Institute of Commonwealth Studies, University of London

DECOLONISING TRANSITIONAL JUSTICE: A FRAMEWORK FOR HISTORICAL REPARATION FOR AFRO-DESCENDANT PEOPLES IN COLOMBIA

Esther Ojulari

A THESIS SUBMITTED TO THE INSTITUTE OF COMMONWEALTH STUDIES, SCHOOL OF ADVANCED STUDY, UNIVERSITY OF LONDON FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

LONDON, AUGUST 2021

DECLARATION

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the School of Advanced Study, University of London, is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

This thesis is dedicated to

my mum Gloria Ojulari Sule

my brothers and sisters, aunts, uncles, nieces, and nephews from our beautiful extended family in Colombia

our ancestors from whom we continue to learn

my son Ifé Damián Renteria Ojulari and my niece Lumumba Amalia Rosero Garzón who are the present and the future of our struggle.

This thesis was made possible by you all and it belongs to all of you

ABSTRACT

This thesis examines Afro-descendant advocacy processes and mobilisation around the issue of historical reparation in the context of transitional justice, and in particular how key transitional justice moments in Colombia have provided an important platform and political opportunity to put the issue of historical reparation in the public debate. Through discourse analysis of human rights and advocacy reports written by Afro-descendant organisations, analysis of the content and scope of relevant norms and jurisprudence, and interviews and focus groups around advocacy strategies, the thesis explores, how Afro-descendant activists have mobilised around the issue of historical reparation through decolonial and people-centred processes in two key ways:

Primarily it shows how, through advocacy processes at three key moments in the Colombian transitional justice landscape, Afro-descendant activists have shaped and influenced the transitional justice normative framework leading to a progressive body of norms and jurisprudence that seek to address not only victims' rights in general but the ethnic, racial and collective damages suffered by Afro-descendant peoples during the armed conflict as well as the structural and historical underlying factors that have led to a differential impact of conflict on Afro-descendant peoples.

These normative achievements are demonstrated through the language and scope of provisions contained in Constitutional Court rulings around forced displacement, Laws and Decrees on the right to reparation for victims of the internal armed conflict, and the Final Peace Agreement between the FARC-EP and the National Government all of which now embody an important "ethno-racial focus."

Secondly, through decolonial analyses of the unbroken chain of racial oppression and violence since the colonial period and the Transatlantic Slave Trade to the current moment of armed conflict and in the neoliberal development agenda, Afro-descendant activism has challenged many of the traditional critiques and arguments against reparation for slavery by demonstrating that it is an issue of past, present and continuing injustice as colonial crimes continue in the contemporary context of coloniality.

The thesis shows how transitional justice provides a useful and important language and framework for articulating reparation demands centred on issues of truth, structural transformative change and guarantees of non-repetition. When this is articulated though the language and visions of the autonomous, ethno-territorial and people-centred rights struggles of Afro-descendant organisations in Colombia it creates the case for a decolonial and transformative historical reparation which goes beyond general claims limited to economic compensation to include structural demands for land, autonomy and self-determination that would address both past and present injustice and create the conditions for the non-repetition or non-continuance of racial injustice into the future.

ACKNOWLEDGEMENTS

I would like to thank the School of Advanced Study, University of London for providing the funding and conditions which enabled me to embark on this thesis journey. A huge thank you to my supervisor, Dr. Corinne Lennox for your endless and tireless support, guidance and encouragement throughout this research process. During the most difficult moments you kept me motivated, focused and dedicated to this process.

I extend a special thank you to my friends and colleagues from the Proceso de Comunidades Negras (PCN), CONPA and wider organisations of the Afro-descendant and Human Rights movement in Colombia without whom this research process would not have been possible. In particular, thank you to Carlos Rosero, Charo Mina Rojas, Helmer Quiñones, Francia Márquez Mina, Diego Grueso, Harrinson Cuero Campaz, Marie Cruz Renteria, Naka Mandinga, Ajamu Baraka, Fernando Vargas Valencia, Sheila Gruner; Orlando Castillo, and Marcos Oyaga. Their roles as partners, interviewees, focus group participants, and academic advisors were fundamental to the initial design of the research project, the realisation of the field work and the analysis and consolidation of the ideas and conclusions presented.

To all my friends and family, near and far thank you for your support, encouragement and advice which has accompanied me through this process.

Finally, I thank my mum Gloria Ojulari Sule, who is my rock, my best friend, my greatest critic and my biggest supporter and who made this research process possible. I am forever grateful for the emotional support and the care she has provided to me and my son Ife Damian Renteria during this long journey.

Thank you

Table of Contents

ABBREVIATIONS AND ACRONYMS

ACHR – American Convention on Human Rights
ATGM – Association of Territories gained from the Sea
BACRIM – Criminal Gangs
CAH - Crimes against humanity
CAT - Convention against Torture (CAT)
CC – Constitutional Court
CEV – Truth Commission
CNMH – National Centre for Historical Memory
CNOA – The National Conference of Afro-Colombian Organisations
CODHES –Consultancy on Human Rights and Displacement
CONPA – National Afro-Colombian Peace Council
CPRs - Civil and political rights
CRC - Convention on the Rights of the Child
CRT – Critical race theory
CYP - Children and young people
DANE - National Administrative Department of Statistics
DDPA – Durban Declaration and Plan of Action
ECI – State of Unconstitutionality
ECLAC - Economic Community of Latin American and the Caribbean
ESCRs - Economic, social and cultural rights
FARC-EP - Revolutionary Armed Forces of Colombia—People's Army
FPIC – Free prior informed consent
GBV – Gender-based violence
GNR – Guarantees of Non-Repetition
HRC – Human Rights Council
IACHR - Inter-American Commission on Human Rights
IACrtHR – Inter-American Court of Human Rights
ICC - International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICERD - International Convention on the Elimination of All Forms of Racial Discrimination
ICJ - International Court of Justice
ICPs - Individual complaints procedures
ICRC - International Commission of the Red Cross
IDPs – Internally Displaced Peoples
IHL – International Humanitarian Law
IHRL – International Human Rights Law
IL – International Law
ILC - International Law Commission
JEP – Special Jurisdiction for Peace
OAS - Organisation of American States
PCHR - People-centred human rights
PCN – Black Communities Process
PDET – Development Plans with Territorial Focus
PIRC - Integral Plan for Collective Reparation
RUV – Victim Registry
SIVJRNR – Integrated System for Truth, Justice, Reparation and Non-Repetition
TJ – Transitional Justice
UARIV – Victims Unit
UNSRR – United Nations Special Rapporteur on Contemporary Forms of Racism
UBPD - Unit for Searching for Disappeared Peoples
UDHR - Universal Declaration of Human Rights
UNGA – United Nations General Assembly
UNP – National Unit for Protection
UNTBs - human rights monitoring mechanisms or treaty bodies (UNTBs)
URT – Land Restitution Unit
WGEPAD – Working Group of Experts on People of African descent

INTRODUCTION

I. Thesis and research questions

During a workshop with Afro-descendant women victims of the armed conflict in Buenaventura, Colombia, we discussed the implementation of Colombia's new transitional justice mechanisms; the Special Jurisdiction for Peace (JEP), the Truth Commission (CEV) and the Unit for Searching for Disappeared Peoples (UBPD), which together make up the Integrated System for Truth, Justice, Reparation and Non-Repetition (SIVJRNR) enshrined in the peace agreement between the government and the FARC-EP. I asked participants what each of these concepts meant to them as Afro-descendent women: *truth*, about what happened during the armed conflict; *justice*, for the crimes committed; *reparation*, for victims of human rights abuses; and *non-repetition*, of violence and violations of rights.

Participants explored the meaning of these concepts as they related to their ethno-territorial collective rights as members of Afro-descendant communities and their experiences of intersectional discrimination as black women. One group concluded that guarantees for non-repetition of the violence and human rights abuses committed in the Pacific region against Afro-descendant communities during the armed conflict could only be achieved through historical reparation, that is to say, reparation for the enslavement of Africans and Afro-descendants during colonial and early republic Colombia, and the racism, inequality, marginalisation and continued violence their descendants have suffered since.

This analysis was not unique to this group of women. Afro-descendant activists throughout the movement in Colombia have long pointed out the links and continuity between the violence inflicted upon their ancestors during enslavement and the disproportionate and differential experiences of internal displacement, forced disappearances, assassinations, massacres, forced recruitment and sexual violence suffered during the sixty-year internal armed conflict of the 20th and 21st Centuries. During the international conference "From reparations for the armed conflict to historical reparations," (Cali, march 2017) organised by PCN (Black Communities Process), CNOA (The National Conference of Afro-Colombian Organisations) and CODHES (Consultancy on Human Rights and Displacement), these links were made explicit as activists asserted that the human rights abuses against their communities in the context of the armed conflict cannot be repaired and will not cease without an historical reparation process (Ojulari et al., 2017).

This thesis explores the ways in which the contemporary transitional justice (TJ) process in Colombia has been an important opportunity for Afro-descendant organisations to advance the agenda of

reparation for enslavement and colonial injustices. Through autonomous approaches to TJ and collective reparation claims they have developed an own[1] language and framework of TJ which enables the articulation of demands for decolonial, transformative reparations beyond the contemporary armed conflict, to address wider structural and historical roots of oppression and violence.

Societies undergo transitional justice processes to address and overcome particular moments of societal atrocity. Whether responding to an internal armed conflict or an authoritarian regime, TJ frameworks combine judicial and extrajudicial processes that seek to repair injustice and restore dignity to people who have experienced violations of their rights. Thus, as well as seeking sanctions for those who have committed grave crimes against humanity (CAH), war crimes or genocide.TJ has become increasingly focused on the rights of victims through processes for truth, requiring whole societies to come to terms with their past, ensuring justice (whether ordinary or restorative) is served to those responsible, as well as reparation and measures to guarantee non-repetition. However, as I argue in the thesis, when a TJ process takes place in a (post)colonial context, such rights will never be restored unless the process takes a decolonial approach, recognising that contemporary injustices committed against victims are a consequence of both the legacy of colonialism and enslavement and the continued relations of coloniality that underpin contemporary society.

Over the past two decades, and largely as a result of advocacy by Afro-descendant activists themselves, TJ legislation in Colombia has evolved to enshrine an important legal framework for repairing the collective injuries committed against Afro-descendant peoples during the armed conflict. Under Decree Law 4635 of 2011 several Afro-descendant communities have made collective reparation claims, identifying and documenting the collective harms caused to their communities, territories, cultures and identities and the necessary reparatory measures to restore and repair those harms.

The most recent peace process in Colombia, which has been praised worldwide for the centrality of victims' rights and its gendered and ethnic approach, built on existing norms[2] to include measures for collective reparations in the Final Peace Agreement (Piccone, 2019). This agreement was signed between the National Government and the FARC EP, just one of the armed groups involved in the conflict. As such, it alone cannot bring about full peace. However, the result of five years of negotiation, it contains an important provisions on the rights of victims (Chapter 5), and, as a result of

[1] The term "own" is used throughout as a direct translation from the Spanish *propio* to describe the autonomous Afro-descendant approaches to collective rights and justice.

[2] As shall be explored in detail in chapters 6, these include Law 975 of 2005 (The Peace and Justice Law), Law 1448 of 2011 (The Victim's Law) and Decree Law 4635 on collective reparations for Afro-descendant communities.

advocacy by Afro-descendant and indigenous groups, an Ethnic Chapter which includes safeguards to protect the ethno-territorial rights of Afro-descendant and indigenous peoples and ensure collective reparations (Poder Legislativo, 2016).

While the scope of these norms is limited to reparations for rights violations committed in the context of the internal armed conflict, the TJ framework has been an important platform for Afro-descendant organisations to advance their internal agenda for reparations for the colonial crime of enslavement and related racial injustice.

By drawing on the experiences of advocacy and internal organising work of Afro-descendant organisations Proceso de Comunidades Negras (PCN) and the National Afro-Colombian Peace Council (CONPA) in Colombia, this thesis demonstrates how a decolonial approach to TJ provides an important framework and language for historical reparation demands through: 1) enabling a decolonial understanding of contemporary atrocity crimes[3] of CAH, genocide and ethnic cleansing[4]; and 2) conceptualising reparation measures which go beyond individual material compensation or inclusionist policies to include demands for truth, collective rights, and guarantees of non-repetition (GNR) that seek transformative structural change.

To understand and interpret the work being carried out by the organisations that participated in this research, I apply a decolonial theoretical framework, which draws on post-colonial perspectives by writers such as Fanon (1952 (2008); 1961 (2001)), Césaire (1950 (2000)), Said (1978), and Rodney (1972), works by Latin American Liberation Philosophers such as Dussel (1993; 2000), Quijano, (1999; 2000), Maldonado (2007; 2008; 2011), and Mignolo (2003; 2007), and settler colonial theories by writers such as Matsunga (2016) whose theories on modernity and coloniality have contributed to understandings of violence, exclusion, inequality and racism in the contemporary period as a continuation of the ideologies underpinning the European colonial project since its origins. The research questions, theoretical framework and methodology are all committed to decolonial approaches to research and social change.

[3] See United Nations framework of analysis for atrocity crimes (United Nations, 2014)

[4] While this thesis discusses some crimes that may be considered War Crimes during the armed conflict, it focusses on CAH, genocide – understood by many one of the most serious examples of a CAH (Fruli, 2001), and ethnic cleansing – precisely because it aims to show these crimes as "widespread and systematic," (see *Prosecutor v Mrkšic, Radic, and Šljivanèanin – Vukovar Hospital Decision,* 3 April 1996, para. 30*; Prosecutor v. Akayesu,* 2 September 1998, paras. 579-580 and *Prosecutor v. Erdemovic*, 7 October 1997, para 21-22*),* and in an historic and ongoing context since the colonial period to the present, whether in times of war or "peace". Further the crimes discussed may have been committed by armed groups, parties to the conflict and subjects of IHL, or groups who, while not recognised as parties to the conflict, often carry out such crimes in the service of the colonialist economic project in the territories of Afro-descendant communities such as Buenaventura.

Research Questions

This thesis explores the central question: **How are Afro-descendant activists in Colombia decolonising transitional justice as part of the ongoing struggle for historical reparation?** To answer this question, I analyse testimonies from interviews, focus groups and workshops with Afro-descendant human rights and racial justice activists, official documentation and reports and minutes from meetings on issues of reparations and Afro-descendant rights in which I have participated over this duration of the field work process which began in 2014. These analyses respond to three sub questions:

1. **How are activists taking a decolonial approach to denouncing human rights violations committed against Afro-descendant peoples during the armed conflict?**

   This question explores how through activism and advocacy activists have demonstrated that human rights violations, CAH, genocide and ethnic cleansing, committed during the armed conflict are both a legacy of enslavement and a continuation of colonial crimes, in a paradigm of coloniality. The analysis applies decolonial concepts such as the "myth of modernity" and the "just war" (Dussel, 2000) and the "non-ethic of war" (Maldonado, 2007) to demonstrate how these contemporary crimes are underpinned by the same colonial ideologies of capitalism, white supremacy and patriarchy which were used to justify enslavement and colonisation. This decolonial reading forms an important basis for demonstrating that historical reparation is interrelated and inseparable from reparation for the armed conflict in the context of TJ. It enables activists to overcome some of the typical objections to reparation demands which assert that slavery was a crime of the past, with no identifiable victims or responsible parties, showing on the contrary how this colonial crime has very real and ongoing consequences for Afro-descendant peoples in the contemporary period.

2. **How are Afro-descendants activists decolonising TJ norms?**

   The second question explores how through activism and advocacy Afro-descendant activists themselves contributed to the evolution of the very normative framework which they now use to demand collective reparation. Through the analysis of constitutional and TJ norms and jurisprudence it shows how the emerging TJ normative framework has, largely as a result of activism by Afro-descendant organisations, created a legal and political opportunity for a decolonial demand for historical reparation. This question explores the important role of

ongoing activism and advocacy in shaping TJ and human rights norms to address the most pressing concerns of racial justice movements.

3. **How can decolonial TJ provide a framework for historical reparation?**

Finally, the thesis asks whether TJ can really provide a framework for historical reparation. This question explores first how TJ concepts such as truth, reparation and GNR enable an approach to reparation that goes beyond individualist and material-based reparation to enable space for collective demands in the framework of structural transformation. However, it also recognises and addresses the limitations of state centred TJ processes which are driven by powerful economic and political interests and thus shows the importance of own, internal, decolonial and autonomous processes of TJ and reparation.

With a focus on the case of Buenaventura on Colombia's Pacific coast, the thesis explores how Afro-descendant communities are demanding collective reparations in the framework of TJ are simultaneously making demands for historical reparation through a "people-centred human rights" (PCHR) approach (Baraka, 2013). Going beyond Eurocentric and state-centred concepts of rights, this approach, rooted in own epistemological decolonial understandings of collective rights, cultural identity, territory and autonomy pushes the very boundaries of TJ to demand transformative reparation that not only seeks to repair the damages caused by the armed conflict but to understand these as a continuation of colonial crimes and demand structural and systemic transformation to break the ongoing cycle of colonial violence.

II. Research Context:

i. Afro-descendants in Colombia

Colombia, in the Northwest of South America, has one of the most geographically diverse territories in the continent, with wetlands in the East, Andean Mountain range in the centre, jungle in the South and West and both Caribbean and Pacific coast lines. It is rich in natural resources, with oil reserves, gold, silver, emeralds and platinum. The 2018 national census reported a total population of 41,468,384 of whom 3.4 percent are indigenous (belonging to 87 different peoples), around 6.2percent are Afro-descendant and 0.01 percent are Romani, the remainder being "white/mestizo" or not identifying as an ethnic group (DANE, 2018). These figures represented a significant reduction of more than 30% of the registered Afro-descendant population from 4,311,757 in the 2005 census, to

1,329,000 in 2018 and was the result of serious methodological issues in the data collection process.[5] It has been referred to as a "statistical genocide" by Afro-descendant organisations (see PCN 2019), a group of whom took legal action against the state through a "Tutela process"[6] at the Constitutional Court (see CNOA, 2020). Organisations such as Afrodes estimate the true figure of the Afro-descendant population is closer to 25-30 percent (Afrodes et al, 2019).

Colombia's Afro-descendant population is diverse, composed of "Afro-Colombian" and "black" peoples (terms often used to refer to all Afro-descendants in Colombia), *Raízales* (populations of the Caribbean islands of San Andres, Providencia and Santa Catalina, descended from enslaved people from Jamaica who speak both English-based creole or patois, and Spanish); and *Palenqueros* (from settlements founded by escaped slaves during the colonial period, who in the case of San Basilio de Palenque speak creole mixed with Ki-Kongo and Ki-Mbundu languages brought to Colombia by enslaved Africans and preserved through the generations). Thus, there is no homogenous Afro-descendant experience or indeed movement, but rather a diversity of histories, identities, cultural practices and languages, which have translated into a diversity of visions and demands throughout Afro-descendant social movements. Throughout this thesis I refer to "Afro-descendant peoples," which as well as well as encapsulating the diversity of groups mentioned above, is, in line with the perspectives of many activists, a political affirmation of their status as "peoples," who as such should be subject to the right to self-determination.

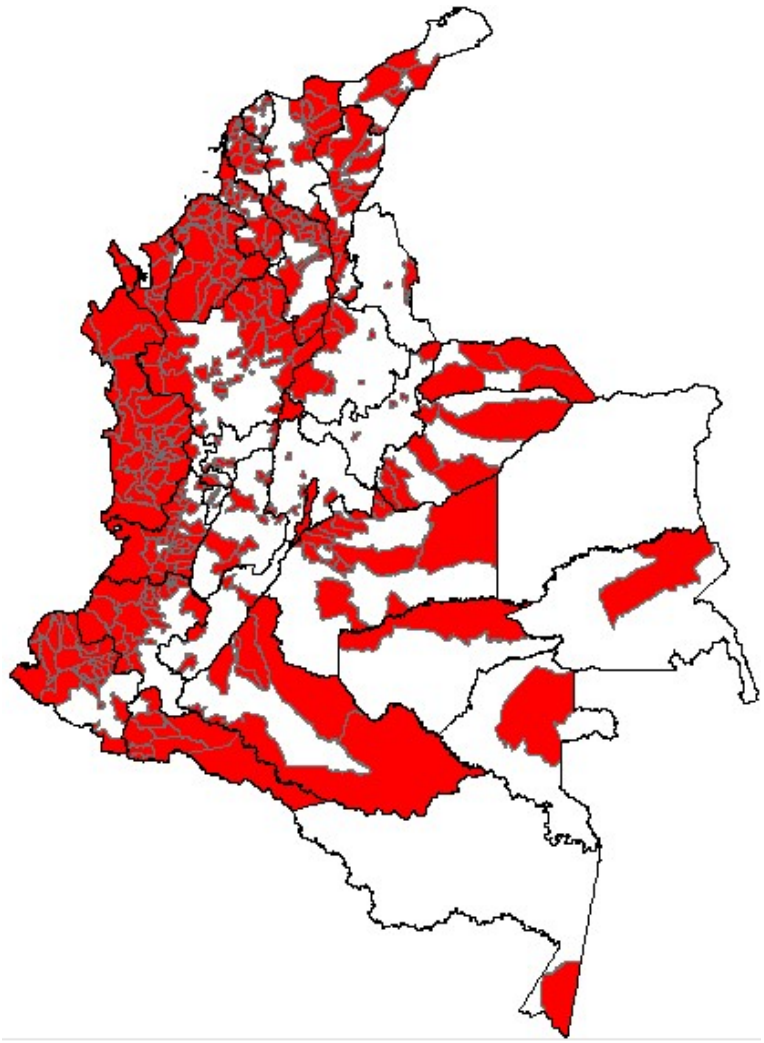
As discussed, the main case study for this thesis is the community of Buenaventura on the Pacific coast and as such many of the issues raised relate to that specific context. However, it also draws on the national level work of *Proceso de Comunidades Negras* – PCN, whose social mobilisation and demands draw on experiences not only from the Pacific but also the Caribbean region, and urban contexts such as Bogotá and Medellin. As shall be discussed in Chapter 4, this movement has brought together traditionally urban struggles around racism and discrimination and more rural struggles around land and ethno-territorial rights to develop and ethno-racial approach to the defence of Afro-descendant rights.

Nueva Granada, present day Colombia, was a key point for the transatlantic slave trade with Cartagena, on the Caribbean coast, being one of the main ports through which enslaved Africans were trafficked to mainland South America. Many were also internally trafficked to different areas of the country, particularly to the Pacific coastal region, to be exploited for their labour in mining,

[5] As Daniel Gómez Mazo, founder of Ilex Acción Jurídica has argued, the discrepancies in the date were due to limitations in the design of the census question that inquired about the ethnic-racial identity of the population and the deficiencies in the census operation, such as the lack of coverage of areas where the Afro-descendant population lives and logistical difficulties (see CNOA, 2020).

[6] Under constitutional law all people have the right to take a "tutela" legal action for the immediate protection of their constitutional fundamental rights where these are violated or threatened by the action or omission of a public authority (see Constitution of Colombia, article 86).

agriculture, commerce, pearl fishing, domestic work and craft production (de Friedemann and Arocha, 1995). Resistance by enslaved Africans was constant and many escaped to establish free *cimarrón* and



Map 1 - Afro-descendant territories based on census populations (20%+) and presence of community councils, organisational processes and collective territories. Source: CONPA (2021)

palenquero communities which continue to be symbols of black resistance today. Although following the "abolition" of slavery in 1852 many Afro-descendant people migrated to more central cities including Popayán, Cali, Medellin and Bogotá (see de Friedemann and Arocha, 1995), many communities continue to live in those rural and semi-rural areas in which their ancestors were enslaved during the colonial period: the Caribbean islands, the Caribbean Coast and the Pacific region (see Map 1).

ii. Armed conflict and violence

Colombia has a turbulent political history, the effects of which continue to impact on Afro-descendant peoples. As in many other Latin American countries, enslaved Africans played a key role in the war of independence fighting alongside creoles for independence from the Spanish crown under the promise of the abolition of slavery. The country gained independence from the Spanish and became a Republic in 1810, yet slavery was not fully abolished until 1852. Since the founding of the Republic, Colombia has experienced continued political and social conflicts. Following a period known as the "violence" in the 1950s, political power was shared between two sectors: liberals and conservatives, in what was known as the National Union, with little room for political opposition.

The mid-1960s to 1970s saw the emergence of left-wing guerrilla groups including the ELN (National Liberation Army) the ELP (Popular Liberation Army), the FARC-EP (Revolutionary Armed Forces of Colombia—People's Army) and M19 (The 19th of April Movement) and struggles over land ownership, social justice and political participation. This led to a decades-long conflict between these groups and state forces, that has long since become entangled with the drugs trade and neoliberal economic agenda. In the late 1970s and 1980s paramilitary death squads were created by powerful landowners and in collusion with the military and police (Castillejo, 2013a), operated to counter the guerrilla groups but also to quell political dissent and wider social movements resisting powerful private economic interests in their territories. Both guerrilla groups and paramilitaries, as well as the Colombian military have been involved in widespread human rights abuses including CAH and war crimes, particularly of rural communities, including Afro-descendant peoples, who are often caught in the cross-fire or accused of colluding with one or other of the armed groups. Hundreds of thousands of people have lost their lives or are victims of forced disappearances, and millions more have been displaced from their homes, resulting in more than 8 million IDPs between 1985 and 2019 (UNHCR, 2020). Consequently in 2000 the representative of the United Nations Secretary-General on Internally Displaced Persons, Francis Deng observed that 'displacement in Colombia is not merely incidental to the armed conflict but it is also a deliberate strategy of war' (cited in HRW, 2005:10).

Displacement has been a strategy of guerrilla, paramilitaries and the military to gain control over territories, natural resources, and acquire strategic areas for economic development (Arboleda, 2007). Many of these areas are the ancestral lands of Afro-descendant and indigenous peoples. Thus, Afro-descendant peoples, particularly communities in the rural Pacific region, are among the worst affected by the conflict, with large-scale human rights violations carried out by all parties to the conflict (Houldey, 2008). The most far reaching and numerous displacements during the conflict have taken place in black territories such as Urabá, Bajo y Medio Atrato, Magdalena Medio, Sur de Bolívar, Montes de María, Norte del Cauca, Buenaventura and Baudó (Rosero, n.d). Despite gaps in official data due to underreporting and lack of racially disaggregated data, reports have repeatedly demonstrated the disproportionate impact of displacement on Afro-descendant communities (Constitutional Court, 2009a).

As shall be explored in Chapters 4 and 5, the vulnerability of Afro-descendants to violence and displacement is exacerbated by existing and continued violations of their basic economic, social and cultural rights (UNDP, 2010; IACHR, 2011) and longstanding state abandonment and lack of investment. However, the Pacific region's rich natural resources and biodiversity meant renewed interest in recent decades with both State and private funded large-scale development projects in mining, logging, agrobusiness and biofuel production as well as hydroelectric and infrastructure projects (Rapoport Centre, 2007). These neoliberal development projects are linked to ongoing violence and have created further human rights concerns for Afro-descendants, including loss of lands, threats to environment and traditional livelihoods, health concerns, violence, intimidation and further forced displacement, while revenues from the commercial activities do not benefit local communities who continue to have inadequate sanitation, water and electricity services (Veléz, 2012:444).

iii. Buenaventura

The Special District of Buenaventura, located in the Department of Valle del Cauca on the Pacific Coast of Colombia covers an area of 607.800 Hectares - 99.64% rural, and just 0.35% in making up

Map 2 - Buenaventura, Valle del Cauca. Source: Reliefweb (2014)

the urban city (see Map 2). According to the 2018 national census, Buenaventura has a population of 250.318 (a significant reduction from the 2005 Census of 271.060), and 85% pf the population are Afro-descendant, again, less than the 89% represented in the 2005 Census (DANE, 2005; 2018). Buenaventura is rich in biodiversity with jungle, coastline and mangroves, and natural resources, including gold. Rural areas accessible by road are mainly to the north and east of the city and the

cuencas, to the north and south are only accessible by boat. Buenaventura has 48 Afro-descendant *consejos comunitarios* (community councils) many of which have collective land titles. The urban part of the city is divided into the largely residential "continent" mainland area and the "island" residential and commercial centre, which is connected to the mainland by a bridge.

Like many municipalities in the Pacific region, Buenaventura has been historically marginalised with low socio-economic indicators even compared to the rest of the Department of Valle del Cauca as shown in the Table 1 below.

Table 1 - Percentage of households facing deprivation by variable (%). National Total, department. of Valle del Cauca 2018. Source: DANE (2020).

Variable	Total BTura (%)	Urban BTura (%)	Rural BTura (%)	Valle del Cauca (%)	National (%)
Iliteracy	14.1	11.4	26.5	6.1	9.5
Barriers in access to health	4.5	4.0	6.9	6.5	6.2
Low educational attainment	48.3	43.2	72.4	39.4	43.8
Long term unemployment	43.5	41.2	54.3	12.1	11.8
No access to potable water	26.3	17.4	68.3	4.3	11.7
Inadequate sewage systems	32.4	29.9	44.3	5.9	12.0
School absence	5.2	4.6	7.8	2.0	3.3
Informal employment	88.6	87.4	94.2	67.5	72.3

Originally a quiet fishing village, during the beginning of the 20th Century Buenaventura saw the construction of a major Pacific coast port which would become one of the country's principle international ports. On a daily basis 20+ large-scale cargo ships dock in the waters outside the city and every year over 12 million tons of cargo pass through the port, amounting to nearly 70% of the country's commercial imports and exports (Comisión Intereclesial de Justicia y Paz, 2015). In 2013 alone, $31 billion USD of imports and exports passed through one of Colombia's poorest cities (*ibid*). This local reality is a microcosm of global inequality in the context of rampant neoliberal development. The cutting-edge, highly developed port with its 24-hour running water, electricity, and internet and high-tech logistics is juxtaposed with a city in which most of the roads are unpaved, and a large proportion of the population live without basic services. With the privatisation of the port in 1994 and subsequent expansion, the region become a strategic point for international commerce and drugs trafficking converting it into a site of territorial dispute by armed groups.

Armed conflict in Buenaventura

Buenaventura's location, next to the Pacific coast and with direct routs the departments of Cauca and Valle del Cauca to the East and to the Chocó Department and Panamá to the North, has made it a site of economic and territorial interests for armed groups and drugs trafficking. Clashes and territorial disputes between factions of the FARC-EP as well as *Bloque Calima* (Calima Block) of the AUC (United Self-Defence Forces of Colombia paramilitary groups) and military operations has left local residents caught in the cross-fire on numerous occasions and often directly targeted suffering some of the worst massacres and mass displacements of the armed conflict.

In early April 2001, the black community of the Naya river suffered a mass displacement after a group of more than 100 paramilitaries from the *Bloque Calima* travelled through the territory, torturing and murdering community members who were branded as FARC collaborators (CNMH, 2018). The group engaged in a three-day armed combat with the Front 29 of the FARC ending on April 16th while the state armed forces took ten days to arrive. The massacre claimed 24 lives and lead to seven forced disappearances and the forced displacement of over 6,000 people (CNMH, 2018).

The violence then spread to the Yurumanguí river where on 29 April, 15 members of the *Bloque Calima* massacred seven people, raped a woman and pillaged a nursery school in the village of El Firme, displacing the entire village (CNMH, 2018). Residents of the 12 other villages along the river have also suffered ongoing violence in the context of the armed conflict including assassinations, forced disappearances, recruitment of children and young people, sexual violence, confinement and displacement, destroying the social fabric and weakening social process and cultural traditions. Almost 3,000 people have left Yurumanguí due to the violence (OHCHR, 2015).

Since the demobilisation of paramilitaries in 2005, many re-formed as *bandas criminals* (criminal groups) linked to drugs trafficking operating both in rural and urban parts of Buenaventura (CNMH, 2015). Due to the dynamics of the armed conflict in the surrounding region Buenaventura has become both a site of conflict in itself, and a receptor of displaced populations from elsewhere in the Pacific region. It has seen extremely high rates of intraurban displacement as conflict has flared up in different sectors of the city related to the drugs trade and large-scale development projects (Comisión Intereclesial de Justicia y Paz, 2015). In 2012, Buenaventura was identified as the municipality with the highest rates of expulsion displacement (72,792 people) and the 5th highest rates of reception of displaced populations from other areas of the country (68,053 people) (Contraloría General de la República, 2012). Figures since then have remained high. As of December 2020, Buenaventura had 296,685 registered victims of armed conflict (registered in the UARIV Unique Registration System). Of those, 284,561 (95.9%) were victims of forced displacement, 15,984 (5.4%) of threats, 12.375 (4.2%) of murders, 2,180 (0.7%) of forced disappearances, and 1,151 (0.4%) of confinement (UARIV, 2020).

In 2014, Buenaventura received national and international attention for the violent phenomenon of *casas de pique* (chopping houses) in which criminal groups tortured, murdered and disappeared people as a strategy of terror for territorial control (HRW, 2014). As such, while Colombia's peace talks took place in La Habana (2012-2016), Buenaventura was under military control, which, as shall be discussed below, shows how TJ has often meant not a rupture with past violence but the continuity of violence and the "structural dis-protection" of communities (Castillejo, 2018) characterised by violence in the midst of "post-violence." In this sense, the case of Buenaventura raises questions of where the line between past, present and future lies when "transition" seems to be merely "another chapter of ancestral terrors" (Castillejo, 2018).

Community resistance

Activists in Buenaventura denounce that the situations of poverty, violence and conflict are directly related to the extractivist economy of mining and port expansion which fails to contribute to the local economy and as shall be discussed in the thesis, views the local population as an obstacle to development. Following several years of organising and activism in which local organisations demanded the state declare a state of humanitarian emergency in Buenaventura, in May 2017 the community initiated a general strike that lasted for 22 days and become the object of national and international recognition for its historic achievements. Tired of the ongoing neglect by the national government, lack of basic services, and constant situations of violence and violations of basic human rights the population of the city took to the streets to protest, march, campaign, block roads and negotiate for real structural and fundamental change denouncing the real lived impacts of structural racism, neoliberalism and global capitalism and calling for autonomy and basic human rights. Part of the strike agreements was a government commitment to advance with the collective reparations processes of 11 *Consejos Comunitarios* of Buenaventura, which shall be discussed in the forthcoming chapters.

iv. Transitional Justice in Colombia

Colombia's nearly 60-year long internal armed conflict, with multiple actors, has seen several attempts at peace negotiations under different governments since the 1980s, some of which led to the exchange of prisoners or demobilisation of armed groups. In 1984 the first ceasefire agreement was signed between the FARC-EP and the government agreeing to restructure and modernise institutions, strengthen democracy and ensure guarantees for political participation of members of the FARC (Pares, 2019). The M-19 and EPL also agreed to begin negotiations with the government leading to another ceasefire agreement which later broke down. In 1985 the M-19 occupation of the Palace of Justice led to a repressive response by the military and the death and disappearance of an unknown

number of members. The extreme right took advantage of this to criticize the peace processes with the guerrillas and delegitimize their political demands (Pares, 2019).

Due to the breaking of commitments by the various parties, this first wave of talks and agreements came to an end during the second half of the 1980s.[7] Another process began towards the end of the 1980s with M-19 which led to the call for a National Constituent Assembly and eventually the adoption of the new constitution of 1991. The 1990s and early 2000s saw a number of other processes between governments and guerrilla groups.[8]

The peace process with the AUC (2003-2006) during the first government of Álvaro Uribe Vélez, was another key moment in peace processes in Colombia ushering in the first TJ process which included the demobilisation, disarmament and reintegration of AUC members between 2003 and 2006 and truth and justice processes. This process was regulated by the Law 975 of 2005, the Peace and Justice Law that aimed to: "facilitate peace processes and individual or collective reintegration into the civilian life of members of illegal armed groups, guaranteeing the rights of victims to truth, justice and reparation" (article 1).

In 2011 the Senate passed Law 1448, the Victims and Land Restitution Law which created the national Victims Unit and a programme of legal, administrative, social and economic measures for victims of the conflict and the right to return for displaced peoples and three Decree Laws 4633, 4634, and 4635 were later adopted for collective reparations for indigenous peoples, rural communities and Afro-descendant communities.

In 2012-2016 the Santos government and FARC-EP held peace talks in Havana and in June 2016 the parties signed a 6-point peace agreement to end the decades-long conflict, which after a failed public referendum was modified and resigned in November 2016. The Final Peace Agreement creates a wide programme of measures for the demobilisation and reintegration of ex-combatants of the FARC, rural reform programmes, political participation, programmes to substitute illicit crop cultivation, and the SIVJRNR (Integrated System of Truth, Justice, Reparation and Non-repetition), all of which aim to contribute to lasting peace.

While many hoped that the implementation of the peace agreement would help end the violence and displacement, activists were also aware of ongoing threats to the peace and security for Afro-descendant peoples and territories including mega development projects and the continued existence of other armed groups occupying territories. The Ethnic Chapter, the most important section of the

[7] Among these, right-wing sectors allied with national elites murdered nearly 4,000 militants and sympathizers of the *Union Patriotica* political party generating deep mistrust (García Duran, 2010).

[8] Including processes with EPL, Quintín Lame, and the PRT (Workers Revolutionary Party of Colombia) the CGSB (Simón Bolívar Guerrilla Coordinating Board) involving ELN and EPL; the CRS (Socialist Renewal Stream) 1993-1994 ELN dissidents; ELN on the Palacio de Viana (1997-1998); FARC-EP (Caquetá, 1998-2002); ELN in the first years of the Uribe administration (2005-2008).

peace agreement, creates safeguards and measures to ensure the collective rights of ethnic groups are not threatened by any measures in the peace agreement. As discussed in Chapter 6 of this thesis, there are several provisions within the peace agreement which create measures for reparations. These include the Development Programmes with a Territorial Approach (PDET); participatory development planning processes in rural territories most affected by the armed conflict aimed at structural transformation through rural economic development and infrastructure programmes, environmental protection and measures for reconciliation and peace among others (Final Peace Agreement, 1.2.2). Another important provision related to reparation is the created of the transitional justice mechanisms of the SIVJRNR, Special Jurisdiction for Peace (JEP), the Truth Commission (CEV) and the Unit for Searching for Disappeared Peoples (UBPD) (Final Peace Agreement, Chapter 5).

As well as these institutional experiences of TJ, there are also processes of "transitional justice from below" (Gómez, 2013), which as shall be discussed, are rooted in own visions and processes for memory and conflict resolution for marginalised groups.

III. A decolonial theoretical framework

This thesis is researched and written within a decolonial epistemology which not only locates the question of reparations and TJ within existing theoretical work on coloniality and decoloniality but through the research and findings aims to contribute to actual decolonial processes being led by Afro-descendant activists in Colombia and beyond. The research questions, theoretical framework and methodology are all committed to decolonial approaches to research and social change.

The paradigm of coloniality

The concept of coloniality, or *colonialidad*, central to Latin American liberation philosophy, is largely influenced by and related to post-colonial and decolonial studies of philosophers and critical thinkers from other colonised regions such as Aimee Césaire (1950), Franz Fanon (1952; 1961); and Edward Said (1978). Latin American liberation philosophers such as Dussel (1993; 2000), Mignolo (2007; 2014), Maldonado (2007; 2008; 2011) and Quijano (1999; 2000), among others have developed widely read work on the coloniality of power, knowledge and being, highlighting the relationship between modernity, exploitation and domination, the ways in which knowledge production continues to reproduce colonial thought and maintain the hegemony of European epistemologies, and the lived experience of colonisation and its impact in language (Maldonado, 2007). Writers such as Lugones (2008) have also developed concepts of the coloniality of gender, exploring how occidental concepts of gender and patriarchy imposed through colonisation continue to shape and inform gender relations and inequality in so-called post-colonial states.

The concept of coloniality demonstrates that despite processes of "decolonisation" and "independence" in territories colonised by European states during the 15th to 20th centuries, the philosophies and ideologies underpinning colonialism remain in place. While colonialism implies a political and economic power relationship in which the sovereignty of one people resides in the power of another people or nation, coloniality as a pattern of power emerges as a result of colonialism (Maldonado, 2007). This is not limited to formal power relations but is evident in the ways in which knowledge, authority and intersubjective relations are articulated through the global capitalist market and the idea of race (Maldonado, 2007). Thus, while "colonialism precedes coloniality, coloniality outlives colonialism," and permeates all areas of modern experience (Maldonado, 2007:131).

Coloniality therefore cannot be understood without a critical reading of colonialism and modernity, and the ideologies and paradigms upon which they rested. One's understanding of modernity depends on one's location (Mignolo, 2007; Dussel, 2000). From a 17th European philosophical perspective "modernity" emerges in the Reformation, the Enlightenment, the French Revolution, possibly also the Italian Renaissance and the construction of the English Parliament rooted in the philosophical and political achievements of figures such as Galileo, Bacon, Hegel, Kant and Descartes around the self, emancipation, freedom, intellectual maturity and self-knowledge (Dussel, 1993; 2000). However, this is a Eurocentric view of modernity (Dussel, 2000). Modernity begins in 1492 with the "discovery" of the Americas, European colonial expansion and the establishment of mercantilism, commercialism and the great industrial revolution of the 18th Century (Dussel, 2000). Thus "modernity" begins with Europe's self-proclamation as the centre of the world juxtaposed to the periphery of the rest of the world, and the establishment of an order which supposed superior and inferior territories and peoples: "the colonisation of space and time" (Mignolo, 2007).

The racialisation and othering of non-Europeans, and the codification of conquistadores and conquered through biological race served to justify both the colonisation and enslavement of non-Europeans as part of the project of modernity (Quijano, 1999). Central to this was the concept of "Manichaean misanthropic scepticism" (Maldonado, 2007) or the dehumanisation of non-European peoples rooted in the ideas of those first Europeans – the *ego conquiro* – who arriving in the Americas in the late 15th and early 16th Centuries questioned the very humanity of the indigenous peoples and whether they had souls (Quijano, 2000). These colonisers created new racial categories, such as Indians (indigenous), blacks, mestizos, mulattos and Europeans and hierarchies on which relations of domination and subjugation were based (Quijano, 2000).

As European colonialism expanded throughout the world, the idea of race, based on supposed biological difference and the inferiority of non-European cultures was used to naturalize and legitimize the relations of domination between European and non-European peoples (Quijano, 1999;

2000). This included the justification of enslaving Africans in the context of capitalism and the newly emerging world market. Thus, while colonial philosophy questioned the humanity of both Africans and Indigenous peoples, the particular racialisation of Africans as animalistic, unintelligent, inhumanly strong, etc., was used as justification for African enslavement.

A decolonial framework enables an understanding of how the racialisation of colonised peoples continues to underpin contemporary structural racism and economic exploitation in the context of modernity and capitalism. In the USA, for example, in the same way that racism was used to justify the enslavement during the colonial period, institutional racism is now used as a tool to incarcerate Afro-descendants within the prison industrial complex (Davis, 2010). Throughout the Americas, racial stereotypes are used to justify the economic exploitation of Afro-descendant people, including the denial of access to certain jobs, and the overrepresentation in low-paid jobs with poor conditions.

The racial hierarchies and the dehumanisation of colonised peoples were rooted in the philosophical notions of rationality that were central to the paradigm of the enlightenment. Quijano's work on coloniality of knowledge (1999, and 2000) demonstrates how colonialism supposed the superiority of occidental epistemologies, or ways of thinking and viewing the world.

A decolonial reading of Descartes shows how the assertion of *Cogito Ergo Sum* (I think therefore I am) which posed that the proof of one's existence was rooted in thought or one's ability to think, implies that "others do not think" and therefore "are not" (Maldonado, 2007). Cartesian philosophy thus created a philosophical justification for Manichean misanthropic scepticism and the denial of humanity of the colonialised other based on the supposed inferiority of their thought. This denial of existence is what Maldonado has referred to as the "coloniality of being" and thus we see a relationship between the concepts of the coloniality of knowledge and coloniality of being. Hegelian philosophy also played a role in subjugating non-European thought and peoples through his view of world history which saw Africa and Latin America as immature and lacking history or development (Lecures, 231-234, cited in Dussel, 1993:70-71).

The idea of modernity as progress and development in contrast to the racialised, backward, uncivilised, undeveloped other, incapable of rational thought, gave the colonial project a justification for spreading modernity: bringing civilisation to the world. The drive for modernity was so insatiable that it justified the use of violent force to uphold this ideology. Thus, while modernity claims to be based on rationality, it was also a justification for an irrational praxis of violence (Dussel, 2000). The *ego conquiro* asserted that not only was it his right to colonise but his *duty* to civilise and essentially save the savage. As such he behaved not within the ethics of the kingdom but within a paradigm of

the “non-ethic of war” (Maldonado, 2007) in which violence against colonised peoples was seen as part of a “just war” (Dussel, 2000).

Dussel refers to this dynamic as the “myth of modernity” (2000) demonstrating how Eurocentrism, racism, modernity and civilisation all interplay to justify violence and war against non-European bodies beginning with idea of Europe as more developed, civilised and superior, the need of the colonised to follow the unilineal, European-style development process, the opposition to this civilising process on the part of the barbarian and thus the need to exercise violence to destroy any obstacle to modernisation and development. The victims produced by this violence are seen as a sacrifice to the greater good of development and civilisation and as being guilty of obstructing progress, and thus modernity is presented, not only as not guilty of violence but as the emancipating hero (Dussel, 2000). In summary, modernity “develops an irrational myth, a justification for genocidal violence” (Mignolo, 2007: 454).

In the contemporary context, coloniality and racism can be understood as the radicalisation and naturalisation of this non-ethic of war, evident in the continued and constant war-like relations of violence, oppression, exploitation and domination of the State over colonised peoples even in supposed times of “peace” in which modernity is “a perpetual process of conquest through ethics…” (Maldonado, 2007:139).

Thus, just as violence was used to supress rebellions and punish Africans who attempted to escape enslavement, the contemporary state response to Afro-descendants who pose any kind of threat or challenge to the capitalist order and their exploitation within it is one of violent oppression. The notion of the “non-ethic of war”, or the “just war” within the modern capitalist state, can be used to analyse the different forms of violence inflicted upon non-White bodies in most contexts. However, in the context of Colombia, which has been engaged in actual internal armed conflict for over six decades, these concepts take on even greater significance. While Colombia’s internal armed conflict has often been portrayed as a class-based political ideological war, the ethno-racial dynamics of this violence are impossible to deny. Particularly the past three decades of the conflict have been carried out in the ancestral territories of Afro-descendant and indigenous peoples who make up a disproportionate number of the victims of the conflict. Afro-descendant and indigenous leaders who protest against injustice and violations of their ethno-territorial rights are frequently the victims of assassinations often by armed paramilitary groups, almost always linked to an objection and resistance to private economic actions and the development projects. Thus, whether in contexts of war or peace the non-ethic of war central to colonialism continues to underpin relations of dominance and oppression of Afro-descendant and indigenous bodies in the defence of modernity and development.

This understanding of colonial processes of racialisation and dehumanisation of Africans, their relation to modernity and capitalism and the use of violence in the name of progress and development are central to the arguments made throughout this thesis concerning the disproportionate and differential impact of the armed conflict on Afro-descendant people in Colombia and the demand for historical reparation.

Decolonialising thought

Of course, colonisation is never met with static and passive peoples but has been characterised by constant processes of resistance. If the response to colonialism is decolonisation, then the response to coloniality must be a decolonisation of paradigms, knowledge, thought and power relations. While Cartesian philosophy and science have aimed to consolidate the modernity project, Césairean decolonial philosophy and science aim at consolidating the decolonisation project. Largely influenced by the work of Fanon and Césaire, Maldonado discusses a decolonial shift (*giro colonial*) in thought, which includes: expression of doubt or scepticism with respect to colonialism; intellectual inspiration from indigenous and Afro-descendant leaders and resistance such as Cimarron communities in Latin America and the Haitian Revolution; a decolonial attitude that goes beyond the hegemonic rationalism and positivism of the academy; and the transformation of ideas into a practical project of decolonisation (Maldonado, 2007:159).

Decolonial science, to which the present thesis subscribes, aims to demonstrate the nature and implications of colonisation and the naturalisation of the non-ethic of war in modernity and to find concrete solutions and reflect on the epistemological and ontological bases of the Cartesian sciences. Mignolo, drawing from work by Dussel, refers to this process as "delinking" or to "change the terms and not just the content of the conversation," changing "the hegemonic ideas of what knowledge and understanding are and, consequently, what economy and politics, ethics and philosophy, technology and the organisation of society are and should be" (Mignolo, 2007:459).

Thus, decolonisation implies shifting the very centre of knowledge production. From an epistemological perspective delinking may involve denaturalising concepts that tend to totalise or dominate certain realities (Mignolo, 2007:459) and shifting the very centre and geography of reason (Mignolo, 2007:462). This means retelling the very history of modernity and colonialism from the perspective of the colonised and undoing the myth of modernity (Dussel, 2000), not by replacing Eurocentric totalitarianism with a different type of totalitarianism, but rather through "pluriversality as a universal project" (Mignolo, 2007:452-3) which brings other epistemologies and ways of understanding to the foreground.

IV. A decolonial approach to transitional justice

i. Transitional justice as an emerging field of study

Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes" (2003: 69).

Despite the ever-expanding body of TJ experiences around the world, in the form of truth and reconciliation commissions, tribunals, institutional reform processes and reparations programmes, attempts to conceptualise TJ from a theoretical perspective within the academic field of TJ studies are still in their infancy. Buckley-Zistel et al., argue that this is due largely to: 1) the heterogeneity and interdisciplinary nature of TJ as an academic subject which makes theory development complex; 2) the relative newness of TJ practice and the speed with which it has evolved as a field; 3) the constantly evolving nature of TJ as it is applied to new contexts which go beyond the original realm of political transitions and punitive justice tends; and 4) a focus on local knowledge and viewpoints on TJ experiences rather than designing theories (2015).

This last point suggests that local knowledge and experiences cannot contribute to theory building, or that theories may not emerge from local knowledge and perspectives of TJ. It is precisely the aim of this thesis to contribute to theoretical work on TJ by centring on "local" activist knowledge and perspectives on reparations and TJ. From a decolonial perspective, it is these local knowledges and perspectives that are essential to building a new theoretical framework of TJ that could address continued colonial injustice.

Despite being a practice-based field, TJ theories are important in enabling an explanation and understanding of advances within the field and developing models and vocabulary to apply to wider contexts, all of which can be helpful to practitioners (Buckley-Zistel et al, 2015). TJ theories that have been developed through research and practice can be grouped into several categories.

A first set of theories aims to conceptualise what TJ actually *is* through looking, for example, at its *goals,* as Corker (1999) has done. A second set of theories stems from concrete *existing philosophies*, often based on liberal thought, such as Andrieu's work on John Rawls's liberal theory of justice (1971), Dyzenhaus (2012) who draws on Hobbes' work on rule of law, or Dhawan (2012) who draws on the post-colonial work of Edward Said to challenge the Western sites of production and reproduction of the notions of TJ (cited in Buckley-Zistel et al, 2015). This last example most closely

relates to the present thesis in which decolonial approaches allow for redefinitions of what TJ should involve from the perspective of colonised and formerly colonised peoples.

While many theoretical perspectives focus on the concept of *justice*, others focus more on the concept of *transition* asking what transition processes should *lead to* and how this can be accomplished. O'Rourke´s work looks at how TJ can contribute to consolidating a gendered citizenship (cited in Buckley-Zistel et al, 2015:5). In the same vein the present thesis is interested in the goals of TJ, in particular how TJ can lead not only to justice for past crimes but to transformative measures towards the decolonisation of existing power structures which underpin ongoing racial injustice.

Through a study of the genealogy of TJ, Teitel (2003) demonstrates three key moments in Transitional Justice. Phase I, the post-war phase beginning with the Nueruemberg trials in 1945 was characterised by "interstate cooperation, war crimes trials, and sanctions." While focus was on accountability, there was also a turn towards to the use of international criminal law (ICL) and moves towards individual and not just state responsibility.

Phase II emerged in response the collapse of the Soviet Unión, and the transitions to democracy first in the Southern cone and then in Eastern Europe and Central America in the 1970s and 80s. A new form of TJ emerged associated with nation building and the rule of law, shifting focus from international tribunals to local trials. The focus on rule of law raised legal dilemmas such as "retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and compromised judiciary." (Teitel, 2003: 76-77). As such, compromises were often made in which prosecutions had to be forgone in favour of truth seeking and accountability, creating a scenario of "restorative justice" albeit "imperfect and partial" justice (*ibid*: 77). In this context a new dichotomy between truth and justice emerged in which justice was traded for truth, reconciliation and peace, such as in the cases of Argentina and South Africa (*ibid*)

Phase III, associated with globalisation and "heightened political instability and violence" is characterised by the expansion and normalisation of TJ which has become a central paradigm for the rule of law. This includes the creation of institutions such as the International Criminal Court (ICC) and a greater emphasis on IHL mirroring elements of Phase I. The expansion of IHL however, has come to determine not only the rules of war, but as it increasingly intertwined with IHRL, it has crept into discussions around human rights justifications for intervention under the guise of concepts like "pre-emptive self-defense", "the war on terror" (Teitel, 2003) and more recently the "responsibility to protect" (UN, 2005: paras.38-39). As shall be demonstrated in Chapter 2, since the writing of this genealogy, several more important developments have taken place within this current phase of TJ.

Through his study of TJ genealogy Teitel demonstrates the relationships between "the type of justice pursued" on the one hand and "the relevant limiting political conditions" on the other (2003: 69) concluding that:

> "Two political dimensions determine what signifies rule of law in periods of transition: the transitional context, specifically the circumstances relating to political and legal conditions associated with periods of political change, and other political factors, such as local context." (2003: 93).

Likewise, Hansen (2011) argues that there cannot be one general theory of TJ as processes take place not only in different historical moments but in varying contexts:1) regime transitions to liberal democracy, 2) regime transitions to different but equally oppressive regimes, 3) continued armed conflict, and 4) in "consolidated democracies." In each of the four cases, TJ scholarship must ask *whose* interests are served by TJ processes, *what* those interests are and what constitutes "legitimate interests."

Hansen argues that most TJ scholarship has focussed on the first category rooted in the experiences of the 1980s and 1990s in Eastern Europe and Latin America, yet in reality many regime transition contexts do not actually lead to liberal democracies but continue to be characterised by human rights violations or violence, with new regimes often using TJ for their own interests, even limiting liberalisation and democratisation. Referring to the case of Rwanda he recognises that TJ may serve legitimate purposes other than liberalisation depending on context and societal needs, such as ensuring peace and security following mass atrocities, and thus, scholarship should not dismiss such cases.

An increasing number of TJ processes take place in conflict contexts that are not undergoing fundamental regime change, such as the use of TJ mechanisms during the paramilitary demobilisation process in Colombia of 2005 or following the 2007-2008 election violence in Kenya (Asaala and Dicker, 2013). The case of Colombia highlights the complexities of analysing a TJ process taking place in an ongoing conflict where, beyond liberalisation or government reform, TJ serves as a "tool for controlling the ongoing conflict and maintaining the status quo in government" and may not always be transformative (Hansen, 2011:30). Scholarship on such cases must go beyond established concepts of transition and recognise that while such contexts may employ the same processes as democratising TJ, the meanings of "change," "redress," and "reconciliation" may differ (Hansen, 2011:37).

There is often debate about the true urgency of TJ processes in such post-conflict contexts, where efforts towards security and development may be seen as more immediate priorities (de Greiff, 2010). De Greiff argues that contrary to the views of TJ critics, TJ must not be seen as merely being

backwards looking, focussing on non-urgent retributive approaches to justice, nor should it be seen as only concerning the needs and interests of (direct) victims. Rather, TJ remains urgent for society as a whole in the aftermath of conflict. Human rights, including victims' rights to truth, justice and reparations, contribute to overcoming inequality, exclusion and discrimination and building civic trust, and are necessary and conducive to the future development of a society.

TJ processes in "consolidated democracies" such as Australia and Canada, have used TJ mechanisms to address historic and colonial violence against indigenous peoples (See Balint et al, 2014, Park, 2015, Matsunga, 2016). These cases tend to be placed in a different academic camp all together as they are not seen as transitional processes at all. Hansen warns that if TJ only focusses on cases of radical change, scholarship risks "moral differentiation" (2011:40), where it is mainly poor countries in transition that are seen as having problems with grave human rights, and Western, so-called "consolidated democracies" are painted as "just", having a few problems in the past and invisibilising current and ongoing human rights abuses. As shall be explored below, such a dilemma highlights the importance of decolonial or "settler-colonial" TJ which links past to present atrocities in so-called democratic states.

Hansen concludes that the three main goals of TJ are ensuring non-repetition, or "prevention," which, in deeply conflicted contexts such as Colombia may mean non-continuance of violence and in consolidated democracies may mean 1) public recognition of past atrocities, 2) achieving a just society beyond liberalisation and democratisation, 3) recognition of how certain ethnic and racial groups are marginalised within so-called democratic societies, 4) calling into question the success of liberal transitions, and 5) addressing the needs of victims in diverse contexts, which in the case of historical injustice may include indirect or descendants of victims. Thus, TJ cannot merely rely on 1980s and 1990s TJ frameworks which emerged in response to a specific set of TJ processes, but rather the variety of contexts must be taken into account.

In line with is genealogy model discussed above, Teitel explores the tensions between the local and the supranational in TJ taking place in this new era of globalisation characterised by complex interaction on local national and international politics and legal processes, the rising role of civil society and other local private actors and a lack of guiding normative principles (Teitel, 2003: 899). This analysis set the scene for the emerging normative framework on the principles of reparations (discussed in Chapter 2) that would largely guide local and domestic processes into the 21st Century.

The localisation of TJ he argues, meant it missed broader dimensions of global political debates. Thus, TJ is being globalised at the same time as increasing critiques of globalisation-related economic reforms, increases in poverty and equality are emerging.

ii. Critical transitional justice theories

Among emerging critical TJ theories, Franzki and Olarte (2015) discuss the "political economy of transitional justice" warning that academic analyses often fail to recognise that the concept itself does not constitute a neutral description of processes such as truth commissions, trials, reforms and reparations, but has come to reflect a particular liberal perspective on such processes. Scholarly work often asks about the extent to which TJ processes have brought about liberalising change while failing to question this particular model of regime change or exploring which other political and socioeconomic projects could replace authoritarian regimes or conflicts. In this way, TJ seeks to establish liberal democratic orders, marginalising other notions of democracy. They argue instead for a critical theory of TJ which would question the prevailing liberal order.

Focusing particularly on TJ as emerging with the downfall of communist regimes in the 1980s, they argue that it is based on two initial premises: 1) that transition to liberal democracy is desirable, and 2) that truth commissions, trials, institutional reforms and reparations can contribute to the fostering of democratic rule of law and societal reconciliation. Scholarship that fails to question this liberal goal contributes to the reproduction of such approaches and takes the prevailing post-cold war power as given. Further, such apolitical scholarship tends to ignore continuing socio-economic dimensions of conflict in post-transition regimes.

Balint et al (2014) note that the origins of TJ, as a response to widespread human rights violations in the context of oppressive regimes in Central and South America and Eastern Europe, have meant that it has been largely focused on guaranteeing civil and political rights (CPRs), and has overlooked economic, social and cultural rights (ESCRs) (see also Arbour, 2006). Thus, by taking an overly liberal and individualist model of accountability, TJ has failed to address the "institutional arrangements and [economic] structures [that] may be deeply implicated in the production of the violation or harm in the first place" (Kapur, cited in Balint et al 2014:199). In this way it has tended to focus on strengthening rather than challenging the liberal state, legitimising the nation-state through reforms and focussing on reconciliation rather than structural transformation (Balint, 2014). In a similar sense, Castillejo points out the difficulties of imagining a post-violence future "in scenarios where political and economic hegemonies continue to be historically rooted" (2018).

In the case of Latin American dictatorships of the 1970s and 1980s, TJ processes never considered dismantling or even addressing the neo-liberal rational behind these authoritarian regimes though the democratisation processes taking place. Liberal democracy itself circumscribes the scope of TJ and shapes the very interpretation of past injuries (Franzki and Olarte, 2015) which has led to deepening

social inequalities and a continuance of both ESCRs *and* CPRs violations in the context of the ever-expanding neoliberal agenda in the region.

Thus, while violations of CPRs are intrinsically link to ESCRs, both as causes and consequences, ESCRs are rarely directly addressed in TJ (Arbour, 2007). Attempts to consider the economic dimensions of TJ which propose (re)distributive justice approaches to transition have met stark criticism often questioning whether legalistic instruments and mechanisms are even apt to address the economic and structural patterns underlying human rights violations. These debates are linked to wider debates on the "justiciability of ESCs"[9] (Schmid and Nolan, 2014). Thus, more recent engagement with the economic dimensions of TJ tends to be limited to best practice recommendations in peacebuilding and depoliticizes the issue of wealth distribution in democratic society. Franzki and Olarte (2015) argue that the problem is not that TJ is liberal per se, but that scholarship conceives of it as an apolitical issue and fails to reflect on the political implications of TJ processes.

Related to this, and relevant for the current case, while some TJ scholarship addressing the economic dimensions of internal armed conflicts has focused on *violations of ESRs*, TJ has rarely addressed the *economies of war*. That is to say, TJ has rarely addressed the financial sources of war and the role that business and private actors have played in financing armed groups or contracting such groups to protect their business interests through the use of violence (See Carranza, 2008; Wesche, 2009; Michalowski et al., 2018 among others). In the case of Colombia, the Peace and Justice Law of 2005 and the 2016 Peace Agreement between the FARC-EP and the government have opened up space for debate and discussion of the role of business in financing paramilitary groups, initially through testimonies in which many AUC members revealed the roles of both national and transnational private companies in funding, collaborating with, supporting, conspiring with and even initially creating paramilitary groups (*ibid*).

However, due to pressures by powerful political and private elites, neither of these TJ moments have created judicial mechanisms with jurisdiction to prosecute these private or "third party" actors.[10] Rather cases have been passed to the ordinary justice system, often at the local level, where lack of resources and institutional capacity along with threats, violence, co-optation, corruption, intimidation, accusations of defamation and delays prevent cases from advancing, and as such most cases remain at the preliminary investigation stage (Wesche, 2009). If TJ fails to focus on the criminal responsibility

[9] For summaries of some of the earlier debates on the state obligations and the justiciability of ECRs in IHRL see among others: Langford, 2008; Scott, 1999; Baderin and McCorquodale, 2007; Eide, 2001; Melish, 2008; Nowak, 2001; Haywood, 2009.

[10] Despite its wide scope in the Peace Agreement, the scope of the JEP was reduced through the legislative process to prevent it from summonsing third party actors. These actors may voluntarily submit to the JEP but there is little incentive to do so.

of private actors in war economies, those with the maximum levels of responsibility continue to enjoy impunity and the freedom to continue financing violence in their interests (Wesche, 2009).

iii. Settler-colonial theories of transitional justice

Another key area of critical TJ studies is the emerging body of post-colonial and settler-colonial analyses. TJ has not adequately accounted for harms and violations inflicted in the context of European colonialism nor their ongoing effects and repercussions in the so-called post-colonial or settler colonial context (Balint et al, 2014; Matsunga, 2016). Balint et al (2014) show, for example, how despite contemporary violence and injustices in East Timor, South Africa and Rwanda all being informed or underpinned by colonial injustice, none of the transitional processes undergone in those countries addressed the historical and colonial dimensions of the injustice.[11]

In the case of Western colonial settler states, such as US, Canada, Australia and New Zealand, which imply the permanence of colonisers in the territory (Veracini, 2011), which never underwent formal transitions from one regime to another (Matsunga, 2016) and in which internal colonial relations of power were upheld post-independence, there is a pending need to address colonial pasts. While TJ has tended to place these Western liberal states as the bastion of human rights and justice who lead and support other (fragile) states in transition processes, the field has had little concern for the historic or continued injustice and harms inflicted against colonised peoples within such states or their need to reckon with their own problematic pasts through TJ processes (Balint et al, 2014, Matsunga, 2016). We can therefore talk of a "Eurocentric blindness" within TJ to the role of Western states in perpetuating mass harm.

More recently however, Western colonial settler states have begun to adopt measures to address colonial injustice and particular harms to indigenous peoples that employ or at least resemble TJ mechanisms and rhetoric (Matsunaga, 2016, Park, 2015, Balint, 2014 et al). These include the TRC of Canada into the atrocities committed in the context of indigenous residential schools[12] (Matsunaga, 2016) and the Australian National Inquiry into the Separation of Aboriginal and Torres Strat Islander Children from Their Families (Balint, 2014). In both countries, as well as in the USA, other TJ mechanisms such as governmental apologies, reparations funds and reconciliation initiatives have also been implemented (Balint, et al 2014).

[11] The East Timor process focused on events following the Indonesian invasion in 1975 failing to address the Portuguese colonial period, the South African TRC process on the rise of the National Party from 1948 onwards, did not examine the history of Dutch and British colonialism, and despite a recognition of the role of the Belgian colonial past in contributing to the genocide in Rwanda, this did not feature in the legal TJ process (Balint et al, 2014:201).

[12] During a 100-year period the Canadian government forcibly placed First Nations, Inuit and Métis children in residential schools as a form of forced assimilation which has been recognised as genocide (Matsunga, 2016).

Parallelly, there has been broadening of academic and practitioner interest in the role that TJ can play in addressing settler-colonial harms to indigenous peoples exploring questions on the principles and goals of TJ, the limits of truth, cultural and critical perspectives on reconciliation and ways of incorporating decolonisation (Matsunaga, 2016). Park (2015) argues that settler colonialism continues to act under the logic of violently eliminating the indigenous population in order to expropriate land and build new societies and thus the goal of TJ must be decolonisation.

Matsunga (2016) explores land-centred understandings of decolonisation and indigenous resurgence in the context of TJ focused on "reconciliation" with Canada's indigenous population. However, she warns against incorporating decolonisation struggles into TJ, asserting that the foundations, goals and discourses of TJ, based on legitimising and consolidating state power and governing systems which are assumed to be just, are factors that impede and block, rather than facilitate indigenous decolonial demands. Further, TJ may lead to narrow understandings of truth and may silence indigenous voices which call for redistribution of land, reducing them to merely expressions about the legacy of past injustices. In settler state nations, if reparations for colonial crimes exist at all, they tend to be theorised in terms of symbolic justice, state redress and the politics of amends (Matsunaga, 2016). While apologies have been important parts of transitional processes, the centrality of these risks stifling more structural demands for land redistribution and restructuring of power.

Indigenous critiques of TJ sight two main issues. Primarily, the mono-national approach and the need to unify the nation does not address the realities of indigenous nationhood, and secondly the truth commission model does not fit with many indigenous world views, as it tends to focus on individual experiences of violence, to address the recent past and isolated violations through testimonies from survivors and direct witnesses, and to rely on archival and written sources (Matsunaga, 2016). Thus, the TJ process in Canada has tended to conceptualize residential schools as an isolated incident in an otherwise functioning democracy, rather than part of an historical and ongoing process of (settler) colonial violence.

Matsunga argues that much of the settler-colonial literature on TJ in Canada assumes that decolonisation should be integrated into the otherwise functioning model of TJ without raising questions of whether it in itself can, should or does actually contribute to decolonisation (2016). Decolonisation from an indigenous perspective is often *land-centred* which is far from the state-imposed practices of TJ. While TJ may seek to uncover truth and repair past atrocities, it does so in a publicly managed way that enhances and consolidates the liberal democracy and rule of law (Matsunaga, 2016:34).

Tuck and Yang (2012) also warn against the incorporation of decolonisation demands into TJ arguing that decolonisation has different goals to the human rights-based social justice project. Decolonisation from an indigenous perspective in the settler colonial context involves actions which disrupt ongoing settler colonialism and works towards the restoration of land. It is committed to indigenous and not settler sovereignty. Reconciliation in TJ motivates what Mawhinney (1998) has called "moves to innocence" (cited in Tuck and Yang, 2012:9) which involves a problematic attempt to "reconcile settler guilt and complicity," (Tuck and Yang, 2012:3), and remove white peoples' culpability and involvement in systems of domination thus maintaining and reproducing white privilege.

Settler "moves to innocence" may include the focus on "*conscientisation*" (2012:19), or decolonising the mind, without committing to the work of decolonising power and structure, thus decolonisation gets treated as a process of merely changing attitudes and thinking rather than actual structural change. Decolonising epistemologies is an important and necessary process, yet a focus on critical consciousness alone can be an obstacle to decolonisation (Tuck and Yang, 2012). In this way, TJ can contribute to ongoing settler colonial violence "…by denying certain expressions of emotion and manifestations of resistance as legitimate and by relegating colonial harm to the past" (Coulthard, 2014:22).

The warnings of Matsunaga, Tuck and Young, and Coulthard raise important questions in terms of what reconciliation and justice means from different cosmovisions or ways of viewing the world and the extent to which TJ can help or hinder struggles for colonial justice.

Focusing on the case of indigenous people in Australia, Balint et al (2014) use settler colonial theory to propose a structural justice approach to TJ. They argue that the harms inflicted against indigenous peoples in settler colonial states must be viewed as structural harms that require structural justice measures, centring structural reform in any attempt to address the past (Balint et al 2014). They pose a need for a more robust theory of TJ in relation to both post-conflict and postcolonial contexts which must open up to indigenous worldviews and jurisprudence rather than remaining rooted in Western frameworks (Balint et al 2014).

TJ has largely failed to address structural injustice and foster structural change as it is generally seen as a temporary process addressing a particular key moment, such as the end of an armed conflict or dictatorship, and also focusing on recent events in short time frames. Further, it tends to employ an understanding of the past, the present and the future as "discrete and sequential" (2014:200) with a linear notion of time as progressive. In this understanding the past and future are seen as separable and successive instead of intertwined and co-implicated, making it difficult for TJ to acknowledge and

address the enduring structural arrangements that resulted from past as well as present injustice and the ongoing effects of past inequalities on present and future generations (Balint et al, 2014: 201).

Drawing from experiences in South Africa and Colombia, Castillejo (2013a) identifies the limits of TJ in addressing the historic dimensions of violence and the "layers of historic injustice" that lead up to contemporary violence. The scope and reach of TJ mechanisms depend on their terms of reference which are often limited to addressing specific, recent moments in time, specific human rights violations and specific victims. Thus, he argues the stories and testimonies of groups suffering historical violence have been rendered "intelligible" to most TJ mechanisms (Castillejo, 2013a, 2013b). The historical injuries that groups wish to address are often beyond the "legal epistemologies" of TJ mechanisms and the violences suffered in the past are not subject to reparation. This was exemplified by the TRC process in South Africa which was limited to the 22,000 victims of specific forms of bodily violence and failed to address the wider victimhood of victims of apartheid and colonialism including the two million people who were forcibly relocated in the context of apartheid. The focus on specific forms of physical violence obscured the systematic, structural and historical dimensions of apartheid essentially leaving the fundamentals of apartheid intact (Castillejo, 2013a).

Castillejo questions the TJ promise of fostering an imagined new nation while simultaneously leaving violence in the past and moving forward within the same paradigm of democracy and capitalism. He asks, how we can imagine a new post-violence future when political and economic hegemonies remain historically rooted and intact and how peace can be achieved when the structural causes of conflict are not resolved. TJ norms present a particular relationship between violence and temporality which do not comprehend the historical or structural nature of violence that are its root causes. Thus, he suggests that current TJ scenarios should be seen as "a kind of continuity with the past rather than the radical rupture in which they are often presented," and that it may be necessary to decolonise TJ theories and practices (Castillejo, 2013a).

Recent years have also seen an emerging recognition of the need to address the legacy of colonialism and slavery in the African context, particularly through truth and reconciliation commissions (IOHR, 2021).

One important example is the Mauritius Truth and Justice Commission (MTJC) which was created in 2019 to investigate "the consequences of slavery and forced labor during colonial times to the present," (IOHR, 2021). This Commission was the first to attempt to cover such a long period of time: 1638 to present (about 370 years). The MTJC has made recommendations for measures for reparation, truth and memory and GNR (MTJC, 2011). On the issue of reparations, it concludes that "No amount of reparations will ever repair the damage done to those who endured slavery and the slave trade" and that "What modern society can do is to ensure that such actions never occur again in whatever form

and the justifications (philosophical, religious, ideological, economic, biological etc.) that were used to establish colonial slavery and the slave trade are not used to institute new forms of servitude" (2011: 394).

However, it goes on to recommend that "Funding for reparations is sought by the Mauritian government from the historical slave trading nations, namely, the United Kingdom and France, for the rehabilitation and reconstruction of communities and settlements where slave descendants are in the majority," (2011: para 67) and that "Reparations be provided to poor individual families in terms of social reparations such as housing and education so that this community and its descendants are better able to create a more stable social and economic existence going into the future" (2011: para 68).

Another important example of this the Arusha Agreement (2000), which addresses the cycles of so-called "ethnic violence" and grave violations of rights in Burundi, since the country's independence from the colonising power of Belgium. The agreement recognises the historical and colonial roots of contemporary ethnic violence, noting that "The colonial administration, first German and then Belgian under a League of Nations mandate and United Nations trusteeship, played a decisive role in the heightening of frustrations among the Bahutu, the Batutsi and the Batwa, and in the divisions which led to ethnic tensions." It further recognises that the administration used a strategy of "divide and rule" and "undertook to destroy certain cultural values that until then had constituted a factor for national unity and cohesion." (Arusha Agreement, 2000: 16).

In 2014, a Truth Commission was created with a mandate to establish the truth about the mass atrocities and CAH committed between 1962 and 2008. In 2018 the mandate was extended to investigate and clarify the truth about the serious violations of human rights and IHL committed between February 26, 1885 and December 4, 2008, thus starting with the Berlin Conference that divided Africa up between the colonial powers and covering a period of 123 years. The new mandate included the task to 'determine the role of the colonizer in the cyclical violence that has afflicted Burundi' (Article 6.2.c).

In defence of the decision to extend the mandate Justice Minister Aimée-Laurentine Kanyana, asserted that the cycles of violence 'that have scarred Burundi have their origin in colonial times' (IOHR,2021). Importantly, the decision to investigate the responsibility of colonial powers was made based on the consultation and suggestions of 3,887 citizens in 2009-2010 (Ibid)

The public discussion generated around this process has opened the door to discussions and demands for historical reparation. In 2020, the Burundi parliament demanded €36 billion in compensation (Zoutberg, 2020) and an official apology from the former colonising powers for the crimes committed between 1896 and 1962 (Kanyange, 2021).

In July 2020, Belgium established a Special Parliamentary Commission in order to examine Belgium's colonial past in the Congo (1908-1960), and Rwanda and Burundi (1919-1962) and to "identify lessons for the future (Chambre des Représentants de Belgique, 2020 cited in IOHR, 2021). However, the Commission has been criticized for not including historians or experts from the former colonies among the commissioners (IOHR, 2021) and thus may be seen as maintaining a paradigm of coloniality in terms of knowledge production, truth telling, justice and reconciliation.

iv. Transitional Justice from below

Related to the critical justice theories and settler-colonial theories, proposals for own, or different models of TJ from the people have emerged. Within the settler colonial work Balint et al (2014) propose an approach to TJ rooted in settler-colonial theory which would provide new possibilities for recognising and responding to the contemporary reverberations of historical harms, enabling a move away from individualist and state-centred approaches focused on state-building towards approaches rooted in structural change. It would allow for wider comprehension of what constitutes harm – beyond the physical, to include socioeconomic, cultural and intergenerational harms and for the development of a theory on historical harms.

Here it is important for settler-colonial injustice to be reconceptualised in the TJ language of "harms" enabling recognition of historic colonial injustices and converting these issues from welfare or social policy issues into "justice issues". In this sense the law must be seen as a tool for social change. This may further encourage a move away from contemporary time-bound TJ which focuses on transitional moments from conflict to peace or dictatorship to democracy, enabling us to rethink the very concept of *transition* to be about transition from *unjust to just relations* – transformation of the social, economic, political and legal frameworks that underlie settler colonialism; and to think about justice not only as a response to moments of transition that arise, but as a *process* that may facilitate and even bring about a transition. TJ may need to consider more long-term interventions and to move Western frameworks to include indigenous worldviews.

In short, drawing on insights of settler colonial theory and analyses of structural injustice and the role of law in initiating change, Balint et al propose a "new justice model for transitional justice that is premised on recognising the continuities between the past, present and future and that recognises the structural frameworks that both constitute and continue current and past injuries," (2014: 215-216).

Castillejo explores the role of testimonies in challenging the assumptions of TJ when historical injuries are beyond the scope of institutional TJ mechanisms, when survivors' voices fracture

theoretical scales of reconciliation and when certain forms of violence have been rendered "unintelligible" (2013b). He asserts the importance of understanding "harm as an accumulative phenomenon" (2013b: 19) with layers of historical injuries, but also questions whether these can be part of the TJ agenda. As the aim of TJ is national unity, certain "unspeakable" experiences are left unintelligible and as such TJ frames and regulates the kinds of testimonies that can be included and who can speak (Castillejo, 2013b). There is no space for victims who will not forgive, or victims who are outraged at the world as such testimony "unsettles the vey moral economy that discourse of reconciliation and healing often establish" (Castillejo, 2013b:20).

For Gómez, TJ must be seen as a space of dispute in which different actors with different interests, discourses and resources struggle around the design and implementation of mechanisms, creating contradictions and tensions around political needs and justice norms and between the interests of powerful groups and marginalised groups (2013). Thus, we make speak of both TJ from above and TJ from below. TJ from above places emphasis on public policies, legal normative frameworks and the role of political elites and reproduces Western liberal values, while TJ from below focuses on the participation of non-state actors, and non-formal conflict resolution processes, the voices of the subalterns, own processes for collective memory and truth, flexible approaches producing a much more solid or "thick" versions of TJ (McEvoy, 2008 in Gómez, 2013).

That is not to say that these disregard institutional language and frameworks, which despite having been used for colonial and ethnocentric practices, also have potential to empower marginalised groups and oppose oppressive practices (Gómez, 2013). Such processes include advocacy at multiple local, national and international levels, which not only contribute to the "boomerang" effect pressing governments to change policies (Keck and Sikkink, 1998), but also go beyond this by carrying out simultaneous national and international processes, transforming human rights language and practice in what Merry has termed the "vernacularisation" of discourses of truth, justice and reparation (cited in Gómez, 2013: 156-157). Such processes resist the universalist project of development and liberal law as a tool of oppression and rather convert it into a tool for emancipation (Gómez, 2013:158).

Thus, TJ from below departs from the "discursive prevalence of legal standards and instruments" and the centralised, national-level decision-making processes of state-centred TJ. (Uprimny and Guzmán, 2010). Rather it enriches processes focused exclusively on normative standards articulating processes rooted in the voices of the victims (Uprimny and Guzmán, 2010). It centres the voices of those directly affected, offers the possibility of a more inclusive process not structure exclusively by those with power, creates the opportunity to visibilize the contributions and roles of those people traditionally excluded and; enables the construction of flexible frameworks to incorporate local experiences (Uprimny and Guzmán, 2010).

v. Theories of Reparation(s)

Theories of reparations within TJ require frameworks to guide understandings of the "justification, purpose and aims of reparations and how they relate to theories of justice" (Laplante, 2015:67). Most reparations work within the TJ field focuses on the *importance* of reparations and the *complexity* of reparations programmes, without offering fully developed theories of reparations (Laplante, 2015). Laplante argues for the development theory to improve the design and implementation of reparations programmes and offers a "justice-based theory of reparations in transitional justice settings" (2015:67). Reparations, she asserts, can and should be seen through a lens of justice and she proposes a justice continuum which employs four theories of justice: reparative justice, restorative justice, civic justice and socio-economic justice. These theories range from narrower to broader visions of justice which embrace a pluralistic view of justice.

