TRANSITIONAL JUSTICE AND INDIGENOUS PEOPLES IN LATIN AMERICA

Lessons learned from case studies of Guatemala, Peru and Colombia

GIJTR
Global Initiative for Justice
Truth & Reconciliation

Due Process of Law Foundation

The Due Process of Law Foundation (DPLF) is a nonprofit organization dedicated to human rights and the rule of law in Latin America. DPLF is headquartered in Washington, DC, with an office in El Salvador and a multinational team of professionals based throughout the region. Working with civil society organizations throughout Latin America, DPLF provides technical legal assistance, promotes dialogue with government representatives, and creates opportunities for the exchange of information and experience. DPLF also conducts research and produces publications that analyze and discuss the main human rights challenges in the region, in light of international law and comparative perspectives. Founded in 1996 by Professor Thomas Buergenthal and his colleagues at the United Nations Truth Commission for El Salvador, DPLF has worked on transitional justice issues since its inception, promoting compliance with international standards and the use of inter-American and international law to improve legislation, policy, and practice through comparative research and the exchange of lessons learned in the Americas and other regions of the world.

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The International Coalition of Sites of Conscience (ICSC or the Coalition) is a global network of museums, historic sites and grassroots initiatives dedicated to building a more just and peaceful future through engaging communities in remembering struggles for human rights and addressing their modern repercussions. Founded in 1999, the Coalition now includes more than 300 Sites of Conscience members in 65 countries. The Coalition supports these members through seven regional networks that encourage collaboration and international exchange of knowledge and best practices. The Global Initiative for Justice, Truth and Reconciliation is a flagship program of the Coalition.

Cover photo caption: A woman places an offering on a memorial for victims of the Guatemalan Civil War (1960-1996) during a ceremony commemorating the 10th Anniversary of the publication of the Truth Commission report. (AP Photo/Rodrigo Abd)

ABOUT THIS REPORT

The concept of transitional justice refers to a set of institutional mechanisms that document human rights violations suffered in relatively recent periods of violence, with the dual objective of providing an effective remedy to victims and reducing the potential for new cycles of violence by reforming institutions and social processes.

This model understanding of transitional justice has proved to be insufficient to reflect the experience of Indigenous peoples. The various transitional justice mechanisms, due to their historical contexts and doctrinal roots, have not properly recorded the experiences considered relevant by Indigenous peoples. And because they have failed to incorporate the range of Indigenous encounters with violence and oppression, they have not adequately linked the violations of the past with the ongoing marginalization of the present.

However, transitional justice is dynamic and has been gradually incorporating more effective practices to reflect Indigenous experiences. At times, it has been transformed in response to interventions and adaptations by Indigenous communities and thanks to the growing international recognition of Indigenous peoples' rights.

The report *Transitional Justice and Indigenous Peoples in Latin America – Lessons learned from case studies of Guatemala, Peru and Colombia* shows both the limitations and the possibilities for constructive interaction between the field of

transitional justice and the normative framework of Indigenous rights. Protracted armed conflicts in Criollo (mixed heritage) States gave rise to generic transitional justice experiences, devoid of Indigenous approaches; but in their application, the instruments of truth, justice, and reparation encountered the specificity of Indigenous experiences and rights and had to be transformed in varying degrees. Broadening the field of transitional justice potentially includes the understanding of, and action on, the continuing territorial dispossession and harassment of Indigenous peoples.

The cases examined call for a decisive integration of the framework of Indigenous peoples' rights and Indigenous leadership within transitional justice, decolonizing its approaches, broadening its historical perspective, and enhancing its capacity to shape profound political transformations in Criollo States and their economic models.

This report was prepared as part of a project undertaken in the first half of 2021 by three GIJTR member organizations: the Due Process of Law Foundation (DPLF) the Centre for the Study of Violence and Reconciliation (CSVR), and the International Coalition of Sites of Conscience (ICSC). The Latin America regional report was prepared by DPLF and includes the case studies of Guatemala, Peru and Colombia, and the Africa regional report was prepared by CSVR and includes the cases of Morocco, Nigeria, Rwanda, Kenya, and Sierra Leone.

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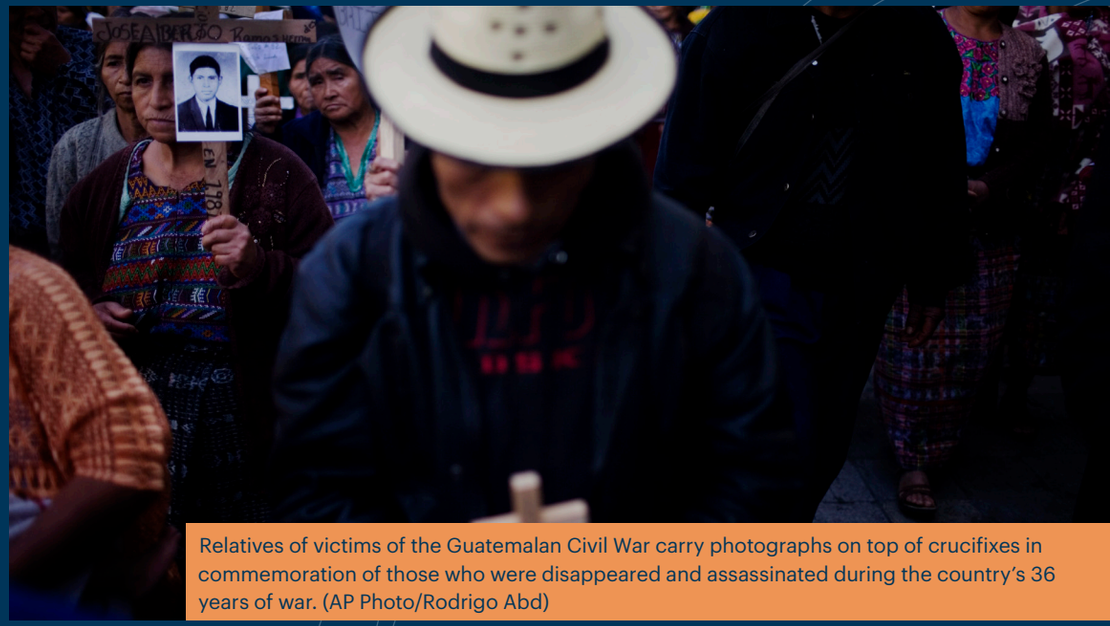
Indigenous organizers waiting for a meeting with a European commission for human rights in the city of Ayacucho, Perú in 1985. They are holding photographs of their family members that disappeared at the hands of the armed forces. (AP Photo/Martín Mejía)

ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION (GIJTR)

In countries around the world, there is an increasing call for justice, truth, and reconciliation to confront legacies of gross human rights violations that cast a shadow on transitions from repressive regimes to participatory and democratic forms of governance.

To meet this need, the International Coalition of Sites of Conscience (ICSC or the Coalition) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014. GIJTR seeks to address new challenges in countries in conflict or transition that are struggling with legacies of or ongoing gross human rights abuses. The Coalition leads the GIJTR, which includes eight other organizational partners: American Bar Association Rule of Law Initiative (ABA ROLI), United States; Asia Justice and Rights (AJAR), Indonesia; Centre for the Study of Violence and Reconciliation (CSVR), South Africa; Documentation Center of Cambodia (DC-Cam), Cambodia; Due Process of Law Foundation (DPLF), United States; Fundación de Antropología Forense de Guatemala (FAFG), Guatemala; Humanitarian Law Center (HLC), Serbia; and Public International Law & Policy Group (PILPG), United States. In addition to leveraging the expertise of GIJTR members, the Coalition taps into the knowledge and longstanding community connections of its 300-plus members in 65 countries to strengthen and broaden the GIJTR's work.



Relatives of victims of the Guatemalan Civil War carry photographs on top of crucifixes in commemoration of those who were disappeared and assassinated during the country's 36 years of war. (AP Photo/Rodrigo Abd)

GIJTR partners, along with members of the Coalition, develop and implement a range of rapid-response and high-impact program activities, using both restorative and retributive approaches to justice and accountability for gross human rights violations. The expertise of the organizations under the GIJTR includes:

- Truth telling, reconciliation, memorialization and other forms of historical memory;
- Documenting human rights abuses for transitional justice purposes;
- Forensic analysis and other efforts related to missing and disappeared persons;
- Victims' advocacy such as improving access to justice, psychosocial support and trauma mitigation activities;
- Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage in transitional justice processes;
- Reparative justice initiatives; and
- Ensuring gender justice in all these processes.

To date, the GIJTR has led civil society actors in multiple countries in the development and implementation of documentation and truth-telling projects; undertaken assessments of the memorialization, documentation and psychosocial support capacities of local organizations; and provided survivors in Asia, Africa and the Middle East and North Africa region with training, support and opportunities to participate in the design and implementation of community-driven transitional justice approaches. Given the diversity of experience and skills among GIJTR partners and among Coalition network members, the program offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner, while promoting local participation and building the capacity of community partners.

Indigenous women participate in a ceremony to commemorate the victims of the Guatemalan Civil War, in which more than 250,000 people died and disappeared. (AP Photo/Rodrigo Abd)

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1. TRANSITIONAL JUSTICE AND INDIGENOUS PERSPECTIVES

Transitional justice, according to the definition used by the agencies of the United Nations system, is "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation" (UN, 2010).

This definition is, by its general nature, broad enough to include violations suffered by Indigenous peoples or to include transitional justice initiatives implemented by Indigenous peoples themselves. Another foundational definition of the field of transitional justice, which also emerged from the United Nations system, affirms that "Every people has the inalienable right to know the truth about (...) the perpetration of heinous crimes" and that "a people's knowledge of the history of its oppression is part of its heritage..." (UN, 2005). These statements do not limit knowledge of the legacy of violence to the efforts of a State but open the field in principle to the initiatives of the people, including Indigenous peoples.

Despite this potential, however, transitional justice efforts have overlooked the perspective of Indigenous peoples in various ways, either as victims of massive

People carry coffins with the remains of victims killed in a 1984 massacre in a funeral ceremony in Putis, Perú in 2009. According to the Truth and Reconciliation Commission, the Peruvian military killed 123 people in that massacre. (AP Photo/Martin Mejia)

human rights violations, or as stakeholders or leaders in transitional justice processes. Neither the documents cited above, nor the studies carried out by special mechanisms—such as special rapporteurs of the UN or the Organization of American States—have directly explored the relationship between transitional justice and the rights of Indigenous peoples.[1]

This omission is not the result of transitional justice being necessarily generic in its approach. The theoretical roots of transitional justice are strongly tied to the liberal and individualistic perspectives that gave rise to the human rights canon. But both the field of human rights and the theory and practice of transitional justice have shown a tendency to incorporate specific experiences: in the aforementioned documents, which date back to the first decade of the century, the impact of pioneering research on the gender perspective in transitional justice,[2] and on the development of approaches consistent with children's rights, is already evident (Parmar et al., 2010).

Open to sectional perspectives, the field of transitional justice likely welcomes the perspective of Indigenous peoples as a late arrival, which can and should be incorporated in principle. But, as we shall see, this theoretical potential is only now beginning to surface, and is missing in practice from concrete transitional justice processes.

