics.

<u>The ethnic perspective of the Truth Commission</u>

The Commission, in line with the provisions of the peace accords, takes a special ethnic focus which seeks to guarantee the participation of the ethnic peoples in the clarification of truth, recognition of responsibilities, coexistence and contributions to non-repetition. This entails five action lines:

- A special space for consulting which is to guarantee the participation of the ethnic peoples in the development of a differentiated methodology which takes into account their particular cultures, languages and geographic aspects which will be co-managed with the other parts of the SIVJRNR.
- The elaboration of a special chapter on the ethnic groups in the final report.
- The permanent concertation with ethnic authorities in the territories.
- The permanent dialogue through a working group consisting authorities that represent the different ethnic peoples.
- The creation of an ethnic consultative board integrated by representatives from the ethnic peoples and experts in specific areas.

The consultancy process resulted in separate agreements with the different ethnic groups. The one with the indigenous peoples was concluded in January 2019 and is a comprehensive agreement including all three institutions of the SIVJRNR.[132] When it comes to the specifics of the Truth Commission, the Permanent Forum for Concertation with the Indigenous Peoples (MPC), presented its suggestions regarding the Truth Commission's protocol for relations with indigenous peoples and the methodology

for working with ethnic groups. These were later incorporated into the document by a joint working group. A central agreement was the creation of a Steering Committee for Ethnic Peoples within the Truth Commission which is to coordinate actions with the peoples, to guarantee a do-no-harm perspective of its actions as well as contributing to the reinforcement of collective rights and ethnic peoples' communities. Among the agreements is also the increased focus on the artistic and cultural dimension of the commission as well as a differentiated geographic division of the work of the commission when it comes to indigenous peoples. The Commission also agreed to accommodate the criteria for prioritisation presented by the MPC and to conclude the prioritisation with authorities at the local level.[133]

The Commission's protocol for relations with indigenous peoples and its ethnic methodology are inclusive and comprehensive documents that have the potential, if applied throughout the institution and process, to contribute to a differentiated approach facilitating the active and effective interaction with indigenous peoples as communities and individuals.[134] The 2019 report on Colombia by the UN High Commissioner for Human Rights as well as the third report of the Kroc Institute also commend the integration of ethnic groups in the work of the three institutions of the SIVJRNR.[135]

Legal measures

Legal framework for indigenous peoples in Colombia

The 1991 constitution introduced specific legal recognition and protection of indigenous peoples as a cultural group and in relation to the rights over territories. It also strengthened indigenous peoples' right to political participation and self-determination. The constitution increasingly became a tool for claiming indigenous peoples' rights. Social mobilisation, protests and land occupations as a way of asserting claims were partly shifted to the national political agenda, claiming the protection of their rights. The new institutions such as the Constitutional Court and the Constituent Assembly were used to create a new social pact for indigenous peoples.

The Constituent Assembly abolished legislation that prevented indigenous peoples from managing their own lives and territories. This while the Constitutional Court strengthened the status of indigenous peoples as collective subjects of rights as well as collective ownership of territories. Lastly, the Government became legally obliged to consult indigenous communities when taking measures affecting their rights and territories.

However, despite the formal recognition of indigenous peoples' rights through legislation and jurisprudence, the impact has been limited. One example is that licenses for exploiting natural resources in indigenous territories have been granted without following the standards of consultation established by the Constitutional Court. In general, the obligation to consult is seen as a barrier to progress and development rather than a tool for inclusion and sustainable development. The lack of implementation of legal and policy instruments, high level of impunity and the absence of a progressive agenda for the inclusion and recognition of indigenous peoples makes up for this situation.[136] Can the legal measures under the transitional justice system support a different development?

The Special Jurisdiction for Peace from an indigenous peoples' rights perspective

The Special Jurisdiction for Peace is the justice component of the SIVJRNR, created by the peace agreement. The JEP is set to investigate, clarify, prosecute and punish the most serious crimes committed over more than fifty years of armed conflict in Colombia. The benefit of a perpetrator that choose to appear before the JEP is the reduced sanctions that apply to those fully cooperating with justice by telling the truth and acknowledging responsibility.

It is still early on in the process in order to assess the JEP from an indigenous peoples' rights perspective. The JEP has barely begun to operate and there is lots of ground to be covered before any concrete results can be seen. What can be assessed so far is the consultancy process with indigenous peoples and the profile of cases selected.

When it comes to the consultancy process with indigenous peoples it has been developed within the same framework and in cooperation with the other institutions of the SIVJRNR. The protocols for the relationship and the participation of indigenous peoples has been developed and there will be periodic follow-up meetings though the Ethnic and Racial Committee. Four out of thirty-eight JEP magistrates are from the indigenous peoples. So far so good. However, what probably will become the most challenging part is complementarity with indigenous peoples' justice systems (Special Indigenous Jurisdiction) and the desire set out in the peace agenda of the indigenous peoples discussed above, to handle cases of human rights violations not only committed by members of their communities, but also by other actors. The inclusion of the territorial and ethnic perspectives is regulated in the JEP Rules of Procedure. Chapter 15 outlines the coordination with the Special Indigenous Jurisdiction, while chapter 16 handles the roles of the Territorial and environmental commission and the Ethnic commission within the JEP. Both commissions have bearing on indigenous peoples' rights.

The Rules of Procedure sets out both the interjurisdictional coordination and articulation and the participation of victims and perpetrators pertaining to the indigenous peoples within the JEP framework. The provisions of the document constitute a rather flexible framework that have the potential to comply with a culture-sensitive participation of indigenous peoples within the JEP, as well as an interjurisdictional coordination that can approximate the expectations of complementarity of the Special Indigenous Jurisdiction spelled out by the indigenous peoples. Ayda Quilcue Vivas, Human Rights and Peace Counsellor with ONIC said that "… for the first time, a clear will between two justice systems, such as the JEP and JEI, is declared, which is far from the ordinary system in this country, these agreements open a path of hope …".[137]

Looking at the cases taken on so far by the JEP, five out of seven cases have bearing on indigenous peoples' rights and also on indigenous peoples as victims.

JEP case number two handles the situation in Ricaurte, Tumaco and Barbacoas in the Nariño department. This case prioritises the territorial and ethnic focus – especially looking at the victimising actions perpetrated against the Awa people. The area has been marked by illegal economic activities related to the armed conflict, including illegal mining and arms trafficking, counting victimising practises as anti-personal mines, forced economic exploitation, forced displacements, confinement, massacres and arbitrary detentions.[138]

Case three handles the extrajudicial killings known as "false positives" – extrajudicial killings where victims were presented as enemy soldiers killed in combat by state forces. This practice was one of the main elements in the International Criminal Court's preliminary exam on Colombia. Some of the victims belong to indigenous communities.[139]

JEP cases number four and five address the severe human rights situation in a number of municipalities in the departments of Antioquia, Chocó and Cauca. They include forced displacements connected to land grabbing, environmental damage, massacres, torture, sexual violence, forced recruitment and illegal detention, among other crimes. An important part of victims are different indigenous peoples and a central reason for developing these two cases is that they are to show the impact of the conflict on indigenous peoples, as peoples in these regions have been among the most severely affected by the conflict, including infractions by all actors.[140] [141]