Reparative justice has its roots in the "corrective justice" concept of classical legal thought which seeks to right a wrong through compensation or restitution (England 2009, cited in Laplante, 2015: 70). In international law, it has often mirrored the individual case by case model but in TJ it has increasingly taken on administrative approaches with widespread programmes and policies for all victims. Restorative justice, which has roots in religious and spiritual traditions and customs from around the world, also refers to repairing harm but embraces a broader notion of harm than reparative justice in which victims and perpetrators come together in the aftermath of conflicts and rights violations and victims themselves define *what* must be restored and *how*. In TJ contexts this has evolved to include the State either as direct perpetrator or as failing to protect citizens from third parties. Importantly it takes a participatory approach which aims to restore dignity to the victim and avoid revictimisation.

Civic justice mends relations between the government and the governed through the consolidation of citizenship rights previously denied or violated in times of conflict or authoritarian rule. This theory views reparations as part of wider social, political and juridical reform processes leading to social reconstruction (Laplante, 2015:76). Reparations here define a legitimating moment when states transform from those which tolerated oppression to those that respect human rights and democratic values. Finally, socio-economic justice aims to remedy social and economic historical inequalities. As socio-economic inequality is often the root of social conflict, this approach is important for remedying injustice but also for creating GNRs of human rights violations. It may include compensation, restitution, reparation and distributive justice (allocation of goods of society).

Proposals for reparations for slavery[13] often resemble distributive justice through large-scale redistributive transfers aimed at reducing socio-economic inequalities. However, due to the marginalisation of ESCRs in TJ, as discussed, mechanisms have rarely proposed reparations for victims of ESRCs violations (Arbour, 2007).

Moffett and Schwarz identify five principles for assessing the effectiveness of reparations processes in TJ: 1) *completeness* and *comprehensiveness,* ensuring the inclusion of all rights violations and all victims affected during the event in question; 2) *complexity* and *coherence,* including both collective and individual approaches, which are coherent and complementary to other approaches taking place; 3) *appropriateness* and *proportionality* including the idea that reparation should neither enrich nor impoverish victims but be proportionate to the harm suffered; 4) *acknowledgement* by society of the harm caused; and 5) *transformative* justice which centres on more structural causes of violence and victimisation (2018: 14-15).

This last point is particularly important for the present case. Brachthäuser and Haffner (2018) discuss how "transformative reparations" may be aimed at societal change. They argue that instead of merely reinstating the *status quo ante*, transformative reparation seeks to change structures of unjust hierarchy and social inequality and should include political representation, economic redistribution and social recognition, although such measures have rarely been put into practice. The idea of transformative reparations is central to the argument for decolonial TJ and reparation which I make in this thesis. I argue that the model for reparation within the Colombian TJ process, which includes collective reparations for ethnic peoples, creates an opportunity to demand a more transformative reparation.

Reparations in TJ has tended to focus on exceptional experiences of violence rather than the ongoing, less visible forms of structural injustice (Balint et at, 2014). Experiences that have recognised the underlying structural bases of contemporary injustice such as the truth and reconciliation processes in South Africa, Peru and Guatemala failed to provide effective means to confront and redress injustice. Structural inequality is not easily reduced to individual responsibility and thus is not adequately addressed by the individualistic models of TJ which focus on individual perpetrators. Therefore, social and distributive justice is often seen as outside of the scope of current approaches to TJ (Balint et at, 2014). Arbour argues that individual or collective reparations cannot substitute broader based, long term socio-economic policies aimed at redressing and preventing widespread inequalities and discrimination (2007:20).

[13] Throughout this thesis the term "reparations for slavery" refers to crimes committed during the transatlantic slave trade as opposed to other modern-day forms of slavery.

Gready argues that transformative reparations cannot, and should not, pursue structural socio-economic reform alone; rather there is a need for coherency between different TJ mechanisms, and a coherency between reparation on the one hand and those distinct ongoing state duties concerning development and social services on the other. This, in turn, requires a fundamental reorientation of transitional justice wherein its temporal mandate is expanded so that it takes form as a long-term, victim-centred, and context-specific process in unequal societies. Transformative reparations processes challenge the idea that it is always desirable to 'restore' victims to pre-conflict situations of poverty, discrimination, and exclusion? (Gready, 2021: 3).

As discussed above, TJ has traditionally ignored or side-lined socio-economic rights largely due to the manner in which it has mirrored the legalistic bias of the human rights discipline, which sees civil and political rights as more justiciable in a court of law (Gready, 2021). Rather than being seen as underlying structural causes, socio-economic inequality is often treated as no more than useful context for understand physical forms of violence (Sharp, 2012, in Gready 2021). Yet, the poorest, most discriminated and excluded members of society are often overrepresented among victim populations and victimisation only accentuates that poverty. The ongoing discrimination and inequality often present in transitioning societies justifies the call for a distributive rather than corrective approach to reparation which involves structural and socio-economic policy measures which often make more sense than individual compensatory or restitution measures (Uprimny and Guzmán, 2010).

As Gready above noted, it is essential to differentiate between on the one hand, social policies (which come under a state's general obligations to fulfill the economic, social and cultural rights of its citizens), and on the other reparations programmes (which come under a state's responsibility to repair damages or harms suffered by victims of rights violations). This distinction is important so as not to lose the focus of the victims' rights (Uprimny and Guzmán, 2010:249). The symbolic nature of reparations also differentiates development policy from reparation and reparations tend to look to the past, while social policy is about the present and the future. The concept of transformative reparations as discussed in the DeJusticia organisation aims to bridge the important elements of these two areas, or in other words to connect corrective justice (which looks to the past) to distributive justice (which looks to the present and future).

In line with the discussions around TJ from below Uprimny and Guzmán (2010) suggest a concept of "transformative reparations from below" as a model which helps implementing states make decisions concerning i) the selection of reparations beneficiaries (taking into account both the suffering of victims and their needs); ii) choice of benefits (measures that empower and reduce poverty and inequality); iii) the design of the procedures (as opportunities to reduce discrimination and empower

victims through participatory processes); and iv) the articulation between the reparation and social policy (compatibility between reparations and general development strategy (2010: 272).

v. Reparations for slavery and colonial harms

As shown above, most existing work on reparations within TJ scholarship, even that which looks at injustice committed in the context of colonialism, focuses on recent harms or in the case of the settler-colonial analyses has focused on colonial crimes against indigenous peoples. The particular colonial experiences of Afro-descendant peoples have been largely absent from these discussions. On the other hand, much of the scholarly work on reparations for slavery tends not to be located within TJ scholarship, but in legal scholarship or history (see Matsuda, 1987; Brophy, 2004; Hylton, 2004; Posner, 2003; Beckles, 2007; 2013; Robinson, 2004; et al). Brophy (2004) talks of three generations of slavery reparations scholarship. He locates the first-generation including work by Matsuda (1987), in the 1980s when research opened up discussion of a possibility for reparations for slavery and racial crimes, although critiquing the existing liberal legal system which did not provide a language for discussing the issue.

The second generation with works by Yamamoto (1995; 1997; 1998) and others during the 1990s and early 2000 draws from the Civil Liberties Act of 1988 which provided compensation for Japanese-American internment victims and recognised the possibility of legalised reparations and what reparations for slavery might look like (2004). The third generation, to which Brophy's own work subscribes, focuses largely on legal critique of reparations raising legal obstacles such as the statute of limitations, problems with "identifying the appropriate plaintiff class members and the appropriate defendants," and cultural issues and arguments (Brophy, 2004:85). Rather than hindering the struggle for reparations such critiques are opening up the discussion on reparations and enabling it to advance further still and deepening discussion of details of what reparations cases may look like.

Using critical legal studies (CLS), Matsuda presents reparations demands as an example of legal norms "generated from the bottom" (1987:362). As shall be shown in Chapter 3, CLS can be used to refute standard legal objections to reparation by centring the voices and experiences of those at the centre of the discussion: the victims. A similar approach can be used with TJ, reading this doctrine not from the perspective of purely international norms, but from the decolonial epistemologies of victims.

As part of the third generation, Brophy seeks to identify what reparations might look like and how the law might be used as a framework for reparations. He discusses the possibilities of reparations lawsuits concerning Jim Crow and slavery through tort law, addressing common objections to

reparations such as causation and proof of damages, the role that lawsuits might play, and whether the goals of reparations can be reached through such lawsuits. He concludes that "using tort law for reparations may provide relief for some of the victims of slavery and Jim Crow… [and that]…tort law is an ideal vehicle for framing discussions about moral culpability" (Brophy, 2004:86).

As shall be explored in Chapter 3, many of the proponents and opponents of reparations situate their arguments within the tight framework of the liberal legal system, without ever calling into question the legitimacy of that system. Thus, arguments about the legality of slavery at the time, the statute of limitations and tort law concepts of duty, causation and damages are cited as legal obstacles to the call for reparations (see for example Massey, 2004). If one takes a decolonial approach or even a critical race theory approach (see Delgado and Stefancic, 2012; 2013; Bell, 1980, Crenshaw et. al, 1995) which questions the very legitimacy of liberal law, one can move past such legal obstacles. This is the importance of a decolonial TJ approach, which not only takes the debate out of the realm of domestic tort law, into international law (IL) but also calls into question the colonial roots of IL.

V. The Afro-descendant struggle in Colombia as a contribution to decolonial theories of transitional justice and reparation

The literature examined above provides some important points for analysis and examination of the thesis question. However, as shall be discussed in this section, there are some notable gaps in this work concerning regions and populations of focus. Thus, the present thesis builds on and goes beyond the existing and emerging theories on TJ and reparation, in particular the emerging post-colonial and settler colonial theories in several ways.

Colombia as a settler-colonial state

Primarily, it is important to observe that the work on settler colonialism has focused on "Western liberal states" such as the USA, Canada, Australia and New Zealand, those states which are positioned in the international community as stable and democratic, the bastions of human rights. Colombia presents an important and interesting contrasting case in this respect. Latin America in general may be described as characterising the settler-colonial experience, in which as shall be detailed in Chapter 4, following the wars of independence from the Spanish and Portuguese, European descendants were established as the ruling elite and colonial racialised power relations were maintained in a paradigm of coloniality.

Yet, Latin American states tend not to be considered as "Western," and due to turbulent histories of oppressive dictatorships and internal armed conflict, nor were they historically positioned as

democratic, stable states. The dictatorships of South America are precisely what lead countries such as Argentina, Bolivia, Brazil, Chile, Ecuador, Paraguay, Panamá, Perú and Uruguay to be some of the first test subjects in the new experiment of TJ that emerged in the 1980s. Others such as Guatemala, El Salvador, and now Colombia, joined the group of TJ subjects in processes of transition from internal armed conflicts to peace. 60 years of armed conflict, which has involved grave human rights violations and CAH, committed both by state and illegal armed groups created a need for a rigorous TJ process in Colombia. Despite this turbulent history and present, there is a perception among some sectors, that Colombia is a democratic state, with a functioning, albeit in-perfect electoral and judicial process, supported by a progressive Constitution that seeks at least in theory, to consolidate democracy and the rule of law further still (see discussions by Uprimny, 2016; Garcia Villegas, 2014; and Uprimny and Sanchéz, 2012 among others). Thus, Colombia represents an important case of a supposedly democratic, settler-colonial state in which a TJ process is already being implemented and which can be analysed for its potential of raising and addressing the very decolonial and structural justice questions that the settler-colonial TJ theorists have raised for Western, democratic states.

In this sense Colombia fits between the two typologies outlined by Hansen above – 1) a country whose TJ process is taking place not in a context of profound transition but one of continued armed conflict, and 2) one which may be considered as a consolidated democracy that must face up to historic atrocities. In such a case GNR must be re-posed as "guarantees for non-continuance".

Afro-descendants as protagonists of decolonial transitional justice

Secondly, the present research goes beyond current settler-colonialism theories by centring not on the decolonial struggles of indigenous peoples, but those of Afro-descendant peoples. Even within the post-colonial and settler-colonial critiques of TJ, which focus largely on concepts of sovereignty and land rights, Afro-descendant peoples remain largely invisible. There is a gap in the settler-colonial TJ research on the experiences and struggles of Afro-descendants as colonised peoples, who suffered a particular set of colonial and structural harms including genocide, ethnocide and enslavement – analyses which would be of particular relevance to TJ processes and discussions on reparations in Canada and the USA among others. As discussed in Chapters 2 and 3, the issue of reparation for enslavement has commonly been addressed within history, domestic tort law (in the case of USA), and to an increasing degree international human rights law (IHRL) scholarship.[14] By focusing on the case of Afro-descendant peoples in TJ, this thesis brings discussions on reparation into the growing conversation on the potential of TJ to address colonial crimes. As with existing settler-colonial analyses, the thesis engages with important questions raised around the role of land and autonomy in

[14] Particularly in relation to the emerging human rights framework on the rights of Afro-descendant people, which contains several principles and State obligations useful for reparation demands.

decolonial struggles, central to reparation demands of Afro-descendant peoples in Colombia. However, it also examines the meaning and role of ancestral lands and territories for those communities who due to violence, displacement or economic migration no longer live on those lands and whose struggles for racial and historic justice do not necessarily involve consolidating land rights or the right to return to those territories.

Transitional Justice as a site for decolonial struggle

Thirdly, the thesis engages and grapples with analyses like those of Matsunga on the potential risks of attempting to locate decolonisation struggles within TJ processes. It is widely recognised that although Colombia's armed conflict has transformed in many ways during the 60-year war, the initial underlying, root causes of the conflict, which stem from the colonial period, were the unequal distribution of land, private ownership and resultant extreme wealth inequality across the nation. The conflict continues to be characterised by battles between different armed groups and actors (illegal and "legal") for land, resources and economic and territorial control in the context of the deepening neoliberal agenda. Yet, while the Peace Agreement with the FARC-EP proposes some structural measures as part of the transition to peace, it does not call into question, and less still proposes transformations to the neoliberal economic model which has further entrenched economic inequalities and continued to fuel and intensify the armed conflict sin the 1980s.

Thus, while many Afro-descendant activists recognised and supported the signing of the peace agreement, they were also cautious about the possible adverse and grave consequences it could have in ethnic territories and on already hard-won ethnic rights. In particular, as is already being seen, since the negotiations there was a fear that the agreement may facilitate the further encroachment of neoliberal development projects and consequential forced displacement and persecution of community leaders, precisely the opposite of what may be hoped of a decolonising TJ process. It was for this prior analysis and understanding of the political and economic dynamics of TJ and the peace process, that Afro-descendant and indigenous organisations advocated for the inclusion of the Ethnic Chapter to create safeguards to protect their ethno-territorial rights in the context of continued state hegemony and neoliberal economic development in which the peace agreement was to be implemented.

Thus, this thesis argues the importance of a decolonial approach to TJ calling into question the colonial capitalist/neoliberal economic model which underlies contemporary injustice. Related to this, it addresses the important issues raised around cosmovisions and alternative ways of viewing and understanding TJ. It is precisely these different visions which are leading Afro-descendant activists to

expand the notion of reparations beyond the context of rights violations in the armed conflict to the realm of historic reparations.

Building a decolonial framework for transitional justice

Finally, the thesis builds on the settler-colonial theories of TJ to incorporate Afro-descendant decolonial theory. The thesis is researched and written within a specifically decolonial epistemology which not only locates the question of reparations and TJ within existing theoretical work on coloniality and decoloniality but through the research and findings aims to contribute to decolonial struggles being led by Afro-descendant activists in Colombia and beyond. This implies not only a decolonial reading of the issues being studied, but a decolonising of the very frameworks of analysis employed. Rather than arguing, as Matsunga above has done that decolonisation struggles should take place outside of the realms of TJ, I attempt to show that TJ can itself be decolonised and used as an opportunity to demand decolonial justice.

As shall be discussed throughout the thesis, human rights are intrinsic to TJ, in particular in terms of reparations which are rooted in the rights of victims of human rights violations A growing body of work highlights the ways in which human rights systems emerged in and perpetuate the colonial order, and of the need to decolonise human rights (Baraka, 2013; Driver, 2014; Fitzpatrick, 2014; and An-Na'im, 2016). Such a perspective is essential for a discussion on reparation.

In her report on reparations which shall be discussed in detail in Chapter 2, the UN Special Rapporteur on Contemporary Forms of Racism (SRR) argues that "the pursuit and achievement of reparations for slavery and colonialism require a genuine "decolonisation" of the doctrines of international law that remain barriers to reparations" (Achiume, 2019: para 10) in order to "make them fit for the purposes of undoing the legacies of historical racial discrimination and injustice including by looking to indigenous and other value and legal systems to inform the process" (*Ibid*: para 58).

Developed largely through years of work with the Afro-Colombian movement, African American activist Baraka proposes a decolonial model to human rights: "people centred human rights" (2013), which moves away from state-centred processes to focus on the ways communities themselves are defining the terms and language of human rights from a decolonial perspective. Baraka argues that human rights are rooted in a Eurocentric paradigm of neoliberalism and colonialism arguing that the meaning and content of what are recognised as human rights must instead be determined by the people—not States. He identifies four necessary conditions for human rights to be fully realised for oppressed peoples; 1) an epistemological break with a human rights orthodoxy grounded in Euro-

centric liberalism; 2) a reconceptualising of human rights from the standpoint of oppressed groups; 3) a restructuring of prevailing social relationships that perpetuate oppression; and 4) the acquiring of power on the part of the oppressed to bring about that restructuring.

The conditions outlined by Baraka, combined with the concepts identified in the Latin America coloniality literature, are central to a decolonial TJ model which seeks to "de-link" from predominant TJ discourse and theories. The thesis will demonstrate how through struggles for reparation in the context of TJ, Afro-descendant activists are: 1) revealing and deconstructing the myth of modernity through TJ truth processes which are rooted in autonomous and collective truth processes and advocacy within institutional processes; 2) Demanding reparations that seek to repair the ongoing harms caused in the context of the non-ethic of war on colonised peoples in the paradigm of coloniality; 3) Leading an epistemological shift in which "victims" of rights abuses redefine what truth, reparations, and justice mean from a collective and ancestral perspective and rooted in autonomous concepts of rights; and 4) Demanding a structural and decolonial transformation as GNRs, recognising that in the contemporary paradigm of coloniality, modernity, rampant capitalism and neoliberalism, "non-repetition" can only be achieved if these root causes of violence and injustice are transformed.

In conclusion, Colombia was chosen for this research because, while it represents a unique case both in terms of Afro-descendant rights in general and in terms of TJ, the Afro-Colombian reparation experience has much to contribute to the global reparation movement. By employing the decolonial TJ framework, the case offers an alternative model and language for reparation, beyond the more common domestic tort law models; a model whose concepts of truth and GNR and whose explicit human rights-based approach may be relevant to all struggles for reparations for slavery and colonial crimes, whether or not they take place in formal TJ contexts. However, this thesis is not only a contribution to the reparation struggles of Afro-descendants in Colombia and beyond, but it is a critical contribution to the very notion and understanding of TJ both as an academic field of study and a practice.

VI. Thesis structure

Chapter 1: A decolonial methodology

Chapter 1 outlines the methodology for the thesis. The aim of this research is to effect positive social change and contribute to processes towards racial and social justice. Therefore, it employs "activist research" (Hale, 2006) guided by decolonial, anti-racist and critical race theory (CRT) approaches to research aiming to deconstruct the unequal power relationships in research, strengthen social

processes and prioritise the voices of marginalised and oppressed peoples through participatory processes (see Sefa Dei, 2005, Tuhiwai Smith, 2012, Delgado and Stefancic, 2012 et al).

The research question itself was not created purely from a revision of literature of existing academic studies and theories but stems from years of work carried out by Afro-descendant activists which was consolidated during the 2017 international workshop on reparations, which I organised alongside PCN, CNOA and CODHES which aimed to identify links between demands for reparations for harms caused in the armed conflict and demands for historical reparations, and which set the stage for this research. The findings from the research will go on to inform and support the continued work of the growing reparations movement through future academic and activist spaces aimed at consolidating a National Reparation Commission.

Chapter 2: IHRL and Transitional Justice as a Framework for reparation for slavery and colonial crimes

Chapter 2 presents the legal framework for reparations in IL, outlining the main instruments that establish the right to reparations for gross human rights violations, now a central part of both IHRL and TJ. It begins with the evolution of the right to reparation in IHRL and then explores reparations core principles and measures examining conventions, the Principles and Guidelines on the Right to Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) and jurisprudence and norms from other relevant international and regional human rights mechanisms. Next it examines TJ as a site for reparations exploring concepts of collective and transformative reparations particularly in relation to CAH and genocide, concepts which have been further consolidated as TJ has developed. The chapter then examines key legal debates concerning reparations such as state responsibility, causality and the statute of limitations. Finally, it looks at debates around the issue of reparation for slavery in IHRL and examines the argument for a decolonial approach to IHRL and TJ to be able to address historical reparation in this sphere.

Chapter 3: The call for reparation for slavery

Chapter 3 presents the case and prevailing arguments for historical reparation. It begins with an overview of the reparation movements in the USA and CARICOM, demonstrating similarities and differences between two types of cases 1) an Afro-descendant movement in a colonial settler state, which has brought demands against both the colonial settler State and private entities (USA), and 2) previously colonised Afro-descendant states which gained independence in the 20th Century and have brought demands against formerly colonising States of Europe (CARICOM). In the USA case,

litigation through domestic tort law has been the principal strategy, while in the Caribbean case, governments have more recently used state-to-state political diplomacy, although there is a possibility, they will use international justice forums in the future.

Drawing on the wide literature on the issue of reparations from authors such as Beckles (2007; 2013), Robinson (2004) and Coates (2004) among others, it outlines the main arguments for reparation which include the abhorrent violations that took place during enslavement, the economic legacy of enslavement, and continued situations of racial injustice.

The chapter examines the content of reparations demands demonstrating how much of the case law in the USA has focused on economic reparation and wealth redistribution through public policy. Thus, it sets the stage for demonstrating how the Colombian case, while including monetary reparation has much greater focus on the land and autonomy, which I argue has greater potential for affecting long-term structural change for future generations.

The chapter examines key debates and arguments made against reparation by academics, legal practitioners and politicians, which tend to be either legal or practical/pragmatic arguments and demonstrate the profound limitations of using domestic legal litigation to seek reparation. Finally, rooted largely in these objections, it proposes the need for a decolonial IHRL approach to reparation.

Chapter 4: The Reparations Agenda in Colombia

Chapter 4 begins with a contextual overview of reparation activism in the region of Latin America. It then presents the Colombian case outlining historical arguments for reparation including violence, Colombia's independence process, the continued enslavement of Afro-descendants in the republic and the long slow process of abolition which, as with many other contexts resulted in reparations being paid to the perpetrators of the crime and not the victims. It discusses how the legacies of slavery and the continued paradigm of coloniality continue to operate through the denial of human rights and freedoms of Afro-descendants.

Drawing on interviews and documentation the chapter discusses the reparation agenda in Colombia, the main actions taken thus far, visions for reparation and state responses to the issue, setting the scene for the subsequent chapters on the ways in which this discussion has more recently been articulated within the TJ framework.

Chapter 5: Reparations is not just an historic issue: Making the case for decolonial reparation in Colombia

Chapter 5 demonstrates how a human rights approach has been used to overcome the principal obstacle to the legal argument for historical reparation: the temporal argument. In line with the

arguments made by the current UN SRR discussed in Chapter 2 on decolonising human rights, the chapter shows how the issue of reparation for slavery is not an historical one but a current one. Through analysis of human rights advocacy reports and interviews and focus groups it shows how Afro-descendant activists have demonstrated that the disproportionate and differential impact of the armed conflict on Afro-descendant peoples as racialised and collective victims, is due both to the legacy of colonialism and slavery, and to a continuation of the racial and economic crimes committed during the colonial period, underpinned by the intersecting ideologies of continued coloniality.

Chapter 6: Decolonising Human rights and Transitional Justice: A platform for Reparations in Colombia

Chapter 6 shows how, parting from the analysis in the previous chapter of the links between historical and contemporary violence, Afro-descendant organisations have shaped the TJ normative framework to ensure the inclusion of collective rights and own visions to address historical underlying factors. It presents an overview of the general normative framework for reparation in Colombia's TJ processes through laws, decrees and constitutional court rulings, in three key moments: the demobilisation of paramilitaries in 2005 which led to the adoption of Law 975; the adoption of law 1448 in 2011 (The Victims' Law) and Decree Law 4635 on collective reparations; and the 2016 "Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace" between the government and the FARC-EP. In addition, it analyses relevant Constitutional Court (CC) orders such as CC Sentence T-025 and CC Order 005 of 2009 on the national situation of displacement in the country. Through interviews, workshops and content analysis of laws and policies it shows how advocacy has contributed to a progressive framework.

Chapter 7: People-centred transitional justice: towards a decolonial approach to reparation?

Finally, Chapter 7 shows how activists in Buenaventura are using the TJ framework for an alternative understanding of reparation demands and measures. Again, drawing on interviews, focus groups, workshops and documentation it demonstrates how these actors are adopting a decolonial and PCHR approach to TJ in which claims for reparation for the crimes of the armed conflict and connected to demands for historical reparation, addressing wider structural and historical underlying causes. The chapter highlights the central TJ and IHRL reparation concepts such as restitution and rehabilitation, truth processes and collective reparations, transformative reparation and structural GNR rooted in the guarantee of ethno-territorial rights to culture, identity, territory, land and autonomy, which go beyond the common economic and material inclusionist approach to reparation.

The chapter discusses the challenges and limitations of attempting such a decolonial approach to reparation and TJ when the State still sets the rules and has little political will to implement and advance in reparations processes as these demands conflict with powerful economic interests. This state response is further evidence of the paradigm of coloniality in which not only the armed conflict, but human rights and TJ processes of resistance exist demonstrating the need for bottom-up and autonomous processes for reparation and TJ. It then applies the concept of TJ from below to demonstrate how despite the constraints of state-centred approaches, Afro-descendant organisations continue to push for own autonomous processes.

Finally, the conclusion chapter brings these stages together to paint a picture of the Afro-descendant advocacy strategy and struggle to 1) get the issue of historical justice on the public agenda, whilst navigating through the various challenges and obstacles that institutional and State-centred transitional justice processes pose and 2) to strengthen own internal reparation processes.

CHAPTER 1 - METHODOLOGY

"Decoloniality is not a metaphor"

(Tuck and Yang, 2012)

In line with a commitment to decoloniality this research employs a decolonial methodology aimed at challenging and deconstructing traditional Eurocentric research processes, which not only centre Eurocentric epistemologies but often uphold unequal power relations between "researcher" and "researched" treating the latter as a mere object of study and failing to contribute to constructive processes of change or empowerment. I draw on the experiences and perspectives of anti-racist, decolonial and critical race theory researchers from colonised and oppressed peoples including indigenous and Afro-descendant writers. This chapter outlines the research approach and methods employed in the process of constructing the thesis.

I. Decolonising Research

Decolonising epistemologies

As shown in the introduction, the concept of the coloniality of knowledge (Quijano, 1999) demonstrates how occidental knowledge systems have been valued and prioritised over indigenous or Afro-descendant thought systems throughout the Americas. Perhaps nowhere is this coloniality of knowledge more evident than in the world of academia. Education systems, including universities and research institutes are still overwhelmingly dominated by European epistemological thought systems. Eurocentrism in the academy must not be seen merely as accidental but as a continuation of the hegemony of European rationality seen as superior to African and indigenous American ways of thinking and viewing the world, perpetuated by racist stereotypes of the colonised world and its peoples.

The coloniality of knowledge is evident throughout the world. Drawing on anti-racist research in Canada, Gormley (2008) argues that not only have epistemologies and ontologies been dominated by European academic tradition, but specifically by White, male ways of understanding the world. According to anti-racist perspectives, the values placed on phenomena (axiology) in research are not absolute or objective, but context specific and dependent on the person who is making the judgements. Much research relies on established, occidental epistemologies which are often racially biased (Scheurich and Young, 1997, cited in Gormley, 2005). Likewise, research tends to impose cultural constructions of "the other" rather than employing indigenous or minority group theories and methodologies (Stanfield II, 1994, cited in Gormley, 2005). Thus, "…studying a minoritised group using the epistemologies, ontologies, and axiologies of the dominant class is a racist research etc., even if the authors of the study had the noblest of intentions towards their participants" (Gormley: 2005:103). Such research is not only ideologically driven and culturally specific, but is often simultaneously presented as universal, neutral and objective (Wahab, 2005:32).

Anti-racist research critically engages with structures and practices of racialised domination, exposing hegemonies and subverting conventional research to enable greater autonomy and decolonise representations (Wahab, 2005). This process must begin by decolonising ways of thinking and knowledge production, in line with Mignolo's concept of "delinking" (2007) from the hegemony of epistemologies rooted in modernity, and Ngugi wa Thiong'O's concept of decolonising the mind (1986).

Decolonising theories, epistemologies and methodological approaches is central to the work of many Latin American liberation philosophers and sociologists such as Boaventura de Sousa Santos, Fals Borda, Mignolo and Maldonado. Drawing on the work of post-colonial pioneers Aimé Césaire and Frantz Fanon, Maldonado (2008; 2011) talks of the "decolonial turn" central to decolonial or "Césairean" social sciences and the importance of questioning *what colonisation actually is* and expressing doubt or scepticism about the colonial project which has long been presented as a positive story. It must involve a change of "attitude" about the very notion of knowledge which reflects on the epistemological and ontological foundations upon which our sciences are built and in this regard be inspired by indigenous, *Cimarron* and black revolutionary writings and theories.

Likewise, Sefa Dei (2005) discusses how the stories told throughout academic research have been based on the epistemologies of the colonisers, and thus tell a biased history of the world. Even when researchers attempt to adopt a decolonial approach we find ourselves trapped in a cycle, reproducing occidental epistemologies in order to justify our use of non-occidental epistemologies. Researchers can challenge the occidental hegemony of knowledge by using sources in native languages and drawing from local philosophies to construct research problems and questions (Gormley, 2005). In my own research I attempted to use primarily Colombian, Latin American, African, Afro-Caribbean

and African American literature on race, ethnicity, reparations and coloniality. However, while Gormley's important observation highlights the power inequalities between occidental (European and North American) academic tradition, and Southern/Non-Western/local subjects of research, power relations and racial hierarchies also exist within the Southern contexts themselves.

As I embarked on this research before arriving in Colombia, I read a wide body of literature on race and ethnicity in Latin America, much of it extremely useful for my understanding of the context. Yet, the vast majority of this literature was written by English speaking, Western, white researchers. Upon arriving in Colombia, I began to engage with more writers from the region writing on social and historic dimensions of race in the country, yet much of this local literature, was also written by white/European-descendant academics, including the literature on decoloniality. It was through exploration and engagement with the movement that I was able to engage with a wider body of literature on collective rights, reparations and de-coloniality by Afro-descendant writers and activists central to my understanding of the research problem.

Decolonising research relationships

A decolonial approach to research must also recognise and deconstruct the colonial power relations so often central to research processes. The trend of European and occidental academics travelling abroad to study the "other" has its roots in colonialism when European governments viewed collecting information on colonised peoples, as well as the flora and fauna of their lands as an essential part of colonisation and control. This history is particularly evident in the discipline of anthropology but the colonial roots of research "on" non-European peoples and lands are evident across the social and natural sciences. Tuhiwai Smith (2012) identifies and denounces the colonial power structures that are still a part of research carried out with indigenous peoples in New Zealand and around the world.

Local peoples or ethnic minorities, the "subjects" of research, are not merely raw data subjects for the researcher to analyse, but the creators of knowledge, the expert theorists of their own realities. Their ways of viewing and understanding the world must be central to the research (Sefa Dei, 2005). This perspective is what has guided not only my research methodology, but the very focus of the thesis which analyses how Afro-descendant activists are themselves constructing their own ways of understanding and interpreting TJ, reparations and collective rights.

One of the key challenges of anti-racist research has been to deconstruct the myth of the unquestioned authority of the researcher (Wahab, 2005), the idea that the researcher is the expert; that (s)he (usually he), having studied classic occidental theories and epistemologies, can insert themselves into a community, extract information and make expert analysis and conclusions on the phenomena under study. The methods employed in anti-racist research set out to dismantle this established power relation and value the knowledge and expertise of the researched and not just the researcher.

The origins and racial/ethnic identity of the researcher are also relevant here. As CRT researchers point out, "white privilege" plays a role in research dynamics and power relations between the researcher and the "researched," and white researchers must be aware of the position of privilege that they occupy in research carried out with ethnic minorities linked to existing power relations, as well as their own preconceptions (Parker and Lynn, 2009). Power relations are not only affected by race, but other markers as well such as gender, age, nationality and social class.

Osler (1997) acknowledges in her research with black teachers that some of her interviewees told her it was important to them that she was a black woman (cited in Ferreira, 2011). Ferreira also recognises that being black affected relationship dynamics with both black and white teachers, making accessing information with black teachers easier than with white teachers (2011: Loc.1683). As an Afro-descendant person and member of the international black and reparation movement with a proximity to the people I researched with, having spent several years working along-side and supporting their work, I was able to build relationships of trust.

Embracing Subjectivity

Challenging traditional research epistemologies and ontologies also involves questioning the notion and commitment to objectivity in research. Traditional sociological and social science research has often attempted to take positivist epistemological scientific approaches, characterised as objective and value-free, favouring quantitative and "rigorous" research methods over more qualitative methods which relied on the interpretations of the researcher or were more subjective and context specific.

In quantitative research, researchers often claim to operate in a value-free and unbiased way, whereas qualitative researchers are seen as acknowledging their values and biases in the research process. Yet, this is a false dichotomy as neither quantitative nor qualitative research is ever really objective as it is shaped by power dynamics and researchers' own racial, class and gendered identities, epistemological, ontological and methodological beliefs and preconceptions (see Gormley, 2005; Wahab, 2005).

Acknowledging one's role, identity and personal experience in the research process is thus a more honest and realistic approach. Challenging the dominant epistemologies, ontologies and axiologies implies recognising subjectivity in research; what constitutes knowledge, how we perceive reality, and how we place value judgements on social phenomena all depend on our own position and identities as researchers (Gormley, 2005). As they aim to affect social change, or decolonise reality, many anti-racist and decolonial scholars make no claims to objectivity, but fully recognise their subjectivity in the research process and their political/social interests. Anti-racism research in particular, has drawn from interpretivist strands of social science and Marxist and feminist approaches

which emphasise "the human actors and their interpretive and negotiating capacities at the centre of analysis" (Jamal, 2005:235), placing greater emphasis on the researcher and their subjectivity.

These schools make an effort to centre the voices of the most marginalised, challenge dominant discourses, and recognise the subjectivity of both researcher and research subjects through methodological choices. Such research obliges the researcher to resist colonising relationships, raising questions about *who* is speaking and on *what* and on the social and political contexts of knowledge production and sources of data (Sefa Dei, 2005:13).

My identity and subjectivity linked to my own racialised and gendered experience affected the research choices I made and how I understood and interpreted the research data collected. I approached the research process with an agenda: to engage in a discussion on the issues of coloniality and racial injustice and to contribute to the process of challenging and dismantling this paradigm. I do not feel that this personal agenda in anyway affects the legitimacy of my research; on the contrary it places it firmly in the camp of activist research (Hale, 2006).

Decolonising realities

As Marx wrote: "the philosophers have only interpreted the world in various ways: the point is to change it" (Marx, 1977:423). A commitment to decolonial research does not just mean a change in epistemologies and research relationships, but a "decolonial turn" in one's understanding of the very purpose of research. Knowledge production on coloniality and decoloniality must be aimed at decolonising power structures and relations; in this case to decolonise TJ and contribute to the struggle for decolonial reparations. While Cartesian philosophy and science had the purpose of consolidating the colonial project of modernity, Césairean philosophy and science or decolonial research should try to consolidate decolonisation project (Maldonado, 2008; 2011).

In her work with Afro-descendant communities in Colombia, Botero has developed a Collective Action Research approach, closely linked to Participatory Action Research. This approach involves collectively building research methodologies, knowledge, using diverse epistemologies, memory and narrative together with research participants (Botero, 2012). It aims to collectively build autonomous thinking and create alternatives to modernity and development models, contributing to change together with communities. Through my research process and the contributions and experiences of the Afro-descendant activist participants I aim to demonstrate how they are deconstructing oppressive ideologies through a decolonial approach to TJ.

II. Research Design

The collaborative development of the research questions

This research has been a long time in the making, largely because at the beginning of the research process I felt uncomfortable about my original approach and the way I had developed my research question. I initially took a deductive approach, engaging with existing theory and academic research into Afro-descendant rights in urban contexts in Colombia and developing from this theory a research question around education. However, upon arrival in Colombia to carry out field research as I began to work alongside the organisations that later become my main research partners, Proceso de Comunidades Negras (PCN) and The National Afro-Colombian Peace Council (CONPA), I took the decision to change the direction of my research.

PCN is a network of over 100 ethno-territorial organisations working for the rights of Afro-descendant communities around the country. It was formed in 1991 shortly after the adoption of the new Constitution with the aim of enabling participation in the elaboration and adoption of Law 70 of 1993 on Afro-descendant territorial and cultural rights. Members of PCN include community-based organisations and *consejos comunitarios* (community councils) subjects of collective land titles under Law 70 of 1993. PCN is divided into regional Palenques[15] and has an Assembly, a National Council of Palenques and a Regional Coordination Team which includes representatives of women, young people and older people. Since its origins PCN has been committed to the defence of the rights of Afro-descendants in Colombia in the context of the armed conflict but also related to cultural identity, the defence of territory, historical justice and the struggle against racism. PCN works to strengthen local organisational processes providing training and capacity building and training new generations of Afro-descendant leaders through leadership schools. The organisation has developed and promoted an own autonomous vision of development and human rights which, based on cultural traditions and cosmovisions of Afro-descendant people, is central to demands for reparations.

CONPA is an inter-organisational platform that was formed in 2014 as a joint response to the grave and disproportionate impacts of the armed conflict in Afro-descendant communities and the need for participation of Afro-descendant civil society in the peace negotiations between the FARC-EP and the national government. It is made up of The Association of Displaced Afro-descendants (AFRODES)[16],

[15] The term Palenque refers to Afro-descendent communities of resistance that were founded during the colonial period by groups of Africans who managed to escape from enslavement and form free communities. Many of the palenques were located in remote areas of the country. The most well-known is Palenque de San Basilio located outside of Cartagena, but there are Palenque communities all over the country.

[16] The organisation Afrodes was founded with a view to addressing the issue and was one of the first to put forward racialised analyses of the dynamic of displacement in Colombia.

the National Conference of Afro-Colombian Organisations (CNOA), The National Afro-Colombian Authority (ANAFRO), The Afro-Colombian Pastoral (CEPAC), The Association of Community Councils of Northern Cauca (ACONC), the National Network of Afro-Colombian Women (CAMBIRI) and PCN. CONPA, together with the indigenous organisations that form the Ethnic Commission, participated in the peace talks in La Habana and contributed to the inclusion of the Ethnic Chapter in the Final Peace agreement. They have since played an important role in the implementation of the peace agreement ensuring an ethno-racial focus across the TJ mechanisms and measures.

After several months working alongside activists from PCN and later CONPA, beginning in August 2015, assisting national and local meetings, workshops, conferences and internal discussions I realised that the original research question I had devised did not recognise the reality of the discourses, struggles or priorities of the Afro-descendant community organisations I was now working with. Further, I realised that the issues I was planning to study had already been widely written about by other Afro-descendant academics and that my research would not necessarily be a valuable or new contribution to the Afro-Colombia struggle. In line with my decolonial approach it was important to me to focus on an issue that would produce analyses that could support and contribute to the struggle for racial justice.

In summer 2016 I was invited to accompany PCN, together with CNOA and the human rights NGO Consultoría para los Derechos Humanos y Desplazamiento (CODHES)[17] in the organisation of an international conference on reparation. We carried out numerous internal meetings to discuss the context, needs and priorities for the reparation agenda in Colombia and identify a strategy for strengthening links with the international reparation movement through the convening of an international conference. The Conference, held in March 2017, aimed to bridge conversations and activism around the right to collective reparations for Afro-descendant communities in the context of the armed conflict and norms such as Constitutional Court order 005 of 2009 and Decree Law 4635, and the wider conversation on historic reparations for slavery and racial injustice. Participants included academic-activists working on reparations and racial justice in Colombia and internationally, and together we collectively identified a set of priorities and strategies to advance in the reparation agenda (discussed in detail in Chapter 4).

[17] CODHES is one of Colombia's most well-known and respected human rights organisations that has long been an important partner to the Afro-descendant movement in particular in accompanying struggles for human rights, ethno-territorial rights and reparations in the context of the humanitarian crisis, the armed conflict and the implementation of the Peace Agreement. At the time of writing and during much of the research process I held the role of regional coordinator in Buenaventura for CODHES, which also enabled me to further develop relationships and accompaniment processes with Community Councils in Buenaventura.

This process laid the foundations for the present research. Among the conclusions of the event, outlined in the outcome document (Ojulari et al, 2018) was the need to carry out research into the issue of historical reparation in Colombia and convene a national reparation commission. The research questions in this thesis aim to contribute directly to this process.

Selection of a Case Study

In order to analyse reparations processes within TJ, as well as working with PCN and CONPA at the national level, it was necessary to identify a particular case study that could add rich experience and provide conclusions that would be generally applicable to the wider issue. Within the wide network of consejos comunitarios that are part of the PCN, I identified a collective of Consejos Comunitarios and urban communities in Buenaventura as the main case study, with whom I was already working in my capacity as regional coordinator of CODHES in Buenaventura.

Buenaventura was chosen primarily because it represents one of the territories which clearly exemplifies the paradigm of coloniality that this thesis is concerned with. It is a majority Afro-descendant territory in which neoliberal and capitalist interests, white supremacy and violence converge resulting in it being one of the territories most affected by violence and armed conflict and in which Afro-descendant communities have, as is argued suffered grave CAH, genocide and ethnic cleansing, and systematic violation of their ethno-territorial rights. This experience has in turn led to the consolidation of important and widely recognised resistance processes and collective mobilising in which the revindication of ethno-territorial rights and reparation has been central.

In this sense Buenaventura represents an important example of an Afro-descendant reparation process with its roots in decades of grass roots social mobilisation that has over the past ten years been consolidated into an "own vision" of decolonial reparation. In 2011 PCN, la Fundación para el Desarrollo de la Mujer de Buenaventura y la Costa Pacífica –FUNDEMUJER, 17 Community Councils, inhabitants of communes 3,4,5,7 and 12 of urban Buenaventura and other social organisations in Buenaventura elaborated an autonomous proposal for collective reparations which was rooted in the long-standing processes of resistance of the communities of Buenaventura to historical and continued injustice. It was constructed through a participatory process facilitated by the Comisión Nacional de Reparación y Reconciliación -CNRR-, The Mission for the Peace Process of the OAS (Mapp/OEA), the International Organisation of Migration (IOM) and The University of the Pacific (PCN et al 2011).

PCN and 11 of the consejos comunitarios that participated in the autonomous proposal then embarked on a collective reparations demand in the framework of Decree Law 4635 of 2011 transforming the

autonomous proposal into an administrative reparation process with the State's Victims Unit. Each of the 11 Community Councils made declarations in accordance with the normative framework of DL 4634 and were included and registered as ethnic collective subjects for reparations.[18] As shall be discussed in Chapter 7, in 2015 one of the Community Councils of Buenaventura, Yurumanguí embarked on a land restitution process to reclaim land which was in the hands of a mining comply with colonial roots. The case was won in 2018 converting the community of Yurumanguí in the second black community to win such a case in the country.

In the context of the implementation of the Peace Agreement, the consejos comunitarios of Buenaventura have continued to organise, participating in mechanisms and decision making around truth, justice, reparation and non-repetition and specific measures for structural change within their territories centred particularly on the guarantees and safeguards of the Ethnic Chapter.

Thus, the case of Buenaventura represents four important moments in the demand for decolonial reparations: 1) an autonomous process rooted in own visions of ethno-territorial rights and liberation; 2) an institutional collective reparation process within the framework of TJ legislation in dialogue with the state which has sought to maintain the autonomous decolonial vision of reparation; 3) a specific demand for restitution of ancestral territories against a colonising actor; and 4) mobilisation for the implementation of the Ethnic Chapter as a fundamental guarantee of transformative reparation and GNR of violence in their territories. As shall be explored throughout the thesis, all of these moments demonstrate the decolonial character of the Afro-Colombian struggle.

As discussed above, this thesis focuses mainly on the social mobilisation processes of PCN and some other organisations, and activists that have taken part in similar and/or joint advocacy processes. The focus on ethno-territorial rights, identity and cultural rights and justice for human rights abuses suffered during the armed conflict in relation to reparations demands is largely a reflection of the focuses of struggle carried out by this organisation mainly in the Pacific region of the country but also in areas of the Caribbean, Antioquia, and Bogotá. While the thesis does not aim to make sweeping generalisations about the experiences of black communities or the social mobilisation priorities and demands, many of those highlighted in the PCN and Buenaventura cases reflect the struggles of other organisations around the country.

[18] The Consejos Comunitarios in the collective demand are C.C Rio Yurumanguí; C.C Rio Raposo; C.C Plata Bahía Malaga; C.C Río Cajambre; C.C Mayor Río Anchicayá; C.C Alto y Medio Río Dagua; C.C Bajo Calima; C.C Río Mayorquín; C.C Rio Naya; C.C Córdoba, San Cipriano y Santa Helena and C.C La Gloria. There are two further subjects, the C.C La Esperanza and the Association of Territorios Ganados al Mar from urban Buenaventura who, as shall be discussed below, have not yet been included in the UARIV route for collective reparation.

Qualitative and participatory methods

Decolonial and anti-racist approaches to research tend to favour qualitative methods of research such as interviews, narrative and ethnography over quantitative methods. Such methods are flexible, allowing for greater generation of ideas, are interested in subjects' points of view and allow them to explore around the issues of discussion (Bryman, 2009). Beyond quantitative data on racialised experiences lay the grey realities of experiences of racism, which are far better revealed by qualitative ethnographic study (Jamal, 2005). As an interpretivist strand of sociological research, scholars working on the sociology of human rights also tend to employ qualitative methods such as interviews with rights holders and duty bearers and document analysis, legislation and policy (Hynes et al, 2010). This research uses qualitative, ethnographic research methods including in-depth interviews, participatory workshops, participation in meetings, forums, and conferences to explore activists' experiences and understandings of TJ and processes of demanding reparations. This activist ethnography of human rights and TJ explores how peoples' subjective experiences are translated into reparations and rights narratives.

Linked to the issue of subjectivity, CRT research centres the voices of minorities who are in a unique position to talk about racism subjectively and from personal and collective experience. The experiential knowledge of people of colour is legitimate, appropriate, and critical to understanding, analysing, and teaching about racial subordination (Solórzano and Yosso, 2009). Thus, CRT often employs subjective methods such as life histories, biographies, scenarios, parables, testimonies, chronicles, and narratives to amplify minority voices (Solórzano and Yosso, 2009). In the context of legal studies, naming one's own reality through "counterstorytelling" (Delgado and Stefancic, 2001) enables one to contest assumptions around the universality of law, can represent a kind of self-preservation or self-healing process for marginalised groups and helps to overcome ethnocentrism in research (see Ladson-Billings and Tate IV, 1995). The present research draws on CRT methodologies by prioritising the voices and stories of Afro-descendant activists and certainly draws on this unique minority voice theory.

Data Collection and Analysis Methods

There are three main data sets analysed in this thesis: [19]

1) **Discourse analysis of interviews, focus groups and workshops with Afro-descendant activists -** The first set of data is a discourse analysis of the transcripts from in-depth

[19] A full list of the interview and meeting dates, times and locations as well as documents analysed can be found in the Appendix.

interviews with seven activists from PCN and CONPA working on the issue of reparations. Interviewees include Carlos Rosero, founding member of PCN and member of CONPA, who has been leading the process for reparations within the organisation; Helmer Quiñones, previously a member of the organisation Afrodes and current member of CONPA, Marie Cruz Renteria member of the Consejo Comunitario of Yurumanguí and representative on issues of women and reparation at Palenque Congal, the Buenaventura branch of PCN; Naka Mandinga, member of the Consejo Comunitario of Yurumanguí and elder and founding member of PCN; Charo Mina Rojas member of PCN and CONPA, who played a key role in the peace negations with the FARC and the adoption of the Ethnic Chapter; Diego Grueso, previously a member of Afrodes and currently an official at the JEP; and Francia Marquez Mina, at the time of interview a member of the Consejo Comunitario La Toma in Northern Cauca, the Mobilisation of Afrodescendant Women for the Care of Life with the and Ancestral Territory and PCN. At the time of final write up of this thesis, Francia had additionally become a candidate in the presidential pre consultation process in representation of the Soy Porque Somos movement as part of the Pacto Histórico collective, in advance of the May 2022 presidential elections

I also carried out focus groups with community members of the 11 consejos comunitarios of Buenaventura and a workshop with members of the Association of Territorios Ganados al Mar in Buenaventura, both associated with PCN Palenque Congal, to gain a detailed analysis of how these activists had intervened and contributed to the construction of TJ norms in Colombia through advocacy processes, and how they understand and operationalise platforms of TJ, reparations and human rights.

2) **Discourse analysis of Afro-descendant advocacy reports –** In order to analyse advocacy initiatives around reparation and Afro-descendant rights I carried out a discourse analysis of shadow reports submitted by three organisations, PCN, Afrodes and CNOA and partners to the UN Committee on the Elimination of Racial Discrimination (CERD). I chose this data set because the information presented is a consolidation of the hundreds of reports written by the organisations over the last twenty years. As it was beyond the scope of this thesis to study all these reports, the CERD shadow reports, represent a manageable alternative and indication of the main arguments made. There are six reports in total, two from each of the last three CERD sessions in which Colombia was examined.[20]

[20] Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CERD

Table 2 - Discourse analysis data: shadow reports to the CERD

Report Title	Authors	Date	CERD Session	Data Set ID
Informe alternativo al decimocuarto informe presentado por el Estado colombiano al Comité para la Eliminación de la Discriminación Racial	Observatory on Racial Discrimination - ODR (Members: Programa de Justicia Global y Derechos Humanos de la Universidad de Los Andes; PCN and the Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia)) and Comisión Colombiana de Juristas	2009	75th Session	R1
Los Derechos Humanos en los Afrocolombianos en Situación de Desplazamiento Forzado	AFRODES	2009	75th Session	R2
Structural Discrimination in Colombia: Differential Impact of Mining on the Rights of Afro-descendant people	Association of Community Councils in the North of Cauca (ACONC), Franciscan Family of Colombia and Franciscans International	2015	87th Session	R3
Colombia: el flagrante incumplimiento y sistemática violación de ICERD	PCN, CNOA, Movimiento Nacional Cimarrón, Asociación Casa Cultural El Chontaduro, and the International Institute on Race, Equality and Human Rights.	2015	87th Session	R4
Incumplimiento sostenido del Estado de Colombia del ICERD y sus Observaciones Finales	AFRODES, CNOA, Red Nacional de Mujeres Kambirí, Foro Interétnico Solidaridad Chocó, (FISCH) and Colectivo de Justicia Racial (Justiciar)	2019	100th Session	R5
Violations of Afro-Colombian Women's Human Rights	PCN, MADRE, Human Rights and Gender Justice (HRGJ) Clinic of Cuny School of Law, Co-Sponsored by: Asociación de Mujeres Afrodescendientes del Norte del Cauca (ASOM)	2019	100th Session	R6

These reports are also complemented by references from some other key reports that illustrate the issues addressed by Afro-descendant organisations in their advocacy processes including *The Autonomous Proposal for Collective Reparations* developed by Proceso de Comunidades Negras (PCN et al, 2011) and *Black women as a target of war* (Mina and Estupiñan, 2019).

3) Official state documents, norms and jurisprudence - Finally, I analysed TJ norms and jurisprudence from the Colombian Constitutional Court from 2000 to 2019, including *Constitutional Court order 005 of 2009* on Afro-descendant victims of forced displacement, *Decree Law 3645 of 2011,* the Ethnic Chapter included in the Final Peace Agreement between the FARC-EP and the National Government signed in November 2016, The Tribunal Superior de Distrito Judicial de Cali

(2017) judgement on the restitution of lands in Yurumanguí, and public declarations made by political leaders on Afro-descendant rights often in the context of the annual commemoration of the abolition of slavery on 21st May made between 2000 and 2019.

I used data analysis tool NVIVO to carry out the discourse analysis on the data sets. Using the theoretical framework as a guide for analysis I codified texts of transcripts and key documents according to the four categories of analysis:

1. Reparation as both an historic and contemporary issue
2. Colonial ideologies as underpinning contemporary crimes in the context of armed conflict
3. Transitional Justice as a framework and language for reparation
4. People Centred Human Rights approach to transitional justice.[21]

III. Research Considerations

Reliability and Validity

The notions of reliability (the extent to which a study is free from random error) and validity (the extent to which a study measures what it claims to measure) have been central to discussions on social science research since its origins (Bryman, 2008; Berg, 2001; Harris et al, 2002). As discussed above, to position itself as legitimate scientific enquiry early sociology placed considerable emphasis on adopting positivist, objective research approaches that could withstand scrutiny of their reliability and validity. Traditionally, quantitative methods were considered as being objective approaches to research and as such as having higher validity and reliability, while qualitative methods tend to rely more on the interpretations of the researcher.

The use of semi-structured as opposed to unstructured interviews can help to increase reliability and validity (Bryman, 2008). However, taking into account the above discussion on objectivity and subjectivity I am also wary of making sweeping claims to reliability and validity in this thesis. I acknowledge my own personal agenda and interests in this research process and further note that the conclusions I make may also be influenced by my personal experiences as a person of African descent in Colombia. In this sense the project aligns with my interests in justice for Afro-descendant peoples and while this guided my research, I have used reliable methods that interrogated and validated these assumptions.

[21] A table of the categories of analysis and codes used can be found in the appendix.

Ethical Issues

There are several ethical questions that should be considered for social research including obtaining informed consent and respecting participant privacy (see Ruane, 2005; Berg, 2001). This is particularly important when working on sensitive or security related issues or with vulnerable groups. Prior to the interviews and workshops, I briefed all participants on the focus and aims of my research as well as my own personal background. I also provided participants with a consent form on which they could agree or not for the interviews to be recorded, for the information to be cited in the thesis and a number of other criteria.

Tuhiwai Smith talks about some of the methodological principles that are being developed from indigenous experiences for how researchers can ensure that research with indigenous peoples is more respectful, ethical, sympathetic and useful (2012:9)**.** These draw on responses by indigenous peoples who have openly challenged researchers about racist practices and attitudes, ethnocentric assumptions and exploitative research. She suggests a number of questions to consider when embarking on a research process including: *Whose research is it? Who owns it? Whose interest does it serve? Who will benefit from it? Who has designed its questions and framed its scope? Who will carry it out? Who will write it up? How will the results be disseminated?* (2012:10). These questions are relevant for research with all oppressed groups and essential for a research process committed to decolonising epistemologies, research relationships and realities. As such, my ethical framework focuses on responding to these questions in as open and as honest manner as possible.

Whose research is it? Who owns it?

The questions of ownership in research relate to the very question of ownership of ideas and knowledge. This thesis will become part of the body of research affiliated to the Institute of Commonwealth Studies, University of London, however, the content of the research, the knowledge and ideas produced belong to everyone who contributed to the research process. The acknowledgements at the beginning of the written work aim to make this extremely clear. I aim to publish a summary of the thesis in Spanish with PCN to contribute to their body of work on Afro-descendant human rights, reparations and justice as part of the ever-growing base of knowledge produced through the organisation's processes and struggles.

Whose interest does it serve? And who will benefit from it?

As discussed above, the principal aim of this research is to serve the interests of Afro-descendant peoples in Colombia in the struggle for reparations and justice. It aims to name, reveal, denounce and transform racial injustices, both through the research process and methodologies, and through the analysis and conclusions which should be used as tools for advocacy to make change. Further it will

contribute to the body of knowledge and available information about the human rights of Afro-descendant people, not just in Colombia, but internationally and particularly in the context of the International Decade for People of African Descent and the global struggle for reparation using new strategies within institution and autonomous human rights and TJ frameworks.

Who has designed its questions and framed its scope?

As discussed above, I designed the specific research questions, but they grew out of questions posed by colleagues from PCN, CODHES and CNOA in preparation for the International Conference of Reparations (Ojulari, 2018). In all of the conversations I had with community members and activists before formulating the research questions, the issue of historic reparations was of great concern.

Who will carry it out? Who will write it up?

The research and writing up was carried out by myself but throughout the research process including data collection, analysis and write-up I engaged in constant feedback and discussions with my research partners about the analyses and findings that I was working on. I also held a final meeting in September 2020, in which I socialised and discussed the analyses and conclusions made with research participants inviting feedback, discussion and debate about whether these findings truly represent their subjective feelings and experiences on the issues. Much of the content of the analysis involves direct narrative from the interviews carried out with the research partners in order to ensure that their subjective voices are heard and not distorted by my own perceptions of what they have said.

How will the results be disseminated?

Dissemination is not a one-off reporting back task, and sharing knowledge, and not just information, is a long-term commitment (Tuhiwai Smith, 2012: loc 554). As well as publishing the research in Spanish, I will continue to accompany the activists involved in this process in particular through a proposed initiative to design and implement a diploma or course on historic reparations for members of the community in collaboration with PCN as well as contributing to the convening of a National Reparation Commission. The knowledge consolidated in this research process will form a central part of that work, and I hope it will continue to grow and explore other related areas through relations with community organisations and processes. The end of the research process for this thesis is merely the beginning of a long-term process of decolonial knowledge construction and PCHR towards reparation and justice and in partnerships with Afro-descendant communities in Colombia and beyond.

CHAPTER 2: IHRL AND TRANSITIONAL JUSTICE AS A FRAMEWORK FOR REPARATION FOR SLAVERY

Reparation for victims of human rights violations, crimes against humanity (CAH), war crimes, genocide, and ethnic cleansing, those crimes which the UN has collectively termed "atrocity crimes" (UN, 2014) is a fundamental principle of International Law. Over the past 60 years, largely through the evolution of TJ, the principle of reparations has developed into a right for both individual and collective victims of human rights violations to receive redress in material and symbolic forms, for damages suffered at the hands of states and third parties.

However, reparations have largely been limited to relatively recent events and contexts in which direct victims, or their immediate families are still alive. Further, in line with general principles on State responsibility the right to reparations has been limited to crimes for which States had international legal responsibility at the time of commission. As such, demands for reparation for slavery are often met with the response that enslavement was not illegal at the time (McDougall, 2002).

Over the past ten years, and particularly in the last five years in the framework of the International Decade for People of African Descent, however, Afro-descendant civil society and human rights mechanisms on Afro-descendant rights and racism and discrimination have increasingly put the issue of reparation on the IHRL agenda.

This chapter explores this development beginning with an overview of the evolution of the right to reparations in IHL, IHRL and ICL through treaties, declarations, and UN treaty body and regional body jurisprudence. It identifies key standards, principles and issues concerning reparation such as the identification of victims, individual and collective reparations measures, state responsibility, causality and statutory limitations. The last part of the chapter explores the growing normative framework on the rights of Afro-descendant people(s) showing how this has begun to incorporate provisions on reparation for the enslavement and colonial crimes.

I. Early origins of a right to reparation in International Law

It is a general rule in international law (IL) that the violation of a law creates an obligation for some form of reparation which aims to eliminate the consequences of the violation and restore the situation to that which would exist had the act not occurred (Gillard, 2003:531).

In line with the state-to-state origins of IL, the most commonly cited precedent for reparation for internationally wrongful acts is that established in *Chorzow* (1927) concerning a dispute between Poland and Germany following Poland's breech of a bipartite agreement made between the two counties following the First World War. In its ruling, the Permanent Court of International Justice, the predecessor of the International Court of Justice (ICJ), concluded that as a general principle of IL "any breach of engagement involves an obligation to make reparation in an adequate form…"[22] It states that:

> …reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have excited if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear...such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[23]

This established the principle of *restitutio in integrum* (restoring a situation to what it would have been if the violation or breach had not occurred) as the central principle of reparation. Since *Chorzow*, the ICJ has widely applied the restitution approach to cases (Watkins, 2009).

This state-to-state approach prevailed over a victim-centred approach in early IL mainly because States are the direct subjects of IL, while individuals claim their rights via their States (Gillard, 2003:536-7). The events of WWII, however, led to the development of international human rights law and by the 1950s IL had seen State-to-individual and State-to-society reparations experiences.[24] As IHRL, IHL and ICL[25] have developed over the past 70 years, treaty law, jurisprudence and customary law have increasingly affirmed the rights of individuals against States, recognising individuals as a subject of IL (Evans, 2010.23), and as such increasingly recognised the State obligation to make reparations to individuals or collectives. Reparation can now be broadly understood as:

---

[22] Factory at Chorzow Case, (Germany v. Poland) Jurisdiction, 1927, P.C. IJ, Ser.A, No.9, p.21.
[23] *Ibid.*
[24] A/74/321 (21 August 2019): para.30.
[25] While and in-depth analysis of the normative framework and jurisprudence of international criminal law (ICL) is beyond the scope of this thesis it is important to note that this body of international law has also developed important standards on reparations. The 1998 Rome Statute of the International Criminal Court (ICC) required the Court to "…establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" (article 75) and further provides for the establishment of a "trust fund" for the benefit of victims and their families (article 79).

> …as a set of measures aimed at restoring or guaranteeing the rights of victims and promoting reforms that prevent the repetition of victimisations. These measures have the following objectives: to help the victims to improve their situation, recognising their rights and dignity as persons and showing solidarity with the victims and a way to re-establish their trust in society and institutions (Beristain, 2009).

i. Reparations in International humanitarian law

While the right to reparation has been mainly developed in IHRL as shall be discussed below, some of the earliest references to reparation can be found in IHL, the body of law that governs relations between states and treatment of civilians in the context of armed conflicts. Both the Hague Convention (IV) of 1907 on the Laws and Customs of War on Land (article 3) and Additional Protocol I to the 1949 Geneva Conventions on the protection of victims in International Armed Conflict[26] (article 91) create provisions for compensation to be paid by parties to conflicts whose armed forces violate the IHL provisions they contain. State responsibility in IHL may also be incurred by omission when due diligence to prevent violations from taking place has not been demonstrated or repression of the acts has not been ensured.[27]

Despite this, the notion of a right to reparation under IHL remains highly contested. The Geneva Conventions do not explicitly mention compensation or other forms of reparation and there have been few instances where armed groups have actually made reparation for violations of IHL (Gillard, 2003:535). Further, the IHL norms that do address compensation refer only to International Armed Conflicts (IACs) and not to Non-international armed conflicts (NIACs) and Additional Protocol II of 1977 relating to the protection of victims in NIACs makes no reference to compensation or other forms of reparation and remedy.

Nevertheless, there are a growing number of cases in which non state actors in NIACs have been required to make some kind of reparation. This is the case with the provisions contained in Chapter 5 of the Peace Agreement between the FARC-EP and the national government in Colombia which includes reparations measures to be adhered to by the FARC (Final Peace Agreement, 2016).

Further, the International Commission of the Red Cross (ICRC) affirms that State responsibility for reparations has become a customary norm, both in IACs and NIACs (Henckaerts and Doswald-Beck, 2005: 537-550 cited in Evans, 2010), and makes reference not only to compensation but to reparation in its wider sense. The ICRC Customary Law Study states that "A State responsible for violations of

[26] It is important to note that Additional Protocol 1 refers only to IACs and not to NIACs.
[27] 1977 Protocol Additional I to the Geneva Conventions, ICRC Commentary to article 91, paras. 3645-3661, www.icrc.org 85 Ibid, para 3660.

international humanitarian law is required to make full reparation for the loss or injury caused," (ICRC, 2005: Rule 150).

As well as citing general International Law provisions such as the ILC Draft Articles which shall be discussed below, the ICRC commentary makes references to specific IHL cases such as The Agreement between the Government of Canada and the National Association of Japanese Canadians (Japanese-Canadian Redress Agreement) adopted in 1988 which included an apology for, and acknowledgement of violations of IHL (cited in ICRC, 2005: rule 150), and the UN Compensation Commission (UNCC) which reviews claims for compensation for direct loss and damage arising "as a result of [Iraq's] unlawful invasion and occupation of Kuwait" and has included some awards for violations of IHL suffered by individuals (cited in ICRC, Rule 150).

ii. Reparation in international and regional human rights systems

Nevertheless, the main IL source for the right to reparations today can be found in international and regional human rights norms. Provisions on remedies and reparations are a key feature in all IHRL instruments and for rights to have meaning there must be adequate and effective remedies available for redress.[28]

The origins of reparations in IHRL stem from the 1948 Universal Declaration of Human Rights (UDHR) which states that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (article 8). The 1966 International Covenant on Civil and Political Rights (ICCPR) enshrines this principle as a legally binding norm stating: "any person whose rights or freedoms as herein recognised are violated shall have an effective remedy," (article 2 (3a)). In addition, ICCPR articles 9 (5) and 14 (6) provide a right to compensation for unlawful arrest, detention and conviction.

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires States Parties to ensure "effective protection and remedies" and access to "just and adequate reparation or satisfaction" for violations of the rights contained (article 6). As the UN Special Rapporteur on Racism (UNSRR) has asserted, effective protection from racial discrimination must include reparations and guarantees on non-recurrence.[29] Other instruments that include measures for redress and reparations include the Convention against Torture (CAT) (article 14), the Convention on the Rights of the Child (CRC) (article 39) and the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (para. 4).

[28] *Ibid:* para.35.
[29] *Ibid*: para.28

Perhaps the most advanced recognition of the right to reparation in a HR treaty can be found in the UN 2006 Convention on Enforced Disappearance which asserts victims'[30] rights to truth, reparation and "prompt, fair and adequate compensation" (article 24.4). The Convention draws on the then recently adopted 2005 UN Basic Guiding Principles on Reparations (BGPs), discussed below, identifying the components of reparation as "restitution, rehabilitation, satisfaction and guarantees of non-repetition" (article 24.5).

While most IHRL instruments (other than the Enforced Disappearances Convention) are silent on specific principles of reparations, human rights monitoring mechanisms or treaty bodies (UNTBs) have developed important principles. Human Rights Committee General Comment No. 31 on Nature of the General Legal Obligation Imposed on States Parties to the Covenant, makes the link between the concepts of "remedy" and "reparation" stating that article 2.3 of the ICCPR requires States to "make reparations to individuals whose Covenant rights have been violated," in order to provide an effective remedy.[31]

UNTBs have further developed the right to reparation through individual complaints procedures (ICPs). The UNTBs for the above-mentioned treaties have the competence to receive individual complaints from, or on behalf of individuals or groups claiming to be victims of a violation of any of the rights contained, and to recommend redress and reparations in cases where States have ratified the treaties in question and, where necessary made declarations or adopted additional protocols accepting jurisdiction for individual complaints.[32] Thus, individuals have acquired increasingly more means to defend their rights at the international level.

ICPs have been instrumental in guaranteeing human rights for individuals and not only have a remedial effect for the direct victims involved but also a wider preventative role, example through recommendations around adjusting laws and practice (Callejon et al, 2019), which are important GNR.

Despite this, the UNTB ICPs have been utilised less than regional complaints procedures (Callejon et al, 2019). Latin American NGOs, for example, focused litigation on human rights violations within the Inter-American System over the UN system (Grossman and Amezcua, 2013).

[30] Defined as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance" (article 24.1).
[31] CCPR/C/21/Rev.1/Add.13 (26 May 2004): para.16
[32] See ICCPR, First Optional Protocol to the Covenant; CRC, Third Optional Protocol to the Convention; ICERD, Article 14; and CAT, article 22.

With regards to the Inter-American system, The American Convention on Human Rights (IACHR) adopted by the Organisation of American States (OAS) in 1969, provides another legally binding and enforceable complaint mechanism through the Inter-American Court of Human Rights (IACrtHR). Article 25 of the Convention affirms the right to a legal remedy and Article 63 specifies the role of the Court in ruling on remedies and compensation for "injured parties" (article 63.1) thus giving the IACrtHR a primary and not subsidiary role in awarding reparation to victims of human rights violations (Amezcua, 2011). The normative framework and jurisprudence of the Inter-American system is particularly relevant to the present case as Colombia has ratified the American Convention and has accepted the jurisdiction of the Court.

Despite international standards on investigation, prosecution and punishment of those responsible for gross human rights violations, and consequential reparations for victims, in many contexts, particularly armed conflicts or oppressive regimes, domestic legal systems often lack the capacity or political will to fulfil such obligations (Sandoval, 2009). Thus, regional level human rights systems have taken on the task of dealing with complaints. Through numerous investigations and judgements, the IACrtHR has been crucial in the evolution of standards and principles developing a coherent approach to reparations (Sandoval, 2009). The IACrtHR, supported by the Inter-American Commission on Human Rights (IACHR), played a significant role in developing jurisprudence on reparations even before the concept gained wide recognition as a comprehensive concept within the UN human rights system (Evans, 2010). The 1985 Inter-American Convention to Prevent and Punish Torture and the 1994 Inter-American Convention on Forced Disappearance of Persons have also contributed to the development of the right.

For its part the European Convention on Human Rights (ECHR) goes beyond domestic law stating that "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party," (article 41).

iii. Reparations and atrocity crimes

Perhaps the area which has seen most development and jurisprudence in terms of a right to reparations concerns what the UN has more recently termed "atrocity crimes"; that is crimes against humanity (CAH), war crimes, genocide, and ethnic cleansing (UN, 2014). As Tomuschat asserts, the legal consequences of breeching IHL or IHRL are only related to gross or serious breaches of those crimes and while there is no specific definition of "gross" or "serious" in IL, it may be inferred that at a minimum this includes "all international crimes as well as any situations which "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms"

in accordance with ECSOC resolution 1503 (XLVIII) (Tomuschat, 2007). The crimes collectively termed atrocity crimes would certainly fall under this category.

The Convention on the Prevention and Punishment of the Crime of Genocide defines this crime as:

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group," (article 2).

The Rome Statute (1998) reiterates the definition of genocide (article 6), with the same terms of the Convention.

Crimes against humanity (CAH) are defined in the Rome Statute as a list of crimes including, but not limited to: murder, extermination, enslavement, deportation or forcible transfer, torture, sexual slavery and rape, persecution, forced disappearances and apartheid (article 7). Genocide is often considered a CAH, albeit a specific and particularly serious CAH. As the Rome Statute creates provisions for reparations in relation to the crimes within the jurisdiction of the Court it can be inferred that these crimes create a right to reparation for their victims.

Ethnic Cleansing, also recognised as an atrocity crime (UN, 2014) has no official definition in IHRL, however, the Commission of Experts on Yugoslavia defined it as: "…a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas" (UN Security Council, 1994: para 130).[33] In two resolutions on the former Yugoslavia, the UN General Assembly recognised "the right of victims of 'ethnic cleansing' to receive just reparation for their losses" and urged all parties "to fulfil their agreements to this end".[34]

Ethnocide, often known as "ethnic genocide," or "cultural genocide" (UNESCO, 1981), is also relevant to the present discussion. While ethnocide was not included in the 1948 Convention and is not classified as an international crime, many ethnic groups have discussed the term and asserted the importance of considering it an international crime at the same level as genocide. For example, the First Declaration of Barbados: For the Liberation of the Indigenous Peoples (1971) recognizes the

[33] Actions identified as part of ethnic cleansing strategies include murder, torture, arbitrary arrests and detentions, extrajudicial executions, rapes and sexual assaults, serious physical injuries to civilians, confinement of the civilian population in ghetto areas, forced transfer, displacement and deportation of the civilian population, attacks or threats against civilians and civilian areas and use of civilians as human shields among others (UN Security Council, 1994, para: 134).

[34] UN General Assembly, Res. 48/153 (ibid., § 94) and Res. 49/196 (ibid., § 95); see also UN Commission on Human Rights, Res. 1998/70 (ibid., § 98).

culpability of states in the crimes of genocide and ethnocide, calling on states to: "guarantee all indigenous populations the right to be and remain themselves, living according to their customs and developing their own culture by building specific ethnic entities." The close relation to CAH may open the door for future recognition of ethnocide as an international crime and therefore reparations for its victims.

Finally, it is necessary to discuss the category of War Crimes. While the international crimes of CAH, and genocide may be committed in times of war or peace, in accordance with the Rome Statute, war crimes are those committed during an IAC, and in some cases NIAC (article 8) and thus subject to international humanitarian law (IHL). These include a much longer list of crimes and varying forms of violence and attacks against civilians and civilian objects or property, found also in the Geneva Conventions, and in the case of NIAC, common article 3 of the Conventions.

As has been demonstrated in numerous legal cases, what differentiates war crimes from CAH and genocide, is that while war crimes may be one-off, isolated acts of violence, for a crime to be recognised as a CAH or genocide there must be existence and knowledge of a *widespread* and *systematic* plan of violence, and in the case of genocide an intention to *destroy in whole or in part* the victim group in question. This has meant that some judges have interpreted CAH and genocide as being more serious crimes than war crimes, an assertion that is reflected in the often harsher sentencing of perpetrators (Fruli, 2001).

As discussed in the introduction to this thesis, I focus on CAH and other atrocity crimes 1) because of this widespread nature which allows for a collective analysis of crimes and reparations and 2) as this focus allows for analysis of the ongoing and systemic nature of such crimes in the case of Afro-descendant peoples, before, during and beyond the context of the armed conflict.

As shall be discussed in the following section, the core principles of reparations in international law have largely been developed in relation to the above mentioned atrocity crimes.

II. The core principles and measures of reparations in international law

i. The principles of reparations

The original IL concept of reparation, established in the *Chorzow* Case only deals with two forms of reparations: restitution (or *restitutio in integrum*) and compensation, concepts which are often seen as the basic foundations for reparations. Jurisprudence in the ICJ, the Inter-American and European Human Rights Systems has shown for example, that the underlying principle behind reparations is

"full restitution" (*restitutio in integrum*) and the reestablishment of the *status quo ante* (Watkins, 2009:572).

In its first judgement in application of article 63.1, *Velásquez Rodríguez v. Honduras* in 1989, the IACrtHR established that "just compensation" is a general principle of IL and identified reparation as consisting in "full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and compensation for patrimonial and non-patrimonial damages, including emotional harm" (IACrtHR, 1989: para 189).

In this sense, the original core of reparation is an example of "corrective justice" in that it seeks to rectify or erase an unjust harm perpetrated against a specific victim (Uprimny and Guzmán, 2010). However, paradoxically, it is impossible to restore a victim of grave violations of human rights to the *status quo ante* (Watkins, 2009:572) and even more so in the case of the atrocity crimes outlined above which often involve loss of life, or serious psychological and physical harms. Thus, a broader set of principles and components of reparation have been developed through the adoption of IHRL norms and TJ practice.

The core principles on reparations developed through customary law were consolidated in the International Law Commission (ILC) Draft Articles on State Responsibility.[35] The Draft Articles outline state obligations "to make full reparation for the injury caused by the internationally wrongful act" where "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State" (article 31). The commentary to Article 31 states that it requires a responsible State to endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" through reparation.[36]

In 2005 the UNGA adopted The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law through Resolution 60/147 (BGPs). Developed over a 15-year period, the BGPs build on the 2001 Draft Articles identifying "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international

[35] Although human rights are not specifically referred to in the ILC Articles, the official Commentaries clarify that; ''When an obligation of reparation exists towards a State, reparation does not necessary accrue to that State's benefit. For instance, a state's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights." (ILC, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 33, para. 3).

[36] (ILC, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 31).

human rights and international humanitarian law, which are complementary though different as to their norms" (preamble). Rather than introducing new obligations for states they set forth "existing, complementary international legal obligations of States" (Watkins, 2009:559). The right to a remedy is premised on three core principles: 1) "equal and effective access to justice," (para 3(a)), 2) "adequate, effective and prompt reparation for the harm suffered," (para 3(b)) and 3) "access to relevant information concerning violations and reparation mechanisms," often referred to as the right to "truth" (Cassel, 2006).

While the text itself is not legally binding its legal significance can be greatly increased by contending that all of the 27 Principles may be characterised as codifying positive international law; the source of which is to be found either in treaty stipulations or in rules of customary law (Tomuschat, 2007). As shall be discussed below, several legal experts have questioned the normative value of the BGPs as creating a right to reparation.

In the same year the updated principles for the protection and promotion of human rights through action to combat impunity were adopted.[37] While the original 1997 document addresses a right to "fair and effective remedy," which included obtaining reparation, this updated version directly addresses the "right to reparations" as a central component stating that "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator" (principle 31). This again emphasises that reparations should be "a readily available, prompt and effective" and goes beyond to ensure that those seeking reparation are "afforded protection against intimidation and reprisals" (principle 32).

ii. Components of reparations

Through this expanding normative framework, the concept of reparations measures has developed beyond the original *restitutio in integrum* and compensation components to incorporate a more holistic approach. Both the ILC Draft Articles and the BGPs identify four main components of reparation: guarantees of non-repetition (GNR) (ILC 2001, article 30; BGP principle 23); restitution (article 34; BGP principle 19); compensation (article 36; BGP principle 20); and satisfaction (article 37; BGP principle 22). The BGPs add an additional component of rehabilitation (principle 21).

This holistic framework represents a progressive approach to reparation; where restitution is not possible states should provide compensation, and where compensation fails, measures of

[37] UN Doc. E/CN.4/2005/102/Add.1.

satisfaction.[38] These components have also been further developed in through IHRL jurisprudence and emerging norms including the HRC[39] and the General Comment 3 of the CAT.[40] In 2016 the Human Rights Council published "Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights" which provides an overview of the jurisprudence of the Committee on reparation and below reiterates the main components of reparations in IHRL. At the Inter-American regional level, since *Velasquez* the IACrtHR has pioneered in the evolution of reparations standard, through an expanding body of jurisprudence, which have become increasingly holistic and comprehensive (Cassel, 2005; Sandoval, 2009). Reparation legislation adopted through TJ processes also usually seek to redress through the range of measures drawing from these five components (Magarrell, n.d).

Restitution

Restitution or "restoring the victim to the original situation"[41] may include releasing wrongfully imprisoned people, returning wrongfully seized property or facilitating the right to return to one's place of residence (Gillard, 2003; Evans, 2010). However, as mentioned above full restitution is rarely possible in practice (Amezcua, 2011). If property has been destroyed, for example, restitution is materially impossible (Gillard, 2003), and in cases of grave and widespread violations, particularly where lives have been taken, the principle of *restitutio in integrum* is simply unfeasible (Moffett and Schwarz, 2018). Thus, in most cases of serious violations the other complementary measures have been used (Cassel, 2006).

Compensation

Compensation entails payment for economically assessable damage, including physical and mental harm, lost social benefits, material damages, moral damage and costs incurred.[42] Thus, compensation is awarded for both material and non-material loss (Gillard, 2003; Amezcua, 2011) and should be proportional to gravity of the violations (Evans, 2010)

Compensation is mentioned in the ICCPR only in relation to right to justice (Articles 9(5) and 14(6)). However, the HRC has expanded on this, often concluding in cases of violations of the right to life (Article 6) and the prohibition against torture (Article 7), that victims have a right to an effective remedy, including compensation (Evans, 2010:50). Compensation has been the most commonly

[38] A/74/321 (21 August 2019): para 36
[39] CCPR/C/21/Rev.1/Add.13 (26 May 2004): para.16.
[40] CAT/C/GC/ (13 December 2012): paras. 8-18.
[41] GA Res 60/147 (21 March 2006): para 19
[42] *Ibid*: para.20

prescribed remedy by UNTB complaints procedures although the amounts of compensation are not specified. Compensation remedies have included restitution of legal costs, lost income, housing and psychological support (Callejon et al, 2019).