Beginning with the payment of reparations, official apology, and the creation of the Truth and Reconciliation Commission of Canada (TRC, 2006), which focused on the violent policy of cultural assimilation against the Métis and Inuit First Nations, attention to Indigenous leadership in transitional justice processes has grown, albeit with somewhat limited approaches, such as subsuming transitional justice under the concepts of reconciliation (UN Human Rights Council, 2019) and access to justice (Littlechild & Stamopoulou, 2014), or focusing on a particular mechanism of transitional justice, such as truth commissions (González & Rice, 2012; United Nations Permanent Forum on Indigenous Issues, 2013).

The still tentative approximation between transitional justice and the rights of Indigenous peoples is surprising insofar as both fields have garnered more theoretical interest and increased practical output over the same historical period—since the end of the last century—and have reached maturity with the adoption of seminal documents within international institutions such as the UN system. Just as concern about impunity was giving rise to the now classic formulation of four main lines of action in the transitional justice sphere (right to truth, right to justice, right to reparation, non-repetition) (Commission on Human Rights, 2005), the UN Permanent Forum on Indigenous Issues was taking center stage and the United Nations Declaration on the Rights of Indigenous peoples was being negotiated and adopted (UN, 2007).

The consequence of a generic approach that fails to consider Indigenous actions and perspectives can be seen in the different phases of implementing transitional justice: from the design of the legal mandates of the mechanisms, through their execution and follow-up. If a truth commission, for example, does not explicitly include violations suffered by Indigenous peoples in its mandate, such abuses may be rendered invisible, with consequences for reparation processes or institutional transformations.

But the impact may be more significant than a lack of perception and involvement. A kind of transitional justice that is silent on the perspectives of Indigenous peoples affects its potential as a precursor to institutional and cultural transformations. If transitional justice is usually—as its name indicates—activated in situations of opportunity such as political transitions, its mechanisms explicitly or implicitly reflect an agenda of necessary transformations. A purely generic approach conveys the message of equally generic protection of rights in a liberal society but raises doubts as to whether such a configuration can cope with the diversity and multiculturalism inevitable in modern societies or whether, on the contrary, it will suppress the experiences of marginalized groups behind its apparent sectional neutrality.

The systematic integration of an Indigenous approach in transitional justice can have a profoundly transformative role in the field, in at least these four aspects:

1 The United Nations Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has announced a thematic report on addressing colonial injustices. The questionnaire makes no direct reference to Indigenous peoples. See United Nations. Human Rights - Special Procedures. Questionnaire. Transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts. 2021.

2 See pioneering work by Rhonda Copelon: Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law. McGill Law Journal, 2000. Vasuki Nesiah: Truth Commissions and Gender: Principles, Policies and Procedures. International Center for Transitional Justice, 2006. Ruth Rubio and further developments at the ICTJ, Ruth Rubio (ed): The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations. Cambridge University Press. 2009.

i. **In its scope:** the legal mandates of transitional justice institutions focus on recent historical periods in which serious human rights violations have been committed, generally recognized as violations of life, humane treatment, and protection under the law, i.e., violations against individual persons (Yashar, 2012). An Indigenous approach, or one receptive to Indigenous perspectives, opens the time frame of transitional justice to long, intergenerational, historical processes linked to the establishment of colonial power. Proposing long historical memories with ongoing present-day implications calls into question the "transitional" nature of the period for the implementation of transitional justice. This approach is not limited to the examination of violations against individual Indigenous people but integrates—with equal importance—violations of collective rights, such as self-determination, existence as specific ethnic entities, and access to territories, knowledge, and resources without which the existence of the collective would be at risk (Rodríguez-Garavito & Lam, 2013).

ii. **In the centrality of the State:** transitional justice institutions are State institutions; at times, transitional justice practice ignores the emergence of non-State processes from society and local communities (McEvoy & McGregor, 2008). Moreover, transitional justice is justified as State policy to promote national reconciliation, which involves the design, representativeness, and legitimacy of the State. Given that the Indigenous experience affirms specific identities—in principle differentiated from the dominant national identity—transitional justice processes based on the Indigenous or ethnic experience may be considered in parallel to the State.[3] Moreover, they may question the very rationale of reconciliation under a single national identity, the origins of which involve violence against Indigenous identities (Kuokannen, 2020), posing, rather, a new relationship between peoples (Esparza, 2014).

3 See, e.g., the emergence of truth commissions led by Indigenous peoples or ethnic groups at the regional level within the State, the most recent being the Yoo Rrook Justice Commission in the State of Victoria, Australia. Letter Patent 2021, but also the Interethnic Truth Commission of the Pacific Region, Colombia. See https://verdadpacifico.org/mandato/ Retrieved on August 15, 2021.

iii. **In the understanding of substantive concepts:** it cannot be assumed that Indigenous normative or philosophical frameworks, in their enormous variety, coincide precisely with the human rights principles that provide the theoretical architecture of transitional justice. The meaning of the search for truth, or the understanding of what is true or false, or the enunciation of truths, is a reflection with a staggering history in the Western philosophical tradition and can be equally challenging when considering traditional knowledge. The same is true for perceptions of what is fair or unfair, of rightful claimants in justice and reparation processes (Izquierdo & Viaene, 2018), of the value of retributive versus restorative approaches (UN Human Rights Council, 2019a, 6-7), of the experience of victimhood, or of the meaning of reconciliation (UN Human Rights Council, 2019b, 10-17), among other basic concepts.

iv. **In procedural matters:** transitional justice, being predicated on the rights of victims and the resulting obligations of the State, has taken a legalistic approach that involves increasing levels of procedural complexity, underpinned by the work of highly specialized bureaucracies and the management of information through written and archival sources. This approach, typical of State institutions and the legal world, may be alien to Indigenous processes based on orality, performance, and tradition-based jurisprudence (UN Human Rights Council, 2019a, 7-10). Opening transitional justice proceedings to such a paradigm shift would, in principle, be supported by an equally consequential change in the consultative processes of transitional justice bodies, if the right to free, prior, and informed consultation that protects Indigenous peoples is taken seriously (UN Permanent Forum on Indigenous Issues, 2013, 17).

This is undoubtedly an ambitious plan, which places transitional justice on a path toward the decolonization of its theoretical assumptions and practical procedures. It is not a given that the desirable interaction between the fundamental principles of transitional justice and Indigenous peoples' rights will

achieve these transformations, but such interaction might be expected to move things in that direction.

As we will discuss in the following section on comparative cases, official transitional justice processes have incorporated cross-cultural perspectives, but even such approaches can fall short when they are merely declarative. An intercultural approach can be understood in superficial ways that do not challenge asymmetrical power relations and are limited to mechanisms of cultural or linguistic translation to facilitate Indigenous participation, but not necessarily to transform the processes already decided by the State. Transitional justice, even with a greater receptiveness to Indigenous perspectives and rights, would still face a significant number of theoretical and probably existential challenges (Izquierdo & Viaene, 2018).[4]

A certain theoretical modesty is needed to acknowledge that a process to decolonize transitional justice is a tentative, contingent, and prolonged task that cannot merely be proclaimed in rhetorical terms. The announcement of such a program can raise expectations that go beyond the scope of any human rights project in relation to specific goals such as the fight against impunity. It is important to differentiate between the proposal of a necessarily ambitious program and the creation of unrealistic expectations that lead to frustration and additional re-victimization.

Even partial responses can be powerful if they signal a trend toward transforming the transitional justice framework as it connects with Indigenous perspectives (Arthur, 2012, 37-48). A proclamation of the ultimate ambitions of a decolonizing perspective still needs to show effectiveness and concreteness, seizing opportunities to create new leadership and develop capacities.

4 "The hegemonic view of human rights has not yet dealt with the pressing challenges that provoke indigenous views because they question dominant modern ontology culture/nature, mind/body, human/non-human, belief/ reality divides."

2. TRANSITIONAL JUSTICE AND INDIGENOUS PEOPLES IN GUATEMALA, PERU, AND COLOMBIA

Transitional justice in Guatemala, Peru, and Colombia is couched in very different contexts and, therefore, different parameters. The history of the Indigenous peoples in the three countries is different, as is the local understanding of Indigenousness. However, the three transitional justice processes are comparable for three reasons:

i. they responded to protracted armed conflicts that had a disproportionate impact on Indigenous peoples;

ii. they included experiences of negotiation and increasing ownership of the instruments of transitional justice by Indigenous peoples; and

A woman holds a bouquet of flowers while attending a march for peace in Bogotá, Colombia in 2016. (AP Photo/Fernando Vergara)

iii. there is ongoing violence and marginalization of Indigenous peoples, despite the implementation of transitional justice measures ostensibly justified for the sake of non-repetition.

The transitional justice processes in the three countries, based on how long they have been in existence, have shown a growing acceptance of Indigenous perspectives and the incorporation of inclusive principles in the design and implementation of transitional justice mechanisms. In broad terms, although there are exceptions, it can be said that:

i. the Guatemalan process, which arose from the 1996 Peace Accords, initially acknowledged the Indigenous dimension less explicitly;

ii. the Peruvian process, which began with the fall of an authoritarian regime in 2000, pays attention to some aspects of inclusion, such as the multicultural perspective; and

iii. the Colombian process is the one that most explicitly includes the rights of Indigenous peoples, while recognizing that it is a long process of transitional justice. It has comprised different stages with internal tensions, from the Justice and Peace Law of 2005—arising from the paramilitary demobilization process—to the peace agreement signed with the FARC guerrillas in 2016.

We must examine the transitional justice experiences of these three countries to understand whether they presented opportunities for the interaction of the field of transitional justice and the rights of Indigenous peoples. The experiences of truth commissions, the search for disappeared persons, reparation policies, and criminal justice proceedings are presented below. This review is necessarily

incomplete to the extent that institutional reform processes are very broad and are conflated with the political transformations of each transition, and because memory policies emerged initially as components of reparations and are only recently being recognized as a mechanism of transitional justice in themselves (United Nations Human Rights Council, 2020).

2.1 TRUTH COMMISSIONS

Truth commissions are probably the best known instrument of transitional justice and have been adopted by many countries facing a transition to peace or democratic rule. The commissions conduct non-judicial investigations into the most serious violations of human rights or international humanitarian law, seeking to give effect to the right to the truth of the victims and of society as a whole. Although their investigations may not result in court judgments, by documenting and publicizing abuses, commissions often create the conditions for the effective realization of other victims' rights, including the pursuit of criminal justice, reparations, and guarantees of non-repetition.

2.1.1 Guatemala – Commission for Historical Clarification (CEH)

The CEH was created in 1996 as a result of the peace accords between the Government of Guatemala and the Guatemalan National Revolutionary Unity, URNG, which put an end to an armed conflict that began in the 1960s between successive civilian and military governments and different coalitions of guerrilla forces. The stated goal of the agreement is to "clarify with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict" [underlining added],[5] with no specific mention of Indigenous communities and their rights. The commission was comprised of three members, appointed by the Secretary-General of the United Nations, the parties to the agreement, and the academic institutions, respectively. One of its members, Otilia Lux de Coti, was a Mayan activist.

5 Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. Oslo, Norway, 1994.

The commission dedicated a significant part of its methodology—explained in the final report—to its engagement with Mayan organizations and to ensuring that Mayan interpreters would be available to facilitate the taking of testimony. In terms of the thematic development of the mandate, its work focused on violations of international human rights law and international humanitarian law applicable to internal conflicts (CEH, 1999, 44-47). The commission focused on human rights violations resulting in death, serious injury, disappearance, torture, sexual violence, and kidnapping. It is interesting to note that in the enumeration of acts included, the commission opened a category of "others" (acts), which included the "burning of milpa [maize field]" (CEH, 1999, 69), a military tactic with specific impacts on Mayan populations.