Finally, JEP case number seven is investigating recruitment and utilisation of children in the internal armed conflict. This is an area where the impunity level is high as the ordinary justice system only has reached condemnatory sentences in ten cases over the years. Only the investigations opened by the Prosecutor General count 5,252 victims recruited by the FARC- EP, but this is only a part of actual victims. As an example, Human Rights Watch estimated that in 2003 the FARC-EP counted about 7,400 child soldiers in their organisation, this while the total number of child

soldiers at that point in time amounted to 11,000.[142] The JEP considers that the recruitment of children belonging to the ethnic groups is especially grave as it implies the loss of cultural identity and their role in their communities. ONIC registered 540 cases of child recruitment pertaining to indigenous peoples between 1989 and 2016.[143]

Comparing with the research framework

Mandate

The first requisite of the research framework is for transitional justice to go *beyond the state-centric view*. This means taking into account the different nations and minorities present within the nation state, taking a multi-ethnical and multi-cultural approach. A common way of interpreting the reconciliation part of a truth commission is the re-establishing of trust between citizens and between citizens and the State as well as the repairing of national unity and identity. However, while reconciliation is an important goal, it should not mean the strengthening of a particular national identity at the expense of others. This would, apart from ignoring the right for indigenous peoples to define their own nationhood as provided by the UN Declaration on Indigenous Peoples, also ignore the fact that many conflicts stem from and develop patterns of ethnic dominance and failure to embrace a multi-ethnic environment. Instead of a mono-national reconciliation, there is a need for a multi-national, multi-cultural and multi-ethnic reconciliation approach, which requires dialogue across these dimensions.

In the Colombian process this aspect probably becomes more evident when looking at developments not necessarily exclusively proper to the internal armed conflict but which happened before and during the conflict. A central aspect is access to and possession of land and territory where different ethnic groups compete for resources. Indigenous peoples, groups of African descent and people part of Farmers' Reservations need to live side-by-side. Simultaneously, their property and existence are threatened by the invasion of colonisers, legal- and illegal extractive industries and others. This also leads us to the different development models, applied by the different cultures and the Colombian State. For indigenous peoples, this is an important divider vis-à-vis the State as the development model based on extraction of natural resources, pursued by the State, is a contradiction to their cosmovisions and a threat to their wellbeing and survival as peoples.

While all three components of the SIVJRNR were designed in order to consult, include and adapt to the different ethnic minorities, when it comes to reconciliation it is too early to tell if the process will be able to produce a multi-national, multi-ethnic and multicultural form of reconciliation. The Truth Commission as well as the JEP certainly places lots of efforts in order to investigate the infractions to international humanitarian law and gross violations of human rights committed against indigenous peoples, as well as to clarify the impact of the internal armed conflict on their wellbeing and survival as individuals and peoples. But, perhaps the task of multidimensional reconciliation will be one of the most challenging for the SIVJRNR to achieve. Timewise, as a process, it would not be reasonable to demand anything close to full achievement within the limited timeframe available for the Truth Commission, although setting a solid ground would be important. One should also be aware of the fact that many initiatives, proper to peoples, communities and civil society are taking place around the country that can contribute to this multidimensional reconciliation, however, having said that, the official inclusion of this concept by the State is critical for its success.

Turning to the negotiation of the peace agreement, this was an affair exclusively between the Colombian State and the FARC-EP. Indigenous peoples had long before the negotiations demanded to be part of the process, but their will was not heard – in other words, their status as a nations was ignored. It was not until the very final stages of negotiations that they were invited to the table, negotiating the Ethnic chapter.

The second component in the research framework calls for transitional justice to *go beyond an individualistic form of analysis*. Many truth commissions have focused on crimes committed against individuals such as forced disappearances, extrajudicial killings and torture. While utterly important and also contributing to the patterns of violence in a specific context, telling the truth regarding indigenous peoples necessarily entails analysis of the effects on the peoples and communities, including economic, social, cultural and environmental rights. In the Colombian case, already the peace agreement between the Government and FARC-EP, takes account not only of individual damage but to a large degree focuses on the impact on different groups, including indigenous peoples. In particular, the Ethnic chapter strengthens this approach.

Also when it comes to the Truth Commission and the JEP, there is a pronounced emphasis on the damage the internal armed conflict has caused ethic groups. Including in the cases opened within the JEP, the focus on ethnic groups as collectives is marked.

The third element of the research framework calls transitional justice to *go beyond recent violations*. A typical transitional justice process stemming from the transition from authoritarian rule to democracy or from internal armed conflict to peace, is limited in time to the period concerned between the outbreak and the conclusion of the events. Commissions might, for explanatory reasons, be a bit flexible regarding the time period handled in order to give a background to main events, but in general terms stick to the limited time-frame set out in their mandates. When it comes to indigenous peoples this becomes a limiting factor as events important for the realisation of their rights are likely to fall way beyond the short mandate of this kind of truth commission. Looking at the indigenous peoples of the Americas, the history of violence and repression goes more than five hundred years back in time. Translating this to the current process in Colombia, the long internal armed conflict makes for a relatively extended time window to work within – from 1958 to 2016 – but still this is quite far from what would have been a suitable time frame for a truth commission exclusively handling the Colombian State's historical repression of indigenous peoples. The Truth Commission seems to be open to a certain flexibility in order to reflect the impact on indigenous peoples. In fact, its mandate includes to reflect the historical context in terms of the origins and multiple causes of the conflict, relying on the documents published by the Historic Commission of the Conflict and its Victims and other sources. However, it still remains to be seen how far back in time the Commission will go in their final report and the mandate is still reduced to the internal armed conflict.

Looking at the JEP, the cases opened are not only recent but at the same time not going back too far in time. As an example, in case five, on the situation in the northern part of Cauca, the period of investigation is set to 1993-2016. This may be explained by the fact that the possibility of finding and presenting proof is one of the criteria for choosing cases and time is an obvious limitation to that end.

The fourth component of the research framework calls for transitional justice to *go beyond archival and written sources*. Interviews, public hearings and other events are at the very heart of truth commissions, including the one in Colombia. However, the oral source is often translated into writing in the form of reports and recommendations, using the dominant language. This while oral tradition generally is a centrepiece of indigenous peoples' culture. And still, generalising about oral tradition, the different cultures also present different characteristics in terms of their understanding of their own and the surrounding environment, time frameworks and historic events. Adapting to this reality means looking at all stages of the process – including methodology, effective interaction with peoples, the resulting products and the presentation of the same. As with other groups, the outcome will also necessarily depend on who you incorporate in the process i.e. which sub-groups and individuals you listen to. Handling all these aspects in a country counting more than a hundred peoples, obviously is a huge task. Success is intimately connected to the meaningful participation of indigenous peoples throughout the process. The Commission and the JEP have started out in a positive manner, inviting the peoples

at an early stage and through the creation of mechanisms for continuous accompaniment of the process. There are though some reasons for concern – mainly to do with security. Will the Commission be able to operate in all relevant areas due to the security situation? Are the indigenous peoples willing to participate under these conditions and will they be able to do so safely? The Commission will apply alternative ways of participating in the areas where it finds difficulties operating due to security conditions, but what will this mean for truth, reconciliation and non-recurrence?