Compensation has also been a main element of the reparations jurisprudence of the IACrtHR which awards both material (pecuniary) damages for economic loss, including litigation costs and attorney fees, and moral (non-pecuniary) damages for pain and suffering (Cassel, 2006). Unlike UNTBs the Court usually prescribes specific amounts of compensation which have increased significantly over time in particular in relation to moral damages (Cassel, 2006). However, in more recent years, in cases where countries have their own DRPs, the Court has increasingly deferred the decision of compensation amounts to States, which has somewhat weakened its influence (Sandoval, 2018).

Rehabilitation

Rehabilitation as a measure of reparation includes "medical and psychological care as well as legal and social services."[43] The IACrtHR has ordered states to provide rehabilitation measures in the areas of education, medical services or scholarships to survivors and has also extended this to collective measures. In *Plan de Sanchez Massacre*, it ordered the state to provide medical treatment including free medicine and a health clinic, education in Mayan culture, bilingual teachers, housing assistance and infrastructure investment in the affected community (Cassel, 2006).

Satisfaction

Satisfaction comprises a wide range of measures to cease violations, disclose the truth, restore dignity, accept responsibility, commemorate or pay tribute to victims, and ensure sanctions against responsible parties.[44] These may include "investigations and sanctions against perpetrators, protection of witnesses and the victim's relatives, search for the whereabouts of disappeared, public disclosure of the truth about violations and official recognition of State responsibility along with public apologies and commemorations to victims" (Evans: 2010:48). Satisfaction measures in TJ have also been referred to as symbolic reparations and may include apologies, changing street names, creating dignified burial sites as an effort to ensure the general public understanding about crimes committed and victims' suffering (Magarrell, n.d:10). While acknowledgement of the truth of violations is often the absent from reparations processes it is often cited as one of the most important elements by victims (Magarrell, n.d).

[43] *Ibid*: para.21
[44] *Ibid*, para.22

By including satisfaction measures UNTBs such as the CAT recognise that while material compensation is important, the pain and suffering experienced by victims of torture and their families must be addressed by wider justice remedies such "investigations, establishment of responsibilities, and punishment that is proportional to the offense" (Grossman and Amezcua, 2013:1). In Concluding Observations to Bosnia and Herzegovina in 2006 the HRC refers to satisfaction measures concerning family members of 15,000 disappeared peoples calling on the State to take immediate steps to investigate unresolved cases and ensure access to information through the national database and an active fund for families (cited in Evans, 2010:53).

In IACrtHR jurisprudence satisfaction measures have included investigation and prosecution of responsible parties, symbolic measures such as naming streets, schools or plazas after victims, public ceremonies and apologies, and locating remains of disappeared peoples to ensure proper burials (Cassel, 2006). The IACrtHR first awarded additional satisfaction measures in *Aloeboetoe v Suriname* ordering the State to provide education and health services to the community, even though it did not recognise the community as an injured party (Sandoval, 2009). The IACrtHR has stated that reparation must have public repercussions and therefore satisfaction measures are often awarded to benefit "the society as a whole" (Schönstenier, 2008 cited in Sandoval, 2009:273).

In this respect measures such as access to information and public disclosures of the truth are often implemented. In most cases a combination of symbolic and material reparations is necessary as symbolic measures alone can feel empty, while material measures also require symbolic aspects to give them meaning; however, depending on the context all reparations have an important symbolic role (Magarrell, n.d). Thus, as Uprimny and Guzmán assert:

> "…although reparation policies should have a significant material content to face the material effects of violence, they must also have an inevitable symbolic dimension, since the damage caused is usually irreparable, which also includes the recovery of truth and memory," (2010: 249)

Guarantees of non-repetition

GNR are important not only for bringing relief to direct victims but for preventing future violations. They involve measures that contribute to non-recurrence and often include institutional reform, strengthening of State institutions and ensuring sufficient civilian oversight and proper respect for human rights.[45]

Among its very specific recommendations the HRC has incorporated all components including GNR such as law amendments (Callejon et al, 2019). The IACrtHR has also ordered legislative,

[45] A/74/321 (21 August 2019): paras.23 and 37.

administrative and policy reforms including removing *de jure* rights violations, training of military, police and judicial personnel, improving information and transparency within the administration of justice, and improving prison conditions (Cassel, 2006).

There is a close relationship between satisfaction measures and GNRs. In *Mapiripán Massacre v. Colombia* while the IACrtHR did not recognise the community as a direct victim or injured party, it awarded satisfaction measures in the form of a monument to remember the massacre which it deemed as a non-repetition measure to benefit future generations (Sandoval, 2009). Likewise, in *19 Tradesmen v Colombia* the Court stated that the satisfaction measure of truth benefits the whole society as it prevents crimes being committed in the future (cited in Sandoval, 2009). As shall be discussed below, GNR often involve structural and transformative reparations measures. Thus, reparation itself is seen as a form of GNR. As the UN has observed in the case of atrocity crimes,

> "This risk factor is also relevant where the legacies of past atrocity crimes have not been adequately addressed through individual criminal accountability, *reparation*, truth-seeking and reconciliation processes, as well as comprehensive reform measures in the security and judicial sectors. A society in this situation is more likely to resort again to violence as a form of addressing problems" (UN, 2014: 11).

III. Reparations in transitional justice

Reparations have become an important part of TJ aiming to help States transition towards democracy in the wake of conflicts and authoritarian regimes (Matsunga, 2016). As TJ experiences have developed around the world, such processes have contributed to the evolving normative framework on reparation. In 2011 the Human Rights Council created the Special Rapporteurship on the promotion of truth, justice, reparation and guarantees of non-recurrence.[46] The Special Rapporteur's 2014 report makes several important observations and recommendations including the need for reparations programmes that respond to the magnitude and gravity of violations in question, the importance of both individual and collective reparations, material and symbolic measures for victims, reparations programmes not just for victims but for society as a whole, responses to all and not just some HR violations, the need to view development and reparations programmes as distinct, state acknowledgements of violations, and the role of political will over economic resources as hindering reparations programmes (De Greiff, 2014).

While the normative framework on reparations has been fundamental in securing justice for many victims of grave human rights violations, it is important to note that in line with general human rights principles, victims are required to seek reparations in national courts and exhaust domestic remedies before bringing claims to international bodies. However, in times of armed conflict or repressive

[46] HRC Res 18/7 (13 October 2011).

regimes, national remedies are often not even available (Watkins, 2009). In TJ contexts with mass human rights violations, it is not always possible to deal with reparations through judicial measures so many States have adopted domestic reparations programmes (DRPs) including "executive or legislative initiatives which identify a group of victims as beneficiaries of reparation and then provide them with redress" (Sandoval, 2017). This has been the case in Colombia where, by the time Law 1448 was adopted in 2011, there were nearly 5.5 million victims of forced displacement alone (Codhes, 2012:8). However, many state DRPs did not meet international standards and in Latin America victims have taken cases to the IACrtHR. As shall be discussed below, however, this has caused push-back on the Court's jurisprudence and despite having been progressive in many areas, such as identification of victims, monetary compensation and requirements on evidence. The Court has often rolled back its own standards to be more in line with DRP standards when adjudicating leaving legal uncertainty for those seeking remedies beyond their borders and hindering the ability to obtain "adequate, prompt and effective reparation" (Sandoval, 2017:12).

In contexts of transition, with mass violations of rights it is impossible to punish all perpetrators or indeed "repair" all victims and as such one may think of reparation in contexts of transitional justice as an "imperfect justice" (de Greiff, 2005). Perhaps because of the widespread and systemic nature of the violence address during transitions, TJ processes have been central in the development of standards around two key areas: collective reparations and transformative reparations.

i. Collective reparations

Although the GBPs do not explicitly address issue of collective reparations, they recognise the existence of victims who have "collectively suffered harms" (para 8) and in practice there is a growing tendency to adopt or order collective reparations. The term generally refers less to the type of reparations measures that are afforded and rather to the subjects of such measures, including ethnic or racial groups who are recognised as collective victims of a crime or violations of their collective rights. Collective reparations may include such measures as an apology addressed to victims in general, the construction of a school, or a hospital or measures of cultural redress in favour of specific ethnic groups (Manjoo, 2017).

There are often concerns that collective reparations may undermine the needs of individual victims, such as in the case of sexual violence (Manjoo, 2017). Thus, they may be more appropriate where there has been a violation of collective rather than individual rights such as ethnic groups rights to collective lands, which will be discussed in more detail in chapters 6 and 7.

Collective reparations are important for addressing the more structural causes of violence. In the case of South Africa for example, the TRC took an individualist approach to identifying victims which it defined as: 'direct survivors, family members and/or dependent of someone who had suffered a politically motivated gross violation of human rights associated with a killing, abduction, torture or severe ill-treatment' (Hamber 2009, cited in Gready, 2021: 6). Therefore, the reparations policies recommended were also developed on an individual basis, and largely ignored the millions of people that had suffered other forms of socio-economic and structural violence under apartheid.

ii. Transformative reparations

The crimes being addressed through TJ processes are not only massive and widespread in terms of numbers of victims, but they are also often underpinned by deep structural inequalities, poverty and discrimination (Uprimny and Guzmán, 2010). The concept of transformative reparations largely emerged in the context of women's rights movements and scholars advocating for reparations for sexual and GBV in armed conflict contexts. They showed how 'retrospective' reparations, which focused purely on the past crime, failed to address the structural inequalities that precede and, in many cases, endure after the conflict (Manjoo, 2017: 1195). As such, "measures of restitution risk returning women to conditions that gave rise to the initial violence", as in many cases sexual and GBV was a widespread part of structural violence prior to an armed conflict (*ibid*).

Uprimny and Guzmán argue that while backwards-looking restorative reparation approach may be suited to societies free from social inequality, discrimination and poverty, and with functioning legal and social institutions, in other contexts (which it may be argued are most contexts), such an approach will merely preserve the conditions of social injustice which permitted the victimisation in question. In this sense, transformative reparations are intrinsically linked to GNR (Manjoo, 2017: 1195) or prevention of future violences.

In *González et al. v. Mexico (Cotton Field)* the IACrtHR asserted that due to structural underlying discrimination reparation must aim to change the situation so that it achieves not only restitution but rectification.[47]

For Uprimny and Guzmán, discussions around transformative reparations address:

> "…the tension between the duty of States to make every effort to rectify an unjust damage perpetrated against a victim (corrective justice) and their duty to equally make every effort to achieve an equitable distribution of goods and services. burdens among all members of society (distributive justice)…[which in legal terms represents]… a tension between the duty

[47] Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field")* v. Mexico. Judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs) Para 450.

> of the State to repair the victims of serious violations of civil and political rights, due to atrocious crimes, and the duty of the State of satisfying the economic, social and cultural rights, especially of poor and vulnerable populations," (2021:236).

In relation to gender-based violence Manjoo identifies two important shifts provoked by the development of transformative reparations: 1) they can mean a "shift away from a narrow conceptualisation of compensation as reparations," 2) An expanded focus on individual, institutional and structural transformation which goes beyond the individual victim to contemplate wider harms and corresponded measures, indirect including collective harms and reparations.

While transformative reparations have been discussed in non-transitional contexts, TJ has been a particularly important cite for discussion because of the growing role of the transformative approach to transitional justice. Emphasising the structurally transformative role of TJ Arbour has asserted that:

> Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, *and it must address the human rights violations that pre-dated the conflict and caused or contributed to it*. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social, and cultural rights (2007:3, author's emphasis).

Uprimny y Guzman demonstrate that the idea of transformative reparations is not new, even if the concept is. Post WWII reparations programs in France and Norway excluded measures of compensation for the loss of "property sumptuary", such as jewelry, specifying that the purpose of reparations was not to rebuild fortunes but rather to assist the victims in the process of national reconstruction. Likewise, the 2007 statement of Nairobi on the rights of women and girls to reparation and to an effective remedy, asserts that "reparations must go beyond the reasons and immediate consequences of crimes and violations; they must seek to address the structural inequalities that negatively affect the lives of women and girls"

Nevertheless, the limitations of litigation-based reparations processes prove a particular challenge for transformative reparations as court rulings for structural change, which often involve economic and policy measures, are difficult to implement and ensure compliance. In general there has been little implementation of structural reparations measures and most remain in the realm of recommendations rather than practice (Brachthäuser and Haffner, 2018). In *Cottonfields* for example, the Mexican government failed to fully implement the Court's orders and the country has continued to face "…an ongoing pattern of targeted, brutal violence against women" (Manjoo, 2017). As such political approaches to reparation are more likely to achieve structural transformative measures than legal processes (Moffett and Schwarz, 2018).

IV. Key legal debates on reparations in IHRL

i. The right to reparation in IL

While the issue of reparation and remedy is addressed in many international instruments, there is continued discussion about the legal weight of the main instrument that consolidated the core principles and components of reparations: the BGPs. Langmack (2018) questions the normative value of the BGPs, evaluating the instrument's specific wording as well as its drafting and adoption process. He suggests that, as the BGPs do not create new international obligations but rather identify mechanisms for implementing existing obligations, they may be argued as being policy recommendations rather than legal obligations. The limited language they use, such as the right of victims to *benefit from reparation* rather than a direct *right to reparation* further weakens them. During the adoption process, while no states voted against the resolution, 13 members of ECOSOC abstained, with reasons including the lack of an existing customary right to reparation and their failure to create new obligations (Langmack, 2018:572).

Tomuschat also asks whether individuals have a true entitlement to reparation or whether the BGPs establish no more than mere guidelines that may be implemented by States depending on their capacities. Principle 15 mentions a duty of States to provide reparation ("a State shall provide reparation to victims . . ."), however this proposition is attenuated by the phrase: "In accordance with domestic laws and international legal obligations . . ." In the same sense, principle 11 talks of a right to reparation but again this is contingent to existing international law.

Sandoval (2018) argues that in evaluating the legal value of the BGPs it is necessary to analyse the legal status and scope of each of the 13 principles addressed in relation to existing IHRL norms. Further she asserts that the very drafting process is important to take into account. The fact that States were involved in the drafting could be indicative of the legal nature of some principles but also of emerging international law on reparation; some of the principles are already legally binding under international law although the question is still less clear in the case of IHL.

However, Sandoval argues that even if the legally binding nature of the BGPs is contested, the document has made important contributions to the right to reparation. The drafting process was important for bringing together different stakeholders on the issue, and for clarifying the distinction between procedural aspects (remedy) and substantive aspects (forms of reparation), they have contributed to the concept and recognition of "victims," and influenced State behaviour including the creation of domestic and international norms, such as the 2006 Convention on Enforced

Disappearances mentioned above, discussions in international criminal case law, and greater engagement with the issue by UNTBs, such as those mentioned above.

In relation to IHL, Tomuschat asserts that the right to reparation of victims is largely dependent on the alleged perpetrators of an act. While States may have international obligations to make reparation, this is less clear with non-state actors. Although non-state actors enjoy a certain status under Common Article 3 of the Geneva Conventions, it is doubtable whether this would infer civil responsibility due to non-compliance with such commitments. In this sense the obligation would fall on the State as stated in principle 6 of the GBPs:

> "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations" (principle 6).

Despite reparation provisions in IHRL, in practice the UNTB jurisprudence discussed above has often been inconsistent in its application. The Human Rights Committee for example, has been largely flexible on its decisions concerning individual complaints of wrongful imprison or death row, only occasionally awarding compensation as reparation. Further it tends to avoid specifying amounts of money for reparation. The CERD Committee has also taken a flexible approach, rarely awarding compensation and leaving amounts it to the discretion of the state.

At the regional level, while the ECHR has awarded financial reparation in numerous cases, it generally awards much lower amounts than sought and takes a cautious approach basing decisions on the context of each case. There is less doubt of the existence of a right to reparation in the Inter-America system as the IACrtHR has developed a strong doctrine on this right through its jurisprudence (Tomuschat, 2007). However, even here there remain questions as to the solidity of this right, as the Court's first ruling on the subject invoked the *Chorzow* case without questioning whether a ruling on Inter-sate relations can be applied to State to individual relations.

ii. The recognition of Victims

Central to discussions on the normative framework on reparations is the definition of "victims." However, human rights treaties rarely define or even refer to the concept of victim.[48] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides a full definition of victims as:

> …persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental

[48] For example, the ICCPR mentions victims in article 9 on the right to liberty but does not define the term.

> rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (para 1).

Crucial for the present thesis, this definition recognises the possible collective nature of victims. It also goes on to recognise that victimhood is irrespective of the identification or prosecution of a perpetrator, and further includes appropriate immediate family and dependents of direct victims as well as those suffering harm due to intervening to prevent victimisation in its definition of victim (para 2).

The 2005 Basic Principles expand on this definition:

> victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation (para 8).

This again recognises victims as not only those directly affected by the violation but all those who have suffered harm, including dependents, family members, community members and others. However, at the national level this recognition depends on how domestic law defines "immediate family" and "dependents" (Sandoval, 2009:249). Again, this definition also states that recognition as a victim is not dependent on identification of the responsible party (para 9).

The 2006 UN Convention for the Protection of All Persons from Enforced Disappearance defines victim as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance" (article 24) thus again ensuring recognition beyond direct victims.

The IACrtHR previously developed distinctions between victims and "injured parties" as recognised in the ACHR (article 63.1). While victims were those directly affected by the human rights violation, injured parties include others affected. Over time, under the framework of its evolving Rules of Procedure, the Court has expanded the concept of victim. While in earlier judgements it only referred to those suffering a direct violation as victims, and categorised family members as "injured parties,"[49] in more recent judgements it has recognised family members as indirect victims whose rights have also been violated[50] reserving the category "injured party" for wider persons or groups that suffer as a result of gross HR violations (Sandoval, 2009).

More recently the Court removed the category of injured party and the current rules of procedure adopted in 2000 refer only to "victim" defined as "the person whose rights have been violated,

[49] *Velásquez Rodríguez*, cited in Sandoval, 2009

[50] For example, in *Street Children v. Guatemala* the court recognised the mothers and a grandmother of assassinated children as victims of the right to humane treatment and the right to a fair trial.

according to a judgment pronounced by the Court," and "alleged victim" defined as "to the person whose rights under the Convention are alleged to have been violated" (IACrtHR, 2000: article 2)

There are several elements in the Court's jurisprudence that are relevant for the discussion on historical reparation. Primarily, as mentioned, the Court developed a clear distinction between "direct" and "indirect" victims of human rights violations. While "direct victims" are those that suffer direct infringements of their rights, "indirect victims" are those who suffer new violations resulting from the primary violation. Indirect victims are:

> persons who suffer inhumane treatment as a result of the arbitrary killing, disappearance or inhuman treatment/arbitrary detention of a beloved one or whom, as a result of subsequent facts to the primary violation, suffer a new violation of their rights as when there is a lack of effective investigation, prosecution and punishment of the perpetrators (Sandoval, 2009:276).

Secondly, the Court has often applied the principle of "presumption" not requiring evidence when deciding that family members have suffered moral damages for the rights violations of their children, parents or siblings.[51] Wider IHRL mechanisms such as the Human Rights Committee also use a flexible approach in reparations claims with UNTBs also relying on presumptions and circumstantial evidence rather than resting the burden of proof on victims who often have unequal access to evidence (Amezcua, 2011).

Thirdly, the Court's jurisprudence has opened the possibility for recognition of "unknown victims" who while not identified at the time of the case, may come forward later. This is important for cases where significant time has passed since the crime and victims may not be initially easily identifiable (Cassel, 2005). Fourth, the Court has adopted a flexible approach to the recognition of family members including deferring to indigenous peoples' customary concepts of family, such as in *Aloeboetoe et al. v. Suriname* where it recognised matrilineal family structures when considering next of kin (Cassel, 2005; Sandoval, 2009).

Finally, The IACrtHR has developed innovative measures to provide collective redress for example in relation to claims from indigenous peoples who have suffered serious human rights violations (Evans, 2010). The Court has expanded the notion of collective victims, to recognise members of a wider community as victims or injured parties, awarding reparations based on membership to the affected community as well as to the community as a whole. In *Saramaka People v Suriname* it recognised the Saramaka people as the "injured party" identifying members of the community as those "connected by a strong and unique bond with their ancestral land that determines their culture, way of life, beliefs and survival" (Sandoval, 2009:273).

[51] In 2001 the Court took a step back refusing to recognise moral damages for a victim's siblings who could not provide evidence of their relationship with the direct victim (Sandoval, 2009).

While the expansion of the concept of victim in cases of gross human rights violations is an important step, it is important to note that the concept of "indirect victim" is still limited to close family members, next of kin, parents, children and some cases siblings, thus either of the same generation or one generation removed (Sandoval, 2009), which would exclude the descendants of enslaved peoples several generations back from being recognised as victims.

TJ has also played an important role in expanding reparations beyond the realm of the individual to collectives. In cases of widespread human rights violations, in which such violations became the norm, rather than on a case-by-case basis, broad social policy measures are often seen as the most appropriate response. Victims' participation has also been central to TJ processes. In post-conflict situations, although victims often have less political weight than governments and other parties to conflict, putting victims' rights on the agenda is increasingly seen as essential to lasting peace (Magarrell, n.d).

iii. State responsibility and reparations

In order for reparations to be awarded to victims, human rights mechanisms must determine the responsibility of the state in question. The Draft Articles state that "every internationally wrongful act of a State entails the international responsibility of that State" (ILC, 2001: article 1). Both actions and omissions qualify as international wrongful acts if, 1) the act or omission is "attributable" to the State and 2) it constitutes the breach of an international obligation, in this case a human rights obligation (ILC, 2001: article 2).

This second condition implies that the obligation in question must be binding on the State at the time of commission. The Articles go on to state that "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs," (ILC, 2001: article 13). As shall be shown in the following chapter, this principle has often been called upon to oppose the call for reparation for slavery as there was no IL treaty criminalising slavery at the time.

A third important element is the question of *whose* actions constitute actions of the State. Generally, States are not responsible for the actions of private individuals. However, IHRL creates both positive and negative obligations for States to respect, protect and fulfil human rights. This means they not only have a negative duty to refrain from violating rights, but a positive duty to protect from violations by third parties, and to create conditions in which individuals and collectives can realise

their rights.[52] This may include enacting legislation to ensure rights are protected, taking action to protect individuals who are facing threats to their human rights and ensuring access to impartial legal remedies in cases of violations.

However, in many cases the actions of individuals are also attributable to the State, particularly concerning individual agents or organs of the State such as military, police forces, the judiciary, the legislature, irrespective of the position or ranking the person holds (ILC, 2001: article 4). This may also include people empowered by the State as "elements of government authority" at the time of the act (ILC, 2001: article 5), people acting on the instruction of the State (article 8) and even those exceeding authority or contravening instructions (article 7).

The Inter-American System has also contributed to the notion of State responsibility in situations of armed conflict, drawing from principles of IHL and making important contributions to the notion of obligations and responsibility following acts of omission and complicity with non-State actors (Evans, 2010).

The question of attributability is also relevant to the issue of historic reparation as enslavement was a state-sponsored enterprise in which States and Crowns directly carried out crimes of trafficking and trading, but also facilitated the trade and import of enslaved people to the Americas by private third-party private companies and individuals.

iv. Causality

The issue of causality, as shall be shown in the next chapter is another of the key arguments in opposition to the demand for reparations for enslavement. The principle of causality in IHRL implies the need for a demonstrable causal link between violations, harms, and reparation (IACrtHR, cited in Amezcua, 2011). In this sense reparations "should redress only direct damages produced by the illegal act, leaving out those damages which are too indirect or remote" (Amezcua, 2011:3). However, when harm is due to concurrent causes in which there are several responsible parties, indirectly responsible parties may be held responsible for some consequences of the wrongful conduct (Amezcua, 2011:3).

In the case of IHL, The Eritrea-Ethiopia Claims Commission demonstrated that a breach of *jus ad bellum* by a State does not create liability for all that comes after; instead, there must be a sufficient

[52] See for example E/C.12/1999/10 (8 December 1999); E/C.12/GC/24 (10 August 2017); E/C.12/1999/5 (12 May 1999); CEDAW/C/GC/28 (16 December 2010); CRC/C/GC/16 (17 April 2013); CCPR/C/GC/36 (2 September 2019); A/HRC/17/31 (21 March 2011); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

causal connection.[53] In *Case of Ricardo Canese v. Paraguay* the IACrtHR did not award reparation for pecuniary damages as it did not find any causal link between the alleged pecuniary damage and the facts of the case[54]

Causality has also been among the requirements applied by the European Court of Human Rights when deciding whether to award reparation. If the victim is unable to prove the causal link between the violation and injury the Court is unlikely to award reparations. Where the Court finds casual links for one type of damage but not for the other, it may award specific reparation. For example, in *Quaranta v. Switzerland* concerning the imprisonment for 6 months of an individual who was later pardoned, and claimed both pecuniary and non-pecuniary damages, the Court asserted it:

> "…does not perceive any causal connection between the breach of Article 6 (art. 6) and the alleged pecuniary damage. On the other hand, the violation found must have caused the applicant non-pecuniary damage justifying the award, assessed on an equitable basis, of 3,000 Swiss francs."[55]

To overcome the limitations of proof of causality for pecuniary damages the IACrtHR has developed the concept of "life plans" which enables an assessment of the impact of violations on eliminating or curtailing the life options that the victim may have had if the violation were not committed, which the Court regards as a loss of assets (Amezcua, 2011).

In some cases, a lack of causality may not lead to the denial of reparation, but it may affect the *type* of reparation measures awarded. In the case of *Bosnia and Herzegovina v Serbia and Montenegro* for example, as the ECrtHR could not prove the causal nexus between Serbia's violation of its obligation under the Genocide Convention and the damage resulting from the genocide it did not award compensation as reparation and rather resorted to satisfaction measures.[56]

v. Statute of limitations

Statutes of limitations which set the maximum amount of time that may pass between the alleged offence and initiation of legal proceedings have posed a serious obstacle to reparations claims (Hessbruegge, 2012). However, as recognised through of number of early UNGA resolutions, in

[53]The Eritrea-Ethiopia Claims Commission Final Award Ethiopia's Damages Claims, Reports of International Arbitral Awards, Volume XXVI, 17 August 2009, p.631-770, herein known as 'EECC Final Award Ethiopia', para.289

[54] *Case of Ricardo Canese v. Paraguay* Judgment of August 31, 2004 (Merits, Reparations and Costs), IACrtHR. (para. 203).

[55] *Quaranta v. Switzerland ECHR,* (Application no. 12744/87) JUDGMENT STRASBOURG 24 May 1991. (para. 43).

[56] *Bosnia and Herzegovina v Serbia and Montenegro.* International Court of Justice.

IHRL statutes of limitations do not apply for cases of grave violations of human rights.[57] In 1968 this was consolidated through the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity which affirms no statutory limitation shall apply to war crimes, CAH or genocide in IL "irrespective of the date of their commission," (article 1).

Similar provisions either removing or adjusting statutes of limitations are enshrined in the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, the Statute of the International Criminal Court (ICC) (article 29), the 2006 UN Convention on Enforced Disappearance addresses (article 1) and the Basic Principles (para 6). As shall be shown in the following chapter statutory limitations, and the passing of time are often evoked as counter arguments to the case for historic reparation.

In a 2011 ICJ ruling on reparation for acts of violence committed during the decolonisation period in India (1945-1950), the court decided to partly suspend statutory limitations for direct relatives of the victims with the argument that the case involved grave violations of rights, namely torture that were regarded as wrongful and unacceptable at the time of their commission in 1947 (Van den Herik, 2018).

In the *Mau Mau* case, which victims of torture by British colonial authorities during the 1950s Kenyan uprisings sought compensation. This case set important precedent for statute of limitations in colonial cases. The British government argued that as so much time had passed since the events occurred and as many of the relevant witnesses (especially implicated high-level officials) had already died, a fair trial would not be possible. However, the Court rejected the argument asserting that:

> "… a fair trial of this part of the case does remain possible and that the evidence on both sides remains significantly cogent for the Court to complete its task satisfactorily. The documentation is voluminous, as I have said already, and the governments and military commanders seem to have been meticulous record keepers. The Hanslope material has filled gaps in the parties' knowledge and understanding and that process is still continuing. I am not satisfied that the defendant has adequately taken into account the number of potential witnesses, presently identified or otherwise, at levels of government and the army lower than the politicians, senior civil servants and generals, who might be able to supplement its case on the documents (*Mutua & Ors v FCO*, para.95).

[57] See GA Res 3(I) (13 February 1946) and GA Res 170(II) (31 October 1947) on the extradition and punishment of war criminals; GA Res 95(I) (11 December 1946) affirming the principles of IL recognised by the Charter of the International Military Tribunal, Nürnberg, and the judgement of the Tribunal; GA Res 2184(XXI) (12 December 1966) and 2202(XXI) (16 December 1966) condemning the violation of the economic and political rights of the indigenous population and policies of apartheid as CAH; and ECOSOC Resolutions 1074 D(XXXIX) (28 July 1965) and 1158(XLI) (5 August 1966) on the punishment of war criminals and persons who have committed CAH.

V. A normative framework on reparations for slavery and colonial crimes in the IHRL system?

The above analysis demonstrates the evolution of a right to reparation for grave human rights violations, particularly in the case of CAH, and other atrocity crimes under IHRL, rooted in numerous instruments and jurisprudence and further strengthened and developed in the realm of TJ practice. Cases in which IHRL and TJ processes have addressed reparation for colonial crimes are rare, and even more so for the transatlantic slave trade in particular.

It may be argued that the very origins of the UN Human Rights System should make it an obvious platform for the reparations agenda. The system was effectively established in response to grave human rights abuses against persecuted minority groups in the wake of WWII, and was consolidated and expanded in the context of the world struggle for independence and decolonisation of countries during the 1950s and 1960s.[58] The 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples, known also as the Declaration on Decolonisation (GA Res 1514 (XV)), mandated the immediate end to colonialism, with transfer of powers from colonialists to colonised, and immediate cessation of repressive measures against colonised peoples, thus prohibiting colonialism under IL. The first legally binding UN human rights treaty was dedicated to the issue of racial discrimination (ICERD, 1965) creating, as mentioned above, measures for redress for victims of racism and racial discrimination (article 6).

The atrocity crimes (genocide in particular) which were the focus of the first UN instruments following WWII often have a racial or ethnic dimension to them as all involve systematic violence against particular groups including ethnic or racial groups.[59] Thus, it may be said that the most heinous crimes which attack the very core of humanity, including genocide and slavery, have often been directed at ethno-racial groups. These crimes are therefore essential for an understanding the issue of racism in the IL system.

Afro-descendant activists have a long and important history of using international bodies to push the West to confront its colonial history and the ongoing oppression of black peoples. As Baraka notes, the birth of the UN human rights system was viewed by African American radicals as an opportunity

[58] As stated on the UN Website, "The decolonisation efforts of the United Nations derive from the principle of "equal rights and self-determination of peoples" as stipulated in Article 1 (2) of the Charter of the United Nations, as well as from three specific chapters in the Charter which are devoted to the interests of dependent peoples. The Charter established, in its Chapter XI ("Declaration regarding Non-Self-Governing Territories", Articles 73 and 74), the principles that continue to guide the decolonisation efforts of the United Nations…Administering Powers are also obliged under the Charter to transmit to the United Nations information on conditions in the Non-Self-Governing Territories. The United Nations monitors progress towards self-determination in the Non-Self-Governing Territories" (https://www.un.org/dppa/decolonisation/en/about).

[59] See the Genocide Convention

both to raise the issue of systematic racial oppression in the USA and the question of continued colonialism around the world.[60]

One of the first human rights demands brought to the UN in the framework of the Genocide Convention was presented by organisations of the Afro-descendant movement in the US. The demand "We charge genocide" of the Civil Rights Congress (Patterson, 1951) presented the human rights situation of the Afro-American people, demonstrating the existence of the conditions listed in points a, b and c of the Convention and calling on the Human Rights Commission Human to study this systematic and widespread violence. This call remains as significant as ever and an important reference for the organisations of the black people of African descent in the world.

The genocide demand was preceded by two other key documents presented to the UN by African American organisations in 1946 and 1947 which similarly called on the new international mechanisms to address the widespread racism and human rights violations facing black people of the USA[61]

To a large extent the contemporary reparations struggle is rooted in the black radical traditional that engaged in an economic analysis of white supremacy, made use of global solidarity networks and international forums and addressed domestic racism as a human rights violation (Biondi, 2003). However, as shall be demonstrated below, while the fight for contemporary human rights issues concerning racism and racial discrimination has seen considerable advances over the past nearly six decades since the adoption of the ICERD, reparation for slavery has until very recently, largely remained at the margins of international discussions.

i. Slavery and racism in the early HR system

The precursor to the UN human rights system, the League of Nations, adopted the Slavery Convention in 1926, which not only provided a definition of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (article 1.1) but also provided a definition of the slave trade as all acts involved in "the capture, acquisition or disposal of a person with intent to reduce him to slavery", "the acquisition of a slave with a view to selling or exchanging him," "acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged," and "every act of trade or transport in slaves" (article 1.2).

The convention creates state obligations to take steps to prevent the slave trade (article 2.1) and bring about the abolition of slavery (article 2.2) yet allows for forced labour for "public purposes" (article 5). While it calls on states to punish infractions of laws on slavery (art 6), as the convention predates

[60] Interview: Ajamu Baraka, 2017.

[61] See NNC, 1946 "A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States of America," NAACP, 1947 "An Appeal to the World! A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress" and CRC, 1952 "We Charge Genocide."

IHRL, and was adopted at a time when only states were the subjects of IL, it contains no provisions for redress for the victims of slavery.

The international prohibition of slavery was reaffirmed in the UDHR (art 4), the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) and the 1966 ICCPR (article 8).

Recognising and combatting racism is central to the discussion on reparation for slavery. The right to freedom from racial discrimination has been part of the human rights framework since its origins enshrined in the UDHR (article 1s, 2 and 7) (1948), the UNESCO Convention against Discrimination in Education adopted in 1960 and the first of the legally binding UN human rights treaties, the ICERD (1965) which condemns doctrines of racial superiority as scientifically false, socially unjust and dangerous, and defines racial discrimination as:

> …any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (article 1.1).

The ICERD commits States to refrain from acts of racial discrimination (article 2(a)), and to adopt measures to prevent racial discrimination by third parties (article 2(a)(d)) and special measures for protection of discriminated groups (article 2.2). This was reiterated in CERD General Recommendation (GR) 32 on special measures to eliminate *de facto* and *de jure* racial discrimination.[62] Such measures include affirmative action, which as shall be shown in subsequent chapters, is often seen as a form of reparation.

Subsequent human rights treaties have also prohibited discrimination (or distinction) on the grounds of race, colour or ethnicity in the realisation of the rights they enshrine which can be read in conjunction with other subsequent articles, and many also have specific articles on equality before the law or prohibiting discrimination in other areas related to the context of the instrument.[63]

The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (UNSRR) was created in 1993[64] and mandated in 1994 to examine incidents of contemporary forms of racism and racial discrimination against particular groups, including "blacks" and to recommend State measures to overcome them.[65] As shall be shown, this Rapporteurship has been fundamental in progressively developing analyses and recommendations on racism in relation to a range of thematic issues and increasingly from a decolonial perspective.

---

[62] CERD/C/GC/32 (24 September 2009)
[63] See ICCPR, articles 2, 4, 20, 24, 26; ICESCR, article 2 and 10.3; CEDAW; CAT article 1.1; CRC, articles 2; ICMRW, articles 7 and 13,
[64] Commission on Human Rights resolution 1993/20
[65] Commission on Human Rights resolution 1994/64: para 4

Since its creation in 1945, UNESCO has been at the forefront of the issue of racism on the UN agenda. In 1949 it launched a major global program to combat racism which led to the adoption of a series of statements on race and racism, between 1950 and 1967, deconstructing scientific and biological notions of race and racial inferiority or superiority and condemning racism in its various forms (UNESCO, 1969). These statements culminated in the adoption of the 1978 UNESCO Declaration on Race and Racial Prejudice which, although soft law, provided one of the most comprehensive definitions and condemnations of racism in IHRL at the time, recognising both the individual and structural nature of racism as ideology, attitudes and behaviours, recognising that racism may be *de facto* or *de jure*, and recognising the negative impact of racism on both victims and perpetrators as well as wider society and goals of peace and security (article 2.2).

The Declaration asserts that "Racial prejudice, historically linked with inequalities in power, reinforced by economic and social differences between individuals and groups, and still seeking today to justify such inequalities, is totally without justification" (article 2.3). This is fundamental for the discussion on reparation as it not only recognises the historical roots of contemporary racism, but how racism is used to justify economic and social inequality, arguments which shall be shown in the subsequent chapters, are central to the case for historic reparation. It further links racial, ethnic, colour or national discrimination to the denial of self-determination of peoples (article 3).

The UN organised three World Conferences against Racism (WCAR): Geneva (1978), which led to the adoption of the above-mentioned Declaration, Geneva (1983) and Durban (2001) as well as the Durban Review Conference (2009). The 2001 third WCAR is considered a key moment and catalyst in the evolution of an international normative framework on the rights of Afro-descendant people, including debates on the issue of reparation (McDougall, 2002; Lennox, 2009; 2010).

ii. The Third World Conference against Racism

The main catalyst for the emergence of the issue of reparations on the international agenda was the 2001 Third WCAR. Durban came in the wake of the victory over Apartheid in South Africa, thus, while it addresses racism, racial discrimination xenophobia and related intolerance in general, it had special significance for the anti-racist struggles of Africans and Afro-descendants.

The conference aimed to "identify the sources, causes, victims, forms and contemporary manifestations of racism; to develop and provide methods of prevention, effective remedies, compensatory measures and strategies for achieving effective cooperation and enhancement of the United Nations, and other mechanisms for effective combat against racism" (Dampha, 2015:10). It was viewed by many as an opportune moment and adequate platform for the reparation demand with many hoping that the outcome document would furnish guidelines for reparation (Dampha, 2015:10).

Indeed, Durban was the first time that a claim for reparation for the slave trade, colonialism and apartheid was formally presented and discussed at the international level (Dampha, 2015:37).

In the lead up to Durban Afro-descendant people from all over the Americas met at the Regional preparatory conference in Santiago de Chile, where many were able to hold their States accountable for racism for the first time. Delegates at the regional conference prepared a list of demands and arguments to take to Durban. The Santiago Declaration highlights the lasting effects of colonialism and the slave trade, makes links between contemporary racism and structural inequality and the legacies of enslavement and seeks measures to remedy those affects stating that:

> We recognise that slavery and other forms of servitude of people of African origin and their descendants and the indigenous peoples of the Americas, as well as trafficking of slaves, were morally reprehensible and in some cases constituted crimes according to national law and, if they occurred today, would constitute crimes of conformity with international law. We recognise that these practices have caused these considerable and lasting damage of an economic, political and cultural nature, and that the justice currently requires significant national and international efforts to repair such damage. Such reparation should be carried out in the form of policies, programs and measures to adopted by the States that benefited materially from such practices and must tend to correct the economic, cultural and political damage inflicted on communities and peoples affected (para.70).

The issue of reparation was also raised at the African regional preparatory conference with the outcome document recommending that "a Development Reparation Fund should be set up to provide resources for the development process in countries affected by colonialism…" (cited in Howard and Lombardo, 2018:88).

Several organisations and movements prepared papers and positions on reparations for the Durban Conference. For example, The December 12th Movement in the USA took three goals to Durban: 1. To characterise the institution of slavery and the transatlantic slave trade as CAH; 2. To assert economic motive of white supremacy and 3. To call for reparations (Biondi, 2003:14).

In the lead up to the conference, states unfriendly to the reparations cause, including the USA and the EU attempted to depoliticise the conference by emphasising the issues of "xenophobia and related intolerance" and diverting the focus away from racism against Afro-descendants and Africans (Biondi, 2003).

During the conference itself, reparations continued to be a topic of controversy. President Thabo Mbeki's opening words called upon States to "defeat the consequences of slavery, colonialism and racism which, to this day, continue to define the lives of billions of people who are brown and black as lives of hopelessness" referring to colonialism and slavery as a "crime" and asserting that those who suffer from racism, xenophobia and related intolerance today do so "because their forebears were enslaved, colonised and racially oppressed." He called on attendees to declare themselves "determined to unite in action to repair the gross human damage that was caused in the past" and on

states to "back up their apologies with new commitments to the economic development of the nations that have suffered from this human tragedy" (cited in Dampha, 2015:16 and 38).

Some States called for slavery to be declared a CAH with liability for reparation while others wanted an apology (McDougal 2002). Two main groups in favour of reparations emerged during the conference: one which campaigned vigorously for financial compensation and the other which advocated the total cancellation of the external debt of African countries, increasing development aid and an apology. Zimbabwe, Namibia, Zambia and African and Afro-descendant NGOs took firm positions in support of financial reparation, while Senegal, Nigeria and South Africa appeared more moderate, in favour of cooperation and assistance. The South African delegation favoured this latter group, perhaps for the sake of diplomacy as the host country (Dampha, 2015:42). In response to such assertions, Shepherd at al assert that the "Western European bloc has mobilised its finest minds at Durban to immobilise the reparation issue" (2012: 61).

Nevertheless, the Durban Declaration and Programme of Action (DDPA) included several important agreements concerning reparation including the recognition of enslavement as a CAH:

> We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organised nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences (DDPA para 13).

It also recognises and welcomes that some States have made apologies and reparation for mass crimes committed in the context of slavery, colonialism and apartheid, (DDPA, para 100-101) and calls on those "who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so…" (DDPA, para 101). In the end, the DDPA did not call for reparations, and while States agreed that slavery is a CAH and *always should have been*, they maintained that it was legal during the time of the slave trade thus calling into question the issue of State responsibility. Further, although recognising the lasting impacts of slavery and colonialism, States refused to formally apologise as this would imply responsibility and risk opening the way to court cases and financial compensation.

Britain alluded to this concern during the conference when a spokesman referred to the "legal implications" of apologising (Dampha, 2015:46). The country has upheld it's position against assuming responsibility, stating over a decade later that it would not pay reparations or apologise for the slave trade and instead made a donation of £300 million in the Caribbean Development Bank (BBC, 2015).

While States at Durban reaffirmed the right of individual victims to reparation in their national courts, they did not affirm the legitimacy of such claims concerning the slave trade. The DDPA recognises the historical injustices of enslavement and its relation to contemporary inequality without creating legal or moral obligations (McDougal, 2002). Nevertheless, the conference and the DDPA pushed the issue of reparation onto the international stage and the formal recognition of slavery, colonialism, and apartheid as CAH was "was a potential source of legal engagement and might generate legal proceedings" (Dampha, 2015:47).

Durban was the first international UN event to address the fact that racism and notions of racial inferiority were critical to colonialism and the slave trade. The DDPA was important in linking the past to the present and identifying slavery and colonialism as root causes of contemporary racism (McDougall, 2002). Further, the fact that governments even discussed the issue of reparation at this level was an important benchmark for the reparation process (Mc Dougal, 2002:139).

The Durban process led to the creation of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action (IGWGD), an important platform for follow-up of the DDPA,[66] and The Working Group of Experts on People of African descent (WGEPAD) mandated to study and make recommendations concerning racial discrimination faced by Afro-descendants in the diaspora.[67] The WGEPAD was instrumental in the adoption of an International Year on People of African descent (2011) and the International Decade and members of the Group have played an important part in further putting reparations on the international agenda.

iii. Developments in the framework of the UN Decade for people of African descent

Ten years after Durban, the UN proclaimed 2011 as the International Year for People of African Descent with the aim of "strengthening national actions and regional and international cooperation" for the rights of Afro-descendant people, greater participation, integration and promotion of heritage and culture.[68] The Year was an important benchmark for Afro-descendant civil society, with organisations in Latin America holding the first "World Summit on People of African descent" in La Ceiba, Honduras, and calling for reparations, a UN International Decade for People of African Descent, the establishment of a development fund and a Permanent Forum for people of African descent.

While the impacts and visibility of the International Year were limited, a key achievement was the adoption of CERD GR 34 on Racial Discrimination against People of African descent,[69] which

[66] Commission on Human Rights resolution 2002/68
[67] Commission on Human Rights resolution 2002/68
[68] UNGA Resolution 64/169: para.1
[69] CERD/C/GC/34 (3 October 2011)

contains important provisions on the specific forms of discrimination facing Afro-descendants and contributed to greater visibility (Murillo and Ojulari, 2017). However, the GR makes no reference to reparation or redress, beyond a mention under access to justice of compensation for victims of racially motivated crimes.[70]

In 2014, in line with calls from civil society, the UNGA proclaimed the International Decade for People of African Descent (2015-2024). During the presentation and negotiation of the Draft Programme of Action for the implementation of the decade, (which later became the Programme of Activities) in 2012, members of the WGEPAD and the UNSRR made presentations on the issue of reparation and the importance of including the issue in the Decade plan.[71]

However, States at the meeting stressed the importance of keeping any reference to reparations in line with the language of the DDPA, that is to say, no explicit reference to the issue.[72] The EU representative, who throughout the meeting demonstrated scepticism to the very issue of a special category of rights for people of African descent,[73] opposed the issue noting that "the issue of reparations for the transatlantic slave trade was a divisive issue that jeopardised the 2001 Conference and that recognising that slavery is a crime against humanity does not imply that the issue of reparations for people of African descent is a human rights issue."[74]

While the final programme of Activities for the Decade does not make an explicit call for reparation, it does recognise previous efforts by States and calls on them to make apologies:

> (i) Acknowledging and profoundly regretting the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, colonialism, apartheid, genocide and past tragedies, noting that some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and massive violations committed, and calling upon those that have not yet expressed remorse or presented apologies to find some way to contribute to the restoration of the dignity of victims.[75]

Since its launch in 2015, the Decade has been an important platform for Afro-descendant civil society to advance in in the global agenda for reparation, and several human rights mechanisms, in the framework of the Decade have begun to address the issue in their observations and recommendations.

The CERD asserted in observations to the Holy See in 2016 that actions to combat racism could contribute to "providing moral reparation for the participation of the Catholic Church in the transatlantic slave trade and in the ruthless policies of colonialism in Africa," and encouraged the

[70] Ibid: para.37
[71] See interventions by the Chair of the WGEPAD Mireille Fanon Mendes France and SRR Dou Dou Diène in A/HRC/21/60: paras 37, 64 and 65.
[72] A/HRC/21/60: para.39.
[73] Observations of the author during her own participation in the WGEPAD session.
[74] A/HRC/21/60: para.93.
[75] A/RES/69/16 (18 November 2014): para.17(i)

Holy See to "hold a high-level dialogue, with representatives of Afro-descendants, on the role of the Catholic Church in the transatlantic slave trade and its consequences…. "[76]

Likewise, in 2016, the WGEPAD carried out a country visit to the USA which propelled the issue of reparation back onto the international stage. In its report the Working Group asserted that: "the legacy of colonial history, enslavement, racial subordination and segregation, racial terrorism and racial inequality in the United States remains a serious challenge, as there has been no real commitment to reparations and to truth and reconciliation for people of African descent"[77] and that "Past injustices and crimes against African Americans need to be addressed with reparatory justice."[78] It encouraged US congress to move forward with the HR40 Bill and for the country to apply elements of the CARICOM 10-point Plan[79] which shall be discussed in the next chapter.

During the 71st Session of the UNGA (2016), the issue of reparation was for the first time included the UNGA Resolution on the global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action. The resolution, based on the reports of the UNGA Third Committee under its agenda item 66(b)[80] states in its preamble that States welcome "the call upon all the former colonial powers for reparations, consistent with paragraphs 157 and 158 of the Durban Programme of Action, to redress the historical injustices of slavery and the slave trade, including the transatlantic slave trade."[81] This was an important and significant advance as it uses language that goes beyond that of the DDPA and the Decade Programme of activities mentioned above.

The initial draft resolution[82] was submitted by Thailand to the Third Committee 71st Session, presided by Colombia and attended by members of the WGEPAD. The session report of the Third Committee[83] notes that among the documents in consideration for the agenda item 66(b) was the "Note by the Secretary-General transmitting the report of the WGEPAD,"[84] on the activities of the WGEPAD from 1 July 2015 to 30 June 2016 which includes reference to several lectures delivered by then WGEPAD Member Verene Shepherd on the issue of reparation.[85] Both Shepherd and Fanon Mendes-France's

[76] CERD/C/VAT/CO/16-23 (11 January 2016): para.24.
[77] A/HRC/33/61/Add.2 (18 August 2016): para.68
[78] *Ibid*: para.91
[79] *Ibid:* para.94
[80] "Comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action"
[81] See preamble of A/Res/71/181
[82] A/C.3/71/L.48 (3 November 2016). Countries that voted against the draft resolution include in the Third Committee were Australia, Czech Republic, Canada, France, Germany, Israel, Marshall Islands, United States, United Kingdom and Palau (https://www.un.org/en/ga/third/71/docs/voting_sheets/L.48.Rev.1.pdf).
[83] A/71/482(8 December 2016)
[84] A/71/297 (5 August 2016)
[85] "In 2015, Ms. Shepherd delivered three lectures about the International Decade and its relationship to the issue of reparatory justice: (i) "From Montego Bay to Morant Bay: making the case for reparatory justice" (Mandeville, Jamaica, 26 July 2015); (ii) "The decade for people of African descent and reparatory justice" (University of St. Martin, Sint Maarten, 3

work during their membership on the WGEPAD was fundamental in getting the issue of reparation on the international agenda and is an important example of how UN special mechanisms and procedures can progressively influence the development of human rights norms and jurisprudence on specific issues. Since the precedent set by the 71st Session, subsequent UNGA Resolutions on agenda item 66(b) have continued to include the new paragraph on reparation.[86]

During the 24th Session of the WGEPAD held in March 2019 on the issue of Data for Racial Justice, then Chair, Ahmed Reid, presented a document entitled "Data for Reparation," demonstrating economic and development disparities between Caribbean States and the former colonial powers of Europe in order to "show how the long-term legacies of enslavement and colonialism continue to harm the sustainable development prospects of the Caribbean" and argue for the need to reframe the discourse on development (Reid, 2019:1-2).

Citing Chair of the CARICOM Reparations Commission, Sir Hilary Beckles, Reid's report rejects the common views of Western States which blame contemporary leadership in the Caribbean for underdevelopment and poverty in the region, asserting that such views lack historic perspective (Reid, 2019:4). Making links between the 2030 Sustainable Development agenda and the demand for reparation he asserts the need to address the structural colonial roots of low economic growth and the poverty trap in the Caribbean in order for its people to enjoy the right to development" (Reid, 2019:14).

Also in 2019, the recently appointed UNSRR, E. Tendayi Achiume focussed her annual report on the issue of reparation arguing for a human rights-based and structural approach and presenting reparation for slavery and colonialism as a human rights obligation for States. The report applies the human rights and TJ reparations principles of "restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition" and calls for full implementation of the ICERD, in particular article 6. Citing the DDPA it highlights both the historic injustices of slavery and colonialism, and contemporary racial inequality and discrimination, which it argues, result from a failure to redress historic injustice and calling for reparation.[87]

In October 2019, the OHCHR held a special meeting on reparation with the participation of Member States, Sir Hilary Beckles, CERD members Verene Shepherd and Pastor Murillo, and activist/academic Hans Fassler, who addressed some of the current issues within the debates on

October 2015); and (iii) a keynote address "Past imperfect, future perfect (?): reparation, rehabilitation, reconciliation" (University of Edinburgh, United Kingdom of Great Britain and Northern Ireland, 4 November 2015);" (para 34(c)).

[86] See Preambles of A/Res/72/157, A/Res/73/262, A/Res/74/137

[87] A/74/321 (21 August 2019)

reparation including economic legacies, links to the sustainable development agendas, the role of universities, and legacies of racism.[88]

Thus, discussions and decisions on racial discrimination, the rights of Afro-descendants and reparation within the IHRL sphere have progressively contributed to the conceptualisation of a rights-based and structural approach to reparation for slavery and colonialism.

This chapter has traced the evolution of the right to reparation within IHRL and raised key questions for its applicability to the call for reparation for historical and colonial CAH, genocide and ethnic cleansing. Despite a robust normative framework on reparation for human rights violations, it suggests that IHRL and the international community that upholds it have avoided applying this framework to the issue of historical and colonial crimes. Even as IHRL has increasingly addressed the rights of Afro-descendants and the issue of racism, the focus has been on present-day rights violations and not those of the colonial past. Thus, the following chapter will examine the key historical, legal and moral arguments made by Afro-descendant activists for historical reparation and show how they have engaged with the legal debates both domestically and in IHRL to make claims.

[88] Available at: https://conf.unog.ch/digitalrecordings/index.html?embed=-h&mrid=12F06197-44AB-418B-8124-C6C779BDDBE0# (accessed 2 November 2020)

CHAPTER 3: THE CALL FOR REPARATION FOR SLAVERY

> *"Whether or not we get reparations, and we will, but whether or not we get Reparations the very process of calling for Reparations is reparatory. It is self-healing, it is restoring dignity to our community and seeking justice in the name of our ancestors who were violated. It will enable us to reflect, to learn, to unlearn in an autonomous way" (Ron Daniel, Chair NAARC, in Ojulari et al, 2018).*

The demand for reparations for the transatlantic slave trade is as old as the crime for which it seeks justice. During and immediately after the four hundred years of the transatlantic slave trade, Africans and their descendants fought for compensation and justice for the genocide, exploitation and violence committed against them and their ancestors and the lasting trauma of these crimes. As the slave trade was abolished and outlawed by the various European and newly independent States of the Americas throughout the 19th Century, promises such as that of the "40 acres and a mule" to formerly enslaved Africans in the USA, or land titles for Afro-descendants in Colombia, were made and then promptly broken. Previously enslaved people were either completely abandoned and left to rebuild their communities with no support from the governments whose citizens and institutions had committed such grievous crimes, or they were subjected to new, but no less brutal systems of economic exploitation, segregation, and discrimination while their former enslavers received huge pay outs for the loss of their "property" or "assets" in the wake of abolition.

The reparations movement has never ceased to fight for justice for what is recognised by many as the greatest crime in modern history; using moral, political and legal arguments to demand justice, all of which have received aggressive criticism and refutations from numerous sectors.

This chapter presents the case for reparation for slavery. It begins by tracing the evolution of the reparation movement in the USA and Caribbean highlighting the various strategies used including legal cases against private corporations and government institutions and international diplomacy

demands.[89] Through a revision of existing literature from both advocates and opponents of reparation, it provides an overview of the main arguments for and against reparation and the content of reparation demands. Finally, rooted largely in the recent work by the UNSRR, it makes the argument for a need to decolonise IHRL and make a human rights-based case for reparation.

I. Calls for reparation in the Diaspora

i. Reparation in the Caribbean

The Caribbean has a long history of reparation demands with Jamaica playing a particularly pivotal role (Rauhut, 2018a). In the 1930s, the Rastafarian people, descendants of Maroon communities, became the first to call upon the Jamaican government concerning the violence experienced during slavery, making important demands for land restitution (Rauhut, 2018a). The Rastafari reparation movement is very much a decolonial movement. Communities practice "reasoning" or conversation and exchanging ideas on narratives of anti-colonial struggle, resisting mental-slavery and rejecting the colonisation of thought while smoking ganga (Rauhut, 2018a).

In the 1960s the Rastafari movement made formal reparation demands to the British Crown calling for repatriation to Africa. In the 1990s they began to develop a wider reparation agenda, participating in key international events including the 1990 First World Conference on Reparation in Lagos, the 1993 Pan-African Conference on Reparations in Abuja and the 2001 Third WCAR in Durban along with other sectors of the Jamaican reparations movement (Rauhut, 2018a).

The Caribbean reparation movement was revitalised after the WCAR at Durban, and again Jamaica played a leading role founding the Jamaican Reparation Movement in 2002 to create public awareness around slavery history. In 2004 a coalition of Rastafari groups made a claim of 72.5 million GBP to the British government as compensation for slavery and called for the repatriation of 500,000 Jamaican Rastafarians to Africa. Britain rejected the claim on the grounds that it could not be accountable for wrongs in the past centuries (Dampha, 2015:14-15).

In 2007 the Jamaican National Bicentenary Committee was convened and challenged the British abolitionist narrative of the Bicentenary which glorified Britain's role in abolition and ignored the 300 years of resistance and rebellion that enslaved Africans themselves had carried out (Shepherd, 2008; Shepherd et al 2012).

[89] Whilst also making reference to the landmark Mau Mau case in Kenya which establishes important precedents for reparations for colonial crimes, the chapter focuses on reparations for the victims of the transatlantic slave trade in the Americas.

In 2009 Jamaica became the first country to establish a National Commission on Reparation (NRC). 11 CARICOM countries have since established national reparations committees, councils or commissions.[90] The recent advances in reparation have been strengthened by the championing of the issue by activist and scholar Verene Shepherd who chaired the Bicentenary Committee and later became chair of the NRC. Her role as member and chair on the UN WGEPAD and later member of the UN CERD Committee enabled more visibility and attention to the issue at the international level (Rauhut, 2018a).

In 2011 the Minister for Foreign Affairs of Antigua and Barbuda made a public demand at the UN for reparation for injustices suffered by enslaved Africans and their descendants, arguing that violence and segregation against Afro-descendants had compromised their possibilities for progress. He called for former slave-trading States to formally apologise for the crimes they committed over the four centuries of the African slave trade and make commitments to the economic development of the nations that suffered (Dampha, 2015: 15-16).

In July 2013, during the 34th CARICOM meeting, the Heads of Government of the CARICOM countries agreed to form National Reparations Commissions to establish the moral, ethnic and legal case for the payment of reparations by European colonial countries to the nations and people of the Caribbean Community for the genocide of their indigenous peoples, the transatlantic slave trade and a racialised system of property-based slavery. They also agreed to establish a regional CARICOM Reparations Commission (CRC) with a representative from the University of the Antilles (UWI) who reports to a Reparations Subcommittee of the Prime Ministers. The CRC was established in September 2013 with Professor Hilary Beckles as Chair and three vice-chairs (Verene Shepherd, Armand Zunder, Jomo Thomas). While inspired by the Durban Conference, Caribbean activists have also argued that the Durban agenda has not been sufficiently adopted by European governments and as such the CRC process is seen as a renewal of the Durban process (Rauhut, 2018a).

On March 10, 2014, the CRC adopted a Caribbean Reparatory Justice Program known as the 10-Point Plan that asserts demands to the previously colonising European States in the areas of development, education, health, culture, technology, and economy, in addition to an official apology and repatriation for Afro-descendant people to the continent of Africa. In this sense the CRC reparation agenda may be seen as going beyond an individual compensation model to a collective reparation model which is distributive and transformative as it seeks to address structural harms (Moffett and Schwarz, 2018).

[90] Antigua and Barbuda's Reparations Support Commission; The Reparations Committee of the Bahamas; The Reparations Task Force of Barbados; The Reparations Committee of Dominica; The Reparations Committee of Guyana; The National Reparations Council of Jamaica; The Reparations Committee of Saint Kitts and Nevis; The Reparations Committee of Saint Vincent and the Grenadines; The National Reparations Committee of Suriname; The Reparations Commission of Trinidad & Tobago Reparations Commission; and The National Reparations Committee of the Governments of Santa Lucia.

In March 2016, the CRC sent letters to the governments of Great Britain, France, Spain, the Netherlands and other European States that participated in the transatlantic trade demanding reparation and establishing a two-year deadline for responses. Most States have now responded, but making no commitments to reparations (Wilkinson, 2017).

The CRC process has allowed for a diplomatic process with "states talking to states" not only bilaterally but on a regional level (Rauhut, 2018a). The backing and support of States has strengthened activist movements. The agenda was also signed by CELAC (The Community of Latin American and Caribbean States) and ALBA (The Bolivarian Alliance for the Peoples of our America). This model, which involves all levels and sectors of society including States, strengthens national level debate on the issue and offers a new collective and transregional approach to reparation which is a useful model for other contexts (Rauhut 2018a; 2018b). However, while the CRC advances have certainly influenced the movement in the USA and elsewhere, the key difference is that in the USA, Colombia and wider Latin American cases, Afro-descendant communities have demands not only towards European States but domestically towards their own governments. The charge of responsibility against states in North and Latin America is a considerable obstacle to those States taking on and championing the call for reparation as the Caribbean states of CARICOM have done.

ii. Calls for Reparations in the USA

The USA has some of the most prominent, visible and contested reparations claims stretching back to the period of enslavement. Coats (2014) describes the story of Belinda Royall a Ghanaian woman was sold into slavery as a child and freed after 50 years of enslavement when British enslaver Isaac Royall fled during the Revolution in 1783. She presented a case before the Massachusetts legislature arguing that she was denied any of the wealth that she had helped accumulate through her unpaid work and was granted a pension of 15 pounds and 12 shillings to be paid out of the Royall estate. This, Coats argues, is one of the earliest successful demands for reparations in the USA (Coats, 2014).

Following the War of Independence, reparation became a widely accepted cause, with the Quakers in New York, New England, and Baltimore even going so far as to make Quaker membership "contingent upon compensating one's former slaves" (Coats, 2014). In this period formerly enslaved people pushed for the confiscation and redistribution of former plantation lands (Biondi, 2003). Several well-known enslavers granted freedom and land as a form of reparation to the people they had previously enslaved (Coats, 2014).

Following the abolition of slavery in the 19th Century, formerly enslaved people in the USA were promised "40 acres and a mule." Yet as slavery gave way to Jim Crow racial segregation, this promise went largely unfulfilled. The contemporary reparations movement in the USA largely traces its roots back to the unfulfilled promise of 40 acres and a mule.

In the 20th Century, reparations demands were taken up by black-nationalist and civil rights activists, including the Nation of Islam who in the 1940s called for reparation and territory for the descendants of enslaved people (Coats, 2014). However with migration towards the North, demands became less about land restitution and began to focus more on the financial "debt" which was owed descendants of enslaved people (Biondi, 2003). It In the 1950s, "Queen Mother Moore" turned the demand for reparations in a "crusade", educating about the struggle and in 1955 founding the Reparations Committee of Descendants of US Slaves.

In 1963 Martin Luther King made the speech "Why We Can't Wait" and later published his book of the same title (1964) calling for social and economic compensation for African American descendants of enslaved people. In 1968 the organisation the Republic of New Africa called for reparation and the Black Panther Party called for reparation and a UN plebiscite for blacks on national aspirations. In 1969 James Forman published the Black Manifesto in which he claimed reparation in the form of a Southern Land Bank, publishing houses, TV networks, universities, all with the aim of reversing the consequences of racial capitalism. In 1987, the National Reparations Coalition for Blacks (N'COBRE) was formed, and in 1993 the NAACP endorsed the demand for reparation (Coats, 2014).

In 1989 Congressman John Conyers introduced the bill, "HR 40, the Commission to Study Reparation Proposals for African Americans Act" (taking its name from the "40 acres and a mule" promise) before the US Congress. This did not call for reparation, but merely sought recognition of the inhumanity and injustice of slavery and the creation of a committee to examine its consequence in terms of discrimination and make recommendations to Congress on suitable measures for redress. Even so, it was repeatedly rejected, and Conyers resubmitted it every year since 1989 until his retirement, when it was taken over by Congresswoman Sheila Jackson Lee.

The end of the 20th Century and early 21st century in the USA saw a number of reparation cases brought by organisations such as the Reparations Coordinating Committee (RCC) and N'COBRA making claims not only against the State but against some of the many private corporations that were involved in or benefited from the slave trade. In 2000 the State of California passed a law requiring insurance companies to report information on their slaveholding policies[91] and in 2002 Chicago City Council ordered all enterprises to disclose profits made from slavery.[92]

In 2002 a case was brought against the AETNA Life Insurance Corporation, the Fleet Boston Financial Services, Lloyds of London, the Liggett Group, Brown and Williamson, RJ Reynolds.[93] *FleetBoston* involved a plaintiff, Deadria Farmer-Paellmann who sued for damages "on behalf of

[91] See *Slavery Era Insurance Policies Bill* (Hayden, 2000) and *Insurance Slavery Regulations* (California Code of Regulations, 2001)
[92] See *Municipal Code of Chicago*, Title 2, Chapter 2-92, Article V, § 2-92-585. Slavery Era Business / Corporate Insurance Disclosure.
[93] See *Fleetboston Financial Corporation v United States*, 2007

herself and others in a similar situation", that is to say, all African American descendants of enslaved people in the US (cited in Hylton, 2004:33). The plaintiffs sought both settlements and apologies from corporations which "knowingly benefited from a system that enslaved, tortured, starved and exploited human beings," (Biondi, 2003:6). Cases were also brought against several railway companies including CSX Incorporated, Canadian National Railways, Norfolk Southern and Union Pacific. Ultimately these cases were not successful. However, they have been important in raising awareness of reparation claims, although Biondi argues that the heart of the reparations case should be with the State (2003).

There have also been a number of cases calling for reparation for racial crimes committed during the Jim Crow era. Racist and segregationist housing policies, managed by "contract sellers" and with collusion by banks and the Federal Housing Administration left black families with huge debts and no access to the mainstream US housing market. In response the Contract Buyers League was formed which sought reparation for financial crimes committed against black home buyers. The group embarked on a legal suit seeking reparation from those responsible, which although did not win them any remuneration, forced contract sellers to the table enabling some of the affected families to move into regular mortgages or simply take over their houses outright. By then they'd been billed for thousands (Coats, 2014).

In 2003 victims of the Tulsa race riot of 1921 which resulted in the destruction of numerous properties and the collapse of "black wall street" filed against the state for collusion in the attacks. Again, as shall be describe below, this case was not successful.

In 2008 the House of Representatives passed Resolution 194 tabled by Congressman Cohen. It called for a formal apology for the perpetuation of slavery and Jim Crow, recognised the continuing legacy and impact of both racial systems of oppression and expressed "commitment to rectify the lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in the future" (article 4).

The creation of the CARICOM Reparations Commission in 2014 gave new inspiration to the US movement. Caribbean Reparation leaders were invited to participate in the International Reparations Summit held in New York in April 2015 to provide a platform for exchange, build on the existing movement and to revive the HR40 bill process (Rauhut, 2018a). The Summit led to the convening of The National African American Reparations Commission which adopted its own preliminary 10-point programme for reparation, drawing on the CARICOM plan.

On Juneteenth 2019 the House Committee on the Judiciary held an historic congressional hearing on HR40 "H.R. 40 and the Path to Restorative Justice" to revive the call for the Commission (Booker, 2019). The hearing involved the participation of prominent activists, lawyers and scholars on

reparation and several voices against the idea of reparation. During his opening words Congressman Cohen reiterated the recognition of Durban that slavery is a CAH.

iii. A model for Colombia

The examples from the Caribbean and USA demonstrate two key approaches to reparation. The first are demands made by predominantly black or African descent States whose lands were colonised by European nations and in most cases did not gain independence until the second part of the 20th Century. As well as the specific physical and moral harms caused by slavery and colonialism, these States cite underdevelopment and economic inequality within the international community as a result of the centuries of appropriation of natural resources by colonising states as key arguments for reparations. Demands have so far been concentrated in the realm of international politics and diplomacy, however, there is a growing movement to bring the case of CARICOM to the realm of international law.

The second concerns a case in which Afro-descendant peoples who reside within or are citizens of a "settler-state nation", in which a European descent class gained independence from European States through wars of independence but continued enslavement after independence. Even once slavery was abolished political and economic wealth remains largely in the hands of the European descendant elites of the States. As shall be explored below, the reparations movement in the USA has used mainly domestic legal approaches through tort law to demand reparations as damages for injury.

In these differing contexts, identified responsible parties also vary. In the first example the demand falls to the European colonial states as the "primary institutions that framed and enforced enslavement laws, implemented supportive fiscal measures, and invested public revenues that created and sustained the slave system" (Beckles, 2007). As Beckles points out "all western European nations were participants with varying degrees of management success and profitability." (Beckles, 2007:15). In the second case the demand falls mainly on the colonial settler state that enslaved Africans and Afro-descendants well after independence. In both the USA and CARICOM cases there are also numerous private and civil institutions that both participated in and benefited economically from enslavement including the Church, and in the case of the UK the royal family (Beckles, 2007).

In the case of Colombia, as in other parts of Latin America and in the USA, enslavement continued well after the nation's achieved independence. Thus, there is also a strong case to be answered by the Colombian State and contemporary institutions that participated in enslavement of Africans post-independence. While as shall be demonstrated in the next section, Caribbean nations demonstrate the stark economic inequality between European nations and their own islands economies as a legacy of colonialism and slavery, Afro-descendants in Colombia and elsewhere demonstrate continued

economic and social inequality compared to European descendants and in particular those richest families that directly benefited from slavery during and after the colonial period. Thus, like the experience in the USA, the Colombian case does not represent a state-to-state demand, but the demands of a people, marginalised and excluded within a nation, seeking reparations principally from their own national government but also with the potential to look to European countries and private actors for responsibility.

II. The case for reparations

Activists and scholars alike have argued that there is a clear case to be made for reparation for historical colonial crimes in a framework of legal redress (Gifford, 1993). As shown in Chapter 2, a fundamental premise of liberal law is "*ubi jus, ibi remedium*: where there is a right, there must be a remedy" (Gifford, 1993).

Despite the differing contexts throughout the diaspora the arguments for reparation for the crimes of slavery are similar. These arguments were well summarised by Lord Gifford during the First Pan-African Congress on Reparations,[94] where he identified three arguments for reparations, each of which will be discussed below:

> a. That the mass kidnap and enslavement of Africans was the most wicked criminal enterprise in recorded human history, b. that no compensation was ever paid by any of the perpetrators to any of the sufferers, and c. that the consequences of the crime continue to be massive, both in terms of the enrichment of the descendants of the perpetrators, and in terms of the impoverishment of Africa and the descendants of Africans then the justice of the claim for Reparations is proved beyond reasonable doubt (Gifford, 1993:np).

i. The gravity of the crime

The widespread violence and abuse committed against Africans which involved trafficking, forced labour, torture, sexual violence and psychological abuse is undeniable. Families were separated, both men and women were submitted to sexual violence, often in front of their families, they were beaten, forced to work in unhealthy and dangerous conditions and denied their humanity. Beckles describes how "Africans were reduced by slave relations to the legal status of non-humans…They had no right to life, their existence as social beings was at the pleasure of owners whose rights over them were effectively unlimited" (Beckles, 2007:15-16).

The damages go beyond physical violence and exploitation to deliberate strategies of destroying culture, languages, memories and families through separating children from their mothers, (Robinson,

[94] Congress held in Abuja, Federal Republic of Nigeria, April 27-29, 1993.

2004:8). Robinson argues that in the USA, simply ending slavery and setting enslaved people free was not sufficient to heal the psychological, cultural and deep rooted inter-generational damage. The crimes committed were so damaging and have had such a lasting effect on society that reparation is not just about repairing the victims, but it is about reconciling society as a whole (Robinson, 2004).

ii. Continued Consequences: The Economic Legacy of Slavery

The second and third reasons given by Gifford - that compensation was never paid to the victims, and that there are continued consequences of slavery - both relate to the economic legacy of slavery manifest in economic inequality.

The contemporary wealth of European states and relative poverty of previously colonised nations is attributed largely the transatlantic slave trade and looting of resources. Williams (1944) argues that the economic exploitation of Africans enabled Europe's industrial advancement, and Britain's rise as an industrial superpower. Colonialism and enslavement of Africans stimulated the British economy to such an extent that it enabled the industrial revolution on a scale that would have been unimaginable without the plundering of African and Caribbean territories. Some would argue that the UK owes its entire position as a global power to its colonial expansion and enslavement, as Britain's own previous Prime Minister Churchill unashamedly pronounced in a speech:

> Our possessions of the West Indies, like that of India …, gave us the strength, the support, but especially the capital, the wealth, at a time when no other European nation possessed such a reserve… and enabled us not only to acquire the appendage of possessions which we have, but also to lay the foundation of that commercial and financial leadership which…enabled us to make our great position in the world (cited in Beckles, 2007:22).

The wealth of the colonising States came at the detriment of the colonised states. The European colonial project of plundering natural resources and exploiting the economic labour of colonised peoples resulted in the economic development of Europe and the "underdevelopment" of African nations (Rodney, 1972). Fanon made the case for reparation arguing that Europe's wealth was attributable to the colonial exploitation of Africa, asserting that Europe is the creation of the Third World, built on stolen wealth of under-developed peoples, and thus European actions to help under-developed peoples should be reparation (Fanon, 1963). This perspective has remained central to the Caribbean reparation process which, as Shepherd notes has involved a necessary reframing of development discourse as an obligation to repair historic injustices rather than a charitable process (cited in Rauhut, 2018b).

Not only did European states see huge profits from slavery but numerous private institutions such as banks and insurance companies, shipping companies, cotton and sugar companies and Royal families can trace much of their wealth to the slave trade and colonialism. The British royal family was deeply involved and invested in slavery through the Royal African Company which was created to supply

2000 enslaved Africans annually to Barbados, Jamaica and Leeward Island and generated profits for the royal family (Beckles, 2007). The corporate secretary of the Royal African Company was the philosopher John Locke, which demonstrates just how ingrained the institution of slavery was in British elite and liberal society. However, University College London's Project "Legacies of British Slave Ownership" demonstrates that "slave owner-ship" was not confined to aristocracy and gentry but also large sections of the middle classes (Centre for the Study of the Legacies of British Slavery, 2021)

The end of slavery saw huge pay-outs to slaving families for "loss of assets," further contributing to the concentration of wealth in their hands, while enslaved people themselves received no compensation or reparation for the traumas endured. Britain's own ex-Prime Minister David Cameron, who on a 2015 trip to Jamaica asserted that rather than seeking reparation, Jamaicans should "move on" from the wounds caused by slavery (Mason, 2015) has family members who received £4,101 – equivalent to more than £3m today – to compensate for the 202 "slaves" forfeited with the abolition of slavery in Jamaica (Davies, 2015).

In the case of settler colonial States, in which Afro-descendant people are ethnic minorities, this wealth disparity translates to socio-economic inequalities in which the descendants of slaving families and private companies, continue to hold much of the economic wealth and political power while Afro-descendants are among the most poor and marginalised. In several cotton states in the USA in the early 19th century, one third of all white income was derived from slavery and enslaved people were the largest financial asset of property in the US economy (Coats, 2014). That wealth disparity has been inherited through the generations.

Many of today's most wealthy institutions in the US, such as Harvard Law School, Fleet Bank, Brown University and Aetena Life Insurance were founded with, or owe their economic success to money from the slave trade (Robinson, 2004). In California, prior to the adoption of the Slavery Era Insurance Policies Bill, insurance policies of several companies were discovered which document coverage for slaveholders for damages or deaths of enslaved people. The documents were "the first evidence of ill-gotten profits from slavery, which profits in part capitalised insurers whose successors remain in existence today" (Hayden, 2000: Sec. 1(a)).

During the 2019 Juneteenth congressional hearing Julian Malveaux identified three economic damages caused by slavery: 1) the denied ability to participate in the nation's economic growth, through the Homestead Act of 1862 that excluded formally enslaved people and through which 10% of land along with development grants was distributed to recent immigrants; 2) the denial of the right to accumulate, stymied by violence and lynching (the first documented lynching was a black man who opened a grocery store near a white man's store); 3) public policy hostility to black people which

aimed to truncate black development, particularly through official government housing policies, red lining and segregation (see Malveaux intervention in Booker, 2019).

These economic legacies of enslavement have translated today into lower economic capital, lack of access to education, serious health disparities, and lack of access to employment for Afro-descendant people such that in the USA today around 21 per cent of black people live in poverty, more than double the rate for white people (8.8 per cent) (Achiume, 2019: para.23).

iii. Coloniality and continued conditions of enslavement

"It was 150 years ago, and it was right now." (Coates Juneteenth intervention, Booker, 2019)

A final argument, from a decolonial reading of the legacies of slavery and colonialism demonstrates how contemporary inequalities are not only the legacy of slavery, but the continuance of the colonial paradigm well after independence and abolition in which slavery for many merely gave way to new forms of exploitation, racism and terror.

The ideology of racism used to justify enslavement became an underlying factor in the continued human rights violations against the descendants of those enslaved. In the USA this manifested in Jim Crow segregation laws and black codes in which black people were victims of violence, including lynching and sexual assault, prevented from voting, denied workers' rights, equal education and property ownership (see Glélé-Ahanhanzo, 1995 and Achiume, 2019). Places of worship, schools, and local economies such as Black Wall Street in Tulsa were bombed or destroyed.

In the so-called liberal North, although such segregation laws did not exist, people experienced structural and institutional racism preventing them from owning properties and accessing dignified jobs and resulting in ghettoisation or *de facto* segregation (see Coats, 2014). However, this racial discrimination was not only *de facto* but often enshrined in local law and policy. After the Civil Rights Acts of the 1960s, the colonial paradigm continued. The second half of the 20th Century saw the entrenchment of the prison industrial complex in which numerous, mainly private prisons were built providing a source of cheap labour for some of the biggest corporations in the country. This "New Jim Crow" (Alexander, 2010), may be considered as a new contemporary form of black enslavement in which deep-rooted institutional racism ensures vastly disproportionate numbers of African Americas are arrested, charged and imprisoned in this system. In 2004 while African Americans accounted for 14% of nonviolent drugs crimes, they accounted for 75% of prison admissions for those crimes and in 2018 black adults were 5.9 times more likely to be incarcerated

than whites (see Achiume, 2019). Statistics such as these are central to the arguments of proponents of reparations such as Robinson (2004).

The continued relation of coloniality is also evident in the previously colonised, majority Afro-descendant countries of the Caribbean. For example, as Fanon Mendes-France has shown, land ownership in Guadeloupe is still underpinned by colonial relations, with ownership concentrated in the hands of descendants of enslavers and Afro-descendants making up the majority of the peasant workers population (Ojulari, 2018).

During the First Pan-African Congress on Reparations Lord Gifford argued that:

> …the iniquities perpetrated against African people today - whether in South Africa by the apartheid regime, in Mozambique and Angola by terrorist forms of de stabilisation, in Britain and the USA by racist attacks and by systems of discrimination - are the continuing consequences, the damages as lawyers would say, flowing from the 400-years-long atrocity of the slave system (1993)

The Abuja Proclamation reemphasised this ongoing nature of the "historical" violation and the UNSRR also asserts that "many contemporary manifestations of racial discrimination must be understood as a continuation of insufficiently remediated historical forms and structures of racial injustice and inequality." (Achiume, 2019: para 20).

As shown in Chapter 2, one of the key components of reparations is "non-repetition". The contemporary grave and mass violations of Afro-descendant peoples' rights are therefore a central part of the argument for reparation – not only to redress past crimes but to prevent ongoing and future ones. The recognition of continued coloniality manifest in racial inequality and colonial ideologies strengthens the argument for a more transformative and structural rather than individual reparation. Contemporary racial inequality demonstrates that emancipation processes were never transformative as they never altered the ideologies and structures upon which chattel-slavery was premised. Thus, there is a need for transformative reparations (Moffett and Schwarz, 2018).