The succinct enumeration of acts under the commission's mandate is accompanied in the report by equally succinct reflections on racism, which contribute to the underlying causes of the conflict and the legal framework applicable to the rights of Indigenous peoples (CEH, 1999, 86-93, 315). The voluminous CEH Report on human rights violations generally follows a generic and thematic approach; it reflects the analysis of criminal conduct rather than the ethnic identity of the victims. However, in what is arguably the report's most consequential conclusion, it includes its individual thematic findings on killings and other crimes in the detailed analysis of violations "of the right to existence, integrity, and cultural identity" (CEH, 1999, 3, 171-206) of the Mayan population, and the commission of acts constituting the crime of genocide (CEH, 1999, 3, 314-424).

Despite its generic mandate, the CEH concluded that the overwhelming majority of the crimes—committed by the State in its counterinsurgency activities—had targeted Indigenous peoples, within the framework of a racist and discriminatory mentality and with the intent to exterminate them. The CEH therefore affirmed that acts constituting genocide have been committed in Guatemala, which opens the door to legal action to determine criminal responsibility for this crime. It should be noted that the CEH, by decision of the parties that negotiated the peace accords, was not empowered to assign individual responsibilities, unlike previous truth commissions.

The report also produced a differentiated analysis of the impact of the conflict on Indigenous peoples (CEH, 1999, 4, 163-190), pointing to the destruction of institutions of self-government, productive practices, relationship with the

territory, and cultural knowledge, among others. The report's recommendations were also developed to specifically address the impacts suffered by the Mayan peoples, including policies on memory, reparations, the reform of State institutions, the use of multicultural approaches, and political participation.

Broadly speaking, the CEH was a truth commission that, at its inception, lacked a mandate and methodology that explicitly reflected the perspectives of Indigenous peoples. However, in its development, and as a result of the mobilization of victims' and Indigenous peoples' organizations,[6] the commission's investigation shed light on the patterns of violence directed against these peoples, their causes, and their consequences. In this process, the CEH explicitly adopted the legal framework of Indigenous peoples' rights, and those aspects of international criminal law—such as the definition of the crime of genocide—that directly touched upon the Indigenous experience. The CEH's findings on the commission of the crime of genocide have been widely recognized as a platform to demand justice, reparations, and reforms from an Indigenous perspective (Monzón, 2021).

2.1.2 Peru – Truth and Reconciliation Commission (CVR)

Peru's CVR was created in 2001 (PCM, 2001) at the end of a period in which an armed conflict between the State and subversive organizations converged with the establishment of a civilian-military authoritarian regime. Unlike in Guatemala and Colombia, Peru's transition was not the result of a political agreement between opposing parties: the subversive groups were defeated militarily with no negotiation process. The authoritarian regime under which these groups were defeated was in turn defeated by citizen mobilization and collapsed when its leaders fled the country.

The result of a non-negotiated transition, in which democratic forces are not compelled to make concessions to authoritarian or armed groups, is that the transitional justice agenda is less constrained in its parameters. Thus, unlike the Guatemalan CEH, the CVR could attribute individual responsibility, and, unlike the Colombian Truth Commission, it could refer its information to the justice system for criminal prosecutions.

The CVR was created with a thematic mandate that included the most serious human rights violations while leaving the list open to other acts that the commissioners considered similarly serious. The mandate explicitly mentions "violations against the collective rights of the country's Andean and Native communities." This formulation introduced the possibility of including a rights-based approach from the very design of the commission.

In Peru, unlike in Guatemala and Colombia, the recognition of Indigenous identity is usually limited to the communities of the Amazon basin, which in the mandate of the CVR are called "Natives." The groups referred to in the CVR's mandate as "Andean communities" are recognized under domestic law as "peasant communities,"[7] that is, with a terminology that alludes to a class position or refers to productive processes.

There is no question—in the common perception or in their legal recognition—that these communities have traditional practices of self-government and territorial control, with their own cultural and linguistic characteristics that date back to precolonial history. In other words, they possess the characteristics normally considered inherent to Indigenousness. However, their forms of political engagement do not generally invoke the notion of Indigenousness. Only recently, in the context of the recognition of the right to prior consultation, have some Andean communities explicitly claimed this identity.

This ambiguity in the perception of "Andean" identity, which can be directed at the notion of peasantry as well as of Indigenousness, is evident in the CVR's work. The commission had no commissioners who self-identified as Indigenous (unlike the Guatemalan and Colombian commissions), and of twelve commissioners, only one was fluent in Quechua, one of Peru's native languages. The commission overcame this limitation with a personnel policy that prioritized the recruitment of staff members who spoke Native languages.

6 The most important precursor to the CEH was the Interdiocesan Project for the Recovery of Historical Memory, a truth-seeking project led by the Catholic Church in partnership with human rights organizations and Indigenous communities, which established protocols on the ground for taking testimony and created expectations that later became important for the development of the commission. The project published the report Guatemala, Nunca Más [Guatemala, Never Again!], 1998.

7 General Law on Peasant Communities 24656 of 1987: Article 2. "Peasant Communities are public interest organizations, with legal existence and legal status, made up of families that inhabit and control certain territories, linked by ancestral, social, economic, and cultural ties, expressed in the communal ownership of land, communal work, mutual aid, democratic government, and the pursuit of multisectoral activities, whose goals are oriented toward the full realization of their members and of the country."

The Final Report of the CVR repeatedly referenced racism and ethnic contempt as components of violence, both by the State and by subversive organizations. The report noted in its general conclusions (CVR, 2003, VIII, 216) that 75% of the fatalities involved Quechua-speaking victims, in a country where only 20% of the population is Quechua-speaking—choosing a rather oblique way to show the disproportionate impact of the violence on Indigenous people. The report includes a specific chapter on racism (CVR, 2003, VIII, 101-162) that uses categories referring to Peru's colonial heritage and discrimination against Indigenous peoples (CVR, 2003, VIII, 101-162). The chapter acknowledges that the conflict was ostensibly fought in the name of distributive conflicts, but goes on to say that, even in their ideological formulations, the actors betrayed a strong racist undercurrent. Both the State and the subversive organizations considered Indigenous identities and traditional communities to be indicators of backwardness and deserving of contempt from Criollo society.

The final report also contains a chapter that relates directly to the legal mandate to examine violations of "collective rights" (CVR, 2003, VI, 627-715), but does not refer separately to the substantive rights of self-government, cultural rights, territory, and others. Instead, it subsumes the destruction of communal life into two main types of acts: forced displacement, which affected both Andean and Native communities, and the effective enslavement of Asháninka people in the Amazon region by the subversive group Sendero Luminoso (Shining Path).

Peru's CVR, unlike Guatemala's, began its work with a direct mandate to investigate the violations committed against Indigenous peoples. However, particularities in the understanding of Indigenousness in Peru resulted in both a limited approach to the peoples of the Amazon region who perceive themselves as Indigenous and a limited understanding of collective rights. Another notable difference with respect to the Guatemalan commission is that the CVR does not say that acts of genocide were committed with the intent to exterminate a group explicitly recognized for its ethnic or racial identity. On the contrary, in its conclusions, the CVR states that crimes against humanity were committed by all the armed actors and that, in the case of the Shining Path, a "genocidal potential" was observed, a formulation not further developed.

2.1.3 Colombia – Truth Commission (CEV)

In discussing transitional justice mechanisms in Colombia, we should bear in mind that they derive from different political processes. The Truth Commission (CEV), with the Disappeared Persons Search Unit (UBPD) and the Special Jurisdiction for Peace (JEP), were established at the same time, as an integrated system, following the Peace Agreement between the Government of Colombia and the FARC-EP (November 24, 2016). Other transitional justice mechanisms in the areas of reparations, memory, and criminal justice arose from earlier political processes, such as negotiations with paramilitary groups (Law 975), or from developments in constitutional case law (Marín, 2021, 47-76), leading to an assortment of mechanisms whose institutional architecture is not always consistent.

The peace agreement devoted a specific section (pp. 205-208) to the perspective of "ethnic peoples," namely Indigenous, Afro-descendant, Raizal, Palenquero, and Roma peoples. This "ethnic chapter" states that the various aspects of the peace process must apply an "ethnic approach" consistent with Colombia's constitutional and legal obligations, including binding international agreements. The ethnic approach in the agreement calls for respect for:

> … self-determination, autonomy, self-government, participation, consultation, and free, prior and informed consent; social, economic, and cultural identity and integrity; the rights over their lands, territories, and resources, which entails the recognition of their ancestral territorial practices; the right to restitution and the reinforcement of their territorial status; and the mechanisms in place for the protection and legal certainty of ancestrally and traditionally occupied or possessed lands and territories.

The agreement therefore provides for the implementation of transitional justice mechanisms with broad ethnic participation and specific prior consultation with the different ethnic peoples. The design and forms of engagement of the CEV required consultation mechanisms and formal agreements between the government and ethnic peoples, including Indigenous peoples, centralized through the Permanent Roundtable for Consultation with Indigenous Peoples

and Organizations (MPCI), an institution established in 1996 (Decree 1397 of 1996) to facilitate legal and administrative decisions that may affect Indigenous peoples.

The CEV was created by a decree with the force of law (Decree 588 of 2017) that established, as an explicit part of its mandate, the investigation of crimes perpetrated against ethnic peoples. A Selection Committee, made up of institutions nominated by the parties to the conflict, appointed eleven commissioners, including one person nominated by the Indigenous organizations and another by the Afro-Colombian organizations.[8] Once created, the CEV signed a protocol governing relations (Truth Commission, 2018) with the Indigenous organizations through the MPCI, in which it committed to include the ethnic perspective systematically in its institutional design, and to provide guarantees, such as a respectful relationship with the Indigenous authorities, security and psychosocial support, and the use of interpreters in the various Indigenous languages. The CEV also established that one of its territorial offices would be directly in charge of engagement with Indigenous peoples.

The activism of the Indigenous organizations succeeded in ensuring that the Selection Committee respected the commitment to diversity in the composition of the team of commissioners, and appointed an Indigenous commissioner, Patricia Tobón, a member of the Embera People. In addition, the consultation carried out by the CEV, once it was formed, prompted it to set up a specialized office for ethnic issues.[9] The work of the Ethnic Peoples Office has facilitated the collection of testimonies and investigations prepared by Indigenous peoples, and the drafting of an "ethnic chapter" to include representative cases of crimes committed against Indigenous peoples.

The mandate and implementation of the CEV—still in process at the time of writing—incorporates the Indigenous perspective more fully than the Guatemalan CEH and the Peruvian CVR, both formally and substantively. Not only is its mandate explicit regarding the implementation of an ethnic approach, but, in its procedures, this approach is respected and consequential. The presentation of the CEV's Final Report will demonstrate whether the CEV also goes beyond its predecessors in terms of findings and policy recommendations.

8 See https://comisiondelaverdad.co/la-comision/los-y-las-comisionadas. Retrieved on August 15, 2021.

9 Minutes of the meeting of the Permanent Roundtable for Consultation with Indigenous Peoples and Organizations. "Holding and recording of prior consultation on the instruments of the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition." January 19, 2019.