When it comes to written versus oral sources, interviews with the Commission are typically taped and then transcribed. It means that the records will be available in both forms and could be used for non-written products, including in different languages. Exactly which products will be produced for the dissemination of the findings and recommendations of the Commission is too early to tell, but consulting the indigenous peoples continuously throughout the process makes for a possibility of arriving at a set of products that respond to the different cultures. Looking at products at hand at the time of writing though, even the ones conducted by the indigenous peoples are text and internet based. This might of course have to do with the fact that these are the ones that are most visible and for natural reasons reached when performing a desk study.

Turning to the JEP, much of the advances and challenges are common to the ones faced by the Commission. Being a judicial institution though, some additional challenges are at hand. One is the assessment and understanding of oral evidence. Another the communication of findings and conclusions. While yet another, although not specifically tied to the use of sources, is the recognition and reparations that the sentences involving indigenous peoples as victims and (individual) victimisers will determine – aiming at reparations adapted to the cultural reality at hand. Lastly, looking at the UBPD, this institution has been part of the joint process of consultations with indigenous peoples, conducted in cooperation with the Commission and the JEP, why the elements for a successful culturally adapted process of clarifying and searching for forcefully disappearances and the return of victims found to families are present. It remains to be seen how it will be implemented in practice.

Procedures

The second tier of the research framework is concerned with the protocols and procedures of the transitional justice system at all stages of the process, involving and adapting to indigenous peoples.

The first of three aspects to consider is to *ensure consultation to obtain free, prior and informed consent*. A crucial success factor for truth commissions is to consult with the ones they are to serve – the victims. These consultations need to take place throughout the process – from design to implementation. In this respect it is important to bear in mind the often stated fact that for truth commissions, the process is as important as the outcome. In the case of indigenous peoples, States have a duty to consult in good faith to obtain free, prior and informed consent of any administrative or legislative measure affecting indigenous peoples.

As discussed above, the negotiation of the peace accords did not fully entail a satisfactory procedure of free, prior and informed consent – the involvement of indigenous peoples took place at the very final stages of peace negotiations, resulting in the Ethnic chapter. Also, in preparing for the implementation of the peace accords, the Fast-Track process applied, meant little involvement of indigenous peoples and the process most probably did not live up to the standards of free, prior and informed consent. The majority of norms consulted with indigenous peoples remained paper products or were substantially altered after consultations. However, when it comes to the different parts of the SIVJRNR, participation and consultations in good faith to obtain free, prior and informed consent has been established as the standard of processes from the very beginning.

The second element of the research framework is for the transitional justice system *to respect indigenous peoples' representative institutions*. In relation to free, prior and informed consent, a centrepiece is to determine who

represents the indigenous peoples. In a matter that concerns only one people, representation might be less complicated but in the framework of a transitional justice system, determining rightful participation might be challenging. Broad representation is a natural way to ensure inclusion and avoid exclusion but also means challenges in terms of coordination. Furthermore, indigenous communities, as all societies, consist of different sectors that not necessarily are represented in their leadership, such as women, children and youth. For a truth commission a challenge is to ensure that anyone that should be heard will be given the opportunity and that the interests of different sub-groups will be taken into account. Central is also the principle of *do-no-harm* in order to avoid worsening divisions within communities and between communities and to avoid re-victimisation. From a transformative justice perspective i.e. for transitional justice to contribute to a transformative process when it comes to indigenous peoples' rights, the strengthening of indigenous peoples' organisations and the movement as a whole, can be an important result of the transitional justice process, as seen in Guatemala.[144.]

In the Colombian case, the respect for indigenous peoples' representative institutions has been profound. As discussed above though, women have not necessarily felt represented in the national indigenous organisations and have also used other arenas such as the participation of women in the peace process as a vehicle for advocacy. While this is a natural path to take, some women also have hesitated to engage and speak out as it might fire back at them, in fear of harming and dividing the indigenous movement. Looking at the Permanent Forum for Concertation with the Indigenous Peoples (MPC), which is the mechanism used for free, prior and informed consent in relation to the SIVJRNR, all eight delegates representing indigenous organisations are men. This while one of two "permanently invited" is a woman and two out of five delegates representing the National Commission for Human Rights of the Indigenous Peoples (CDDHHPI) are women.[145] Now, even if numbers and representation do not tell the whole picture when it comes to the processes behind or real influence in the process, they indicate that there is a potential problem of representation and a real problem of equality.

Another complexity in the Colombian case is the large number of indigenous peoples. The process is of course made more manageable through the interaction with organisations that represent several or even a large number of peoples, such as in the case of ONIC. However, it seems reasonable to be concerned whether the peoples that are smaller in numbers and at the verge of being extinct, have a say and real influence. ONIC claims to represent these peoples and in effect draws attention to the special situation faced by them, but still, in a process like this, it must be of great importance seeing to that not only the stronger peoples are heard and benefit from the process but also the ones lacking resources and their own political platform. Otherwise the process risk worsening inequalities and dividends between peoples.

The third and last element is for transitional justice *to provide attention to the specific needs of indigenous witnesses*. The different entities in transitional justice should adopt culturally adapted methodologies for the interaction with the different indigenous peoples, including psychosocial support. It is also important to count with indigenous staff and interpreters to be able to fulfil their role. Among the many elements at hand, central concepts of the framework within transitional justice might not have a translation into indigenous languages, and similarly, the way of describing an event by an indigenous witness might not be correctly understood by an outsider to the culture. And, again, to be able to do-no-harm in order to avoid negative effects for the individual and the community and avoid re-victimisation, cultural adaptation is essential.

In Colombia, the SIVJRNR has set the protocols for the interaction with indigenous peoples, placing participation in every moment as a cornerstone of the process, but this is a huge task, considering the rich variety of indigenous peoples and other ethnic groups. A chain is only as strong as its weakest link and this certainly goes for the special procedures within a transitional justice process. Perhaps most important in this respect is the last link – the ones at the very end of the chain – interacting with individual and collective victims. It is still too early to

say how this interaction with indigenous peoples will turn out in reality – i.e. how indigenous peoples will grade their experience of participating in the SIVJRNR.

Final comment on the comparison

Looking at the Colombian peace process and the resulting framework for transitional justice, so far in the process, the comparison with the ICTJ recommendations, used as a research framework for this study, paints a process that to a high degree complies with the recommendations. The part that differs most from the recommendations is the peace process i.e. the negotiation of the peace accords, which was an affair between the FARC-EP and the national Government, at least partly ignoring the status of indigenous peoples as nations and their right to free, prior and informed consent, even if invited at last moment, negotiating the Ethnic chapter together with other ethnic minorities. However, it is also true that the peace negotiations is the only part of the transitional process examined in this paper that has been concluded and for that sake the only one that can be fully evaluated.

Supposing that the implementation of the SIVJRNR follows the path taken during its inception phase, the possibilities for the Colombian process to be transformative in regards to indigenous peoples' rights should be promising, relying on the accuracy of the ICTJ recommendations. However, not only the SIVJRNR is decisive in this respect – also other parts not examined in this paper, as for example the land restitution programme, the reincorporation programme, the Development Plans with Territorial Focus, the National Comprehensive Program for the Substitution of Crops Used for Illicit Purposes and the Comprehensive Rural Reform will have implications for the realisation of indigenous peoples' rights. And, maybe above all, the peace and security in the territories affecting the wellbeing of indigenous peoples, threatened by legal and illegal activities that continue and even accelerate in the post peace-accords era in the form of extractive industries, agribusiness, colonisation by small farmers, drug production and trafficking, illegal armed groups and criminal gangs; causing displacement, confinement, land grabbing, killings and other human rights violations leading to a veritable ethnocide or cultural genocide and in some cases ethnic cleansing of indigenous peoples.