III. Approaches to reparations demands

As discussed in Chapter 2, reparation measures can be divided into five key components: restitution of property and lands, economic compensation, rehabilitation, satisfaction (or symbolic) and GNR. However, most literature on reparation for slavery tends not to use this IHRL language and rather focuses on whether reparation seeks monetary or symbolic measures. Hylton identifies two types of reparations demands: conventional justice or tort claims in which plaintiffs claim damages through

restitution or economic compensation; and those seeking general social justice or wealth redistribution programmes usually through administrative processes (Hylton, 2004).

Here we see differences between the two contexts mentioned above: claims within settler state nations such as the USA, and State-to-State claims as in the case of the nations of CARICOM. Whether through litigation or political approaches, monetary compensation has always been a central component of reparations demands in all cases, however, the State-to-State demands tend to employ more mixed approaches to reparations measures, whereas demands in the USA have tended to focus on economic compensation and/or wealth redistribution.

i. The justice model of reparations

The traditional liberal justice model based on the principle of *restitutio in integrum*, aims to return the injured party to the situation prior to the injury, or if not possible, to provide economic compensation for the damages caused. The *Tulsa* case cited above falls within this category and is more consistent with Tort Law Doctrine than general social justice, or social policy approaches (Hylton, 2004).

Massey argues that there might be two types of claims to recover damages for slavery: "damages for the wrongful restraint suffered by slaves…[and]…restitution based on unjust enrichment," (2004:161). However, due to the impossibility of returning the descendants of enslaved people to the conditions that they would be in had their ancestors not been enslaved, demands made within the justice model have tended to focus on monetary compensation.

In tort law, claims for loss of profits usually fail if there is no specific proof of what would have been earned had the damage not occurred. Thus, opponents of reparation assert that the impossibility of calculating the economic loss weakens the case (Massey, 2004). Further, they cite the impossibility of legally demonstrating that plaintiffs suffered injury, that the injury was caused by some person who owed them a duty, and that the injury resulted in damage, all within the statute of limitations (Massey, 2004:90).

However, while opponents assert that it is impossible to identify fair damages for slavery, judges and juries frequently calculate non-quantifiable damages in other legal cases (Matsuda, 1987). Indeed, as seen in Chapter 2, IHRL has long set a precedent for paying reparation to victims of CAH and other atrocity crimes through judicial measures. Thus, just as Germany and other parties involved in the Holocaust pay reparation to Jews, parties that played a role in and benefitted from the slave trade and black holocaust owe reparations to the blacks (Robinson, 2004).

Reid identifies key cases in which reparations have been paid in the context of colonial crimes or CAH and genocide. These include 150 million Gold Francs (later reduced to 90 million) paid by Haiti to France since 1825; £20 million GBP paid by the British Government as compensation to British

enslavers in 1834, much of which was reinvested in railroad and other leading industries; $170 million paid to the Māori people by the New Zealand Government in 1995 in compensation for the theft of land by settlers in 1863; $5 billion paid by Italy to Libya in 2008 for colonial occupation; $1.4 billion paid in 2009 to indigenous peoples in the USA by the Obama administration for government mismanagement of a century-old system of Indian land trusts; £19.9 million paid to the Mau Mau victims of colonial violence in Kenya by Britain in 2012; $65.2 billion paid by Germany to the World Jewish Congress and Israel in 1952 for atrocities committed during the Holocaust and for the resettlement of Jews; and $1.2billion paid to Japanese-Americans by the USA for internment in camps during World War II (Reid, 2019).

Reparation scholars have made calculations of damages based on local wages at the time and damages for injuries. In 2005 a group of British scholars and finance experts calculated the economic figure that Britain would need to pay if it accounted for a retrospective wage for 2 million enslaved black people in the Caribbean, fixed at the lowest rate for English field workers for the last 200 years plus some for loss of assets in Africa and trauma. The figure calculated was 7.5 trillion GBP, three times the GDP at the time (Beckles, 2007).

ii. The social welfare model

The second type of demands focus on wider social policy and social justice measures often including wealth redistribution such as direct cash transfers, indirect social welfare, race-based subsidies, affirmative action programmes and other special measures aimed at specific groups of victims such as in *FleetBoston* mentioned above. Thus, while some approaches may include economic compensation, they also relate to wider satisfaction, rehabilitation and GNR components identified in the IHRL framework. According to Hylton, such approaches are based on a "belief that reparations litigation will compensate or correct for years and years of inattention, or insufficient attention, to the welfare of African Americas," (Hylton, 2004:33). It is important that policies are recognised as part of reparation and not merely general social welfare programmes for disadvantaged groups.

iii. Structural and collective approaches to reparation

As shown above, in the USA reparation demands have largely focussed on economic measures. In a country where Black exclusion has been so closely tied to capitalism, through exclusion from private property ownership, it is not surprising that the reparation movement has also largely focused on monetary compensation as a means to inclusion in the system. However, this has meant that many claims lack a more structural critique of the capitalist system that is complicit not only in the historic but ongoing oppression of Afro-descendants. In Coats' article, he makes no critique of capitalism, in

fact he critiques progressives for focussing on class struggles over racial struggles. Considering that racism and slavery itself are integrally tied to capitalism (Williams, 1944 (1994)), a reparation claim that does not seek structural transformation cannot hope for real, lasting change.

However, sectors of the reparation movement in the USA, rooted in the black radical tradition, have taken a more structural approach to demands. During the 2019 congressional hearing activist Danny Glover, a close ally of the NAARC quoted MLK Jr asserting that justice for black people cannot be achieved without radical changes in the structure of our society (Glover intervention, in Booker, 2019). It was clear to see in this hearing how opponents have attempted to discredit the reparation movement as being only about monetary compensation. While economic compensation is a big part of the demand, all advocates for reparation spoke of the need for a range of approaches. These calls were ignored by opponents who repeatedly returned to the issue of money and the impossibility of calculating amounts or identifying victims, and the unfairness of requiring white America to pay for the crimes of a few people to whom most are unrelated.

The CRC State-to-State demand has taken a more of a mixed measures approach, thus far using political diplomacy approaches over legal litigation. The CRC 10 Point Plan demands a combination of material, (compensatory and social welfare) demands, and symbolic demands including a full formal apology, repatriation, indigenous peoples' development programme, cultural institutions, public health programmes, programmes for illiteracy eradication, an African knowledge programme, psychological rehabilitation, technology transfer, and debt cancelation (CRC, 2021).

This demand must not be confused with international development or foreign investment proposals. Central to reparation is the *recognition* that a wrong has been done, and as such official apologies and other symbolic measures are key to such demands. During Durban for example, as discussed above, the claim for reparation was channelled into a discourse on development assistance to avoid discussions on recognition of responsibility (McDougal, 2002:139). Development measures may be framed as reparation but must go beyond paternalistic or charity measures in which victims are dependent groups, and rather ensure effective participation in the construction of programmes (Moffett and Schwarz, 2018). Thus, while development aid may be part of reparation measures this must be done with full recognition of the connection between contemporary problems and historical origins (Achiume, 2019: para.54)

Such structural approaches are necessarily more collective than individual. The CARICOM collective, structural approach to reparation has also influenced a shift in approach among sectors of the USA movement (Rauhut, 2018b). Indeed, Coats observes how reparation demands used to be focused on pay-outs and now argue for "something broader" that aims at racial justice and national reckoning (2014: np).

Like the CARICOM 10-point plan, the NAARC plan (NAARC, 2015) includes a combination of material and symbolic, structural and collective demands including: a formal apology and establishment of a MAAFA/African Holocaust Institute; Repatriation and an African Knowledge Program; the right to land for social and economic development; funds for cooperative enterprises and socially responsible entrepreneurial development; resources for the health, wellness and healing of black families and communities; education for community development and empowerment; affordable housing for healthy black communities and wealth generation; strengthening Black America's information and communications infrastructure; preserving black sacred sites and monuments and; repairing the damages of the "criminal injustice system."

Teaching of history is an essential part of holistic reparations demands. As Robinson argues "There is no greater crime that you can commit against a people than to strip them of their story of themselves," (2004:6). The UNSRR highlights the importance of education to ensure consciousness of the "scale, scope and contemporary legacies of racial discrimination, rooted slavery and colonialism" arguing that public ignorance and lack of awareness is a serious barrier to reparation (Achiume, 2019: para.60). Even opponents such as Massey recognise the value of symbolic reparations, arguing that, accounting of the profits of slavery is not only necessary for calculating damages but also part of the "truth" aspect of reparations (2004). Expanding on the notion of truth, Bryan Stevenson has also developed an important analysis which pushes the US reparations debate towards the IHRL and TJ framework placing emphasis on truth and reconciliation (Helm, 2019; Schilling, 2018).

IV. Key debates in the case for reparations

The demand for reparation has been met been met with fierce opposition by States, politicians, the media, and the general public. Objections to reparations tend to focus on questions such as: *who can claim reparations? Who must pay reparations? How much should be paid?* (Posner, 2003, Coats, 2014; Massey, 2004). These questions relate directly to the legal litigation approach to reparations but also claim to pose important practical obstacles for the wider political call for reparations. Thus, while proponents of reparations focus on the historical and continued injustice of slavery, opponents tend to focus on the practical policy obstacles and the legal barriers, minimising the issue of injustice and often failing to provide real moral or justice arguments against reparation.

Massey argues that tort law approaches to reparation face three legal issues: duty, causation and damages, all of which relate to statutory limitations, as well as constitutional problems around racial classification. Each of these become increasingly complex with the passage of time (Massey, 2004). Matsuda notes that standard objections to reparations come under four categories: (1) factual objections and excuse or justification for illegal acts; (2) the difficulty in the identification of perpetrator and victim groups; (3) the lack of sufficient connection between past wrong and present

claim (causation); and (4) the difficulty of calculating damages. However, she argues that each of these objections can be refuted when employing a critical legal studies perspective rooted in the flexibility of legal doctrine and inviting new consciousness of law, in particular rooted in demands for reparations made by "those on the bottom" (1987:388). This, approach, as shall be shown below, relates to the decolonial, people-centred approach to TJ and reparations.

i. Statutes of limitations – slavery was a long time ago?

The first objection to reparation for slavery is that too much time has passed since the event took place and as such statutory limitations should apply. Statutes of limitations exist to avoid difficulties concerning the identification of victims and responsible parties and causation, which become increasingly difficult to prove as time passes (Hylton, 2004). Further, as one of the aims of tort law is deterrence, the longer the time has passed between the injury and the enforcement, the less of a deterrent effect a law is likely to have (Hylton, 2004; Massey, 2004). However, reparations tend to be justified on the backward-looking grounds of corrective justice, as opposed to forward looking grounds such as deterring future wrong-doing (Posner, 2003). Further, from a decolonial understanding the injustice continues, new forms of exploitation and discriminations exists and those responsible for or benefiting from such injustice should be deterred.

Prescription rules in tort law prevent claims from being brought when responsible parties and witnesses have moved location or passed away and evidence may no longer be fresh (2004). The impact of intervening factors as time has passed since slavery make it harder still to calculate damages (Moffett and Schwarz, 2018). Thus, opponents argue that even if slavery were to be considered illegal at the time, any statute of limitations that could have existed would have been well expired by the 21st century.

However, as Matsuda counter argues, in legal cases "Plaintiffs operating under a disability are not required to press their claims until the disability is removed; a continuing wrong does not start the clock running under a statute of limitation until the wrong culminates in an act of finality" (1987:381). Reparation for slavery is claimed on the basis that the harm continues. The crime itself prevented successful presentation of claims at the time, as direct victims of slavery and segregationist or racist laws were prevented access to justice. Thus, a strong argument for the claim to reparations is despite the passing of time is that the victims had no way of accessing justice at the time of the initial crime. Opponents of reparations often question how far back we can look to injustice. Matsuda concludes that best way to provide a suitable time bar is by looking at this issue from the victim's perspective and whether there exists an identifiable victim class that continues to suffer due to the wrongful act in

question (1987:385). Further, as shown above, as slavery has been shown to be a CAH in IL, it would not be subject to statuary limitations.

ii. The Victims of Reparations Demands

The second key issue concerns identifying the victims. As more time passes following a crime, less direct victims remain alive. This raises various questions of legal succession including whether family members can file claims for reparation, which kind of reparations they are eligible for, and how legal successors are identified (Wühler, 2018). In the case of reparation for slavery where several generations have passed this becomes more complex still.

Hylton identifies cases in which there are identifiable and non-identifiable victims and identifiable and non-identifiable injurers. The Japanese internment, the Holocaust and the Tulsa cases all involved identifiable victims and injurers, while the *FleetBoston* slavery case has neither identifiable victims nor injurers and reparations would have to be decided on a group basis. Indigenous communal land claims cases in the USA and Australia on the other hand have non-identifiable victims but identifiable injurers (Hylton, 2004).

This relates to the problem of duty which arises with the question of whether a contemporary defendant owed and breached a duty to the contemporary plaintiff. The identification of victims and responsible parties is a basic prerequisite for tort suits seeking compensation (Hylton, 2004). While a standard legal claim involves Plaintiff A (individual victim) and Defendant B (perpetrator) in reparations claims we have Plaintiff Class A (victim group member) and Defendant B (perpetrator descendants and current beneficiaries of past injustice) thus reparations claims challenge the standard legal model (Matsuda, 1987).

In this sense, the case for reparation for colonialism may be stronger than that for reparation for slavery, as colonialism (in the case of the Caribbean, Asia and Africa) occurred more recently and many individuals who lived under colonialism, or their immediate descendants are still alive including direct victims of genocide, violence and economic exploitation, or indirect victims of the socioeconomic consequences (Howard and Lombardo, 2018:88). To a large extent, colonialism in the Caribbean was a continuation of slavery, based on the same racist ideologies for economic gain and reparation claims face the same legal debates around the applicability and definition of CAH, and the issue of retroactivity in IL (Howard and Lombardo, 2018).

The legal culture in the USA is one of individual rights and responsibilities (Massey, 2004:166). Thus, while many reparations advocates embrace collective rights and collective liability, they are required to prove why this should displace the individual rights system. A decolonial reading of justice would allow for a collective understanding of rights.

It is often argued that group-based reparations are unjust due to diversity within both victim groups (i.e., some descendants of enslaved people may not face economic inequality, may not feel affected by the harms inflicted by slavery or may not identify with the victim group) and perpetrator groups (not all white people are the descendants of the perpetrators of slavery) (Matsuda, 1987). However, by "looking to the bottom" we may show the horizontal relationship between all members of the "victim" group (all black people suffer from racism, irrelevant of wealth), and among the perpetrator group (all members of the white class continue to benefit from the legacy of slavery and continued structural racism) (Matsuda, 1987). Opponents also argue that undeserving people, who do not really belong to the victim group may benefit from reparations (Matsuda, 1987). Here Matsuda reminds that "Minorities have often sought to disassociate from the negative stereotypes attributed to their group only to find that others refuse to think of them as individuals. To be then deprived of benefits because they lack sufficient evidence of group coherency is a double insult," (Matsuda, 1987:387).

The challenge of identifying victims is largely overcome in cases where entire states claim victimhood, such as the CARICOM (Moffett and Schwarz, 2018). Moffett and Schwarz argue that West African and Latin American States may also fall into this category although as shall be discussed in Chapter 4, in the case of slavery, Latin American States and a significant proportion of their populations were perpetrators and not victims.

Finally, it is argued that the sheer magnitude of the crime prevents legal processes from being able to accurately respond to the numbers of victims and the amounts that would be owed. In other words, the scope of the injury makes remedy impractical (Biondi, 2003). This argument merely strengthens the case by reinforcing the seriousness and impact of the crime. A TJ perspective challenges this critique as reparations are a central part of remedying mass harms cause by CAH and other atrocity crimes, even in cases where it may be argued, the sheer scope of the damage is irreparable.

iii. Responsible parties

The question of who would pay reparation is often raised to spread fear and thus opposition among white / European-descent populations. Massey asks inflammatory questions about whether individual white people or descendants of slave owners would have to pay reparation (2004). Such a strategy, which was used by reparations opponents during the Juneteenth hearing, promotes the myth that "reparations are something taken from white Americans and then handed over to African Americans" when in reality reparation advocates mostly demand justice from the federal government which was responsible for the crime and failed to compensate for it since or private companies (Lockhart, 2019).

Opponents of reparations in which the responsible parties would be private individuals argue that it is not possible to hold an individual legally responsible for crimes committed by their ancestors

(Massey, 2004). For both individual descendants of enslavers and companies that profited from slavery, the concept of "*remoteness*" in common law suggests that where there are no longer living defendants to answer the charge, cases cannot be heard. However, as with the statute of limitations, remoteness does not apply in cases of CAH (Beckles, 2007).

Most corporate defendants had no direct role in slavery but are rather the successors of companies previously involved in slavery which have since changed ownership, legal personality or merged with other companies and thus in most cases are not liable (Hylton, 2004; Moffett and Schwarz, 2018; Rauhut, 2018b).

The principle of *State succession* means that such temporal restrictions on liability do not apply to States, which are the successors of those same States that legalised and sponsored the slave trade and whose political identity has remained largely consistent since the slave trade (Moffett and Schwarz, 2018:13; Rauhut, 2018b). Thus, the CARICOM demand focuses on the responsibility of European States. While they recognise that private actors played pivotal roles in the slave trade, slavery was a State-sponsored enterprise (Shepherd, 2014 cited in Rauhut, 2018a).

Nevertheless, in the case of States, as seen in the previous chapter, responsibility for human rights violations, including CAH and genocide requires that the act in question was a breach of law at the time, and that it may be attributable to the State. Thus, a prominent argument against reparation is that the slave trade was not illegal at the time and therefore no crime was committed. What's more, there were several norms actually enshrining slavery and the principles that underpinned it. The USA enshrined at least seven provisions in the 1787 Constitution that recognised slavery as part of the legal order (Massey, 2004:159) while Slave Laws across colonial governments functioned to classify enslaved Africans as "non-human" and thus to justify their enslavement (Beckles, 2007).

Of course, if slavery was legal at the time this is because European States made it so. There was no universal international law system as exists today, and European or colonial laws were never consulted with colonised peoples who had no say in whether such a practice would be legal or not. Thus, one must ask: under what legal authority did the colonial States make slavery legal? The answer is simple, under that of colonialism (Beckles, 2007). However, that fact that laws permitting slavery under European Colonialism were only applied to Africans demonstrates that the practice of chattel slavery in general was not considered legal at the time. Indeed, no other group was submitted to such a system of bondage; people classified as "white" could not be enslaved and chattel slavery was considered a "universal violation in Western Europe" (Beckles, 2007).

Even if slavery were legal at the time, the Nuremburg Trials set a precedent by employing retroactive justice, validating through the proceedings, the legal provision that crimes of enslavement and genocide "are not to be subverted by their historical nature" (Beckles, 2007).

Tulsa, often seen as the most compelling reparations case in the USA, concerns crimes that were illegal at the time, in which the responsible parties (City and State) still exist today and the victims are still alive, the acts were concentrated in time and place, the government sponsored the harm, and promises were made at the time to help rebuild the city and then broken (Massey, 2004; Brophy, 2004:93). Even the statute of limitations is weak as the courts were not available to seek justice for African Americans at the time (Brophy, 2004). Yet even with all these factors, the Tulsa case was not successful.

iv. Causation

The problem of causation requires that the current situation of the victim is directly caused by the past conduct (Massey, 2004). Tort law in the USA typically demands a close connection between proof of harm and relief (Brophy, 2004). The US legal system is characterised by proof of individual harm and individual remedy making claims for race-based social actions for past racial harms complex. Opponents assert that demonstrable evidence that African Americans suffer socio-economic inequality today does not prove that this situation is due to slavery and is therefore only circumstantial evidence of causation (Massey, 2004).

A necessary condition for overcoming the casual objection is a recognition that victims may suffer transgenerational harms as descendants of victims face economic hardship, psychological health, physical health etc (Moffett and Schwarz, 2018:5). Thus, it is important to demonstrate that slavery is still in "living memory" – descendants are still trapped in the context of the crime and can illustrate this in terms of direct cause and effect (Beckles, 2007).

The concept of transgenerational harm draws from work on "intergenerational trauma" or how trauma caused during "sudden and unpredictable events" (Cross, 1998, 387), may transmit from generation to generation. Much work has been done on intergenerational trauma and post-traumatic stress syndrome (PTSS/PTSD), particularly from a psychological and behavioural perspective.[95] Multigenerational transmission of trauma is an integral part of human history, found in all cultures and societies

[95] See for example work on multi and intergeneration trauma among Holocaust survivors (Danieli, 1985; 1988; 1993; Solomon et al, 1988), on intergenerational trauma in Ukraine (Bezo, 2015); on intergeneration trauma and PTSS in Cambodian families following the Khmer Rouge Regime (Field et al, 2013; Burchert et al; Sack et al), on intergeneration trauma in genocide survivors and their families in Rwanda (Kagoyire, M. and Richters, 2018; Sandole and Auerbach, 2013; Musanabaganwa, 2020 and Shira et al, 2019), and wider work on the "multigenerational legacies of trauma" (Danieli, 1998),

(Danieli, 1998). However, most of the research into the issue has looked at trauma caused by relatively recent cases of violence, initially focussing on the Nazi Holocaust, and more recently other events such as the Rwandan genocide; events since which only one or two generations have passed and transmission of trauma from parent to children can be studied. Here, an intergenerational perspective can reveal the impacts of trauma and repeated patterns within families, and help explain:

> "…certain behaviour patterns, symptoms, roles, and values adopted by family members, family sources of vulnerability as well as resilience and strength, and job choices (following in the footsteps of a relative, a namesake) through the generations," (Danieli, 1998:9).

In the context of trauma transmitted over longer, historical periods we may speak of the "intergenerational legacy of the trauma" (Cross, 1998: 387). However, in the case of the transatlantic slave trade, many of the regular concepts used in intergenerational trauma studies are not so easily applied. The "event" of slavery was an institution that lasted four centuries, characterised by long-term, multidimensional black victimisation but also by "black coping" (Cross, 1998). Several generations have since passed, making it difficult to scientifically demonstrate direct casual links and the transmission of behaviours, practices and feelings from original survivors of slavery to their contemporary descendants.

However, at a cultural level the historical legacies of slavery on present day Afro-descendant communities are often identified, observed and discussed. The book by Afro-Colombian author Carlos Caicedo *¿Por qué los negros somos así?* (Why we black people are like this?) (2001) seeks to explore certain (often negatively perceived) behaviours and practices among the black population of the Chocó region as a legacy of the violence and trauma experienced by their ancestors during enslavement.

Cross however, questions such sweeping conclusions. From causality perspective he asks: how can we demonstrate the relationship between this past suffering and contemporary "black anxiety," when much of contemporary black trauma (estrangement from education, family patterns etc) is more easily traceable to recent personalised events in the context of segregation, Jim Crow and contemporary institutionalised racism (Cross, 1998: 387). Noting the coping and resilience strategies and high motivation adopted by previously enslaved people following their liberation he concludes:

> "…contemporary black problems are just that, problems traceable to contemporary circumstances and not dysfunctional attitudes transported out of slavery and projected into the present as a legacy of the trauma of slavery" (Cross, 1998: 391).

Rather then, the real legacy of slavery is white racism, which in a context of a lack of reparations and land redistribution measures, the post-slavery adoption of racist education, employment and housing policies and the deliberate underdevelopment of the black South became the real root of contemporary trauma (Cross, 1998).

In Chapter 5 I explore a different approach to intergenerational trauma studies, by focusing not on the individualist psychological and behavioural impacts of historical trauma, but rather the collective cultural and identity aspects of intergenerational harms. Taking the analysis beyond the realm of the family, and parent to child transmission, this collective, historical analysis of harms explores how the traumatic experiences of a People, stripped of their ethnic identity and heritage and forced into a place of racial inferiority can collectively affect future generations in terms of the loss of cultural practices, sense of history and collective identity. This analysis builds on local Afro-descendant understandings of collective harms experienced during the armed conflict, which highlight not only the sheer numbers of victims of violence, but the impacts on their specific collective rights as a people to identity, culture, territory and autonomy.

In dialogue with Cross's analysis, rather than dismissing the role of slavery due to intervening events, I explore how such harms have been continuously inflicted on Afro-descendant peoples at different historic moments since the period of enslavement until the contemporary period. From the decolonial perspective these moments should not be seen as separate to slavery but the continuation of that system under another name, forcing each new generation to cumulatively face new forms of trauma, in "layers of historical injustice" (Castillejo, 2013a), which build on previous traumas passed down. This continued injustice also forces "victims" to continually adopt new strategies of resilience by rebuilding a sense of collective identity, recovering memory and cultural practices, and breaking the "conspiracy of silence" (Danieli, 1998: 4) around their history as a people.

As discussed, opponents argue that identifying a casual nexus between contemporary suffering and the original crime becomes increasingly difficult over time due to intervening factors. Moffett and Schwarz argue that more recent factors such as "apartheid, colonialism, black codes, segregation, international depts and other discriminatory practices all contribute to current suffering in a way that at least obscures, and at most completely overrides the historically based claims," (2018:4). However, a decolonial understanding of slavery enables a reading of the continuous nature of a crime that did not end with abolition but morphed and manifested through the different "intervening factors" they cite. Rather than weakening the case for reparation, these intervening factors should strengthen the argument as they are also consequences of slavery and the ideologies that underpinned it.

There may be a claim that slavery caused racism which is in turn responsible for modern-day injustice. Massey asserts that racism exists where slavery did not, however, it is important to recognise that 1) the unique and specific forms of anti-black racism or "afro-phobia" that are consistent around the world are a consequence of slavery and colonialism, and 2) slavery was a global system which established structural racism on a global scale, and therefore racism need not only exist in territories in which slavery occurred to demonstrate that slavery is a root cause of modern-day racism.

v. Wider arguments against reparation

Massey argues that beyond pragmatic or practical obstacles to reparation there are political consequences for race-based redistribution programmes. These include complaints of unfairness from those people who do not receive reparations and incentives for people to "organise along racial lines," creating further racial divisions in society (2004:170). However, this argument ignores the fact that there are already racial divisions and racial inequality in society precisely which need addressing through a process of reconciliation and reparation.

Further, Massey argues that reparations could divert attention away from other approaches to addressing social problems, asserting that racial inequality is on the decrease since the 1940s and blaming ongoing poverty on family structure of black families rather than the legacy of slavery. He also cites constitutional problems with reparations claiming that racial classification and programmes based on race are against equal protection guarantees. Reparations programmes might be challenged as unconstitutional by Native Americans or whites whose ancestors were enslaved or victims of indentured labour and thus argues for "race-neutral" welfare initiatives. This misses the point of reparations which isn't just about closing socio-economic gaps but recognising responsibility and reconciling for gross violations of rights committed against a people.

vi. The threat of reparations

Many potential responsible parties are reluctant to even engage in discussions about reparations. During the Santiago Regional preparatory conference of the WCAR, Canada and the USA opposed the inclusion of a paragraph on reparation in the conference report; the European Conference against Racism barely addressed the persisting discriminatory legacies of slavery and colonialism, and as shown, the issue was controversial during the Durban WCAR (Achiume, 2019). During the 2007 bicentenary commemoration of the abolition of the slave trade, the UK government held activities and events to discuss the end of the trade, even founding the Wilberforce Institute for Study of Slavery and Emancipation (WISE), yet the issue of reparations for slavery was not considered a priority neither in the Institute's programme of work nor in the bicentenary activities (Beckles, 2007).

States' refusals to issue formal apologies for their roles in slavery and colonialism seem to be driven by a concern that apologies could be construed as an admission of legal responsibility (Achiume, 2019: para.53). In 2001 the French government became the first to recognise slavery as a CAH through the *Taubira Act* and made an official apology for its involvement. The legislation was criticised by many, especially African observers, as having "been partially emptied of substance... Particularly with regards to the compensation to States and to descendants of slaves" (see Beckles, 2007). In 2005 the Haitian president Aristide called upon the French government to repay the 150

million francs (US $21 billon) illegally extracted from the country since independence; the first formal request by a Caribbean government to a European for reparations for colonial crimes. Shortly after, the Haitian president was deposed by a French and US invasion and the next president took the issue off the political agenda (Beckles, 2007). Thus, Western law has avoided contemplating the criminal nature of slavery, while simultaneously criminalising modern, previously colonised states for modern day human rights violations. In an attempt to avoid the issue and avoid recognition of past crimes, Western States have diverted the conversation to financial aid, debt relief, fair trade and investment in "developing" countries.

Beyond the legal, constitutional, pragmatic and practical objections cited by opponents of reparations, there is a fear of what reparation would really mean for the current world order. A true reparation process would reveal uncomfortable truths, force nations and corporations to accept responsibility for some of the most grievous crimes ever committed and reveal the ways in which these crimes have been covered up by contemporary States through mis-education, media and retelling of history. Reparation would mean revealing the great lie of modern history, breaking the silence that followed the crime and allowing for true human liberation (Beckles, 2007). As Coats asserted, the idea of reparation frightens US society not because they may have to pay, but because it threatens America's very heritage, history and standing in the world (Coats, 2014).

vi. A decolonial approach to IHRL and Transitional for Justice historic reparations

The above analysis shows that IHRL may help to overcome some of the numerous arguments against reparation such as the statute of limitations, State succession and collective approaches to victim recognition. Thus, the fight for reparation should be at both domestic and international levels, through legislative measures, legal battles and grass roots education (Biondi, 2003). The legal limits of Tort law mean that IL may be the only likely forum for reparation claims, although as many of the same limitations exist within the IHRL, a more adequate approach may be political rather than legal process (Moffett and Schwarz, 2018). If reparation activists are to continue to push the agenda in the IHRL realm, there is a need to rethink IHRL from a decolonial perspective.

The legal, and to an extent the practical critiques of reparation demands assume the legitimacy of the liberal legal system. As we have seen, a critical legal perspective as proposed by Matsuda, allows a victim centred perspective on the law which "reveals the flexibility of legal doctrine and invites new consciousness of what law can be," (1987:388). A similar approach can be used with TJ, focused not only on international norms, but decolonial epistemologies of the victims of grave human rights violations and CAH and other atrocity crimes.

Despite increasing attention on the issue of reparation for slavery in the IHRL sphere, the struggle continues to be met with many of the same legal objections as domestic tort law such as issues of responsibility, the non-retroactivity of law (the intertemporal principle in IL) or limitations around the identification of victims of historic crimes. Indeed, States have often use IL itself to impede the reparation process (Achiume, 2019).

From a decolonial understanding of IHRL, it may be argued that many IL principles were adopted precisely to absolve States of their responsibility for colonial crimes. When the UN was founded in 1945, "750 million people - almost a third of the world's population then - lived in Territories that were non-self-governing, dependent on colonial Powers," (United Nations, 2021). Thus IHRL was born at a time when European States were still holding colonial power over most of the world and only four African countries – Egypt, Ethiopia, Liberia and South Africa – were members of the UN (Howard and Lombardo, 2018).

The first IL instruments reflected the interests of those colonial powers. The UN Charter makes the call to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," (article 1.2). It is often argued that this implied a right to independence for colonised peoples, however, the Charter did not envisage compulsory, universal and immediate decolonisation (Howard and Lombardo, 2018). Rather than calling upon colonial powers to grant independence to those under colonial rule, it merely created a set of rules and principles to be followed by colonial administrations (although avoiding this term) to ensure the economic, social, and educational advancement, just treatment, and protection against abuses for peoples who "have not yet attained a full measure of self-government" (article 73). Thus, colonialism was legal under IL until the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (The Declaration on Decolonisation) in 1960.

The adoption process of the UDHR is another example of the coloniality inherent in IHRL as during negotiation colonial powers sought to reduce the rights of people under colonial rule. The UDHR states that "…no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (article 2). However, during the drafting process, while the Soviet bloc, supported by other countries such as Cuba, Ecuador and Egypt pushed for a stronger clause which would give special protections for residents under colonial rule, the proposal was opposed by the USA and most European colonial countries especially the UK, Netherlands and France (Howard and Lombardo, 2018). Thus, even the cornerstone foundation of universal human rights sought not to recognise the injustices of colonialism.

The coloniality of IHRL is further reflected in the very development of the right reparation. The adoption of the Basic Principles and Guidelines on Reparations for Victims was delayed by influential

states that did not want them adopted prior to the Durban Conference as they may have strengthened arguments for reparation for slavery and colonialism (see McCracken, 2005, and Van Boven 2009). As seen the "highly politicised issue" of reparation for slavery divided states and could have complicated the Durban process had it been enshrined into human rights standards prior to the conference (Van Boven 2009:30). Thus, although the Basic Principles were originally presented to the Commission on Human Rights in 2000, rather than being brought to vote, they were consulted with interested governments, NGOs, and IGOs possibly to delay the process until after Durban (McCracken, 2005:78).

Historically, legal doctrine has been used to serve the interests of those that enslaved and colonised and not the victims of enslavement and colonisation, as shown above through the compensations paid to former slave owners and colonising countries. The UNSRR asserts:

> States must recognise that the very same international law that provides for the intertemporal principle has a long history of service to both slavery and colonialism…International law itself played an important role in consolidating the structures of racial discrimination and subordination throughout the colonial period, including through customary international law, which was co-constitutive with colonialism. Part of the problem, then, is that international law has not fully been "decolonised" and remains replete with doctrines that prevent the reparation and remediation of the inequality and injustice entrenched in the colonial era. When Member States and even international lawyers insist on the application of the intertemporal principle as a bar to pursuing reparation and remediation of racial injustice and inequality, they are, in effect, insisting on the application of neo-colonial law (Achiume, 2019: para.50).

Thus, in order to overcome the principal arguments against reparation IL must be decolonised. As the general prohibition on slavery was not enshrined in IL until the 1926 Slavery Convention, states have claimed not to have responsibility, by appealing to the intertemporal (or non-retroactive) principle (ILC, article 13) and arguing that slavery was not the object of an international obligation at the time it took place. However, the intertemporal principle is not an unmoveable bar and can be examined when: 1) an act is ongoing and continues into a time when IL considered the act a violation; or 2) when the wrongful act's direct ongoing consequences extend into a time when the act and its consequences are considered internationally wrongful (*ibid,* para.32).

In relation to the first point, while slavery may have formally ended, the system merely transformed and continued well after slavery was outlawed in 1927. The 3rd Amendment to the US Constitution, for example, allows for the forced labour of prisoners, a central component of today's prison industrial complex. While other States may not have similar State-sanctioned modern slavery, forced and exploitative labour continues, and in the case of Afro-descendants who experience racialised forced labour, it may be argued that this is a continuation of colonial enslavement by third parties. As the State has a responsibility to protect victims from such CAH, it would also be responsible for such a breach.

The second point requires a decolonial understanding of racism and racial discrimination. As shown above, several instruments have recognised contemporary racism as a direct and ongoing consequence of slavery and colonialism. Thus, contemporary manifestations of racism, rooted in and caused by slavery and colonialism continuing after slavery and/or colonialism were outlawed, cannot be subject to the intertemporal bar (*ibid*, para.49). The UNSRR calls on states and international lawyers involved in the interpretation and implementation of IL to explore this possibility as a way of overcoming the legal hurdles and obstacles to racial justice. She concludes that, if legal measures could be enacted to enable "slave owners" and colonising powers to receive reparation, legislative and executive bodies can reform the law and taking the similar measures for reparations for the victims of those crimes (ibid, para.51).

The arguments for and against reparation for slavery outlined in this chapter lay the foundations for locating the Colombian Afro-descendant reparation agenda within the wider global movement. As shall be shown in the following chapter, many of the same arguments around economic legacies and ongoing crimes are made in the call for reparation in Colombia, however while the Colombian case is more in-line with the settler-colonial US experience, the focus of demands and measures tend to adhere more to a structural and collective approach with shares elements with but goes beyond both the US and Caricom experiences.

CHAPTER 4: THE REPARATION AGENDA IN COLOMBIA

While (at the time of writing) there is no national reparations commission or official reparation movement in Colombia, PCN along with a number of academics and activists from other organisations have increasingly focused on the issue over the past decades, consolidating a vision and agenda for reparation for Afro-descendant peoples. This chapter presents a brief history of this process, outlining key moments, strategies, and arguments for the case for reparation. It draws on academic work, outcome documents from key meetings and events, and interviews and focus groups carried out with activists.

It begins with a broad look at how the issue of reparation has been addressed in Latin America then presents the case for reparation in Colombia, a genealogy of the reparation movement, emergence, approaches and specific demands being made. Finally, it looks at how the State has responded to the call for reparation through its discourse and actions.

I. A reparation agenda in Latin America

The reparation agenda of Afro-descendant movements in Latin America has not received as much media or academic attention as the movements in the USA and the Caribbean. This may largely be because while black movements around the region have long fought for racial justice and equality through a variety of approaches, most have not explicitly used the term reparation (Antón, 2007; Rauhut, 2018b). Further, unlike the countries of CARICOM, Latin American governments do not have a strong or dedicated position on reparation, so it has been largely in the hands of civil society to promote (PCN V National Assembly, 2014).

Despite the centrality of race and racism to colonialism and the establishment of modern republics in Latin America, the issues of race and racism were rendered largely invisible in the post-independence nations whilst they simultaneously continued to exclude, marginalise and oppress Afro-descendant peoples in a complex scenario of ideologies of *mestizaje*, whitening policies and a myth of racial democracy. The promotion of *mestizaje* ideologies as part of the nation-building projects outwardly celebrated the nations' racial mixing, but also served to deny and hide African, and to an extent, indigenous peoples' languages, cultures and histories through processes of acculturation or assimilation (de Friedemann and Arocha, 1995). Several writers contrast this outward celebration of *mestizaje* in Latin America with the experience of legal measures for racial segregation and inequality in the USA (Telles, 2004; Andrews, 2004; Htun, 2004; Cottrol, 2001). However, the ideologies of *mestizaje*, while appearing to erase categories of race, continuously reconstructed and recreated such categories, thus re-establishing a basis for racism (Wade, 2004:356). *Mestizaje* was bound up with the reaffirmation and consolidation of whiteness and whitening in which mixing played a role of eliminating blackness and indigenousness (*ibid*: 357).

Nevertheless, the *mestizaje* narrative contributed to a denial of the existence of racism through the "myth of racial democracy" which maintained the false notion of harmonious racial relations and racial mixing. This "myth" has meant the denial of racism, significant obstacles for racial justice movements, and in many cases a lack of self-identification among many Afro-descendant people themselves (Gates Jr. 2012, Hasenbalg, 1996; Safa, 1998; Cottrol, 2001; Htun, 2004). The systematic invisibilisation of Afro-descendant peoples in national narratives, and the denial of contributions made to the construction of nations, and even the denial of the very presence of black communities in many countries has meant that Afro-descendants have even been denied the right to self-identify and self-recognise as such (Cuesta, 2006). In this context, consolidated and constantly active racial justice movements in Latin America faced great barriers in getting the issues of racism and racial inequality on the national agenda.

Yet Afro-descendant activist groups are increasingly evidencing the existence of racism in their societies, supported also by increased academic research by both local and international scholars as well as the collection of racially disaggregated data by governmental and non-governmental institutions demonstrating patterns of inequality, marginalisation and racial stratification.[96] The growing body of research into black movements in the region gives visibility not only to the long and sustained struggle for racial justice in the region, but also to how the issue of reparation is a central, albeit often implicit component of that struggle.

[96] See for example work by Wade, 1997; Andrews, 2004; 2018; Salas, 2005 et al, Telles, 2004; 2014; Asher, 2009; Paschel, 2016 among others.

The reparation issue has been promoted in Latin American agendas in several key moments. The First Congress of Black Culture of the Americas held in 1977 in Cali Colombia, one of the first Pan-African meetings to be held in Latin America, marked a significant change in racial politics in the region (Lao-Montes, 2007). The meeting included the participation of organisations and people from Africa, Europe and the Americas (Castillo and Caicedo, 2015), but it was organisations from Latin America that led the process, organising cultural, intellectual and political networks (Lao-Montes, 2007). Figures such as Afro-Colombian writer Manuel Zapata Olivella discussed issues of the invisibility of Africa and Afro-descendant people, the reproduction of racism in educations systems and the lack of participation of black communities in political, economic, cultural, religious, and artistic life across the region (Castillo and Caicedo, 2015).

A second key moment was fuelled by the 1980s Washington Consensus and the deepening of neoliberal economic policies around the region, leading to the emergence of new social movements of resistance. These movements largely influenced the multicultural citizenship reforms that took place throughout the region in the context of transitions towards democracy, opening space for ethnic minority groups to make claims to collective rights (see Lao Montes, 2007; Molyneux and Lazar, 2003; Sieder, 2002). Of the 15 countries to implement multicultural citizenship reforms by 2005, only Brazil, Colombia, Ecuador, Guatemala, Honduras and Nicaragua extended (some) collective rights to their Afro-descendant populations, the vast majority focusing on indigenous peoples (Hooker, 2005:286). However, these platforms were important in opening new space for greater discussion on the rights and historic justice for Afro-descendant peoples.

A third key moment was the Durban WCAR (2001) and preceding Regional Conference in Santiago (2000), widely cited as a defining moment for Afro-descendant movements in Latin America in getting the issue of racism on the table and opening the door for a debate on reparation (see McDougall, 2002, Antón, 2007, Lao Montes, 2007; Lennox, 2009; 2020). Indeed, after Durban many black movements in the region widened their demands and struggles to include reparation for enslavement and racial discrimination (Wade, 2018:135). In Brazil, while racial justice movements and demands existed long before Durban, following the conference there was a proliferation of demands critiquing the myth of racial democracy and an "opening up" of activists denouncing racism and calling for a recognition of the legacy of slavery, with some activists demanding reparation (Fischer, Grinberg and Mattos, 2018)

However, while there is now a wide body of academic literature and reports into racism and racial justice movements in the region, there is still very little specifically on the issue of reparation. Colombian academic and activist Claudia Mosquera's 2007 edited collection on "Afro-reparations" is perhaps one of the most comprehensive texts on reparation including cases particularly from

Colombia, Ecuador and Brazil, the three countries with perhaps the most consolidated work and experiences explicitly on reparation.

i. The case for reparation in Latin America

The case for reparation in Latin America is rooted in the memory and understanding of the history of enslavement in the region which is becoming increasingly visible through historical research. Nueva Granada, present day Colombia, was a key point for the Spanish transatlantic slave trade. Cartagena, on the Caribbean coast was one of the main ports through which enslaved Africans were brought to mainland South America during the slave trade. They were trafficked to different areas of the country, and later the region, to be exploited for their labour in mining as well as a range of other activities including agriculture (in particular sugar cane), commerce, pearl fishing, domestic work and craft production (de Friedemann and Arocha, 1995).

Slavery was justified by the Spanish crown under the argument of economic growth. On February 28th, 1789, the crown legalised slavery through a royal decree granting free trade in "slaves" in Cuba, Santo Domingo and Caracas to Spaniards and foreigners. The King justified this in the name of promoting agricultural production and taking advantaged of the riches offered by the climate and fertility of the lands (Constitutional Court, 2009: Section 2.2).

While Portugal dominated the transatlantic trafficking routs in the first centuries of the slave trade, the Spanish crown managed many of the "slave ports" in the Americas. It signed contracts with foreign traffickers and conceded permits to allow them to import enslaved people through their ports, in particular Cartagena de Indias, in today's Colombia, Veracruz in Mexico and Buenos Aires in Argentina, while the Spanish Treasury charged taxes to allow the trafficking of large numbers of enslaved people (Ferreira and Seijas, 2018).

When Portugal was replaced by England and the Netherlands as the dominating force in trafficking of enslaved Africans in the mid-17th Century, it began to focus its economic attention on Brazil, its biggest colony. It vastly increased trafficking of enslaved people to Brazil to prop up the sugar, and later coffee industries, such that by the end of the trade Brazil had received 45% of all Africans trafficked to the Americas (Ferreira and Seijas, 2018), while 50-60% of all Africans trafficked to the Americas had been taken to the region now known as Latin America.

The enormous wealth that the slave economy generated for Portugal led the country to heavily oppose the abolition movement. It only supported the criminalisation of trafficking when Brazil gained independence in 1822 and Portugal wished to protect and maintain its labour force in its existing colonies in Africa by preventing them from being trafficked to the Americas. Such accounts of the disregard for African human life and the economy driven violence committed by colonising States are central to the claims for reparation.

Struggles for liberation from European colonialism and the ideals of equality and freedom which underpinned the liberation processes were contradicted by a *criollo* or European descendant elite that simultaneously sought to maintain the institution of slavery and the lucrative economy that it enabled. During the wars of independence, Simon Bolivar "The Liberator" sought refuge in Haiti, the only republic which recognised the freedom of all, under the protection of President Alexandre Petión who had converted his country into a support base for the liberation struggles around the region. Petión granted Bolivar exile and supplied him with arms, ships and soldiers to continue the liberation struggle on the condition he declare the abolition of slavery in the region.

On June 2nd, 1816, Bolivar adopted The Carupano Decree for the freedom for slaves, within the context of a revolutionary independence process declaring "The absolute freedom of the slaves who have wailed under the Spanish yoke in the past three centuries." However, during the congress of Angostura on 19th February 1819, Bolivar was unsuccessful in his calls to congress to guarantee the absolute freedom of the enslaved and the issue was left to the next Congress enabling the continuation of the old regime and all its privileges (Constitutional Court, 2009: para 6.2).

Thus, the question of abolishing slavery was not directly decided during the independence processes but rather left open for each province to decide on the issue. There were 5 main legislative approaches to abolition: 1) immediate abolition without compensation such as the case of Haiti; 2) immediate abolition with compensation for enslavers such as the case of the English Antilles; 3) gradual abolition with compensation for enslavers such as the case of Colombia; 4) gradual abolition with patronages such as the case of Cuba; 5) slow and gradual abolition, but without compensation such as happened in Brazil (Constitutional Court, 2009: para.4.1). In all cases Latin American countries were slow and reluctant to abolish slavery, continuing the practice well after the new Republics had achieved independence from the Spanish and Portuguese crowns.

As such, the economic legacy of enslavement in the region not only corresponds to the wealth of the colonising nations, but that gained by newly independent nations that continued slavery to prop up their new economies. Sugar produced by slave labour was the main pillar of the Cuban economy well into the 19th Century (Ferreira and Seijas, 2018) and enslaved people did not achieve emancipation until 1886 in the country. Africans were still enslaved in Porto Rico in 1873, and the process of emancipation in Brazil lasted more than six decades after independence due to the central role that slave labour played in the emerging coffee industry (Ferreira and Seijas, 2018). Following abolition, many freed Africans and Afro-descendants continued to endure exploitative work conditions comparable to enslavement (Ferreira and Seijas, 2018) and in the same activities in which their ancestors were enslaved such as cotton picking in Peru, and gold mining and sugar cane cultivation in Colombia for such low wages that it is almost comparable to slave labour.

Traffic and trade were at a peak during the 18th century with 6 million victims, subsequently reducing to 1.89 million in the 19th Century. However, the vast majority of enslaved people trafficked to the Americas during the 19th Century after independence, were trafficked to Brazil and Spanish America (Constitutional Court, 2009: para.2.2). The continuance of slavery and later slave-like economic exploitation left a clear economic legacy within Latin American societies in which formally enslaving families continue to make up the elite and, in many cases, continue to dominate the same industries employing Afro-descendant people on low wages and exploitative conditions. In Brazil, the average monthly income of people of European descent (USD$ 860) is nearly twice that of people of African descent (USD$ 466), (WGEPAD, 2014).

Racial laws or "*codigos negros*" also continued to be adopted and implemented after the abolition of slavery, such as the so-called "whitening policies" to reduce the size of Afro-descendant populations which were seen as an obstacle to development.[97] In Colombia, in the early part of the twentieth century such whitening policies were enshrined in Law 114 of 1922 which states that:

> The immigration agents will not endorse the passports of any immigrants in any of the cases specified in Law 48 of 1920, nor of individuals who due to their ethnic conditions would be a source of concern in Colombia. The entrance into the country of individuals who due to their ethnic, organic or social conditions would be inconvenient for the nationality and the greater development of the race is prohibited. The authorities of the ports and the border cities will comply with this provision acting in agreement with the National Government (Law no 114 of 1922, article 11 *my translation*).

ii. Reparations demands in Latin America

Racial justice movements around the region have largely centered on collective land rights and ancestral territories. This is the case of Afro-descendant peoples in Ecuador, Quilombola peoples in Brazil and the Garífuna people in Central America (see Anderson, 2007; Thorne, 2004, Lao Montes, 2007, Fischer et al, 2018; Offen, 2018, Anton, 2007). While these movements do not always employ a language of reparation, where discussions of reparation do take place, land rights struggles are often referred to (see Anton, 2007).

In Brazil, the 1988 Constitution, which enshrined the principle of racial equality for the first time, associated land rights claims with racial reparation. However, in the case of Afro-descendant Quilombolas this was limited to a transitory article that would not be developed into a judicial structure to claim such titles for another seven years, and even then, it only applied to communities that could legally prove they were descendants of enslaved people (Fischer et al, 2018:194). Members of the Quilombola people call on the State and society to view these land rights as "…reparation for

[97] See Arocha and de Friedemann, 1984; de Friedemann and Arocha, 1995; Perez and Stubbs, 1995; Hasenbalg, 1996; Wade, 1997; Arocha, 1998; Safa, 1998; Reichmann, 1999; Cottrol, 2001; Telles, 2004; Reid Andrews, 2004, 2018; Htun, 2004; Hooker, 2005; Cuesta, 2006; Anton, 2007; Garcés Aragon, 2008

hundreds of years of exclusion from the right of Brazilian blacks to own land and the recovery of a cultural ancestry and a past, a legitimate claim to space and cultural and racial identity" (Farfan-Santos, 2016: 7, cited in Offen, 2018: 602).

Racial justice movements which speak directly to reparation often focus on inclusionist, equality approaches advocating for affirmative action policies to address racial inequalities in areas such as political participation, education and employment. This is particularly the case in Brazil and Ecuador (see Anton, 2007; Lao Montes, 2007; Rosa, 2012; Domingues, 2018; Fernandes, 2019). In Ecuador, the Afro-descendant movement has largely mobilised around affirmative action as necessary for the realisation of citizenship rights, demanding legislative and policy measure to combat poverty and racial inequality and ensure social inclusion (Antón, 2007). Many of the proposals for affirmative action and inclusion in the areas of education, employment, health, culture, justice, and budgets were incorporated into the National Afro-Ecuadorian Development Plan (2003) and the National Human Rights Plan.

Brazil is well known for the advances in affirmative action particularly in the areas of education and public employment. The end of the 20th Century saw a breaking of the silence on racism with the adoption of laws which criminalize racism, the recognition of culture, memory and land rights, affirmative action policies and the growing recognition of slavery as a CAH whose victims needed reparation (Fischer et al, 2018). In 1996 in response to the Afro-Brazilian movement's demands, President Cardoso became the first to recognize the historic significance of racism in the country and to suggest affirmative actions as a means of reparation (*ibid*, 2018:196).

This was further consolidated under the Lula government with the creation in 2003 of the now disbanded Secretariat of Policies for the Promotion of Racial Equality (SEPPIR). This move, which included the appointment of numerous activists from the black movement within the government institutions making up the SEPPIR, was an historic step in the institutional recognition of racial justice demands. It included the creation of a secretariat for Affirmative Action Policies and even the institutionalisation of the concept of reparation with the creation in Salvador da Bahia of a Municipal Secretary of Reparations.[98] In 2010 the adoption of the Racial Equality Statute further institutionalised the concept of reparation stating that "Affirmative support programs constitute public policies aimed at repairing distortions and social inequalities and other discriminatory practices endowed, in the public and private spheres during the country's process of social formation" (article 4, para. VII).

[98] A/HRC/27/68/Add.1 (23 September 2014).

A third central issue of concern for racial justice and reparation in Latin America is that of recognition. As mentioned above an important distinction between Latin American movements and those of the US relates to the context of *mestizaje* and myth of racial democracy which not only denied the contributions of Afro-descendant people to the development of their nations, but invisibilised the very existence of Afro-descendants as a people, reflected in national discourse and academia. As well as limitations in quantitative data on enslavement and African history, there is a lack of qualitative research into the actual human lived experiences of enslavement in the region, the social and cultural implications of enslavement, and a need to deepen societal memory of enslavement (Ferreira and Seijas, 2018). Thus, a key area of reparations demands in the region concerns a retelling of history, a recognition of the role that enslaved Africans played in the wars of independence from the Spanish and processes of memory and recovering what has been denied and stolen (Anton, 2007).

Underpinning all of these issues is the struggle to overcome racism, in all its forms; not only through structural measures but through transforming culture and attitudes, educational reforms, media campaigns and wider public education (Anton, 2007).

II. The Case for Reparation in Colombia

The case for reparation in Colombia largely reflects the case for reparation in other contexts, citing the historical injustices and the sheer horror and violence of enslavement, the lack of compensation for freed slaves, the compensation paid to slave owners, and contemporary injustices of inequality, structural racism and violence as a legacy of enslavement. However, Colombia also represents a unique case due to its particular history, the configuration of the State, the role of land struggles in the 20th Century and the ongoing armed conflict which has had disproportionate impact on Afro-descendant communities. Therefore, activists assert the importance of developing an own model of reparation that responds to this particular context.[99]

i. Historical arguments for reparation

The double discourse of liberation

> *"We were slaves not only of Europeans. We were also slaves of the children of Europeans who settled here. Los Mosquera, Los Valencia, Los Caicedo, Los Chaus, were of course slavers, who also enriched themselves with slave labour after independence."*[100]

[99] Interview with Carlos Rosero, 2019.
[100] Interview with Naka Mandinga, 2019.

As discussed above, the discourse of liberation during the struggles for independence largely excluded enslaved Africans. In Colombia the *creoles* driving the liberation process opted for a gradual abolition process through birth laws and manumission.

Antioquia was the first province to consider the manumission of enslaved people, proposing and adopting the first *birth law*. The Antioquia Birth Law (20th April 1814) did not abolish slavery but denied enslavers the possibility of owning the children ('receiving the fruit') of enslaved women, thus aiming to free children and obliging enslavers to take responsibility for them up to 16 years old. Although the arguments for this law included the "inhumanity of slavery," the principal motive was political and economic; the institution of slavery could not be abolished with one fell swoop due to the economic and political consequences this would have in society (CC, 2009: para 4.2.2). Proponents emphasised the impact abolition would have on the economy and argued that a more sensible option was to improve the living conditions of enslaved people (*ibid*).

The law also made it illegal to introduce "slaves" into the territory, it nullified any legal acts of sale (num.6) and prohibited the separate sale of "slaves" from the same family (num.4). The legislator was required to "free one slave out of ten" (num. 7) and the Meetings of Friends of Humanity was created to ensure manumission processes took place (num. 11). However, the law upheld restrictions on the liberty of children. Those who at 16 years of age did not have an occupation and were not considered "useful," would not 'enjoy' citizenship rights and remained under the custody of boards (num.3) while emancipated persons who "abused their freedom" had their rights suspended (num.5).

While no compensation was given to emancipated people, a fund was established to pay manumissions. This was financed through voluntary contributions made by "sensitive and virtuous citizens," through a "title of commandments for the redemption of captives" and through taxes on "slave owners" (num.9). The Antioquia Law was in place until 1816 when it was suspended following the reconquest of Spain.

As in many other countries in the region, enslaved Africans played a key role in the war of independence, fighting alongside creoles. This was encouraged through promises of freedom, but also through threats of servitude for those that did not enlist. Like economic enslavement, the utilization of enslaved people in the wars of independence was also rooted in racist ideologies. In a letter sent to the Conversative political and military leader General Francisco de Paula Santander, Simon Bolivar attempted to convince the General to enlist enslaved Africans in the ranks of the independence army. While Bolivar has historically been remembered in many narratives as the *libertador* who attempted to decree freedom for enlisted slaves through their participation in the wars of independence[101] as agreed in a deal made with Haitian President Alexander Petión, his letter to Santander reveals the racism and dehumanization of Africans hidden behind these discourses of freedom:

[101] Initially through the *Carupano Decree of 2 June 1816*.

> The military and political reasons I have had for ordering the slave levy are very obvious. We need robust and strong men, accustomed to inclement weather and fatigue; men who embrace the cause and the career with enthusiasm; men who see their cause identified with the public cause and in whom the value of death is little less than that of their life" (Bolívar, 1820).

He goes on to assert that:

> The political reasons are even more powerful… Such people are enemies of society, and their number would be dangerous. It is not to be admired that, in moderate governments, the state has been disturbed by the rebellion of the slaves…Will it not be useful for them to acquire their rights on the battlefield and that their dangerous numbers be diminished by a necessary and legitimate means? (Bolívar, 1820).

The historical contributions of enslaved Africans to the achievement of independence has largely been erased from national narratives: During our interview, PCN founding member and reparation advocate Carlos Rosero asserted:

> …our elders won the war of independence. Here they sell us the story of the liberators and all that, but a portion of those liberators were black. As troops, and black officers, they killed them. All of them are listed as traitors, and as I don't know what. They were erased from history. So, we are left simply as slaves. And there you can put symbolic [reparation], but also material.[102]

Following the wars, enlisted Africans were betrayed by those that had promised them freedom. The war of independence in Colombia was fought from 1810 to 1819 and concluded with the Battle of Boyacá on the 7th of August 1819. Yet, Bolivars promise to Petión went unfulfilled, and slavery was not officially abolished until 1851. Thus, as Rosero concludes: "We went, and we won the Independence, but we didn't win freedom."[103]

This particular history leads reparations activists from CONPA and PCN to assert that responsibility for the crime of enslavement lies not only with the Spanish and European colonial States, but also with the Republic of Colombia and the powerful slaving families that continued well after independence.[104] As the new republic embarked on its nation-building project of modernity, Afro-descendants were excluded from that project and denied citizenship (Mosquera, 2007).

Despite this history, a particular challenge for the reparation movement in Latin America is that many States view themselves as the victims of colonialism rather than recognising their own role in enslavement. In 2014 the Economic Community of Latin American and the Caribbean (ECLAC), made a public declaration on reparations which, like the DDPA recognises slavery and the slave trade as a CAH. However, ECLAC States distance themselves from responsibility asserting that they:

> …resolutely support an expedited joint effort, which is action-oriented and in good faith with those colonising States, which were responsible for the genocide of native populations and the enslavement of Africans in the region, with the sponsorship and organisation of the state, in

[102] Interview with Carlos Rosero, 2019.
[103] *Ibid*
[104] Interviews with Helmer Quiñones, 2018; Carlos Rosero, 2019; Naka Mandinga, 2019

> order to identify fair and effective mechanisms to repair the consequences of such serious human rights violations that constitute a crime against humanity to which they are morally bound (ECLAC, 2014)

In response, PCN asserts:

> This important offer by the member states of ECLAC is the same as the position maintained by GRULAC, throughout the entire process of the III WCAR, which supports the demands of the Afro-descendant movement for reparations, but on the understanding that they should be the responsibility of those who, in the 2014 declaration, are called colonising states. This position constitutes an enormous challenge for organisations and activists of the African diaspora in Latin America (PCN, 2014).

Reparation for the perpetrators

As mentioned above, the creole elite of Colombia secured a gradual abolition of slavery, the result of a long process beginning with the revolution of Cartagena (1812), manumission in Antioquia in 1814, which was pushed back by the reconquest of Spain, and the "freedom of birth law" of 1821 (Carabali, 2007). By the 19th Century the "threat" of revolts or rebellions was widespread. Especially as enslavement was concentrated in three areas of the country, the Caribbean Coast, the Pacific Coast and the Southwest, where the population of enslaved Africans was relatively high compared with the white population.

The Law of Manumission of Slaves (based on the Antioquia Birth Law) was adopted on 19th July 1821. This raised the age of minors from 16 to 18 and enabled parents or family members to buy their children's freedom so they were no longer under the power of the enslavers. Further it enabled the new citizens to acquire small pieces of land to cultivate; a promise that was never fulfilled however.[105] Those that defended the law argued that labour under conditions of freedom would be more beneficial to the economy than slave labour as personal incentives would mean more dedication to the work. Others cited the incompatibility between the liberatory project of the independence revolution and enslavement (CC, 2009: para.7.4).

In defence of the law the president stated that slavery was opposed to the fundamental law of the Republic (CC, 2009: para.7.4). Congressman Restrepo laid out the principal arguments for ending slavery asserting that slavery is directly contrary to the law of nature, to the spirit of the Gospel, to the security and permanence of the Republic, to good customs, to the population, and to increasing agriculture, mining and all kinds of industry (CC, 2009: para.7.5). Yet, the decision was made to abolish slavery gradually and with full respect for the enslavers; a decision rooted in the excuse of the need to gradually integrate former slaves into society.

[105] Interview with Helmer Quiñones, 2018.

The Law of Manumissions created manumission committees and public ceremonies for freeing enslaved people. Between 1821 and 1851 20,000 people were freed through this process. These ceremonies often took place on important dates marking significant battles or liberation achievements. In this way the first steps taken towards the abolition of slavery were intrinsically tied to discourses of independence and liberation from the Spanish (Restrepo, 2006). However, while enslaved Africans could buy their freedom through manumission processes, this depended on their being able to save sufficient funds which, in reality very few people could achieve. Many did not even attempt it, knowing that even if they were "free" their rights would not have been respected in the society (CC, 2009: para.1.5).

On 30th August 1821, just weeks after the adoption of the Law of Manumission, the first Constitution of the Republic of Colombia (The Constitution of Cucuta) was adopted. While the Constitution protected "the freedom, security, property and equality of all Colombians," it defined Colombians as "free men," affirming that some men were not free and thus continuing to recognise the existence of slavery. Congress had denied Bolívar's petition for absolute freedom for slaves and respect for their property, political and natural rights. However, although the revolutionaries decided not to abolish slavery outright, they were obliged to adopt measures to regulate the treatment of enslaved people. The Constitution invoked the "*cédula española 'fechada en Aranjuez a 31 de mayo de 1789'"* which had set standards for treatment, working and rest hours and working conditions, as well as establishing parameters for punishments for enslaved people. It contemplated punishments for slavers that broke these conditions and called on parish priests to encourage "good treatment" by slavers.

The second Constitution of the Republic (1830) maintained the same language on the "equality of all Colombian men" and introduced the concepts of citizens and rights. This Constitution included the categories "free men" and "freedmen" (article 9), but again as this implied the existence of "non-free men" it still recognised the institution of slavery in the republic. The third Constitution (1832) of the State of Nueva Granada, asserted that *Granadinos* again included both those born free and those freed (article 5) and incorporated the Birth Law of 1821 including "the sons of slaves born free, by the ministry of the law, in the same territory (article 5.5).

In the 1830s and early 1840s there were frequent revolts of enslaved peoples in southern Colombia. The Civil War (The War of the Supremes), Colombia's first internal armed conflict (1839-1841) awakened visions of freedom among enslaved people. This was to such an extent that José María Obando, previous vice and future president of the Republic, adopted a decree preventing enslaved people from joining the army in Cauca and Buenaventura.

The 4th Constitution (1843) also upheld the institution of slavery and months after its adoption, with the victory of the conservatives over the liberals in the War of the Supremes, Law 22 of 1843 was adopted reinstating the possibility to sell enslaved people across international borders. Thus, enslaved

people waiting for their freedom under the Birth Law could be sold to a country where slavery was still legal.

It was not until four decades after having decided to grant "freedom to all Colombians" that this promise was fulfilled with the adoption of the Law of 21st May 1851 (Law on the freedom of slaves) creating conditions for "a true republican project [to be] finally established in Colombia" (Constitutional Court, 2009: annex: para 13). The Law of 21st May declares that:

> From January 1, 1852, all slaves that exist in the territory of the republic will be free. Consequently, from that date they will enjoy the same rights and will have the same obligations as the Constitution and laws guarantees and imposes on other Grenadians (article 1).

Yet even with this landmark law, the dehumanisation and disregard for African lives continued. The law's main objective was to repair the perpetrators and not the victims of the crime (PCN, 2014). Most of the text focuses on the forms and processes of manumission and compensation, through state funds for "slave owners." It even states that: "Manumission funds are sacred and no authority or public corporation, or official of any kind whatsoever, may distract them from their purpose, nor give them different investment from those established herein…" (article 11).

Articles 16 and 17 address money paid out for slaves in the event of the death of a "slave owner," articles 14-15 address the freedom of enslaved people in other nations and a possible agreement with Peru, and no more is said in the law about the conditions or situation of previously enslaved people.

After the adoption of the Law of 21st May, a constitutional reform was introduced affecting articles 2, 4 and 6 of the 1843 Constitution. The subsequent 5th Constitution of 1853 (article 6), 6th Constitution of 1858 (article 11), 7th Constitution of 1863 (article 12), 8th Constitution of 1886 (article 22) and the current Constitution of 1991 (article 17) all reiterate the prohibition of slavery. Despite this legal evolution however, racism and exclusion of Afro-descendant peoples remained constant.

The Law of 21st May without a doubt sped up the process of Manumission which had begun in 1821, with another 10,000 people freed after its adoption. Yet for many activists, the law's prioritisation of reparation for "slave owners" goes against its own objectives of equality for freed Africans. This echoes the analyses of Beckles that, by legislating compensation for slave owners, slaver States were in fact reducing enslaved Africans and Afro-descendants to objects and property, contradicting their Constitutions which recognise the equality of all men (Human Rights Council, 2019).

As such, in 2009 Antonio Bohórquez Collazos brought a legal case against Law of 21st May with the accusation that it violates the preamble and articles 1, 2, 11 and 13 of the 1991 Constitution. The plaintiff argued that 1) the law ignored the principle of human dignity by creating compensation for the "owners" of enslaved persons through the manumission process, thus reifying the latter, reducing

them to "merchandise" and perpetuating their social discrimination; and 2) the law represents a "*relative legislative omission,"* as while it ordered the release of all enslaved people in the name of equality, it then established a regime of inequality by creating that system of compensation for slave owners and no such compensation for the freed slaves and their descendants. He thus charged that the law "deliberately omitted the regulation of the compensation that the freedmen should receive for the material and immaterial damages suffered as a result of slavery" (Constitutional Court, 2009: Section III, Para.1).

The plaintiff further argued that the law continues to be in effect as no other law has since repealed or subrogated it and the inequality of treatment was never corrected by the legislator. Such omission goes against the Constituent of 1991 which enshrines principles of respect for dignified human life at its core, based on "material fairness, with racial democracy and under the unequivocal precept of material equality" (*ibid*: Section III, Para.2).

The case heard testimonies from state institutions including the Ministry of Culture, the Ministry of Interior and Justice and The Attorney General's Office; academic institutions such as the Colombian Jurisprudence Academy, ICESI University, Santiago de Cali University, and Cauca University and civil society organisations including PCN, the Observatory on Racial Discrimination, The Centre for Law, Justice and Society Studies and DeJusticia.

Many of the state and academic interventions called upon the Court to declare itself inhibited from ruling, arguing that the Law of 21st May no longer had effect. Castaño Rodríguez, Director of the Law Programme at the University Santiago de Cali, argued that the law has not been the cause of racism and discrimination against people of African descent, nor could it be expected to eliminate "the lack of equality and fraternity among Colombians, as well as discrimination against certain communities," (*ibid*: Section IV, para.5). He invoked the principle of non-retroactivity stating that "the Constitutional Court cannot declare the unconstitutionality of a norm on the grounds that it violated rights that, at the time of issue, did not exist," and concluded that "…it is not possible to grant retroactive effects to the Political Constitution of 1991 to study the enforceability of laws that are not in force, nor producing legal effects at the time of filing the lawsuit" (*ibid*). Similar arguments were made by state institutions and other legal academics.

The joint intervention by the Centre for Legal, Justice and Society Studies, DeJusticia and the ODR presented counter arguments for why the Court should not declare itself inhibited from ruling on the case. They identified and refuted four possible reasons why the Court may pronounce itself inhibited from ruling: 1) Substantive objection (as the direct victims of the crime are no long alive); 2) institutional (the Court does not have the jurisdiction to formulate reparations policy); 3) the security of the decision (as the enslaved people were freed and the compensation to owners was paid there is

no object on which to rule); and 4) as the issue is of an "absolute legislative omission" the Court would not have jurisdiction (*ibid*: Section IV, para.9).

To counter the first point, they argued that there is a case for repairing historical injustices based on three main arguments. Firstly, the damage is not only historical but ongoing as "Since the adoption of the institution of slavery, the Afro-Colombian population has been continuously and permanently discriminated against and the effects of slavery have remained uninterrupted over time." (*Ibid*: Section IV, para. 9.3.1). Secondly, the damage is reflected in the marginalisation, exclusion and disproportionate violation of human rights facing the Afro-Colombian population. Thirdly, the Afro-descendant population is subject to the right to reparation for the damages suffered as a result of the institution of slavery in accordance with IHRL.

The intervention goes on to reiterate the claim that the Law of 21st May represents a relative legislative omission by arguing that:

> …its express purpose was to free the slaves and that they enjoy the same rights as the rest of the population. But precisely by omitting a slave reparation policy and, on the contrary, establishing economic compensation for the perpetrators, that is, the owners, the law continued to discriminate against the former slaves and incurred a relative omission against their own purpose, which was achieve not only free slaves but achieve equal rights of that population with the rest of Colombians (*ibid*: Section IV, para.9.3.2).

DeJusticia called upon the Court to declare it a duty of the government and congress to adopt a comprehensive and collective reparation policy based on consultation with the Afro-descendant community (*ibid:* Section IV, para.9).

PCN in their intervention also argued that the effects of the Law of 21st May remain in force in time and space asserting that the Court has a duty to order collective reparation aimed at generating "real conditions of material equality between Afro-Colombians and the rest of society," (*ibid*: Section IV, para.8).

In the end, the Court decided that Law of 21st May no longer had legal effect, and that it was inhibited from ruling, arguing that it can only issue substantive pronouncements on current legal norms or norms that continue to have legal effects (*ibid*: Part VI, para.3). It concluded that it was not competent to examine the law due to "subtraction of matter" as it was no longer in force and no longer produced effects within the current legal system (*Ibid,* Section VI, para.4.6)

However, taking into account the arguments made in the interventions, particularly from civil society the Court stated that this decision did not remove the need for a public debate about the consequences and implications of racist practice, both past and present "not only to evidence and abolish them, but to overcome them, repair those affected and ensure that they are never repeated in the national territory" (cited in Sánchez, 2011).

The final sentence adopted includes some important considerations concerning the lasting effects of enslavement in Colombia. In particular the Clarification of Vote by Magistrate María Victoria Calle included a detailed analysis of the historical context and genesis of the Law of 21st May, demonstrating how, despite the abolition of slavery some 160 years ago, marginalisation and exclusion of black communities has continued both through their being silenced in official history and a progressive loss of cultural identity around the African origins of Colombia (Sánchez, 2011). In her judgement Magistrate Calle stated that as enslaved people were freed with no compensation, the real protection of recourse to freedom was a protection for the "masters" (Calle, Constitutional Court, 2009: para.10.3.4). She further concluded that:

> …the Law of May 21, 1851, is not an act by which the legal decision was made to free enslaved persons in Colombia; It is the legal decision through which the long, complex and painful process of manumission that had begun 30 years earlier was ended. Specifically, it opened the door to move from a gradual abolition with compensation to a policy of immediate abolition with subsequent compensation (*ibid*, para.13).

This recognition supports the inconformity of reparations activists to the process of abolition in Colombia, which was never about the rights and lives of the enslaved, but about the interests of those that enslaved them. This is evidenced by the deepening racial inequality following abolition such that, as Vergara observes "if there existed a relationship of inequality based on exploitation during slavery, in the process of liberation that relationship became more acute," as the subjects of manumission passed "from slavery to servitude" (2014:356).

Thus, the 30-year process of Manumission in which countless enslaved Africans bought their own freedom is a key argument for reparation. Carlos Rosero recounts how in Yurumanguí, Buenaventura, enslaved Africans paid 500 million pesos for their freedom per person despite the fact that Petión had already paid for that freedom through his direct support to Bolívar. For 32 years after Bolívar had made a deal to abolish slavery, the institution continued. He asks:

> …how much was that worth in money? How much was the suffering of two or three more generations that ended up enslaved worth...when in 1819 they had made an agreement with the Haitians?...How many people was it, how much do they owe us for that? How much should they give us back?[106]

The Expropriation of Ancestral Lands

Another key argument particular to the case for reparation in Colombia is rooted in the expropriation of ancestral lands of Afro-descendant communities which became widespread in the mid-20th Century but began as far back as the turn of the 20th Century. In Northern Cauca soon after abolition Afro-descendant communities became victims of continued systematic violence, land dispossession and expropriation and forced displacement as well as violent attacks and killings of social leaders

[106] Interview with Carlos Rosero, 2019.

(Carabali, 2007). While many Afro-descendants in the region continued to work in the haciendas where they had previously been enslaved, many other families had bought or obtained collective land titles following abolition (Carabali, 2007). This land was fundamental in providing families a system of economic stability and autonomy. Francia Marquez of the Mobilisation of Afrodescendant Women for the Care of Life and Ancestral Territory and PCN recounts how land meant freedom for her community:

> In the mountain area where people still managed to hold some land, people are freer. They are more independent, they have more autonomy, food rights, so the greater the amount of land owned by black people, the greater the possibilities of freedom and autonomy. And I think that's something our elders taught us; that without land we were nobody, that's what they told us. Without territory we are nothing. That is why I think that in my community they always brough us up thinking that we had to protect that piece of land, that was not a gift, that it had cost us a lot and that we had to take care of it, as an inheritance, not only for us but for the next generations. Like, those who lost the land was again condemned to slavery.[107]

Yet, the 20th Century saw new interest in lands and agriculture from the descendants of slaving families which meant violent displacement of communities in the context of the conflict between conservatives and liberals. During both the 1000-day war (1899-1902) and later "The Violence" in the mid-20th Century, countless families were driven of their lands. The new landowners did away with the economic base that Afro-descendant communities had built, destroying their production processes and leading to displacement and a new form of urban marginalisation (Carabali, 2007). Those that were not driven off by violence were driven off by economic warfare. Francia Marquez goes on to describe how with the arrival of the sugar can industry to the region in the early 20th Century, the government, through what is now the Agrarian Bank, loaned Afro-descendant farmers money to switch their existing agricultural production to sugar cane. Many of these cultivations failed because this monocrop was not part of their culture, and because they were used to producing small-scale for self-consumption. When they were unable to pay back the loans, their lands were seized and sold to the large sugarcane producers, leaving them with little choice but to work for these employers on the lands that were once theirs. She describes this process as a deliberate strategy to return the black communities to slavery:

> …since we are in a racial state, that racial state prioritizes all its actions to maintain its structures in favour of white supremacy…everything it does, everything it develops is to maintain the power of white supremacy, so it has created conditions for us to return to slavery, because submitting us to slavery again guarantees that white supremacy will stay in power.[108]

As shall be discussed in Chapter 5, this appropriation of ancestral lands continues today. Carlos Rosero recounts how today the State gives mining titles to outsider private mining companies on the same lands in La Toma that families had purchased a few years after the abolition of slavery. There

[107] Interview with Francia Marquez, 2020.
[108] *Ibid*.

are similar experiences of black communities on the Caribbean coast who had brought land but were later expropriated.[109]

In 1959, Congress adopted Law 2 on "the Nation's forest economy and conservation of renewable natural resources," which declared lands, including Afro-descendant and indigenous ancestral lands as *baldios* or wastelands that would become Forest Reserves for the use for energy production (article 2). These ancestral lands were those for which Afro-descendant communities already had historical titles either through purchase, agreements with the Spanish Crown (as in the case of the Palenque de San Basilio) or through the sovereign right of possession.[110] The consequences of Law 2 were that the customary property rights of Afro-descendant peoples over their territories were denied. It further lead to a period of economic plunder, violent encroachment on lands and resources and the beginning of decades of deterritorialisation and a forced displacement strategy that continues to today (Quiñones, 2010: 11-12).

Thus, for many activists there is a case to be made for a "double reparation" both for the crimes of enslavement and the subsequent violent expropriation of ancestral lands during the 20th and into the 21st Century (Carabalí, 2007).

ii. The legacies of slavery

As with arguments for reparation from around the region and the Diaspora, the case for reparation does not rest only on historical crimes, but on the lasting legacy of those crimes in the contemporary period.

The economic legacy

There are several ways in which the economic legacy of enslavement manifests in Colombia. Primarily, not only the Spanish Crown, but the ruling elite families of Colombia continue to enjoy the huge wealth accumulated during slavey and many of those families continue to dominate the industries in which their forefathers enslaved Africans, such as mining and agribusiness. There has been a silence around economic legacies of enslavement and the elite families that descend from the slaving project, hidden from the national history which needs to be retold (Mosquera, 2007).

Secondly, the fact that compensation was never paid to enslaved peoples, coupled with the continued structural marginalisation and exclusion from the nation-building project has led to the current situation of socio-economic inequality lived by Afro-descendant communities (Mosquera, 2007).

[109] Interview with Carlos Rosero, 2019.
[110] *Ibid*

Viveros Valencia argues that the social, economic and political structural inequalities with their roots in the colonial slave system are still felt today and are expressed in inequalities in areas of health, education, housing, basic sanitation, social security and access to the labour market, and place Afro-descendants at the base of the social pyramid, with the lowest life quality and social welfare indicators in the country. This legacy is evident both in statistics comparing the situations of Afro-descendant geographic territories such as Buenaventura with the rest of the country, and population data on the situation of Afro-descendant people residing in specific cities such as those in Cartagena or Cali compared with the rest of the population of those cities. Such socio-economic inequalities are increasingly being recognised in official government reports and statistics (see MinInterior, 2009 et al).

Helmer Quiñones describes this scenario:

> So, there are people who have been dispossessed for centuries, and at the same time other people who have accumulated from that dispossession. So we are currently among the poor, the poorest in the country. And it is obvious, just as it is obvious who are the people of the Colombia of accumulation, like the great presidents with surnames and heritage for 200 years, [while] we have been dispossessed of almost everything.[111]

Racism

"The entry into force of that legislation in 1852 did not destroy the slave system either. Particularly although it could have destroyed the conception that we were merchandise, that is to say that we could be traded, it did not destroy the strongest core of the slave system and that is racism"[112]

A second legacy of slavery is the institution and ideology of racism itself. One of the main arguments made for the need for reparation is to undo the ongoing paradigm of racism and racial hierarchisation which continues to affect the life quality of Afro-descendant people today (Mosquera, 2007). Viveros (nd) asserts that racism and racial discrimination "is reproduced in both institutional practices and government policies" and that policies for specific action for Afro-descendant populations do not recognise the existence of ideologies of racism, and as such there is a "a systematic obscuring of racism in racial public policies in Colombia."

The dehumanisation of Africans was central to the colonial ideology of racism (Mosquera, 2007) and this same dehumanisation and disregard for black lives underpins the continued violence and exclusion of Afro-descendant people. There is a continued process of exclusion, marginalisation and oppression of black communities and legislation has often gone directly against the black population excluding them and their culture from the nation (Cuesta, 2006).

[111] Interview with Helmer Quiñones, 2018.
[112] *Ibid.*

In this sense black lives only matter in terms of their economic use. Carabalí shows how in the case of Afro-descendants in Northern Cauca, "Their economic value was inversely proportional to their social vale, a characteristic the continues today," (Carabalí, 2007:391). Thus, racism and the social construction of race and racial difference are rooted in slavery. While the manifestations of racism may change over time, the ideology of racism always plays the same function, to uphold economic power structures (Mosquera, 2007:234-235). Thus, while racism is dynamic and in constant transformation, adapting and taking different and new forms in the various contexts and moments in history, since the colonial era it is always related to the colonial dynamics of accumulation and dispossession (Mullings, 2013).

