

## Biomass

### Keywords

- > Forced displacements
- > Ancestral land rights
- > Palm oil

## 1. Introduction

The armed conflict that has been ravaging Colombia for decades has caused millions of victims, among whom are people who have been tortured, murdered, disappeared, exiled or internally displaced.<sup>1</sup> The magnitude of the forced displacement of population in Colombia is surpassed only in Sudan. According to the *Consultoría para los Derechos Humanos y el Desplazamiento (CODHES)*, the main NGO that monitors displacement in Colombia, since 1985, a total of 5.2 million people have been displaced, about 90,000 during the first half of 2011. Government figures are lower, but not small: according to the Presidential Agency for Social Action and Cooperation (*Acción Social*), which is responsible for internally displaced persons, the total is 3.6 million since 2000, and 44,000 people were registered as displaced during the first half of 2011.<sup>2</sup>

The problem of internally displaced persons is but the other side of the coin of a process of massive misappropriation of productive lands, which is driven surreptitiously by powerful economic interests.<sup>3</sup>

The displacements are directly related to the armed conflict and, particularly, to the coercion exerted by paramilitary groups and guerrilla organizations on families and communities – in the form of threats and other violations of human rights – so that they are forced to abandon their land. However, more often than not the expulsion of the local population and the forceful appropriation of lands is driven by economic not military factors.

The department of Chocó is one of the areas of Colombia in which human rights are systematically violated. This situation is well-known and uncontested. Governmental agencies and the international community have become aware of it in various ways and have taken a series of decisions in this



Map of the Department of Chocó, Colombia

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regard, which have nevertheless failed to obtain any appreciable results.

In the following, the situation in the Department of Chocó will be described. Against this backdrop, the emblematic case of the Afro-descendant communities of Curbaradó and Jigumiandó will be appraised.

## 2. The Department of Chocó: a general description

Chocó is one of the thirty-two departments of Colombia, in the west of the country. The area is bordered by the Pacific and the Atlantic Oceans, and is of huge natural value. Chocó is actually located in a broad valley with a number of important rivers such as the Atrato, San Juan, Andágueda, Baudó, Beberá, Beberamá and Bojayá. The topography of the area is quite diverse, with flood plains, mountains, huge forests and coastline.

The region has an ethnically diverse population of approximately 545,000, most of which is of African descent. There is a minority belonging to other indigenous people or 'mestizos'. The indigenous population of about 40,000 (Kuna, Katios, Embera and Wounaan) are distributed in 116 settlements. Afro-descendants number about 370,000, thus representing 74% of Chocó's population. These communities – particularly those of African descent – have a specific constitutional status and are entitled to special protection, due to

<sup>1</sup> Organization of American States, Inter-American Commission on Human Rights, Report on the Demobilization Process in Colombia, OAS/Ser.L/V/II.120, Doc. 60; 13 December 2004.

<sup>2</sup> "Colombia: Mejoras en la respuesta gubernamental aún no surten efecto en los desplazados internos"; <http://www.internal-displacement.org/countries/colombia>. On this issue, see Abrisketa, Joana, "La población internamente desplazada en Colombia: claves para interpretar la regulación internacional", (2009) 18 Revista Electrónica de Estudios Internacionales (www.reei.org).

<sup>3</sup> "There is a widespread perception among displaced persons that there is no willingness to return land and other property to them and, in some regions of the country, they suspect that while displacement may originally have been caused by armed conflict, the taking over of their lands by large corporations is at least a side effect, if not part of a policy of forced displacement. The Representative heard allegations of lands occupied illegally, either through transfer of titles under duress and for minimal financial compensation or through forgery of land titles. Also, there were numerous allegations that indigenous land and Afro-Colombian collective property were acquired in violation of article 60 of the Colombian Constitution and of Law No. 70. Indeed, the report of the Procuraduría quotes Acción social reporting that over 6 million hectares of agricultural land have been abandoned over the past 10 years.;" Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin. Addendum: Mission to Colombia. UN Doc. A/HRC/4/38/Add.3 (24 January 2007). para.53. On this issue, see Comisión Colombiana de Juristas, Despojo de tierras campesinas y vulneración de los territorios ancestrales, Bogotá DC, June 2011.



the persecution and abuses they have suffered throughout their history.<sup>4</sup>

Chocó is one of Colombia's poorest departments. In 2005, 79.1% of its population was not able to satisfy its basic needs.

The population lives in rural communities: most are engaged in fishing, small-scale agriculture and forestry, and women generally collect *piangua* (small shellfish) and crabs. Therefore, the very existence of the communities of African descent and indigenous communities depends on their traditional lands.

The indigenous communities live in settlements in the headwaters of rivers, whereas the Afro-descendant communities had their collective ownership of the downstream lands recognised by Colombian Law No. 70, enacted in 1993. The relationship between the two communities has always been one of solidarity and good neighbours, a fact that has allowed them to survive in an environment of extreme complexity and fragility.

The department of Chocó is located in an area that is of strategic importance to a wide variety of interests. It is one of the richest areas in natural resources. Due to the density of its forests, its relative isolation from populated areas, and its access to both the Pacific, and the Atlantic Oceans, the department has become a stronghold of clandestine drug operations since the 1960s. Throughout this time, the leaders of these operations have been expanding their influence, purchasing land and turning the place into a key commercial corridor.

Over time, with the emergence of paramilitary and guerrilla forces, Chocó became a battlefield, with episodes of extreme violence, such as the Bojayá massacre, on 17 April 2002, which left a hundred civilians dead and displaced nearly all the residents of the town and surrounding areas.

For some time, the deployment of armed forces in this department has become part of the landscape, especially under President Uribe, who stepped up military control. This policy resulted in an increase in armed

clashes, in which the local population was often the hardest hit.