Finally, a note on the comprehensiveness of the Colombian system for transitional justice. The system, the SIVJRNR, spells out that it's the *Comprehensive* System for Truth, Justice, Reparations and Non-recurrence. Even the name itself says that it ought to be comprehensive. However, this is only true to a certain extent. Its three components – the CEV, the JEP and the UBPD – are to a large extent to collaborate and as has been discussed above, has done so for example in terms of coordinating processes for the free, prior and informed consent, avoiding parallel processes as much as possible. However, the mandates and rules of procedure to a certain extent contradicts this comprehensiveness – at least in the wider meaning of also being integrated in terms of procedures from a victim's perspective. The fact that the CEV cannot share information to the JEP is one such contradiction. Another example is that victims and witnesses might have to appear before more than one entity, giving the same story, if participating in more than one mechanism. Added to this are the different institutions for reparations that sit outside the SIVJRNR framework, remainders of the institutions created within the implementation of the peace process with the paramilitary, product of the Law on Victims and Land Restitution (law 1448 from 2011) such as the Unit for the Attention of Victims and the Land Restitution Unit. These institutions that lay outside the SIVJRNR framework are central for reparations and many individuals and collectives now entering the SIVJRNR, most likely already rendered their story to these institutions. So, the comprehensiveness of the Colombian system for transitional justice is at its best, partly reality, although having said this one also has to admit that the preconditions are challenging, having to relate to a past process with the paramilitary, and a possible future process with the ELN.

CONCLUDING REMARKS

Indigenous peoples' participation in transitional justice – opportunity for change?

The question whether indigenous peoples' participation in transitional justice represents an opportunity for change is not easily answered, and the answer will necessarily vary from one case to the other. Further, the present case study was made relating to a transition from internal armed conflict, why the question is how much can be translated to a situation where the transition at hand is one of authoritarian rule to democracy or from colonisation to self-determination and self-governance. As discussed above, the Colombian peace and transitional justice process to a large degree comply with the conditions set forth in the research framework, conditions which are supposed to give fertile ground for the participation of indigenous peoples and for advancing indigenous peoples' rights. The exception is the peace negotiations process where indigenous peoples were invited at the very last moment.

A central aspect of the research framework says that transitional justice should *go beyond recent violations* in order to help realise the rights of indigenous peoples. Looking at one of the most recent truth commissions being set-up – the Norwegian truth commission, investigating the "Norwegianisation" and injustices against the Sámi people and the Kven Norwegian Finnish minority – the time frame for the commission is from the nineteenth century until today and can be extended even further back in time if considered relevant. Such a time-frame naturally provides a fertile ground for investigating historic injustices and their impact on the situation of indigenous peoples and minorities today. What is more – it was set up with these groups at the centre. In comparison, the Colombian Commission and the SIVJRNR, embarks a quite limited time frame – from 1958 to 2016 – and does not have the indigenous peoples at the centre of its mandate. Due to the length of the internal armed conflict though, the window is unusually wide – amounting 59 years – this while the Commission might go even further back if considered relevant for its mandate. In practice, the Commission has also shown to extend the timeframe beyond 2016 – following and acting on current developments – for example related to the grave situation of human rights defenders and social leaders seen since the inception of the Commission.

A commission counting a more generous time window arguably would have a better chance of delivering a more comprehensive truth, provided that it counts with resources to dig deep enough in each relevant time period and topic i.e. it would deliver "more truth". But, what about justice? The short answer is that truth commissions are usually not judicial bodies and therefore not supposed to deliver justice in the sense of sanctions and material or monetary reparations. However, returning to the central question of this report – if transitional justice can deliver change for indigenous peoples – brings us to question what a truth commission and the whole transitional justice system can bring about to push change? One position is what would be fair and desirable from the peoples' perspective and another what is reasonable and achievable taking account of all actors and interests in a specific context. Going back, say five hundred years, will certainly provide more information on historic injustices and as well as evidence on the origin of a people and the historic occupation of ancestral lands, for example. These evidence can be used in different processes, including in courts. One example is a case where a Sámi community[146] sued the Swedish State aiming at self-determination of hunting and fishing rights within their territory – a right that had been taken away by means of a Government decision – leaving decision-making to the regional administration. The Sámi community used official written sources as well as archaeological findings in order to prove their long-term links to their ancestral lands. A transitional justice system that can deliver such evidence would potentially be a resource for peoples defending or aiming at re-conquering their rights to ancestral lands.

However, returning to the Colombian case, what would be reasonable and achievable looking at the context and its different actors? Although it would be important to disclose and make widely known all injustices committed by the Spanish Crown during colonial times – especially less known practices – maybe from a justice perspective it would be wiser and more reasonable to focus on more recent times, say from the independence from Spain. This would probably also make for better chances in terms of justice, as it would be possible to claim the continuity of the Colombian State from that point in time. Now, the mandate of the Colombian Truth Commission does not go as far back as independence from Spain, it does however cover a relatively wide time-frame within which there should be a good potential for finding and exposing the patterns of gross human rights violations and serious infractions of international humanitarian law committed against indigenous peoples, albeit only in the context of the internal armed conflict. These findings could be used as an advocacy resource for indigenous peoples at a more general level. When it comes to the JEP, as discussed above, cases will probably be of more recent nature, but on the other hand provide more detailed evidence on specific events and situations compared to the Truth Commission.

Looking outside of the SIVJRNR, there are also other mechanisms with potential to advance indigenous peoples' rights on the ground. The land restitution programme is such a component, having the potential for securing much needed land rights for the peoples, albeit the above discussed capacity shortage for its implementation, which needs to be addressed for effective change on the ground. Other components include the Development Plans with Territorial Focus, the National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes and the Comprehensive Rural Reform – also these facing difficulties of adequate implementation, especially in relation to indigenous peoples.

Reflecting on the genuinely disturbing conditions for the incredibly rich variety of indigenous peoples living within and across Colombian national borders, it might actually be an advantage to concentrate efforts on disclosing the recent history of injustices, including on-going injustices. This since resolving a situation where the majority of peoples face serious threats of being extinguished as peoples, cultures and individuals, needs urgent attention, resources and effective action from the Colombian Government and its branches.

Another provision of the research framework is for transitional justice processes *to go beyond archival and written sources*. While this is essential in relation to indigenous peoples, when looking at the different truth initiatives run by indigenous peoples and their organisations in Colombia, these are mainly expressed in Spanish and use internet as their platform. The reason for coming across these initiatives for this study naturally stems from the fact that much of the research was made using internet sources – there are of course a plethora of other truth initiatives – especially local – having other setups. Mapping the different initiatives has not been part of this study as its focus is on the "official" transitional justice process, however reflecting on former initiatives, they might have something to say about the participation of indigenous peoples in transitional justice and the opportunity for change. In order to reach change, indigenous peoples need to advocate their truth and their rights in front of "mainstream" society including the State and its institutions and the way to reach them is through mainstream language and platforms. Thus, indigenous peoples' truth initiatives that use the language of the colonising State might well be rational from an advocacy for change perspective.