2.2 SEARCHING FOR DISAPPEARED PERSONS

The search for disappeared persons is one instrument for enforcing the right to the truth to which victims, their families, and society are entitled. Search mechanisms, which seek to ascertain the fate and determine the whereabouts of disappeared persons, are components of transitional justice policies.

The search for disappeared persons is related to justice, since, in the case of enforced disappearance, the discovery of information provides evidence for judicial investigations. At the same time, and creating a certain tension with the first objective—that of justice (Crettol et al., 2017)—the search is humanitarian in nature, focused on ensuring that family members and communities can finally process the grief of losing their loved ones in a manner consistent with their cultural and religious practices.

2.2.1 Guatemala – Absence of a specific mechanism for the search of the disappeared and community activism

The CEH recommended that Guatemala adopt an "exhumation policy" that could address the challenge of multiple clandestine cemeteries and graves following massacres committed by State forces (CEH, 1999, 5, 65-67). However, several successive governments have failed to heed this recommendation. A bill for the creation of a National Search Commission (Congress of the Republic, 2019) has not yet been passed in the legislature, despite a persistent demand, including an exhortation from the bench in a high-profile case (EFE, 2018).

Neither in its stated objectives nor in the composition of the proposed commission does the bill explicitly refer to Indigenous peoples, who were disproportionately affected by the armed conflict. However, it does say that the commission should be guided—among other principles—by "respect for the cultural, linguistic, and ethnic diversity of the Guatemalan nation, particularly of the victims."

Without an specialized institution (search commission) to centralize the search and develop methodologies and capacities, in Guatemala, it is the Public Prosecution Service that must carry out investigations in response to complaints from families and communities. However, the regulatory framework for the Public Prosecution Service refers to joint investigations and the removal of

corpses, rather than standards and guidance for the recovery of remains at mass burial sites.

In practice, lacking its own technical capabilities, the Public Prosecution Service receives complaints and opens a preliminary forensic investigation. The vast majority of complaints come from victims' organizations that work directly with the affected Indigenous communities, victims of the Mayan genocide who have reported the location of clandestine graves left in the wake of massacres (Chacón & Barrantes, 2015). The preliminary forensic investigation, conducted by a prosecutor, is followed by a forensic investigation for the recovery and analysis of human remains, carried out through agreements with specialized civil society institutions, including the Forensic Anthropology Foundation of Guatemala (FAFG).

To date (2021), the FAFG has completed almost 3,500 exhumations in which it has recovered over 5,900 individual skeletons and identified over 2,100 victims. Since the Public Prosecution Service rarely acts beyond forensic investigation—and therefore the prosecution of enforced disappearances is rare—in practice, searches in Guatemala pursue humanitarian aims.

Indigenous peoples' participation is ongoing and activates their own values and knowledge, but the lack of centralization in the search process makes it difficult for the technical civil society organizations whose field of expertise is forensic technology to systematize practices and create specific protocols. Beyond the tasks of identification, the return of victims' remains to their families for burial creates a new opportunity for the activation of traditional cultural and religious practices. A proper burial (Volpe, 2017) requires funeral rituals that bring the person's death into the present, as if it had just occurred, which gives family members and the community the opportunity to mourn the departed (Melgar, 2019).

The Guatemalan case seems to reflect a process in which the absence of the State and, therefore, the nonexistence of a concrete search institution within the transitional justice process in that country, has deprived Indigenous peoples of the opportunity to concentrate their advocacy and secure the recognition of their rights. Their cultural practices related to the treatment of absence and death are spontaneously activated in the process opened by civil society forensic experts, but a national legal and institutional framework that enshrines the right to these practices has not yet been established.

Thousands of rural farmers (*campesino/as*), indigenous activists and students march in different Colombian cities in 2016 to demand progress in the signing of the Peace Agreements between the government and insurgent forces (*la guerrilla*). (AP Photo/Fernando Vergara)

2.2.2 Peru – Leading role of the Public Prosecution Service and creation of the Office of the Search for Disappeared Persons (DGBPD)

The Peruvian CVR designed a National Anthropological-Forensic Investigations Plan and recommended its implementation to the public authorities (CVR, 2003, IX, 209-275). This would include the creation of a specific institution, the National Commission for Disappeared Persons, with the participation of human rights organizations, the International Committee of the Red Cross, the Public Prosecution Service, and the National Ombudsperson's Office. The Commission would have its own forensic anthropological unit, without prejudice to the Public Prosecution Service's role in the investigations. The CVR detailed the functions, procedures, and structure of the forensic anthropological unit, but did not articulate the principles that would govern the unit and, therefore, did not mention intercultural approaches or the rights of Indigenous peoples and Andean communities.

None of the CVR's recommendations regarding this national plan were adopted by the public authorities. The Public Prosecution Service carried out all investigations related to forced disappearances, developing its own technical capacity in the years following the CVR, through the Specialized Forensic Team of the Institute of Forensic Medicine (Chacón & Barrantes, 29-47). The Public Prosecution Service issued various directives governing its intervention in the search for disappeared persons, and the Ministry of Health developed guidelines for providing psychosocial support to the families of the disappeared, but not one instrument makes any mention of intercultural principles or the incorporation of Indigenous peoples' rights.

The closest thing Peru has to an intercultural approach is—like in Guatemala—the process that follows the scientific procedure for the identification of human remains. The transfer of human remains has been supported by the institutions involved in reparations, namely the High Level Multisectoral Commission (CMAN), which has provided coffins to family members and organized funeral activities in coordination with local authorities according to the most appropriate local customs and religious practices, including the issuance of public and official apologies. This support has led to the development, by the Ministry of Justice and Human Rights, of a protocol for psychosocial support (Ministry of Justice, 2017). The protocol proposes a multicultural approach, and search participants have referred to it, although emphasizing only one aspect: the use of interpreters to allow interaction with family members and communities in areas where Native languages are spoken.

It should be noted, however, that the search and associated legal developments have occurred primarily in the Andean region, where burial sites have been located, and not in the Amazon region, where there are other cultural perceptions of death and disappearance. Specialists who carried out consultations on memory policy with leaders of the Asháninka ethnic group in the central jungle region received testimonies that indicate little interest in the search for human remains and even in the commemoration of the dead (Ponciano del Pino, 2014, 204-246). Unlike the traditions of Andean peoples, the Asháninka prefer funerary practices of complete oblivion, which aim to release the spirit of the deceased so it cannot return and find its family.

This long and uneven process has led, despite the failure to immediately adopt the recommendations of the CVR, to the enactment of a comprehensive piece of legislation: the Law on the Search for Persons Who Disappeared during the Violence of 1980-2000 (Ministry of Justice, 2017) (Law 30470). This law, intended to prioritize a humanitarian approach, centralizes and systematizes search activities and charges the Ministry of Justice and Human Rights with implementing a national search plan and creating the National Registry of Missing Persons and Burial Sites.

The law specifically mentions respect for Indigenous peoples in multiple phases of the search process, to wit:

i. In the creation of a registry of victims, to include "ethnicity variables" of the victims, including mother tongue and membership in Indigenous communities;

ii. In respect for intercultural dialogue for the identification and protection of burial sites, respecting the cultural practices of "the Native population";

iii. In the inclusion of "standards of cultural relevance" in relations with relatives of the disappeared, for whom search institutions must guarantee the right to prior and informed consent;

iv. In the burial of human remains, in which psychosocial support should be "culturally relevant" and provided in the language of the affected communities, with respect for the customs and traditional ways of each community.

The enactment of Law 30470 signified a paradigm shift in State intervention since, as in so many other jurisdictions, the search for persons had revolved around the public prosecutor's investigation and, therefore, was associated with the identification and prosecution of the perpetrators. The enactment of this law was perceived by victims' and family members' associations as a significant step forward in their struggle. The creation of the Office of the Search for Disappeared Persons (DGBPD) —an executive body with a budget and human resources for this purpose—by the Ministry of Justice and Human Rights was especially welcomed.

Legal developments incorporating intercultural principles have occurred organically and slowly throughout the process initiated by the CVR. The protocols adopted over time by different institutions—and culminating in the law—gradually integrated the principles of engagement with Indigenous peoples, including, in a roundabout way, both Andean and Amazonian peoples. However, the rights of Indigenous peoples have not yet been fully integrated, as the focus seems to be on families rather than on peoples.

2.2.3 Colombia – Disappeared Persons Search Unit (UBPD)

The Disappeared Persons Search Unit (UBPD) grew out of the transitional justice process initiated by the peace agreement between the Colombian State and the FARC-EP, in the same way as the CEV and the Special Jurisdiction for Peace (JEP). It was therefore designed in keeping with the same principles enshrined by the parties in the Ethnic Chapter of the agreement: use of prior consultation, respect for the forms of self-government of ethnic peoples, and adequate guarantees to increase their participation. Its objectives, functions, relationship with other public entities, and structure are established in a decree with the force of law (Decree Law 589).

Like the other transitional justice instruments created in the agreement, the UBPD submitted for consultation a protocol governing relations with Indigenous peoples, through the Permanent Roundtable for Consultation with Indigenous Peoples (MPCI). The protocol begins by rethinking the concept of "disappearance," which in the experience of the Indigenous peoples is not only applied to individuals, but also constitutes part of the risk of extinction faced by Indigenous peoples. This understanding is reiterated as a guiding principle of the whole relationship by recognizing disappearance as "multiple offense" crime that gives rise to "multiple parallel violations and impacts" (MPCI, 2019) on Indigenous peoples' rights.

The protocol fully recognizes the rights guaranteed to Indigenous peoples under the Colombian Constitution and Constitutional Court rulings, and in international instruments such as ILO Convention 169 and the UN Declaration on the Rights of Indigenous peoples, including respect for their self-determination, the use of prior consultation, respect for Indigenous legal principles, and minimal interference in the affairs of Indigenous communities.

The objectives of this engagement are defined as the humanitarian and extrajudicial search for the truth, the protection of the participants in the search process, the culturally appropriate treatment of the human remains of Indigenous persons, and the institutional adaptation of the UBPD to ensure the search for Indigenous persons.

There are several aspects of the search process—recognized in the decree law establishing the UBPD—which require consultation with Indigenous peoples. The management of burial sites in Indigenous territories is particularly sensitive, both because of the control over the space and its spiritual significance, and the protocol recognizes the role of Indigenous security institutions such as the Indigenous Guard and the Indigenous authorities.

Another salient aspect is the acknowledgment that the stakeholders in the process include not only the relatives of the disappeared person but also the authorities of the Indigenous communities, which the UBPD recognizes as spokespersons and counterparts in the access to information.

The protocol recognizes the membership of Indigenous representatives in the Advisory Council of the UBPD, which includes members from various public institutions, and establishes an internal group specialized in matters related to Indigenous peoples and a channel for dialogue.

Finally, the protocol identifies how each phase of the search process will require consultation with the Indigenous peoples. It also identifies the methodology to be applied, including the preparation of search plans, the surveying of burial sites, the exhumation of human remains, identification, and culturally appropriate means of transferring the remains to their families and communities.

As such, the process in Colombia is markedly different from Peru's. In Colombia, the search process led by the UBPD is centralized and intentional: it starts with the responsibility of the State through a dedicated institution, and Indigenous people are directly involved through their organizations, which have a tangible impact on the structure and procedures of the UBPD. In Peru, the DGBPD is not the consequence of a political agreement, nor of an organic and decentralized transformation. Rather, the humanitarian—rather than judicial—approach is clear from the unit's design. In Colombia, the focus on respect for Indigenous peoples, although thematically as widespread as that recognized in Peruvian law, is more detailed and recognizes specific spokespersons.