In the case of Colombia, racism must also be understood from the perspective of the geographic racialisation of the country rooted particularly in the historical abandonment of the Pacific region (Mosquera, 2007:235). Racialised territories are those in which a significant number of an ethnic group are concentrated (Vergara, 2014). Vergara's concepts of "emptied territories" and "emptied bodies" demonstrate how racism and the racialisation of both Afro-descendant bodies and Afro-descendant territories empties them of meaning in the national imagination, presenting only stereotypes from a "single story." Emptied territories are those "where colonisation, exploitation, violence, deterritorialisation, development policies and liberation resistances coexist covered in a cloak of narratives of under-development and barbarism" (2014:352). For both emptied territories and emptied bodies, atrocities are justified through racialising narratives.

iii. Continued colonial crimes

Finally, as shall be explored in more depth in the following chapters, a central element to the case for reparation in Colombia is that racialised violence and colonial crimes against Afro-descendant people did not end with the abolition of enslavement, but rather transformed in the contexts of capitalism, the neoliberal economic model, and the continuing armed conflict. For many, the contemporary situation of Afro-descendants is comparable or even worse than the period immediately following emancipation (Carabalí, 2007) or even that experienced during enslavement.[113]

The internal armed conflict for many is the latest episode in this continued colonial war for resources and territorial control which impacts the integrity of Afro-descendant peoples. The recent decades of the armed conflict have converted Afro-descendant ancestral territories into "scenarios of war" and black communities themselves as victims of displacement, clashes between armed groups, forced disappearances, and modern-day colonisation (Cuesta, 2006:66). This armed conflict obliges us to think about reparation from two moments of suffering: the past and the present. Thus, as mentioned above, many activists have made the case for a "double reparation" that responds both to the crimes of

[113] Interview with Helmer Quiñones, 2018.

enslavement and the subsequent violence inflicted upon black communities largely through forced displacement, land expropriation and the wider armed conflict (Mosquera, 2007; Carabalí, 2007).

II. The evolution of a reparation agenda in Colombia

"We need to re-politicise and radicalise the black movement in Colombia by broadening it's understanding of the historical causes of inequality. It does not matter if reparations are achieved or not. Making your demand is a way of questioning and understanding the role played by trafficking, enslavement and colonialism in today's world system." (V National Assembly of Proceso de Comunidades Negras-PCN, 2017)

i. Law 70 of 1993 – the first reparations law in Colombia?

While the State has never explicitly adopted a law to repair the victims of the crime of slavery in Colombia, Law 70 of 1993: *In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands*[114] is seen by many as a reparatory law.

The adoption of the 1991 Constitution of Colombia was part of the wave of multicultural citizenship reforms that took place across Latin America as well as being one of the outcomes agreements for the demobilisation of the M-19 guerrilla group following peace talks. However, during the negotiations there had been no discussion about the rights and territories of ethnic peoples (Arocha, 1989, in Wade 1995) and rather, as has been the case in subsequent peace negotiations, ethnic authorities and organisations had to protest and pressure the government for inclusion (Wade, 1995).

Afro-descendant peoples faced further exclusion from this process as no Afro-descendant representatives were elected to the Constituent Assembly. Rather both Afro-descendant and indigenous peoples were represented by an indigenous Embera leader from the Pacific region on the justification that black and indigenous peoples in the region faced the same issues of colonisation and land loss (Wade, 1995). During the discussions, others taking part questioned the very inclusion of Afro-descendant people as an ethnic group (Wade, 1995).

The 1991 Constitution recognises and protects the country´s ethnic diversity (article 7) and includes several articles on "ethnic rights" including language rights (article 10), culturally relevant education (article 68), and political participation through quotas (article 176). However, while it includes several specific provisions for indigenous peoples including two seats in the Senate, the only direct reference to Afro-descendant peoples is Provisional Article 55 which instructs congress to adopt:

> …a law which recognises black communities which have been occupying barren lands in rural areas along the rivers of the Cuenca del Pacifico, in accordance with their traditional

[114] All citations of Law 70 of 1993 are taken from the English translation by Norma and Peter Jackson of Benedict College, Columbia, 2007.

> practices of production, the right to collective property over areas which have been demarcated by that same law (Colombian Constitution of 1991, PA55),[115]

within two years of the new Constitution coming into force.

Following the adoption of the Constitution several existing Afro-descendant organisations and activists came together to form PCN with the aim of transforming PA 55 into such a law. This law materialised in 1993 with the adoption of Law 70 which whose objective is to:

> …recognise the right of the Black Communities that have been living on barren lands in rural areas along the rivers of the Pacific Basin, in accordance with their traditional production practices, to their collective property as specified and instructed in the articles that follow (article 1).

Law 70 is based on the principles of recognition and protection of ethnic and cultural diversity, respect for the integrity and dignity of black communities, participation in decision-making processes and protection of environment (article 3). It recognises rights to collective land titles as non-transferable, imprescriptible, and non-mortgageable (Chapter III), use of land and protection of natural resources and the environment (Chapter IV), mining rights (Chapter V), education and cultural rights (Chapter VI) including freedom from racism (article 33), and economic and social development including participation and consultation mechanisms (Chapter VII).

For many activists Law 70 is one of the most important pieces of legislation for Afro-descendant peoples' rights not just in Colombia, but throughout the African diaspora. Carlos Rosero recalls an encounter with African American activist Tukufu Zuberi who viewed Law 70 as a reparatory law.[116] When discussing the issue of historical reparation all the interviewees and focus groups brought up Law 70 demonstrating the significance that this law has for the struggle for reparatory justice. As recognised by the Constitutional Court, at the very least the law opened up space for a debate on reparation by highlighting the need to overcome historical marginalisation and exclusion as a legacy of slavery (Constitutional Court, 2009a: Part II, para.14).

It is important to highlight however, that the process around the construction of Law 70 and the ethno-territorial approach to Afro-descendant rights has been the subject of critique among some academic circles and sectors of the movement. It is argued that the exclusion of black activists from the Constituent Assembly and their representation by indigenous negotiators lead to an essentialised and limited conceptualisation of black communities in PA55, namely, those rural communities with specific traditional practices, and limited to the Pacific region. This conceptualisation was later reflected in Law 70 which defines black communities as:

[115] All citations of the 1991 Colombian Constitution are taken from the translation provided by the Richmond Constitution Finder. Available at: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf [accessed 17 June 2014].
[116] Interview: Carlos Rosero, 2019.

> …the group of families of Afro-Colombian descent who possesses its own culture, shares a common history and has its own traditions and customs within a rural/semi-rural setting, and which reveals and preserves a consciousness of identity that distinguishes it from other ethnic groups (article 2.5).

Law 70's focus on Afro-descendant peoples as ethnic communities characterised by cultural difference it is argued, resulted in a definition of blackness that "ruralises and indigenises blackness and prioritises ethnic difference over racism" (Wade, 2009); a process that Restrepo has described as the "ethnicisation" of black rights (2013). This has been understood in the context of wider historical processes of exclusion of Afro-descendants from the national narrative of *mestizaje* and *indigenismo*, in which Afro-descendants, who had previously been imagined along racial and not cultural lines, did not fit the dominant cultural rights model and narrative (Wade, 1997). Thus, the "ethnicisation" of black rights has been understood by some as a response to the very constraints and parameters established by the state's multicultural agenda and the dominant academic (anthropological) narrative of ethnic rights which only permitted inclusion along ethno-cultural lines (see Wade, 1995, 2009; Restrepo et al, 2013; Ng´weno, 2012; Paschel, 2010).

Three principal concerns with ethnic rights framing are expressed in these critiques: 1) it excludes the rights of the roughly 70 percent of the black population that do not live in the rural pacific region or do not necessarily identify with traditional cultural identities of the black communities identified in Law 70 (Paschel, 2010, Mosquera, 2007); 2) the focus on ethno-territorial rights overshadows the issue of racism, further invisibilising the racialised experiences of black communities in the context of the myth of racial democracy (Wade, 2009). Indeed, Law 70 makes only one reference to racism and one reference to urban experiences (Paschel, 2010); and 3) the ethnicisation of black rights was a necessary and perhaps obligatory strategy for inclusion in the new multicultural space that only made room for ethnic groups and had no interest in addressing issues of racial discrimination. It is argued that the government's multicultural agenda far from being a benevolent act of respect for ethnic peoples' rights, was rather part of the wider neoliberal strategy seeking to consolidate control over the pacific region and ethnic territories (Wade, 2009; Ng'weno, 2012).

Concerning the first point, while it may be true that the majority of the black population lives in urban contexts this does not undermine the legitimacy and importance of a law addressing the land and cultural rights of a people facing what many have described as "ethnocide" (Quiñones, 2010; Arboleda, 2019; 2016; Mosquera, 2003). As Wade asserts, Law 70's concept of black communities addresses the rights of those with "a common regional history of settlement and production and, more implicitly, of recent threats from exploitative colonisation" (1995:350). Thus, it is a direct response to this ongoing and urgent threat.

Further, Law 70 proposes a concept which is fundamental to understanding urban black identities; the notion of "*campo-poblado*" or the "rural-urban setting." This recognises that despite processes of migration and forced displacement towards urban areas, many black communities, even after several generations, still maintain strong cultural and identity ties to their ancestral territories and many reconstruct and maintain elements of those cultures and territories in the urban territory. Black urban territorial rights are increasingly asserted using the language and parameters of Law 70, both as communities seek to reconstruct territory in cities such as Medellin and Bogotá (García Sánchez, 2012), and as they resist new threats of land dispossession in urban areas through initiatives such as "*Marcando Territorios*" and the defence of the "*terrenos ganados al mar*" in Buenaventura (CNMH, 2015).

Harrinson Cuero of PCN locates this debate in wider discussions on the recognition, or not, of Afro-descendants in Colombia as an (ethnic) "people" subject to the rights recognised in IL and in particular ILO Convention 169 of 1989 on Indigenous and Tribal Peoples and its predecessor ILO Convention 107 of 1957. Cuero asserts that as ILO 107 recognised collective rights for tribal and semi-tribal populations the latter of which includes "groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community," (article 1.2), this applies to the experience of those Afro-descendants who through forced displacement and processes of acculturation may have lost certain elements of their cultural identities[117] (see also CONPA 2021a). While ILO 169 does not include this definition, it emphasises the principle of "self-identification" thus restoring the decision-making about who is and is not a "tribal people" to the people themselves. As Colombia has ratified both of these conventions, and Law 70 is rooted in the normative framework on ethnic rights, Cuero argues, the country has set a precedent through which Afro-descendant people whether in urban or rural contexts, and whether having maintained or lost elements of their cultural traditions may still identify as a tribal people, and thus as subjects of Law 70.[118]

On the second concern, that of racism, it is important to note that the organisations mobilising around ethno-territorial rights have not sacrificed the struggle against racism for a focus on ethnicity and culture, but rather view the two as interrelated an indivisible. Thus, the issue of racism is a central component of the PCN struggle and principles. Afro-descendant peoples are both an ethnic and racialised group and are victims of both ethnic and racial discrimination which are intertwined and inseparable. As Francia Marquez Mina, has repeatedly demonstrated, it is racial discrimination and structural racism that has facilitated the very denial of ethno-territorial rights of Afro-descendant peoples through ongoing processes lack of recognition (Marquez, 2020).

[117] Interview: Harrinson Cuero, 2020.
[118] *Ibid*.

Harrison Cuero talks of "ethno-racial racism" (see CONPA, 2021a), which he describes as "The denial of the other, based on both phenotype and ontological ideologies," [119] in which it is precisely Afro-descendant peoples' cosmovisions and ethno-territorial rights demands, that are seen as a threat to the hegemonic, extractivist economic order, that underpin much of the racism, discrimination and racial violence that they face.

As shall be shown in the following chapters therefore, it is this inseparable dialogue between racialised and ethnic experiences of Afro-descendant peoples that has led them to push for an "ethno-racial" approach to TJ, which aims to address the ways in which the devastating cultural and territorial damages caused by the armed conflict and the lack of state response or protection have been driven and perpetuated by racism.

The third point resembles the "interest convergence" theories of critical race theory which demonstrate how rights for oppressed and marginalised groups only become institutionalised when in the interests of the ruling elite or they do not threaten established power structures.[120] Thus, the multicultural citizenship agenda must be understood in the context of the wider neoliberal agenda which through the "limited recognition of cultural rights" seeks to strengthen state capacity to shape and neutralise political opposition to the economic development agenda by incorporating rights-holders into the neoliberal project (Hale, 2005). Hale's warning that neoliberalism recognises only "limited" cultural rights, which often include "cultural recognition" but not control over resources (2005:13) is certainly evident here. While Law 70 recognises collective land titles for "black communities," rights to the renewable and non-renewable natural resources, subsoils, or national parks within the ancestral territories of Afro-descendant peoples are excluded (article 6). Harrinson Cuero views such limitations as the sadly logical result of seeking laws for colonised peoples in the context of a racist State.[121]

Further Law 70 (Chapter III) creates *Consejos Comunitarios* to hold and manage collective land titles (article 5), but these have less autonomy and control than for example in Indigenous reserves which are recognised as territorial entities and receive part of the official national budget (1991 Constitution, article 239; Law 70, 1993). Despite years of advocacy, key chapters of Law 70 concerning mining rights have still not been regulated for implementation. Finally, in many cases Consejos Comunitarios have been co-opted or usurped by outside interests in order to sell ancestral lands and enable access to private investment or state development[122] while those that fight to protect their

[119] Interview: Harrinson Cuero, 2020.
[120] see Bell, 1995; Ladson-Billings and Tate IV, 1995; Ladson-Billings, 1998; Dudziak, 2009; Delgado and Stefancic, 2012, Ojulari 2016
[121] Interview: Harrinson Cuero, 2020.
[122] See for example the case of the Consejo Comunitario La Esperanza, Buenaventura outlined in JUZGADO SEGUNDO CIVIL DEL CIRCUITO ESPECIALIZADO EN RESTITUCIÓN DE TIERRAS SANTIAGO DE CALI – VALLE DEL

territories and communities in accordance with the law are frequently subject to violence and repression (CODHES, 2014).

Thus, Ng'weno concludes that the recognition of multicultural citizenship must be seen as a state strategy through the creation of new categories of citizens and "governable populations" to gain increased legitimacy and authority over territories and resources in order "to continue ruling" (Ng'weno, 2012:157). Conversely, some have argued that it was precisely the economic interests in black territories in other regions of the country such as Northern Cauca that led to their exclusion from Law 70 (Carabalí, 2007). Indeed, the struggle of the Consejo Comunitario de la Toma to gain collective land titles in Northern Cauca has faced ongoing legal and institutional barriers that defend the interests of mining companies and deny the very existence of the black community.[123] What is clear is that behind the "politics of recognition" (Taylor, 2000), whether ethno-territorial rights are partially recognised or denied there are constant competing and powerful economic and political interests driving State decision-making.

This panorama does not however undermine the importance and significance of Law 70 for the Afrodescendant struggle for reparation and racial justice. Francia Marquez recounts a conversation with an African American elder and ex-member of the Black Panthers in which she told him about law 70:

> He stared at me, and tears started to come out, he started crying, and I didn't know why he was crying. Then he told me…thank you very much for bringing that news. That the black people in the United States who, like the Black Panthers who were exterminated…and many of them, like, Mumia, were rotting in the prisons of the United States for that dream, had fought for the dream of owning collectively titled land for black people. I connected this with the voice of our elders who told us that having land is freedom. I believe those Black Panthers in the US knew that real freedom for black people meant having land. Having collectively titled territory.[124]

What makes Law 70 law so powerful for so many black activists within and beyond Colombia is that it goes beyond the inclusion and equality approach typical of many anti-racist struggles, to encompass a demand for autonomy, territory and as PCN elder Naka Mandinga describes; "a right to be different."[125] It is precisely this ethno-territorial focus that makes the law not only reparatory, but decolonial, enabling Afro-descendant peoples to assert their status as a people, to claim political and economic autonomy rooted in their own ways viewing the world and to reclaim and protect lands and cultural practices lost or threatened through historical and ongoing processes of colonisation. In this

---

CAUCA, Auto de Interlocutorio No. 022, adopted 21st February 2017, Radicación 76-001-31-21-002-2016-00071-00.

[123] Interview: Francia Márquez, 2020.

[124] Interview: Francia Márquez, 2020.

[125] Personal communication with Naka Mandinga, 2016.

sense it may be seen as a step towards self-determination for a still colonised people. Mina speaks of the significance of Law 70 and the process of its construction:

> What we did during 1991 with the inclusion of the AT55 that lead to Law 70, our constitution as PCN, everything has been part of a work seeking to create the conditions to guarantee that historical… to guarantee that construction and that survival as a people. Everything we do is linked to that demand and that aspiration, and that project. That is part of the political project.[126]

Thus, despite the very real limitations and challenges of claiming decolonial rights within an ongoing paradigm of coloniality in which neoliberal interests prevail, the process of drafting and advocating for the adoption and implementation of Law 70 has been fundamental in shaping and defining the discourse, visions and direction of the Afro-descendant struggle for self-determination, racial justice and reparation. This is reflected in PCN's own autonomous model of rights and which Ajamu Baraka identifies as People Centered Human Rights[127] that shall be discussed below.

ii. A people-centred human rights

In an interview with Ajamu Baraka we spoke about his interaction and understanding of the work of PCN:

> I think that [PCN] they're doing a lot of human rights work that has not been clearly identified as being people centred human rights. They're just doing the work, but in practice it reflects some of the approaches that we talk about in this people centred approach…They are responding to their objective needs. And the, the ethical framework that they operate from, and they therefore create what they consider to be a right and they then organise and agitate around that. So, even moving away from things like the right to development. They are not, they say that that is too limiting, a western concept and then creating their own understanding. So…a fundamental part of PCHR is this epistemological decolonisation if you will. The fact that people themselves are involved in concrete struggles, people themselves who have their own experiences are also knowledge producers. And from their own understanding of the world, they determine collectively what they need and because of their experiences as colonised people, who are responding in a positive and innovative way, they are in fact creating ideals, structures and approach that have a universal applicability.[128]

Perhaps due to prior understanding and awareness of the neo-colonial and neoliberal political landscape and the consequential limitations of decolonial struggles within the state-centred constitutional rights sphere, since its origins PCN has also embarked in parallel a process of own autonomous rights "*derecho propio*," which largely reflects Baraka's people centred human rights approach (2013). Following the adoption of Law 70 on August 27 of 1993, PCN defined and asserted an own vision of collective rights during the organisation's I National Assembly held in November 1993 which reaffirmed the rights and principles that they had pushed for in Law 70, articulating them

[126] Interview: Charo Mina, 2020.
[127] Interview with Ajamu Baraka, 2017.
[128] *Ibid*.

within own language and from the perspective of the life projects of Afro-descendant peoples. These own rights emphasise the interrelatedness, interdependence and indivisibility of territory, cultural identity, being and autonomy. PCN et al. (2008) outline the organisation's five principles which constitute this own vision of rights.

The first is the affirmation and reaffirmation of being: the right to *be black, to be black communities.* This includes a right to be a collective from an own ecological, social, economic, and political life vision of the world contradicting the dominant ideology that "exploits", "discriminates" and locates black peoples in a "subordinate position" (PCN, 2008:3). The right to be black, is the right to have a different vision of the "Past, present and future" (*ibid*). It calls on members of the black community to "begin a deep process looking to their interior, to their own consciousness to be able to transform those beliefs, stereotypes and imaginaries that the dominant culture has imposed and that has distorted the black being" (PCN, 2008:3-4). This affirmation is not only an example of an own vision of rights but an example of the decolonial turn.

Second is the right to "a space to be," that is the *right to territory*. This asserts that "We cannot *be*, without the space to live according to what we think and want as a way of life," the vision of territory is a vision of habitat and a space where "the black man and the black woman collectively develop their BEING, in harmony with nature" (PCN, 2008:4). This right implies defence and recuperation of ancestral territories which may translate to restitution of land.

Third is the right to "exercise being" (otherwise known as autonomy, organisation and participation), in relation to the dominant society, political parties, social movements and other ethnic groups. This right emphasises the need for political conditions for participation and social mobilisation of black communities towards autonomy for decisions and actions that define their lives as an ethnic group (PCN, 2008:5).

Fourth is the right to "an own vision of the future" including an own vision of ecological, economic, and social development rooted in own cultural vision and traditional production practices and organisation (PCN, 2008:5). This represents a decolonial vision which challenges and resists the hegemonic development model based on the interests of the dominant society. It includes the right to "own development" and preservation of cultural diversity. It is an anti-capitalist vision asserting that capitalism has been demonstrably incapable of guaranteeing the future existence of animal, vegetable and human life on the planet. Thus, it proposes an own and alternative development model in accordance with traditional practices which have demonstrated sustainability and development of natural and cultural diversity on the planet (*ibid*).

Finally, the model asserts the importance of an internationalist approach to black struggles and identifying with the black struggle around the world. The 1993 PCN assembly asserted:

> We are part of the struggles that black peoples are developing in the world for the conquest of their rights. At the same time, from its ethnic particularities, PCN will contribute to the joint struggle, with the sectors that favour the construction of a dignified and alternative life project (cited in PCN, 2008).

An understanding of these principles and own rights is essential to understanding the particularities of the reparation demands in Colombia which as shall be shown in the following chapters, have largely been rooted in this own vision of ethno-territorial rights developed through decades of activism and internal processes which seek to assert an own language of human rights emerging from locally grounded territorial struggles.

iii. The increasing use of the language of reparation

The Law 70 process was certainly a key moment for the reparation movement in Colombia. Carlos Rosero recounts that the first time he recalls hearing about the idea of reparation was during the discussions for the drafting of Law 70 when a colleague made a presentation about what he called the elite's "betrayal" of the black people, concluding that there was a "debt" owed to the black community.[129] The language of "debt" became largely integrated into the discourses of the movement throughout the 1990s and, as shall be discussed below, within the State and institutions discussing issues of Afro-descendant rights and development.[130]

A second key moment was in the months following the adoption of Law 70 when PCN adopted one of its main guiding texts entitled, *Principles of Development on an own vision of the future* (1994), which outlined seven principles for the Development Plan for Black Communities, including the principle of "compensation" which it defined as:

> …repairing the historically constructed and increased imbalance between the significant contribution of the Afro-Colombian population to the construction of material, cultural and political nationality, and the very scarce retribution of the nation to black communities in terms of social investment and productive resources for its sustainability and development.

The document asserts that while the state has sought to address the imbalance through some legislative measures, including, Law 70 of 1993, recognition should materialise in "the mandatory allocation of public resources" such as a percentage of the GDP to finance the development of Afro-Colombian regions and communities" (PCN, 1994).

[129] Interview: Carlos Rosero 2019
[130] *Ibid*.

As mentioned above, the next defining moment for reparation was the 2001 Durban World Conference in which activists from PCN, including interviewees Carlos Rosero and Naka Mandinga participated. Carlos Rosero discusses how, while there were previous conversations and discourse around compensation and the debt owed to black communities it wasn't until the Durban process that they began to speak directly and explicitly about historical reparation.[131]

Following this, in 2005 the Nacional University of Colombia (UNC) held a "Seminar on Afro-reparations, slavery remembrance and contemporary social justice." The outcome agreement asserted that "the nation will be multi-ethnic and multicultural when it assumes the existence of several memories" challenging the denial and exclusion of Afro-Colombian history (Cuesta, 2006). The seminar discussed arguments for reparation, what should be repaired and how, including as shall be discussed below material, symbolic and public policy measures for reparation and the ongoing existence of a "debt" despite the adoption of multicultural legislation and affirmative action policies (Cuesta, 2006).

During PCN's IV National Assembly (2008) the organisation established the issue of "historical reparations" as one of the guiding principles of struggle. Nevertheless, it has been difficult to get the issue on the agenda because for many, slavery is "an issue of the past" (Rosero, 2008), and further, the urgency of armed conflict and ongoing humanitarian crisis have left little time for activists to dedicate to the reparation agenda. As shall be explored in the following chapters this is a vicious circle as historical reparation is a fundamental GNR or non-continuation of the violence inflicted in the armed conflict.

In 2017 PCN together with CNOA and COHDES organised the International Workshop: From Transitional Justice to Historic Reparation which aimed to identify and evidence "The connections between current and continuing injustices against people of African descent and historical reparations." The outcome document of the workshop demonstrated among others 1) The existence of a historical continuum linking the tragedies of the past with those of the present and the urgency of working on the issue of reparation; 2) The limited advances in cases of collective reparation and land restitution; 3) The need to document and clearly identify the victims and the consequences of the events that demand reparations both historical and in the context of the armed conflict; 4) the need for a public policy on historical reparation with adequate resources; 5) the importance of an international reparation agenda through which Afro-descendants across the region must join forces 6) The need to create a National Reparations Commission (Ojulari et al, 2018).

During the V Assembly of PCN held in August of 2017 the organisation further developed its work on reparation identifying priorities in the areas of education, collaborative work with the international

[131] *Ibid*.

agenda, the promotion of a law on reparation and reiterating the need for a National Reparation Commission.

On 21st May 2019 in commemoration of Afro-Colombian Day PCN and other organisations held a public audience at Congress of the Republic: "Day of Dignity and Resistance of the Black People."[132] Presentations were made by different members of the movement on the humanitarian crisis, the national development plan, the progress of the collective reparation agenda and the implementation of the peace agreement. I was invited to make a presentation on historical reparation during which we reiterated the now public call for the convening of a National Commission for Historical Reparation (Ojulari, ND). On 21st May 2020 PCN organised an international virtual forum on reparation with participants from Colombia, Venezuela, the USA and the Caribbean to share experiences in the reparation process and continue constructing the process for the National Commission.

iv. Approaches to reparation

The approach and vision for reparation within PCN very much reflects the own vision of ethno-territorial rights outline above. There are several key elements to the way activists view and understand reparation.

Primarily, while for many activists reparation must be demanded from the state, a key element of the reparation process is the internal work within the black community referred to as *trabajo hacia adentro*.[133] All of the interviewees discuss this issue referring to the importance of self-reflection about who we are as a people and our history,[134] self-recognition and reaffirmation of identity and a legacy,[135] research, political education for new generations and well-developed strategies beginning with understanding internally that there is a debt to be paid to the black people.[136] Members of PCN emphasised this point during the V General Assembly citing self-education and community training as a priority for reparation, developing new generations of fighters (PCN, 2017).

Secondly, for some, the reparation process is seen as a political battle more than a legal one. It requires not only court cases and legal proceedings but organisation and mobilisation. Importantly the movement must be politicised and radical with aims beyond cash.[137]

For Mina the reparation project must look not only to the past, but to the present and the future, to combat the continued oppression, racism and the violation of the black peoples' rights which prevents

[132] https://titulaciones.renacientes.net/2019/06/04/21-de-mayo-dia-de-la-dignidad-y-resistencia-del-pueblo-negro/ (accessed 15 September 2020)
[133] This was mentioned in interviews: Naka Mandinga, 2019; Marie Cruz Renteria, 2019, and Carlos Rosero, 2019.
[134] Interview: Helmer Quiñones, 2018.
[135] Interview: Marie Cruz Renteria, 2019.
[136] Interview: Carlos Rosero, 2019.
[137] *Ibid*

them from realising their life plans as a people. In her words "reparation implies generating conditions to guarantee the survival as the black Afro-descendant people." [138]

As mentioned, among the priorities identified for a reparation agenda during the PCN V National Assembly was the establishment of a National Commission for the Study of Historical Reparation composed of activists, entities and academics (PCN, 2017). For PCN a Commission among other aims, should attempt to respond to the questions posed by Congressman Conyers in HR40 such as: should states make apologies? Do we still suffer the effects of slavery? Does the situation justify compensation? This would also require the formulation together with the wider Afro-Colombian social movement of a proposal on the nature of historical debt, the amount and the mechanisms to make it effective.

Finally bringing the political and legal reparation agenda together, PCN aim to push for an Historical Reparation Law which builds on the contributions and conquests of the African diaspora and strengthens the own and collective perspective of the rights of the Black People in Colombia, bringing together the experiences of Afro-descendants in Colombia and beyond (PCN, 2017). In the context of the 2014 presidential elections, ANAFRO The National Afro-Colombian Authority, supported by PCN, presented a proposal to the then candidate for re-election, Juan Manuela Santos calling on him to commit to presenting a bill for a Reparation Law to congress addressing the consequences of enslavement, the slave trade and the lasting consequences of racism and racial discrimination. They further called on Santos to commit to creating an office and working group consisting of the president's office, The Ministry of Finance, The Department of Planning, The Financial Fund for Development Projects-FONADE, The Ministry of Education, The Ministry of Justice and the Afro-Colombian National Autonomous Authority ANAFRO to draft the bill (ANAFRO, 2014).

Viveros (nd) argues such a law should "recognise the historical victimisation caused by enslavement and its mark on the present, and…effective racial equality policies that dignify the collective memory, the cultural project and the material conditions of existence of the NARP people."

The third important approach to the reparation agenda links to the PCN principle of internationalism. As mentioned above the Durban process was decisive in developing a national agenda. Mandinga speaks of the importance of Durban not only for influencing the agenda in Colombia but for linking up agendas with movements across the region and the world through the Santiago, Petare and Geneva preparatory spaces:

> Within the framework of this work with the other Afro-descendants from other countries, …Afro-Brazilians, Afro-Hondurans, Afro-Nicaraguans, we demanded the United Nations, precisely, in the framework of that Durban conference against racism, discrimination the

[138] Interview: Charo Mina, 2020

> xenophobia and related forms of intolerance that took place in 2001…We demanded precisely for historical reparation. There we established our point of view…[139]

The advances of the CARICOM reparation process have also been fundamental in influencing the Colombian agenda providing an inspiring model that involves the whole of society. Activists assert the importance of creating joint processes that link up reparation movements from around the world and seek global justice for a global crime. Indeed, recent actions have included exchanges with the reparation movements of the Caribbean and the NAARC of the USA.[140]

The PCN V National Assembly identified the need for a common platform for historical reparation in which the black movement in Colombia would converge and articulate with the global movement. It called for autonomous coordination mechanisms between various expressions of the Afro-Colombian Movement that want to work jointly to establish the Platform for Action around the UN Decade for People of African Descent focused on the demand for historical reparation, autonomy and strengthening radical action to combat racism and racial discrimination (PCN, 2017).

The internationalist approach responds not only to joining forces with other distinct movements, but responds to a reality that in the context of a globalised world dominated by transnational corporations, the damages suffered by black communities are globalised in nature, and so too must resistance be globalised.[141] Mina identifies the relationship between historical justice from those States responsible for the slave trade and the continued violence perpetuated through racist foreign economic and military policy such as the US Plan Colombia which continue to impact on the conditions and rights of the black people in Colombia.[142]

The internationalist approach applies not only to solidarity with the Diaspora but with brothers and sisters on the African continent. Recalling the words of writer Achille Mbembe, Diego Grueso asserts that:

> Until we demand a reparation for Africa, and a reconstruction of that civilisation, the same thing will continue to happen to us. Because what happens to us here has to do with Africa being broken. If that is not improved, if that is not cured, then we will not have a future or a destination where we are going ... I believe that this is the absence of a repair.[143]

v. Reparations demands

The reparation measures identified by activists reflect many of the same demands made by movements in the US and Caribbean cited in Chapter 3 and elsewhere in Latin America. However,

[139] Interview: Naka Mandinga, 2019.
[140] Interview: Helmer Quiñones, 2018
[141] Interview: Naka Mandinga, 2019.
[142] Interview: Charo Mina, 2019.
[143] Interview: Diego Grueso, 2020

rooted in the own vision of rights outlined above, there is also a more decolonial vision of reparation which emphasises not only material measures such as compensation and restitution, and symbolic measures, but also more structural and political measures around autonomy and self-determination. This is emphasised by Mosquera who asserts that reparation models in Colombia should not replicate models in other countries but rather must connect to collective rights (Mosquera 2007:254)

Material measures

All the activists interviewed mention in some way or another the economic compensation dimension of reparation. Citing the lasting-legacy of the abolition and manumission process, Carlos Rosero for example cites the importance of compensating the economic damages caused to black families who bought their freedom.[144] However economic and material measures were rarely manifested in terms of individual pay-outs but rather in collective terms.

In line with international norms, restitution was a central concern, in particular land restitution. This shall be explored in more detail in the fourth-coming chapters as it is largely related to the armed conflict and TJ. However, it is worth mentioning here as land struggles also preceded the armed conflict. Land restitution is one of the most contentious and radical measures of reparation because it relates not only to recuperating the material and physical land, but is also central to the autonomy and self-determination of colonised peoples, and further challenges the established capitalist economic order that seeks to preside over the natural resource.

Carlos Rosero speaks of how the main intention when entering the constitutional process was to retrieve the lands of black communities that had been lost as a form of reparation. Related to this was also the recovery of biodiversity which is heritage of black communities and has been expropriated by large scale development projects. He asserts that:

> …the issue of territory is an issue of historic reparation for us. One understands that this issue isn't part of the CARICOM demand, for example, because they are states, where the majority of the population are black. But in our case here, sister, this cannot not be part of the reparation proposal. And I am speaking about land ownership, but also the environment.[145]

Symbolic measures

The recognition of the crime and of responsibility on the part of the State is central to the reparation process for many activists in Colombia. As Cuesta asserts "the State must admit to having caused

[144] Interview: Carlos Rosero, 2019
[145] *Ibid*.

deep damage," (Cuesta 2006). This includes recognition of the history of enslavement and its implications in the present, of the appropriation of history and culture,[146] and of the culture and contributions made by Africans and their descendants to the country (Cuesta, 2006).

An important part of this is empowerment of victims through the retrieval and reconstruction of memory. Symbolic actions include for example the construction of monuments and museums (Cuesta, 2006, Mosquera, 2007). For some it also includes representation of multicultural diversity in all public and decision-making spaces such as media, radio, press, television, publicity etc (Cuesta, 2006). However, while symbolic measures have their value in affirming the struggle for reparation, they alone do not address inequality, as inequality is material.[147]

An inclusionist perspective

Public policy towards equality and inclusion is cited by many activists and academics as an important element of reparation. Several mention social, economic and even symbolic inclusion through affirmative actions (Mosquera, 2007). For Mosquera, affirmative action is an important measure in the Colombian context because it goes beyond the scope of Law 70 which is focussed on rural communities and the right to difference (Mosquera, 2007). Affirmative action, however, is not just about inclusion but recognition and equality from a point of difference, and a necessary means to ensure participation for the guarantee of economic, social, political, cultural and environmental rights (Mosquera, 2007, Cuesta, 2006).

While affirmative action is an important dimension of reparation, the issues facing the black population such as land dispossession or the historic economic debt cannot be resolved by quota laws.[148] It is important that inclusionist measures do not lead to a denial of oneself or the requirement to take on the hegemonic values and thought categories. In many experiences, inclusion has meant precisely this, the rejection or denial of the black self, history and origins.

Structural transformative reparation

Perhaps what sets the Afro-Colombian reparation movement apart from others is the focus on autonomy and self-determination. Reparation is not so much about inclusion in the dominant system as structural change and the right to choose one's own future, economic system and way of relating to the world and the environment. Viveros argues that it is necessary to "de-hierarchise" the social structure in order to overcome the historical inequalities and ongoing exclusions that Afro-descendant people have suffered. Márquez and Quiñones (2019) call for reparation in the framework of 1960 UN

[146] Interview: Charo Mina, 2020.
[147] Interview: Carlos Rosero, 2019.
[148] *Ibid*.

Declaration on Decolonisation, citing the importance of the right to self-determination. They call upon the black movement to contextualise their struggle in the framework of this declaration, beyond the human rights instruments such as the ICERD, ILO 169, or domestic legislation.

Carlos Rosero stresses the importance of Law 70 which recognises the rights of black communities in the framework of their own cultural aspirations, rooted in autonomous culture, and goes on to discuss self-government as a part of reparation related to land and recuperating forms of self-government that black communities had developed following colonialism.[149] In this way, reparation requires conditions to be able to survive and realise the life project as black people.[150]

The importance of autonomy extends into all aspects of life. For example, Marie Cruz Renteria of PCN Palenque Congal in Buenaventura talks about own systems of health, and the recognition and strengthening of knowledge as related to territory. She asserts that reparation is more than ensuring the availability of doctors and nurses in marginalised territories but includes spaces and conditions to practice ancestral medicine including traditional midwifery which directly challenges the historic tendencies to demonise traditional medicine as witchcraft.[151]

The decolonial and transformative perspective also includes a gendered approach. Women from the Afro-descendant movement have stressed the importance of a gendered and intersectional approach to reparation demands which takes into account the differential patterns of violence and exploitation suffered by African and Afro-descendant enslaved women, and the differential legacies that these have for Afro-descendant women today (Lozano y Peñaranda, 2007).

III. State recognition of reparation?

While the State has not taken official steps to facilitate a nationwide discussion on the issue of reparation there are several key moments over the past 20 years in terms of state recognition. In 2001, 150 years after the abolition of slavery in Colombia, Congress adopted Law 725 establishing 21st May as National Afro-Colombian day. The law states that:

> "…in recognition of the pluri-ethnicity of the Colombian Nation and of the need of the Afro-Colombian population to recover their historical memory, a commemoration campaign will be developed that includes organisations and institutions that carry out actions for the benefit of the groups involved in this historical event..." (article 2)

Over the past two decades, often in commemoration of Afro-Colombian day political figures including President Juan Manuel Santos, have recognised the existence of what they refer to as "the historical debt" owed to Afro-descendants. In the introduction to the published educational curriculum series "The Catedra de Estudios Afrocolombianos" (2001), the then Minister of Education

[149] *Ibid*
[150] Interview: Charo Mina, 2019.
[151] Interview: Marie Cruz Renteria, 2019.

Francisco José Lloreda Mera writes of the task which "not only represents the recognition of a great debt to these communities, but the important contribution to the coexistence of this great nation." (MinEd, 2001).

On, 21st May 2011, during his first term, President Santos stated that "…this country is indebted to its Afro population and in these four years we will make every effort to generate a change," (Santos, 2011). On 21st May 2014, he stated, "I am conscious that we are in debt to you and that it is never too late to recognise that," (Santos, 2003). Making a clear the link between the historical struggle for liberation and the contemporary armed conflict he stated:

> That is why, in my effort to achieve peace, I am clear about the enormous impact that the armed conflict has generated in the Afro-Colombian, black, Palenquero and Raizal people, and how much we have to do to heal their wounds. Just look south of Bolivar, the middle Magdalena, the Urabá, the entire Pacific, the north of the department of Cauca - all areas inhabited mostly by Afro-Colombians - to understand that you today, 163 years later, need a second liberation. I mean the liberation from war, forced displacement, exile, crying and pain (*ibid*).

In terms of action, beyond discourse the main advances have been in affirmative action and development policies. The Constitutional Court ruled on affirmative action in Sentence T-422 of 1996 establishing jurisprudence on the difference between recognition of the black community as an ethnic group (the subjects of Law 70) and positive discrimination for all Afro-Colombians. The court ruling makes clear that affirmative action is not about preserving the cultural differences of specific groups but eliminating barriers to material equality and challenging factors that cause inequality (Grueso, 2007).

In response to some of the obligations under Law 70 several public policies have been enacted concerning affirmative action and development within black communities. Conpes document 2909 of 1997 created the Support Programme for the development and Ethnic Recognition of black communities to establish actions for the protection, promotion and defence of ethnic, individual and collective rights of black communities. Conpes 3169 of 2002 distinguished between rights for black peoples recognised as ethnic groups, Raizal communities and the black population affected by poverty and discrimination to identify the types of responses the government should have (Grueso, 2007)

Conpes 3310 of 2004 created commitments to affirmative action, related to discrimination. The document defined affirmative action as "…guidelines, programmes and administrative measures aimed at generating conditions to improve access to economic, social and cultural development opportunities and promote the interaction of the black or Afro-Colombian population" (cited in Grueso, 2007: 625).

However, upon examination of the document one observes that it was neither a rights-based or reparatory approach, and as many of the actions proposed, did not go beyond general obligations of

the State (Mosquera, 2007:252). Mosquera further argues that the State implements policy with a lack of historical context, asking, what does recognition of pluriethnic multicultural national mean without reparatory justice? (Mosquera, 2007). She sees the multicultural citizenship reform as an attempt to re-found the nation, but asks:

> is such a re-founding possible with only the recognition of the pluriethnic and multicultural character of the national space, without the State repairing the damage done to the collective life project of the sub-alternised black, Afro-Colombian and Raizal people, without that same state undertaking actions of reparative justice? (Mosquera, 2007:221).

In many cases public policies aimed at the black communities have been considered, and even ruled by the Constitutional Court as unenforceable as the government failed to consult communities in line with their rights to FPIC before adopting the policies. Likewise, there has been a lack of will to regulate and implement Law 70 or comply with its commitment to adopt Development Plans for black communities.[152]

This chapter has outlined the evolution of the demand for historical reparation in the specific context of Colombia, providing some fundamental elements to respond to the question of how Afro-descendant activists are framing the case for reparation. The following chapters will show how these arguments have fed into activism in the realm of TJ and indeed developed, bringing this issue to the forefront of debate.

[152] Interview: Naka Mandinga, 2019.

CHAPTER 5: REPARATION IS NOT JUST AN HISTORICAL ISSUE: THE CASE FOR DECOLONIAL REPARATION IN COLOMBIA

> *"The transatlantic slave trade, enslavement, the existence of a development model and a society in which structural racism is perpetuated, the internal armed conflict and its impact on our people, are all the plots of a single story. The internal armed conflict has increased the imbalance between our communities and the rest of Colombian society. Likewise, it has increased the debt between Colombian society and the descendants of Africans. For Proceso de Comunidades Negras-PCN, there is no room for debate on the issue of double reparation. The historical reparations and those as a result of the internal armed conflict are one and the same, and have the same origin."* (Rosero, 2007)

As demonstrated in previous chapters, the main arguments against reparation are temporal; that as the Transatlantic slave trade took place in the distant past, and as neither victims nor perpetrators are still alive, it is difficult or impossible to identify recipients of reparation or indeed responsible parties. Further, as the crime of slavery was not illegal at the time, States or private entities involved cannot be held legally responsible.

However, as this thesis shows, while the transatlantic slave trade ended generations ago, the descendants of enslaved people still experience the effects of slavery, manifest in structural racism and racial inequality. Thus, as the UNSRR asserts, the historical crime still has contemporary repercussions for the descendants of the victims (Achiume, 2019). Further, the contemporary injustice and violence that Afro-descendant peoples face is not only a legacy of the past, but a continuation of the very colonial crimes committed against their ancestors in a paradigm of coloniality.

Through discourse analysis prioritising the voices of activists as they recount their advocacy processes and experiences, as well as direct citations from advocacy reports, the chapter shows how, beyond the wider arguments for reparation outlined in the previous chapter, Afro-descendant activists have articulated both of these counter arguments in specific relation to the contemporary armed conflict; 1)

the legacy of slavery and colonialism in the disproportionate and differential impact of the armed conflict on Afro-descendant peoples; and 2) the continuance of colonial crimes in the context of the armed conflict. I highlight three key assertions that have been made in these advocacy processes:

1. That Afro-descendant peoples are a racialised collective victim who have experienced both disproportionate and differential impacts and harms during the armed conflict.
2. That this collective victimisation is a legacy of slavery and colonialism manifest in contemporary socio-economic inequality and marginalisation which has left Afro-descendant communities particularly vulnerable to the impacts of the armed conflict.
3. That the violence and crimes committed in the armed conflict against Afro-descendant peoples take place in the context of a continued colonial economic project for territorial control and resources and are driven by the same underlying ideologies that underpinned the violences of slavery and colonialism (capitalism, racism, white supremacy, patriarchy).

I. The recognition of a racialised collective victim

Primarily, advocacy has been essential in establishing the recognition of Afro-descendant peoples as a "collective victim" of the armed conflict. This implies a recognition not only that Afro-descendant peoples are *disproportionately* affected by the armed conflict in terms of numbers, but that they have been *differentially* impacted by the conflict as 1) they have suffered from specific forms of anti-black racism both as a rights violation in itself, and as an underlying factor in the violation of other rights, and 2) in terms of the specific damages to their collective ethno-territorial and cultural rights as an ethnic group. In this sense activists have taken an "ethno-racial" and collective approach to advocacy demonstrating that the conflict not only impacts on Afro-descendant people as individuals, but it has collective implications for Afro-descendant peoples as an ethno-racial collective.

This advocacy process begun long before the current TJ scenario. In the 1990s and 2000s several Afro-descendant organisations including Afrodes, PCN and CNOA, often with the accompaniment of national and international NGOs such as Codhes and Global Rights, and academic institutions such as the Observatory on Racial Discrimination of the University of the Andes, began publishing reports that highlighted, from a rights-based perspective, this disproportionate and differential impact of the armed conflict on Afro-descendant peoples.[153] Many of the arguments made in these reports are consolidated in the shadow reports to the UN CERD identified in the Methodology Chapter and Appendix (ODR et al, 2009; Afrodes, 2009; ACONC, 2015; PCN et al, 2015; Afrodes et al, 2019; PCN et al, 2019), which are the main focus of the present analysis. These were also complemented by

[153] See among others: CODHES (2005); Afrodes and Global Rights (2007), Afrodes (2008); CODHES (2009); Rodríguez at al., (2009a); Rodríguez et al., (2009b); Quiñones (2010).

reports from inter-governmental agencies and international human rights mechanisms through country visits and responses to petitions from Afro-descendant civil society.[154]

i. Counting our victims – the disproportionate impact of conflict?

The issue of counting victims of the armed conflict is complex for any group, and particularly for Afro-descendant peoples. As Cuero and Ojulari (2021) observed:

> Traditionally, we Afro-descendants tell the stories of our ancestors from memory, narrative, testimonies, art, dance, music, from the feeling-thinking; we do not narrate the deaths of our *renacientes* [new generations] with numbers. However, in a world governed by white supremacy, in which racism kills us in a thousand ways, we are often forced to prove said racism and its complicity in the violations of our fundamental rights to life and integrity. Our society denies the existence of racism itself while seeking to delegitimize our claims by pointing out that we are inaccurate, resentful and stuck in history…how many deaths does it take to show disproportionality? Answering this question leads us to the horrific task of counting our dead and recording acts of violence with cold data and statistics, in order to prove the suffering of those who suffer from systemic racism and the new patterns of a practice normalised five centuries ago; violence against the humanity of the Afro-descendant black subject."

Thus, as the human rights agenda in Colombia grew, Afro-descendant organisations and their allies found themselves faced with the horrific task of proving to the government, to the media and to international human rights organisations the quantity of their suffering under the armed conflict. This was no easy task, as discussed in Chapter 4, the historic invisibility of Afro-descendant peoples in Colombia translated to a lack of official disaggregated data on the situation of Afro-descendant people and consequently on a lack of official data on the disproportionate impact of the armed conflict in their communities. Nevertheless, through rigorous research processes such patterns were revealed.

Forced Displacement

As shown in Chapter 2, the forced displacement of groups is classified as both a War Crime and a CAH.[155] The Monitoring Commission on Forced Displacement Public Policy reports that Afro-descendant communities have been victims of displacement in the context of the armed conflict at least since 1980, triggered by threats, combats between armed groups and the military, air attacks and massacres (Comisión de Seguimiento, 2013:202). Further it recognises that 50% of displacements of Afro-descendant communities have been classified as mass displacements (*ibid*).

The impact of displacement has been so widespread and systematic, that it became a key issue for early advocacy processes. As Diego Grueso (formally of Afrodes, and current staffer at the JEP) expresses, organisations felt that "if we could solve this, we could solve everything" and that this

[154] See for example: CIDH (2006); CIDH (2009a); CIDH (2009b), McDougall (2011).
[155] See Rome Statute articles 7.1.d; 7.2.d; 8.2.b.viii; 8.2.e.viii

would "obviously connect us to the displacement of the past."[156] Thus, reports initially focused attention on the alarming statistics on forced internal displacement showing the disproportionate impact on Afro-descendant communities and territories, thus making the links between racial inequality and displacement. All six civil society reports to the CERD submitted between 2009 and 2020 draw attention to this issue.

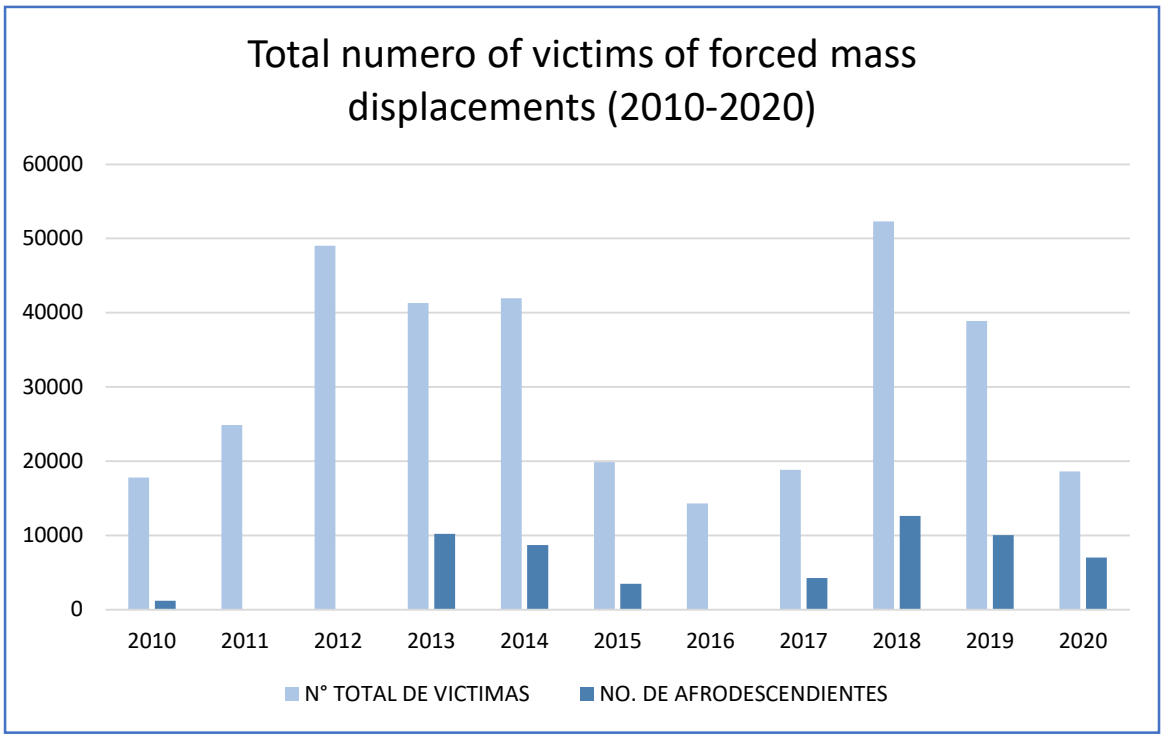
However, even on this issue there was a stark lack of official data. In 2009 the Constitutional Court recognised that systems for data collection on the issue of forced displacement had failed to include data on Afro-Colombian victims which is an important obstacle to demonstrating the true magnitude of the humanitarian situation the population faces (2009a: para.32). Thus, the lack of disaggregated data to demonstrate the specific impacts of the conflict on Afro-descendant peoples has itself been an issue repeatedly raised in the advocacy reports.[157] Even with gaps in the data, organisations were able to initiate a conversation on the disproportionate impact of the conflict. Citing a 2008 CODHES analysis, PCN reported in 2009 that Afro-Colombians were the ethnic minority group most affected by displacement, representing 22.5% of the displaced population, and even more alarmingly, that 12.3% of the entire Afro-Colombian population was in situations of displacement.[158] As early as 2002, CODHES recorded that 38% of displaced people belonged to an ethnic group, of which 33% were Afro-Colombian (CODHES 2003). Castillo (2007: 330) cites official statistics for the early 2000s, indicating 43% of displaced people were Afro-Colombians. Considering the official census data at the time suggested just 10.6% of the national population were Afro-descendant, and even taking into account the Census underestimates the true size of the Afro-descendant population these figures were a clear early indication of the magnitude of the problem. The advocacy reports also draw attention to the impact of forced displacement on Afro-descendant women. Afrodes reported for example that at least 200,000 Afro-descendant women had been forcibly displaced from municipalities in the Pacific region, and that due to high rates of underreporting the figure could be as high as 500,000.

Perhaps due to this underreporting, these high figures contrasted with lower figures in other official reports. The Comisión de Seguimiento estimated in 2009 that that 24% belonged to some ethnic group, with 17% being Afro-Colombians and 6.5% indigenous (2009: 145). The Constitutional Court itself cited official data from the UARIV demonstrating a more than 50% increase in the percentage of Afro-descendant displaced peoples from 6% in 2003 to 14% in 2007 (2009, para. 33). Forced displacement continues to disproportionately affect Afro-descendant people even after the signing of the peace agreement. According to CODHES (2020), between 2010 and 2020 there were 1,091 mass displacements in the country affecting 337,782 victims. Even taking into account that the ethnic-racial

[156] Interview: Diego Grueso, 2020.
[157] R4.
[158] R4.

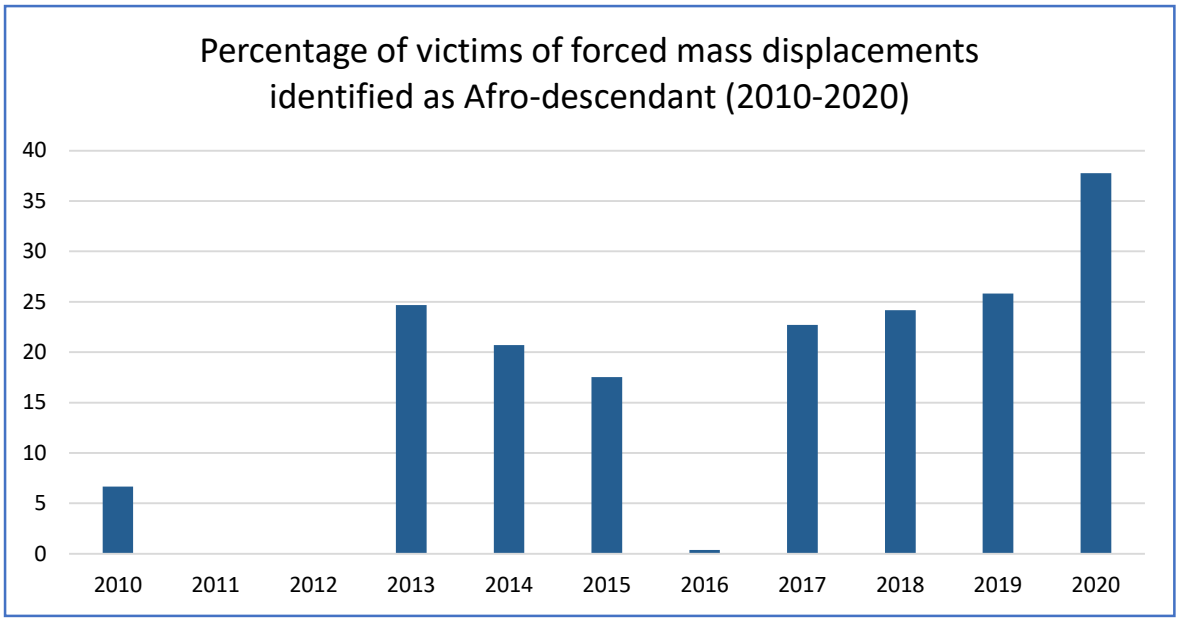
identity is not recorded in all cases, 57,588 victims were identified as Afro-descendant, equivalent to 17% of the total.[159]

While there was a general decrease in the total number of victims of displacement for the first three years following the signing of the peace agreement, the decrease in Afro-descendant victims was less significant, and as such there is an observable an increase in the *proportion* of victims identified as Afro-descendants in the same period; 24.2% in 2018, 25.8% in 2019, and 37.8% in 2020, suggesting a shifting of the focus of the conflict towards Afro-descendant territories in the post-agreement scenario (see graphs 1 and 2).[160]



Graph 1

[159] Source: SISDES database (CODHES, 2021). Cut-off date, November 2020).
[160] Source: SISDES database (CODHES, 2021). Cut-off date, November 2020



Graph 2

As is evident there are still stark gaps in the data; the apparent absence of Afro-descendant victims of forced displacement in 2011, 2012 and 2016 for example raises particular questions to which we will return below.

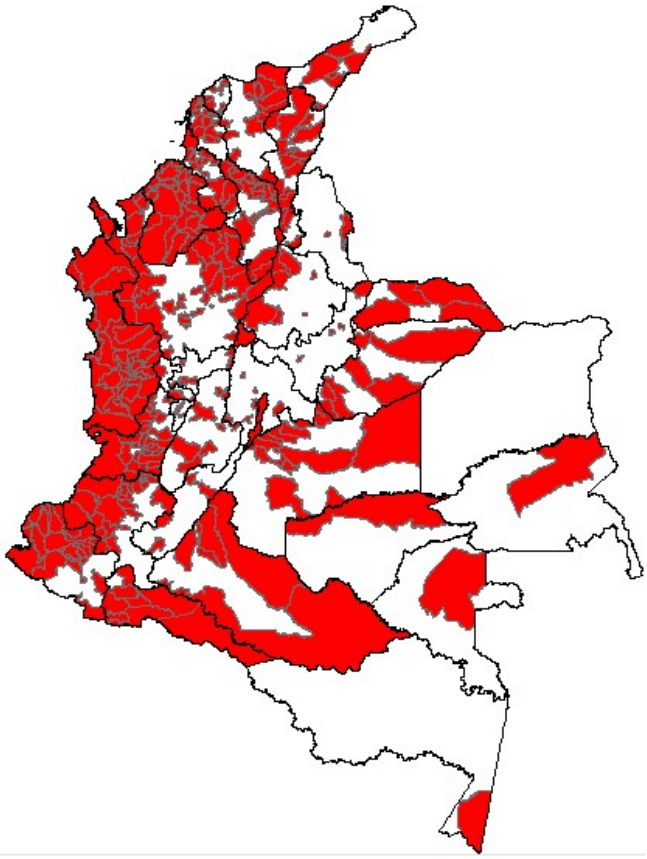
The difficulties in obtaining statistical data on Afro-descendant displacement led organisations to develop a geographical and territorial methodology which has more recently been termed "the territorial racialisation" of the armed conflict (CONPA 2021). By drawing on the idea of the "racialisation of national geography" (Mosquera et al, 2007: 31) in Colombia and the parallel territorialisation of the conflict, organisations were able to arrive at estimates of the impact of the conflict in Afro-descendant territories and thus on Afro-descendant peoples.

In 2007 Afrodes carried out an analysis of data from the state Registry of Victims from 1997 to 31st September 2007 in municipalities with greatest "Afro-Colombian significance." These municipalities were identified using three criteria, 1) municipalities with Afro-descendant collective land titles or ancestral territories, 2) municipalities in which the majority of the population was Afro-descendant; and 3) municipalities with the greatest concentration of the Afro-descendant population, according to the 2005 Census. The analysis demonstrated that the three categories of municipalities had suffered 294.842, 416.566 and 764.373 displaced people respectively over the ten-year period, indicating the sheer impact and magnitude of violence in Afro-descendant territories (cited in Constitutional Court, 2009a: para.36).

More recently this same model was used to show that between 1985 and 2020, more than half, 56.8%, of all forced displacements that took place in Colombia were located in the 362 municipalities that can be identified as "Afro-descendant territories." These municipalities represent some 32,3% of all

municipalities in the country, and are home to 92,6% of the Afro-descendant population (CONPA, 2021).

Here it is useful to recall the territorial distribution of Afro-descendant territories highlighted in Map 1.



See Map 1 (Introduction)

As is visible on the map, the vast majority of Afro-descendant municipalities are located in the four departments of the Pacific Coast (Chocó, Valle del Cauca, Cauca and Nariño). Likewise, almost all of the municipalities in those departments can be considered Afro-descendant territories. Therefore, even with more general, department level data, a territorial analysis of the armed conflict can be useful.

If we return to the case of 2012 in graph 2 above for example, a territorial analysis shows that despite almost no registry of Afro-descendant victims of displacement in that year, the four departments most affected by displacement were Chocó, Valle del Cauca, Cauca and Nariño which accounted for close to 70% of the 49,022 total victims registered that year (see graph 3)[161]

[161] Source: SISDES database (CODHES, 2021). Cut-off date, November 2020

Graph 3[162]

In Auto 005 of 2009, the Court itself cited geographically focused official data on displacement stating that:

> According to official records, the departments most affected by the displacement of Afro-Colombians during the years 1997 to 2007 were Chocó, with 24,127 displaced persons, followed by Valle de Cauca with 22,119 displaced persons, Nariño with 18,040, Antioquia with 14,142 and Bolívar with 11,263. Of the total number of displaced Afro-Colombians, 29,140 people did so in mass displacement events and 111,126 did so individually (2009a, para.35).

It was perhaps this territorial approach, coupled with the structural and underling factors of violence identified (discussed in the next section) which convinced the Court to recognise the "disproportionate impact of forced displacement on the effective enjoyment of individual and collective rights of Afro-Colombian communities" (2009a, para.89), despite the absence of racially disaggregated data.

Forced displacement is not only the crime that has had the greatest numerical impact on black communities. Forced displacement is intrinsically related to other CAH and is understood both as a crime in itself, and as a self-protection strategy adopted by communities who experience or are at risk of other human rights violations such as threats, assassinations, forced disappearances, forced recruitment of minors and sexual violence. PCN et al. show that 31% of displaced Afro-descendant women had experienced physical aggressions, and 20% had been victims of sexual violence.[163]

[162] Source: SISDES database (CODHES, 2021). Cut-off date, November 2020
[163] PCN et al., 2009

Thus, while data is even more limited on the impact of these other CAH on black communities' reports have also addressed the disproportionate and differential impact of other crimes in the context of the conflict.

Other crimes against the humanity of Afro-descendant peoples

Afro-descendant territories have suffered from mass killings, or massacres in their communities in the context of the conflict. While this is an historic issue, it is noteworthy that between January 1 and August 24 2020, CODHES registered 42 massacres in the country with a total of 182 victims. 61% of all massacres occurred in the Pacific region. The department of Nariño was the most affected, where 7 massacres were reported, resulting in 34 victims, and 3 of the 7 massacres occurred in the municipality of Tumaco. The case of Nariño also shows the interrelation of the victimising facts. In the same period there were 7 attacks on social and community leaders, including 4 homicides and 18 mass displacements which left at least 8,514 displaced persons (CODHES, 2020)

Particularly since the signing of the peace agreement, increased attention has been paid to threats and assassinations of Afro-descendant human rights defenders and social leaders.[164] Again, while official data often fails to identify the racial identity of the victims, the territorial analysis has enabled organisations to show the disproportionate impact. CODHES reported between January 1 and August 31, 2018, 140 murders of leaders and social leaders, of which 24 or 17% were leaders of African descent. Of the total number of murders, 22 occurred in the Department of Cauca, 10 in Valle del Cauca, 6 in Nariño and 5 in Chocó. In other words, 31% of the murders occurred in the Pacific region. During the same period, 320 attacks against social leaders were reported in 27 departments. 67 or 21% of the attacks were against leaders of the black people of African descent and 93 of these attacks, that is, 29% of the total, occurred between the departments of Valle del Cauca and Cauca (CODHES, 2018)

Between 2011 and 2020 CODHES show that of a total of 2557 aggressions and murders of social leaders, 423 took place in Cauca, 256 in Valle del Cauca, 131 in Chocó, and 159 in Nariño indicating that the four departments of the Pacific accounted for 37.9% of all aggressions and murders of leaders.[165]

iii. The differential impact of violence against a People

Even where the disproportionate impact of violence in black communities cannot be shown through individual or geographical data and statistics the work of Afro-descendant organisations, has contributed to a growing discourse around the "differential impact" of the armed conflict. This idea, rooted in the definition and understanding of Afro-descendants as peoples with specific histories,

[164] R5; R4.
[165] Source: SISDES database (CODHES, 2021). Cut-off date, November 2020

experiences and collective rights derived thereof, argues that they experience specific forms of violence which have a different impact compared to that in other victim groups. While this issue will be explored in more detail towards the end of this chapter, it is worth highlighting a few examples here.

Primarily, As previously discussed, Afro-descendants, different to all other groups in the country, including indigenous peoples, experience a specific form of "anti-black racism" which, rooted in colonial stereotypes and racialising discourses underpins the violence that this group experiences (addressed in section III of the present chapter). Thus, reports have highlight both how racism is an underlying factor in the armed conflict and a violation of rights in itself. ODR, et al (2009) report how 63.79% of displaced women reported being victims of aggressions based on the colour of their skin, many enduring racist insults.[166] Afrodes write:

> In the specific case of the Afro-Colombian population in situation of forced displacement, the phenomena of racial discrimination are particularly aggravated. Not only because of the multiple forms of violence by armed actors, but also because through the actions or omissions of the State and legal and illegal economic actors, as well as with individual and collective practices, attitudes and behaviours from society in general.[167]

The differential impact of violence has also been highlighted in relation to Afro-descendant women. All six CERD shadow reports for example address the specific issue of sexual violence against Afro-descendant women which was also highlighted in Constitutional Court Order 098 of 2008 (discussed in Chapter 6). Sexual violence and other forms of GBV are seen as having intersectional and therefore differential impact on Afro-descendant women. As the IACHR concluded:

> "The impact on Afro-Colombian women is significant, and it manifests itself in different ways due to their worldview, culture and traditions, identification with their territory and their status as women. In addition to the effects discussed in previous sections, Afro-descendant women lose the possibility of continuing with their cultural practices, such as, for example, watching over their dead, performing funeral rites and sharing their life in community," (IACHR, 2006:116).

Likewise, the widespread crime of forced recruitment of children and young people is also seen as having a differential impact in black communities. In addition to implying direct violations of the children's rights prohibited in the IHRL and IHL, for Afro-descendant peoples, the recruitment of their children means a deep rupture in the social fabric of the community. As has been observed by the Ombudsman's Office:

> "These circumstances of violation of rights generate transculturisation processes that are experienced by the peoples and communities of this population, accentuate conditions of

[166] R1: para 115.
[167] R2:4.

> poverty and give rise to a complex situation of vulnerability, associated with the internal armed conflict" (Ombudsman, 2014).

Thus, not only does recruitment deprive children of their right to a freely chosen future, but it deprives the entire community of its future generations, the *renacientes,* through whom the culture and identity of the People is reproduced and continued into the future (CONPA, 2021). The forced recruitment of children and other violations of children's rights have an impact on the intergenerational transmission of knowledge, traditions and cultural practices, those essential coping and resilience strategies for overcoming intergenerational trauma, thus affecting the very survival of the People.

The observations and conclusions made around the disproportionate and differential impact of the armed conflict in Afro-descendant peoples have led organisations to call on the government to adopt and implement policies and programmes of assistance and reparation with a differential approach. All six of the CERD shadow reports critique the government for a lack of adoption or implementation of differential policies to assist and attend Afro-descendant collective and individual victims of the conflict. They call on the CERD Committee to make recommendations to the government to ensure differential policies such as: the collection of disaggregated data, special measures to prevent racial discrimination against victims when they seek protection, economic and social assistance, collective protection measures that respond to the collective threats facing Afro-descendant peoples, and socio-economic and psychosocial programmes that are culturally relevant. However, the calls for differential policies do not only relate to humanitarian assistance for collective and individual victims of the conflict, but as shall be shown in the following chapter, were in large part the basis of the call for a differential approach to reparation which takes into account the wider structural, historical and racialised experiences of the conflict for Afro-descendant peoples.

II. Structural racism and the legacy of the unpaid debt

Once there was recognition, albeit limited by the State and international organisations of the disproportionate and differential impact of the armed conflict and of the collective victimhood of Afro-descendant peoples, a second key strategy in this advocacy process has been to demonstrate the *causes* of this disproportionate and differential impact. This impact is shown to be the product of historical and structural processes that intensify the armed conflict on Afro-descendant peoples and territories.

The first of these causes is the socio-economic legacy of slavery and colonialism, which, as discussed in Chapter 4, is manifest in the regions in which Afro-descendant communities live, the industries and types of work they labour in, and the marginalisation and exclusion that many face. Afrodes assert that:

> Structural exclusion of the Afro-Colombian People continues to register critical levels that have been historically documented in a systematic way. Originating in the historical experience of slavery, it persists today despite the advances and achievements that the rest of the Afro-Colombian population has made in terms of well-being and the contributions of Afro-Colombian communities to the material and cultural wealth of the country.[168]

Reports cite official statistics demonstrating not only socio-economic inequality in the areas of health, education, housing, water and sanitation, but how this inequality is geographically distributed indicating how structural discrimination and state abandonment led to particularly grave situations in the territories with greatest presence of Afro-descendant people.[169] Citing the UN Independent Expert on Minorities, ACONC asserts that "The map of high-density Afro-Colombian populations overlaps almost completely with the map of areas of extreme poverty."[170] Further, the reports critique the State for failing to recognise that geographical marginalisation is not accidental but related to racial discrimination:

> This pattern of marginality, added to the concentration of the black population in some regions of the country (especially the Pacific and Atlantic coasts), serves today to deny racial discrimination and excuse the inaction of the State in them. In fact, one of the most recurrent responses of the Colombian State to criticism of the situation of Afro-Colombians is to point out that it is not due to the existence of racial discrimination, but to the fact that black people in Colombia live in inhospitable places.[171]

The reports then demonstrate how these socio-economic conditions and marginalisation are underlying factors in the disproportionate impact of the armed conflict on communities:

> Forced displacement of the Afro-Colombian population must be understood as the result of structural factors that transcend the immediate causes related to the dynamics of the Colombian armed conflict in recent years. These factors are fundamentally related to processes of exclusion and discrimination towards this human group that have been historically configured, that still persist and that are deepened with the phenomena of forced displacement and with the persistence of a development model contrary to the principle of respect for cultural diversity.[172]

All these underlying factors, it is argued, created a particular situation of vulnerability and disadvantage for Afro-descendant peoples when faced with the arrival of the armed conflict in their territories. All the interviews and focus groups highlight in some way or another this socio-economic legacy and its relation to both the contemporary armed conflict and the call for reparation. A member of PCN Palenque Congal describes how a:

> …scenario of weakness arose that prevented us from defending ourselves, protecting ourselves in the conflict. And that is a historical debt because it is generated by the whole process of trafficking, then the stage of racism and exclusion. Trafficking, racism and exclusion. Racism and exclusion after trafficking weakened our institutions, weakened our

[168] R2:3.
[169] R1, R2, R3, R4.
[170] R3: 5
[171] R1: 8
[172] R2: 3.

> ability to analyse the political context in which we lived, weakened our possibility of economic development which meant that when the conflict arrived, everyone could do what they wanted with us.[173]

Another participant asserts:

> In the black towns in the Pacific, the dynamics of the conflict are much deeper, it makes for more disaster. This has to do with those structural elements that we have in the territories, without means of communication, without means of transportation. In other words, total absence [of the state] when the actors [armed groups] arrived and did what they wanted with our communities.[174]

Communities faced an urgent situation where, when massacres and other gross violations took place in black territories the outside world, the state, the media etc, did not event hear about them for days due to lack of communication and transport infrastructure. This, the participant asserts, is the result of historical racism, discrimination and segregation.

A crucial area in which socio-economic marginalisation is linked to the impacts of the conflict is forced recruitment of children and young people (CYP) as lack of access to education and employment in Afro-descendant regions and territories leaves CYP vulnerable to recruitment. Despite the lack of racially disaggregated data, evidence shows that the departments of Chocó and Cauca are among the worst affected by forced recruitment (Arias, 2020). Both the Ombudsman's Office and the Secretary General of the UN Security Council have recognised the heightened vulnerability of Afro-descendant children to forced recruitment (see Gómez, 2014).

Carlos Rosero describes how *pelaos* (boys) from rural Buenaventura who joined the armed groups were often signed up after their communities were fumigated by the army and ran out of food, while others joined because they were offered large sums of money on the spot. If these boys had university opportunities or well-paid jobs they would not leave with the armed groups. Thus, he asserts this situation has to do with the historical inequality of the black people.[175] One member of Palenque Congal also describes how recruitment of *pelaos* has much to do with structural elements and thus relates to historical reparation.[176]

Thus, these issues will continue if the underlying causes of poverty and inequality are not addressed and the relationship between the armed conflict, the legacy of slavery and historical debt is described as cyclical. As Carlos Rosero asserts:

> …the conditions underlying the effects of the internal armed conflict are those inherited from enslavement. So, in the end, what does the internal armed conflict do? It widens the power

[173] Focus Group, PCN Palenque Congal, 2019.
[174] *Ibid*
[175] Interview: Carlos Rosero, 2019.
[176] Focus group, PCN Palenque Congal, 2019.

> gap that black people already had. So, we had a gap like that [gestures], with the displacement that gap widens.[177]

As reparation was never granted to the victims of slavery their descendants face increased vulnerability in the armed conflict, and consequently the armed conflict has then left them in an even greater situation of vulnerability with an even great claim to reparation.

To illustrate this, several interviewees use the analogy of a chair or a table with a broken leg. As one member of Palenque Congal asserts:

> …I'm going to add the example that [names another member of the organisation] always gives, the example of the chair or the table. It is that one puts a *bulto* (100lb) and oops, it breaks. But what happens is that we… is that the *bulto* is the [armed] conflict, but when the conflict arrived the table only had three legs, and the other [missing] leg represents State omission and absence. So obviously they put two packages on the table and it has three legs, oops, it falls to the floor.[178]

Diego Grueso speaks about the significance of early work by Afrodes and other organisations to reveal the disproportionate impact of displacement in black communities and its relation to the wider demand for historical reparation:

> …we emphasised that one of the most important factors of vulnerability that caused the disproportionate displacement of Afro-descendant communities was the historical discrimination against these communities. So, you were already talking about historical reparation. You were already creating a diagnosis. A diagnosis that already included the historical and social situations in which people had been forced to leave those territories that they had rebuilt despite oppression, first from colonialism and enslavement, but then in the republic.[179]

He makes links between the first great displacement of enslaved Africans to the Americas, the second in which those that escaped enslavement or following abolition sought refuge and protection from a still racialised society in isolated territories of the Pacific, and then how this isolation has left them essentially unprotected and more vulnerable in this third displacement in the context of the armed conflict.[180] Thus, the legacy of slavery is not only in socio-economic inequality but in these repeated patterns of forced movement and lack of security and protection. The fact that these patterns of violence and forced movement repeat among the black population, is directly related to the fact that there has never been a process of reparation for the original crime, which would "rupture the historical continuum" or "break the historical roots of the violence against the same bodies." The absence of reparation, he asserts, means that the situation only worsens.[181]

[177] Interview: Carlos Rosero, 2019.
[178] Focus group: PCN Palenque Congal, 2019.
[179] Interview: Diego Grueso, 2020.
[180] *Ibid*.
[181] *Ibid.*

Marie Cruz Renteria asserts that we must understand that the state of Afro-descendant communities was already one of victimisation, inequality and injustice prior to the armed conflict, so that reparation measures may go beyond to address underling factors making "the transition to historical repair."[182]

Naka Mandinga makes the case for historical reparation based on the situation of vulnerability or what he calls the "fertile ground" that armed groups found in Afro-descendant communities:

> In the case of us Afro-descendants, we have been demanding reparation. So far, the Colombian state has advanced in a law of reparation to the victims of the armed conflict in Colombia. But they understand armed conflict as the events caused by the ELN, FARC-EP. But for us Afro-Colombians, the affectations come from many years before. We have been affected for many years before. Therefore…the conflict of the subversion and the armed forces found fertile ground, precisely, so that the affectations were much greater as we had been victims of some historical affectations, caused from the very moment of our kidnapping in Africa, slavery in America and the whole system of racism, marginalisation, exclusion, to which we have been subjected. Therefore, I say that reparation for us, Afro-Colombians, has to address, what we call historical reparation, to those damages caused for a long time.[183]

For Carlos Rosero there is in fact no distinction between historical and contemporary reparation.

> From our perspective there is no double reparation - historical reparation is not one thing and reparation for the internal armed conflict another. Because the subjects were historically constructed. And so, what made us weak in the internal conflict? The legacy of slavery. If we, as a legacy of slavery had been a powerful community in economic terms, in political terms, in participation, even in military terms, the conflict would not have raged upon us.[184]

These statements demonstrate that reparation is neither a purely historical nor a purely contemporary issue but one that address a continuous situation. The subjects of reparation – the collective victim identified above, was not constructed during the armed conflict but during the colonial period, and the legacy of that period has left them vulnerable to contemporary manifestations of violence. In this sense collective reparations to which Afro-descendants are entitled in the context of TJ must "imply a State policy that links the past and the present,"[185]

III. The continuation of colonial crimes

The third moment in this advocacy process has demonstrated that the disproportionate and differential impact of the armed conflict on Afro-descendant peoples is not only a legacy of slavery, but a continuation of the colonial project under new terms. This reflection has been central to the analyses of PCN and the other organisations of CONPA through their advocacy processes at the national and international levels.

[182] Interview: Marie Cruz Renteria, 2019.
[183] Interview: Naka Mandinga, 2019.
[184] Interview: Carlos Rosero, 2019.
[185] Intervention by PCN during Constitutional Court case on Reparation (CC, 2009, Section IV, para. 8).

In order to understand how the armed conflict represents the latest moment in a continued and sustained colonial economic project it is necessary to return to the ideologies that underpinned the origins of the colonial project; capitalism, modernity, white supremacy and patriarchy, and the role that these ideologies played in justifying colonialism itself as a civilising and progressive economic project, justifying both the exploitation of people and resources to consolidate the project, and the violence exercised against those seen as an obstacle. From this perspective the armed conflict represents the latest stage in this ongoing colonialist economic project as the State and differing private actors use violence and exploitation to gain control of territories and resources of economic interest, many of which are the ancestral territories of Afro-descendant peoples.

The data analysis demonstrates three interrelated theses concerning the armed conflict as a continuing colonial project: 1) the intersection of racialisation and modernity which sees Afro-descendant peoples as an obstacle to development, thus justifying the use of violence in the name of economic interests; 2) Racism, patriarchy and the dehumanisation of black bodies which serves to justify the both the exploitation of black bodies and the particularly macabre forms of violence committed against them; 3) the specific collective damages caused to Afro-descendant peoples which essentially amount to the violation of the right to self-determination and threat to their very existence as a people. The conclusion drawn from these three dynamics is that Afro-descendant peoples are the victims of a continued process of ethnocide and genocide in the context of an an-going colonialist economic project.

i. Racialisation and modernity: Afro-descendant peoples as an obstacle to development

The war as an ongoing colonialist economic project

While it is understood that there are multiple factors, dynamics, and interests driving Colombia's armed conflict, all of the data analysed shows that, at least in the context of the Pacific region, the main driving force of the violence is economic interests. This includes both the illegal and "legal" economies, of illegal armed groups, private entities and the State itself. Just as the colonisers of the 15th, 16th and 17th Centuries sought to control land and resources for economic gain, so too do the armed groups and armed forces in the Pacific who seek territorial control for access to natural resources such as timber, minerals and water, to facilitate the use of lands for growing licit and illicit crops, or for control of strategic "corridors"[186] for the purposes of importing and exporting licit or illicit products.