Internal participation and representative institutions

In the Colombian case, the respect for indigenous peoples' representative institutions has been profound. However, women have not necessarily felt represented in the national indigenous organisations and have also used other arenas, such as the participation of women in the peace process, as a vehicle for advocacy. While this is a natural path to take, some women also have hesitated to engage and speak out as it might fire back at them,

in fear of harming and dividing the indigenous movement. Looking at the mechanisms for interaction with the SIVJRNR, even if numbers and representation do not tell the whole picture when it comes to the processes behind or real influence in the process, they indicate that there is a potential problem of representation and a real problem of equality.

Another challenge in the Colombian case is the large number of indigenous peoples. The process is of course made more manageable through the interaction with organisations that represent several or even a large number of peoples, such as in the case of ONIC. However, it seems reasonable to be concerned whether the peoples that are smaller in numbers and at the verge of being extinct, have a say and real influence. ONIC claims to represent these peoples and in effect draws attention to the special situation faced by them, but still, in a process like this, it must be of great importance seeing to that not only the stronger peoples are heard and benefit from the process, but also the ones lacking resources and their own political platform. Otherwise the process risk worsening inequalities and dividends between peoples. Having said this, there is not necessarily an automatic correlation between the size of a people in terms of individual members and its advocacy power, but in general it seems reasonable to assume that peoples in danger of extinction have fewer resources for advocacy.

While the research framework rightfully points to the importance of respecting indigenous peoples' representative institutions it might be valuable to keep in mind the basic principles of a human rights-based approach, including participation, non-discrimination, empowerment and transparency.

Scope of justice delivered by the SIVJRNR

Looking at the scope of justice that can be expected from the SIVJRNR in terms of collective justice for indigenous peoples, the aim of justice within the framework of JEP is to be restorative – i.e. to repair what was broken through the conflict. What we can expect is for truth to be delivered at a more general level by the Truth Commission while the JEP will bring clarity on collective and individual cases, including sanctions and reparations. Thus we can expect truth, justice and reparations. However for the system in itself to be transformative in terms of indigenous peoples' rights, might be hoping for too much. It definitely can lay a fertile ground and provide tools that can be used for carving out those rights in a transformative manner in the near future. Then, of course, as pointed out in the previous section, several of the components laying outside of the SIVJRNR, but being part of the package resulting from the peace accords, are important building blocks for the realisation of indigenous peoples' rights on the ground.

From rhetoric to action

Perhaps the most important aspect for bringing transformative justice to the indigenous peoples of Colombia is converting words into action. As been shown above, the Colombian State and its branches has a mediocre record when it comes to make effective the promotion, protection and implementation of indigenous peoples' rights. The right to life and survival is a central and basic part of all human rights covenants, which is not being guaranteed by the Colombian state in relation to indigenous peoples, as has been shown and continuously criticised by the Colombian Constitutional Court. Moreover, indigenous organisations witness the generally poor implementation record of agreements sealed with the State and the excessive responding time by different Government agencies discussed above, due to lack of resources and specialised knowledge on indigenous peoples, which makes implementation slow and inadequate.

In this respect it is notable how the peace accords have been praised for their focus on the territories, gender approach and focus on ethnic groups, and how at the same time, these parts of the accords are lagging behind in terms of implementation.

Non-recurrence – already a vision broken?

Essential for a transformative process to take place – and even a restorative process to thrive – is the effective non-recurrence of past events and avoid re-lapsing into conflict. Unfortunately, apart from the fact that the internal armed conflict between the FARC-EP and the Government is only one of the multidimensional conflicts that indigenous peoples of Colombia face, if not re-lapsing into conflict, at least the conflict is transforming, involving other patterns and actors. As been discussed above, the security situation for human rights defenders and indigenous peoples' leaders has aggravated after the signing of the peace accords as the vacuum left by the FARC-EP is claimed by other armed groups. Murders of human rights defenders and social leaders continue at alarming rates and new cases of forced displacements and confinements continue in the first half of 2020.

In some cases the vacuum created means access to geographic areas rich in natural resources which also attract other actors – both legal and illegal – leaving the indigenous peoples with many fronts to cover. From this perspective – interpreting the provision of non-recurrence in a wider manner – recurrence, even if not being a carbon copy of the past, is already happening in certain contexts. All the above is of course subject to the exact reality of each people and location – just as it has been before – not all peoples were affected in the same manner and magnitude by the internal armed conflict.

Looking at reformation of the State apparel and turning to security sector reform, unfortunately various highly troublesome developments have been disclosed in 2019 and 2020. First, in 2019, the uncovering of directions within the army similar to those that triggered the earlier false-positive scandal of extrajudicial killings by the army in order to show better statistics and obtain rewards. Then in 2020, the unfolding of a systematic operation by Army intelligence units, developing detailed dossiers on the personal lives of at least 130 reporters, human rights defenders, politicians, judges, and possible military whistle-blowers. Both actions are a form of repetition that have implications for indigenous peoples. The need for a serious security sector reform and lustration within the security sector is evident and urgent.[147]

Looking at reconciliation as a part of non-recurrence, a common way of interpreting the reconciliation part of a truth commission is the re-establishing of trust between citizens and between citizens and the State as well as the repairing of national unity and identity. However, while reconciliation is an important goal, it should not mean the strengthening of a particular national identity at the expense of others. This would, apart from ignoring the right for indigenous peoples to define their own nationhood as provided by the UN Declaration on Indigenous Peoples, also ignore the fact that many conflicts stem from and develop patterns of ethnic dominance and failure to embrace a multi-ethnic environment. Instead of a mono-national reconciliation, there is a need for a multi-national, multi-cultural and multi-ethnic reconciliation approach, which requires dialogue across these dimensions. The SIVJRNR makes a serious attempt to include a differentiated approach also in relation to reconciliation, but, as discussed above, this process must be wider than the SIVJRNR, longer in time and transformative, in order to ensure a multi-national, multi-cultural and multi-ethnic reconciliation and the building of a platform for co-existence which embraces the multi-national, multi-cultural and multi-ethnic dimensions.

Transitional justice – transformative in itself or a vehicle for change?

Just a few concluding words on the potential of transitional justice to be transformative. No doubt that transitional justice should aim at reaching beyond its restorative basis and nature. But, how much can we expect from transitional justice itself? Looking at the Colombian process and its different components, what can be expected is mostly restorative measures, although some of these might have effects that to a certain extent changes the life of individuals and collectives. The Truth Commission will deliver truth, the JEP will deliver truth, verdicts, sanctions and reparations and the UBPD will deliver the right for relatives to know the truth about the fate of their loved ones and the right to care for their remains. Moreover,

victims should be at the centre of these processes and non-recurrence is the overarching goal. However, to what degree can we expect this process to amount to a level of being transformative? Perhaps it is not from the proper SIVJRNR that we can expect transformative justice but rather the long-term use of its products and the processes that are connected to and inspired by the SIVJRNR and the implementation of the peace accords that as a sum can add up to transformative justice. As elaborated upon above, several components of the peace accords and on-going processes originating from the demobilisation of the paramilitary, also add to restitution and hopefully also to a transformative process of Colombian society.