Nevertheless, narcotics are far from being the only factor that spurs conflicts in the area. Because of its strategic location, the department of Chocó has been chosen for the construction of a number of large scale infrastructure projects, such as the "Plan Puebla Panamá" (PPP), and the "Initiative for the Integration of Regional Infrastructure in South America" (IIRSA), which will have to absorb the increase in traffic of goods as a result of the new free trade agreement between Colombia and the United States of America.

Moreover, there is growing interest in the agricultural use of the area for large scale palm oil plantations as a source of biofuel, which also spurs conflict with the local and indigenous communities who refuse to abandon their land. Land is often abandoned as a result of armed conflict itself. Once these communities have been displaced, palm oil companies illegally occupy the land, depriving the victims of the possibility of returning. However, more often than not, local and indigenous communities are driven out of their lands by paramilitary forces. According to several reports, such operations have occasionally been supported by regular military forces.

In this context, then, conflicts are plentiful and complex. Above all, however, the suffering of local populations is immense. The assassination of political leaders who seek to assert the rights of their communities, sexual violence against women, the forced recruitment of children, intimidation, threats and violence of all kinds are part and parcel of the every day life of these communities. No solution to these conflicts is expected, at least not in the near future.

### **2.1. Ownership of land**

During the pre-Columbian era, before it was conquered by the Spaniards, the territory now covered by the department of Chocó was inhabited by various indigenous groups. After the European

<sup>4</sup> Constitutional Court of Colombia, Judgments T-188 [1993] and T- 422 [1996].



occupation, its extraordinary wealth in resources led to mining becoming the predominant economic activity in the area. In order to increase productivity, the colonists began to use African slaves. Historians estimate that over 80,000 slaves were brought to Colombia, particularly to the mining areas. Therefore, little by little the indigenous inhabitants of the region were displaced by Afro-descendants. This trend explains the fact that nowadays 74% of the population is Afro-descendant.

In its case law, the Colombian Constitutional Court has established the criteria under which individuals qualify as 'Afro-descendant', as this cannot be based solely on issues such as skin colour or the location of the community they belong to in a specific territory. According to this case law, two conditions need to be met if an individual is to qualify as Afro-descendant: (1) an 'objective' condition (namely, the existence of cultural and social traits shared by the members of the group that distinguish them from other social sectors), and (2) a 'subjective' element, consisting of a group's collective identity that prompts individuals to become members of that group.<sup>5</sup>

After the conflicts over land had begun in Chocó, the first Indian reservations were set up in the Pacific area during the 70s, and protection was enhanced in the 80s through a regional organization, the *Organización Regional Waunnana* (OREWA). Its aims were to achieve the autonomy and self-determination of the indigenous communities by supporting the process of certifying legal ownership of their lands, and reinforcing the indigenous authorities' administrative capacities, the rule of indigenous law and their control of the natural resources, agroforestry, mining and hydrocarbons in their ancestral territories.<sup>6</sup>

At the same time, the Afro-descendant communities that had settled along the rivers created local committees, which was the first time that the people in this area had opted for self-government. In turn, these communities were part of a

larger organisation – the so-called Peasant Association of the Atrato, the *Asociación Campesina Integral del Atrato* (ACIA) – representing 35 communities. Along with other black communities, ACIA began the struggle for the "collective territory of black communities" based on ethnicity and the right to survive as a culture.

Their demands are reflected in Provisional Article 55 of the 1991 Constitution, which recognizes 'traditional production practices, the identity of these communities and their right to collective ownership of their ancestral lands'.<sup>7</sup> This provision directs Congress to pass a law that recognizes 'the black communities who have been occupying uncultivated land in rural areas adjoining the rivers of the Pacific Rim, according to traditional production practices, the right to collective ownership of the areas that the same law will demarcate (...)'.<sup>7</sup>

Law no. 70 of 1993 implements this constitutional mandate, by defining the beneficiary communities as those composed of 'Afro-Colombian families who have their own culture, a shared history, as well as their own traditions and customs in the relationship with land, revealing and maintaining awareness of identity that distinguishes them from other ethnic groups' (art. 2.5). The law recognizes the collective ownership of the black communities over their lands, and establishes mechanisms to ensure the traditional uses and the protection of their natural resources. It also grants participation rights to Afro-descendant communities in decision-making processes concerning the exploitation and expropriation of non-renewable natural resources.

<sup>5</sup> Programa Presidencial de Derechos Humanos y Derecho Internacional Humanitario Diagnóstico de la situación de los municipios habitados por las comunidades afrocolombianas priorizadas por la Honorable Corte Constitucional en el departamento de Chocó, p. 11 ([www.derechoshumanos.gov.co/Observatorio/documents/2010/DiagnosticoAfro/Choco.pdf](http://www.derechoshumanos.gov.co/Observatorio/documents/2010/DiagnosticoAfro/Choco.pdf), Accessed on: 09-03-12).

<sup>6</sup> Bello, M.N. [et al.]. (2008). Chocó: acercamiento a la subregión del medio atrato chocoano. Colombia: GIDES, p.21.

<sup>7</sup> Defensoría del Pueblo. "Informe Defensorial sobre la Situación de Derechos Humanos y desplazamiento forzado en el municipio de Bojayá, Atrato Medio". Bojayá. Mav 2003. p.5



Comisión Intereclesial Justicia y Paz. *Jigua y Curva* (23 November 2008). Source: <<http://justiciaypazcolombia.com/Jigua-Curva>>

These collective properties are indefeasible, imprescriptible and inalienable. Hence, they cannot be sold or delivered to persons outside the Community Councils. It is important to note that in those cases where the land is being held in bad faith, or surrendered to third parties, this does not involve loss of the rights of the landowner. In turn, these rights carry with them the obligation to exploit the land in a sustainable manner. Non-compliance with these requirements may result in expropriation and Currently, black communities are represented by the Community Council of the TO (Cocomacia), an organisation representing 120 communities and other local Community Councils. Its main goal is to achieve the 'recognition of their ancestral lands, facilitation of community development, social cohesion and a political statement against the armed conflict and neglect of the State.'<sup>8</sup> In turn, they are responsible for 'identifying and assigning areas within the allotted land; ensuring the conservation and protection of collective property rights, the preservation of cultural identity, and the use and conservation of natural resources; electing the legal representative of their community; and carrying out conciliatory functions in disputes within the community (art. 5, Law no.70).' Due to the political influence that these organisations have gained, both the indigenous and Afro-descendants have managed to 'certify their collective ownership of almost 80% of the lands they have occupied since ancient times'. However, this does not mean that they can actually enjoy their legitimate right in practice.