2.3 REPARATIONS PROGRAMS

Victims of the most serious violations of human rights and international humanitarian law are entitled to receive comprehensive reparation, including both a financial compensation element and measures for the restitution of rights, rehabilitation, symbolic satisfaction, and measures to ensure non-repetition. However, in transitional justice processes, generally marked by the scale of the violations and the demands for reparations, judicial systems may not be able to provide reparations effectively and in a way that is not burdensome to the victims. For this reason, several countries have implemented nonjudicial administrative programs that process victims' claims under a simplified procedure.

2.3.1 Guatemala – The National Compensation Program - PNR

The notion of compensation—a word used instead of "reparation"—appears very early in the Guatemalan transitional justice process. As early as 1994 (Pisani, 2007), the Comprehensive Agreement on Human Rights, part of the peace process, establishes the "humanitarian duty to compensate and/or assist victims" and suggests programs addressed, as a matter of priority, "to those whose need is greatest, given their economic and social position." In 1996, the National Reconciliation Law designated the Secretariat of Peace (SEPAZ) as the institution in charge of a public compensation policy, which immediately began consultations with civil society and administered pilot projects in 1999 in highly affected areas, such as Chimaltenango and Quiché, where the Mayan population is concentrated.

In parallel, the Report of the Commission for Historical Clarification (CEH) recommended the creation of a National Reparations Program (PNR) and various measures in four areas: material restitution, especially of dispossessed lands; compensation for the most serious violations; physical and mental rehabilitation; and symbolic measures of satisfaction and to restore dignity. In its conceptual framework, the CEH used the term reparation as conceived in international human rights law, including its various forms. It is notable that the CEH recommendation is silent on the specificity of Indigenous peoples: their presence becomes apparent only when the recommendation indicates the need to use Native languages to administer reparations programs (CEH, 62-65).

The program led by SEPAZ had important elements for the recognition of Indigenous peoples because it was built in consultation with communities and prioritized areas they identified as key, including the exhumations of victims of massacres and the legal certainty of the communities' land rights.

The National Program, which would eventually be called a "compensation" program, was only created in 2003 by the executive branch through a government order, which explicitly mentions the prioritization of Indigenous peoples:

> The criteria for prioritizing collective beneficiaries will consider the seriousness of the violations, the socioeconomic status and vulnerability of the communities, organized groups of victims, and Indigenous peoples affected by human rights violations and crimes against humanity. (Panetta, 2013).

Initially set to last eleven years, the program has survived to the present day, although it has undergone several restructurings and has constantly had to contend with a lack of resources from the State. The categories of reparation include those recommended by the CEH, which closely tracked concepts of international human rights law, but include an additional category of "cultural restitution measures" (Martínez & Gómez, 2019) aimed at reconstructing the history of the communities and valuing the memory and narratives of the elders.

There is debate about how much the program reflects the values and concepts of the Indigenous communities. From one perspective (Velásquez, 2008, 107-131), the PNR has achieved a significant level of intercultural translation in which the comprehensiveness of reparations (a concept derived from transitional justice) finds a parallel in the concept of maya kem, a metaphor that integrates social and temporal processes like a fabric—threads and textures that form a harmonious and fluid whole, with balance and completeness:

> In Mayan languages it is very common to use the word "weaving" to refer to processes. For example, *kemom tzij*, literally "weaving of ideas," means the process of thinking. Why *maya kem*? Because, when the fieldwork was done in the communities to design the compensation measures, it was nearly impossible to explain the concept of "comprehensiveness," or the concept of "tangible and intangible measures," and be understood. We learned and confirmed that, when we used the communities' own cultural codes, communication was very easy (Velásquez, 2007, 108).

From this particular perspective, some have suggested that a sort of exact correlation has been achieved between Mayan concepts and concepts used by the State bureaucracy; each compensation measure corresponds to ideas about the rebalancing of an adversely affected world and actions divided into "tangible" and "intangible" to achieve such renewed equilibrium.

A critical perspective (Viaene, 2008, 133-171) on the inclusive scope of such interculturality contends that "compensation" etymologically alludes to the metaphor of torn fabric and that this admittedly suggests connections to notions of mending and resewing a tear. However, from the perspective of the Mayan Q´eqchi´ communities, the harm caused by the genocidal violence is so atrocious that it is impossible to simply make improvements, and the re-foundation or re-creation of a social relationship must be considered: "Mend (xiitink) means it's like [if] just a little bit is torn, and I mend it. But it's not a little bit, what they [the Army and the Government] did. What they did is massive..." (Viaene, 2008, 151).

Some also argue that economic compensation is highly problematic for the Mayan Q´eqchi´ communities. The PNR, in its search for corollaries, justifies financial reparations through financial transfers based on the Mayan concept of k'ajk'munk, which, in reality, refers to the notion of gratitude for a service performed rather than reparation for a harm caused. This imperfect relationship between the two concepts creates a situation of distress and guilt in which accepting a check can mean accepting the harm suffered and a transaction in which the memory of loved ones is betrayed or sold.

Another problematic element of the PNR was its failure to include genocide as one of the victimizing acts that should be compensated (Martínez & Gómez, 2019, 34-36). In the government's view, the admission of such a crime was politically intolerable, and for the Mayan communities, its exclusion was an insult to their memory and undermines the possibility of collective recognition. The solution to the impasse was to let the program itself, through its governing body—the National Compensation Council—decide on all other violations. Eventually, the Guatemalan government found a reason to permanently suspend the program for budgetary reasons (Montepeque, 2021).

2.3.2 Peru – The Comprehensive Reparations Plan (PIR)

As in the case of the CEH, the Peruvian CVR recommended reparations, but at a much more precise level of detail, devoting an entire chapter to it in the recommendations volume (CVR, 2003, IX, 139-205). The program proposed by the CVR, which would be largely adopted in the Law creating The Comprehensive Reparations Plan in 2005 (Law 28592) included measures that—as in the case of the CEH—also reflected the categories of reparations provided for in international law, with some notable and important differences that would have different impacts on Indigenous peoples.

Restitution, for example, emphasized the restoration of lost rights, in particular citizenship identity and its legal recognition. During the armed conflict,

governments often denied forced disappearances with the spurious argument that the existence of the allegedly disappeared persons could not be proven because they lacked official documents, such as birth certificates or voter registration cards (CVR, 2003). This type of reparation, moreover, is aligned with a rationale of inclusive nation-building, which assumes that Indigenous peoples—whether Andean or Amazonian—seek to belong to the Peruvian nation before being recognized on a differentiated basis.

Other measures with a differentiated impact include the widespread implementation of collective reparations in Peru (Correa, 2013). In contrast to Guatemala and Colombia, the Peruvian reparations process has advanced more rapidly in the identification and economic reparation of severely affected communities, which are defined in the law as "peasant and Native communities and population centers." While this language seems to refer to geographic definitions, it actually refers—as in the case of the CVR—to Indigenous Andean communities, legally called "peasant" communities, and to the Amazonian peoples. Collective beneficiaries of reparations qualify if they can prove one of several situations: the concentration of individual violations as occurs with massacres, physical destruction, forced displacement, the breakdown of communal institutions, and the loss of family and communal infrastructure (Law 28592, Article 7). Collective reparation consists of the provision of a fund equivalent to US$33,000 to be used in a project decided by the community in a consultation process led by the program.

The fact that collective reparation is fundamentally economic and depends on consultation reinforces the role of communal and local authorities, such as mayors and governors, for whom obtaining redress makes them look effective in the eyes of their electoral base. Likewise, reparation in this situation becomes just another transfer, comparable to physical infrastructure development and construction programs.[10] This political dynamic and the political prestige that development brings, on one hand, dilutes the restorative element of the actions; on the other hand, it accelerates the transfers of resources. In Peru, as of 2019, collective reparations have been granted to 1,852 of the 5,712 identified population centers and communities (Guillerot, 2019).

Peru's reparations efforts point to the importance of an intercultural approach, but this does not emerge from the CVR as clearly as it does from the report of the CEH; nor does Peru's law give it the same priority that the Guatemalan or Colombian laws do. In contrast to these countries, the Peruvian legal framework does not provide for Indigenous organizations to participate in the governing bodies responsible for reparations, and intercultural considerations are reduced to the need to work in Indigenous languages and to explore the difficulties of applying economic reparations given specific family structures in Andean and Amazonian communities.

A serious shortcoming of the Peruvian program and its limited perception of intercultural concepts is apparent when it is implemented in regions where Indigenous communities and settler populations coexist. For example, in areas where the Asháninka population of the central jungle was severely affected, reparations projects are taken advantage of by the settler population or mixed population centers, while the Native population has little knowledge of its benefits. The procedures for accessing reparations are also onerous. It is difficult for the Asháninka Natives to document their status as individual victims, the procedures and documents are bureaucratic and complex, and there is no shortage of corruption (Villameriel, 2014).

However, as occurs in collective reparations or the restitution of identity, the dominant theme of Peruvian reparations in relation to Indigenous peoples is inclusion in the common State. On whether reparation contributes to reconciliation—that is, to the restoration of ties—the perception is that, in reality, what the policy has done is to create ties that did not exist before, by recognizing citizenship, with all the strengths and weaknesses of this construction in a fragile State such as Peru (Villameriel, 2014, 95).

As in Guatemala, in Peru there is a glaring exception to the victimizing acts covered by the reparations program. In its final years, the authoritarian Fujimori regime carried out policies that were presented as family planning but involved illegally inducing poor women to undergo sterilization. This policy, which is known in Peru as the forced sterilization scandal, was not included in the legal mandate of the CVR and has taken a parallel legal route to that of other violations committed during the conflict. The sterilizations had a far-reaching impact in Andean communities and rural areas where women did not speak Spanish, the language in which the health workers operated (Vidal, 2020). The struggle of the women—in practice, Andean Indigenous women leaders—who have organized and taken their experiences to the courts has led to the creation

10 Remarks by President Humala after delivering reparations to victims of terrorism in Lucanamarca. See https://www.youtube.com/watch?v=M57QCJqBhoU&t=61s. Retrieved on July 12, 2021.

of an official list of victims but has not yet led to their formal inclusion in the reparation process.

2.3.3 Colombia – Victim Assistance and Comprehensive Reparation Unit – UARIV

Colombia underwent a lengthy process for the planning and practical application of reparations for victims of the armed conflict (Marín, 2021) since the adoption of the 1991 Constitution, which arose from a peace process with various guerrilla groups. As early as 1997, Law 418 on the recruitment of minors provided that, in keeping with the "principle of solidarity," victims should receive the "necessary assistance to cover basic needs, to satisfy the rights that have been violated." The notion of reparations, as in Guatemala, began with a purely humanitarian rationale of solidarity and support for those who were affected, rather than a vision of reparations as an acknowledgement of State responsibility for harmful acts and omissions.

A key process for reparations has been the organization and advocacy of displaced communities, who have used the institution of *tutela* [a special constitutional remedy] to seek protection from the Constitutional Court. In 2004, the court found that displacement had become so widespread that it should lead to an explicit declaration of an "unconstitutional state of affairs" that must be reversed through direct action by the State (Constitutional Court, 2004).