Moreover, for transitional justice to contribute to a transformative process when it comes to indigenous peoples' rights, the strengthening of indigenous peoples' organisations and the movement as a whole, can be an important result of the transitional justice process, as previously seen in Guatemala.

So, can transitional justice in itself be transformative? It all boils down to a question of where and when transitional justice starts and ends. The transition from armed conflict to peace or from authoritarian rule to democracy in itself must be said to be of transformative nature and certainly needs to be transformative also in its different parts and details in order to be sustainable. It entails processes that pertains to the proper transitional justice process but can also include other processes, for example provided by a peace treaty. This while the seeds sawn in a transitional justice processes also have been known to grow and prosper long after the official process ended, nurturing from the fertilisers produced by the process and the rain that suddenly make them grow and give fruit. Turning to indigenous peoples, to say that transitional justice processes so far to any significant degree have been transformative would be to say too much. Transformative processes include so much more than a verdict on gross human rights violations against indigenous peoples and non-repetition of the past, it means changing structures and creating opportunities, ensuring that new generations of indigenous peoples can lead a life in peace, counting on the full enjoyment of rights and freedoms as peoples and individuals. It means the recognition of ways of life, not only on paper, but in practice. And it means turning the development of peoples slowly dying to creating the preconditions for cultures to flourish. The potential is there for transitional justice processes to at least serve as tools that can be used for advocating change in this direction, including the cases where truth commissions are not dedicated to transition from colonisation to self-determination and self-governance.

INTERVIEWS

Soraya Gutiérrez Arguello | Colectivo de Abogados José Alvear Restrepo | Colombia
Jomary Ortegón Osorio | Colectivo de Abogados José Alvear Restrepo | Colombia
Carlos Martín Beristain | Commissioner | Commission for the Clarification of Truth, Coexistence and Non-Recurrence | Colombia

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LA PARTICIPACIÓN DE PUEBLOS INDÍGENAS EN JUSTICIA TRANSICIONAL – OPORTUNIDAD DE CAMBIOS?

Aprendizajes de Colombia

RESUMEN EJECUTIVO

RESUMEN EJECUTIVO

El presente estudio profundiza en la participación de los pueblos indígenas en los procesos de justicia transicional, con el objetivo de comprender si estos procesos pueden servir como un vehículo para promover los derechos efectivos de los pueblos indígenas en un territorio determinado. Se estudia el proceso de justicia transicional en curso en Colombia, producto de los acuerdos de paz del 2016 entre las FARC-EP y el Gobierno colombiano, con el fin de comprender mejor las dinámicas y posibilidades que se presentan en el marco de un proceso actual. Como marco de orientación para el análisis, se utiliza un modelo producto de un simposio organizado por el Centro Internacional para la Justicia Transicional.

Al observar el contexto colombiano, los diferentes expertos coinciden en que los pueblos indígenas y otras minorías étnicas han sufrido de manera desproporcionada los efectos del conflicto, tanto en respecto a los efectos directos del conflicto como a los más indirectos. Como consecuencia de estos impactos, así como de otros factores, al menos cerca de la mitad de los más de cien pueblos indígenas de Colombia, enfrentan el riesgo de extinción. El estudio presenta una serie de pruebas que apuntan a que el Estado colombiano no ha sabido proteger a los pueblos indígenas, pero lo que es peor, también encuentra evidencia contundente que apunta a la falta de voluntad del Estado para proteger a los pueblos.

Los pueblos indígenas han sido víctimas de una serie de factores negativos generados directa e indirectamente por el conflicto armado, que incluyen pero no agotan: asesinatos y masacres, reclutamientos forzados, falsos positivos y desapariciones forzadas, amenazas, desplazamientos forzados, confinamientos, violencia sexual, reclutamiento de niños y niñas y el acaparamiento de tierras. Además de estos factores del conflicto armado, también luchan con otros conflictos que en algunos casos se ven agravados por el conflicto armado interno, como megaproyectos, minería y tala legal e ilegal, agroindustria, producción y tráfico de drogas, y colonos. Además de esto, su supervivencia también depende de la gestión y adaptación a fenómenos globales como el cambio climático y las pandemias – como en el momento de redactar este informe – el COVID-19.

En cuanto a los conflictos violentos, los pueblos también sufren los conflictos con los grupos guerrilleros restantes: ELN y EPL, fuerzas neoparamilitares, disidentes de las FARC-EP y bandas criminales. Todo se reduce a un cuadro que incluye múltiples conflictos que afectan el bienestar y la supervivencia de los pueblos, algunos derivados directamente de los conflictos armados, otros indirectamente y agravados por los conflictos, y algunos de otra índole. Considerando este contexto complejo, ¿qué puede significar un proceso de justicia transicional derivado de un acuerdo de paz con uno de los actores – las FARC-EP – para el avance de los derechos de los pueblos indígenas en Colombia?

En primer lugar, si bien las negociaciones de paz carecieron de la participación de las minorías étnicas hasta el último momento, cuando se incluyó el capítulo Étnico, el sistema creado para el proceso de justicia transicional cuenta con los elementos y estructuras para un proceso inclusivo y culturalmente adaptado. El Sistema Integral de Verdad, Justicia, Reparación y No Repetición (SIVJRNR) a través de sus tres instituciones; la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición (CEV); la Jurisdicción Especial para la Paz (JEP); y la Unidad de Búsqueda de Personas dadas por Desaparecidas en el Contexto y en Razón del Conflicto Armado (UBPD); todos con certeza harán importantes aportes a la satisfacción del derecho a la verdad, la justicia y la reparación de los pueblos indígenas y las personas pertenecientes a los pueblos. La pregunta es si pueden contribuir a una justicia transicional de índole transformador, promoviendo el respeto a los derechos de los pueblos indígenas en Colombia.

Suponiendo que la implementación de la SIVJRNR siga el camino recorrido durante su fase inicial, las posibilidades de que el proceso colombiano sea transformador en cuanto a los derechos de los pueblos indígenas deberían ser prometedoras, apoyándose en la veracidad de las recomendaciones del

ICTJ. Sin embargo, no solo el SIVJRNR es decisivo en este sentido, también otros programas e instituciones, como por ejemplo el programa de restitución de tierras, el programa de reincorporación, los planes de desarrollo con enfoque territorial, el programa de sustitución de cultivos ilícitos y la reforma rural integral tendrán implicaciones para la realización de los derechos de los pueblos indígenas. Y, quizás sobre todo, la situación de seguridad en los territorios es decisiva, afectando el bienestar de los pueblos indígenas, amenazados por actividades legales e ilegales que continúan e incluso se aceleran en la era post-acuerdos de paz en forma de industrias extractivas, agroindustria, colonos, producción y tráfico de drogas, grupos armados ilegales y bandas criminales; provocando desplazamientos, confinamiento, apropiación de tierras, asesinatos y otras violaciones de derechos humanos, conduciendo a un verdadero etnocidio o genocidio cultural y en algunos casos a la limpieza étnica de los pueblos indígenas.