## 2.2. Main causes of forced displacement

The main causes of forced displacement are ongoing armed conflicts and the presence of significant economic interests in the area.

### 2.2.1. Armed conflicts

In the 60s, Chocó was considered to be strategic for its isolated location, the coast and its proximity to the border. In

the 80s, drug dealers began to buy huge portions of land here and armed groups began military operations against drug cartels in order to 'liberate' the area. Ever since, military operations have been intense in the area.

During the 80s, the FARC also appeared on the scene, and became a major influence in the region of Chocó (in particular, the 'Frente 57' in Alto Atrato, between Quibdó, Lloró and Bagadó). On the other hand, in such municipalities as Condoto, Istmina, Novita, Sipi, and the coast of San Juan and San Jose del Palmar, the tension was increased by the clashes between the guerrillas and the paramilitary group of the 'Autodefensas Campesinas' of Córdoba and Urabá, which later became known as 'Bloque Elmer Cárdenas'. Eventually, these paramilitary forces were supported by the government army. Since 2003, under direct orders of President Uribe, regular forces have provided a strong military presence in almost all municipalities in Altrato.<sup>9</sup>

During the continuing acts of war, on 17 April 2002, the paramilitary forces Elmer Cardenas attacked the Atrato, particularly the municipalities of Vigía del Fuerte and Bellavista. The battle against numerous guerrilla forces caused many civilian deaths, particularly in the infamous Bojayá massacre.<sup>10</sup> As a consequence, the population of the urban areas and their surroundings was displaced.

In this context, the rules of international humanitarian law concerning the protection of civilians during armed conflict become fully applicable. In particular, as the Colombian Constitutional Court stated, this concerns:

<sup>8</sup> Bello, cit. (note 6), p.22

<sup>9</sup> Ibid., p.27.

<sup>10</sup> On these events, see *Bojayá: La guerra sin límites*, Informe del Grupo de Memoria Histórica de la Comisión Nacional de reparación y Reconciliación, Bogotá: Aguilar, Altea, Taurus, Alfaguara, S. A., 2010





Comisión Intereclesial Justicia y Paz. Jigua y Curva (23 November 2008). Source: <<http://justiciaypazcolombia.com/Jigua-Curva>>

a) the principle of distinction, which prohibits, among other things, attacking civilians, using methods of warfare or weapons, inflicting indiscriminate harm, as well as acts intended to spread terror among the civilian population, etc; and

b) the principle of humane treatment that protects the people of African descent, as a number of fundamental guarantees are directly applicable to the situation that they suffer under the internal armed conflict.<sup>11</sup>

### 2.2.2. Economic interests

In the department of Chocó, several economic interests have been major these, the main ones are:

**a) The interests of the state:** Chocó is located in the center of such major Colombian mega-projects as the "Plan Puebla Panama" and the "Initiative for the Integration of Regional Infrastructure in South America." Both have been planned to connect Latin America with the United States, through roads, waterways and other networks. These projects, which are strategic for some interests, have obliged the government to make some exceptions and modifications to collective ownership in areas such as the Atrato-Truandó, and the rivers Meta and Putumayo.

There are also other important economic activities such as hydroelectric and oil zones. The government is greatly interested in constructing roads and other infrastructure to attract investment. One example of this interest is the project to communicate Buenaventura and Tumaco Bays, on Colombia's southern Pacific coast.

Since the recent free trade agreement signed between Colombia and the United States, projects such as this have been given increasing importance, and other plans have been made to modernize the communication throughout the territory.

**b) Agriculture and Livestock:** One of the key threats to Chocó is the

monoculture of palm oil. Since the early years of this century, Colombia has been the largest producer of palm oil in America and among the top producers in the world after Indonesia, Malaysia and Nigeria. The economic benefits for the country derived from palm-oil projects help to legitimize the misappropriation of vacated lands controlled by paramilitary groups which facilitate the laundering of illegal investments and benefit from the mass production of biofuels as a substitute for oil.

This activity has not only displaced native people and African descent communities, it has also generated important cases of human rights violations. In this regard, the Ombudsman has stated that although there is a legal framework that recognizes the right of ethnic groups to their land "it is well known that in the collective territories ... some lands have been given to people who are not from the communities for the cultivation of oil palm."<sup>12</sup>

The same report by the Ombudsman denounced some of the strategies used by the palm-oil companies (Urapalma, Curavaradó Palmas, Palmas SA, Pamadó etc.) to displace local communities, granting individuals the ownership of collective lands through illegal purchase and sale contracts. These companies have also constructed the infrastructure needed for crops, changed land use by deforestation, and dried up and diverted water sources. The same document indicates that some firms take advantage of the displacement caused by armed conflict to occupy the collective lands and then, with the support of armed groups, deny the previous settlers the right to return.

Another sector that is attracting increasing interest is banana cultivation, in particular the company Multifruits SA, a subsidiary of the U.S. transnational Delmonte. Logging associated with deforestation for the expansion of oil palm plantations, is also beginning to raise concerns. In this sector, companies like Smurfit Kapa - Carton de Colombia or Pizano SA and its subsidiary Maderas del Darién, in

<sup>11</sup> [2009] Constitutional Court of Colombia, Judgment 005/09, 26 January 2009, paras. 22-31.

<sup>12</sup> Ombudsman Decision No 39 - Violation of human rights because of the planting of African palm in collective territories of Jiguamiandó and Curbaradó (Chocó) - Bogotá, June 2nd, 2005. (Non official translation)



the municipalities of Riosucion and Carmen del Darien have contributed to water pollution and the destruction of tropical rainforests, Andean forests and other ecosystems.