At the same time, the Colombian government was carrying out a process to demobilize paramilitary groups, as part of a legal framework for transitional justice known as the Justice and Peace Law of 2005 (Law 975). This law provided for alternative sentences with reduced prison time for demobilized combatants who met a series of requirements, including surrendering the ill-gotten properties of the armed groups for purposes of reparations. A Constitutional Court ruling declared the law constitutional with numerous conditions, including the individual surrender of assets by members of armed groups (Constitutional Court, 2006). Such reparations, in principle, were to take place as part of special criminal proceedings in which the demobilized combatants would recount their actions and acknowledge their victims. However, criminal proceedings were delayed and extremely burdensome for the victims, so some suggested the idea of a specific law on reparations through an administrative procedure different from the judicial one.

The Victims and Land Restitution Law (Law 1448) of 2011 established an ambitious reparations program that is generous in the forms of reparations, the sums awarded, and the victimizing acts considered. The law is similar to those of Guatemala and Peru in including forms of reparation aligned with the concepts enshrined in international human rights law, and in considering both individual and collective reparations; but it is much more ambitious insofar as it includes forced displacement as a victimizing event, since this violation affects millions of Colombians, and its inclusion entails a major financial commitment. The law called for the creation of a Single Registry of Victims to include nearly 9 million people, 8.1 million of whom are victims of displacement.

For reasons of political expediency, the law had to be enacted without a process of prior consultation with Indigenous peoples and Afro-descendants, so the legislature voted with the understanding that the executive branch would negotiate separate decree laws with these ethnic groups. Accordingly, Decree Law 4633 was issued in 2011. Although it reiterates the core elements of the law, it reflects differentiated measures for ethnic peoples. This decree would form the basis for a new milestone in Colombian transitional justice: the Ethnic Chapter in the Peace Agreement between the Government and the FARC-EP in 2016.

The Permanent Roundtable for Consultation with Indigenous Peoples (MPCI) played a central role in the negotiations, and succeeded in incorporating its own concepts of reparation, including the concept of equilibrium. Equilibrium, or symmetry, is the natural rule of life which, having been altered by violence, requires a process of restoration and harmonization (Vargas Valencia, 2021). In an important legal victory, Decree 4633 included the concept of territory as a victim, understanding as such not only the geographical area, but also its integration with living beings, including humans, and spiritual knowledge and practices (Izquierdo & Viaene, 2018). Territory is harmed when the link—which the decree recognizes—between Indigenous peoples and Mother Earth is disrupted, affecting their harmony and damaging their health and food (Rivera, 2009).

In contrast to the Guatemalan case, in which State actors examine Indigenous concepts to find parallels with legally established categories, Colombia appears to take the opposite route: it is the Indigenous peoples who question and challenge the legal categories of the Criollo State. Thus, for example,

the Arhuaco People criticize the word "reparation" for its possible allusion to mechanical processes:

> "Reparation" should be repaired. I need to understand the word because that is what is said on the outside, but I don't know how much it encompasses the spiritual part of our meaning. Because if we don't come together on that, how do we have a dialogue? Healing must be done from the origin, where the disorder was fertilized and born, from thinking, that's how we have to intentionally address it. If repairing means healing, we must unite to heal the Sierra, to heal it from the heart. (Rivera, 2009, 25)

The language of the law negotiated between the State and Indigenous peoples is not limited to "translating" concepts through the use of their language or a semantic study. On the contrary, Decree 4663 is an original document whose language, while maintaining the recognition of rights, transforms the idea of harm and restorative action. Harm, in this sense, ceases to be seen as the infringement of individual rights and is instead seen as the experience of territories that are "in pain" in the same way that an individual body would be (Rivera, 2009, 26).

Despite the Colombian law's significant conceptual achievements for Indigenous peoples, it is still criticized for being poorly implemented, particularly with regard to collective reparations. Unlike the Peruvian experience, Colombia has prioritized individual reparations: 960,000 people have received compensation and 690,000 have received psychosocial care. However, at the collective level, only 775 beneficiaries have been identified, for which 148 reparation plans have been effectively agreed upon, including for ethnic communities (Marín, 2021).

An important element that differs from the Peruvian and Guatemalan cases is the use of ethnic self-identification mechanisms for victims participating in the program. The program has thus determined that 237,000 (2.6%) of the 9 million victims identified are Indigenous.[11]

11 Victim Assistance and Comprehensive Reparation Unit. Report. Single Registry of Victims. See https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394. Retrieved on May 25, 2021.

2.4 JUDICIAL PROCEEDINGS

2.4.1 Guatemala: post-conflict justice processes

Indigenous peoples face structural obstacles to obtaining justice through the national judicial system. These difficulties do not result from the inherent characteristics of a period of violence, such as the mass scale of the crimes or the weakness of the justice institutions; they are part of the ordinary discrimination that has existed in times of conflict and peace. The courts are not physically located near the communities affected by the genocide, the proceedings are onerous, and the justice authorities are unfamiliar with Indigenous languages and customs (Cisneros de Alencar, 2014, 113-124). The sum of these obstacles results in an ongoing experience of racism and impunity and the reluctance of Indigenous peoples to seek access to the formal justice system.

Consequently, many accountability processes take place in community-based customary proceedings under a normative system often radically opposed to the regular justice system, which is based on retribution and criminal punishment. Using this form of justice is essential for the cases of former patrolmen, members of the community who served the State repression and who continue to live among its members (Viaene, 2019). Under the rationale of transitional justice, which reserves prosecution for the "main perpetrators," these perpetrators are part of the impunity gap for which there are few answers.

In the worldview of Mayan Q'eqchi communities (Viaene, 2008, 83-85), the original transgression, the great suffering or *nimla rahilal*, has caused such an imbalance in the world that it is impossible to go back. Therefore, justice has to be equally cosmic, in a process in which human beings have limited agency: pain will take care of the perpetrators, and the harm they have caused can only unbalance them (the perpetrators) internally. In this context, community justice does not seek to maintain this imbalance with a punishment that does not resolve things but tries to mobilize an ancient knowledge preserved by the elders, through a dialogical process of advice that reactivates the capacity for shame and repentance.

The obvious difficulty of the Indigenous judicial process is that it takes place in circumstances of exclusion, without formal recognition by the State or, worse, with interference (Cisneros de Alencar, 2014, 117-118), when State judicial

authorities fail to recognize its validity. This hostility only accentuates distrust and lack of interest in seeking access.

It is in part because of this experience that notable cases in the search for justice have taken place at the supranational level, either through universal jurisdiction or in the non-criminal system of human rights protection offered by the Inter-American Court of Human Rights.

As in other transitional justice mechanisms, the activism of victims' organizations and Indigenous peoples has had a significant impact on judicial proceedings, both internationally and in the Guatemalan judicial system.

At the international level, the best known case is the one brought by Nobel Peace Prize laureate activist Rigoberta Menchú before the Spanish National Court (Center for Justice and Accountability). In 1999, she and other victims filed a complaint against former de facto presidents General Efraín Ríos Montt and General Romeo Lucas García. The National Court asserted its jurisdiction through the principle of universal jurisdiction and issued arrest warrants in 2006, which were ignored by Guatemala. The cases were terminated upon the death of the defendants, Lucas García in 2008 and Ríos Montt in 2018.

In the Inter-American Court of Human Rights, cases including Bámaca Velásquez and Plan de Sánchez involved Mayan victims (IACtHR, 2004, 2000). In the Bámaca Velásquez case, concerning an enforced disappearance, the Inter-American Court recognized the specific impact on the Indigenous people to which the victim belonged, since the absence of funeral rituals deprived the victim of the opportunity for continuity and reunion between the generations of the living and the dead. In *Plan de Sánchez*, which concerns multiple human rights violations, the Court recognized specific violations including the killing of elders and women, who preserve traditional knowledge, and the destruction of the traditional community order, replaced by forced displacement to "model villages" that were operated in a militarized fashion.

Beginning in 2000, Mayan victims' organizations, together with a human rights organization, the Center for Human Rights Legal Action (CALDH), advocated for a community consultation process to decide whether to file a complaint in the domestic courts against General Ríos Montt. This case—the first genocide case in the national courts—overcame numerous procedural hurdles and resulted in a landmark judgment affirming that the facts constituted the crime of genocide and imposing a sentence against the main defendant. The Ríos Montt case was the first time a judicial investigation into genocide was completed.

The 2013 judgment is important because it specifically affirmed the intent behind the crime. The CEH found that acts of genocide existed, but, consistent with its non-judicial character, it could not determine the intent of the perpetrator. The judgment, on the other hand, could reconstruct the military plans, statements, and actions that credibly demonstrated that the perpetrators' intent was to destroy the Ixil Mayan ethnic group. Acts such as massacres, sexual violence against women, and forced disappearances are consistent with a predetermined plan of extermination and a racist mentality. In addition, the criminal trial itself made significant efforts at inclusion by allowing genocide survivors to testify, the first time that such narratives, expressed in Native languages, were publicly heard in a Guatemalan courtroom.

The imposition of an 80-year sentence against Ríos Montt is likely significant for its declaratory impact, but it is not necessarily the most important outcome of this or any other trial. If it were, the subsequent complications, which led to the case being overturned on technicalities and the proceedings starting all over again, would have dulled any interest in the judgment. The death of the main defendant, Ríos Montt, in 2018 resulted in the dismissal of the case against him. The co-defendant, Ríos Montt's former intelligence chief, José Mauricio Rodríguez Sánchez, was acquitted the same year, and the judgment was affirmed in 2021 (Burt & Estrada, 2018).

The anticlimactic end of the genocide case illustrates both the possibilities and limitations of access to formal justice for Indigenous peoples. A legal precedent was only partially achieved, since the first judgment was overturned, but the high national and international profile of the case had a significant impact. The case did not have a retributive impact on the defendants, but it did have an important declaratory effect, and the Court annexed numerous specific reparation measures to the judgment for the reconstruction of the Mayan culture affected by the genocide. Here, as in other cases that have been emerging (Martínez & Gómez, 2019, 38), the courts have proposed the translation of the judgment into Native languages as a measure of reparation.

2.4.2 Peru – Proceedings derived from the Truth Commission and others

The Peruvian CVR, unlike the Guatemalan CEH, was not prevented from assigning alleged criminal responsibility and, on the contrary, had the obligation to cooperate with the Public Prosecution Service in its task of doing justice (PCM, 2001). The commission's final report included a specific volume (CVR, 2003, VII) of 73 cases it deemed emblematic, in which it recommended that the Public Prosecution Service open or reopen criminal investigations, as some had been interrupted by an amnesty law enacted during the authoritarian regime of Alberto Fujimori. The recommendation and the volume consisted only of a condensed, public version of the investigation conducted by the CVR. All documents and testimony obtained by the commission to form its conclusions were forwarded to the Public Prosecution Service, with copies to the Office of the Ombudsperson.