Uno de los muchos desafíos en el caso colombiano es la gran cantidad de pueblos indígenas. Si bien el proceso se hace más manejable a través de la interacción con organizaciones que representan a varios o incluso a un gran número de pueblos, como en el caso de la Organización Nacional Indígena de Colombia (ONIC), parece razonable preguntarse si los pueblos que son más pequeños en número y se encuentran en peligro de extinción, tienen voz e influencia real. La ONIC alega representar a estos pueblos y en efecto llama la atención sobre la situación especial que enfrentan, pero aún así, en un proceso como este, debe ser de gran importancia procurar que no solo los pueblos más fuertes sean escuchados y se beneficien del proceso, pero también los que carecen de recursos y de plataforma política propia. De lo contrario, el proceso corre el riesgo de agravar las desigualdades y la fragmentación entre los pueblos.

Si bien el marco de investigación con razón señala la importancia de respetar las instituciones representativas de los pueblos indígenas, podría ser valioso tener en cuenta los principios básicos de un enfoque basado en los derechos humanos, incluida la participación, la no discriminación, el empoderamiento y la transparencia.

La pregunta de si la participación de los pueblos indígenas en la justicia transicional representa una oportunidad de cambio no se responde fácilmente y la respuesta necesariamente varía de un caso a otro. Además, el presente estudio de caso se relaciona con la transición de un conflicto armado interno, por lo cual la pregunta es cuánto se puede traducir a una situación en la que la transición en cuestión sea de un gobierno autoritario a la democracia o de la colonización a la autodeterminación y la autogobernanza. El proceso colombiano de paz y justicia transicional cumple en gran medida con las condiciones planteadas en el marco de la investigación, condiciones que se supone darán un terreno fértil para la participación de los pueblos indígenas y para el avance de los derechos de los pueblos indígenas. La excepción es el proceso de negociaciones de paz, donde los pueblos indígenas fueron invitados solo en el último momento.

Ahora bien, ¿qué sería razonable y alcanzable considerando el contexto y sus diferentes actores? Aunque sería importante revelar y dar a conocer ampliamente todas las injusticias cometidas por la corona española durante la época colonial – especialmente las prácticas menos conocidas – quizás desde una perspectiva de justicia sería más sabio y razonable enfocarse en tiempos más recientes, como sugerencia desde la independencia de España. Probablemente también generaría mejores oportunidades en materia de justicia, ya que se podría reclamar la continuidad del Estado colombiano a partir de este momento. Mientras el mandato de la Comisión de la Verdad de Colombia no se remonta a la independencia de España, cubre un marco temporal relativamente amplio dentro del cual debería haber un buen potencial para encontrar y exponer los patrones de violaciones graves de derechos humanos y graves infracciones al derecho internacional humanitario, cometidas contra pueblos indígenas, aunque solo en el contexto del conflicto armado interno. Los hallazgos podrían usarse como un recurso de incidencia de los pueblos indígenas a un nivel más general. Cuando se trata de la JEP, los casos probablemente serán de naturaleza más reciente, pero por otro lado, brindarán evidencia más detallada sobre eventos y situaciones específicas en comparación con la Comisión de la Verdad.

Mirando fuera del SIVJRNR, también existen otros mecanismos con potencial para promover los derechos de los pueblos indígenas en la práctica. El programa de restitución de tierras es un componente que tiene el potencial de asegurar los derechos a tierra y territorio que tanto necesitan los pueblos. Sin embargo, la escasez de capacidad para su implementación debe abordarse para lograr un cambio efectivo sobre el terreno. Otros componentes incluyen los Programas de Desarrollo con Enfoque Territorial, el Programa Nacional Integral de Sustitución de Cultivos de Uso Ilícito y la Reforma Rural Integral, también enfrentando dificultades de implementación adecuada, especialmente en relación con los pueblos indígenas.

Al reflexionar sobre las condiciones altamente preocupantes de la increíblemente abundante variedad de pueblos indígenas que viven dentro o cruzando las fronteras nacionales colombianas, podría ser una ventaja concentrar los esfuerzos en revelar la historia reciente de injusticias, incluidas las injusticias en curso. Esto dado que resolver una situación en la que la mayoría de los pueblos enfrentan serias amenazas de extinción como pueblos, culturas e individuos, requiere de una atención urgente, de recursos y de una acción efectiva del Gobierno colombiano y sus instituciones.

Al observar el alcance de la justicia que se puede esperar del SIVJRNR en términos de justicia colectiva para los pueblos indígenas, el objetivo de la justicia en el marco de la JEP es de ser reparadora, es decir, reparar lo que se rompió durante el conflicto. Lo que podemos esperar es que la Comisión de la Verdad entregue la verdad a un nivel más general, mientras que la JEP brindará claridad sobre casos colectivos e individuales, incluidas sanciones y reparaciones. Por tanto, podemos esperar verdad, justicia y reparación. Sin embargo, esperar que el sistema en sí mismo sea transformador en términos de derechos efectivos de los pueblos indígenas, podría ser esperar demasiado. Sin duda puede sentar un terreno fértil y proporcionar herramientas que se pueden utilizar para lograr esos derechos de una manera transformadora en un futuro cercano. Luego, por supuesto, como se señaló en la sección anterior, varios de los componentes que se encuentran fuera del SIVJRNR, pero que forman parte del paquete resultante de los acuerdos de paz, son pilares importantes para la realización de los derechos de los pueblos indígenas en la práctica.

Quizás el aspecto más importante para llevar justicia transformadora a los pueblos indígenas de Colombia es convertir las palabras en acciones. El Estado colombiano y sus instituciones tienen un historial mediocre en cuanto a hacer efectiva la promoción, protección e implementación de los derechos de los pueblos indígenas. El derecho a la vida y la supervivencia es una parte central y básica de todos los pactos de derechos humanos que no está siendo garantizado por el Estado colombiano en relación a los pueblos indígenas, como ha sido demostrado y continuamente criticado por la Corte Constitucional. Además, las organizaciones indígenas son testigos del historial generalmente deficiente de implementación de los acuerdos celebrados con el Estado y del excesivo tiempo de respuesta de las diferentes agencias gubernamentales, debido a la falta de recursos y conocimientos especializados sobre los pueblos indígenas, lo que hace que la implementación resulta lenta e inadecuada.

En general, llama la atención cómo los acuerdos de paz han sido elogiados por su enfoque en los territorios, el enfoque de género y el enfoque en los grupos étnicos, y cómo al mismo tiempo, estas partes de los acuerdos están rezagadas en términos de implementación.

Es esencial para que se lleve a cabo un proceso de transformación – e incluso para que prospere un proceso de restauración – la no repetición efectiva de eventos pasados y evitar volver a un estado de conflicto armado. Lamentablemente, aparte de que el conflicto armado interno es solo uno de los conflictos multidimensionales que enfrentan los pueblos indígenas de Colombia, si no reincidiendo en conflicto, al menos el conflicto se está transformando, involucrando a otros patrones y actores. La situación de seguridad de los defensores de derechos humanos y los líderes de los pueblos indígenas se ha agravado tras la firma de los acuerdos de paz, ya que el vacío dejado por las FARC-EP es reivindicado por otros grupos armados.