The official narrative of the armed conflict wrapped up in the language of the "war on drugs," tends to focus on the *illegal* economic activities as drivers of the violence committed by illegal armed groups

[186] R1: pp.51.

in the region. In this sense the advocacy reports have demonstrated how both guerrilla and paramilitary groups seek territorial control for cultivating and transporting illicit crops. As these actions have often taken place in Afro-descendant territories, communities are described as "caught in the cross-fire" of clashes between groups and the military, with some having no option but to become involved in the drugs trade. Thus, the disproportionate impact of violence is understood as a consequence of the economic and strategic significance that their ancestral territories represent for illegal groups.

Similar analyses are made about illegal mining prevalent in all four departments of the Pacific, including in Buenaventura. "Illegal predatory economies of an extractive natures" such as mining and monoculture projects are identified as an underlying factor in the armed conflict and links are made between illegal mining companies and new paramilitary groups that provide protection to these companies.[187]

The second economic analysis, which diverts from the official narrative of the conflict, seeks to reveal the "legal" economic interests surrounding the conflict; those that involve "legal" private companies who use armed groups to defend their interests, with at best the omission, and at worst, complicity or direct action of the State. Such interests include those of the agrobusiness, infrastructure projects – referred to as "mega-projects", and large-scale mining, all of which have been linked to the increase of violence and mass displacements in Afro-descendant territories. These "legal" economic actors are as much as part of the conflict as the armed groups. As Marie Cruz Renteria asserts:

> Right now, we officially say that the FARC is not in the territories, but there are the multinationals, there are the miners, the retros [mining machinery] ...Well, the FARC is not shooting, but the retros are destroying the territory. With different forms, but it continues to happen.[188]

The 2010 report of the UN Independent Expert on Minorities on Colombia was emblematic in highlighting the relationship between megaprojects, forced displacement and violence and the collusion of both national and foreign companies in a bid for territorial control and resources,[189] a dynamic that is now well documented.

In the Chocó African palm plantations are established on Afro-descendant collective lands that were invaded by paramilitaries using force and violence to appropriate those lands.[190] As shown in the *Urapalma* case, following the forced displacement of Afro-Colombian communities from collective lands in Urabá, paramilitaries established a 17,000-hectare palm oil project. Several investors were later convicted for conspiring with paramilitaries and for being the authors of the displacements. Not

[187] R3: pp.7
[188] Interview: Marie Cruz Renteria, 2019.
[189] A/HRC/16/45/Add.1, (25 January 2011): paras.68 and 94.
[190] R1.

only did these companies propose the projects to paramilitary groups but they employed paramilitary members to force landholders to cede their titles (Wesche, 2019).

In Buenaventura various studies and campaigns demonstrate the relationship between forced displacement and violence in Buenaventura and the mega-economic interests for territorial control at the expense of the rights and lives of the people (Estupiñan, 2016). PCN report that State's economic policies in Buenaventura are forcing displacement in seven barrios of the city to make way for the port expansion.[191] Just months after the mass displacement of communities in 2005 and 2006 due to a sudden rise in violence, intimidation and threats, the international company TCBUEN began work on its port expansion plan, in the very barrios that had been displaced.

Should there be any doubt as to the complicity of these economic actors, testimonies by paramilitaries during the Justice and Peace process (discussed in Chapter 6), admitted that many who had carried out the violence received direct funding from private legal companies (CNMH, 2012; 2015b; 2018). The testimony of a commander of the *Bloque Bananero* operating in the mainly Afro-descendant territory of Urabá, confirmed the large payments the group received from landowners including banana growers and cattle ranchers. Members of the *Bloque Élmer* in the same region reported receiving funds from cattle ranchers, logging and mining companies (Wesche, 2019). These testimonies not only demonstrated private sector involvement in financing violence and displacement, but the role of political actors in the context of "para-política"[192] (Wesche, 2019). Paramilitaries have asserted that displacement and killings of supposed members of guerrilla groups and collaborators helped to "cleanse" the regions of "negative and violent elements," open up space for multinationals and enable landowners to return to business. They even described themselves as "agents of progress" (Castillejo, 2013a: n.p).

The Buenaventura Autonomous Proposal for Reparation elaborated by PCN, Fundemujer et al, (here on in, "The Autonomous Proposal,") outlines this link between development interests, armed groups and Afro-descendant territories:

> Investment projects in the Colombian pacific in the context of the neoliberal economy have emphasised three perspectives: as a region that is projected for the extraction of raw materials, as a platform to access the international market and as a potential for biological recourse due to its significant biodiversity… These projects are financed via private capital, the State is a minority partner which makes this development policy more problematic, beyond the fact that it does not have a social development perspective and respect for ethnic rights. This deepens, since the illegal armed groups are in open confrontation as they seek territorial control, which in turn guarantees economic and political control, and infiltrates spaces of the public administration (2011: 42).

[191] R4.

[192] "Para-politics" refers to the AUC political agenda and strategy in defence of private property in which they removed elected officials, presented their own candidates and co-opted public institutions embarking on a system of military, political and social control (Wesche, 2019).

These economic interests, while referred to as "legal" are often unconstitutional as they involve the granting of legal titles and concessions by the State in violation of Afro-descendant peoples' right to FPIC recognised in the Constitution of 1991 and ILO 169. Communities in Northern Cauca have organised to defend their rights against all mining that takes place in their territories without FPIC which they and the Constitutional Court (judgement T1045A) have asserted are "illegal mining."[193]

Further, the analyses show that these "legal" projects are not just isolated cases but are part of the State's ongoing neoliberal economic model and the development agenda that has been further consolidated with the signing of the peace agreement, enabling greater access to territories once occupied by the FARC. ACONC reported in 2015 for example that in Northern Cauca alone 267 mining concessions had been issued by what is today the National Mining Agency and in the municipalities of Buenos Aires and Suárez, 35 mining concessions have been granted without FPIC.[194]

In 2019, PCN reported that the government has signed 739 mining titles with multinational corporations and 17 Free Trade Agreements with foreign governments that negatively impact Afro-Colombian ancestral territories. All six of the reports, and most of the interviews and focus groups mentioned the economic model or development agenda as main driver of the armed conflict. There are direct links made between the interests of transnational corporations, State complicity through military protection for those corporations, and violence against communities by both military and paramilitary forces. ACONC demonstrate how the State has militarised parts of the Northern Cauca region precisely to protect the mining companies:

> The entrance of companies into the territories also contributes to the militarisation of the area. We have observed the creation of military units to protect the interests of transnational corporations. The members of the community of La Toma have assessed that the construction of a military base in premises close to the urban sector of the municipality has had impact on the worsening of the armed conflict between the national Government and the FARC-EP.[195]

State complicity in the actions of illegal armed groups in the pursuit of the development agenda was also brought to attention by the UN Independent Expert on Minorities, who after meetings with Afro-descendant organisations asserted that:

> In some situations involving claims of usurped land, the interest of the Government appears to be complex. Massive single-crop agro-business development projects, such as palm oil plantations, and large-scale mining industry, figure prominently in national development plans. The Government provides financing for projects that accord with national planning goals, which some claim have financed projects on usurped Afro-Colombian lands. Local or departmental governments may have an ownership stake in public-private projects, as is the case in the planned port expansion project in Buenaventura, which threatens to displace

[193] R3.
[194] R3: 9
[195] R3: 10

> thousands. Consequently, when Afro-Colombian communities seek Government assistance in regaining their lands or in bringing legal cases, they are unclear whether the Government is acting as a neutral referee or as an interested party.[196]

These testimonies demonstrate the role of the illegal and "legalised" economic interests in the ancestral territories of Afro-descendant peoples. However, it is the intersection of racialisation and modernity that permits these interests to convert into rampant violence against Afro-descendant peoples themselves.

Repression of the existence and resistance of the black people

As discussed in the coloniality literature, the racialisation of people and territories seeks to justify colonisation in the name of economic development and civilisation. Vergara's concepts of "emptied territories" and "emptied bodies" shows how racist narratives serve to justify atrocities against both peoples and territories seen as under-developed and barbaric (2015). The theories of the "non-ethic of war" (Maldonado, 2007) and the "myth of modernity" (Dussel, 2000) show how the capitalist logic, which puts private profit over the lives and rights of (colonised) peoples, will use violence to remove those that stand in its way. In this sense both the very existence of the Afro-descendent people in the territories of interest, and their resistance to the ensuing economic model are seen as a threat to the colonial economic project.

Existence

As Afrodes assert, economic actors and armed groups acting in their interests use "violence to eliminate any human or natural obstacle that stands in the way…the "new "development promise" maintains the same logic"[197]

Reports make several references to how Afro-descendant peoples and particularly those that exercise their right to FPIC are described in the media and by politicians as an "obstacle to development."[198] PCN cite an article in *El Tiempo* newspaper that discusses how ethnic consultation processes "paralyse" the State agenda, blocking infrastructure and development projects and are, according to the Ministry of Agriculture, a great cost to the nation. In another article in the *Revista Dinero*, prior consultation is described as a "stone in the shoe" of both the private sector and the State development agenda.[199]

[196] R3: para. 69
[197] R2: 16.
[198] R3.
[199] R4.

The idea that Afro-descendant peoples are seen as an obstacle to development was also reflected in the Buenaventura Autonomous Proposal for Reparation:

> The mega projects and development plans which are currently proposed for the region, continue to view it as a provider of raw materials and deposit for riches waiting to be exploited, and its population as an obstacle for development. The mega projects, especially the ports of Buenaventura are carried out at the cost of the destruction of the territory. In addition, the territories of the black communities are expropriated in the desire that nothing gets in the way of development projects.[200]

Mari Cruz Renteria asserts:

> You feel there is interest. We are in a geostrategic territory for everything. For export, for import of raw materials. We have minerals of all kinds, water sources, biodiversity. Well, those of us here want to take a step forward in terms of law in legal terms. So, we hinder. We hinder Colombia's economic opening to the world level. So, we ethnic peoples are an obstacle who have a law that says that everything that is going to be done in the territory has to be done with consent. So, we hinder. And in the end then, there is no other strategy but denying us everything and ultimately stripping us, displacing us, wasting us, it's like that.[201]

That the existence of Afro-descendant peoples is seen as an obstacle is further demonstrated by the fact that the violence and displacement is largely concentrated in those territories where communities have obtained collective land titles (Rodríguez et al., 2009:115). PCN reported in 2009 that of the 132 collective land titles awarded since the adoption of Law 70 of 1993, 116 are in the Pacific region. Renewed economic interest in the same region and the arrival of large-scale development projects coincided with the armed conflict, increased presence of armed groups and the military and displacement in those same collective territories.[202]

The Institute for Intercultural Studies of the Javeriana University of Cali asserts that by December 2012, of the 350,000 hectares awarded in mining titles to multinational and national corporations and individuals in Cauca, 82,000 hectares overlapped with Community Councils.[203] In 2010, Héctor Sarria, who holds a mining license in the territory of La Toma Community Council sued the Suárez municipality in May 2010 calling for the eviction of five thousand families who make their living from artisanal mining in that territory. The eviction order was prevented by the local Community Council.[204]

As Charo Mina of PCN asserts that:

> It's not that slavery has passed; it has continued happening. It has been a driving thread. Thus, the armed conflict is part of this process. It is not a coincidence that until the 80s the Pacific was wastelands of Colombia and since then, when Colombia woke up and opened its eyes clearly to the opportunities that its environmental riches had, it realised that the Pacific exists and, in these wastelands, there were people, it needed to look at it. It's not for nothing that in

[200] PCN, FUNDEMUJER et al, 2011:42
[201] Interview: Marie Cruz Renteria, 2019.
[202] R1.
[203] R3.
[204] R3.

> 2000 when there were more than 5 million hectares titled, paramilitarism became concentrated in the black territories in areas of collective titling. So, it is a continuum, and of course a recognition of the historicity, the continuum of racist violence against the people of the black people is highly important.[205]

These experiences relate directly to decolonial theories on the relationship between economic interests and black bodies; these black bodies were seen as an obstacle to development and so strategies of violence were used to remove them. Land titling is seen as an important protection mechanism for ancestral territories.[206] The lack of political will from the government to protect and advance with titling of lands is another indication of complicity in the agenda for control of their territories.

Resistance

Just as the violence against Afro-descendant peoples is seen as historical and continuous, so too are the processes of resistance that initiated during the period of slavery:

> Since our departure from the African continent, the black communities in the 16th and 17th centuries have avoided being enslaved, we prefer to be shipwrecked in the Atlantic Ocean, we fled from the mining enclaves and established ourselves in Palenques; paying for our children and grandchildren to be free. All this allowed us to survive with a historical memory that contributed to our assuming ourselves as a type of social construction in the Country and in the Region (American continent), putting into practice the ways of life of our ancestors, all of which we crystalised through our cultural values and practices.[207]

If the very existence of Afro-descendant peoples is seen as an obstacle for development, their organisational processes for resistance against the encroachment of armed groups and economic agenda in their territories is seen as an even greater threat. As such, much of the violence in the context of the armed conflict is a direct response to those processes of resistance. Threats, forced disappearances and assassinations of social leaders who defended human rights, territorial rights, seek land restitution or advocate for alternative models of development are issues that have gained increasing visibility and recognition through the advocacy processes of organisations.

In 2009 PCN brought attention to the case of leaders of the Consejos Comunitarios of Alto Mira y Frontera, Bajo Mira y Frontera in Tumaco who suffered repeated threats, assassination and forced displacements for their work defending their territory.[208] In the same report they highlight the 2008 case of a palm oil businessman who offered $5 million pesos for the lives of Ligia María Chaverra, legal representative of Consejo Mayor de la Cuenca del Curbaradó, y Manuel Denis Blandón, ex legal representative of Consejo Mayor de la Cuenca del Jiguamiandó.[209] ACONC recount how leaders in

[205] Interview: Charo Mina, 2020.
[206] R4.
[207] FUNDEMUJER, 2011:18
[208] R1.
[209] R1.

La Toma, Suárez in Northern Cauca have received threats for opposing mining projects.[210]

Helmer Quiñones likens the killings of Afro-descendant social leaders to the repercussions enslaved Africans faced when they revolted.

> It is like… the slave who tried to leave the system, they mutilated him, they removed his leg, they marked him. Here it is the same, the slave who does not relinquish his powers is assassinated, disappeared. It is an equally macabre system. So, this connects to the first part. In other words, for us it has been a continuity of destruction. For others it may be "no, but this is the armed conflict, that was slavery." Well, they have not had to support this continuously.[211]

In this sense, killings and disappearances of social leaders are seen as a continuation of the violence committed against the ancestors who resisted enslavement. Again, as discussed above, those responsible are identified as illegal armed groups in the context of strategies for territorial control, but also groups acting in the interests of legal companies and the State. This is demonstrated by stories of social leaders who have been have openly opposed the dominant State economic model and received threats from illegal armed groups who appear to have no links to the State. The State not only provides insufficient protection for leaders under threat but creates "situations of vulnerability" for leaders through its economic policies, granting mining titles and denying ethno-territorial rights, which leaves them "at the forefront of the contradictions between economic interests of the State and multinationals, and interests for the defence of ancestral rights and territories," creating direct threats from paramilitary structures.[212] Therefore as ACONC assert:

> …large-scale extractive activities, along with the illegal exploitation of the resources as a source of financing of illegal armed groups, create a situation in which the civilian population suffers the consequences of the conflict, not only because they find themselves in the crossfire, but they are especially at risk for defending their rights to territory and self-determination.[213]

Organisations have also demonstrated the particular intersectional forms of violence that Afro-descendant women face in the context of oppression of resistance. All the reports analysed mention the forms of gender-based violence including sexual violence, sexual exploitation and feminicide that Afro-descendant women have been subjected to during the conflict, but this is particularly stark in the case of Afro-descendant women leaders. Primarily, Afro-descendant women leaders have been criminalised, falsely accused of involvement in armed groups or drugs trafficking as a form of silencing their resistance. PCN refer to this as "a form of symbolic femicide: the leader dead in life: without voice, without territory, without family, without community and without the right to participate" (PCN, 2019).

[210] R3.
[211] Interview: Helmer Quiñones, 2018.
[212] R4: 29
[213] R3:10

Secondly women have received threats and been forcibly displaced for their roles in territorial defence. PCN report how members of the Northern Cauca Mobilisation of Afro-descendant Women in Defence of Life and Ancestral Territories have received multiple threats, and many have been forced to leave their homes for their activism opposing mining licences given to multinationals such as Anglo Gold Ashanti without FPIC as well as opposing other illegal mining operations.[214]

Whether or they are human rights defenders, community leaders or neither, Afro-descendant women have been the target of the dynamics and impact of the armed conflict on Afro-descendant communities because of the important role they play in community resistance, protecting and transmitting cultural practices (PCN, 2019). These analyses show how racialised and gendered bodies are seen as a threat to the status quo and the economic agenda simply for being and existing in their own spaces and territories and maintaining practices and traditions that do not fall in line with the capitalist vision of development.

ii. Racism, patriarchy and dehumanisation of Afro-descendant peoples: a justification for violence and exploitation

As shown in the previous chapter, racism and the racialisation of black bodies have functioned since the colonial period to justify economic and military exploitation and violence. Stereotypes of Africans as strong, unintelligent, that do not feel pain or have feelings, served to justify forced labour in severe conditions, without adequate rest or alimentation. In the wars of independence, the same stereotypes justified military exploitation in the ranks of the armies. Stereotypes of African men and women as hypersexual and animalistic justified sexual and physical violence. The reports analysed have demonstrated how these same racist colonial stereotypes underpin the multiple forms of violence and exploitation inflicted on Afro-descendant peoples in the context of the armed conflict.

Economic exploitation

Economic exploitation has not been recognised as an official crime within the context of the armed conflict in Colombia, at least within the scope of the Victims law and Decree Law 4635 (discussed in Chapter 6), yet it is a widespread phenomenon intrinsically linked to the armed conflict, illegal armed groups and extractive and agriculture industries. The issue of economic exploitation was one of the least addressed issues in the reports analysed. Only the report by ACONC mentions the role of illegal mining in Northern Cauca and the dangerous conditions in which local people are often forced to work, which in one case led to the deaths of 14 people.[215]

[214] R4.
[215] R3.

However, while the reports do not address the issue, several of the interviews placed emphasis on what we may call "modern day slavery." Charo Mina discusses the issue in relation to displacement showing how the appropriation of lands of black communities has led to the loss of autonomous forms of life and economy, stealing their labour and converting them into "another form of enslavement." She asserts that:

> …dispossession forces us to give away our labour, to become not even wage earners, because these are not forms of formal work but forms of informal work, of economy that does not generate dignity ... and where power relations are of the same nature as they were during enslavement.[216]

Helmer Quiñones also speaks about the situation in Tumaco which he describes in several moments as being worse than slavery:

> These people in these rivers where they took refuge from slavery and made communities, are subject to multiple systems of control. It is not like a plantation; it is a system of multiple actors that exploit different resources. There are palm plantations, coca plantations, etc., there is mining, there is everything. So, each of those legal or illegal ventures has a system of foremen. Those foremen exercise a system of dominion over those lands and control over those communities. I couldn't believe it was such a heinous thing, because slavery was atrocious, but this is super atrocious. They are multiple [forms of control], so you no longer have to deal with a single system of oppression but with multiple systems of oppression.…you see mining, oil, high intensity agriculture, palm, coca… What forms of exploitation do you find? You find communities that live in worse conditions than slavery, worse…Everyone lives under violence of all kinds, armed control, rape. I don't know, someone who does a comparative analysis, I don't know if I could conclude that the slave system was worse.[217]

Likewise, Francia Marquez speaks about how displacement and land loss has meant a return to enslavement for Afro-descendant people in Northern Cauca:

> …whoever lost the land was once again condemned to slavery. And this is what has happened to the black people who lost their land in Northern Cauca and are now working as cane cutters in conditions of slavery. Black people who have lost their land in the Pacific either for coca or palm, are living situations of expropriation of dignity. Slavery situations. Submitted either to armed groups or subjected either to the economies imposed by the economic model of development.[218]

Each of these testimonies draw obvious parallels with the colonial crime of slavery and emphasise the continuity of exploitation to which Afro-descendant peoples have been subjected since the colonial period, which has deepened in the context of the armed conflict.

Military exploitation

A second way in which colonial racialisation continues to inform exploitation is through military utilisation. As discussed in the previous chapter, the use of Afro-descendant people during the war of

[216] Interview: Charo Mina, 2020.
[217] Interview: Helmer Quiñones, 2018.
[218] Interview: Francia Marquez, 2020.

independence was a deliberate military strategy towards victory for the creoles, with no regard for the lives or freedom of the black soldiers that fought. This military exploitation has been replicated in the armed conflict.

Use and utilisation of black bodies for military purposes is evident in the case of forced recruitment of CYPs in the different armed groups operating in Afro-descendant territories. As previously mentioned, while there is a lack of disaggregated data on this, the Ombudsman's Office has recognised that Afro-descendant and indigenous children are particularly vulnerable to recruitment (Gómez et al, 2014). PCN mention the high rates of recruitment of children[219] and during the focus group with PCN Palenque Congal one participant mentioned the various pressures that lead to young people joining armed groups which are related to both the dynamics of the conflict and the social-economic and structural conditions, lack of employment or education opportunities that leave many looking for an alternative.[220]

Recruitment of both CYPs and adults into armed groups is related to the racialisation and dehumanisation of Afro-descendant bodies. Carlos Rosero describes the armed conflict as "recycling discrimination"[221] which manifests in all areas including in relation to those that participated actively in the conflict and those that that were impacted by violence. He asserts that "Black people had to go to the army because they did not have [resources] to pay for the military notebook [exemption from military service]. Black people were massacred because they had no military power that defended them."[222] Further, he asserts that the colonial order is reproduced in the ranks of both the army and the illegal armed groups, with mostly white/*mestizo* people occupying the highest ranks and Afro-descendant people occupying the lowest ranks. This he argues, may also contribute to the greater victimisation of Afro-descendant communities in military actions. Thus, the great truths that should be revealed by the TJ in Colombia is that there is an explicit relationship between the war and race and that the colonial order is integral to the armed conflict.[223]

Violence against black bodies

A third dynamic of racialisation and dehumanisation that is communicated through the data analysed is the sheer magnitude of the violence committed against black bodies in the armed conflict. While all groups have suffered from violence and human rights violations in Colombia's armed conflict, the particular levels and forms of violence against Afro-descendant peoples is seen as intrinsically linked to racism and the dehumanisation of black bodies.

[219] R1.
[220] Focus Group: PCN Palenque Congal, 2019.
[221] Interview: Carlos Rosero
[222] *Ibid.*
[223] *Ibid*.

The *casas de pique*, an issued raised by the CERD in its concluding observations to the 87th Session[224] in which victims of armed groups are tortured and dismembered in Buenaventura and other parts of the Pacific is seen as a sign of the complete disregard for the lives of black people. Francia Marquez articulates how the sheer levels of violence against Afro-descendant peoples are an expression both of the dehumanisation of black bodies and the racialisation of people and territories:

> There is an interest in emptying the territories, there is an interest in physical, ethnic and cultural extermination. And this extermination is related to the damage to our humanity, for the damage to our family, but also the damage to territory. Not in all territories is violence expressed in this way. Here we can see it concretely, the Colombian pacific. And what is the territory of the Colombian Pacific? A territory occupied by black people, a territory occupied by indigenous people, by impoverished people. By people who are not considered human. And therefore, as they are not considered human this territory can be damaged, in this territory they can kill, in this territory they can commit massacres, in this territory they can poison, in this territory they can exploit, in this territory they can grow coca, in this territory they can do illegal mining, in this territory they can do everything.[225]

Violence against Afro-descendant women is understood as going beyond other experiences of GBV to be a manifestation of intersectional discrimination rooted in racism. Following meetings with organisations of black women the CIDH reported on how racism is evident in the ways in which armed actors reproduce discriminatory practices in their relations with Afro-descendant women (CIDH 2006). PCN et al (2015) write:

> The coexistence of structural racism and a patriarchal culture remain in force, in an environment of violence and geo-economic wars in urban and rural territories, with a disproportionate increase in violence against women supported by high levels of institutional silence and impunity.[226]

The impunity and lack of justice for victims of such violence is another sign of the lack of regard for black lives. As Helmer Quiñones asserts in the case of Tumaco, "Every family has one or two people who have been heinously murdered without any justice process."[227]

Several of the testimonies make the links between contemporary and colonial violence against black bodies. Carlos Rosero recounts how a fellow member of PCN expressed that "today is not the only time that black people have had to remove their dead from the Cauca River. We have always [had to] remove them out of the Cauca River,"[228] showing the relationship between the historic and continued violence against Afro-descendant peoples in the region of Northern Cauca. Diego Grueso also makes links between contemporary and historical forms of violence asserting "Again those violences. Again,

[224] CERD/C/COL/CO/15-16 (25 September 2015): para.29.
[225] Interview: Francia Marquez, 2020.
[226] R4: 30.
[227] Interview: Helmer Quiñones, 2018.
[228] Interview: Carlos Rosero.

because they are violences that we have already lived before, torture, kidnapping, all kinds of torture, psychological, cultural emptying, all of that again."[229]

Conversely the language of contemporary human rights violations and TJ is also applied to understand the kinds of violences inflicted up black people during the transatlantic slave trade. One member of Palenque Congal asserts that "…people disappeared, all the people who disappeared, all across the Atlantic, where are those people? All that process must be included in the reparation process, beyond that."[230] This reflection demonstrates again the continuities between colonial and contemporary violence.

Links between intersectional GBV committed against Afro-descendant women during enslavement and in the conflict are also made. Helmer Quiñones describes how although all women have been differentially impacted by the conflict the specific racialised and gendered violence impacting Afro-descendant women has been particularly atrocious. He describes the sexual violence the Afro-descendant women have suffered in the armed conflict as an "historical crime" that enslaved African women also suffered and is related to the very genetic structure of America.[231] Thus gender-based violence against Afro-descendant women cannot be understood in isolation from the historical forms of racialisation to which they have been subjected.

As such some organisations have taken an intersectional or black feminist approach demonstrating the intersecting oppressions of white supremacy, capitalism and patriarchy in underpinning the disproportionate, differential and systematic victimisation of Afro-descendant women and also recognising this as a continuation of colonial violence. PCN write:

> Today, after 526 years, violence is still the most effective form of domination, co-optation and maintenance of a modern system as a way of life, based on the eradication of the right to difference and the physical extermination of human groups that Afro-descendants and indigenous people recreate or represent. This scenario places us on a historical timeline of patriarchal, colonial, capitalist violence, which must be understood, studied and analysed to understand the purpose of the violence to which black women were and are subjected in the Colombian territory. These extreme violences, established since colonial times have been maintained and strengthened, they are a constant in the lives of black women, who are deeply violated by the State, by their life partners, family members, and by the racist and sexist patriarchal community and society of the which is part. Black women were born and raised in contexts of extreme violence normalised since colonial times (PCN, 2019).

This analysis demonstrates a decolonial black feminist approach that makes a structural analysis of violence and that fights against the violations and violence of modernity and capitalism and denounces and demonstrates how the colonial, patriarchal, racist and capitalist state continues to violate the rights of black women, justifying their actions in the name of development and progress of

[229] Interview: Diego Grueso, 2020.
[230] Focus group: PCN Palenque Congal, 2019.
[231] Interview: Helmer Quiñones, 2018.

society in general. By beginning with a historical vision of the colonisation of the physical, emotional and spiritual bodies of the black people and recognising that "black women were born and grew up in contexts of extreme violence normalised since colonial times" it makes the connection between past colonial violence and contemporary violence in the context of capitalism, neoliberal policies and development.

iii. The violation of the right to self-determination

Finally, the work done by Afro-descendant organisations and activists has been essential in demonstrating how the collective impacts and harms caused by the armed conflict through the violation of ethno-territorial and cultural rights has essentially amounted to the violation of the right to self-determination of Afro-descendant peoples, which again is a continuation of that original colonial crime. In this sense they can be seen as the latest moment in the chain of multigenerational harms discussed in Chapter 3. These analyses are not limited to a state-centred concept of rights that have been recognised and enshrined in law, but rather articulate experiences within the own decolonial vision of rights outlined in Chapter 4 of: (1) The right to be black and to be a black community (collective culture, identity, recognition); (2) the right to a space to be a black community (territory); (3), the right to exercise being a black community (organising, participation and autonomy); (4) the right to an own vision of the future; (5) identification with the global black peoples struggle (PCN, 2008).

As PCN agreed during their 4th National Assembly that:

> In the framework of the internal armed conflict, the rights to participation and autonomy, to cultural identity, to development within the framework of their own cultural aspirations have been violated, in addition to civil and political, economic, social and cultural rights. All these violations have increased the power imbalance between our communities and the rest of Colombian society inherited at the end of the enslavement (Rosero, 2008).

Rooted in the interrelatedness and indivisibility of rights to ancestral territories, identity, cultural traditions, food sovereignty, health, own visions of development, autonomy, participation, and life itself, activists show how forced displacement and other crimes within the armed conflict have meant collective deterritorialisation that has broken historical and fundamental ties to ancestral territories, and damaged cultural practices, traditional ways of life and the very social fabric of community life, leading to their very destruction as a people.

Thus, while the Autonomous Proposal lays out the Constitutionally enshrined normative formwork for ethnic rights, including Decree 1320 of 1998 on Free prior informed consent; Law 70 of 1993 on collective rights of Black communities; Law 691 of 2001 for participation of ethnic groups in the General System for Social Security; and Constitution Court Orders 005 of 2009 and 100 of 2011, the

damages and measures for reparations are articulated within the framework of people-centred rights or "specific ancestral collective rights of black communities" (Fundemujer and PCN, 2011:36).

One member of Palenque Congal referred to these "own rights" when identifying damages caused to black communities in the context of the conflict asserting that the reparation process must look at how the collective identity of black communities was affected, how territory and the black community's identification with and relationship to territory and nature was affected, understanding "the territory in order to *be*, I cannot *be* outside this territory," and how self-government and territorial control was affected.[232]

This own vision of rights has also enabled a broader understanding of the concept of collective damages showing that these are not merely "plural damages" or a series of individual damages, which can be addressed through individual reparations measures; rather, collective damages are those which impact on a distinct collective whose members experience damage as part of a community. Collective damage results from the violation of collective rights and impairment of the community's collective assets and goods that unite them such as specific customs, ancestral traditions and cultural expression, and as such the whole collective or community is a "victim," (2011:35). Collective damages also include individual damages that have a collective impact such as the assassination of a community leader, cases of sexual violence, selective assassinations or forced disappearances which might lead to forced displacement or psychosocial impacts in the community (2011:35-36). The collective nature of damages means that reparations must therefore also be collective (PCN y FUNDEMUJER, 2011:35).

The right to be a black people

The right to be a black people, or the right to culture and identity is shown to have been affected by multiple factors including the presence of armed groups in ancestral territories, limited movement within the territories, forced displacement, recruitment of members of the communities including children and young people, sexual violence, killings and assassinations that spread terror and fear among communities and prevent them from carrying out traditional cultural practices in the territory. Thus, the violation of this right is intrinsically related to the other own rights to territory, political participation and own visions of development without which Afro-descendant peoples do not have the necessary conditions to protect and maintain their culture and identities as a people.

The Autonomous Proposal identifies a violation of the right to *be* demonstrating that the armed conflict has led to the loss of ethnic and cultural identity and psychosocial affectations. Through

[232] Focus group: PCN Palenque Congal, 2019.

confinement and environmental damage there have been loss of culinary practices by preventing food from being transported. This also has an impact on traditional medicinal practices. It notes the damages to the traditional ways of resolving community and family conflicts, the loss of confidence in neighbours and the general social fabric, traditional figures of authority, loss of the value of solidarity, and psychosocial impacts.

PCN (2009) also describe this impact:

> Forced displacement and the phenomena of confinement and resistance constitute direct and automatic violations of the right to territory. Displaced people are arbitrarily and illegally deprived of their former homes, lands, goods or habitual places of residence. The expulsion from territories of which displaced communities are victims implies the loss of their means of subsistence and the rupture of their social and community networks as well as a profound negative physical, moral and psychological impact.[233]

The particular forms of gender-based violence against Afro-descendant women are also seen as contributing to this wider destruction of black cultural identity. After meetings with groups of displaced Afro-descendant women in 2006, the CIDH reported that:

> The impact on Afro-Colombian women is significant and manifests itself in different ways due to their worldview, culture and traditions, identification with their territory and their status as women…Afro-descendant women lose the possibility of continuing with their cultural practices, such as watching over their dead, performing funeral rites, and sharing their life in community, (2006: para.116).

Violence against women is also seen as having an impact on the wider community: "This situation has a profoundly negative impact on Afro-Colombians' cultural survival due to the central role that women play in maintaining their traditional way of life; this includes family customs, as well as the wider community and political spheres."[234]

Through the intersectional black feminist analysis activists show how GBV is a deliberate strategy to destroy the social fabric of black communities underpinned by interests for territorial control and domination. Thus, violence against Afro-descendant women is not seen as accidental but as "violations that are part of the strategy of territorial control and cover the entire set of sexual and reproductive rights."[235]

Cultural destruction is also linked to the physical and environmental damages caused by the conflict. Several reports talk about the environmental damage to ancestral territories, particularly to water

[233] R1: 150.
[234] R2.
[235] R2: 7.

caused by the use of mercury and cyanide in mining, which impacts on health, food, work, life, and also traditional livelihoods, cultural practices and recreational use.[236]

Again, cultural damages are described as a continuation of colonial crimes. Marie Cruz shows how both the contemporary and historic experiences of mass displacement of African people and their descendants have affected cultural practices and modes of survival. "Ancestrally, we had our production systems, which we brought from Africa. Many of our things travelled. We could not bring the physical territory, but we brought the territory through the practices. And we lost all that. So, we need them to repair that."[237] This statement represents the multigenerational coping and resilience strategies that communities have employed in response to the historical layers of violence events that have a different moment inflicted collective cultural harms on Afro-descendant peoples.

The right to a space to be

Underpinning the violation of the right to be is the violation of the right to a space to be, or the right to territory, which again is shown to be the result of multiple factors, principally forced displacement, but also confinement, clashes between armed groups, the use of antipersonnel mines, and environmental damage. The Autonomous Proposal highlights damages to the environment, worsening poverty, and restrictions on use and control over the ancestral territory. In particular, it notes the drugs trade, contamination of rivers, lack of movement to be able to fish, cultivate crops or hunt according to traditions.

As discussed above the most frequently mentioned human rights violations in the reports, interviews and focus groups is that of forced displacement which relates directly to the right to territory. PCN assert that: "Forced displacement and the phenomena of confinement and resistance constitute direct and automatic violations of the right to territory. Displaced persons are arbitrarily and illegally deprived of their former homes, lands, assets or places of habitual residence."[238] They go on to assert that: "The exercise of the right to territory by Afro-Colombian communities has been seriously affected by the armed conflict, as well as by projects for the exploitation and use of natural resources and the fumigation of illicit crops in areas of black communities."[239] Forced displacement leaves territories open to "colonisers" or "settlers" that occupy lands and resources, and often begin cultivations of illicit crops, which result in aerial fumigations leaving lasting damage to the

[236] R3.
[237] Interview: Marie Cruz Renteria, 2019.
[238] R1.
[239] R1.

environment and territories.[240] They cite violations of land rights in several regions including Bajo and Medio Atrato in the Chocó department.

Damages to territory are understood as damages to the people themselves, especially from an intersectional black feminist perspective:

> "When the territory is damaged, for example with illegal mining, for example with deforestation, for example with the contamination of rivers, and these are our vital spaces, and women are distressed, they become ill from seeing what that damage is doing to the territory, this is implementing direct violence against women. Because we are not only forced to see the death of a physical being, person; we are forced to see the death of a physical being that is also alive, such as the territory. We are forced to see the death of the entire cultural heritage, the practices, the knowledge, the history that is associated with each of these practices, which means the physical space of the territory itself in the sense of community. All those things die off when the territory is affected. All these things are dying when the various forms of violence are implanted in the communities. And those are forms of direct violence against black women. That is what we are seeing today. So, the means is only changing a little, in time, but there is a common thread in these patterns of violence. And that common thread is maintaining ourselves, remembering that we cannot be ... That we cannot defend that reason for being, that being. Being in that relevant difference and that we defend."[241]

Again, parallels with colonial crimes are evident as displacement is seen as mirroring that first great forced displacement of ancestors from Africa who were kidnapped and trafficked to the Americas and exploited for their labour. Rosero refers to forced displacement in the armed conflict as "the biggest aggression that Afrodescendant have suffered in 150 years" (N.D: 549) demonstrating this idea of the continuation of violence from the colonial period to the present day. Language of the right to return is often used, as it is with members of the African Diaspora in relation to Africa. Some processes talk about displaced communities as though they are part of a new Diaspora from the rural communities, maintaining cultural links and relations with their ancestral homelands and facing new forms of discrimination and vulnerabilities in the new urban space.

Diego Grueso also compares displacement to the slave trade and discusses this in relation to reparation:

> "I began the issue of reparation with forced displacement, with an approximation not to the principle, not restorative, or consciously restorative, but with the aim of understanding a humanitarian problem that was presented as very… big. Because Afro-descendant displacement, let's say, at the end of the 90s and 2000s has been the most significant calamity, the widest and deepest wound that the African people in Colombia have suffered since the Diaspora, after slavery. So, I approached it to understand humanitarianly what it was, and what were the possible responses. And one of the responses was that we need to create routes at least for the restitution of the goods and rights that were being taken."[242]

[240] R1.
[241] Interview: Charo Mina, 2020.
[242] Interview - Diego Grueso, 2020.

This excerpt demonstrates both the relationship and links of contemporary forced displacement to the historical colonial crimes of tracking and enslavement and the importance of this issue in initiating the conversation on reparation for Afro-descendant peoples.

The violation of territorial rights is seen as part of the strategy for territorial control which seeks to weaken internal organisation and autonomy and make communities vulnerable to displacement. PCN mention numerous cases where processes for collective land titles have been undermined by weak or insufficient responses from the state. Such is the case with the Popular Peasant Organisation of Alto Atrato - COCOMOPOCA in Lloró and Bagadó, Chocó for whom the state took ten years to respond to their request for collective titles only to give a negative response based on easily resolvable administrative reasons.[243]

The right to exercise being a black people

The third damage identified concerns the possibilities of Afro-descendant peoples to exercise their rights to organising and political participation. The Autonomous Proposal identifies damages to processes of organising, participation (such as free prior informed consent), autonomy, political-organisational processes for the exercise of self-government (administration of the territory, routes of relationship with the institutionally, resolution of conflicts, protection and permanence in the territory), and loss of credibility in the State, as a Social State of Law. It asserts that:

> With the arrival of the armed conflict in the collective territories, part of the organisational demands won through Law 70 of 1993 were truncated, when the authority, legitimacy and recognition that the Community Councils created for the administration of titled territories had won was co-opted by the imposition of patterns of authority infused through force, fear and the cracking of organisation processes (2011:45).

Naka Mandinga asserts that autonomy which he defines as "the right to decide about our destinies" has been denied to Afro-descendant peoples, such that "others thought for us."[244] Tensions are highlighted between the economic development model of private companies and the State and the "democratic processes of black communities that are affected by untold industrial megaprojects."[245]

Harrison Cuero of PCN links the loss of territory to the damages to autonomy asserting that: "Let's say that one of the things that one identifies most affected by the conflict is the total loss of control of

[243] R1.
[244] Interview - Naka Mandinga, 2019.
[245] R2: 47.

the territory. The total loss of control, the weakness of the authority that exercised territorial control, the new figures of power and control that emerge."[246]

As discussed above, in the context of the conflict, Afro-descendant leaders and human rights defenders are denied their rights to organise and defend territorial rights through threats, criminalisation and assassinations, which not only violates their direct rights but damages the wider movement and community processes. PCN and Madre for example document four recent cases of criminalisation of leaders 1) mother and daughter Tulia Marys Valencia and Sara Liliana Quiñones Valencia from Tumaco, who were falsely accused of trafficking and ties to the ELN, arrested, denied bail and spent 15 months in a maximum security prison; 2) Danelly Estupiñan from Buenaventura who is facing unfounded charges of slander and libel, and has received constant threats since her involvement in the strikes in Buenaventura; 3) Victor Hugo Moreno of ACONC who was under investigation for participation in the *Minga* popular movement; and 4) Carlos Rosero of PCN and CONPA who is also under investigation.[247]

All of these leaders have also faced threats and in some cases attempts on their lives and are recipients of the National Unit for Protection's (UNP) leaders' protection programme. The fact that armed groups are threatening their lives and the State is threatening their liberty, both in response to the resistance work that they carry out, is another indication of the multiple interests at play. These activists are unable to carry out their activism due to the situations of insecurity they face. Afrodes condemn the attacks on leaders, which among other impacts is a "strategy to exterminate their possibilities of government with autonomy and collective action to guarantee ethnic rights."[248]

The right to an own vision of the future

Linked to all of these above rights is the right to an own vision of the future, or own visions of development and life plans. The reports analysed demonstrate how time and again the armed conflict has served to impose a development model that is in opposition to the cosmovisions of Afro-descendant peoples. PCN and CNOA demonstrate how development policies and mega projects violate the autonomy and "own option for *buen vivir*."[249] ACONC talk about how development plans by the government clash with the own processes of development (2015). They assert that:

> …communities find themselves subjected to an imposed development model that violates their rights to self-determination and to cultural integrity. The reality is that the development

[246] Focus group - PCN Palenque Congal, 2019.
[247] R6.
[248] R5.
[249] R4.

> model promoted at the national level runs directly contrary to the type of development conceived by Afro-descendant communities.[250]

The violation of the right to FPIC is highlighted in all of the reports examined, without which, as PCN and CNOA assert, the assets and economic stability of Afro-descendant communities is threatened in the context of the national development agenda and violence.[251] Reports also raise concerns about the denial of FPIC to displaced communities and those living in urban contexts amid numerous State processes to reduce the scope of the right to FPIC. PCN and CNOA for example break down Ministry of Interior Resolution 121 of 2012 which, by limiting FPIC to communities with collective land titles excludes Afro-descendants who have been displaced due to the armed conflict, community councils still in the process of gaining collective titles, ancestral territories in areas not susceptible to collective titling, and members of the Afro-descendant population that are from urban areas from consultation mechanisms and processes.[252]

iv. We charge ethnocide, genocide and ethnic cleansing

The culmination of these violations of own ethno-territorial rights to culture, identity, territory, organisation and development, the sheer magnitude of racialised violence and exploitation of Afro-descendant peoples and the oppression and repression of their existence and resistance in ancestral territories has led many activists to conclude that Afro-descendant peoples are the victims of the original and most grave of colonial crimes; genocide, ethnocide and ethnic cleansing.

Academic Santiago Arboleda has written extensively on the subject (see for example Arboleda 2016, 2019). Pulling together the various analyses of the impact of cultural destruction that the armed conflict has had on Afro-descendant peoples, he suggests a reinterpretation of the various damages caused proposing the concept of "eco-geno-ethnocide" which combines experiences of exile or "deterritorialisation," genocide, ethnocide and ecocide (Arboleda, 2019). Almario also writes of ethnocide-genocide (2003) and asserts that the use of generalised terms such as "forced displacement," "violent events" and "acts of war" minimise the true dimension of the situation in the Pacific. These terms, argues Almario, tend to:

> …hide that we are witnessing an ethnocide; because it is Afro-descendants and indigenous people who are subjected to violence and who are displaced and deterritorialised, thereby fulfilling another of the characteristics of this form of violence, ethnic cleansing. (Almario, 2004).

[250] R3.
[251] R4.
[252] R4.

Thus, the third concept that has been explored to describe these dynamics is "ethnic cleansing." While there is no official definition of Ethnic Cleansing in IL, the Committee of Experts on Yugoslavia defined it as: "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas" (UN Security Council, 1994: para. 130).

The concept of ethnic cleansing relates perhaps even more to the situation of Afro-descendants, as it involves not only the cultural destruction of a community but their removal – either culturally or physically from a territory with the intention of gaining control of that territory. Marquez and Quiñones (2007) write how the recognition of rights in the Constitution of 1991 and the Law 70 of 1993 seemed to be the end of a 500-year long nightmare. Yet they assert:

> Since the 1990s, that is, with the beginning of the so-called economic opening (1991) to the present day, we have been subjected to a systematic wave of heinous crimes within the framework of a new wave of systematic economic exploitation and disproportionate armed violence: we are being killed, massacred, raped, harassed, confined and systematically expelled from our ancestral territories" refer to this as a "new chapter of ethnic cleansing.

Central to the IHRL definitions of genocide,[253] ethnocide[254] and ethnic cleansing[255] outlined in chapter 2, these crimes must be shown not only to be systematic, but that the perpetrator had the intention of eliminating wholly or in part an ethnic/racial group, or their culture in the case of ethnocide. The issue of State intention is perhaps the most contentious. The advocacy processes have demonstrated that violence and crimes against Afro-descendant peoples are committed not only by illegal armed groups, but also by the State's armed forces,[256] and State responsibility not only relates to omission, but also by action.

One of the most important conclusions is that while the State has over time increasingly recognised the structural and underlying causes of victimisation of the Afro-descendant population it has failed to take adequate steps for prevention and protection. This further supports the idea that the armed conflict takes place in a paradigm of coloniality in which the State itself has responsibility for committing or enabling the continued acts of violence against Africans in the name of modernity and progress. As Afrodes assert:

> Despite the formal recognition of the phenomena of structural exclusion and the differential impacts of the armed conflict on the Afro-Colombian people, the adoption of effective public policies that affect their structural causes continues to be an incipient process that has no correspondence with the magnitude and characteristics of the problems that are being faced, which are systematically annihilating our possibilities of physical and cultural survival.[257]

[253] The Geneva Conventions
[254] UNESCO (1981)
[255] Comisión de Expertos Yugoslavia (UN Doc. S/1994/674)
[256] R1.
[257] R2: para.3.

While the government has, as shall be shown in Chapter 6, taken wide legislative and policy measures to assist and accompany victims of displacement, measures to prevent displacement are almost non-existent.[258] The State has failed to consult with communities to ensure adequate protection mechanisms[259] and there is a "lack of political will" to protect communities and prevent displacements.[260]

Further, many State actions further expose communities to violence. The denial and undermining of ethno-territorial rights, including the progressive role back of FPIC norms and long delays in responding to requests for collective titles has left communities vulnerable to increased violence and displacement by armed groups.[261] PCN and Madre show how:

> High-level Colombian officials have publicly smeared and threatened human rights defenders or downplayed the dangers they face. Even Colombia's National Protection Unit (UNP) has minimised, disregarded, and dismissed politically-motivated attacks and killings, including against those standing up for Afro-descendants' rights.[262]

Many of the economic policies and laws adopted by the State further threaten the rights and security of Afro-descendant peoples.[263] As PCN and CNAO assert:

> …the State is imposing economic policies that seriously threaten the rights of Afro-descendant communities and that, on the contrary, strengthen the increase in conditions of vulnerability such as internal forced displacement, multiple forms of violence, stigmatisation, multiple forms of discrimination, impoverishment and loss of identity and culture.[264]

Thus, while it may be difficult to prove intentionality, the lack of government measures to prevent human rights violations committed against Afro-descendant communities, whilst simultaneously facilitating the actions of economic and armed actors not only leads to conclusions of omission by the State, but direct complicity in the strategies of armed groups and economic actors to gain control of Afro-descendant territories.

In this sense, in a 2010 report marking the bicentenary of the independence of Colombia, Afrodes concluded:

---

[258] Interview - Naka Mandigna, 2019.
[259] R6.
[260] R3: 11.
[261] R1; R4; R6.
[262] R6.
[263] R2 highlights laws such as the Forestry Law (Law 1021 of 2006) and the Rural Development Law / Statute (Law 1152 of 2007) that are in direct conflict with ethno-territorial rights. While PCN 2009 cite the Rural Development Statute (ley 1152 de 2007), The General Forest Law (ley 1021 de 2006), The National Development Plan (ley 1151 de 2007) and the Free Trade Agreement with the USA (ley 1143 de 2007) that have had direct impact of the constitutionally recognised rights of afrodescendiente communities.
[264] R4.

> To date, our recommendations and those of intergovernmental and State organisations have been ineffective, as they have not translated into a comprehensive response policy which protects, attends to, and makes reparations to the Afro-Colombian population. Thus, the Afro-Colombian humanitarian crisis has continued to worsen to the point where it is understood and expressed by the Afro-Colombian organisational processes and by our population in general as a plan to annihilate our people: our current ethnocide, (Quiñones, 2010: 137).

None of the CERD shadow reports explicitly use the terms ethnocide or genocide but there has been increasing use of the concepts, particularly in the context of the implementation of the Peace Agreement and the worsening of the armed conflict in the Pacific region. By demonstrating the damages to their interrelated own rights, Afro-descendant advocacy processes have demonstrated that these crimes and violences are contributing the destruction of the very life plan of Afro-descendants as a people in Colombia.

During CONPA's recent advocacy process before the CEV, we held numerous conversations and dialogues about how each of these concepts applies to the conflict and this is a position that is continuously being developed and refined. Analysis made in the report presented to the CEV outlines in detail the argument for the charge of CAH showing the Afro-descendant experience of genocide, ethnocide, and ethnic cleansing must be read from a colonial and historic perspective which situates these crimes as a central strategy in the ongoing colonial economic extractivist project rooted in white supremacy in which ethno-racialised subjects with own visions of development and *buen vivir* are seen as a threat to that project must be eliminated either cultural or physically from the territory of colonial economic interest (CONPA, 2021b).

As Arboleda asserts, a holistic reading of these CAHs enables us to show that human rights violations against Afro-descendants in the context of the conflict are not isolated incidents or unintended consequences of clashes between armed groups, but rather part of a strategy for control of peoples, territories and resources. This holistic reading enables us to further demonstrate the intentionality of the State in both action and omission in the commission of CAH against Afro-descendant peoples.

This chapter has outlined the main components of the case for historical reparation for the black people of Colombia rooted in the overarching argument that colonial and racialised crimes for which reparation is sought did not end with the abolition of slavery but rather continued to the present day and are manifest in the contemporary armed conflict. As such the demand for reparation asserts that reparation is not an historical but an ongoing and contemporary issue that links past and present injustice and as such must be addressed in the contemporary transitional justice process.

CHAPTER 6: DECOLONISING HUMAN RIGHTS AND TRANSITIONAL JUSTICE: A PLATFORM FOR REPARATIONS IN COLOMBIA

"*...the country [must] also realise that sometimes those who make the greatest contributions to legislation, jurisprudence and justice, are not necessarily those who manage the systems; it is us*."[265]

This chapter examines how through advocacy work that has shaped the very evolution of the transitional justice framework in Colombia, Afro-descendant activists from PCN and CONPA alongside others, have opened up space for public discussion on historical reparation for Afro-descendant peoples. This has been largely done by emphasising the continuity of colonial and contemporary violence and injustice facing Afro-descendant peoples, as discussed in Chapter 5, and demanding that TJ processes consider and address the structural and historic roots of the armed conflict and its particular impact on Afro-descendant peoples. Thus, I assert that activists are decolonising TJ. This has been a cautious and critical process however, that understands the political and economic interests that drive TJ and the constraints these processes have for achieving real historic justice.

As mentioned in the introduction, Colombia's nearly 60-year long internal armed conflict has seen a number of peace processes under different governments since the 1980s, however, only the most recent of these have created TJ mechanisms and incorporated measures for reparation for victims. While reparations measures are usually adopted as part of recommendations by truth commissions or other TJ mechanisms, in the case of Colombia, with its multiple dimensions to the ongoing and ever adapting armed conflict, such norms have emerged both in the context of specific peace processes and in the context of humanitarian responses to mass violence.

This chapter considers advocacy processes carried out during three key moments which have led to the adoption of reparations measures:

1) the Constitutional Court's declaration of a state of unconstitutionality (ECI) with regards the situation of forced displacement (Sentence T-025 of 2004) and it's follow-up orders on measures for victims; 2) the adoption of Law 1448 of 2011 (the Victims Law) for measures for assistance, protection, reparation and guarantees of non-repetition for victims or the armed conflict; and 3) the 2016 Peace agreement between the FARC-EP and the government which includes measures for reparations particularly in its Chapter 5 which creates the Integrated System for Truth, Justice, Reparation and Non Repetition.

[265] Interview: Helmer Quiñones, 2018.

At each of these moments as the State proposed general laws and measures for victims of the armed conflict, Afro-descendant organisations including PCN and later CONPA, along with other sectors mobilised to push for inclusion and recognition of the specific situation of Afro-descendant peoples, achieving among others, three emblematic norms: 1) Constitutional Court Order 005 of 2009 on the situation of Afro-descendant IDPs; 2) Decree Law 4635 of 2011 on collective reparations for Afro-descendants; and 3) the Ethnic Chapter in the Final Peace agreement between the FARC and the government.

Based on analysis of interviews, focus groups and the norms themselves, each of these key advocacy moments and their results are examined below. This is followed by a discussion on the limit and scope of TJ for historic justice from a critical perspective.

I. Auto 005 of 2009: the demand for an ethno-racial humanitarian response to Afro-descendant IDPs

One of the biggest normative achievements of the advocacy processes analysed took place in the context of the Constitutional Court's response to the humanitarian situation of IDPs in the 2000s and particularly its adoption in 2009 of Court Order 005 on the protection of the rights of displaced Afro-descendant communities which is seen by many as one of the most important pieces of jurisprudence on Afro-descendant rights to date.[266]

Colombia's Constitutional Court has played an important role in the development of a progressive normative framework and jurisprudence concerning humanitarian, human rights and social justice issues. Established through the adoption of the 1991 Constitution, which was adopted during the wave of progressive constitutional reforms in the region, the Court has a strong rights-based approach, rooted largely in international human rights law. Since its creation it has taken a progressive approach in interpreting the Constitution and the norms derived thereof in various areas of law and rights (Garcia Villegas, 2014), including the area of Afro-descendant rights.

Thus, the Constitutional Court has been a fundamental site of a struggle for the Afro-descendant movement through which some of the most progressive normative achievements protecting their rights have been won. Particularly through the 2000s and early 2010s the Court was seen an important ally for the movement adopting progressive jurisprudence.[267] Largely based on the arguments presented in the previous chapter on the disproportionate and differential impact of internal displacement on their communities, organisations systematically made recommendations about measures and steps that should be taken to address the situation (Afrodes, 2009). Thus, the adoption of Auto 005 must be understood as the culmination of many years of advocacy work.

[266] Focus group - PCN Palenque Congal, 2019.
[267] Interview: Diego Grueso, 2020 and Helmer Quiñones, 2018.

i. Background to Order 005 of 2009

While international guidelines on the issue of internal displacement were not adopted until 2001, displacement was recognised as a key issue in the Colombian armed conflict since the late 1990s. In response to the crisis, in 1997 the government adopted Law 387 to prevent forced displacement and guarantee care and protection of IDPs. Although the law does not create explicit provisions for reparation, it establishes the right to return to lands from which victims have been displaced. It further creates measures for socio-economic stability and long-lasting conditions in territories to prevent further mass displacements. Law 387 created the National System for Comprehensive Care of the Displaced Population (SNAIPD), now the National System for Care and Comprehensive Reparation of Victims (SNARIV) to implement the measures.

As the situation of internal displacement became increasingly urgent, and in response to cases brought by over 1,000 displaced families with regards to lack of protection and assistance from the State, in 2004 the Constitutional Court adopted Sentence T-025, declaring a state of unconstitutionality (ECI) with regards to the situation and sheer number of IDPs. As well as ordering competent institutions to adopt measures for the protection of IDPs, the sentence emphasises the rights of victims to reparations.

Following the adoption of T-025 The Commission for Monitoring Public Policy on Forced Displacement was established. This is an autonomous social initiative, which directly represents the interests of the victims and is made up of CSO members such as CODHES who currently hold the secretariat, and national observers including CNOA. The commission produces regular reports on the implementation of T-025 and subsequent laws and policies and carries out advocacy initiatives.[268]

Largely as a result of advocacy by social movements, as a follow-up to T-025 of 2004, the Court adopted four specific orders with a differential focus: Order 218 of 2006 indicated the need to design and implement a differential, holistic and crosscutting approach to all public policy concerning the prevention of forced displacement and protection and assistance to displaced communities. It recognised the particular impacts of displacement on CYPs, older people, women, people with disabilities and people belonging to ethnic groups. Order 092 of 2008 on "The Adoption of measures for the protection of women victims of forced displacement due to the armed conflict," recognised the differential impact of the armed conflict on women. Order 004 of 2009 addressed protection of indigenous peoples displaced by the armed conflict and Order 005 of 2009 addressed protection of Afro-descendant victims of forced displacement.

[268] See for example Comisión de Seguimiento (2013) and Comisión de Seguimiento (2016) among others.

Order 092 on displaced women was a particularly important achievement for the Afro-descendant movement as advocacy work by Afro-descendant organisations including Afrodes, whose reports it cites, led to the inclusion of an intersectional analysis of the situation of Afro-descendant women. The Order recognises "the historical and structural conditions of discrimination, exclusion, marginalisation and vulnerability of women belonging to indigenous groups or Afro-descendant communities," and that the situation of Afro-descendant and indigenous women is "even more serious than the situation of the majority of women," as they face "greater exposure to the gender risks" of displacement (III.1.9.). Order 005 which was adopted a year later built on this differential analysis of the Court.

ii. Order 005 of 2009

Prior to the adoption of Order 005 of 2009, the Court held a technical session on 18 de October 2007 in which Afro-descendant organisations made presentations based on their years of analysis and documentation of the armed conflict and its differential impact on their communities. The Court also received numerous written reports which were fundamental to the language and scope of the Order. The Order cites reports by CNOA, PCN, Afrodes, COCOMACIA, The Pastoral Afrocolombiana, ASOMUJER, and Movimiento Cimarron as well as frequent references to the interventions made during the technical session.

Due to this advocacy process the language in Order 005 goes beyond that of any other norm to date in terms of its historic, structural and economic analysis of the injustices inflicted upon Afro-descendant people and the measures that it orders to address the situation. This set a new precedent for thinking about the links between the armed conflict and the historical violence against Afrodescendant, and indeed between TJ reparations and historical reparations. The Order 005 recognises several fundamental dynamics and introduces new progressive language concerning the rights and situations of Afro-descendant peoples.

The disproportionate and differential impact on collective ancestral rights

Primarily in line with the arguments presented in Chapter 5, Order 005 recognises the disproportionate and differential impact of the conflict on Afro-descendant territories and communities and the gross and continued violations of the rights of Afro-descendants. Based on the evidence provided by the State and civil society it identifies the:

> …risks and factors that evidence the disproportionate impact that displacement has on the effective enjoyment of the individual and collective rights of Afro-Colombian communities and the exacerbation of the situation of extreme vulnerability, discrimination and marginalisation both individual and collective of this population (para.89).

The Order places emphasis on impacts on both the individual and collective rights of Afro-descendant peoples asserting that this affects the "possibility of their cultural survival" and a violation of their "territorial rights, rights to participation, autonomy, cultural identity and development according to their own cultural aspirations…" (para.91). It goes on to emphasise the importance of territory for Afro-descendant peoples (para.93). Not only does it mention territorial rights, but Order 005 represents the first use of the concept "ancestral territories" in Colombian jurisprudence asserting that:

> As an ethnic group, constitutional jurisprudence has insisted that Afro-Colombian communities are holders of fundamental constitutional rights to the collective property of their ancestral territories, to the use, conservation and administration of their natural resources, and to carry out the prior consultation in case of measures that affect them directly and specifically (para.21).

Order 005 mentions the concept of ancestral territories another 30 times in the document citing on several occasions reports by Afro-descendant organisations. This progressive language echoes the charge that displacement has a differential impact for Afro-descendant peoples violating not only their constitutionally recognised ethno-territorial rights but own visions of rights, territory and development.

The Order calls for a differential approach to prevention, protection and care for displaced Afro-descendant communities. Its orders the design and implementation of a specific plan for the protection and assistance to 62 emblematic community cases. Further it ordered the State to design and implement a plan to characterise collective and ancestral territories inhabited mainly by Afro-Colombian population (order 4); implement the "ethnic route" proposed by Acción Social in its land protection and heritage project in cases of mass displacement (order 5); design and implement a strategy for confined Afro-Colombian communities to receive emergency, comprehensive, and timely humanitarian assistance of comprehensive (order 7); and design and implement a comprehensive plan for prevention, protection and care for the Afro-Colombian population (order 9).

The underlying cross-cutting factors of displacement

Secondly, Order 005 identifies "cross-cutting factors" that contribute to the disproportionate rates and differential impact of displacement on Afro-Colombian people. Here the Court explicitly recognises the contributions and analyses made by Afro-descendant organisations during the October 2007 session (para.67). In line with the observations made in the previous chapter, the first cross-cutting factor identified is "structural exclusion" which results in the marginalisation and vulnerability of Afro-descendant peoples (para 68). Here the Court also cites the national census and CONPES 3310 of 2004 on "affirmative action for the Afro-Colombian population" which demonstrate higher levels of poverty and inequity in departments and municipalities with a high Afro-Colombian population as

well as other socio-economic indicators in the areas of education, health, housing, sanitation and running water, incomes and literacy rates (para 69).

Secondly, the Court highlights the role of mining and agricultural processes which impose "strong tensions on…[Afro-descendant] ancestral territories" leading to dispossession (para 67). It asserts that this factor:

> …stands out as one of the factors that has contributed to increasing violence against the Afro-Colombian people in their territory, legal and illegal pressures to promote development patterns driven by the productivity vision that characterizes in the regions corresponding to the majority economic model and unknown models of production of Afro-Colombian communities, which favour the self-sufficiency and promote the protection of cultural diversity and biological of their territories (para 70).

Again, this reflects the observations and arguments made by Afro-descendant activists about the relationship between the economic model, economic interests, displacement and conflict. Here the Court makes specific reference to reports submitted by CODHES, AFRODES and other Afro-descendant organisations as well as in the interventions during the October 2007 session (para.70).

A number of specific cases are identified including that of Buenaventura in which, citing reports by Afrodes and the Pastoral Afro-Colombian, the Court recognises that local government is "planning the implementation of several megaprojects that will have a strong impact on Afro communities in this city, causing further uprooting. The areas that have been designated for megaprojects are currently the most affected by conflict," and that "the goal of violence is to remove people from their land, and therefore create a space for megaprojects," (para.77). Likewise, it identifies the case of Bajo Atrato in Chocó, citing a report from the organisation ASCOBA, recognising the relationship between the mass displacement of 1500 families caused by clashes between illegal armed groups and economic interests noting that "when communities returned, they found their villages destroyed, and their territories occupied by holders of bad faith and planted with palm" (para.78).

The third cross-cutting factor identified is the lack of legal and institutional protection for Afro-descendant collective territories which the Court recognises further enables the presence of armed groups and forced displacement (para.67). Here the Court recognises the State's failure to adequately apply ethno-territorial rights and restitution measures to protect communities and territories which has "facilitated illegal sales and dispossession of collective territories and the expulsion from ancestral territories that are in the process of titling collective," (para.79).

Again, citing the interventions of Afro-descendant organisations it demonstrates the adverse effects of this State omission. These include the lack of policy and intervention taking into account their specific situations which has contributed to processes of denial and loss of cultural identity; the lack of

political will to respect the rights of Afro-Colombian communities; the absence of mechanisms that effectively protect collective rights; and exclusion or underrepresentation of Afro-Colombian communities in decision-making processes constituting a "systematic violation of their right to participate," (para.80).

Thus, Order 005 makes some important advances in the recognition of the links between economic interests and the armed conflict and the use of forced displacement and violence as a strategy to gain territorial control for economic projects. Further it recognises the role of the State in facilitating the dispossession and displacement of Afro-descendant communities both through omission (lack of sufficient protection), and action, through the adoption of economic policies that directly relate to dispossession as in the case of Buenaventura.

Racism, racial discrimination and displacement

A third important contribution to the normative evolution is in the recognition of the relationship between racism, racial discrimination and forced displacement. Helmer Quiñones asserts much of the advocacy carried out by organisations focussed on getting the issue of racism on the agenda of public policy for both response and protection in the context of the humanitarian crisis and for reparation measures.[269] As shown in Chapter 5, organisations consistently highlighted the role of structural racism in the disproportionate impact of the conflict in Afro-descendant communities. As a result of this advocacy Order 005 recognises structural exclusion as one of the transversal factors mentioned above, which contributes to the vulnerability of communities (para.67).

Not only is racism and racial discrimination considered as a factor in forced displacement, but also in terms of the differential impacts of displacement. In line with the arguments presented in the previous chapter, Order 005 recognises that Afro-descendants who are displaced often face heightened racism and racial discrimination in the cities and towns to which they are displaced, often experience institutional racism when seeking assistance and protection, and wider discrimination in access to basic services and rights (paras.110 and 106). The Order cites interventions made in the 2007 session identifying dynamics such as "daily experiences of racist attitudes and behaviours on the part of institutions and general citizens;" greater difficulties in finding work and being overrepresented in low paying, low-skilled work, belittling of Afro-descendant knowledge and competencies; and lack of institutional support for organisational processes (para.107). In this sense it identifies discrimination as a factor leading to the underreporting of cases of displaced Afro-descendant people (para.141).

[269] Interview: Helmer Quiñones, 2018

Historical Reparation

Finally, perhaps one of the most important and historic achievements of Court Order 005 is that it makes direct reference to the issue of historical reparation. In its Annex on emblematic cases that reflect the seriousness of the humanitarian crisis facing Afro-descendant peoples it states that:

> The internal armed conflict has increased the imbalance of power between the black communities and the rest of Colombian society. Forced internal displacement which has disproportionally affected black communities, has increased the debt between the Colombian society and the descendants of Africans, which can be explained by the lack of power of the communities that have been victims [of said phenomenon]. *For this reason, historical reparations and those for the internal armed conflict are one and the same and have the same origin* (p.97-98, my emphasis).

This is a direct reflection of the visions and assertions on reparation made by PCN in their organisational documents discussed in Chapter 4. In another reference, Order 005 recognises that protecting collective territories forms part of historical reparation:

> Finally, it is striking that, when communities decide not to move, the government response is that they cannot assist to them and that they would only do so if they move from the territory. Assistance to resisting communities stems from the state obligation to prevent forced internal displacement and to guarantee conditions so that communities and their members do not abandon, in the case of the Pacific, territories whose legal ownership constitutes a partial form of historical reparation (para.119).

This statement addresses the State's responsibility not only in failing to protect black communities but in failing to assist those that attempt to remain and resist in the territories. In this sense the State is seen as complicit in forced displacement which leads to the undermining of existing historical reparations achievements; land rights. The relationship between land rights, reparation and displacement is presented as cycle in which vulnerability to displacement is largely a consequence of that lack of guarantee of collective lands rights and reparation. Reparation is therefore seen not only as responding to an historical crime, but as creating the conditions to prevent further crimes from happening. Diego Grueso describes the language of the Court, which was largely the result of advocacy processes, as proposing profound and inspiring vision of reparation including the idea of transformative reparation.[270]

iii. Other responses from the Constitutional Court

In 2013 the Constitutional Court adopted Order 119 which analyses the process of registration of displaced populations. It orders the adoption of necessary measures to ensure that victims of forced displacement under conditions outlined in Law 387 or 1997 (even if not considered victims of the armed conflict in line with Law 1448 of 2011), are immediately registered in the RUV and take action to address the existing problems in the registration system. It recognises that forced displacement

[270] Interview: Diego Grueso, 2020.

does not only occur in situations of armed conflict and that victims must be registered irrespective of the responsible party (political, ideological, common or legitimate) or their way of operating. It also recognises that "widespread violence can take place at the rural or urban level, in a locality, a municipality, or a region." Finally, it asserts that for a person to be recognised as a victim of forced displacement "a well-founded fear suffices, although it is usual for generalised violence to be accompanied by threats, harassment or attacks against both the civilian population and the state force; in the latter case with repercussions in the first," (Constitutional Court, 2013a:24).

Order 119 is important because it widens the scope of the concept of armed conflict to recognise victims of crimes committed by groups such as BACRIM (criminal gangs) who are not considered actors in the armed conflict. This is particularly important for the case of Buenaventura where, following the demobilisation of the AUC in 2004 and their transformation into BACRIM many communities continue to be victims of CAH and as has been argued, ethnocide, and ethnic cleansing, carried out by these new groups. The Order discusses the under-registering of communities displaced due to the actions of BACRIM and the consequential lack of assistance and protection for these victims. The Court argues that the denomination of an actor as BACRIM cannot be criteria for deciding whether communities were displaced in the context of the armed conflict and even if such experiences are not within the framework of the conflict, any case of forced displacement should receive protection under the terms of Law 387 of 1997, Sentence T-025 and the various orders adopted subsequently. Further it demonstrates in the case of Buenaventura, the large numbers of cases of mass forced displacement are often not registered because of their intra-urban nature (*ibid*: 7).

In specific reference to the case of Buenaventura, the Court also adopted Order 234 of 2013 which requests information from the government about the implementation of Auto 005 of 2009 in this municipality (Constitutional Court, 2013b). Auto 234 explicitly makes links between the damages and violence suffered by black communities and the neoliberal economic model, requesting information on the barrios of La Inmaculada and Santa Cruz and highlighting the risk in these neighbourhoods "as a consequence, mainly, of the situation of widespread violence that is experienced in this sector and the TCBUEN megaproject "(order 6.1), and requesting information on "Port intervention projects and infrastructure, as well as consultation and participation processes that are being carried out in each of these neighbourhoods," (order 6.2). Also, on the case of Buenaventura the Court adopted Order 074 of 2014 which requests information from the National Government on the measures developed for the prevention, care and protection of the displaced population of the municipality of Buenaventura as a follow-up to Sentence T-025 of 2004 (Constitutional Court, 2014).

In 2015, Gustavo Mestizo, a member of the Afro-descendant movement of Buenaventura brought a case to the Constitutional Court through a *tutela* action against the Ministry of the Interior, the Ministry of Housing, Environment and Territorial Development, the Mayor's Office of Buenaventura, the Regional Autonomous Corporation of Valle del Cauca and the Universidad del Pacífico charging the violation of the rights of the black communities that live in the seafront areas within the framework of macro projects.

The tutela concerned the forced relocation of 3,400 homes in the sector of Cascajal Island, as part of a development project to build a perimeter sea wall. According to the complaint "the execution of the macro projects can affect the economy, the environment and the traditional practices of production of the social conglomerate that inhabits the island, affecting its autonomy and cultural integrity," (Constitutional Court, 2015: order 1.4). In addition, it claims that the Ministry of the Interior did not carry out a FPIC process with the affected families and that the potential impact of the relocation would have on the community was not assessed (*ibid*, order 1.5).

The Court ordered the Municipality of Buenaventura to:

> …prepare a report on the current status of the relocation process of individuals, families and communities that are settled in the low tide lands of the southern part of the island of Cascajal classified as areas under threat conditions and / or non-mitigable risk, the terms of Agreement 03 of 2001 (Buenaventura Land Use Plan) and the plans that exist in relation to future relocations…. (CC, 2015: 3).

and to:

> Warn the Buenaventura mayor's office about the impossibility of evicting the families, individuals and communities settled in the low tide lands of the southern part of the island of Cascajal until the conclusion of the agreement process that will be carried out in compliance with this sentence (CC 2015: 7).

Order 005 and the follow up actions carried out are important examples of how Afro-descendant organisation and advocacy has influenced jurisprudence and norm development in relation to both the armed conflict and historical justice. While these processes began with demands around the humanitarian response to the displacement crisis they acted as a catalyst for further advocacy for justice and reparation. Helmer Quiñones articulates the significance and importance of this initial process of recognition and humanitarian assistance for Afro-descendant victims of displacement as a springboard to address wider justice:

> …from there we started a process to guarantee justice measures. For example, satisfaction that the crimes would stop, non-repetition, we have requested restitution of what has been stripped from us. In other words, it has been a continuous process, the results of which have led the State to introduce mechanisms to recognise the rights that we have built through our own jurisprudence, through our own enforceability of rights. And that's how we got Order 005 of 2009.[271]

[271] Interview: Helmer Quiñones, 2018.

This leads to the second important moment of normative advocacy; mobilisation for collective reparations for Afro-descendant collective victims.

IV. Decree Law 4635 and mobilisation for ethno-racial collective reparations

i. Background to Decree Law 4635

Law 975, truth and reparation

The first example of measures for reparation for victims in the framework of TJ in Colombia is within the context of Law 975 of 2005, the Law of Justice and Peace.[272] As well as measures for demobilisation and reincorporation of members of paramilitary groups, Law 975 enshrined the rights of victims to truth, justice and comprehensive reparations (article 4) incorporating the five IHL principles of reparations; restitution, compensation, rehabilitation, satisfaction and GNR (article 8 and Chapter IX), and providing for "prompt and holistic" reparation (article 37.3). The law also recognised collective victims (article 5) and created measures for collective reparations (article 8) ordering the creation of a collective reparation programme in those regions most affected by the violence, to recover and promote the rights of those affected and ensure recognition and dignity for the victims (article 49).

With this aim, Law 975 created the National Commission on Reconciliation and Reparations (CNRR) with specific functions of ensuring the participation of victims in judicial processes and the realisation of their rights; recommending criteria for reparations under the Victims' Reparation Fund and carrying out and national reconciliation actions to prevent new acts of violence that would disturb national peace (article 51).

Despite the growing evidence of the disproportionate impact of the armed conflict on ethnic groups, this law did not recognise ethnic groups among the collective victims, an omission which was disputed by the Attorney General's Office and the Ombudsman's Office as being in violation of the Constitutional recognition of ethnic and cultural diversity and rights of ethnic peoples to FPIC under Law 21 of 1991 (Mosquera, 2012). The CNRR itself did not initially include any specific measures for reparations for ethnic peoples. However, in 2006 it incorporated an area for Gender and Ethnic populations and as shall be discussed in Chapter 7, in 2011 it accompanied Afro-descendant communities from Buenaventura in the development of the autonomous proposal for reparation.

There was much criticism of Law 975 from its very adoption in part due to the concern that the provisions of the law might actually conceal criminal conducts and facilitate impunity for those

[272] Law 975 was preceded by Law 418 of 1997 which included measures for humanitarian assistance for victims of armed conflict which have seen by some as a form of reparation. However, in 2010 the Connotational Court ruled in Sentence T-458 that the benefits received in the framework of Law 418 do not amount to reparation and therefore do not exclude victims who had received assistance from qualifying for reparation under subsequent laws (see Mosquera, 2012).

responsible, that the institutional architecture it created was weak and that there was a lack of real redress for victims. Indeed, during the first years of implementation there were very few sentences adopted and even after reforms to the law were introduced by President Santos in 2012 and 2013, there remained few convictions (Wesche, 2019). The fulfilment of victims' rights under Law 975 was even more disappointing largely because the right to truth was dependent on the judicial processes. Thus, for many the 2005 TJ process was flawed creating the outside illusion of progressive change and response to victims needs but in reality, avoiding "more thorough reforms of governance and only marginally benefitting the needs of victims" (Hansen, 2011:29).

Castillejo reflects on the "silences" installed in the Peace and Justice Law and identifies several critiques: concerning the origins of the law he observes that it presumed a separation of state and paramilitaries, the negotiations lacked transparency, the law allowed *narcos* to cleanse their needs, and there was institutional denial about the reality of the armed conflict and a shift from the concept of "armed conflict" to a focus on "organised illegal armed groups" (Castillejo, 2013a). The shift in language represented a kind of "historical revisionism" in which the historical nature and continuities of the armed conflict were denied.

While the recognition of a person as a victim under this law is "independent" and does not depend on the conviction of a responsible party, it does depend on proof that the damages suffered were the consequences of illegal actions carried out by illegal armed groups (Law 975, article 5). Thus, the recognition and registration of victims was largely tied to the testimonies (*versiones libres*) of paramilitaries and was guided by the types of injuries suffered, rather than the victims experiences themselves. The criteria here was that the damage must be the consequence of illegal actions committed by an organised illegal armed group. This according to Castillejo has led to a depoliticisation of the conflict, ignoring the historical continuities and causalities of the conflict causalities, political actors, economic interest groups, and secondly difficulties in providing legal responsibilities for violations such as displacement. Displacement was not seen from its historical, economic, structural perspective, and thus was seen as a *consequence* and rather than a *strategy* of war serving particular interests. The State was removed from responsibility and seen "not [as] a perpetrator of violence, but an administrator of law and order" (Castillejo, 2013a). In short, the law renders historical injuries "unintelligible."

Victims had the right to "…prompt and comprehensive reparation of the damages suffered, at the expense of the author or participant in the crime" (article 37.3) and thus members of illegal armed groups must compensate each of the victims of actions that violate criminal law for which they are convicted and, from the perspective of solidarity, must also be jointly liable for damages caused to the victims by other members of the armed group to which they belonged (*ibid*).

While the obligation to repair victims fell first with the perpetrators, in the case where it is not possible to establish legal responsibility for their charges brought to an individual, but where damages to a victim are proven to be related to the activities of the armed groups in question, reparation would be covered by the Victims Reparation Fund (article 42)[273] To activate the reparations orders, once legal charges are made during a hearing the magistrate opens the issue of reparation, with an intervention by the victim or their legal representative to express the form of reparation sought, indicating relevant evidence. If the chamber admits the request this is put to the perpetrator for a conciliation process and once an agreement is reached the reparations orders are included in the ruling (article 23).

Despite progressive principles of reparation in line with IHRL, in practice the implementation of reparations was limited. Further, as discussed in chapter 2, it is important to distinguish between social policy and reparations. As Uprimny and Guzmán highlight the inclusion of "social services provided by the government" as measures of reparations in the law (article 47) had the effect of "the erosion of the right of poor victims to demand reparation because if they did, the government could reply that it had already been delivered to them in the form of social services."

In 2010 the government adopted Law 1424 which built on Law 975 to promote the reintegration of demobilised AUC members who had not participated in the previous process. The law aimed to resolve their legal situation by granting benefits on the condition they comply with a series of requirements including a commitment to contributing to truth and reparation through extrajudicial processes with the National Centre for Historical Memory (CNMH). However, as Amnesty International and others have pointed out, as Law 1424 protects demobilised paramilitaries from prosecution and prevents the use of the evidence given as criminal evidence, it in effect meant that many human rights violations were never fully investigated or responsible parties identified (Amnesty International, 2012). However, the processes did lead to some important truth processes and information much of which was published in reports by the CNMH.[274]

Law 1448 of 2011, The Victims Law

The next important moment was the adoption of Law 1448 of 2011: the Law of Victims and Land Restitution. Again, this is an example of a humanitarian and TJ measure combined. The Victims law is an example of a DRP which included all forms of reparation: restitution, including land restitution, compensation, rehabilitation and guarantees of non-repetition (Sandoval, 2017). It creates measures for protection and assistance to victims of the armed conflict and in line with TJ models it also creates measures for reparation and GNR. Law 1448 created the Unit for Assistance and Comprehensive

[273] This fund is made up of "all the goods or resources that are delivered in any way by the persons or illegal organised armed groups referred to in this law, by resources from the national budget and donations in money or in kind, national or foreign" (Law 975, article 54).
[274] See CNMH (2010); CNMH (2018); CNMH (2015)

reparations for Victims (UARIV) mandated to adopt a Programme for Collective Reparations which would consider damages caused by violations of collective rights, grave violations of individual rights of members of collective groups and the impact of violation of individual rights (art. 151, Law 1448).