### 3. The case of the Jiguamiandó and Curbaradó communities

#### 3.1. Background

The community councils of Jiguamiandó and Curbaradó are both Afro-Colombian ethnic groups with a special constitutional protection. These peoples are settled in the municipalities of Carmen del Darien and Bethlehem de Bajirá, in the region of Urabá, between the departments of Antioquia, Córdoba, Chocó and the border with Panama. In March 2003, they had a population of approximately 1742 people and were composed of 349 families.

The "Genesis" operation conducted by the XVII Brigade of the Army in 1997 was an emblematic event that affected these communities. This military action was commanded by General Rito Alejo del Rio, currently under investigation as a result of the statements made by several former members of the paramilitary (especially the Elmer Cardenas Bloc commander, Freddy Rendón Herrera, alias "El Alemán") which demonstrated that the military and paramilitary groups had colluded to fight against the FARC. This operation was a military maneuver against the FARC that was carried out between the 24th and 27th February 1997, in the black communities of the Cacarica River Basin, in the department of Chocó. The armed forces bombed the area from the air, murdering, as a result, 23 members of black communities who lived on the banks of the river Cacarica. At the same time, military incursions supported by paramilitary groups committed serious crimes against civilians (mutilations, executions, torture, forced disappearances, etc.), which are very well documented and have been condemned by the Inter-American

Commission on Human Rights.<sup>13</sup> On 1st June 2004, the Inter-American Commission on Human Rights received a petition filed by the Inter-Ecclesiastical Commission for Justice and Peace (*Comisión Intereclesial para la Justicia y la Paz*) which claimed that Colombia was responsible for the crimes perpetrated against the peoples of the Lower Atrato.

As a result of this military operation, around 4000 people were displaced to the municipalities of Turbo and Mutata. This circumstance was exploited by the paramilitary and entrepreneurs to illegally occupy the land, which ended up being the largest dispossession of land that has been documented to date.<sup>14</sup> The people of the communities that managed to return to their territory found that their lands were now being exploited by firms. The first families uprooted palm trees, built their own temporary housing and decided to set up humanitarian zones and, later, biodiversity zones as self-protection mechanisms. In 2011, the basins of Jiguamiandó and Curbaradó had eight humanitarian zones and around 50 biodiversity zones.<sup>15</sup>

However, the Government, through the former Colombian Institute of Agrarian Reform (*Instituto Colombiano de la Reforma Agraria-INCORA*), had granted collective titles to numerous Afro-Colombian communities all over the region, on the basis of Law 70 of 1993 and Decree 1745 of 1995, which regulate the procedure for securing the collective title to the territories. In the case of the Lower Atrato, in 2002, the State allocated the community councils of Jiguamiandó and Curbaradó (by the resolutions 2809 and 2801 of 22 November 2000) a total of 46,084 hectares and 54,973 hectares, respectively, located within the jurisdiction of the municipality of Riosucio, currently known as Carmen de Darien and Bethlehem Bajirá, in the Department of Chocó. These lands had the status of *black community lands*. The collective title was established as a mechanism of legal protection of these lands, which entails removing them

<sup>13</sup> Inter-American Commission on Human Rights website: [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/080.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/080.asp) (Accessed on 21st July 2012)

<sup>14</sup> Yamile Salinas Abdala. "El caso emblemático de los territorios colectivos de las comunidades negras de Jiguamiandó y Curbaradó en la región del UrabáCurbaradó". Indepaz ([www.indepaz.org.co](http://www.indepaz.org.co)).

<sup>15</sup> Colombia, "Curbaradó y Jiguamiandó. El reto sigue vigente: la restitución de las tierras"; PBI Colombia. Paquete Informativo. Mayo de 2011, p. 3.



Comisión Intereclesial Justicia y Paz. Jigua y Curva (23 November 2008). Source: <<http://justiciaypazcolombia.com/Jigua-Curva>>

from the market and giving them the condition of “communal lands of ethnic groups”, in accordance with the provisions of Article 63 of the Constitution. Accordingly, these lands are indefeasible, imprescriptible and inalienable.

Nevertheless, as a consequence of the events mentioned above, these peoples have not been able to fully enjoy their lands. The economic incentive of planting oil palm encouraged many entrepreneurs to buy lands for amounts far below their real value, thereby taking advantage of the activity of paramilitary groups in the region.<sup>16</sup> Thus, between 2001 and 2004, other companies such as Urapalma, Palmas de Curbaradó, Pamadó, Palmas SA Palmura, Asibicon, The Tukeka, Selva Húmeda and Inversiones Fregni Ochoa made a massive purchase of lands from which some individuals benefitted quite considerably but without the consent of the traditional authorities that had power over the collective territories. According to a report by the Ombudsman,<sup>17</sup> the negotiations for land were carried out through forced migration processes – repopulation – and policies of co-option. The employers financed community spaces where council representatives were appointed and campaigns to discredit the civil organizations that supported communities’ claims.<sup>18</sup>

Furthermore, speculation and the market value of the collective lands in Jiguamiandó and Curbaradó increased considerably due to the international demand for palm oil to produce biodiesel; infrastructure projects such as the construction of Darien road between Panama and Colombia; and the interests of the timber industry. All this put real pressure on black communities and threatened the power they had over their own territory. It is thought that the plans to develop the region were based on dispossessing these vulnerable groups.<sup>19</sup> In many cases, the illegitimate appropriations of territory were masked by administrative acts that granted them an apparent

legal framework. In some cases even the INCORA (Colombian Institute of Agrarian Reform) supported the misappropriations, and the acquisitions were even registered at the notary office and the register of public instruments.