Among the 73 cases referred to the Public Prosecution Service, many involved crimes committed against Indigenous communities, both in the Andean and Amazonian regions, by both State agents and subversive groups. Massacres, forced disappearances, sexual violence, torture, forced displacement—both in the communities and on military bases—have directly affected the integrity of the communities. The narrative of the CVR, however, lacks a perspective that acknowledges the specific impacts on the collective rights of communities or the status of Indigenous peoples as victims—which are acknowledged in other sections of the final report. The emblematic cases were neutral or silent regarding the ethnic component. And the very language used in the volume, unlike other sections, has a marked legalistic style, undoubtedly due to the division of labor within the commission, which resulted in limited interdisciplinary collaboration (González & Varney, 2013, 46).[12]

There were a few exceptions in cases involving Amazonian communities, such as the disappearance of the Asháninka leader or *pinkatzari* Alejandro Calderón at the hands of the subversive group *Movimiento Revolucionario Túpac Amaru* (Túpac Amaru Revolutionary Movement – MRTA). In this case, in referring to the organization of an authentic Asháninka army in response to the disappearance, and its actions to defeat the MRTA, the CVR directly acknowledges its "respect for the ancestral practices of the Asháninka communities and their right to the possession of their communal lands" (CVR, 2003, VII, 319).

12 See the organizational chart of the Peruvian CVR: there were no direct opportunities for methodological exchange between the different specialties, in González and Varney, 2013.

Legal actions, which, as in Guatemala, were delayed and sometimes unsuccessful, have been equally silent on the Indigenous perspective. Cases were halted or delayed by procedural obstacles incomprehensible to the layperson and to the victims; or were conducted in culturally hostile contexts, including without interpretation into the Quechua language.

In another similarity to the case of Guatemala, the formal judicial proceedings take place in isolation from community-based restorative justice practices. The CVR itself had identified and studied community reconciliation processes in which it recognized the impact of ethnic and racial discrimination and the need for a reconciliatory concept and practice that values the cultural practices of the Andean and Amazonian peoples.

Among the Asháninka People, the experience of the crimes suffered is presented as an absolute rupture: "to reconcile with them they would have to die for a year and then rise again," according to one testimony (CVR, 2003, IX, 68) and, therefore, the conceptually impossible act of reconciliation is feasible only by appealing to ritual and sacredness. The Asháninka People, who have a number of warrior ritual practices, also have practices that heal the impact of participating in the death of others (Ponciano del Pino, 2014). As in the Guatemalan case, even in the absence of formal criminal justice, the Asháninka worldview holds that those who have committed crimes receive cosmic retribution, marked by pain, illness, and guilt, and that only through specific rituals can such a rupture be avoided or overcome.

As stated in a previous section, the Peruvian transitional justice process did not originally include the crime of forced sterilization of women from peasant communities, mostly Quechua-speaking (Carranza, 2020), in the design of the CVR. However, the survivors of this practice, organized in associations, have brought criminal proceedings against former dictator Alberto Fujimori and his former health ministers. Trial hearings were to begin in January 2021. Unfortunately, and mirroring similar experiences in Guatemala, the proceedings had to be suspended due to a lack of Quechua interpreters for a specific variant of the language, which prevented the victims from being able to participate properly in the case (Carrasco, 2021).

2.4.3 Colombia – the Special Jurisdiction for Peace (JEP)

As discussed in previous sections, the Colombian transitional justice process is not limited to determining responsibilities within the framework of the current peace process between the State and the FARC guerrillas. Rather, it is a long process, at times linked to demobilizations, and at others the organic result of advances in the protection of constitutional rights.

The Ethnic Chapter of the Peace Agreement between the State and the FARC includes specific recommendations in all areas of transitional justice. In particular, Indigenous "principles, reasoning, and rationalities" (Belkis & Viaene, 2016) and guarantees for the exercise of Indigenous rights are accepted, particularly in two aspects: (i) respect for the right of consultation and coordination with Indigenous peoples and (ii) the complementarity between the Special Jurisdiction for Peace (JEP), a product of the Peace Agreement, and the Special Indigenous Jurisdiction, i.e., the set of legal norms and practices existing among Indigenous peoples, which have been constitutionally recognized since the entry into force of the 1991 Constitution. In addition, as in the case of the CEV, the mechanism for appointing members of the JEP considered criteria that ensured the presence of Indigenous judges, resulting in the selection of four judges from the Kankuamo, Wayuu, Arhuaco, and Totoro peoples (Vargas Valencia, 2021).

As in the case of the CEV and the Disappeared Persons Search Unit, the representatives of the JEP participated in the prior consultation process carried out with the Permanent Roundtable for Consultation with Indigenous Peoples (MPCI) and reached formal agreements, including where the Indigenous justice system had dealt with cases related to the conflict prior to the existence of the JEP. Typically, as in the cases of Guatemala and Peru, Indigenous justice has engaged in restorative practices to deal with community members who have participated in acts of violence, including guerrillas or members of paramilitary forces. As the JEP was created to administer a special sentencing mechanism for participants in the conflict, competition among jurisdictions must be avoided. The agreement reached between the JEP and the MPCI specifies that the JEP will ask the Indigenous courts to decide whether they wish to retain their exclusive jurisdiction over cases involving members of the Indigenous peoples.[13]

13 Minutes of the session of the Permanent Roundtable for Consultation with Indigenous Peoples and Organizations "Holding and recording of prior consultation on the instruments of the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition." January 19, 2019.

Any measure taken in the Indigenous justice system—or in cases that the JEP administers in proceedings against Indigenous armed actors, for example, pretrial detention—must respect the rights of Indigenous peoples (Zuleta & Romero, 2020, 180-181).

The coordination between the JEP and the Indigenous justice system, as in the cases of Guatemala and Peru (at least in the case of the Asháninka People), is necessary not only to prevent jurisdictional conflicts, but also because, despite the acceptance of Indigenous principles, the JEP continues to be part of a State not seen as inclusive, and because, despite its innovations and restorative components, it continues to be based on concepts from the dominant culture. For the Wayúu People (Torres, 2018), for example, the whole rationale of sentencing and the debate about whether to enforce prison sentences—a key element of Colombian transitional justice—is probably irrelevant because in their understanding a prison sentence does not achieve resocialization or reconciliation. Perpetrators can only be rehabilitated within the group, accepting reproach for a time and acknowledging the pain they have caused.

In terms of the results of the methodology of the JEP's engagement with Indigenous peoples, it is important to note that its jurisdiction has included crimes committed against Indigenous peoples in one of its seven "macro cases," i.e., judicial proceedings that include numerous human rights violations united by a similar historical causality, criminal acts, and territorial contexts. Macro case 5 (JEP, 2021), which focuses on the Cauca Valley, was prepared using the reports of investigative commissions as well as reports prepared directly by the Indigenous organizations of the National Indigenous Organization of Colombia (ONIC). The case includes crimes attributed to State agents and guerrilla organizations, such as the use of landmines, forced recruitment of minors, sexual violence, arbitrary executions, and forced disappearances. Although the case is still ongoing, the recognition of four Indigenous peoples' associations in the Cauca Valley makes it feasible for the JEP to adopt their perspectives in its findings.

3. TRANSITIONAL JUSTICE "WITH NO TRANSITION" FOR INDIGENOUS PEOPLES

The accumulated experience, from the Guatemalan CEH to the Comprehensive System in Colombia, to the reparations process in Peru, appears to lay the foundations for a progressive and optimistic narrative of growing integration between the fields of transitional justice and the rights of Indigenous peoples. From the legal mandate of the CEH—which does not explicitly mention Indigenous peoples—to the agreements signed between the Colombian CEV and Indigenous peoples and the decisions of the JEP, there has been a quarter century of tenacious activism and responsiveness by human rights actors.

Portraits of victims sit on top of stones in the memorial "Eye that Cries" (*Ojo que Llora*) in honor of those that died and disappeared during Peru's internal conflict between 1980 and 2000, killing nearly 70,000 people. (AP Photo/Rodrigo Abd)

This progressive trend is unfolding in the midst of a fundamental tension between rupture and continuity. Indeed, transitional justice is presented as a point of rupture between the past and the present—a means to hold past actors accountable, confront outstanding debts, and make way for a different narrative, articulated variously as "national reconciliation" or "non-repetition." This break between the past and the present signifies the end of a violent conflict, and is supported by undeniable political events, such as a peace agreement or the collapse of an authoritarian regime. However, this experience of rupture, for Indigenous peoples, is negated by the ongoing violation of their rights.

The challenge for transitional justice is for its examination of the past to include those persistent factors that make violence and marginalization an ongoing experience for Indigenous peoples, and that diminish the relevance of the transition experienced in the political sphere of the Criollo State.

This entails, at a minimum, the recognition of three distinct but connected phenomena that call for an existential reflection from the perspective of transitional justice:

i. The deep roots of human rights violations which, in the case of Indigenous peoples, date back to colonial times and the perpetuation of ideologies and practices of dispossession, extermination, and forced assimilation.

ii. The overlap between the territories and communities victimized, both during and after the armed conflicts, by extractive economic models that link exterminating violence and territorial domination.

iii. The preservation of legal mechanisms to deny rights to Indigenous peoples, criminalizing protest and failing to protect human rights defenders in Indigenous territories.

On the first point, transitional justice institutions could play a role in acknowledging the deep roots of the violations suffered by Indigenous peoples. The memory initiatives and the experience of the truth commissions in the three countries have drawn connections between the relatively recent periods investigated and the historical causes of racist and violent ideologies and behaviors.

The difficulty that transitional justice mechanisms face in dealing with the colonial past and its long history is the fear that such an examination will have policy consequences, particularly in terms of reparations. How far back in history should we go, and what responsibility does the State bear for violations committed in the distant past? What implications would there be for the unity of the nation-state in acknowledging the injustice of the colonial past? The concerns raised by these questions—which are existential for the Criollo States—can be integrated in the framework of the full adoption of the rights of the Indigenous peoples, which affirm their right to self-determination and their instruments of self-government without infringing on the authority of the State.

Second, it seems essential to recognize that the maps of violence and of the extractive economic model overlap from the perspective of transitional justice.

In Peru, mining projects are multiplying to the point that mining concessions cover 21% of the national territory, but this fraction of the territory constitutes half of the territory of the Indigenous Andean communities. In the Peruvian Amazon, 72% of the territory is earmarked for oil and gas concessions, covering the vast majority of the Indigenous territories, with harmful effects on the health of their populations (Finer & Orta-Martínez, 2010). In Guatemala, the same government that signed the peace agreement and ratified ILO Convention 169 laid the legal foundations for aggressive mining projects and energy megaprojects in Indigenous territories (Bastos & De León, 2015). In territories such as Baja Verapaz, State violence during the armed conflict was not in response to guerrilla actions, but to local communities' resistance to energy projects (Monzón, 2021). At present, violence in the department of Alta Verapaz similarly reflects the imposition of energy projects that affect communities that lack the legal title to their property that would allow them to defend themselves (Izquierdo & Viaene, 2018). In Colombia, hydroelectric projects affecting the territories of the Awá People were implemented using violence against Indigenous leaders defending their territories. The crimes were carried out by paramilitary groups, according to the killers' own confessions to the transitional justice system (CEV, 2020).

The lack of legal protection for Indigenous communities, which facilitates their dispossession for development projects imposed by the Criollo State, is sometimes a direct result of armed conflict. In Colombia, the conflict is characterized by the forced displacement of communities and the forced sale of land as a condition for the preservation of life. Ethnic peoples (a category which, in Colombia, includes Indigenous peoples and Afro-descendant communities) are uprooted from their lands by the armed conflict, and their claims before the judicial authorities languish while dispossession by violent means continues (Vargas Valencia, 2021).