Law 1448 provides land restitution with agricultural and social and infrastructure projects for people who were displaced after 1991. For those suffering human rights violations since 1985 it provides humanitarian assistance including money transfers and special measures to access social services, for rehabilitation, satisfaction and GNR. For many, Law 1448 takes a transformative approach to reparations as it aims to transform pre-existing contexts of structural discrimination and to prevent future violations (Weber, 2020). However, in practice the expectations of the Victims Law have not been met. Many recipients or victims have asserted the need for reparations to go beyond restitution or compensatory reparation that restores that which was lost, to enable people to make use of the lands through loans, education, health care and public services as well as agricultural support (Weber, 2020). There has been a lack of wider measures to address socioeconomic inequality (*ibid*).

As with the previous Peace and Justice law, there have been many criticisms around the lack of implementation of Law 1448. While the law includes victims of forced displacement and other human rights violations committed in the context of the armed conflict it excludes violations occurring before 1985, making victims of earlier crimes eligible only for symbolic reparation but not land restitution or financial compensation. Victims of human rights abuses between 1985 and 1991 are eligible only for financial compensation and only those whose land was dispossessed or illegally occupied through human rights abuses after 1991 are eligible for restitution. The law was established to be in force until 2021, but while between 2012 and 2019 a total of 8,944,137 victims had been registered, by the end of 2019, only 864.362 (less than 10%) had received reparation (UARIV, 2020). So significant has been the lack of implementation that in January of 2021 Congress adopted Law 2078 which modified and extended Law 1448 for another 10-year period under the justification that "…the reparation process established in the law and in the ethnic decree laws has taken longer than expected and care and reparation for the victims must be guaranteed within the framework of a stable and lasting peace," (Law 2078, article 1).

In *Operation Genesis*, a case concerning a military operation carried out in in 1997 which resulted in the death of community leader Marino López and the mass displacement of over 300 members of the community, the IACrtHR ruled that the Victims Law provided sufficient measures, constituting "an effective remedy for the fulfilment of the right to reparation"[275], which needed to be exhausted before seeking the redress through the Inter-American System. However, noting the common delays in implementing the measures the Court qualified its order by stating that "victims should be given

[275] Inter-American Court of Human Rights, 2013. *CASO DE LAS COMUNIDADES AFRODESCENDIENTES DESPLAZADAS DE LA CUENCA DEL RÍO CACARICA (OPERACIÓN GÉNESIS) VS. COLOMBIA*, SENTENCIA DE 20 DE NOVIEMBRE DE 2013

immediate and priority access to health care services, regardless of the corresponding time frames established by domestic law, avoiding obstacles of any kind."[276] Other cases have also sought to challenge the effectiveness of Colombia's DRP.

Another issue has been the lack of capacity of the UARIV and the wider institutional framework which should work in cooperation for implementation of the provisions of Law 1448. The institutions face budgetary challenges raising questions around the prioritising of victims and how to cover demobilisation process which go beyond the capacity of the UARIV (Balanta, 2014).

The fact that it is considered a TJ law is itself complex, as it was adopted at a time when the armed conflict was still in effect and people continued to be victims of new crimes which will likely continue well after 2021. Further, it only recognises victims of crimes committed by recognised armed groups: guerrilla groups and paramilitaries. As mentioned above, paramilitary groups were demobilised in 2005, and while many of these groups reformed and still operate as BACRIM (criminal gangs) they are not recognised as actors in the armed conflict. Thus, victims of these BACRIM after 2005 are not recognised as victims under the scope of the victims Law (Balanta, 2014).

Further, the intention of supporting and building up small scale farming through land restitution conflicted with the government's neoliberal development agenda which has meant that claimants to land have often had to enter into agreements with large-scale agro industrial companies that occupied the land following displacement (Weber, 2020).

In practice there has been a focus on humanitarian assistance over actual reparation (Balanta, 2014). The focus on humanitarian assistance and compensation should also be reconsidered as they produce little structural change (Weber, 2020).

Still more problematic, the Victims Law was not consulted with ethnic groups and did not include specific ethno-racial measures. As with Law 975, even under the collective reparations measures it did not consider specific collective reparations for ethnic groups.

ii. Decree Law 4635 of 2011

Thus, the next important moment in the advocacy process concerned the push for the inclusion of an ethno-racial focus within the framework of the victim's law and collective reparations. With the possibility of The Victims Law being ruled unconstitutional due to the government's failure to carry out a formal consultation process with ethnic peoples, ethnic organisations negotiated with the government to adopt separate laws which would have the same weight as the Victims Law.

[276] *ibid.*

As a result the government adopted Decree Law 4633 of 2011 "By means of which measures of assistance, attention, integral reparation and restitution of territorial rights to the victims belonging to indigenous peoples and communities", Decree Law 4634 "Whereby measures of assistance, attention, integral reparation and restitution of lands to the victims belonging to the Romany or Gypsy people" and Decree Law 4635 "By which measures are dictated of assistance, attention, comprehensive repair and land restitution to victims belonging to Black Communities, Afro-Colombian, Raízales and Palenqueras."

Decree Law 4635 creates measures for assistance, care, reparation and GNR for Afro-descendant peoples. It is framed around existing collective rights and defines categories of collective damage, specific for Afro-descendant subjects, related to collective rights and that go beyond those established in Law 1448 for non-ethnic communities. In this sense Diego Grueso describes the process of negotiation of Decree Law 4635 as an exercise in "own rights" which I relate to the PCHR model of rights (Baraka, 2013).

> That was a very interesting process of what is now called "own rights", but even a little more sophisticated because it also implied agreements with different actors, consultation with the government… the first example of how to ensure there would be prior consultation, then the negotiation to make sure there was compliance with a decree law etc.[277]

There are four elements to the Decree Law which demonstrate the influence of Afro-descendant activism in its language and scope: the concept of collective damages, the focus on racism, proposals for collective reparation measures and the emphasis on land restitution.

Collective Damages

Decree Law 4635 is based on an understanding of collective damages that need to be repaired through collective measures understood in three ways: Primarily a collective damage may be an individual damage that has effects on the collective – for example, the assassination of a social leader or traditional leader in a community has effects on the rest of the community because of their invaluable and irreplaceable role in defending and protecting the territory and or traditions. An attack on such a person is considered an attack on the wider social fabric and social dynamics of a community, a rupture in cultural and spiritual practices, damages to channels of knowledge transmission and a disruption of organisational or political processes.

Secondly collective damages may be serious and systematic violations of the rights of multiple members of a collective. Mass displacements, massacres, threats to many people in the community, which constitute individual harms when committed against one person, but become collective harms

[277] Interview: Diego Grueso, 2020.

when they are systematic, widespread and repetitive, generating a collective damage on the community.

Thirdly collective damages are those acts that have an impact on already recognised collective rights such as constitutionally recognised rights to cultural identity, autonomy, self-determination, FPIC, territory etc. In this sense Marie Cruz Renteria talks about the need for a collective reparations process that recognises this differential impact in communities because "… the effects have been collective not so much because they are a significant number but because it has affected the collective life of the people."[278]

The PCHR vision of damages is evident in the damages recognised in the Decree Law. The damages echo the advocacy processes of organisations who pushed for a recognition of the underlying and structural factors of violence. Thus, in line with Court Order 005 of 2009 it recognises damages caused not only by the specific crimes committed in the context of the conflict but the existing conditions of vulnerability and social exclusion. Further, the Decree Law recognises damages to cultural integrity - which materialises in loss of capacity for cultural reproduction, conservation and intergenerational transmission of identity or ancestral knowledge.

Related to this, it recognises collective ethno-territorial damages, that is to say an action that affects a community's territorial rights is understood as also creating collective damages to the cultural and symbolic heritage of the communities, their forms of organisation, production, representation, and material and symbolic elements on which the ethnic cultural identity is founded. In this sense it recognises the people-centred understanding of territory and its indivisibility from other fundamental collective rights.

Finally, DL 4635 recognises environmental and territorial damages and the impact of violence on natural ecosystems and territorial sustainability. It does not have as wider scope as DL 4633 concerning indigenous peoples which recognises the territory itself as a subject of rights and a victim of the armed conflict, however its emphasis on environmental and territorial damage is nevertheless important.

A focus on racism

As with Court Order 005, Afro-descendant activism was fundamental in ensuring the centrality of racism and racial discrimination in this new legislation. DL 4635 recognises damages related to racism and racial discrimination in terms of how acts of violence and racial discrimination occur

[278] Interview: Marie Cruz Rentería, 2019.

during or as a result of the armed conflict (article 10). Helmer Quiñones describes this advocacy process:

> When we reached Decree Law 4635 in 2011, we carried out another similar process, we discussed with the State, we developed an autonomous proposal, which the State refused to accept. However, some components of our proposal were taken, and we can say with certainty that in the scheme of protection of victims in transitional justice it was us, the black people that introduced damages for racism and racial discrimination through the Decree Law 4635, article 10.[279]

Collective measures for reparation

Thirdly, DL 4635 enshrines measures for collective reparation from an Afro-descendant perspective and organised around the same five measures found in IHRL Restitution, Compensation, Rehabilitation, Satisfaction and Guarantees of non-repetition.

As Marcos Oyaga of CODHES asserts, collective reparation differs from individual reparation as: Primarily it includes measures to repair the social fabric of collectives, production processes, cultural practices, environment, territory and the very being of the community in relation to the territory. Secondly from the perspective of power, it seeks to bridge the gap between measures related to repairing damage to victims and measures related to peacebuilding. In this sense the objective of collective reparation is to repair damages and strengthen the collective and community so that it can play a political and social role, build peace in the territories, democratic processes in the community and society. The weakening and victimisation of ethnic peoples, organisations and unions through the conflict sought to silence and invisibilize these sectors and in this sense collective reparation seeks to reinforce the voices of the political constructions that have been made invisible.[280] Thus the inclusion of collective reparation measures is fundamental for Afro-descendant peoples.

Under Colombian reparation law the only collective reparations subjects that are eligible for collective compensation are ethnic peoples, as they have governance structures that are managed collectively. Thus, this measure is important for recognising and strengthening self-governance. However, for some this has meant a limitation as Afro-descendants who are not part of Consejos Comunitarios are not recognised as subjects of collective reparations under this Decree. As Quiñones asserts:

> From the beginning it was difficult…we negotiated the Decree Law, but the Decree Law was never really consulted, less with us, the specialised organisations. The Decree Law that we proposed was not adopted, only some elements were taken. So, the Decree Law resembles Law 70 in the sense that it seems very well to identify the rural issue of Afro-descendants, but what is not rural is lost. Then, all the entities understood that the subjects of collective reparation were the Community Councils, but not the organisations.[281]

[279] Interview: Helmer Quiñones, 2018.
[280] Marcos Oyaga, CODHES workshop July 2019.
[281] Interview: Helmer Quiñones (CONPA), November 2018.

Land Restitution

One of the principal measures for reparation is land restitution. Communities who have suffered displacement and loss of land in the context of the armed conflict can appeal to the State through the Land Restitution Unit (URT) for their lands to be restituted and for private individuals of companies that occupied the lands during or after the conflict and that are preventing the community from enjoying their territorial rights to be removed from those lands.

The land restitution program covers lands or territories of black communities, both collective and individual (where black communities live or lived) that have been dispossessed or abandoned since 1991. Once a claim is made to the URT, the case may be addressed immediately or, if it is not characterised as priority, the community may request protective measures to prevent any further damages to the territory which includes halting infrastructure and development projects. Once a case has been prioritised the URT carries out a characterisation of the territorial impacts of the conflict through testimonies and other evidence to determine whether there has been a case of territorial dispossession or abandonment. The case is then passed on to restitution judges at the municipal level and a judicial process begins in which the two parties, the community and the accused argue their cases.

Diego Grueso describes how the initial work on displacement and the right to return called for a "return with guarantees." Land restitution with the guarantee of wider socioeconomic and security conditions had the potential to be both restorative and transformative as it could "transform the reality" of communities by overcoming the situation of disadvantage that they were in prior to displacement.[282]

Claimants do not have to prove that they were displaced from their lands, they must only report the facts against which the accused must justify their actions. The sentences that Judges emit on Restitution Cases create orders to different actors and institutions to ensure that the land is restituted. These may include – concluding collective land titling in incomplete processes, removing external parties from the land, removing contracts or agreements with external parties that may affect the land, annulling other sentences or actions of other entities that would negatively affect the territorial rights of the community, restoring the natural environment, and guaranteeing the right to return of the community.

Decree Law 4635 recognises the situation of vulnerability in which black communities were in prior the conflict arriving in their territories. Thus, while the land restitution process applies to lands dispossessed since 1991 and in the framework of the armed conflict, the normative framework of the

[282] Interview: Diego Grueso, 2020.

Decree Law 4635 recognises that the historical and structural discrimination of black communities has left them particularly vulnerable to dispossession and as such, land restitution processes should also address these wider structural factors. As shall be shown in Chapter 7, communities such as those of Buenaventura have used this framework to address the ongoing effects of historical victimisation.

Quiñones describes the significance of land restitution as part of the wider struggle for historic justice:

> I think the fight for reparation has come with the awareness of crimes that have historically been perpetuated against us. That is why there has always been talk of restitution, the protection of territories. So, if you realise, within the process of the first recognition that the victims of this conflict were made of were the victims of displacement, from there we began a process to guarantee some of these measures of justice. For example, the satisfaction that the crimes were stopped, the non-repetition, we have requested the restitution of what we have been deprived of.[283]

Following the adoption of Decree Law 4635, activists worked hard to ensure effective implementation of land restitution provisions. Quiñones describes how his organisation trained judges and magistrates working on land restitution for Afro-descendant peoples, recalling how the pedagogical material they produced makes special reference to the Durban Declaration and Programme of Action thus placing the issue of land restitution in the wider historical context of racial justice struggles.[284]

As a result, the judicial sentence on the first successful Afro-descendant community land restitution case, that of Renacer Negro Community Council of Timbiquí, includes the same reference to Durban which as Quiñones continues, meant an:

> …awareness of the connection between historical damage and reparation within the framework of the armed conflict, transitional reparation. This was the first-time reference to Durban was included in the Colombian regulatory framework and, the fact that the first case of restitution of Afro-descendant territories was granted in the context of Durban was a great advocacy achievement.[285]

V. The Ethnic Chapter in the Peace Agreement between the FARC and the Government

The third moment in the advocacy process concerns the demands for an ethno-racial focus in the peace agreement between the FARC and the Government.

i. Background - The peace process

[283] Interview: Helmer Quiñones, 2018).
[284] Interview: Helmer Quiñones, 2018.
[285] *Ibid*.

The recent peace process, between the FARC-EP and the National Government, placed much greater emphasis on the rights of victims than the previous paramilitary process. The final agreement signed in November 2016 includes a specific chapter on the rights of victims which creates the Integrated System for Truth, Justice, Reparations and Guarantees of No Repetition (SIVJRNR). During four years of negotiations between the leaders of the FARC and the government in Havana, TJ experts with experiences from around the world were consulted on all manner of elements. Processes were put in place to ensure that victims organisations, women's groups and eventually after much lobbying, Afro-descendant and Indigenous organisations actively participated in the process.

The resultant Final Peace Agreement (FPA) includes several measures and new mechanisms not only to ensure truth, justice and reparations for victims, but social and economic measures such as rural reform, reintegration of ex-combatants of the FARC, and programs for the substitution of illicit crops with the aim of addressing the underlying social and economic factors in the conflict as GNR. Further, the peace agreement has a gender mainstreaming approach which creates special measures for women victims and the Ethnic Chapter which creates special measures and safeguards to protect the rights of Indigenous and Afro-descendant peoples. For its centrality of victims as well as it's gendered and ethnic focus, this peace agreement has been described by TJ practitioners and academics as one of the most progressive in the world.

The FPA contains several measures for reparations for victims. The SIVJRNR includes three new mechanisms all of which have procedures and processes for reparations: a judicial mechanism, The Special Jurisdiction for Peace (JEP), and two extra-judicial mechanisms the Truth Commission (CEV) and the Unit for Searching for Disappeared Peoples (UBPD). While the mandate of the JEP does not extend to ordering measures for reparations, through sentences concerning responsible partiesunder its regime of sanctions it can apply *sanciones propias*[286] "own sanctions" to those under its jurisdiction, (ex-members of the FARC and armed forces who committed grievous crimes during the armed conflict), which may involve their participation or actions in affected communities that contribute to their collective reparation. Such actions may include for example repairing or building new infrastructure, contributing to local development projects, participating in the searching for disappeared peoples, clearing of land mines, or environmental restauration.

The CEV and the UBPD create reparatory measures of a more symbolic nature, principally recognising the rights of victims or families of victims to truth about the crimes committed during the conflict and public recognition as victims. The CEV involves public audiences and events in which victims and perpetrators give testimonies and perpetrators may publicly ask for forgiveness.

[286] Ley 1957 de 2019, Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz (article 126)

Point 5 of the FPA also makes guarantees to ensure the national government strengthens the existing mechanisms and processes for reparation recognised in the Victims Law and Decree Laws mentioned above, and to ensure participation of victims in all repertory measures. Finally, it calls for a reparatory approach in other areas of the peace agreement.

Point 2 of the FPA on Rural Reform creates a new rural development model known as the PDET or Development Programmes with a Territorial Approach. The PDETs are a participatory process through which communities in 170 of the worst affected municipalities in the country constructed local development programmes in their territories. The municipalities were selected through four main criteria: levels of poverty and unsatisfied basic needs, level of impact of the armed conflict, weakness in the administration, presence of illicit crop cultivation (FPA, Chapter 1.2.2). Through several phases of participatory planning each local community, then municipality and eventually region produced development plans which address 8 key areas - Education, Health, Infrastructure, Rural Land ownership, Housing and Sanitation, Economic and agricultural Rejuvenation, food security and reconciliation and peace. In the case of ethnic communities in Buenaventura two extra pillars were included for self-government and biodiversity and conservation (CODHES, 2018c).

As well as being a structural mechanism for GNR the PDETs are designed to have a collective reparatory approach for the communities and territories victims of the armed conflict. Development programmes in and of themselves are not necessarily reparatory, rather fulfilling basic rights obligations that the State should already be implementing. However, these PDET had the potential to be reparatory providing programmes included measures to ensure effective participation of victims in their design and implementation and to ensure a differential gendered and ethnic approach (CODHES, 2018b).

Thus, in order to be reparatory, the PDET needed to take an inclusive approach to ensure effective participation of women, and ethnic minority groups, involve processes for identifying damages to the territory in the context of the armed conflict and measures for collective reparations, articulate with existing measures for collective reparations, plans for the right to return to territories and the restitution of lands, and ethnic rights, and involve actions for not just material, but also symbolic reparations (*ibid*).

In terms of damages for example, CODHES asserted that steps must be taken to identify not just the material damages caused in the conflict, but also the physical, environmental, social and cultural transformations that the territories and their communities suffered as a result of the conflict. They must identify how the armed conflict affected livelihoods, use of the lands, local management, cultural and spiritual links with the land, and life plans. In turn they needed to include concrete measures that would lead to the recuperation of the territory and the strengthening of life plans within the territory. The PDETs, CODHES argues, create an opportunity for collective reparations for

communities which go beyond the existing framework focused on populations and proposes instead focus on the very transformations that the territory as a whole underwent as a result of the armed conflict. Likewise, they can articulate with orders for collective reparations and land restitution in the framework of the Victims Law and strengthen these. As CODHES argues:

> The formal restitution of lands and territories is not enough to compensate for damages and keep them sustainable but must be accompanied by multiple measures that can have access to goods and services that have to be sustainable over time and accompany returns in the conditions of voluntariness, security and dignity - the PDETs can contribute to the strengthening of the policy of restitution and consolidation of the favourable ones, which respond to the needs and expectations of the victimised communities and in harmony with the restitution measures (2018:33).

ii. Mobilising for an ethno-racial focus

Since the beginning of the negotiations in Havana in 2012, Afro-descendant and Indigenous peoples argued for the importance of their inclusion at the negotiating table. In particular, they insisted on the need to generate safeguards and guarantees for the participation and inclusion in the implementation of the agreement. Despite widespread data and evidence that those territories worst hit by the conflict are the very areas recognised as ancestral territories of Afro-descendant and Indigenous peoples live, and that these two populations make up the disproportionate number of victims of the conflict, a specific space for their participation was initially not included.

In 2015 members of the black movement formed the organisation CONPA (National Afro-Colombian Peace Council) and after nearly 4 years of mobilisation and activism under slogans such as "no black people, no peace" together with Indigenous organisations they achieved the creation of an Ethnic Committee (*Mesa Étnica*) which included indigenous organisations the National Indigenous Organisation of Colombia (ONIC), Traditional Indigenous Authorities of Colombia and *Gobierno Mayor*, and CONPA. This group of organisations and authorities soon became the Ethnic Commission for Peace and Defence of Territorial Rights (*La Comisión Étnica*). The advocacy process during the peace negotiations between the FARC and the government, which involved the creation of CONPA and the Ethnic Commission and the alliance between Afro-descendants and indigenous organisations was one of the most important actions in the recent history of social movements in Latin America.[287]

Through this collective participation in the negotiations the Ethnic Commission submitted a draft "Ethnic Chapter" to be included in the peace agreement which included considerations, principals,

[287] Interview: Helmer Quiñones, 2018.

and safeguards for the interpretation and implementation of the Final Agreement with aim of guaranteeing the rights of ethnic peoples.

The advocacy process to ensure this Ethnic Chapter would be included was hard fought. Special provisions and laws for Afro-descendant communities are almost always included as an afterthought. This was the case with Provisional Article 55 in the Constitution, Law Decree 4635 in 2011 and most recently the Ethnic Chapter.[288] Afro-descendant communities must fight until the last moment for their rights to be recognised in normative spaces which should be dedicated to the human rights of the most marginalised and vulnerable groups.

The Ethnic Commission presented a 20-page document of proposals and recommendations to the negotiating committee. With only hours to go before the signing of the final agreement they were told they had to reduce the document to 3 pages. This was done and the Ethnic Chapter now makes up three and a half pages of the 310-page Final Agreement. Yet, as shall be shown in the analysis below not only did these three and a half pages manage to preserve the central aspects of the original proposal, but they may be said to be contain some of the most progressive provisions in the whole agreement.

The inclusion of the Ethnic Chapter ensured an ethno-racial approach in the implementation of the peace agreement including in the truth, justice, reparations and non-repetition mechanisms. As Afrodes point out:

> The creation of the Special Jurisdiction for Peace (JEP) and the Commission for the Clarification of the Truth (CEV) have allowed not only the involvement of magistrates and commissioners belonging to ethnic peoples, but also the creation of "racial commissions" in both institutional structures [which] will allow the introduction of historical demands by virtue of the transitional justice process that both mechanisms lead in Colombia. It is an important fact that must be strengthened in the perspective of recognition but fundamentally in guarantee of justice.[289]

Since the adoption of the Peace Agreement organisations have continued to advocate for the issue of racism to be central to the implementation of the SIVJRNR. Among issues was the advocacy to ensure that the SIVJRNR mechanisms would include people from the ethnic peoples in the highest roles. As such they achieved four Afrodescendant and four indigenous magistrates and three Afrodescendant commissioners in the truth commission. Since then, the organisations have worked closely with the mechanisms to help develop the ethno-racial approach across all of their work. Referring to the continuous pressure and collaborative work between organisations Helmer Quiñones asserts:

> if you realize how those mechanisms are and how we have continued to push and work in an articulated way, these mechanisms are in some sense revolutionary in many aspects,

[288] Focus Groups, PCN 2019.
[289] R5.

> particularly in the structural option within their entities in that approach, the ethnic-racial approach.[290]

An opportunity for historic justice?

Quiñones and others interviewed are clear that the TJ mechanisms created through the Peace Agreement are not necessarily an opportunity to seek and obtain historical reparation. They are mechanisms that respond to a very specific moment of the armed conflict, based on negotiations between two specific actors (The FARC and the government) and thus, the scope of the crimes they address is bound in time and to specific crimes committed by these specific actors. Quiñones asserts that it is therefore unlikely that historical justice and historical damages will even figure in the narrative element of the TJ process due to the scope of time, but this is also due to internal resistance among top officials in the system more than normative limitations.[291]

However, for the movement, this TJ period has been an opportunity to put the issue on the table in the public debate. As he continues:

> …if you read the first paragraph of the ethnic chapter it is a work of art, it is like a mini-Durban statement. And it is here that it recognises historical exclusion, racism, enslavement, and colonialism are transcendental antecedents to understand the destruction that the armed conflict has brought about indigenous and Afro-descendants. We put that.[292]

Indeed, the Ethnic Chapter recognises the colonial and historic roots of the disproportionate impact of the armed conflict on ethnic peoples stating that:

> That the National Government and the FARC-EP recognise that the ethnic peoples have contributed to the construction of a sustainable and lasting peace, to progress, to the economic and social development of the country, and that they have suffered historical conditions of injustice as a result of colonialism, enslavement, exclusion and have been dispossessed of their lands, territories and resources; that they have also been seriously affected by the internal armed conflict and that maximum guarantees must be provided for the full exercise of their human and collective rights within the framework of their own aspirations, interests and worldviews (FPA, 6.1.12.1.)

The Ethnic Chapter has been important in providing another tool to push the country, society, the government and armed groups to recognise the existence of the Afrodescendant people.[293] It opens up a space for the issue to be on the agenda and for an alternative interpretation of the armed conflict as a continuance of the violences suffered during colonialism. The language it contains marks an important advancement for the demand for reparation. The recognition by the State that the Afro-descendent people have historically been victims of injustice with its roots in colonialism may be interpretated as a recognition of historical responsibility. As Charo Mina asserts:

---

[290] Interview: Helmer Quiñones, 2018.
[291] Interview: Helmer Quiñones, 2018.
[292] *Ibid*
[293] Interview: Charo Mina, 2020.

> Within the framework of the struggle, this language of recognition of colonialism and its historical impacts marks the continuum of violence that the black people of African descent have suffered historically. So, for us it has been very significant, and that is why I always propose that the Ethnic Chapter and the Peace Agreement are a step, a component of the process of historical reparation to the black people of Colombia because it obliges a recognition of violence, of the violent events and of everything that the roots of that violence in the internal armed conflict exceed a specific period of the internal armed conflict and place it in a context of the continuum of historical violence.[294]

The achievements with the Ethnic Chapter were not just the result of advocacy initiatives during the peace negotiations but the culmination of many years of advocacy, reports and mobilisation. As one member of the PCN focus group recalls:

> Because many of the things that have been done, the reports, both for the JEP and for the CEV, in one way or another we in their organisational political dynamics have said. In the case of PCN, we have always made the charges, we have made the reports, we have mobilised, we have made communiqués, in the face of the state of collective ethnic rights and deepening victimising acts. We have even dared to name some authors of this damage. Then one sees that they have propitiated a scenario and that this scenario that today can be spoken of as transitional justice is not a gift from the Colombian state either. It has to do with struggles. The most recent thing we have right now in the framework of the peace agreement, that is a disputed thing.[295]

An opportunity for structural transformation?

Perhaps the biggest critique of the peace agreement is its failure to address the economic model. While the agreement contains several measures to address the underlying root causes of the armed conflict, including socio-economic inequality and unequal distribution of lands and property, it does not address the neoliberal economic model that is not only the underlying cause of such inequality, but is the driver, of much of the violence, displacement and land dispossession in the territories worst hit by the armed conflict. In this sense it may be argued that this is a TJ model rooted in the assumption that a transition to peace necessarily means a transition to (or maintaining) liberal democracy. It fails to address those deepest of underlying structural causes of the armed conflict and thus, it's potential for creating GNR of the violence are extremely limited. In this sense it cannot be described as a decolonial or post-colonial TJ model.

However, the Ethnic Chapter may be seen as addressing that gap. While it does not explicitly recognise modernity or capitalism as the root cause of the conflict and violence, the measures it proposes aim at overcoming the current economic model. The Ethnic Chapter reaffirms the rights to autonomy asserting that "ethnic peoples must have control over the events that affect them and their lands, territories and resources while maintaining their institutions, cultures and traditions."

---

[294] *Ibid*

[295] Focus group, PCN, July 2019.

It also creates space for own epistemologies. The principles of autonomy and self-determination of Afro-descendant and Indigenous peoples are central, and safeguards include the right to FPIC and "cultural objection," an intersectional approach to ethnic rights including gender and generation, and the guarantee that the agreement cannot go against the ethnic rights of the communities, that is to say, non-regressivity. When read in conjunction with the measures and mechanisms for rural reform, truth, justice and reparations, these measures if correctly implemented could determine the parameters of development policies in Afro-descendant territories.

The PDETs are extremely relevant here. As the Ethnic Chapter states:

> The Development Programs with a Territorial Approach (PDET), which are planned to be carried out in the territories of indigenous and Afro-Colombian communities, must include a special consultation mechanism for their implementation, in order to incorporate the ethnic and cultural perspective into the territorial approach, oriented to the implementation of life plans, ethno-development, environmental management plans and territorial ordering or their equivalents of ethnic peoples (FPA, 6.1.12.3.).

The rights to cultural objection and FPIC are therefore fundamental as these concepts stem from recognition as a people and self-determination. In this sense, for many the three pages of the ethnic chapter are the most valuable of the who peace agreement.[296]

iii. Critical perspectives on TJ norms

Despite its potential to put issues of historic justice on the table, in line with the warnings of the critical readings of transitional justice outlined in the introduction, the Colombian TJ processes remain constrained by powerful economic and political interests which raises important questions for the true scope and potential for transitional justice to seek historic justice. The omission of a critique of the neoliberal economic model in the FPA is one example. The ahistorical and depoliticised approach to crimes such as forced displacement as discussed by Castillejo above is another. In the context of Law 975 for example, such approaches prevented a discussion on the historical significance of displacement, particular for Afro-descendant and indigenous victims which should be seen as a systematic and historical phenomenon. The fact that it was a military strategy for expropriation of land and wealth concentration was largely hidden. Thus, Castillejo asks "to what extent do State-sponsored laws of national unity fail to render intelligible, beyond development paradigms, material inequalities and historical dispossession that ae the root of conflict itself" (2013a).

The systematic exclusion of Afro-descendant people from TJ processes is another indication of these interests at play. Charo Mina emphasises the lack of political will for including the Afrodescendant

[296] *Ibid*.

people in the peace negotiations which was evident from the dialogues and continues to be evident in the lack of implementation of the ethnic chapter:

> But that process started first by denying us again, it took us out of the space, took away the possibility of participating, denied the possibility of participating, eliminated the possibility of our voice there to generate the analysis to raise the questions to propose the concepts, to jointly elaborate and address response possibilities. Then, from there it had already started with a kick. And, it showed it, and what it continues to show until now is that it was a process that had no political will, no greater interest in effectively including and recognising the [ethnic] peoples. Much less the black people. So, advocacy is difficult under these conditions.[297]

She continues:

> …the State, the government did not commit. And despite the fact that we achieved an Ethnic Chapter, the government wanted a couple of paragraphs, first they said, "we know we have to include the peoples" and secondly "we will discuss it after the agreement is signed," so basically those were the two paragraphs that the government proposed. With all that we pushed and insisted to get the three pages that the Ethnic Chapter has, they were achieved on that basis, that lack of political will. There is no intention on the part of the actors within the peace agreement to make an effective, true recognition of the humanity of the black people, of the humanity of the black person, of the existence of the black community. And of the need to guarantee respect and guarantee that rights are not violated and guarantee that the forms and factors that threaten the integrity of the people and the people are combated.[298]

This chapter has narrated a small part of the story of Afro-descendant advocacy in transitional justice and human rights that has shaped the very normative landscape in Colombia. On multiple occasions, activists have defined the language and concepts of new norms which reflect the demands of their own autonomous and historic struggles. Thanks to these struggles, concepts such as racism, structural exclusion, ancestral territories, and intersectionality are now part of normative framework where they were once invisible.

Each of the three moments analysed have been vital in the progressive recognition of historic injustice against Afro-descendant peoples and as a result of this advocacy, the links between historic colonial and contemporary crimes and rights violations are clear and visible in the human rights and transitional justice landscape. Nevertheless, whether these normative achievements will lead to practical progress on historic justice through implementation is another question, as the political and economic interest constraints to TJ are evident. It is for this reason that struggles carried out at the normative level must also link to and seek to strengthen internal and autonomous processes that do not depend on State political will. Such processes are discussed in the next and final chapter of this thesis.

[297] Interview: Charo Mina, 2020.
[298] *Ibid.*

CHAPTER 7: PEOPLE-CENTRED TRANSITIONAL JUSTICE: TOWARDS A DECOLONIAL APPROACH TO REPARATION?

Beyond the normative achievements outlined in the previous chapter, the second way in which transitional justice has enabled advances in the reparation agenda is through providing an alternative language and framework for the conceptualisation of reparations demands – that is to say, the measures that Afro-descendants call for to repair the damage of enslavement and colonial crimes. As shown in Chapter 3, most reparations demands that have been brought by the movement around the Diaspora have focused on individual compensation or public policies for inclusion.

This chapter shows how TJ has enabled a different vision for historical reparation that includes the language of restitution and rehabilitation, an emphasis on truth, collective rights, guarantees of non-repetition and structural transformative approaches to reparation. Through the collective reparations demands of the *Consejo Comunitarios* of Buenaventura, understandings of truth, land restitution and GNR link the past with the present, contemporary injustice to historic colonial injustice. These actors demand measures that seek not only to repair the damage caused by direct human rights violations in the context of the armed conflict, but which seek to address the wider structural and underlying factors that are the legacy of colonialism and to transform the ideologies and processes that have enabled the continuation of racialised and colonial human rights abuses, not as a double reparation but as one single, decolonial reparation process.

Nevertheless, as discussed in the critical and settler colonial TJ literature, making decolonial demands within the institutional framework of TJ norms, in this case of the DL 4635 (and more recently the Peace Agreement), reveals the very constraints and limitations of state-centred top-down TJ. While communities seek to push the boundaries and scope of the TJ framework and imagine reparations measures in terms of their own ethno-territorial visions of rights, the state, through its institutions seeks to set the parameters and criteria for collective reparations and their subjects.

The third section therefore reflects on the adequateness of TJ for making decolonial claims for reparation. While the limitations within the framework are clear, it shows how communities are also are imagining their own internal processes for reparation through people-centred transitional justice or "transitional justice from below," (Gómez, 2013).

I. Transitional Justice framework for a decolonial vision of reparation

i. Restitution ad integrum

As seen in Chapter 2, restitution is the central principle of reparation. The concept of restitution, or returning things to their original state, has been central to the demands and conceptualisations of

reparations of activists. Marie Cruz Renteria asserts that "Reparation for me means fixing or restoring everything that has been damaged to us as a people, as women."[299]

Restitution of land rights

Land restitution is understood not only as restitution for lands seized during the armed conflict but as a part of historical reparation. As one member of PCN Palenque Congal asserts, referring to the case of indigenous peoples in Cauca, reparation also implies changing material conditions and thus it may be, "necessary to remove some of the guys' lands that are in the hands of the traditional families."[300] The mention of "traditional families" refers to ruling elite families, many of whom are descendants of those same families that participated in and profited from enslavement and land appropriation following the abolition of slavery.

This speaks to case of the Community Council of the Black Community of the Yurumanguí River in Buenaventura, which in early 2018, became the second Afro-descendant community in Colombia to win a land restitution ruling in their favour. This case not only sought to recover lands from which the community had been displaced during the conflict, but to recover ancestral lands occupied by a private mining company and family that claimed ownership of the land since the colonial period, making it a landmark achievement in the struggle for decolonial and historical reparation by Afro-Colombian activists.

The Community Council was constituted on 3rd December 1998 and was awarded collective land titles for 54,000 hectares in 2000 through INCODER Resolution 1131 of 23rd May. However, in 1969 the INCORA (Colombian Institute of Agrarian Reform),[301] had made a serious error when it extinguished the domain of three properties (Yurumanguí, Naya and Cajambre), with the intention of handing them to the state in order for them to receive rural or ethnic community titles. The decision was never registered or legalised before the Office of Public Instruments (OHCHR 2015) and as such when the territory received the collective title resolution, the Agustín Codazzi Geographic Institute found that the territories supposedly extinguished in the 1960s had been purchased by a mining company. Thus, the process of titling was delayed. The heirs of these private owners had founded the company PACIFIC MINES SAS and since requested mining concessions within the land which is part of the collective territory.

[299] Interview: Marie Cruz Renteria, 2019.
[300] Focus Group - PCN Palenque Congal, 2019
[301] Which became the INCODER (The Colombian Institute of Rural Development) in 2003, and eventually the current ANT (The National Land Agency) in 2015 responsible for executing policy ordering rural property of the Ministry of Agriculture and Rural Development (Decree 2363 of 2015, Art.4).

Just one year after Resolution 1131 was adopted, in 2001 the community suffered a massacre and the mass displacement of the entire population of one of its villages, El Firme, which remains a ghost town until now. There were further displacements from the villages of Barranco, Veneral and San Antonio. A subsequent armed clash between FARC and paramilitaries in June of 2001 led to further displacements from the village of Encanto, leaving just 20% of the population in the territory. The community continued to suffer in the face of ongoing clashes between armed groups and the military through the 2000s. In August 2003 low flying military helicopters caused injuries to community members and damages to homes in Veneral causing displacements. In May 2005, in attacks against a FARC base near San Jeronimo and San Jose, grenades were thrown, causing widespread damage and abandoned homes were pillaged. A military operation in November 2006 led to the confinement of villages from San Jeronimo who were caught in the crossfire and trapped inside their homes. In March 2010 due to further actions by the military community members were displaced from the village of La Primavera to El Papayo and in May of the same year, low flying helicopters and indiscriminate shooting caused the destruction of crops in the village of El Aguilar, where 4 members of the community were captured. Further military operations in 2011 and 2014 caused yet more displacements.

Map 3 - Consejo Comunitario de la Comunidad Negra de la Cuenca del Rio Yurumanguí. Source: Espectador (2018)[302]

Thus, in 2015 the Consejo Comunitario initiated a 3-year land restitution battle to recover those ancestral lands and ensure guarantees for the return of displaced community members. They made the following demand:

> That the existence of damages and impacts suffered by the communities members of the Community Council of the Yurumanguí River Basin be recognised, on the occasion of the internal armed conflict, as well as guarantee the fundamental right to the restitution of land and territorial rights of these communities, rights violated by the armed conflict, the related and underlying factors, generated by the abandonment, confinement and environmental effects of the territorial environment," (Tribunal Superior del Distrito de Cali, 2017: para. 2.1).

[302] Map does not depict all 13 of the villages of the Yurumanguí river.

The element of underlying factors and abandonment are key for historical reparation as they seek recognition that this historical state abandonment of communities is what has left them especially vulnerable to the impacts of the armed conflict.

The demand also called for: the original resolution of extinction of dominion to be registered and for all legal businesses concerning the territory be extinct; authorities to cancel registry of the private properties, to rectify errors in maps and suspend processes for mining concession requests; for the Ministry of Interior to prioritise FPIC for the implementation of the Integral Plan for Collective Reparation (PIRC); for the UARIV to advance with the PIRC and adopt a programme of return for displaced people; for the Ministry of Housing to ensure priority access for family subsidies for victims of displacement; for the Mayor's Office to adopt measures for security and enjoyment of ethno-territorial rights; for the Fiscal to investigate the case, and the UNP to investigate risks for leaders; and for the area to be prioritised for de-mining, actions to eradicate illicit crops, agricultural and fishing livelihood projects, prohibition of fumigations, and a plan for recovering and strengthening of social and cultural fabric including a programme for psychosocial and health attention.

The tribunal admitted the case in October 2015, immediately ordering the suspension of mining contracts and activities by "foreigners"[303] in the territory and a risk assessment of the situation of local leaders.

The defendant (Pacific Mines S.A.S) argued that they had legally been carrying out activities in the territory before the armed conflict began and that it had not committed any violence against the community. They even argued that they were victims of the armed conflict as they were unable to carry out their activities due to the conflict.

Claudia Consuelo Dussan Angel of the defendants opposed the claim for restitution arguing that the land in question formed part of a private property that had belonged to her family since 1745 and that her family were victims of a series of events which led to the total dispossession of lands of Yurumanguí, Naya and Cajambre. She provided a series of documents since that year which demonstrated ownership passed down through the family, of the lands of Yurumanguí, Cajambre and Naya – including a document from 1946 demonstrating ownership of her great grandfather and a document from 1983 showing ownership by her grandmother and then father and the foundation of the society Agromines of Yurumanguí Naya and Cajambre in 1984.

She cited Law 70 stating that:

> "…Law 70 of 1993 proclaimed respect for private property, especially in cases such as that of her family, in which the domain is accredited for centuries and the Afro-descendant community's use, usufruct and healthy coexistence in the territory has been respected," and

[303] Term refers to foreigners and Colombia nationals who are not recognised members of the local Yurumanguí community.

> adds that "the legal acquisition of the estates has been overlooked and disrespected the inheritance rights that derive from the royal card," (p19).

However, the collective ownership of the territory does not derive only from the collective titling of 2000, Yurumanguí is an ancestral territory where the community have been settled for centuries and thus protected by Law 70 of 1993. The URT itself recognises this historic presence as part of a community process of resistance against enslavement writing:

> Various forms of resistance against slavery were born in these lands, which enhanced the creation of autonomous social organisations such as the Palenque El Desparramado. Over the years, 13 villages were built [along the river] that were inhabited by slaves and their families to form an ancestral and collective territory, (URT, 2015).

The Tribunal ruled in favour of the community resolving to recognise the community as a victim of the armed conflict, protect their right to land restitution, decree the inexistence of legal business conducted on the territory since 1991 and, after the collective title resolution of 1998, carry out respective processes to extinguish the domain as should have been done in 1969. It calls for the prioritisation for consultation and elaboration of the PIRC, for access to housing subsidies for affected families, a plan for return, criminal investigations into the events that took place in the river, protection measures for the leaders, de-mining, environmental protection, plans for removing illicit crops, production projects, training programmes for members of the community, formalisation of traditional sustainable mining practices and a census of the community.

This was an important achievement, but as has been the case with other processes, implementation of the court orders remains slow, and the challenges of the ongoing conflict have created further damages and further obstacles for implementation.

Cultural and spiritual restitution

As was discussed during both the focus group and the International Meeting on Transitional Justice and Historic Reparation, restitution is not only about the recovering the material and tangible, but also the intangible collective elements rooted in culture, identity and African spirituality, that have been lost or stolen though generations of violence.[304] Thus, what must be restituted goes beyond the material to the very identities of the black community which has been a central part of the multigeneration harms caused to Afro-descendant peoples.

During the International Meeting, participants identified the following elements necessary for a reparation plan: 1) Differential health, including recovering medicinal practices of traditional healers; 2) A differential education that dignifies us; 3) Religious and spiritual respect, giving importance to traditional mourning practices; 4) Culture, as an overarching issue, in particular pre-colonial cultural practices that needs to be recovered (see Ojulari et al, 2018).

[304] Focus Group, PCN, July 2019

In line with the interrelated and interdependent nature of ethnic group rights, land restitution means not just the physical land but also the recovering of ancestral relationships to territories, its relation to group identity and cultural practices. In this sense land restitution is closely related to rehabilitation. As a member of the Association of Lands Gained from the Sea (ATGM) asserted reparation is:

> … our trajectory needs to be rehabilitated against some damages that have been caused to the territory. This rehabilitation has to do with the recovery of those spaces where we used to do these things as collective communities ... many could enjoy [these spaces]. It has to do with the conditions of the territory in which they live ... for Afro and indigenous communities, one cannot look at reparation as psychology looks at it ... these individuals give it a…medicalised view... and it no longer goes to the spaces of being. Not in those spaces. What we are is very important… [305]

In this discussion the question arose of where and how to locate the point of return? To which point in our history do we wish to return? In relation to this point, and related to the ideas of multigenerational harms, Diego Madrid of PCN suggests the community must reflect about the "kinds of behaviours and practices Afro-descendant peoples have taken on, during generations of violence, the life views and world views that were taken from us and made us cheaper." Those elements, he argues, are based on the intangible. Once we determine these elements, we can determine from whom we are demanding reparation (Europe, the Crown, the Church, the State of Colombia and what we wish to be repaired.[306]

ii. Truth: A Dialogue between the past and the present

"The truth is that the generators of this conflict are the heirs of the first. This is the truth"[307]

Perhaps one of the most important contributions of TJ to historical reparations processes is the focus on truth. This relates to the satisfaction element of rights-based approaches to reparation. As discussed previously truth commissions, and measures for truth telling in judicial tribunals are central to TJ processes and are a part of the normative framework in Colombia enshrined both in Decree Law 4635 (referred to in terms of "memory") and the Final Peace Agreement.

The importance of truth and how it relates to both contemporary and historic crimes committed against Afro-descendants is expressed by activists in various ways including rights to memory, recognition and education processes. One member of Palenque Congal asserted "reparation starts from recognition of a damage that has been caused."[308]

The TJ language of truth then influences the way activists talk directly about historical reparation. During the 2017 conference, participants agreed that a first step towards reparations was a need to know our history, to seek the truth of the ancestors to guide the direction of the reparation demand,

[305] Workshop on Collective and Historic Reparations - PCN and CODHES, July 2019.
[306] *Ibid*
[307] Harrinson Cuero, focus group - PCN Palenque Congal, July 2019
[308] Focus Group - PCN Palenque Congal, July 2019.

the need to know both the causes and the consequences of enslavement and the armed conflict and physical and psychological ethnocide that these produced. The construction of a historical truth commission was proposed.

TJ is viewed by the interviewees as an opportunity for truth. In the Autonomous Proposal "truth" is identified as a central element to reparation and non-repetition calling for the "Creation of a Verification or Truth Commission: Integrated by local authorities, the community, human rights bodies, and the international community, so that the truth of the acts of violence in the communities is known," (pg. 46).

The Autonomous Proposal calls for truths, clarification and public disclosure around links between officials, members of the Public Forces Public and companies or large economic actors with armed groups outside the law; relations between the implementation of megaprojects and the acts of violence; the companies that generated forced displacements; public officials with links to armed groups; links between state armed forces and armed groups; those with interests in mining and those responsible for illegally granting mining titles (p.46).

Yet, these truths relate to revealing the very dynamics of the colonial economic project and its key players in the contemporary armed conflict. These uncomfortable truths, which call in to question not only state reasonability, but the links between powerful economic actors, armed groups and violence and the historical colonial dynamics of the conflict, face great obstacles within institutional truth processes. Thus, there is a constant debate as to whether intuitional spaces, such as the JEP and the CEV are adequate for revealing the truth, or whether own processes need to be sought.

iii. Structural transformation as Guarantees of Non-Repetition

The third element of the TJ approach to reparation are guarantees of non-repetition (GNR). All of the activists that participated in the research spoke about the importance not only of repairing the damages caused by the conflict but ensuring they do not happen again. Yet, the biggest challenge for TJ in Colombia is that the armed conflict is still taking place.

During JEP community workshops on TJ, communities were most concerned about the promise of GNR. Community representatives repeatedly asked, "how can we talk about guarantees of non-repetition when we are still in the middle of an armed conflict."[309] A member of Palenque Congal asked "When are they going to stop creating more damage? I mean, we [can] talk about reparation when there is no more damage. When we say ... let's stop here, and repair, [but] we are talking about reparation and others [armed groups] will come..."[310] Another participant asked the same question

[309] Notes from workshops, 2018.
[310] Focus group - PCN Palenque Congal, July 2019.

"How can we cure a wound when it keeps being opened up again and again? You put salt on it, and another wound is inflicted."[311]

GNR is another area in which important links between reparations for the conflict and historic reparation can be made. For many activists, historical reparation itself is a GNR. Preventing the armed conflict in the Afro-descendant territories requires structural transformations to remove the underlying causes of victimisation through for example fundamental changes to the economic model, eliminating racism in all its forms, and guaranteeing ethno-territorial rights, in particular the rights to autonomy and territory. As such, GNR are not seen as additional to reparation, but one of the fundamental measures of reparation that must be ensured.[312]

CODHES member Marcos Oyaga asserts that community approaches to collective reparation in Colombia have centred on collective political processes towards transformation of the environment and society to "radically transform contexts of historical injustice" and structures that underpin violence.[313] One member of the ATGM asserts:

> I believe that our vision of collective reparation and reparation must have a transformative approach. The challenge is great, for us, the black people. As a black people in Colombia, being able to effectively implement collective reparation.... For example, we are saying that rehabilitation goes beyond that and... we have to rehabilitate the territory, we need to defeat that the extractivist gaze that the state has. Part of the vision that we have for the territory is that there is no longer that conception. The Colombian state stops its vision of that.[314]

Reparation is intrinsically linked with autonomy and the freedom to choose own models and ways of living. This is where we see the relationship between collective ethnic rights and GNR. Another member asserts:

> …one of the challenges... in the design of the reparation, is to develop or create our own development, in the way that we see well-being, which has to do with our social and community processes. How we think about ourselves, how we think about the development of the territory, how we think about living and remaining in the territory and being part of the territory… demanding that the State accept [how] we want to live."[315]

Likewise, the Autonomous Proposal makes the recommendation to:

> Promote the transformation of the conditions of exclusion and vulnerability of black communities, through the execution of actions that not only seek to repair the damage caused, but rather seek to: guarantee the community the effective enjoyment of their collective rights, eliminate discrimination schemes, deepen democracy and strengthen the capacities of communities and institutions (Fundemujer and PCN, 2011:61).

[311] Ibid.
[312] *Ibid*
[313] Marcos Oyaga, Workshop - PCN, ATGM and CODHES, July 2019.
[314] Workshop - PCN, ATGM and CODHES, July 2019.
[315] *Ibid.*

For PCN, linking historical with collective reparations is part of the organisation's strategic proposals in the understanding that "historical reparation constitutes the most important measure for non-repetition" (PCN, 2017).

Activists incorporate the language of transformative reparations into these discussions. As Marie Cruz reflects:

> To be able to reach the state of restoring, even of improving, how it was at the time of damage. Reparation goes beyond returning to the state we were in, as we are not in a state to talk about reparation within the framework of rights, we were not in the best state, we did not have guarantees of rights, so reparation should aim to repair *that*. That's how we transition to historical repair.[316]

Transformative reparations are rooted in the true realisation of ethno-territorial rights. Just as the collective damages identified are rooted in the violation of these ethno-territorial rights, the measures that activists identify are also rooted in the guarantee of those interrelated ethno-territorial rights. As Harrinson Cuero of PCN asserts, reparation is the nucleus of the autonomous rights to identity, territory and autonomy; these autonomous rights are both "the main objects of analysis of the damages, and the objects of intervention in terms of reparation."[317]

II. Transitional Justice in a context of coloniality

The Afro-descendant communities of Buenaventura have been fighting the collective reparation struggle at the institutional level for nearly 10 years since the Autonomous Proposal was first presented. The process in the framework of Decree Law 4635 has been underway for 8 years. Yet the advances have been slow.

As Madre and PCN reported to the CERD, land restitution and reparation processes lack guarantees, particularly so for Afro-descendant victims. They report that insufficient funding has been allocated and citing the Monitoring Commission for Law 1448, show that:

> …resources devoted to Afro-Colombian victims had decreased between 2018 and 2019 by 25%. The Commission also found that 64% of land restitution requests have been denied by the Land Restitution Unit, with many denials citing reasons that do not conform to the law.[318]

Thus, the lack of progress is not accidental or due merely to budgetary or capacity limitations as has been suggested by the institutions responsible for implementation, but rather due to the very decolonial, structural and revolutionary nature of the reparation demands being fought for by the communities, demands which directly conflict with State interests and the neoliberal economic

[316] Interview: Marie Cruz Renteria, 2019.
[317] Focus group - PCN Palenque Congal, 2019.
[318] R6.

agenda. Thus, as discussed in the critical and post-colonial literature discussed in the introduction, the real potential for TJ is constantly thrown into question.

i. Competing interests and a lack of political will

During a meeting between representatives of PCN and the 11 Community Councils, and the UARIV in October 2018, to discuss the route for reparations, community representatives asserted that through the reparation process "We want to evidence the damages that go beyond the armed conflict."[319] The response of the UARIV was that the Law only considered damages in the context of the armed conflict, and since 1985.

As shown in the previous chapter, Decree Law 4635 has seen limited implementation. Where reparations cases are being carried out with recognised collective ethnic subjects, the UARIV is not taking the differential approach stipulated in the Decree Law, but rather within the parameters of Law 1448, a law not specially intended for ethnic peoples. Thus, the UARIV itself faces barriers when addressing issues such as damages to cultural integrity because they do not understand what it implies.

One of the most difficult challenges has been pushing institutions to understand and accept that the damages inflicted on Afro-descendant peoples go beyond the last 30 years of the conflict and have to do with structural and historical aspects of this country. Rather the UARIV sees collective reparations as a list of institutionally defined actions, while community demands are seen as costly and asking for too much.[320]

The implementation of collective reparation has been extremely low. As of August 2019, of the 669 registered collective reparation subjects, only 140 had approved reparation plans (PIRCs) and only 6 had been implemented. In the case of ethnic collective subjects, 70% of subjects were in the initial stages of the process (consultation on methodologies for identifying damages in their territories), and only 30 cases have PIRCs, none of which were Afro-descendant subjects (Procuraduría, 2019). There have been 18 judicial sentences for land restitution for ethnic peoples since the law was adopted; 16 for indigenous peoples and just 2 for Afro-descendant peoples (ITM, 2020) although many more cases have been filed by the URT.

While the UARIV has argued that these delays are due to financial capacity or the different times schedules of the communities,[321] for organisations such as Codhes it has more to do with the lack of political will to recognise the autonomous and own approaches to reparations that the communities envision:

[319] Author's own notes from meetings, August 2018.
[320] Marcos Oyaga, Workshop on reparation - PCN and CODHES, July 2019.
[321] Interview: Program official, UARIV, December 2019

> From our perspective, the collective reparation program is not working because there is a difference between how reparation is being thought by ethnic communities, peasant communities, organisations, and how the government is thinking about it. Obviously, organisations and communities are thinking about reparation from a transformative perspective, but also from a perspective of rights and dignity, that is, collective reparation is not simply a few palliative measures, it is not simply that they give us a school, it is not simply that they hold a commemorative act, but it has to do with the transformation before our structural conditions of vulnerability, our structural conditions of poverty, and the transformation of the systems of exclusion and discrimination. And that prospect of reparation was getting too big for the state.[322]

Thus, the community interpretation of DL 4635 conflicts with the government interpretation. As we have seen, the proposal for reparations includes structural demands, which are viewed as a challenge to the interests of key economic actors in the territories. One member of ATGM describes how reparations demands conflict directly with private economic interests:

> To attain the collective reparations conditions in urban contexts such as Buenaventura, it would necessarily mean stopping many projects of port expansion, modernisation and debasement of the city. If you don't stop them, [at least] rethink them in the way they relate to the territory and the people who inhabit your territory. Because I believe that armed conflict is not a means, but an end. The Colombian State is not interested in discussing the economic model. And it is that economic model that has historically generated the affectations in the territories where black communities and indigenous communities live. So that [reparation] would happen by rethinking the expansion or debasement models of the city.[323]

This shows how not only is there an understanding of the economic model as an obstacle to the realisation of ethnic rights, but that reparation can only be achieved by transforming the economic model. Marie Cruz highlights how this plays out in specific demands for ancestral rights such as the demand for recognition and respect for ancestral medicinal knowledge systems and practices, itself a measure of reparation. She asserts that the state does not recognise ancestral medicines because such practices go against the interests of multinational pharmaceuticals who do not aim to cure but to keep people dependent on their products.[324]

Thus, that the intentions of communities to go beyond the immediate crimes committed in the framework of the conflict to address wider structural and historical underlying factors has itself prevented communities and institutions from agreeing on the reparation route.

ii. A neo-colonial approach to reparations

In 2018 the UARIV adopted an internal resolution (Resolution 03143 of 23 July 2018) further adjusting procedures for 1), recognising collective subjects of reparation and 2) identifying damages for reparation. I call this new approach to reparation a neo-colonial model of reparation.

[322] Marcos Oyaga (CODHES), Workshop on reparations, PCN and CODHES, July 2019.
[323] Workshop - PCN, ATGM and CODHES, July 2019.
[324] Interview: Marie Cruz Renteria, 2019.

Primarily, in order to identify and recognise collective ethnic subjects of reparation the institution applies five criteria: 1) Recognition and self-recognition - the UARIV associates this with identity and recognition by the subjects themselves and by external actors; 2) The existence of a collective project, associated with life plans and ethno-development plans; 3) Demonstrable collective practices, including cultural practices, existence of a language, immanent membership patterns; 4) Existence of forms of organisation and defined organisational structures and 5) Existence of a territory.[325]

This last point is perhaps most concerning as it stipulates that subjects of collective reparations must have a recognised collective territory at the time the violation was committed in order to be eligible for collective reparation. When the UARIV defines the territory as an attribute to determine whether a subject is collective, it refers exclusively to the definition of article 4 of Law 70, which relates territory to collective titles. This excludes many black communities in urban contexts such as the ATGM and the Puente Nayero Humanitarian Space in Buenaventura, as well as displaced groups such as La Comadre who are a collective of displaced Afro-descendant women from different territories and who, as a collective which came together due to the very crimes of displacement that they suffered in their respective territories, do not have a shared collective territory.

Thus, despite the great achievement of having the issue of racism included in DL 4635, racialised groups have now been excluded from the norm. As Quiñones asserts in relation to the case of La Comadre, Afro-descendant women who need to explain the disproportionate sexual violence they have suffered through racism are now being forced to work within a norm (Law 1448) that does not address racism or have specific protections for Afro-descendant peoples. He refers to this as "judicial whitening" or "whitened reparation," in which Afrodes, one of the organisations that fought most for DL 4635 is now being excluded from using that very norm they help create.[326]

The second limitation of the new model concerns the identification of damages and measures. DL 4635 starts from the point of damages giving communities the freedom to identify what damages they have suffered, in order to identify adequate reparations measures. This enables them to conceptualise damages in relation to their own visions of environmental, territorial, the relationship with culture and territory. However, the new model rooted in the resolution establishes a list of pre-recognised damages each matched to a list of reparations measures. This further limits the autonomy of communities to think and propose their own visions of reparation. In general, the list of possible measures are related to symbolic measures, remembrance acts, public events and community infrastructure.[327]

[325] See UARIV Resolution 03143 of 23 July 2018.
[326] *Ibid*
[327] Marcos Oyaga (CODHES), workshop - PCN, ATGM and CODHES, July 2019.

While collective reparation is not a judicial process, it still has implications for issues of responsibility. By defining a strict list of damages, the UARIV can effectively define and decide which responsible actors may be included in the list – armed groups and military, and possibly excluding private and economic actors who are not recognised actors in the armed conflict. This is similar to the limitations of the JEP for who testifying and participating is only obligatory for members of the FARC and Armed Forces.

iii. Violence as a response to reparations demands

One of the key truths that CONPA has communicated to the CEV concerns that fact that violence in the context of the armed conflict is very often a response to the processes of resistance being carried out by Afro-descendant communities in defence of their ethno-territorial rights.

The demands for reparation have not only faced institutional delays but an intensification of violence and victimisation of Afro-descendant leaders. One member of Palenque Congal asserts that land restitution demands are a challenge to "change and restructure," the social and territorial order and "that's why they silence us, that's why they kill us, that's why they disappear us."[328]

As discussed in Chapter 5, the role of the State in defending private interests and failing to protect leaders from violence has been widely documented. Thus, Harrinson Cuero concludes that calling on the State to protect leaders and ensure GNR "is like asking the devil to stop taking souls when it is his business. To put it in specific terms. It's his reason for being." He goes on to use an anecdote of mice that repeatedly vote for cats to be their leaders: "…we have to become aware that our reparation will only occur when we stop thinking that the cat will recognise that eating a mouse is bad. The cat will always eat a mouse. It's his nature. What the mouse must do is create the conditions to prevent the cat from coming in."[329]

III. Transitional Justice from below

The political economy of TJ or the coloniality of TJ has meant that many activists are sceptical about the real potential not just for historical reparation, but for truth, reparation and GNR in the context of the armed conflict.

During a JEP workshop with representatives of PCN and the Consejos Comunitarios of Buenaventura in August 2018, one leader demonstrated scepticism about whether the mechanisms of the new

[328] Focus Group - PCN Palenque Congal, July 2019.
[329] *Ibid*

SIVJRNR would really reveal the truth about the conflict in Buenaventura. He asserted that there already exists a wide body of literature and reports on the armed conflict, but few reveal the *truth*, that the root cause of the violence is the capitalist, neoliberal model. As the Statute of the JEP adopted in 2018 exempts third parties such as private actors from testifying, the chances that such truths would be revealed through the JEP were low. At best, institutions like the JEP may serve to throw light on key issues.[330]

Grueso asserts TJ can help us to know "what to repair" and "Help begin to calculate …the size, the extent and depth of the wound."[331] In this sense the JEP represents an opportunity to do a "radiography" of the conflict and can serve as a "spotlight to illuminate the truth" of the conflict, which society can then decide what to do with the information.[332] As was agreed during the reparations conference, despite the limitations, we must be part of the spaces in which the history and truth of the country and the conflict is being retold. The voices of Afro-descendant peoples must be included to help build the history of the country that we have always been denied.

For many, despite efforts to have their voices heard on the institutional truth platforms, there is an understanding of the limits of such platforms and many express the importance of own autonomous processes for truth. Indeed, a central element to the understanding of truth is that ethnic and oppressed peoples themselves have the possibility to construct their own truths. Rosero points out the importance that truth comes from an own perspective "I don't think there is justice in this transition. So, what I aspire to is the truth. And being modest, I aspire to place my truth. Because I also don't think that this transitional system has the possibility of knowing many details of our truth."[333]

It is for this reason that parallel to institutional TJ, Afro-descendant peoples are carrying out their own processes, particularly in the areas of truth and reparations demands. The Autonomous proposal is one of the earliest examples of this. In a pedagogical publication on ethnic peoples' participation in the peace agreement, prior to the adoption of the final agreement, the Ethnic Commission (2016) poses the question of whether Afro-descendant and indigenous peoples should elaborate their own truths to be included in the national truth commission.

In 2015 the Pacific Inter-Ethnic Commission of the Truth (CIVP) was established with members of the catholic church and indigenous, afro-descendant and human rights organisations from the Pacific region with the aim of providing an autonomous platform through which ethnic peoples of the Pacific could construct their own truths. The CIVP, has held autonomous public forums and acts of recognition and memory about events taking place in the Pacific. It is also in the process of constructing a report to be included in the ethnic chapter of the CEV's final report. The first Secretary

[330] Author's own notes from meetings, August 2018
[331] Interview: Diego Grueso (JEP), 2020.
[332] *Ibid*
[333] Interview: Carlos Rosero, 2019.

General of the CIVP, Leyner Palacios, a victim of the Bojayá Massacre in Chocó, has now become a Commissioner of the CEV.

Own truth processes also relate to community research and ethno-education. As Mina asserts:

> Historical reparation is part of an educational process and a critical tool to understand, educate, and guide the political struggle for the recognition that current structures of power were built on the foundation of colonialism, capitalism, patriarchy and racism as forms of oppression, (Mina, N.D).

During the 2017 International Meeting on reparation, participants posed the question: What do we want to be repaired? Concluding that this question involves further reflection about damages, a difficult task since our story has been stolen, hidden and misrepresented. Therefore, there is a need for own processes of research to determine what needs repairing. In the focus group, one member of Palenque Congal asserted:

> [Reparation] is also about how to generate learning processes, where what happened really comes out, becomes visible again, but with more of a sense of truth. So, you say well, what really happened in the time of slavery? How did those processes happen? In the liberation processes, how did the black community also contribute to this process? We are now…. celebrating the Bicentennial, and few of us here know what the bicentennial is, what happened there, in that process? How did the black community contribute to the freedom of this country? So, I feel that in this reparation process we also have to start investigating and knowing more about that.[334]

Another member stated:

> We demand a reconstruction of history. Because what we see today is that, in terms of who we are and what we have been, not all blacks have the same construction, we have an alienating history…I think that part of reparation is the reconstruction of history. In this case of black people, but it is the same reconstruction of the history of Colombia because we do not stop being Colombians too.[335]

In the area of GNR the current proposal for the *Acuerdo Humanitario Ya* is another example through which communities have initiative an own, bottom-up demand for cease fire, and protections through proposed dialogue not only with the State but with armed actors occupying their territories and making the lives of communities impossible. Autonomous processes for strengthening local economies and production, particularly in the context of the economic impacts of the COVID-19 pandemic are a further example of own processes for structural transformation.

In conclusion Afro-descendant activists are putting into practice the language, concepts and analyses that they pushed for in the TJ normative framework through both reparation demands to the State and own internal processes. TJ language and concepts have been important for further developing visions of transformative reparations that go beyond economic compensation to truth and recognition and structural and decolonial measures for land and autonomy.

---

[334] Focus group with PCN Palenque Congal, July 2019.
[335] *Ibid*

These processes however take place in an ongoing situation of coloniality and war and are not without their repercussions as they come face to face with powerful economic and political interests. In most cases demands for reparations are undermined, blocked, or denied, and in many cases activism around reparation and land restitution is met with violent repression including threats and assassinations. Thus, while TJ creates an important space and provides important tools and political opportunities for putting the issue of historical and transformative reparation in the public debate, TJ institutions remain part of a state apparatus whose scope and possibilities for effecting real change remain constrained by powerful interests.

Nevertheless, the people-centred bottom-up approaches to TJ and reparations have value in themselves. The very process of thinking, dialoguing and collectively building reparations demands, using the concepts and terms developed in TJ, is a reparatory process in itself, *hacia adentro,* as communities come together to vision the kinds of collective future they wish to build as a people.

CONCLUSION

This thesis has demonstrated the political opportunity that transitional justice provides to advance in the demand for historical reparation and how Afro-descendant reparations activists are using Colombia's TJ process to do just this in two specific ways.

Firstly, through advocacy processes, activists have influenced the very normative framework that has emerged so that it recognises the collective damages caused to Afro-descendant communities which impact on their ancestral and ethnic rights, and the connection between historical injustices in the colonial and slavery period and contemporary crimes in the context of the armed conflict. This advocacy has enabled the recognition of a right to collective reparations for Afro-descendants that seeks to repair those collective damages and restore ethno-territorial rights and creates a space, albeit limited to include analysis of the historical and structural underlying factors in contemporary injustice.

Secondly, and in the context of the implementation of this normative framework, Afro-descendant reparations activists are pushing the boundaries of TJ still further, demanding collective reparations measures that not only seek to repair the damages caused during the armed conflict and restore the situation in which they lived prior to the impact of the conflict in their territories, but to address the historical damages caused during the colonial period and during two hundred years of racial discrimination, structural racism and marginalisation.

In this sense, the thesis makes new contributions to a number of fields of literature. In particular it is a contribution to the still scarce literature on historical reparation in Colombia which, despite being an implicit and, in some cases, explicit line of struggle and activism within Afro-descendant organisations has rarely been the direct focus of academic literature. By bringing this issue into more widely explored discussions on Afro-descendant ethno-territorial and collective rights, armed conflict, transitional justice and reparations, it not only demonstrates the important links between these fields of study, but highlights the important work and advances already taking place in the Afro-descendant struggle for reparation from diverse perspectives and in diverse spaces.

A decolonial vision of reparation

A further important contribution is the application of decolonial theory to the field of transitional justice and reparations. The reparations processes documented must be understood as decolonial. The focus on collective and not individual reparations is in itself a process of "delinking" from the

coloniality of knowledge and the hegemony of European epistemologies that tend to be rooted in individual rights. By rooting demands in the restoration of own ethnic and collective rights - the right to be a collective black subject, to a space in which to be, to exercise being and to an own vision of the future - these demands go beyond rights recognised in domestic constitutional, or international human rights law. This again provides a decolonial vision of reparation, rooted not merely in economic pay-outs, but in restitution of territory and autonomy as necessary for the self-determination of Afro-descendants as a people.

Further, these approaches to reparation challenge the European concept of modernity and development seeking to protect the territory and environment rather than allowing or facilitating the onslaught of an extractivist and exploitative economic model. In this sense it goes beyond inclusionist and even neoliberal multiculturalist models of reparation and recognition whose essential aim is the inclusion of diverse groups, in conditions of "equality", into the dominant economic model. Rather it is rooted in the right to an own vision of the future and development as a measure for reparation for the damages historically caused by the European economic extractivist and colonist project.

Thirdly these processes have been decolonial in their analysis of violence and war from a decolonial reading of the "non-ethic of war" which states that the colonial violence against Indigenous and Afro-descendant peoples continues in the contemporary period through not only direct armed conflict, but the very model of modernity which puts private profit above the lives of colonised peoples and justifies violence against them in the name of development.

Ongoing advocacy processes within the ever-evolving TJ space have increasingly consolidated this vision. The presentation of the previously mentioned report by the organisations of CONPA in March 2021 to the CEV sent a clear message to the country – for Afro-descendant peoples, the armed conflict is just the latest moment in an ongoing chain of racial violence in the context of the colonial economic extractivist project rooted in white supremacy, patriarchy and accumulation. The culmination of human rights violations suffered by Afro-descendant peoples of Colombia historically, continuously and during the armed conflict amount to CAH, genocide, ethnocide and ethnic cleansing; continuous strategies used by the agents of the economic extractivist project in their attempts to control peoples, territories and resources. It is only through this historical understanding of the contemporary crimes committed against Afro-descendants that reparation may seek to repair the full extent of the damages caused and include measures for guarantees of non-repetition.

The challenge of decolonial reparation

As has been shown, the right to reparations for serious violations of human rights and particularly CAH and genocide is now a widely accepted right in IHRL, IHL and TJ. That the Transatlantic Slave Trade constituted one of the most serious CAHs of the modern world is undeniable. Although the UN Member States at Durban argued that enslavement was not a CAH at the time of the Slave Trade, numerous scholars, lawyers and philosophers at the time recognised it as such. As demonstrated throughout this thesis, when presented with all the facts, the moral, philosophical and arguably legal obligation for reparations for the descendants of the Transatlantic Slave Trade and European colonialism is difficult to deny. Yet, reparations for slavery and colonialism remains one of the most controversial and contested issues of modern times. European States, American States, society in general and even many African nations and have been quick to provide all manner of arguments as to why reparations are an impossible or unnecessary pursuit.

As shown, the decolonial TJ approach provides an alternative framework for understanding reparation. However, the State response, or lack of State response to the decolonial demands of Afro-Colombian activists that aim at structural transformation provides an important context for understanding the wider resistance to historical reparation. If historical reparation implied merely a cheque to be paid to the descendants of slavery by the States and corporations that benefited or collaborated in the enslavement of Africans, the matter may well have been settled long ago. After all, multinational corporations pay out settlements all the time.

However, as shown, from the decolonial and transformative perspective, reparation implies much more than a pay-out. Reparation implies a recognition of responsibility by States, corporations and even individual families whose enormous wealth is attributable to the enslavement of hundreds of thousands of Africans. It implies a process of truth telling, so profound that the true extent of the crimes committed by Europeans would shake society and the world. It implies the rewriting of a history that has been incessantly denied and covered up for centuries, not just of the actions of Europe in enslaving but also its deliberate acts to deny the true nature and value of African history, philosophy, and contributions to the world. By deconstructing the myth of modernity, reparation implies revealing the reality of the history of capitalism, a brutal system that was born on the backs of enslaved Africans.

A structural and transformative approach to reparation also implies non-repetition. Reparation is not just about remedying past injustice, it is about ensuring that such violations never happen again; and that means facing up to the reality that colonialism and enslavement never ended, these institutions were merely transformed. Afro-descendant and other oppressed peoples around the world continue to suffer the colonial crimes of genocide, ethnocide and ethnic cleansing. In this sense, the decolonial reading of the current human rights situation of people of African descent is not only useful, it is

essential for us to understand that *all* human rights violations facing black people today, be they police violence, lack of access to health care or education, discrimination in the justice system or disproportionate violence in the context of armed conflict, stem from the legacy of colonialism and the continued colonial relations in which we live, which are intrinsically related to the global capitalist system and which rely on structural racism to perpetuate and maintain that system. The only way to ensure non-repetition, or non-continuation of these patterns of violence is a deep-rooted structural transformation of the very colonial economic relations that oppress us.

The need for decolonial transitional justice

In this sense, I argue that all countries that were involved in colonialism and enslavement, both the European colonising countries and those that were formed during that process of colonisation, and continued enslavement and colonial relations after independence from the European colonial powers, must undergo decolonial TJ processes to enable not only a confrontation with the truth of their past, but also measures for reparations, justice and structural change to ensure non-repetition.

The decolonial TJ approach to reparation transforms the very nature of the conversation of reparation from one of inclusion in a system that has historically oppressed and exploited Afro-descendants to the decolonial transformation of that system to eliminate the very structures and power dynamics that maintain racial oppression. Afro-descendant peoples calling for reparation can use this model to base their demands and their arguments for a reparation that goes beyond individual cash transfers to a restructuring of society and a guarantee of autonomy and freedom necessary to restore the humanity of those historically and continually victimised.

This is not to disregard the political limitations of institutional transitional processes which, as has been shown, are too often constrained by the very interests of the States and hegemonic powers that lead them, confining them to transitions that maintain and even expand the neoliberal economic agenda, whilst remaining blind to the economic structures that were the root causes of violence and conflict.

Nevertheless, what this thesis shows is that TJ gives us important language and key concepts to articulate our grievances, claims and demands around historic and continued injustice, which can be applied to autonomous, grassroots, TJ "from below". The language of truth, justice, reparation and non-repetition, the concepts of collective victimhood, the centrality of rights and new approaches to transformative reparations can and have been appropriated and merged with own concepts and visions of rights to create an own language of justice and repair from a decolonial perspective. While such demands can be made to the State as the party responsible both for direct crimes and for failing to

protect peoples from crimes committed by third parties, reparation processes must also be own, internal processes that, rooted in knowledge, memory and consciousness of our history and present, seek internal processes of healing and own measures for preventing further oppression.

The time for reparation for the crimes of slavery and colonialism is well overdue and every year that these crimes go unaddressed the continued racial oppression deepens as the colonial economic project expands. The armed conflict in Colombia and the situation of humanitarian emergency that it has created for Afro-descendant peoples has to an extent prevented the movement from advancing with a consolidated reparation movement and demands. However, conversely the TJ processes that have emerged from the armed conflict, despite their limitations, have reinvigorated the conversation on reparation, laying the path and providing the tools for the movement to advance in this historical struggle through internal and external dialogue and collective building with a new language and on new terms that establish as a minimum the rights to truth, justice, transformative reparation and guarantees of non-repetition.

BIBLIOGRAPHY

Secondary sources

ACHIUME, E. T. (2019) *Report of the Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance*. UN Doc. A/74/321. New York: United Nations.

ALMARIO GARCÍA, O. (2003). Los renacientes y su territorio: Ensayos sobre la etnicidad negra en el Pacífico sur colombiano (C. A. Patiño Villa & J. O. Suárez Molano, Eds.). Universidad Pontificia Bolivariana.

ALMARIO GARCÍA, O. (2004). Dinámica y consecuencias del conflicto armado colombiano en el Pacífico: Limpieza étnica y desterritorialización de afrocolombianos e indígenas y 'multiculturalismo' de Estado e indolencia nacional. En E. Restrepo & A. Rojas (Eds.), *Conflicto e (in)visibilidad: Retos en los estudios de la gente negra en Colombia* (pp. 73–120). Editorial Universidad del Cauca.

ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS REFUGIADOS (2020), *Tendencias globales de desplazamiento forzado en 2019* (UNHCR: Copenhagen).

AMEZCUA, O. (2011) *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*. Briefing Paper No. 1. ETJN, Reparations Unit.

AMNISTÍA INTERNACIONAL (2012) *Colombia: La ley de víctimas y de restitución de tierras*. London: Amnesty International Publications.

ANAFRO (2014) 'Compromiso de campaña y de gobierno del señor Presidente Candidato Juan Manuel Santos de los Partidos de la Unidad Nacional, Partido Liberal, Partido de la U y Cambio Radical, con el Pueblo Negro, Afrocolombiano, Palenquero y Raizal. Texto presentado al expresidente Gaviria. Bogotá D.C. Junio de 2014.' Unpublished.

ANDERSON, M. (2007) 'When Afro becomes (like) indigenous: Garífuna and afro-indigenous politics in Honduras', *Journal of Latin America and Caribbean Anthropology*, 12(2), pp. 384–413.

ANDREWS, G. R. (2004) *Afro-Latin America, 1800-2000*. Oxford University Press.

ANDREWS, G. R. (ed.) (2018) *Estudios Afrolatinoamericanos: Una introducción*. Buenos Aires: CLACSO, Consejo Latinoamericano de Ciencias Sociales.

AN-NA'IM, A. A. (2016) 'It´s time to decolonise human rights'. *It´s time to decolonise human rights*, Institute for developing nations, Emroy University.

ANTÓN SÁNCHEZ, J. (2007) 'Afroecuatorianos: Reparaciones y Acciones Afirmativas', in Mosquera Rosero-Labbé, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 155–181.

ARBOLEDA, S. (2007) 'Los Afrocolombianos: entre la retórica del multiculturalismo y el fuego cruzado del destierro', *Journal of Latin America and Caribbean Anthropology*, 12(1), pp. 213–222.

ARBOLEDA, S. (2016) 'Plan Colombia: descivilisación, genocidio, etnocidio y destierro afrocolombiano', *NÓMADAS*, 45, pp. 75–89.

ARBOLEDA, S. (2019) 'Rutas para perfilar el ecogenoetnocidio afrocolombiano: hacia una conceptualización desde la justicia histórica', *NÓMADAS*, 50, pp. 93–109.

ARBOUR, L. (2007) 'Economic and Social Justice for Societies in Transition International Law and Politics, 40:1, 2007', *International Law and Politics*, 40(1), pp. 1–27.

ARIAS, D. (2020) 'El 78% de los departamentos tiene riesgo de reclutamiento de menores, según estudio', *RCN Radio*, 12 February. Available at: https://www.rcnradio.com/colombia/el-78-de-los-departamentos-tiene-riesgo-de-reclutamiento-de-menores-segun-estudio (Accessed: 27 September 2020).

ASAALA, E. and DICKER, N (2013) "Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?" *African Human Rights Law Journal*, 13, pp. 324-355.

ASHER, K. (2009) *Black and Green: Afro-Colombians, Development, and Nature in the Pacific Lowlands.* Durham and London: Duke University Press.

ASOCIACIÓN DE AFRODESCENDIENTES DESPLAZADOS - AFRODES and GLOBAL RIGHTS (2007) *Luces y contraluces sobre la exclusión;* Bogotá: Afrodes.

ASOCIACIÓN DE AFRODESCENDIENTES DESPLAZADOS - AFRODES and GLOBAL RIGHTS (2008) *Vidas Ante la Adversidad: Informe Sobre la Situación de los Derechos Humanos de las Mujeres Afrocolombianas en Situación de Desplazamiento Forzado.* Bogotá: Afrodes.

BADERIN, M. A. and MCCORQUODALE, R., 2007. 'The International Covenant on Economic Social and Cultural Rights: Forty Years of Development' in Baderin, M.A. and McCorquodale, R. (eds), *Economic, Social and Cultural Rights in Action*, OUP: Oxford

BALANTA, X. (2014) 'Victims and Reparations: Limitations and Challenges Colombia Victims Law (Act 1448 of 2011)', *International Journal of Humanities and Social Science*, 4(5(1)), pp. 152–164.

BALINT, J., EVANS, J. and MCMILLAN, N. (2014) 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach', *The International Journal of Transitional Justice*, 8, pp. 194–216.