The situation of these communities is very complex, as the economic interests are very important. In many cases, even the government promotes the planting of oil palm to bring economic growth to the region. For example, the Ministry of Agriculture, under a legal framework for the promotion of palm monocultures, gave the so-called “productive partnerships for peace” – consisting of peasant associations that had agreements with employers – access to cooperation resources, rural credits and incentives.<sup>20</sup> However, palm plantations can have a very negative impact, especially in areas of high biodiversity, because they destroy wildlife species that are not compatible with it and impoverish the soil. They also involve a wide range of environmental costs such as logging and changing water courses.

According to a report published in March 2005 by the Colombian Rural Development Institute (*Instituto Colombiano de Desarrollo Rural-INCODER*), after an inspection in 2004, 93% of African palm plantations belonging to the companies Urapalma, Palmas Curavaradó, Palmas SA and Palmadó are located in the collective territories of the Jiguamiandó and Curbaradó communities, with a total surface area of 3,636 and 180 hectares, respectively. The remaining 7% is located on privately owned land allocated by *INCORA*, before Act 70 of 1993 entered into force. Other companies also operate in the collective land of the Curavaradó river – for example, *Inversiones Fregni Ochoa*, which owns 349 hectares of land suitable for growing oil palm, and *Tukeka*, a cattle ranching company that owns approximately 810 hectares.<sup>21</sup> In addition, new projects, led by entrepreneurs in oil palm cultivation and livestock, were planned for the

<sup>16</sup> Direct connections between the paramilitaries (starting with the former paramilitary leader, Vicente Castaño) and companies have been documented by paramilitary leaders.

<sup>17</sup> Colombia, Ombudsman, Risk report No. 031, 31 December 2009. See: Inter-ecclesiastical Commission for Justice and Peace; Centro de Investigación y Educación Popular-CINEP, *La tramoya: derechos humanos y palma aceitera Curvaradó y Jiguamiandó*, 2005. Colección: Caso Tipo No. 5., octubre 2005.

<sup>18</sup> Yamile Salinas Abdala. “El caso emblemático de los territorios colectivos ...”, cit.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid. Curbaradó*

<sup>21</sup> Sandra Liliana Mejía Alfonso, *La política de agrocombustibles y sus conflictos socioecológicos distributivos en Colombia*, Tesis de grado para optar al título de Magister en Medio Ambiente y Desarrollo, Universidad Nacional de Colombia, Instituto de Estudios Ambientales – IDEEA, Bogotá, 2010, p. 84; available at: [http://www.bdigital.unal.edu.co/2559/1/696894\\_2010.pdf](http://www.bdigital.unal.edu.co/2559/1/696894_2010.pdf)





collective territories allocated to the Community Councils of the Curbaradó and Jiguamiandó, over an approximate area of 21,142 hectares.

The report by INCODER, 2005, stated that employers were indiscriminately using sale contracts to buy land from both settlers and individuals who were members of the Community Councils in order to occupy and exploit the lands. These contracts covered an area of more than 148000 hectares. According to the report, these sale contracts were not legally valid because Section 15 of Law 70 of 1993 establishes that land titles cannot be granted to people who are not from a black ethnic group who occupy the collective lands of black communities. They are qualified as possessors in bad faith. Section 7 of the same law mandates that the only alienable areas are the ones allocated to a family group, when this group is dissolved or when another of the circumstances mentioned in the regulation occur. It also stipulates that only members of the same ethnic group can have the preferential right to occupy or acquire the lands.

Furthermore, coca crops are being planted in the collective territory of the Cacarica basin, driven by the paramilitary groups operating in the region. This worsens the impacts generated by palm. Similarly, the sowing of plantain within the territory of the basin by the same companies cultivating in the region of Urabá is also being denounced.

In addition, according to the INCODER report, palm oil and livestock employers have used another strategy to occupy collective territories. This consisted of buying privately owned lands that had initially been allocated to small farmers from the region and especially to members of black communities, before Law 70 of 1993 entered into force, and were excluded from the collective title. In this way, 142 privately owned pieces of land, equivalent to approximately 13500 hectares, had already been purchased or were being negotiated for purchasing process. According to the report, regardless of the question whether these sales were legally valid

or not,<sup>22</sup> in practice this situation signified that the region of the Jiguamiandó and Curbaradó rivers were undergoing an agrarian counter-reform, since according to Section 72 , paragraph 10 of Law 160 of 1994, farmers and black people who alienate the lands previously allocated by the INCODER are not allowed to profit from the Reform Program again within a period of 15 years.

Finally, the Ombudsman's Decision No. 39 states that the situation of territorial dispute between the various armed groups and the planting of oil palm in the collective territories of black communities, besides threatening and endangering the lives of residents, violates the right to enjoy a healthy environment and ecological balance and the right to land and cultural and ethnic identity. It also generates displacement, which involves the violation of other rights such as food security, right to a decent life, free movement and housing, among others.

According to the INCODER report, the families that constitute the community councils of Jiguamiandó and Curbaradó are in a very serious situation of displacement and forced confinement: their human, economic, social and cultural rights are being violated, and they have difficulties accessing fuels and medicines. It should also be taken into account that the social fabric has been disrupted because the cultivation of oil palm has led to the disappearance of almost all the towns and traditional villages, the destruction of their homes and their workplaces, and the destruction of roads, which prevents communication between the communities.