En algunos casos el vacío creado significa el acceso a áreas geográficas ricas en recursos naturales que también atraen a otros actores, tanto legales como ilegales, dejando a los pueblos indígenas con muchos frentes por cubrir. Desde esta perspectiva, interpretando la provisión de no repetición de una manera más amplia, la repetición, si bien no es una copia al carbón del pasado, ya está ocurriendo en ciertos contextos. Todo lo anterior, por supuesto, depende de la realidad exacta de cada pueblo y ubicación, tal como ha sido antes – no todos los pueblos se vieron afectados de la misma manera y magnitud por el conflicto armado interno.

Para que la justicia transicional contribuya a un proceso transformador en lo que respecta a los derechos de los pueblos indígenas, el fortalecimiento de las organizaciones de los pueblos indígenas y del movimiento en su conjunto puede ser un resultado importante del proceso de justicia transicional, así como se ha visto en Guatemala.

Considerada la reconciliación como parte de la no repetición, una forma común de interpretar la parte de reconciliación de una comisión de verdad es el restablecimiento de la confianza entre los ciudadanos y entre los ciudadanos y el Estado, así como la reparación de la unidad e identidad nacionales. Sin embargo, si bien la reconciliación es un objetivo importante, no debería significar el fortalecimiento de una identidad nacional en particular a costo de otras. Esto, además de ignorar el derecho de los pueblos indígenas a definir su propia nación, según lo establecido en la Declaración de las Naciones Unidas sobre los Pueblos Indígenas, también ignoraría el hecho de que muchos conflictos se derivan de y desarrollan patrones de dominación étnica y la incapacidad de adoptar un entorno multiétnico. En lugar de una reconciliación mono-nacional, existe la necesidad de un enfoque de reconciliación multinacional, multicultural y multiétnico, que requiere de un diálogo a través de estas dimensiones. En el caso colombiano, el sistema de justicia transicional hace un serio intento de incluir un enfoque diferenciado también en relación a la reconciliación, sin embargo, este proceso debe ser más amplio que el sistema de justicia transicional, más largo en el tiempo y transformador, para poder asegurar una reconciliación multinacional, multicultural y multiétnica y la construcción de una plataforma para la coexistencia que abarque las dimensiones multinacional, multicultural y multiétnica.

Solo unas pocas palabras finales sobre el potencial de la justicia transicional de ser transformadora. Sin duda, la justicia transicional debe apuntar a llegar más allá de su base y naturaleza restaurativas. Pero, ¿cuánto podemos esperar de la propia justicia transicional? Mirando el proceso colombiano y sus diferentes componentes, lo que se puede esperar de estos son en su mayoría medidas reparadoras, aunque algunas de ellas pueden tener efectos que en cierta medida cambien la vida de individuos y colectivos. La Comisión de la Verdad brindará verdad, la JEP verdad, veredictos, sanciones y reparaciones y la UBPD el derecho de los familiares a conocer la verdad sobre la suerte de sus seres queridos y el derecho a cuidar sus restos. Además, el marco prevé que las víctimas estén en el centro de estos procesos y la no repetición es el objetivo primordial. Sin embargo, ¿hasta qué punto podemos esperar que este proceso alcance un nivel de transformación? Quizás no sea del propio SIVJRNR que podamos esperar una justicia transformadora, sino más bien el uso a largo plazo de sus productos y los procesos que están conectados e inspirados por la SIVJRNR y la implementación de los acuerdos de paz, que pueden contribuir a la justicia transformadora. Como discutido anteriormente, varios componentes de los acuerdos de paz y los procesos en curso que se originan en la desmovilización de los paramilitares también contribuyen a la restitución y ojalá también a un proceso transformador de la sociedad colombiana.

Entonces, ¿puede la justicia transicional ser transformadora en sí misma? Todo se reduce a una cuestión de dónde y cuándo comienza y termina la justicia transicional. Debe decirse que la transición del conflicto armado a la paz o del régimen autoritario a la democracia en sí misma es de naturaleza transformadora y ciertamente debe ser transformadora también en sus diferentes partes y detalles para que sea sostenible. Implica procesos que pertenecen al proceso de justicia transicional en si, pero también pueden incluir otros procesos, por ejemplo, los previstos por un tratado de paz.

También considerando que las semillas sembradas en un proceso de justicia transicional, pueden crecer y prosperar mucho después de que finaliza el proceso oficial, nutridas por los fertilizantes producidos por el proceso y la lluvia que de repente las hace crecer y dar frutos. Pasando a los pueblos indígenas, decir que los procesos de justicia transicional hasta ahora en un grado significativo han sido transformadores, sería decir demasiado. Los procesos de transformación implican cambios que van mucho más allá de una sentencia sobre graves violaciones de derechos humanos contra los pueblos indígenas y la no repetición del pasado. Significa cambiar estructuras y crear oportunidades, asegurando que las nuevas generaciones de pueblos indígenas puedan llevar una vida en paz, contando con el pleno disfrute de sus derechos y libertades como pueblos e individuos. Significa el reconocimiento de formas de vida, no solo en papel, sino en la práctica. Y significa revertir la tendencia de pueblos que mueren lentamente a crear las condiciones para que las culturas prosperen. Existe el potencial para que los procesos de justicia transicional, al menos, sirvan como herramientas que se pueden utilizar para promover cambios en esta dirección.

En recuerdo de los pueblos y culturas que ya no están con nosotros y en apoyo a los pueblos y culturas que luchan para sobrevivir.

El presente estudio profundiza en la participación de los pueblos indígenas en los procesos de justicia transicional, con el objetivo de comprender de que manera estos procesos pueden ser un vehículo para promover los derechos efectivos de los pueblos indígenas en un territorio determinado. Se estudia el proceso de justicia transicional en curso en Colombia, producto de los acuerdos de paz del 2016 entre las FARC-EP y el Gobierno colombiano, con el fin de comprender mejor la dinámica y las posibilidades que se presentan en un proceso actual. Como marco de referencia para el análisis, se utiliza un modelo producto de un simposio organizado y publicado por el Centro Internacional para la Justicia Transicional.

La Fundación Sueca para los Derechos Humanos es una fundación sin fines de lucro fundada en 1991, con el objetivo de promover los derechos humanos mediante la educación en derechos humanos, la promoción y la cooperación internacional para el desarrollo. La Fundación Sueca para los Derechos Humanos ha estado trabajando junto con organizaciones asociadas en América Latina, África y Asia desde principios de la década de 1990. A lo largo de los años, el papel de la reparación de graves violaciones de derechos humanos y la justicia transicional se han vuelto cada vez más importante. Al mismo tiempo, la necesidad de adaptar las medidas de justicia transicional a las condiciones locales, género, edad, etnia, cultura y otros factores, ha recibido cada vez más atención. El presente estudio tiene como objetivo principal de aportar conocimientos sobre justicia transicional en relación con los pueblos indígenas. La Fundación Sueca para los Derechos Humanos tiene una larga trayectoria de cooperación con socios colombianos y de dar a conocer la situación en Colombia a diferentes actores, con el objetivo de reforzar el conocimiento e inspirar la acción. Otra parte importante de nuestro mandato es trabajar con la justicia transicional. El presente estudio conecta nuestra experiencia en el contexto colombiano y la justicia transicional y muestra las implicaciones inmediatas para asegurar y promover los derechos de los pueblos indígenas en el marco de la justicia transicional.

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