The connection between the violence of the armed conflict and the imposition of extractive projects is understood and explained directly from Indigenous peoples' point of view. For the Mayan Q´eqchi´ of Alta Verapaz, the construction of a hydroelectric dam that will affect the territory of some 200 communities is a new *nimla rahilal*, a great physical and spiritual suffering that includes human beings and the territory (Izquierdo & Viaene, 2018). Mayan communities have not hesitated to establish the connection between the armed conflict and the development model, and to use transitional justice instruments, such as reparations, to condemn the current impact of energy megaprojects and to demand answers to the depredation of their territories.[14]

Third, the imposition of extractive and energy projects on Indigenous peoples' territories has led to the stigmatization and criminalization of those who resist these projects. The same racist stereotypes underlying the abuse during the armed conflicts are reactivated: they are "Indians," i.e., primitive and exotic beings, who oppose progress, who can be manipulated or provoked, and individuals and peoples whose opposition to the economic model can only be explained as being identified with "terrorism" (Bastos & De León, 2015).

Besides stigmatization, which weakens the status of communities and human rights defenders, the large companies responsible for the projects exercise private control over the security forces (Bravo et al., 2019). And laws criminalizing protest facilitate the criminal prosecution of leaders (ECLAC et al., 2020, 133-151).

14 Governmental Order 378-2014 of the Presidency of the Republic (Guatemala). Adopting the public policy of reparation for communities affected by the construction of the Chixoy Hydroelectric Power Plant, whose human rights were violated, to be implemented between 2015-2019.

The transitional justice instruments still in force in Peru and Guatemala, linked mainly to reparations and memory, and the system as a whole, in full force in Colombia, face the challenge of dealing with these three aspects of continuity and non-transition. This requires including transitional justice mandates relevant to Indigenous peoples in terms of their scope, procedures, and underlying concepts.

4. REFLECTIONS AND TASKS

The transitional justice processes in Guatemala, Peru, and Colombia have confronted the legacy of human rights violations against Indigenous peoples, documenting the crimes and opening up pathways to reparations and criminal justice. With their differences, whether or not they arose from political agreements, and with different levels of complementarity among the transitional justice mechanisms, the creation of these instruments presented opportunities for Indigenous organizations to have an impact and enhance the visibility of their leadership.

However, despite these advances, transitional justice has shown systemic limitations in questioning the essence of the historical relationship between the Criollo States and Indigenous peoples, based on the exploitation of territory while ignoring or violently repressing the communities, whether or not there was an armed conflict, and regardless of the type of political regime in power.

Transitional justice undertakes the reconstruction of a legal and institutional scaffolding that affirms a liberal ideal—the rule of law—which finds its legitimacy

Relatives of victims of the Guatemalan Civil War (1960-1996) during a ceremony commemorating the 10th Anniversary of the publication of the Truth Commission's report, which held the Army responsible for 93% of the crimes committeed. (AP Photo/Rodrigo Abd)

and justification in the protection of individual rights. The instruments of transitional justice seek to affirm these obligations, which have been ignored or violated during periods that, in the official narrative, are considered exceptional, characterized by a breakdown in the normative order.

The fundamental problem with this perspective is that Indigenous peoples do not live fully within this legal order, nor do they necessarily seek to do so and, therefore, their experience of their interaction with the State and its institutions is marked by colonialism and the denial of their living conditions as autonomous communities. At best, State institutions—and this includes transitional justice institutions—can propose a respectful, people-to-people relationship between Indigenous and non-Indigenous peoples. But even this optimistic scenario provides only the groundwork and not the full reality of a reconciliation, a new pact or treaty. The contributions of a well-designed and State-driven transitional justice process (and the three processes examined here have progressive elements, despite their limitations) can set this historical transformation in motion, but it would probably be unfair to demand that they carry it out on their own.

Our examination of the cases of Guatemala, Peru, and Colombia suggests reflections and tasks for the fields of transitional justice and Indigenous Peoples' law in the following directions:

i. Recognizing the difference between efforts by State authorities to foster good relationships and the full, active role and leadership of Indigenous peoples.

ii. Using, despite their intrinsic limitations, human rights instruments as minimum standards and baselines in the implementation of transitional justice mechanisms in the areas of truth, reparation, and justice.

iii. Designing, collectively, effective tools for intercultural engagement with decolonizing potential. This task requires drawing the attention of international human rights bodies, Indigenous peoples, formal academic spaces, and activists.

In the first aspect—the difference between engagement with Indigenous peoples and the leadership of Indigenous peoples—we should recognize that transitional justice mechanisms would be configured differently had they originated with Indigenous peoples or were focused exclusively on their rights, rather than arising from the structures of the domestic State seeking accountability for its internal conflicts.

The cases studied all refer to State initiatives that include Indigenous peoples, with varying degrees of success, and which—in a few cases—are related to their rights. This differs from various transitional justice experiences outside Latin America (in Canada, Australia, and the Nordic countries) where truth commissions have been created at the initiative of the Indigenous peoples themselves and focused exclusively on their experiences (González, 2021). These experiences, still very new, represent not the State's application of transitional justice instruments to Indigenous peoples, but the ownership and transformation of these instruments by Indigenous peoples in a renegotiation of their relationship with the State.

The inclusion models can be seen to involve a national transitional justice process in which Indigenous peoples can be considered in the design and legal mandate of the instruments, as well as in their methodology and implementation, with approaches that consider, to a lesser or greater extent, procedural rights that allow Indigenous peoples to decide the conditions under which they wish to participate (if they so wish). This model has served as a platform for Indigenous activism and advocacy, from the historical recognition of the genocide in Guatemala to the use of reparations as a form of dialogue with the State, to the direct and detailed inclusion of Indigenous leadership alongside State representatives, as in Colombia.

This differs from a model of Indigenous ownership, in which Indigenous peoples, exercising their right to self-government, use the conceptual frameworks and instruments of transitional justice on their own terms, both in design and procedures, with the result of challenging—from the very conceptualization of the process—the colonial mindset that prevails in relations between the Criollo States and Indigenous peoples. This model requires a critical gaze and considerable disenchantment with the inclusion model, but it is difficult to imagine its existence without having gone through the inclusion model: there is likely an incremental relationship between the two, as well as a qualitative leap.

The inclusion model seeks, in the best of cases, to present Indigenous peoples with the option of creating new narratives that redefine the meaning of the nation-state and its history, overcoming Criollo and colonial identities, and addressing the challenge of multicultural nations or, even more so, plurinational States. Among the experiences studied, the case of Colombia points to the flexibility of a constitutional framework that, although it emerges from the State, recognizes the right of Indigenous peoples to self-determination and establishes a principle of minimum interference and voluntariness. This experience could provide, in principle, some indications of the possible interplay between the two models of Indigenous inclusion and ownership.

If this is so, we can identify, from the inclusion model, those requirements that make for respectful engagement with Indigenous peoples' rights and that must be formally adopted in consultation with them:

- The substantive and explicit inclusion of violations of Indigenous peoples' rights in the thematic mandate of transitional justice institutions, in terms acceptable to Indigenous peoples.
- The inclusion of Indigenous leadership in all transitional justice institutions, with the active participation of Indigenous peoples' communities and representative organizations, and the adaptation of the structure of transitional justice institutions to effectively reflect such leadership.
- The inclusion of guarantees of safe participation for Indigenous persons and communities, including conditions for the protection of their physical integrity, their legal recognition, and psychosocial support under culturally appropriate conditions.
- The inclusion of permanent consultation instruments in all phases and processes of transitional justice that may affect Indigenous rights, including the possibility of receiving or withholding consent.
- The inclusion of Indigenous knowledge in intercultural dialogue with the conceptual frameworks of transitional justice and the rule of law.
- The inclusion of Indigenous peoples in the follow-up mechanisms of transitional justice instruments and the design of institutional adaptation policies.

The second aspect, which is intrinsic to the inclusion model, involves recognizing Indigenous peoples' human rights standards as baselines and minimum achievements without which transitional justice—beyond its effectiveness in addressing the legacies of violence and impunity in the abstract—fails to advance in acknowledging, questioning, and transforming the legacies of colonialism.

This baseline should be drawn at the intersection of transitional justice and Indigenous peoples' rights, which is both substantive and procedural. First, transitional justice instruments can recognize violations of collective rights, as expressed in the UN Declaration and Convention 169, as part of their thematic mandate. There are direct links between the violation of these rights and violations of international human rights law and international humanitarian law, since serious violations such as genocide, forced displacement, sexual violence, and others are simultaneously clear violations of the right of Indigenous peoples to exist. In the second, procedural sense, transitional justice has for some time now recognized consultation as a fundamental and crosscutting element in all its mechanisms, providing a conceptual and practical bridge to the recognition of the right to prior consultation and free and informed consent within the framework of Indigenous rights.

Adapting the mechanisms of transitional justice specifically involves:

- A thorough review of the mandates of truth-seeking and memory instruments, to ensure that they can effectively highlight Indigenous peoples' experiences and contribute to the substantive implementation of the right to self-governance. This means continuing the trend—seen in the cases examined—of making Indigenous rights explicit, challenging exclusively individualistic notions of rights, recognizing the long histories and narratives that go beyond recent violence, and substantively including Indigenous procedures in all aspects of documentation, analysis, and communication of findings and narratives.
- The challenge to individualistic or development-centered conceptions of reparation, which identify only harm to the delocalized and abstract individual, without community and which frame reparation as an extension of other policies, in particular development policies. This means including notions of reparation that include the territory as a hub that integrates geographic spaces, lives, and knowledge. It also requires reinforcing the

meaning of reparation as acknowledgment, making it a negotiated process between the State and the Indigenous communities, in both its material and symbolic dimensions.

- The dialogue between the retributive conception of criminal justice—at the heart of transitional justice as a means of combating impunity—and the restorative conceptions present in traditional Indigenous forms of justice. This entails, first, recognizing Indigenous justice and negotiating the scope of its application in a transitional justice context. But, more ambitiously, it also calls for transitional justice jurisprudence to accept Indigenous conceptions of agency, responsibility, harm, balance, and the restoration of relationships.

At the third level, international human rights organizations—both those that have embraced or incubated the principles of transitional justice and those that have shaped the contemporary development of Indigenous peoples' law—have the urgent task of fostering a dialogue between these two areas. The proliferation of instruments such as reports and opinions, from rapporteurships and expert panels, has not yet produced a critical mass of knowledge or a permanent platform for interaction that would allow Indigenous peoples to take ownership of transitional justice instruments.

The objective should be to systematize those practical experiences, constitutional and supreme court decisions, and theoretical studies that lie at the intersection of transitional justice and the rights of Indigenous peoples. The result should be explicit guidelines that enjoy the authority of international instruments to achieve the implementation of minimum standards of inclusion and the opening of paths toward ownership. This may take the form of specialized hearings before regional bodies, inclusion in country reports for Universal Periodic Reviews (UPR), specialized sessions of the UN Permanent Forum, reports of special rapporteurs leading to guidelines from the UN Secretary General, and opinions interpreting national law and jurisprudence in light of international instruments.

Achieving this aim requires learning from countries with different experiences of Indigenousness and transitional justice: those that—like the ones examined here—emerged from former colonial processes and republican construction based on the notional inclusion of all identities; and those that—resulting from other forms of colonization—institutionalized coexistence based on treaties and the recognition of parallel entities and identities within the sovereignty of the colonizing State.

It also requires interaction between Indigenous leaders who have been directly involved in transitional justice processes, human rights experts who have worked with such Indigenous leaders, academic institutions, Indigenous knowledge, and representatives of regional and international human rights bodies.

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