Given the scenario described, if indigenous and black communities are not protected by efficient means of participation in decision-making, rigorous socio-environmental impact assessments, etc., its is very likely that their human rights will be violated. However, the Interior Ministry, the body responsible for protecting the rights of African descent communities, has not taken the necessary measures to prevent the damage these peoples

<sup>22</sup> Section 72, subsections 9 and 12, of Law 160 of 1994 questions their validity, since it expressly establishes that "No person shall acquire the ownership of lands originally allocated as vacant lands, if their extension exceeds the maximum limits for land titling established by the Board for Family Agricultural Units in the respective municipality or region. Acts or contracts under which a person provides a company or a community with any kind of ownership of vacant lands will also be null and void, if with them such companies or communities consolidate the ownership of such land on surfaces that exceed those set by the Institute for Family Agricultural Unit. [...] Public Registrar shall not register any traditio acts or contracts of real states, originally allocated as vacant lands, when those acts imply the division of the lands and there in no INCORA's authorization." (Non official translation) Law 160 of 1994 (August 3rd); Official Journal No. 41.479, August 5th 1994.





have historically suffered. This is the current situation, despite the Ombudsman's document sent to the Constitutional Court in 2002, which requested the suspension of crop farming until the companies complied with their obligation to request environmental permits and ensure black communities their fundamental right to participation.<sup>23</sup>

The case of the people of Curbaradó and Jiguamiandó in Colombia shows the limitations that legal and institutional instruments may have in certain cases. The protective legal framework, the numerous statements of the Constitutional Court and the decisions of international bodies have not been sufficient to reverse the violation of the rights of the inhabitants of this area. Currently, a large part of the land recognized as ethnic territory is privately owned. These lands were illegitimately occupied by means of forced displacement.

The situation has not changed much in the last few months. In order to identify the people who are being subject to violence, the Colombian government has conducted several censuses, structured in three stages. In the first stage, carried out in Antioquia, the Atlantic Coast, the coffee region, Valle del Cauca, Bogotá and abroad,<sup>24</sup> 1,600 families displaced from Jiguamiandó and Curbaradó basins were identified. In the second phase, 4,500 displaced people were recorded in the areas close to Choco, such as the Urabá and Cordoba. On 12 February the third stage of the census began to identify those families who had moved beyond the borders. This census is part of the process to restore collective land titles in that area. As Boris Zapata (director of black communities affairs of the Ministry of the Interior) told the newspaper *"El Espectador"*, 100 000 hectares will be restored.<sup>25</sup> However, associations that work with displaced people, such as Pastoral Social and Corporación Nuevo Arco Iris, argue that only 11% of the displaced people in the country are intending to return to their land.<sup>26</sup> The reluctance of some forced

displacement victims to return to their ethnic lands is motivated by the government's failure to ensure safe living conditions and dignity in preceding cases of return. Due to this situation of persistent violence, the government and the communities have failed to agree on one of the aspects of the land restitution process. Whereas the Government proposes to give the lands to the groups first, then to clean them up and, finally, to develop productive projects, taking into account the preceding failures the communities claim that the process should be carried out in a different order: first, cleaning up; second, restitution and third, production projects.<sup>27</sup>

The case of these communities has been addressed by national courts, bodies of the Inter-American human rights system and ILO supervising bodies.<sup>28</sup>

### 3.2. National Courts

The Constitutional Court of Colombia undoubtedly played a prominent role in this case. So, the particular case cannot be separated from the broader context outlined by the Constitutional Court of Colombia, especially in the decision T-025, which in general refers to the phenomenon of internal displacement.<sup>29</sup>

Decision T-025/04, of 22 January 2004, on the protection of the fundamental rights of forcibly displaced African descent people, is a very important document. While it explicitly recognizes the fundamental rights of the victims, it also admits that Colombian institutions are unable to give effect to the rights recognized by the highest court.

This decision concerns 108 proceedings, corresponding to the same number of actions instituted by 1150 households, all belonging to the displaced population. The households are composed of an average of four people, mainly female-heads of households, seniors and children, as well as some indigenous people.

The plaintiffs' actions were implemented through the so-called

<sup>23</sup> Defensoría del Pueblo. "Aprovechamiento forestal y derechos humanos en la cuenca del río Cacarica en el Departamento del Choco", 2002.

<sup>24</sup> *El Espectador*. "Arranca tercer anillo del censo a desplazados de Curbaradó y Jiguamiandó". 21 de febrero de 2012. (<http://www.elespectador.com/impreso/nacional/articulo-327720-martes-arranca-tercer-anillo-del-censo-desplazados-de-curbarado>, accessed on March 8th 2012).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> To follow the case, see the website of the Inter-Ecclesiastical Commission for Justice and Peace, <http://justiciaypazcolombia.com/>.

<sup>28</sup> Also, between 2006 and 2008, the Permanent People's Tribunal conducted a series of sessions in Colombia focused on the impact of transnational corporations on human rights. One of the hearings, concerning biodiversity, was held in the region, in the humanitarian zone of New Hope in God, Cacarica river Basin, on the 25th and 26th February 2007. This settlement was established as a humanitarian zone after the return of some who were violently displaced in 1997 and who remained for years in the territory despite continuous harassment and threats from members of the Colombian armed forces and paramilitary groups. In this session, collusion between paramilitary groups and the main companies operating in the African palm and timber sectors was extensively documented.

<sup>29</sup> Constitutional Court of Colombia, Judgment T-025/04. Bogotá, D. C., January 22nd 2004. File T-653010.



*Comisión Intereclesial Justicia y Paz. Jigua y Curva (23 November 2008). Source: <<http://justiciaypazcolombia.com/Jigua-Curva>>*

<sup>30</sup> United Nations, Doc E/CN.4/1998/53/Add.2, 11 February 1998. Report of the Representative of the Secretary-General, Mr. Francis M. Deng. Guiding Principles on Internal Displacement: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b70263ec125661e0036f36e>

<sup>31</sup> Expressions used by the Constitutional Court of Colombia in the Judgment SU-1150 de 2000, MP: Eduardo Cifuentes Muñoz (Non official translation).

<sup>32</sup> Constitutional Court of Colombia, Judgment T-025/04. Bogotá, D. C., January 22<sup>nd</sup> 2004 File T-653010, Sec. 6.1.

<sup>33</sup> *Ibid.* Sec. 6.2.1

<sup>34</sup> Constitutional Court of Colombia, Tracking order 005/09, of the Judgment T-025/04. Bogotá, D.C., January 26<sup>th</sup> 2009. IV, Sec.67.