BARAKA, A. (2013) '"People-centered" human rights as a framework for social transformation'. Available at: http://www.ajamubaraka.com/peoplecentered-human-rights-as-a-framework-for-social-transformation/.

BBC (2015) 'David Cameron rules out slavery reparation during Jamaica visit', *BBC*, 30 September. Available at: https://www.bbc.com/news/uk-34401412 (Accessed: 4 March 2018).

BECKLES, H., McD (2007) 'Slavery was a long, long time ago": Remembrance, Reconciliation and the Reparations Discourse in the Caribbean', *Ariel: A review of English Literature*, 38(1), pp. 9–25.

BECKLES, H., McD (2013) *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide, Kindle Edition*. University of the West Indies Press.

BELL, D. (1980) 'Brown v. Board of Education and the interest convergence dilemma', *Harvard Law Review*, 93(3), pp. 518–533.

BERG, B. (2009) *Qualitative research methods for the social sciences*. 7th edn. Boston: Allyn & Bacon.

BERISTAIN, C. M. (2009) *Diálogos sobre la reparación: Qué reparar en los casos de violaciones de derechos humanos*. San José: Instituto Interamericano de Derechos Humanos.

BEZO, B. 2015. Living in "survival mode:" Intergenerational transmission of trauma from the Holodomor genocide of 1932–1933 in Ukraine. *Social Science & Medicine*, Vol.134, June 2015, Pp 87-94.

BIONDI, M. (2003) 'The Rise of the Reparations Movement', *Radical History Review*, (87), pp. 5–18.

BOLÍVAR, S. (1820) 'Documento 4182 oficio de Bolívar para el Vicepresidente de Cundinamarca, fechado en San Cristóbal el 18 de abril de 1820, en el que le aclara conceptos relacionados con la libertad de aquellos esclavos que fuesen llamados a las armas por el presidente de la república.' Available at: http://www.archivodellibertador.gob.ve/escritos/buscador/spip.php?article7010 (Accessed: 14 February 2021).

BOTERO, P. (2012) 'Investigación y acción colectiva –IAC– Una experiencia de investigación militante: Research and Collective Action –IAC– An Experience of Militant Research', *Utopía y Praxis Latinoamericana*, 17(57), pp. 31–47.

BRACHTÄHUSER, F. and HAFFNER, A. (2018) 'Transformative Reparation: Should Reparation Change Societies?', *Zielsetzung und Konzept*, 78, pp. 64–66.

BROPHY, A. (2004) 'Reparations Talk: Reparations for Slavery and the Tort Law Analogy', *Boston College Third World Law Journal*, 24(1), pp. 81–138.

BRYAN, M. (2009) *The Americas*. London: Minority Rights Group International, pp. 118–145.

BRYMAN, A. (2008) *Social Research Methods*. 3rd edn. Oxford: Oxford University Press.

BUCKLEY-ZISTEL, S. *et al.* (eds) (2014) *Transitional Justice Theories*. New York: Routledge.

BURCHERT, S., STAMMEL N. and KNAEVELSRUD C., 2017. Transgenerational trauma in a post-conflict setting: Effects on offspring PTSS/PTSD and offspring vulnerability in Cambodian families. *Psychiatry Res*. 2017 Aug, 254, 151-157.

CAICEDO, C. A., (2001) *Por qué los negros somos así* Medellín: Editorial Lealon, 2001

CALLEJON, C., KEMILEVA, K. and KIRCHMEIER, F. (2019) *Treaty bodies' individual communications procedures: Providing redress and reparation to victims of human rights violations*. The Geneva Academy of International Humanitarian Law and Human Rights.

CARABALÍ, A. (2007) 'Los afronortecaucanos: de la autonomía a la miseria ¿un caso de dobre reparación?', in Mosquera Rosero-Labbé, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 389–403.

CARICOM REPARATIONS COMMISSION - CRC (2021). "10 point reparation plan." Available at https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/. Accessed 3 July 2021

CARRANZA, R., (2008), "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *The International Journal of Transitional Justice*, Vol. 2, 2008, 310–330

CASSEL, D. (2005) 'The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights', in De Feyter, K. et al. (eds) *Out of the Ashes: Reparations for Gross Violations of Human Rights*. Antwerpen: Intersentia, pp. 191–224.

CASTILLEJO, A., (2013a). "Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios" *Law and Critique* 24:3.

CASTILLEJO, A., (2013b). "On the Question of historical injuries: transitional justice, anthropology and the vicissitudes of listening." *Anthropology today* 29:1, pp17-20.

CASTILLEJO, A. (2018) 'Del ahogado el sombrero, a manera de manifiesto: esbozos para una crítica al discurso transicional', *Vibrant*, 15(3).

CASTILLO, E. and CAICEDO, J. (2015) 'Educación y afrodescendencia en Colombia. Trazos de una causa histórica', *Revista nuestrAmérica*, 3(6), pp. 114–130.

CASTILLO, L. C., (2007). *Etnicidad y nación: el desafío de la diversidad en Colombia*. Cali: Editorial Universidad del Valle.

CENTRO NACIONAL DE MEMORIA HISTÓRICA (2010) *¡Basta Ya! Colombia: Memorias de guerra y dignidad*. Bogotá: CNMH.

CENTRE FOR THE STUDY OF THE LEGACIES OF BRITISH SLAVERY, (2021). "Context". Available at: https://www.ucl.ac.uk/lbs/project/context/. Accessed 3 July 2021.

CENTRO NACIONAL DE MEMORIA HISTÓRICA (2012) *Justicia y Paz: Tierras y territorios en las versiones de los paramilitares*. Bogotá: CNMH.

CENTRO NACIONAL DE MEMORIA HISTÓRICA (2015a) *Buenaventura: Un Puerto sin Comunidad*. Bogotá: Centro Nacional de Memoria Historica. Bogotá: CNMH.

CENTRO NACIONAL DE MEMORIA HISTÓRICA (2015b) *Una nación desplazada: Informe nacional del desplazamiento forzado en Colombia*. Bogotá: CNMH (Una nación desplazada).

CENTRO NACIONAL DE MEMORIA HISTÓRICA (2018) *Bloque Calima de las AUC: Depredación paramilitar y narcotráfico en el suroccidente colombiano. Informe No. 2*. Bogotá: CNMH.

CELAC (2014) *Declaración sobre la cuestión de las Reparaciones por la Esclavitud y el Genocidio de las Poblaciones Nativas, II Cumbre CELAC*. Habana: Comunidad de Estados Latinoamericanos y Caribeños. Available at: http://www.lacult.unesco.org/docc/reparaciones_esclavitud_final_Es.pdf (Accessed: 3 May 2021).

CÉSAIRE, A. (2000) *Discourse on Colonialism*. NYU Press, Monthly Review Press.

COATES, a-N. (2004) 'The Case for Reparations', *The New York Times*, June. Available at: https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (Accessed: 25 May 2020).

CODHES. 2003. Destierro y repoblamiento. *Codhes Informa: Boletín informativo de la Consultoría para los Derechos Humanos y el Desplazamiento* 44:1-32.

COMISIÓN ÉTNICA (2016). Participación Étnica en el Acuerdo para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera. Comisión Étnica para la Paz y la Defensa de los Derechos Territoriales.

CRENSHAW, K. *et al.* (eds) (1995) *Critical Race Theory: The key writings that formed the movement*. New York: The New Press.

COMISIÓN DE SEGUIMIENTO DE LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO (2009) *El reto ante la tragedia humanitaria del desplazamiento forzado, Vol. 3: Superar la exclusión social de la población desplazada*. Bogotá: Comisión de Seguimiento a la Política

COMISIÓN DE SEGUIMIENTO DE LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO (2013) *El reto ante la tragedia humanitaria del desplazamiento forzado: Garantizar la superación del estado de cosas inconstitucional, ECI en el marco de la nueva ley de víctimas II*. Bogotá: Comisión de seguimiento a la política pública sobre desplazamiento forzado & CODHES.

COMISIÓN DE SEGUIMIENTO DE LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO (2016) *El Reto ante la tragedua humanitaria del desplazamiento forzado: Análisis sobre el estado de cosas inconstitucional*. Bogotá: Comisión de seguimiento a la política pública sobre desplazamiento forzado & CODHES.

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (2006) *Violencia y discriminación contra las mujeres en el conflicto armado en Colombia*. OEA/Ser.L/V/II. Doc. 67. Washington DC: CIDH - OEA.

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (2009a) *Informe sobre la visita al terreno en relación con las medidas provisionales a favor de los miembros de las comunidades constituidas por el Consejo Comunitario del Jiguamiandó y las familias del Curbaradó, municipio de Carmen de Darién, Departamento del Chocó, Republica de Colombia;* Washington DC: CIDH.

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (2009b) *Observaciones preliminares de la Comisión Interamericana de Derechos Humanos tras la vista del Relator sobre los derechos de los afrodescendientes y contra la discriminación racial a la Republica de Colombia;* Washington DC: CIDH.

COMISIÓN INTERSECTORIAL PARA EL AVANCE DE LA POBLACIÓN AFROCOLOMBIANA (2009) *Recomendaciones de la Comisión Intersectorial para el avance de la población Afrocolombiana.* Bogotá: Ministry of Interior and Justice, Colombia.

COMISIÓN INTERECLESIAL DE JUSTICIA Y PAZ (2015) *Buenaventura: El Despojo para la Competativdad*. Comisión Intereclesial de Justicia y Paz (CIJP).

CONFERNENCIA NACIONAL DE ORGANIZACIONES AFROCOLOMBIANAS – CNOA, (2020), "Organizaciones afrocolombianas presentan tutela contra el Dane por reducción de población afrodescendiente en el Census de 2018." *CNOA*. Available at: http://convergenciacnoa.org/organizaciones-afrocolombianas-presentaron-tutela-contra-el-dane-por-reduccion-de-poblacion-afrodescendiente-en-el-censo-de-2018/ (accessed 5 February 2022)

CONFERENCIA NACIONAL DE ORGANIZACIONES AFROCOLOMBIANAS (2019) "Comunicado a la Opinión Pública" *CNOA* Available at: https://convergenciacnoa.org/comunicado-a-la-opinion-publica-3/ (accessed 11 Februrary 2022).

CONSEJO NACIONAL DE PAZ AFROCOLOMIANO – CONPA (2021a - unpublished) - *Informe de contexto de los casos: Buenaventura y los campos sociales minados, Limpieza étnica y Etnocidio. El Cacarica y el etnocidio para el desarrollo*. Informe preparado y presentado a la CEV por Harrinson Cuero.

CONSEJO NACIONAL DE PAZ AFROCOLOMIANO – CONPA (2021b - unpublished) – *Informe Racismo y Guerra*, informe preparado y presentado a la CEV por Esther Ojulari.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO - CODHES (2005) *BOLETÍN CODHES INFORMA #59: ¿Por qué se van?* Bogotá: CODHES.

CONSULTORÍA PARA DERECHOS HUMANOS Y DESPLAZAMIENTO - CODHES (2009) *BOLETÍN CODHES INFORMA #75: Víctimas emergentes.* Bogotá: CODHES.

CONSULTORÍA PARA DERECHOS HUMANOS Y DESPLAZAMIENTO - CODHES (2012) *BOLETÍN CODHES INFORMA #79: Desplazamiento creciente y crisis humanitaria invisibilizada.* Bogotá: CODHES.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO - CODHES (2014) *Estudio de caso sobre el proceso de restitución de derechos territoriales en el Consejo Comunitario Alto Mira y Frontera, Tumaco, Nariño*. Bogotá: CODHES.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO – CODHES (2018) *PDET El enfoque reparador en los Programas de Desarrollo con Enfoque Territorial*. Bogotá, D.C: CODHES.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO - CODHES, (2018b), *Aportes comunitarios para la construcción de iniciativas PDET en la zona rual del distrito de Buenaventura.* CODHES: Bogotá.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO - CODHES, (2018c) "Se agrava situación humanitaria en Colombia" *CODHES*. Availalble at: https://codhes.wordpress.com/2018/09/20/se-agrava-situacion-humanitaria-en-colombia/ Accessed 11 February 2022.

CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO – CODHES (2020), "Asesinatos de líderes sociales y desplazamientos masivos. Radiografía de la crisis humanitaria" *CODHES*. available at: https://codhes.wordpress.com/2020/08/24/masacres-asesinatos-de-lideres-sociales-y-desplazamientos-masivos-radiografia-de-la-crisis-humanitaria/ (accessed 11 February 2022).

COTTROL, R., J. (2001) 'The Long, Lingering Shadow: Law, Liberalism, and Cultures of Hierarchy and Identity in the Americas', *Tulane Law Review*, 76, pp. 11–80.

CROSS, W. E., Jr. (1998). Black psychological functioning and the legacy of slavery: Myths and realities. In DANIELI, Y. (Ed.), International handbook of multigenerational legacies of trauma (pp. 387–400). Plenum Press.

CUERO, H. (2020) *Claves y lógicas para una nueva comprensión de la ordenación territorial en territorios multiétnicos y pluriculturales. 'Caso: Sur del Pacífico colombiano.'* Doctoral Thesis. Universidad Politecnica de catalunya.

CUESTA, P. E. (2006) '¿Qué, por qué y cómo reparar al pueblo afrocolombiano?', *Revista CLAR No. 1*, 1(Enero-Marzo 2006), pp. 62–67.

DAMPHA, L. F. (2015) *Reparation for Slavery and Colonialism: The Teachings of Durban*. CreateSpace Independent Publishing Platform.

DANE (2005) *Censo General 2005*. Bogotá: Departamento Administrativo Nacional de Estadísticas (DANE).

DANE (2018) *Censo General 2018*. Bogotá: Departamento Administrativo Nacional de Estadísticas (DANE).

DANIELI, Y. (1985). "The treatment and prevention of long-term effects and intergenerational transmission of victimisation: A lesson from Holocaust survivors and their children." In: Figley, C.R. (Ed.). *Trauma and its wake* (pp. 295-313). New York: Brunner/Mazel;

DANIELI, Y. (1988). *On not confronting the Holocaust: Psychological reactions to victim/survivors and their children. Remembering for the future, theme II: The impact of the Holocaust on the contemporary world* (pp. 1257-1271). Oxford: Pergamon Press.

DANIELI, Y. (1993). "The diagnostic and therapeutic use of the multi-generational family tree in working with survivors and children of survivors of the Nazi Holocaust." In J. P. Wilson & B.

Raphael (Eds.), *The international handbook of traumatic stress syndromes*. [Stress and Coping Series], Donald Meichenbaum, Series Editor]. New York: Plenum Publishing.

DANIELI, Y. (Ed.) (1998). *International handbook of multigenerational legacies of trauma*. New York: Plenum Press.

DAVIES, C. (2015) 'How do we know David Cameron has slave owners in family background?', *The Guardian*, 29 September. Available at: https://www.theguardian.com/world/2015/sep/29/how-do-we-know-david-cameron-has-slave-owning-ancestor (Accessed: 22 February 2021).

DAVIS, A. Y. (2010) "Slavery, Civil Rights, and Abolitionist Perspectives Toward Prison." In *Are Prisons Obsolete*? An Open Media Book, 22-39. New York: Seven Stories Press.

DE FRIEDEMANN, N. S. and AROCHA, J. (1995) 'Colombia', in Pérez Surday, P. and Stubbs, J. (eds) *No Longer Invisible: Afro-Latin Americans Today*. London: Minority Rights Group International, pp. 47–76.

DE GREIFF, P., (2005) Reparation efforts in international perspective: what compensation contributes to the achievement of imperfect justice. *Estud. Socio-Juríd [online]*. 2005, vol.7, n.spe, pp.153-199

DE GREIFF, P., (2006) Justice and Reparations, in DE GREIFF, P., (Ed) *The Handbook of Reparations*, Oxford Scholarship Online

DE GREIFF, P. (2010). "Transitional justice, security and development. Thematic Paper." *Washington, DC: World Bank. https://openknowledge.worldbank.org/handle/10986/9245 License: CC BY 3.0 IGO."*

DE GREIFF, P. (2014) *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non recurrence*. UN Doc. A/69/518. United Nations.

DEFENSORÍA DEL PUEBLO (2014). *Informe Defensorial – Prevención del reclutamiento de niños, niñas, y adolescentes: Análisis de la política pública con enfoque étnico*, Defensoría del Pueblo: Bogotá, D.C.

DELGADO, R. and STEFANCIC, J. (2012) *Critical Race Theory: An Introduction*. Second. New York and London: New York University Press.

DELGADO, R. and STEFANCIC, J. (eds) (2013) *Critical Race Theory: The Cutting Edge*. Third. Philadelphia: Temple University Press.

DOMINGUES, P. (332AD) 'Agenciar raça, reinventar a nação: o Movimento Pelas Reparações no Brasil', *Análise Social*, 227(2), p. 2018.

DRIVER, S. D. (2014) *Decolonising human rights*. California Institute of Integral Studies.

DUSSEL, E. (1993) 'Eurocentrism and modernity (Introduction to Frankfurt Lectures)', *Bounday 2*, 20(3), pp. 65–76.

DUSSEL (2000) 'Europe, Modernity, and Eurocentrism', *Nepantla: Views from South*, 1(3), pp. 465–478.

EIDE, A. 2001. 'Economic Social and Cultural Rights as Human Rights' in Eide, A. Krause C. and Rosas A. (eds), *Economic, Social and Cultural Rights: A Textbook* 2nd edn Martinus Nijhoff, Dordrecht.

ELSTER, J., 2003. "Memory and Transitional Justice" prepared for the "*Memory of war*" Workshop, MIT January 2003, Columbia University. Available at: Accessed 11 February 2022. http://web.mit.edu/rpeters/papers/elster_memory.pdf

ESTUPIÑAN, D. (2016) *Más puertos; menos comunidad: impactos de la estrategia económica de ampliación portuaria en Buenaventura. Caso: Barrio La Inmaculada Concepción, comuna número cinco de Buenaventura.* Buenaventura: Misereor.

EVANS, E. C. (2010) *The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practice?* A thesis submitted to the Law Department of the London School of Economics for the degree of Doctor of Philosophy. LSE.

FANON, F. (2001) *The wretched of the earth*. Penguin Classics.

FANON, F. (2008) *Black Skin, White Masks*. Pluto Press.

FERNANDES, M. (2019) *Da escravidão no espaço Atlântico às reparações suscitadas por afrodescendentes: Dissertação realizada no âmbito do Mestrado em História, Relações Internacionais e Cooperação*. Universidade do Porto.

FERREIRA, A. de J. (2011) *Addressing Race/Ethnicity in Brazilian Schools: A Critical Race Theory Perspective*. Kindle edition. Seattle: Create Space.

FERREIRA, R. and SEIJAS, T. (2018) 'El comercio de esclavos a América Latina: Una evaluación historiográfica', in Reid Andrews, G. (ed.) *Estudios Afrolatinoamericanos: Una introducción*. Buenos Aires: CLACSO, Consejo Latinoamericano de Ciencias Sociales, pp. 41–69.

FIED, N, MUONG, S., SOCHANVIMEAN, V. 2013. Parental styles in the intergenerational transmission of trauma stemming from the Khmer Rouge regime in Cambodia. *American Journal of Orthopsychiatry*. 2013 Oct. 83(4), pp. 483-94.

FISCHER, B., GRINBERG, K. and MATTOS, H. (2018) 'Las leyes, el silencio y las desigualdades racializadas en la historia afrobrasileña', in de la Fuente, A. and Andrews, G. R. (eds) *Estudios afrolatinoamericanos : una introducción*. CLACSO: Ciudad Autónoma de Buenos Aires, pp. 161–216.

FITZPATRICK, P. (2014) 'Decolonising law and human rights', *Metodo. International Studies in Phenomenology and Philosophy*, 2(1), pp. 117–133.

FRANZKI, H. and OLARTE, M. C. (2014) 'Understanding the political economy of transitional justice: A critical theory perspective', in Buckley-Zistel, Susanne et al. (eds) *Transitional Justice Theories*. New York: Routledge, pp. 201–221.

FRULI, M, (2001) "Are crimes against humanity more serious tan war crimes?" *European Journal of International Law*, Vol. 12. No. 2, pp. 329-350.

GARCÍA, A. (2012) *Especialidades del destierro y la re-existencia: Afrodescendientes en Medellin, Colombia*. Medellin: la Carreta Social.

GARCÍA, M., (2014) "Derecho a falta de democracia: La juridización del régimen político colombiano" *Análisis político* 82, Bogotá, Sep-Dec 2014: págs. 167-195.

GATES JR., H. (2011) *Black in Latin America*. New York and London: New York University Press.

GIFFORD, L. A. (1993) 'The legal basis of the claim for Reparations'. *First Pan-African Congress on Reparations April 27-29, 1993*, Abuja. Available at: http://www.shaka.mistral.co.uk/legalbasis.htm.

GILLARD, E.-C. (2003) 'Reparation for violations of international humanitarian law', *International Review of the Red Cross*, 85(851), pp. 529–553.

GLÉLÉ-AHANHANZO, M. (1995) *Report by Mr. Maurice Glélé-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to the United States of America from 9 to 22 October 1994, submitted pursuant to Commission on Human Rights resolutions 1993/20 and 1994/64*. E/CN.4/1995/78/Add.1. New York: Economic and Social Council.

GÓMEZ, G. (2013) 'Justicia transicional "desde abajo": Un marco teórico constructivista crítico para el análisis de la experiencia colombiana', *Revista Co-herencia*, 10(19), pp. 137–166.

GÓMEZ, É., SABOGAL, F. and GIRALDO, A. (2014) *Prevención de reclutamiento de niños, niñas, y adolescentes: análisis de la política pública con enfoque étnico*. Bogotá: Defensoría del Pueblo de Colombia.

GORMLEY, L. (2005) 'Some Insights for Comparative Education Researchers from the Anti-racist Education Discourse on Epistemology, Ontology, and Axiology', in Sefa Dei, G. J. and Singh Johal, G. (eds) *Critical Issues in Anti-Racist Research Methodologies*. New York: Peter Lang Publishing, pp. 95–123.

GREADY, S., (2021): The Case for Transformative Reparations: In Pursuit of Structural Socio-Economic Reform in Post-Conflict Societies, Journal of Intervention and Statebuilding

GROSSMAN, C. and AMEZCUA, O. (2013) 'Panel II: The Role of the Committee against Torture in Providing Full and Adequate Reparation to Victims', *Human Rights Brief*, 20(4), pp. 1–5.

GRUESO, L. (2007) 'La población afrodescendiente y su referencia como sujeto de ley en el desarrollo normativo de Colombia. Punto de partida para definir niveles de reconocimiento y reparación', in Mosquera Rosero-Labbé, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 619–645.

HALE, C. (2005) 'Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America', *Political and Legal Anthropology Review*, 28(1), pp. 10–28.

HANSEN, T. (2011) 'Transitional Justice: Toward a Differentiated Theory', *Oregon Review of International Law*, 13(1), pp. 1–46.

HARRIS, J. M., HOYLE, R. H. and JUDD, C. M. (2002) *Research Methods in Social Relations*. 7th edn. USA: Thomas Learning Inc.

HASENBALG, C. (1996) 'Racial Inequalities in Brazil and Throughout Latin America: timid responses to disguised racism', in Jelin, E. and Hersheberg, E. (eds) *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America*. Westview Press, pp. 161–176.

HAYWOOD, M., 2009. 'South Africa's treatment action campaign: combining law and social mobilisation to realize the right to health.' *Journal of Human Rights Practice*, 1(1), pp.14–36.

HELM, A. (2019) 'Nothing but the Truth: A Q&A With Bryan Stevenson, Subject of HBO's True Justice', *The Root*, 26 June. Available at: https://www.theroot.com/nothing-but-the-truth-a-q-a-with-bryan-stevenson-subj-1835837305 (Accessed: 22 February 2021).

HESSBRUEGGE, J. A. (2012) 'Justice delayed, no denied: statutory limitations and human rights crimes', *Georgetown Journal of International Law*, 43, p. 335.

HOOKER, J. (2005) 'Indigenous Inclusion, Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America', *Journal of Latin American Studies*, 37(2), pp. 285–310.

HOULDEY (2008). *Fuelling Fear: the human cost of biofuels in Colombia*. War on Want, London

HOWARD, R. E. and LOMBARDO, A. P. (2020) *Reparations to Africa*. Pennsylvania: University of Pennsylvania Press.

HTUN, M. (2004) 'From Racial Democracy to Affirmative Action: Changing State Policy on Race in Brazil', *Latin American Research Review*, 39(1), pp. 60–89.

HYLTON, K. N. (2004) 'A Framework for Reparations Claims', *Boston College Third World Law Journal*, 24(1-Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?), pp. 31–43.

HYNES, P. *et al.* (2010) 'Sociology and human rights: confrontations, evasions and new engagements', *The International Journal of Human Rights*, 14(6), pp. 811–832.

HUMAN RIGHTS COUNCIL. (2019). Meeting on "IDPAD Ensuring Recognition, Justice & Development" (9.12.2019), available at: https://conf.unog.ch/digitalrecordings/index.html?embed=-h&mrid=12F06197-44AB-418B-8124-C6C779BDDBE0 (accessed 2 November 2020).

HUMAN RIGHTS WATCH – HRW. (2005) "Colombia: Displaced and Discarded the Plight of Internally Displaced Persons in Bogotá and Cartagena." *Human Rights Watch*. Vol. 17, No. 4(B).

HUMAN RIGHTS WATCH – HRW. (2014) *La Crisis en Buenaventura: Desapariciones, desmembramientos y desplazamiento en el principal puerto de Colombia en el Pacífico*. USA: Human Rights Watch. Available at: http://www.hrw.org/sites/default/files/reports/colombia0314spwebwcover.pdf.

ICRC (2005), "ICRC's study on customary international humanitarian law (IHL), originally published by Cambridge University Press in 2005." Online database. Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (accessed 11 February 2022).

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2006) *Violencia y discriminación contra las mujeres en el conflicto armado en Colombia.* OEA/Ser.L/V/II. Doc. 67 (octubre 18, 2006).

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2011) *The Situation of People of African descent in the Americas*. OEA/Ser.L/V/II, Doc. 62. Washington DC: Organisation of American States.

ITM (2020) *Boletín del Centro de Ciencia Museo de Ciencias Naturales de La Salle*. Edición especial: Volver a la tierra. Medellin: Instituto Tecnológico Metropolitano. Available at: https://museo.itm.edu.co/docs/boletin-la-piranga/La_Piranga_Ed11-6.pdf (Accessed: 1 November 2021).

JAMAL, S. (2005) 'Critical Ethnography: An Effective way to Conduct Anti-Racism Research', in Sefa Dei, G. J. and Singh Johal, G. (eds) *Critical Issues in Anti-Racist Research Methodologies*. New York: Peter Lang Publishing, pp. 225–239.

KAGOYIRE, M. and RICHTERS, A., ""We are the memory representation of our parents": Intergenerational legacies of genocide among descendants of rape survivors in Rwanda." Torture. 2018, 28(3), pp.30-45.

KECK, M. E. and SIKKINK, K. (1998) *Activists Beyond Borders. Advocacy Networks in International Politics*. Ithaca: Cornell University Press.

LADSON-BILLINGS, G. and TATE IV, W. F. (1995) 'Toward a Critical Race Theory of Education', *Teachers College Record*, 97(1), pp. 47–68.

LAO-MONTES, A. (2007) 'Sin justicia étnico-racial no hay paz: las afro-reparaciones en perspectiva histórico-mundial', in *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 131–152.

Langford, M. (ed.), 2008. *Social Rights Jurisprudence: emerging trends in international and comparative law*, Cambridge: Cambridge University Press.

LANGMACK, F.-J. (2018) 'The Normative Value of the Basic Principles and Guidelines on the Right to a Remedy and Reparation', *Heidelberg Journal of International Law*, 78, pp. 48–52.

LAPLANTE, L. J. (2015) 'Just Repair', *Cornell International Law Journal*, 48, pp. 513–578.

LENNOX, C. (2009) 'Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference Against Racism', *Netherlands Quarterly of Human Rights*, 27(2), pp. 209–213.

LENNOX, C. (2010) *Mobilising for Group-Specific Norms: Reshaping the International Protection Regime for Minorities*. London School of Economics and Political Science.

LOCKHART, P.R. (20 June 2019), "America is having an unprecedented debate about reparations. What comes next?" *Vox*. Available at: https://www.vox.com/identities/2019/6/20/18692949/congress-reparations-slavery-discrimination-hr-40-coates-glover. Accessed 3 July 2021.

LOZANO, B.R. and PEÑARANDA, B. (no date) 'Memoria y Reparación ¿y de ser mujeres negras qué?', in Mosquera, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la esclavitud y justicia reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 715-724.

LUGONES, M. (2008) 'Colonialidad y género' *Tabula Rasa*, 9, pp. 73–101.

MAGARRELL, L. (no date) *Reparations in theory and practice*. New York: International Center for Transitional Justice.

MALDONADO, N. (2007) 'Sobre la colonialidad del ser: contribuciones al desarrollo de un concepto', in Castro Gómez, S. and Grosfoguel, R. (eds) *El giro Decolonial. Reflexiones para una diversidad epistémica más allá del capitalismo globa*. Bogotá: Siglo del Hombre editores, pp. 127–167.

MALDONADO, N. (2008) 'La descolonisación y el giro des–colonial', *Tabula Rasa*, 9, pp. 61–72.

MALDONADO, N. (2011) 'Thinking through the Decolonial Turn: Post-continental Interventions in Theory, Philosophy, and Critique—An Introduction', *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, 1(2), pp. 1–15.

MANJOO, R., (2017) Introduction: reflections on the concept and implementation of transformative reparations. *The International Journal of Human Rights*, 21:9, 1193-1203

MÁRQUEZ, F. (2020) *Violación del Derecho Fundamental a la Consulta Previa como una manifestación del racismo estructural en Colombia*. Undergraduate thesis, Civil Law. Universidad Santiago de Cali.

MÁRQUEZ, F. and QUIÑONES, H. (2019) 'Reclamo bicentenario del pueblo negro', *Semana Rural*, 4 June. Available at: https://semanarural.com/web/articulo/francia-marquez-y-helmer-quinones-reclaman-el-importante-papel-del-pueblo-negro-en-la-independencia/973 (Accessed: 25 May 2020).

MARX, K. (1977c) "Theses on Feuerbach [1845]," in *Appendix to Karl Marx: Early writings*, trans. R. Livingstone and G. Benton. Harmondsworth: Penguin Books.

MASON, R. (2015) 'Jamaica should "move on from painful legacy of slavery", says Cameron', *The Guardian*, 30 September. Available at: https://www.theguardian.com/world/2015/sep/30/jamaica-should-move-on-from-painful-legacy-of-slavery-says-cameron (Accessed: 22 February 2021).

MASSEY, C. (2004) 'Some Thoughts on the Law and Politics of Reparations for Slavery', *Boston College Third World Law Journal*, 24(1), pp. 157-.

MATSUDA, M. J. (1987) 'Looking to the Bottom Critical Legal Studies and Reparations', *Harvard Civil Rights-Civil Liberties Law Review*, 22(Spring), p. 323.

MATSUNGA, J. (2016) 'Two faces of transitional justice: Theorising the incommensurability of transitional justice and decolonisation in Canada', *Decolonisation: Indigeneity, Education & Society*, 5(1), pp. 24–44.

MCCRACKEN, K. (no date) 'Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law', *International Review of Penal Law*, 76, pp. 77–79.

MCDOUGALL, G. (2002) 'The World Conference against Racism: Through a Wider Lens', *The Fletcher Forum of World Affairs*, 26(2), pp. 135–151.

MCDOUGALL, G. (2011) *Report of the independent expert on minority issues, Gay McDougall. Addendum: Mission to Colombia.* Un Doc. A/HRC/16/45/Add.1 (25 January 2011).

MELISH, T. J., (2008). 'The Inter-American Court of Human Rights: Beyond Progressivity,' in Langford, M. (ed.), 2008. *Social Rights Jurisprudence: emerging trends in international and comparative law*, Cambridge: Cambridge University Press.

MIGNOLO, W. D. (2003) 'La colonialidad a lo largo y lo ancho: El hemisferio occidental en el horizonte colonial de la modernidad', in Lander, E. (ed.) *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas Latinoamericanas.* Buenos Aires: CLACSO.

MIGNOLO, W. D. (2007) 'Delinking', *Cultural Studies*, 21(2), pp. 449–514.

MICHALOWSKI, S., SANCHÉZ, N., LOPÉZ, D.M., OSPINA, A.J., MARTÍNEZ, H., DOMÍNGUEZ, V., ARROYAVE, L., "Entre coacción y colaboración. Verdad judicial, actores económicos y conflicto armado en Colombia." Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2018

MINA, C. and ESTUPIÑAN, D. (2019) *Combatiendo a las Mujeres Negras como si fueran un enemigo bélico: La violencia de género en Mujeres Negras del Norte del Cauca, Tumaco, Buenaventura, Atlántico, Bolívar y Guajira*. PCN.

MINA, C. (no date) *El Proceso de Comunidades Negras en Colombia –PCN: "¡Luchando, creando, conciencia de pueblo Negro!"* PCN. Unpublished.

MINISTERIO DEL INTERIOR Y DE JUSTICIA, MINISTERIO DE CULTURA and UNIVERSIDAD DE LOS ANDES (2009). Panorama socioeconómico y político de la población afrocolombiana, raizal y

Palenquera: Retos para el diseño de políticas públicas. MinInt. Bogotá

MINISTERIO DE EDUCACIÓN NACIONAL (2001) *Cátedra Estudios Afrocolombianos*. Available at: https://www.mineducacion.gov.co/1621/articles-339975_recurso_2.pdf (Accessed: 25 June 2016).

MOFFETT, L. and SCHWARZ, K. (2018) 'Reparations for the Transatlantic Slave Trade and Historical Enslavement: Linking past atrocities with contemporary victim populations', *Netherlands Quarterly of Human Rights*, 36(4), pp. 247–269.

MOLYNEUX, M. and LAZAR, S. (2003) *Doing the Rights Thing: Rights-Based Development and Latin American NGOs*. London: ITDG Publishing.

MORRISON, J. (2012) 'Social Movements in Latin America: The Power of Regional and National Networks', in Dixon, K. and Burdick, J. (eds) *Comparative Perspectives on Afro-Latin America*. Gainesville: University Press of Florida, pp. 243–263.

MOSQUERA, C. (2003) 'Repensar la afrocolombianidad en la nación pluriétnica y multicultural', in Restrepo Tirado, E. (ed.) *VI Catedra anual de historia: 150 años de la abolición de la esclavización en Colombia: Desde la marginalidad a la construcción de la nación*. Ministerio de Cultura.

MOSQUERA, C. (2007) 'Reparaciones para negros, afrocolombianos y raizales como rescatados de la trata negrera transatlántica y desterrados de la guerra en Colombia', in Mosquera Rosero-Labbé, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 213–276.

MOSQUERA, C. (2012) *Las mujeres y la reparación colectiva en Colombia: Aprendizajes de las experiencias de la Comisión Nacional de Reparación y Reconciliación - CNRR*. Bogotá: CNRR.

MOSQUERA, C., BARCELOS, L., ARÉVALO, A., (2007). 'Contribuciones a los debates sobre las Memorias de la Esclavitud y las Afro-reparaciones en Colombia desde el campo de los estudios afrocolombianos, afrolatinoamericanos, afrobrasileros, afroestadounidenses y afrocaribeños,' in Mosquera Rosero-Labbé, C. and Barcelos, L. C. (eds) *Afro-reparaciones: Memorias de la Esclavitud y Justicia Reparativa para negros, afrocolombianos y raizales*. Bogotá: Universidad Nacional de Colombia, pp. 13-69.

MULLINGS, L. (2013) 'Interrogando el racismo. Hacia una Antropología antirracista CS', *CS*, 12, pp. 325–375.

MURILLO, P. and OJULARI, E. (2017) "General Recommendation 34: a contribution to the visibility and inclusion of Afro-descendants in Latin America" in Keane, D. and Waughray, A. *Fifty years of the international convention on the elimination of all forms of racial discrimination.* Manchester University Press: Manchester.

MUSANABAGANWA, C., JANSEN, S., FATUMO, S., RUTEMBESA, E., MUTABARUKA, J., GISHOMA, D., UWINEZA, A., KAYITESHONGA, Y., ALACHKAR, A., WILDMAN, D., UDDIN, M. and MUTESA, L. 2020. "Burden of post-traumatic stress disorder in postgenocide Rwandan population following exposure to 1994 genocide against the Tutsi: A meta-analysis" *J Affect Disord*. Oct 1:275, pp.7-13.

NATIONAL AFRICAN AMERICAN REPARATIONS COMMISSION – NAARC. (2015). *Preliminary Reparations Program.* Available at: https://ibw21.org/docs/naarc/NAARC_Preliminary_Reparations_Program.pdf. accessed 3 July 2021.

NG'WENO, B. (2012) 'Beyond Citizenship as We Know It: Race and Ethnicity in Afro-Colombian Struggles for Citizenship Equality', in Dixon, K. and Burdick, J. (eds) *Comparative Perspectives on Afro-Latin America*. Gainesville: University Press of Florida, pp. 156–175

NOWAK, M., 2001. The Right to Education in Eide, A. Krause C. and Rosas A. (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn Martinus Nijhoff, Dordrecht).

OFFEN, K. (2018) 'Ambiente, espacio y lugar: Geografías culturales de la Afrolatinoamérica colonial', in Reid Andrews, G. and de la Fuente, A. (eds) *Estudios Afrolatinoamericanos: Una introducción*. Buenos Aires: CLACSO, Consejo Latinoamericano de Ciencias Sociales, pp. 567–621.

OHCHR (2015) *Yurumanguí, el reto de volver a casa*, *Naciones Unidas Derechos Humanos Oficina del Alto Comisionado Colombia*. Available at: https://www.hchr.org.co/index.php/compilacion-de-noticias/93-tierras/7123-yurumangui-el-reto-de-volver-a-casa (Accessed: 12 August 2015).

OJULARI, E. (no date) 'Un llamado para la conformación de un Comisión Nacional de Reparación para el Pueblo Negro, Afrodescendiente, Palenquera y Raizal'. *Día de la Dignidad y Resistencia del Pueblo Negro Congreso de la República*.

OJULARI, E., HELLEBRANDOVÁ, K. and QUIÑONES, H. E. (2018) *Informe: Retos para un Agenda Nacional e Internacional de Reparaciones para el Pueblo y Comunidades Afrodescendientes en Colombia*. Bogotá, D.C: CODHES.

OJULARI, E. and CUERO CAMPAZ, H., (2021) "Racismo y violencia sistémica en la protesta social en Cali." *Revista Sur*. (24 May 2021). Available at: https://www.sur.org.co/racismo-y-violencia-sistemica-en-la-protesta-social-en-cali/ (accessed 11 Februrary 2022).

OVALLES, M. F., VARGAS, A. I. (2016). Cumplimiento al incidente de reparación integral de las victimas de Jorge Iván Laverde Azapa Alias "El Iguano" en la ciudad de Cúcuta. *Hipótesis libre* Núm. 13

PARES (2019) *Procesos de Paz en Colombia*, *Fundación Paz & Reconciliación*. Available at: https://pares.com.co/2019/01/04/procesos-de-paz-en-colombia/ (Accessed: 2 June 2020).

PARK, A. S. J. (2015) 'Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools', *Human Rights Review*, 16, pp. 273–293.

PARKER, L. and LYNN, M. (2009) 'What's Race Got to Do With It? Critical Race Theory's Conflict With and Connections to Qualitative Research Methodology and Epistemology', in Taylor, E., Gillborn, D., and Ladson-Billings, G. (eds) *Foundations of Critical Race Theory in Education*. New York: Routledge, pp. 148–160.

PASCHEL, T. S. (2010) 'The Right to Difference: Explaining Colombia's Shift from Color Blindness to the Law of Black Communities', *American Journal of Sociology*, 116(3), pp. 729–769.

PASCHEL, T. S. (2016) *Becoming Black Political Subjects: Movements and Ethno-Racial Rights in Colombia and Brazil*. Princeton University Press.

PATTERSON, W.L., (1951). *We Charge Genocide: The historic petition to the United Nations for relief from a crime of the government against the negro people.* Civil Rights Congress.

PICCONE, T. (2019) *Peace with justice: The Colombian experience with transitional justice.* Washington: Brookings.

POSNER, E. A. (2003) 'Reparations for Slavery and Other Historical Injustices', *Colombia Law Review*, 103, pp. 689–748.

PROCESO DE COMUNIDADES NEGRAS (1994) *Documento para la discusión frente al plan nacional de desarrollo para las comunidades negras*. PCN. Unpublished.

PROCESO DE COMUNIDADES NEGRAS (2008) *Territorio y conflicto desde la perspectiva del Proceso de Comunidades Negras PCN; Colombia*. Reporte Final del Proyecto PCN-LASA Otros Saberes, "El derecho al territorio y el reconocimiento de la comunidad negra en el contexto del conflicto social y armado desde la perspectiva del Pensamiento y acción Política, Ecológica y Cultural del Proceso de Comunidades Negras de Colombia". Cali: PCN.

PROCESO DE COMUNIDADES NEGRAS (2017) *V Asamblea Nacional: Documento de Trabajo sobre Reparaciones Históricas*. Unpublished.

PROCESO DE COMUNIDADES NEGRAS, FUNDEMUJER, CNRR, MAP-OEA, OIM (2011). *Propuesta de reparación colectiva para la comunidad negra de Buenaventura*. Cali: Proceso de Comunidades Negras (PCN) y Fundación para el Desarrollo de la Mujer de Buenaventura y la Costa Pacífica (FUNDEMUJER).

PROCESO DE COMUNIDADES NEGRAS – PCN (2019). "El crimen del DANE: El genocidio estadístico de la gente negra, afrocolombiana, raizal y palenquera en Colombia" *PCN* (november 15 2019). Available at: https://renacientes.net/blog/2019/11/15/el-crimen-del-dane-el-genocidio-estadistico-de-la-gente-negra-afrocolombiana-raizal-y-palenquera-en-colombia/ (accessed 5 February 2022).

PROCESO DE COMUNIDADES NEGRAS – PCN (2019b) EL CRIMEN DEL DANE: EL GENOCIDIO ESTADÍSTICO DE LA GENTE NEGRA, AFROCOLOMBIANA, RAIZAL Y PALENQUERA EN COLOMBIA. *PCN*.(15 November 2019). Available at: https://renacientes.net/blog/2019/11/15/el-crimen-del-dane-el-genocidio-estadistico-de-la-gente-negra-afrocolombiana-raizal-y-palenquera-en-colombia/ (accessed 11 February 2022)

PROCURADURÍA GENERAL DE LA NACIÓN (2019). "Comisiones de seguimiento a la Ley de Víctimas y Decretos Leyes Étnicos alertan sobre aumento de nuevos hechos de violencia y precisan que se requieren $115,9 billones para reparar a las víctimas" *Procuraduría.* Available at: https://www.procuraduria.gov.co/portal/-Comisiones-de-seguimiento-a-la-Ley-de-Victimas-y-Decretos-Leyes-Etnicos-alertan-sobre-aumento-de-nuevos-hechos-de-violencia-y-precisan-que-se-requiere-_115_9-billones-para-reparar-a-las-victimas.news Accessed 1st august 2021.

QUIJANO, A. (1999) 'Colonialidad del Poder, Cultura y Conocimiento en América Latina', *Crítica Cultural En Latinoamérica: Paradigmas Globales Y Enunicaciones Locales*, 24(51), pp. 137–48.

QUIJANO, A. (2000) 'Colonialidad del poder y clasificación social', *Journal of World Systems Research*, 10(2), pp. 342–86.

QUIÑONES, H. (2010) *Bicentenario: ¡Nada que celebrar! Informe sobre los Derechos Humanos de las Comunidades Afrocolombianas en el marco de la "celebración" de los doscientos años de vida republicana en Colombia.* Bogotá: Afrodes.

RAPOPORT CENTRE (2007) *Unfulfilled Promises and Persistent Obstacles to the Realisation of the Rights of Afro- Colombians: A Report on the Development of Ley 70 of 1993*. Austin, Texas: Rapoport Center for Human Rights and Justice.

RAUHUT, C. (2018a) 'Caribbean Leaders in the Transitional Struggle for Slavery Reparations', in Bandau, A., Brüske, A., and Ueckmann, N. (eds) *Reshaping Global Dynamics of the Caribbean. Relaciones y Desconexiones - Relations et Déconnexiones - Relations and Disconnections*. Heidelberg: Heidelberg University, pp. 281–296.

RAUHUT, C. (2018b) 'Mobilising Transnational Agency for Slavery Reparations: The Case of Jamaica', *The Journal of African American History*, Winter/Spring 2018, pp. 133–162.

REID, A., N. (2019) 'Data for Reparation'. *24th Session of the WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT*, Geneva. Available at: https://www.ohchr.org/Documents/Issues/Racism/WGEAPD/Session24/AhmedReid_Day2.pdf (Accessed: 4 June 2020).

RESTREPO, E. (2006) 'Argumentos abolicionistas en Colombia', *História Unisinos*, 10(3), pp. 93–306.

RESTREPO, E. (2013) *Etnización de la Negritud: la invención de las 'comunidades negras' como grupo etnico en Colombia*. Editorial Universidad de Cauca (Genealogias de la Negritud).

RFK Centre (2008) *Right to Education of Afro-descendants and Indigenous Peoples in the Americas*. Washington: Robert F Kennedy Centre for Justice and Human Rights.

ROBINSON, R. (2004) 'What America Owes to Blacks and What Blacks Owe to Each Other', *Berkley Journal of African Law and Policy*, 6(1), pp. 1–13.

RODNEY, W. (1972) *How Europe Underdeveloped Africa*. United Kingdom: Bogle-L'Ouverture Publications.

RODRÍGUEZ, C., ALFONSO, T. and CAVELIER, I. (2009a) *El desplazamiento afro. tierra, violencia y derechos de las comunidades negras en Colombia*. Bogotá: Universidad de los Andes, Facultad de Derecho, CIJUS, Ediciones Uniandes.

RODRÍGUEZ, C., ALFONSO, T. and CAVELIER, I. (2009b) *Raza y derechos humanos en Colombia: Informe sobre discriminación racial y derechos de la población afrocolombiana*. Bogotá: Universidad de Los Andes - Observatorio de Discriminacion Racial.

ROSA, J. R. (2012) 'A cultura política da reparação: por uma história comunicativa e uma memória apaziguada', *História: Debates e Tendências*, 12(2), pp. 345–359.

ROSERO, C. (no date) 'Los afrodescendientes y el conflicto armado en Colombia: La insistencia en lo propio como alternativa', *Nadir.org*. Available at: http://www.nadir.org/nadir/initiativ/agp/free/ftaa/noticias_nl/conflictoarmado.htm.

ROSERO, C. (2008) *La Reparación: Visión del Proceso de Comunidades Negras en Colombia PCN. Texto elaborado por Carlos Rosero a partir de las notas del Grupo de Trabajo sobre Reparación. IV Asamblea Nacional del PCN.* Unpublished.

RUANE, J. (2005) *Essentials of research methods: a guide to social research*. Malden, MA: Blackwell Publishers.

SACK, W. H., CLARKE, G. N. and Seeley, J. 1995. "Posttraumatic stress disorder across two generations of Cambodian refugees," *Journal of the American Academy of Child & Adolescent Psychiatry* Sep. 34(9), pp.1160-6.

SAFA, H. (1998) 'Race and National Identity in the Americas', *Latin American Perspectives*, 25(3), pp. 3–12.

SAID, E. (2003) *Orientalism*. Penguin Books.

SALAS, J. M. H. (2005) 'Ethnicity and Revolution: The political economic of racism in Venezuela', *Latin America Perspectives*, 32(2: Venezuelan Exceptionalism Revisited: The Unravelling of Venezuela's Model democracy), pp. 72–91.

SÁNCHEZ, D. (2011) 'Deuda histórica con los afros: Magistrada hizo salvamento de voto y aportó detallado documento que demuestra por qué, a pesar de la abolición de la esclavitud en el país, han prevalecido la marginación y la exclusión', *El Espectador*, 21 September. Available at: https://www.elespectador.com/noticias/judicial/deuda-historica-los-afros-articulo-301008 (Accessed: 23 April 2019).

SANDOLE, D. H. and AUERBACH, C. F., 2013., Dissociation and identity transformation in female survivors of the genocide against the Tutsi in Rwanda: a qualitative research study J Trauma Dissociation. 2013;14(2):127-37

SANDOVAL, C. (2009) 'The concepts of "injured party" and "victim" of gross human rights violations in the jurisprudence of the Inter-American Court of Human Rights: a commentary on their implications for reparations', in Ferstman, C., Goetz, Mariana, and Stephens, Alan (eds) *Reparations for victims of genocide, war crimes and crimes against humanity*. Netherlands: Koninklijke Brill NV., pp. 243–282.

SANDOVAL, C. (2017) 'Two steps forward, one step back: Reflections on the Jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programmes', *The International Journal of Human Rights*, 22(9), pp. 1192–1208.

SANTOS, J. M. (2011) 'Mensaje del Presidente Juan Manuel Santos con ocasión del Día de la Afrocolombianidad'. Bogotá. Available at:

http://wsp.presidencia.gov.co/Prensa/2011/Mayo/Paginas/20110521_02.aspx (Accessed: 28 April 2018).

SANTOS, J. M. (2014) 'Saludo del Presidente Juan Manuel Santos en el Día de la Afrocolombianidad'. Bogotá. Available at: http://wsp.presidencia.gov.co/Prensa/2014/Mayo/Paginas/20140521_03-Palabras-Saludo-del-Presidente-Santos-en-el-Dia-de-la-Afrocolombianidad.aspx (Accessed: 28 April 2018).

SCHILLING, M. K. (2018) 'America Is Racist. So, What Do We Do Now? Activist Lawyer Bryan Stevenson Has Some Answers', *Newsweek Magazine*, 29 November. Available at: https://www.newsweek.com/2018/12/07/bryan-stevenson-racism-equal-justice-initiative-national-memorial-peace-and-1234169.html (Accessed: 22 February 2021).

SCHMID, E. and NOLAN, A., (2014) "'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice" *The International Journal of Transitional Justice*, Vol. 8, 2014, 362–382

SCOTT, C., 1999. 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' *Human Rights Quarterly* 21 pp. 633-660.

SEFA DEI, G. J. (2005) 'Critical Issues in Anti-racist Research Methodologies: An Introduction', in Sefa Dei, G. J. and Singh Johal, G. (eds) *Critical Issues in Anti-Racist Research Methodologies*. New York: Peter Lang Publishing, pp. 1–27.

SHEPHERD, V. A. (2008). "Jamaica and the Debate over Reparations for Slavery: An Overview," *Jamaica Journal*, vol. 31, no. 1–2, p. 24–30.

SHEPHERD, V.A., REID, A., CAVELL, F. (2012). Jamaica and the Debate over Reparation for Slavery: A Discussion Paper Prepared by the Jamaica National Bicentenary Committee. Kingston: Pelican Publishers Limited.

SHRIRA, A., MOLLOV, B., and MUDAHOGORA, C., 2019. Complex PTSD and intergenerational transmission of distress and resilience among Tutsi genocide survivors and their offspring: A preliminary report. *Psychiatry Res* . Jan 271, pp. 121-123

SIEDER, R. (2002) *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy*. Basingstoke: Palgrave Macmillan.

SOLOMON, Z., KOTLER, M. & Milkulincer, M. (1988). Combat-related post-traumatic stress disorders among second generation Holocaust survivors: Preliminary findings. American Journal of Psychiatry, 145, 865-868.

SOLÓRZANO, D. G. and YOSSO, T. J. (2009) 'Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Educational Research', in Taylor, E., Gillborn, D., and Ladson-Billings, G. (eds) *Foundations of Critical Race Theory in Education*. New York: Routledge, pp. 131–147.

TEITEL, R.G., (2002) "Transitional Justice in a New Era", *Fordham International Law Journal*, Volume 26, Issue 4.

TEITEL, R.G., (2003) "Transitional Justice Genealogy," *Harvard human rights journal*, Vol.16

TAYLOR, C. (1992) *Multiculturalism*. Edited by A. Gutman. Princeton, New Jersey: Princeton University Press.

TELLES, E. (2004) *Race in Another America: The Significance of Skin Color in Brazil*. Princeton, New Jersey: Princeton University Press.

TELLES, E. (ed.) (2014) *Pigmentocracies: Ethnicity, Race, and Color in Latin America*. Chapel Hill: University of North Carolina Press.

THIONG'O, N. wa (1986) *Decolonising the mind. The politics of Languages in African Literature*. New Hampshire: Neinemann.

THORNE, E. (2004) 'Land Rights and Garifuna Identity', *North American Congress on Latin America*, 38(2), pp. 21–25.

TOMUSCHAT, C., (2007) "Reparation in favour of individual victims of gross violations of human rights and international humanitarian law" in KOHEN, M., (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law* Liber Amicorum Lucius Caflisch, pp. 569-590.

TUHIWAI SMITH, L. (2012) *Decolonising Methodologies: Research and Indigenous Peoples*. London and New York: Zed Books.

TUCK, E. and YANG, K. W. (2012) 'Decolonisation is not a metaphor', *Decolonisation: Indigeneity, Education & Society*, 1(1), pp. 1–40.

UARIV, 2020. "Víctimas por Hecho Victimizante - Municipio BUENAVENTURA - Fecha Corte 30/11/2020" Available at: https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394 (Accessed 19.12.20).

UN SECURITY COUNCIL (1994). *Letter dated 14 May 1994 from the Secretary General to the President of the Security Council*. UN Doc. E S/1994/674 (27 May 1994).

UNDP (2010) *Derechos de la población afrodescendiente de América Latina: Desafíos para su implementación*. Panamá: United Nations Development Programme.

UNIDAD DE RESTITUCIÓN - URT DE TIERRAS (2015) *En Buenaventura, 2.869 personas afro de la cuenca del río Yurumanguí recuperarán sus derechos étnicos territoriales*, *UNIDAD DE RESTITUCIÓN DE TIERRAS*. Available here (accessed 12.02.20)

UNESCO (1969) *Four statements on the race question*. France: United Nations Educational, Scientific and Cultural Organisation.

UNESCO (1981). *Declaración de San Jose sobre el Etnocidio y el Etnodesarrollo* (11 diciembre de 1981).

UNITED NATIONS (2014), "Framework of Analysis for ATROCITY CRIMES: A tool for prevention." Available at: https://www.un.org/en/genocideprevention/documents/about-

us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf. Accessed 5 February 2022.

UNITED NATIONS (2021), "United Nations and decolonisation." Available at: https://www.un.org/dppa/decolonisation/en/about. Accessed 3 July 2021.

UPRIMNY, R., (2016) "Un sistema judicial para profundizar la democracia" in GARCÍA, M. and CABALLOS, M. A (Eds), *Democracia, justicia y sociedad. Diez años de investigación en Dejusticia*. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2016 61-70.

UPRIMNY, R. and SÁNCHEZ, L.M., (2012) "Constitución de 1991, justicia constitucional y cambio democrático: un balance dos décadas después." *Colombia, tierra de pelea: le(s) conflit(s) au cœur de la société. 71.*

UPRIMNY, R., and GUZMÁN, D.E., (2010) "En búsqueda de un concepto transformador y participativo para las reparaciones en contextos transicionales, 1 *International Law, Revista Colombiana de Derecho Internacional,* 17. 231-286 (2010)

VAN BOVEN, T. (2009) 'Victims' rights to a remedy and reparation', in Ferstman, C., Goetz, M., and Stephens, A. (eds) *Reparations for victims of genocide, war crimes and crimes against humanity*, pp. 19–40.

VAN DEN HERIK, L. (2018) 'Reparation for Decolonisation Violence – A Short Overview of Recent Dutch Litigation', *Zielsetzung und Konzept*, 78, pp. 102–106.

VERACINI, L. (2011) 'Introducing, Settler Colonial Studies', *Settler Colonial Studies*, 1(1), pp. 1–12.

VERGARA, A. (2014) 'Cuerpos y territorios vaciados: ¿En qué consiste el paradigma de la diferencia? ¿Cómo pensamos la diferencia?', *CS*, 13, pp. 338–360.

VIVEROS, H. (nd) '¿Por qué es necesaria una política de reparación histórica en Colombia para el pueblo negro, afrocolombiano, raizal y palenquero?' PCN.

WADE, P. (1995) 'The Cultural Politics of Blackness in Colombia', *American Ethnologist*, 22(2), pp. 341–357.

WADE, P. (1997) *Gente Negra Nación Mestiza*. Bogotá: Universidad de Antioquia.

WADE, P. (2004) 'Images of Latin American mestizaje and the politics of comparison', *Bulletin of Latin American Research*, 23(3), pp. 355–366.

WADE, P. (2009) 'Defining blackness in Colombia', *Journal de la Société des Américanistes*, 95(1), pp. 165–184.

WADE, P. (2011) 'Multiculturalismo y racismo', *Rev. colomb. antropol*, 47(2), pp. 15–35.

WADE, P. (2018) 'Interacciones, relaciones y comparaciones afroindígenas', in ANDREWS, G. R. (ed.) *Estudios Afrolatinoamericanos: Una introducción*. Buenos Aires: CLACSO, Consejo Latinoamericano de Ciencias Sociales, pp. 117–160.

WAHAB, A. (2005) 'Consuming Narratives: Questioning Authority and the Politics of Representation in Social Science Research', in Sefa Dei, G. J. and Singh Johal, G. (eds) *Critical Issues in Anti-Racist Research Methodologies*. New York: Peter Lang Publishing, pp. 29–51.

WATKINS, J. L. (2009) 'The Right to Reparations in International Human Rights law and the Case of Bahrain', *Brooklyn Journal of International Law*, 34(2), pp. 559–588.

WEBER, S. (2020) 'Trapped between promise and reality in Colombia's Victim's Law: Reflections on reparations, development and social justice', *Bulletin of Latin American Research*, 39(1), pp. 5–21.

WESCHE, P. (2019) 'Business Actors, Paramilitaries and Transitional Criminal Justice in Colombia', *International Journal of Transitional Justice*, 13, pp. 478–503.

WILKINSON, B. (2017) 'Europe replies to demand for reparations', *New York Amsterdam News*, 20 July. Available at: http://amsterdamnews.com/news/2017/jul/20/europe-replies-demand-reparations/ (Accessed: 23 April 2019).

WILLIAMS, E. (2021 (1944)) *Capitalism and Slavery*. University of North Carolina Press.

WÜHLER, N. (2018) 'Reparations and Legal Succession - What happens when the victims are gone', *Zielsetzung und Konzept*, 78, pp. 597–602.

Norms and Jurisprudence

BOOKER, C. (2019) *H.R. 40 and the Path to Restorative Justice*. 2141 Rayburn House Office Building, Washington, DC 20515. Available at: https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2261 (Accessed: 22 February 2021).

BRYSON (2007) *Fleetboston Financial Corporation v United States*.

CALIFORNIA CODE OF REGULATIONS (2001) *Insurance Slavery Regulations*, *Sections 2393 - 2398*. Available at: http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/insur-slavery-regs.cfm (Accessed: 15 September 2020).

CITY OF CHICAGO (1990) *Municipal Code of Chicago*, *Code of Ordinances*. Available at: http://chicago-il.elaws.us/code/coor_t2_ch2-92_artv_sec2-92-585 (Accessed: 15 September 2020).

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley del 21 de julio de 1821, *"Sobre libertad de partos, manumisión y abolición de tráfico de esclavos"*

CONGRESO DE COLOMBIA, *Ley 114 de 1922 (30 de diciembre de 1922) Sobre inmigración y colonias agrícolas.*

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 21 de 1991 (4 marzo) *por medio de la cual se aprueba el Convenio número 169 sobre pueblos indígenas y tribales en países independientes, adoptado por la 76ª. reunión de la Conferencia General de la O.I.T., Ginebra 1989.*

CONGRESO DE LA REPÚBLICA COLOMBIANO, *Ley 70 de 1993 (agosto 27) "Por la cual se desarrolla el artículo transitorio 55 de la Constitución Política.*

CONGRESO DE LA REPÚLICA COLOMBIANO, *Ley 387 de 1997 (18 julio) Reglamentada Parcialmente por los Decretos Nacionales 951, 2562 y 2569 de 2001. "Por la cual se adoptan medidas para la prevención del desplazamiento forzado; la atención, protección, consolidación y esta estabilización socioeconómica de los desplazados internos por la violencia en la República de Colombia."*

CONGRESO DE LA REPÚBLICA COLOMBIANO*, Ley 725 de 2001 (27 diciembre) "Por la cual se establece el Día Nacional de la Afrocolombianidad".*

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 975 de 2005 (25 julio) *"Por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios."*

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 1424 de 2010 (29 diciembre) "Por la cual se dictan disposiciones de justicia transicional que garanticen verdad, justicia y reparación a las víctimas de desmovilizados de grupos organizados al margen de la ley, se conceden beneficios jurídicos y se dictan otras disposiciones."

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 1448 de 2011 (junio 30) *"por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones."*

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 1957 de 2019, *Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz*

CONGRESO DE LA REPÚBLICA COLOMBIANO, Ley 2078 de 2021 (8 Jan) *"por medio de la cual se modifica la ley 1448 de 2011 y los decretos ley étnicos 4633 de 2011, 4634 de 2011 y 4635 de 2011, prorrogando por 10 años su vigencia"*

Constitución del Socorro de 1810

Federación de las Provincias Unidas de la Nueva Granada de 1811

Constitución de Cúcuta de 1821

Constitución de la Republica 1830

Constitución Neogranadina de 1832

Constitución Política de la República de la Nueva Granada de 1843

Constitución de la Nueva Granada de 1853

Constitución Política de la Confederación Granadina de 1858

Constitución Política de los Estados Unidos de Colombia de 1863

Constitución Política de Colombia de 1886

Constitución Política de Colombia de 1991

CONSTITUTIONAL COURT OF COLOMBIA (2004) *Sentencia T-025/04*, *Acción de tutela instaurada por Abel Antonio Jaramillo, Adela Polanía Montaño, Agripina María Nuñez y otros contra la Red de Solidaridad Social, el Departamento Administrativo de la Presidencia de la República, el Ministerio de Hacienda y Crédito Público, el Ministerio de Protección Social, el Ministerio de Agricultura, el Ministerio de Educación, el INURBE, el INCORA, el SENA, y otros.* M.P Manuel José Cepeda Espinosa.

CONSTITUTIONAL COURT OF COLOMBIA (2006) *Auto 218/06*, *Verificación de las medidas adoptadas para superar el estado de cosas inconstitucional declarado en la sentencia T-025 de 2004 sobre el problema del desplazamiento interno.* M. P. Manuel José Cepeda Espinosa.

CONSTITUTIONAL COURT OF COLOMBIA (2008) *Auto 092/08, Protección de los derechos fundamentales de las mujeres víctimas del desplazamiento forzado por causa del conflicto armado, en el marco de la superación del estado de cosas inconstitucional declarado en la sentencia T-025 de 2004, después de la sesión pública de información técnica realizada el 10 de mayo de 2007 ante la Sala Segunda de Revisión.* M. P. Manuel José Cepeda Espinosa.

CONSTITUTIONAL COURT OF COLOMBIA (2009a) *Auto 005/09*, *Protección de los derechos fundamentales de la población afrodescendiente víctima del desplazamiento forzado, en el marco del estado de cosas inconstitucional declarado en la sentencia T-025 de 2004*. M. P. Manuel José Cepeda Espinosa.

CONSTITUTIONAL COURT OF COLOMBIA (2009b) *Sentencia C-931/09*, Demanda de inconstitucionalidad contra la Ley del 21 de mayo de 1851 "sobre la libertad de esclavos." M. P. María Victoria Calle Correa.

CONSTITUTIONAL COURT OF COLOMBIA (2009c) *Auto 004/09*, *Protección de los derechos fundamentales de las personas y los pueblos indígenas desplazados por el conflicto armado o en riesgo de desplazamiento forzado, en el marco de la superación del estado de cosas inconstitucional declarado en la sentencia T-025 de 2004, después de la sesión pública de información técnica realizada el 21 de septiembre de 2007 ante la Sala Segunda de Revisión.* M. P. Manuel José Cepeda Espinosa.

CONSTITUTIONAL COURT OF COLOMBIA (2013a) *Auto 119/13, Por medio del cual se hace seguimiento a las acciones adelantadas por el gobierno nacional para la superación del estado de cosas inconstitucional declarado mediante sentencia T-025 de 2004 en relación con el componente de registro y se dictan las medidas necesarias para mejorar la atención de la población desplazada por la violencia.* M.P. Luis Ernesto Vargas Silva.

CONSTITUTIONAL COURT OF COLOMBIA (2013b) *Auto 234/13, Solicitud de información al Gobierno Nacional sobre el cumplimiento en el municipio de Buenaventura (Valle del Cauca) de las órdenes del auto 005 de 2009, que desarrolló el enfoque diferencial para la prevención,*

protección y atención de las comunidades afrodescendientes desplazadas, y del auto 119 de 2013, que analizó el componente de registro de la política de atención a la población desplazada, en el marco del seguimiento a la sentencia T-025 de 2004, por medio de la cual se declaró el estado de cosas inconstitucional en materia de desplazamiento forzado en Colombia. M.P. Luis Ernesto Vargas Silva.

CONSTITUTIONAL COURT OF COLOMBIA (2014) *Auto 074/14*, *Solicitud de información al Gobierno Nacional sobre las medidas desarrolladas para la prevención, atención y protección de la población desplazada del municipio de Buenaventura (Valle del Cauca).* M.P. Luis Ernesto Vargas Silva.

CONSTITUTIONAL COURT OF COLOMBIA (2015) *Sentencia T-550/15, Acción de tutela instaurada por Gustavo Mestizo Ruiz contra el Ministerio del Interior, el Ministerio de Vivienda, Ambiente y Desarrollo Territorial, la Alcaldía de Buenaventura, la Corporación Autónoma Regional del Valle del Cauca y la Universidad del Pacífico.* M.P. Myriam Ávila Roldán.

ECONOMIC AND SOCIAL COUNCIL (1956) *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, *ECOSOC Res 608(XXI)*.

ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN - ECLAC, *Declaración sobre la cuestión de las Reparaciones por la Esclavitud y el Genocidio de las Poblaciones Nativas*, II Cumbre CELAC, La Habana, 2014.

ESTADO DE ANTIOQUIA (1814), *La ley de libertad de vientres de 1814* (abril de 1814)

HAYDEN (2000) *Slavery Era Insurance Policies*. Available at: http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/sb2199.cfm (Accessed: 15 September 2020).

ILO (1958) *Convention on Discrimination (Employment and Occupation*, *C-111*.

INTERNATIONAL LAW COMMISSION (2001) *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, *Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).*

INTER-AMERICAN COURT OF HUMAN RIGHTS (2002). RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS. Approved by the Court at its Forty-ninth Regular Session held from November 16 to 25, 2000

LEAGUE OF NATIONS (1926) *Slavery Convention*.

MCCOMBE (2012) *Mutua & Ors v FCO*.

ORGANISATION OF AMERICAN STATES (1969) *American Convention on Human Rights*.

PODER LEGISLATIVO (2016). *Colombia: El Acuerdo Final de paz. La oportunidad para construir paz. (Cartilla completa del Acuerdo).*

PRESIDENCIA DA REPÚBLICA CASA CIVIL (2010). Subchefia para Assuntos Jurídicos. Lei Nº 12.288 (20 de julho) Institui o Estatuto da Igualdade Racial.

PRESIDENTE DE LA REPÚBLICA DE COLOMBIA, Decreto Ley 4633 de 2011 (diciembre 9) *Por medio del cual se dictan medidas de asistencia, atención, reparación integral y de restitución de derechos territoriales a las víctimas pertenecientes a los pueblos y comunidades indígenas*

PRESIDENTE DE LA REPÚBLICA DE COLOMBIA, Decreto Ley 4634 de 2011 (diciembre 9) *Por el cual se dictan medidas de asistencia, atención, reparación integral y restitución de tierras a las víctimas pertenecientes al pueblo Rom o Gitano.*

PRESIDENTE DE LA REPÚBLICA DE COLOMBIA, Decreto Ley 4635 de 2011 (diciembre 9) *"Por el cual se dictan medidas de asistencia, atención, reparación integral y de restitución de tierras a las víctimas pertenecientes a comunidades negras, afrocolombianas, raizales y palenqueras."*

SENADO Y LA CÁMARA DE REPRESENTANTES DE LA NUEVA GRANADA, LEY 2 (mayo 21 de 1851) "*Sobre libertad de esclavos"*

The Hauge Convention (IV) of 1907 on the Laws and Customs of War on Land (article 3) and Additional Protocol I to the 1949 Geneva Conventions

TRIBUNAL SUPERIOR DE DISTRITO JUDICIAL DE CALI. SALA CIVIL ESPECIALIZADA EN RESTITUTCIÓN Y FORMALIZACIÓN DE TIERRAS. (2017) Referencia: 76-111-31-21-003-2015-00053-01, Solicitante: CONSEJO COMUNITARIO DE LA CUENCA DEL RÍO YURUMANGUÍ. Opositor: PACIFIC MINES S.A.S. y CLAUDIA CONSUELO DUSSAN ÁNGEL M.P. Carlos Alberto Tróchez Rosales

UARIV, 2020. "9 Años de la Ley de Víctimas" *Unidad de Víctimas.* Available at: https://www.unidadvictimas.gov.co/especiales/leyvictimas2020/index.html (accessed 31 July 2021).

UN COMMITTEE ON THE ELIMINTATION OF RACIAL DISCRIMINATION (2009) *General Comment No. 32 on 'The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination'*, *UN Doc. CERD/C/GC/32*.

UN COMMITTEE ON THE ELIMINTATION OF RACIAL DISCRIMINATION (2011) *General Recommendation No 34 on 'Racial discrimination against people of African descent'*, *UN Doc. CERD/C/GC/34*.

UN COMMITTEE ON THE ELIMINTATION OF RACIAL DISCRIMINATION (2016) *Concluding observations on the combined sixteenth to twenty-third periodic reports of the Holy See*. UN Doc. CERD/C/VAT/CO/16-23.

UN GENERAL ASSEMBLY (1948) *Universal Declaration of Human Rights*, *UNGA Res 217 A(III).*

UN GENERAL ASSEMBLY (1960) *Declaration on the Granting of Independence to Colonial Countries and Peoples, known also as the Declaration on Decolonisation*, *UNGA Res 1514 (XV)*.

UN GENERAL ASSEMBLY (1966) *International Covenant on Civil and Political Rights*, *UNGA 2200A (XXI)*.

UN GENERAL ASSEMBLY (1968) *UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA 2391 (XXIII).*

UN GENERAL ASSEMBLY (2001) *Durban Declaration and Plan of Action*, *UNGA 56/266*.

UN GENERAL ASSEMBLY (2005) *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *UNGA 60/47*.

UN GENERAL ASSEMBLY (1966) *International Convention on the Elimination of All Forms of Racial Discrimination*, *UNGA Res 2106 (XX)*.

UN GENERAL ASSEMBLY (1984) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *UNGA Res 39/46*.

UN GENERAL ASSEMBLY (1989) *Convention on the Rights of the Child*, *UNGA Res 44/25*.

UN GENERAL ASSEMBLY (2011) *International Year for People of African Descent (adopted 19 March 2010) UNGA Res 64/169*, *UNGA Res 64/169*.

UN GENERAL ASSEMBLY (2013) *Proclamation of the International Decade for People of African Descent*, *UNGA Res 68/237*.

UN GENERAL ASSEMBLY (2014) *Programme of activities for the implementation of the International Decade for People of African Descent*, *UNGA Res 69/16*.

UN HUMAN RIGHTS COMMITTEE (2004) *General Comment No. 31 on Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004).

UN WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT (2012) *'Report of the Working Group of Experts on People of African Descent on its eleventh session; Addendum; Draft Programme of Action for the Decade for People of African Descent'*, *UN Doc. A/HRC/21/60/Add.2*.

UN WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT (2016) *Report of the Working Group of Experts on People of African Descent on its mission to the United States of America*. UN Doc. A/HRC/33/61/Add.2. HUMAN RIGHTS COUNCIL.

1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

UNESCO (1960) *UNESCO Convention against Discrimination in Education*.

UNESCO (1978) *Declaration on Race and Racial Prejudice*.

Appendix

I. List of Interviews, Focus Groups, Meetings and Workshops

Interviews	Date
Ajamu Baraka – Black Alliance for Peace - BAP	31st January 2017
Naka Mandinga – Proceso de Comunidades Negras - PCN	3rd November 2018
Helmer Quiñones – Consejo Nacional de Paz Afrocolombiana - CONPA	10th November 2018
Marie Cruz Rentería – Proceso de Comunidades Negras - PCN, Palenque Congal	19th January 2019
Carlos Rosero – Proceso de Comunidades Negras - PCN, Consejo Nacional de Paz Afrocolombiana - CONPA	16th November 2019
Charo Mina Rojas – Proceso de Comunidades Negras - PCN, Consejo Nacional de Paz Afrocolombiana - CONPA	22nd May 2020
Harrinson Cuero Campaz – Proceso de Comunidades Negras - PCN	2nd November 2020
Diego Arturo Grueso – Jurisdicción Especial para la Paz - JEP	14th November 2020
Francia Marquez – Proceso de Comunidades Negras - PCN, Mobilization of Black Women in Défense of Territory and Life, President of the National Peace Council	25th November 2020
Focus Groups, Meetings and Workshops	**Date**
PCN, CODHES, CNOA - International Conference from Transitional Justice to Historic Reparation	March 2017
PCN Palenque Congal, Buenaventura - Focus group Historic Reparation	15th July 2019
PCN Palenque Congal, Buenaventura, Codhes and Asociación de Territorios Ganados al Mar – Taller Reparación Colectiva y Reparación Historica	26th July 2019
PCN – Encuentro Nacional – Working Group on Historic Reparation	11th December 2019

II. Documents for Discourse Analysis

Report Title	Authors	Date	CERD Session	Data Set ID

Informe alternativo al decimocuarto informe presentado por el Estado colombiano al Comité para la Eliminación de la Discriminación Racial	Observatory on Racial Discrimination - ODR (Members: Programa de Justicia Global y Derechos Humanos de la Universidad de Los Andes; PCN and the Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia)) and Comisión Colombiana de Juristas	2009	75th Session	R1
Los Derechos Humanos en los Afrocolombianos en Situación de Desplazamiento Forzado	AFRODES	2009	75th Session	R2
Structural Discrimination in Colombia: Differential Impact of Mining on the Rights of Afro-descendant people	Association of Community Councils in the North of Cauca (ACONC), Franciscan Family of Colombia and Franciscans International	2015	87th Session	R3
Colombia: el flagrante incumplimiento y sistemática violación de ICERD	PCN, CNOA, Movimiento Nacional Cimarrón, Asociación Casa Cultural El Chontaduro, and the International Institute on Race, Equality and Human Rights.	2015	87th Session	R4
Incumplimiento sostenido del Estado de Colombia del ICERD y sus Observaciones Finales	AFRODES, CNOA, Red Nacional de Mujeres Kambirí, Foro Interétnico Solidaridad Chocó, (FISCH) and Colectivo de Justicia Racial (Justiciar)	2019	100th Session	R5
Violations of Afro-Colombian Women's Human Rights	PCN, MADRE, Human Rights and Gender Justice (HRGJ) Clinic of Cuny School of Law, Co-Sponsored by: Asociación de Mujeres Afrodescendientes del Norte del Cauca (ASOM)	2019	100th Session	R6

III. Additional documents consulted

Document Title	Authors	Date
Sentencia C-931/09, Demanda de inconstitucionalidad contra la Ley del 21 de mayo de 1851 "sobre la libertad de esclavos." M. P. María Victoria Calle Correa.	CONSTITUTIONAL COURT OF COLOMBIA	2009
Auto 005/09, Protección de los derechos fundamentales de la población afrodescendiente víctima del desplazamiento forzado, en el marco del estado de cosas inconstitucional declarado en la sentencia T-025 de 2004. M. P. Manuel José Cepeda Espinosa.	CONSTITUTIONAL COURT OF COLOMBIA	2009
"Propuesta autónoma de reparación colectiva de comunidades negras de Buenaventura,"	Fundemujer, PCN, CNNR, MAPP-OEA, OIM	2011
Decreto Ley 4635 de 2011 (diciembre 9) "Por el cual se dictan medidas de asistencia, atención, reparación integral y de restitución de tierras a las víctimas pertenecientes a	PRESIDENTE DE LA REPÚBLICA DE COLOMBIA	2011

comunidades negras, afrocolombianas, raizales y palenqueras.”		
Colombia: El Acuerdo Final de paz. La oportunidad para construir paz. (Cartilla completa del Acuerdo).	PODER LEGISLATIVO	2016
Sentencia Referencia: 76-111-31-21-003-2015-00053-01, Solicitante: CONSEJO COMUNITARIO DE LA CUENCA DEL RÍO YURUMANGUÍ. Opositor: PACIFIC MINES S.A.S. y CLAUDIA CONSUELO DUSSAN ÁNGEL M.P. Carlos Alberto Tróchez Rosales	TRIBUNAL SUPERIOR DE DISTRITO JUDICIAL DE CALI. SALA CIVIL ESPECIALIZADA EN RESTITUTCIÓN Y FORMALIZACIÓN DE TIERRAS.	2017
“Combatiendo a las mujeres como si fueran un enemigo bélico: Las políticas económicas del Estado vulneran y exponen a las mujeres afrodescendientes a múltiples formas de violencia, en lugar de garantizar su seguridad.” (Presented to the SIVJRNR)	PCN, Madre	2019

IV. Categories of analysis of interview, focus groups and workshop transcripts

CATEGORY	CODES	SECONDARY CODES
1. Existing Reparations Agenda	1.1 Internal Agenda	
	1.2 Internationalist agenda	Durban and Decade
		Global black movement
		IHR mechanisms
	1.3 National Agenda	Collective Reparations
		Development
		Ley 70
		Political Process
		Transitional Justice Advocacy
	1.4 Understandings of reparations	Autonomy
		biodiversity
		Colombia specific model
		Compensation
		Education
		Health
		Historic debt - Manumission - War of independence
		Inclusionist
		Recognition - symbolic
		Restoration
		Territory
2. RH as a continuous historic and contemporary issue	2.1 Coloniality	Attack on autonomy, culture, ethnoterritorial rights
		Discrimination
		Economic Model - legal economy
		Exclusion and inequality
		Illegal economy
		Patriarchy
		Racism
		State absence-omission
		State responsibility

	2.2 Crimes that repeat in time	Assassinations, Massacres, Disappearances
		Displacement and Dispossession
		Economic Exploitation
		Recruitment
		Sexual and Gender-based violence
		Threats and killings of leaders
		Differential Impact
		Historic roots - legacy of slavery
3. TJ Framework for Reparations	3.1 CAH	
	3.2 Collective victims	
	3.3 compensation	
	3.4 Ethno-territorial rights - autonomy	
	3.5 GNR - structural transformation	
	3.6 Intersectional measures	
	3.7 Justice and Responsibility	
	3.8 Overcome racism	
	3.9 Participation	
	3.10 Reconciliation - restorative justice	
	3.11 Restitution	
	3.12 Symbolic measures - recognition	
	3.13 Truth	
4. lack of state recognition or action		
5. Internal Autonomous processes	5.1 Ethno-education	
	5.2 Own internal processes	
	5.3 Own truth process	
	5.4 PCHR	
	5.5 Territorial resistance	

V. LIST OF MAPS AND TABLES

VI. Original language transcripts of cited interviews