<sup>35</sup> The Court highlights this issue as the single factor that has perhaps most contributed to increasing violence against Afro-Colombians. The problem derives from illegal and legal pressures to promote development patterns based on a productivist logic characteristic of the dominant economy, ignoring the production models of Afro-Colombian communities, which encourage and promote self-sufficiency and the protection of the cultural and biological diversity of their territory; Constitutional Court of Colombia, Tracking order 005/09, of the Judgment T-025/04. Bogotá, D.C., January 26<sup>th</sup> 2009. Sec. 70.

"protection actions" against several government bodies and several municipal and departmental administrations. They accused the authorities of failing in their duty to protect displaced people and not giving an effective response to their requests for housing and access to productive projects, health care, education and humanitarian aid.

The Court solved its first ruling on displaced people in 1999. Since then it has dealt with more than 17 judgments on this matter. In view of the Constitution, the Laws and, above all, the Guiding Principles on Internal Forced Displacement of 1998,<sup>30</sup> the Court has granted protection to different rights such as the right to not being discriminated against, the right to life and personal integrity, the right to effective access to health services, the right to access economy recovery programs, the right to housing, the right to freedom of movement, and the right to access emergency or educational humanitarian aid.

In previous rulings, the Court considered people's forced displacement to be an extremely serious problem. The Court has literally qualified the situation as "a true state of social emergency," "a national tragedy that affects the fate of many Colombians and will mark the country's future in coming decades." As a result of this violence, the affected people are in such a vulnerable state that they become worthy of special treatment by the State.<sup>31</sup>

In a judgment in 2004, the Court noted that Colombia's public policy has a wide variety of instruments concerning forced displacement. These tools embody the institutional response to the problem of displaced populations.<sup>32</sup>

Although these policies were first legally implemented in 1997, they have failed to counter the constitutional rights violations of the majority of the displaced population. This point has been acknowledged by the Social Solidarity Network, which admits that "61 percent of the displaced population did not receive government assistance

in the period between January 2000 and June 2001."<sup>33</sup>

Finally, the Court found that there was a true 'state of unconstitutionality'. This concept is used to describe a factual situation in which constant and repeated violations of fundamental rights affect many people. The solution to this problem requires several agencies to intervene and address the problems of structural order. In cases of this nature, the judgments are not only addressed to those who have applied for protection, but also to all those who may be in the same situation.

In order to overcome the 'state of unconstitutionality', the Court ordered the 'National Council for Integral Attention to People Displaced by Violence' to design and implement a plan of action no later than 31 March, 2004. At the same time, it ordered the competent authorities to ensure that budgets were sufficient to address the critical conditions of displaced people. The Court emphasized that the authorities were obliged to ensure displaced people the minimum conditions that make it possible for them to exercise their right to a decent life.

Since then, the Court has issued numerous 'tracking orders' trying to put pressure on the executive power of the State to enforce the judgment.

In the tracking order of Sentence 005/2009, the Constitutional Court, on the basis of the documents submitted by various organizations that participated in a technical briefing in October 2007, identified three factors that affect Afro-Colombian displacement. These factors are:<sup>34</sup> (i) a structural exclusion of Afro-Colombians that places them in a state of greater marginalization and vulnerability, (ii) the mining and agricultural processes in certain regions impose severe strains on their ancestral lands and favor land dispossession,<sup>35</sup> and (iii) the inadequate legal and institutional protection of Afro-Colombians' collective territories, which has encouraged armed groups that threaten black populations to make them leave their territories.



As far as the communities of Juguamiandó and Curbaradó are concerned, the Court noted that the interim measures taken by the Inter-American Court of Human Rights – which will be discussed later – had not been obeyed in full by the Colombian government. Therefore, it reiterated that these measures were binding and had to be observed. Consequently, the Constitutional Court ordered the Government to implement the measures ordered by the Court of Human Rights in its resolutions of 2003, 2004, 2005 and 2006, without delay. It also ordered the Ministries of the Interior and Justice and Defense to provide the Ombudsman bimonthly reports on the actions taken to comply with the provisional measures.

Furthermore, the Court noted that these Afro-Colombian communities, by reason of their special constitutional protection and their relationship with the land, must be beneficiaries of specific care and protection plans that ensure both the collective dimension of their rights and the individual rights of each person, in the context of policies to assist the displaced population.

Nevertheless, given that the Constitutional Court had very little information on the situation that the mentioned communities were facing, it was not possible to adopt concrete measures that were appropriate to the conditions and needs of the communities in these areas. Therefore, the Court suggested that the national government should design and implement a specific plan of care and protection for each of these communities, with their effective participation and respecting their constituted authorities.<sup>36</sup>

At the same time, the Chocó Administrative Litigation Court issued a decision on 5 October 2009<sup>37</sup> which considered the application for protection of the following rights: the fundamental right to collective property; the right to their territories; the rights to a decent life and subsistence, to a minimum livelihood, to physical

integrity, and to the free development of personality, cultural identity and autonomy of the members of the Curvaradó and Jiguamiandó Community Councils. All these rights had been violated as a consequence of the irregular possession and ownership of their lands by the individuals and corporations sued. The Court also ordered all the companies involved to suspend all activities on the illegally occupied land within 48 hours and to return them to the Community Councils within 30 days. Finally, it ordered all the public authorities concerned to ensure that such acts would not happen again and that the members of both communities would be provided with suitable protection.

The most forceful judgment was adopted by the Constitutional Court by Order of May 18, 2010,<sup>38</sup> after finding a breach of judgment 0073 of 5 October 2009, issued by the Litigation Court of Chocó, which ordered the return of collective territories to the Jiguamiandó and Curbaradó communities within thirty days. The Court took note of the Ombudsman's reports on the lack of progress and the risks derived from the interference in the internal processes of the Community Councils. One example of this interference was the creation of parallel structures with supposed community representatives, but who were more connected to companies with interests in the territory. Another example was the financial support given to campaigns against humanitarian aid professionals and communities. Taking into account that the lands were imminently going to be handed over to those supposed community representatives – which had been questioned by the Ombudsman, NGOs and representatives of traditional black communities – the Court questioned their power to represent the communities and highlighted the impact that they might have on the rights of the communities affected.

Finally, the Court adopted a range of extraordinarily detailed decisions that were based on the premise that the fundamental rights of individuals and Afro-Colombian communities in the basins of the Curvaradó and

<sup>36</sup> Constitutional Court of Colombia, Tracking order 005/09, of the Judgment T-025/04. Bogotá, D.C., January 26th 2009.

<sup>37</sup> Administrative Tribunal of Chocó. Judgment No- 0073. Quibdó, October 5th de octubre 2009. File No: 2009-0030. Protection Action . Judge: Dra. Mirtha Abadia Serna.

<sup>38</sup> Constitutional Court of Colombia, Tracking Order. Judge.: Luis Ernesto Vargas Silva. Bogotá, D.C., May 18th 2010.





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Jiguamiandó rivers were still being violated on a massive and systematic scale and that the orders issued by the Constitutional Court in Auto 05, 2009, either had not been fully enforced by the public authorities and the national government, or their enforcement had been delayed. Therefore, it was reiterated that Colombian authorities had the constitutional and international obligation to comply with these orders and to incorporate a differential holistic approach to prevention, protection and the appropriate care of the Afro-Colombian communities' 'reality'. One of the most notable measures adopted was an order to the Minister of the Interior and Justice urging that the processes of characterization and census of the Curvaradó and Jiguamiandó communities protected by the collective title should be completed transparently, with no manipulation, and within the time fixed by the Court (10 July, 2010). Another measure was the issuance of an order to the Minister of the Interior and Justice to freeze all transactions related to the use, possession, tenancy, property and agro-industrial or mining exploitation of lands covered by the collective title over the Curvaradó and Jiguamiandó river those territories that could prevent them from being restituted later. He was also ordered to immediately suspend the process of administrative and physical delivery of the collective territories of the basins of the Curvaradó and Jiguamiandó rivers, until the census and characterization process had been completed and the General Assembly for the election of the Great Community Council had been held, so that the legitimacy and representativeness of the communities' authorities could be confirmed. Finally, the Court invited the Inter-American Court of Human Rights to form a judicial commission to monitor the compliance with its orders and the situation of vulnerability and risk of people and communities of African descent. It also suggested that the international community – particularly the Inter-American Commission on Human Rights, the ICRC, the International Peace Brigades (BIP, UNHCR and other United Nations agencies), the European Union and the embassies of friendly countries –

should form a special commission to support these communities and to monitor, as an international observer, the process of restitution of the collective lands and the protection of their rights.

More recently, tracking Order 219 of 2011<sup>39</sup> referred to the new Law 1448 of 2011,<sup>40</sup> which contains a whole chapter on land restitution measures. This regulation includes a new institutional structure in charge of the land restitution process and new legal institutions, such as presumptions of dispossession, shifts of the burden of proof, the possibility of arguing restitution applications, a new route for the land restitution process, which requires that some civil and agrarian law concepts be reviewed, among others. However, the Court stated that it did yet have accurate and detailed information from the National Government about the progress of the implementation of this new law, and it concluded that the unconstitutional state persisted, despite the government's efforts and the results obtained so far.

Specifically, as far as the reformulation of land policies was concerned, the Order instructed the Minister of Agriculture and Rural Development to submit two documents to the Constitutional Court, before 8 November 2011. First, he was asked to present a report about the progress to date and about the methodology of future work, the coordination between agencies, and the mechanisms to ensure the participation of displaced people and social organizations. The second document was a program of activities to be implemented in no more than six months as from the date the report was handed in to fill the gaps identified by the Court in Sentence T-025 of 2004 and others. Furthermore, several criminal proceedings are still being carried out into crimes committed over the years against the communities of Curvaradó Jigumiando. However, the vast majority have not yielded significant results so far. The most emblematic started in 2001, was closed in 2004 and was

Comisión Intereclesial Justicia y Paz. Jigua y Curva (23 November 2008).

Source:  
<<http://justiciaypazcolombia.com/Jigua-Curva>>

<sup>39</sup> Constitutional Court of Colombia, Tracking order 219 of 2011, Judge.: Luis Ernesto Vargas Silva. Bogotá, D.C., October 13th 2011.

<sup>40</sup> Law 1448 of 2011 (June 10th). Official Journal No. 48.096 of June 10th 2011, known as "Victims Law". Official name: Ley 1448 de 2011(10 de junio) , por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones





reopened by order of the Supreme Court in 2011.<sup>41</sup> It concerns the murder of the peasant Marino López Mena, allegedly committed by retired general, Rito Alejo del Río, during *Operación Génesis*. On these grounds, General Alejo del Río was sentenced in August 2012 to more than 25 years in prison, and a prohibition to exert any public service for an additional 10 years.<sup>42</sup>

### 3.3. The International Labor Organization

The Indigenous and Tribal Peoples Convention was adopted by the General Conference of the International Labor Organization on 27 June 1989.<sup>43</sup> Despite the small number of ratifications,<sup>44</sup> the Convention is the most important existing conventional instrument to date for the protection of indigenous peoples' rights.<sup>45</sup> The Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR)<sup>46</sup> has examined the application of Convention 169 concerning indigenous and tribal peoples in Colombia.

Since 2005, the African-descent communities of the Curbaradó and Jiguamiandó river basins have requested that the Committee of Experts ensure the application of Convention 169. In its observations about compliance with international obligations under the Convention 169, the CEACR has made various statements concerning these communities.

In its report on the personal scope of the Convention in 2006,<sup>47</sup> the Commission observes:

“that, in the light of the information provided, the black communities of Curbaradó and Jiguamiandó appear to fulfil the requirements set out in Article 1, paragraph 1(a), of the Convention, in accordance with which it applies to ‘tribal peoples in

independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations...’ [...] Furthermore, the definition of ‘black community, as set out in Act No. 70, appears to coincide with the definition of tribal peoples in the Convention. The Committee requests the Government and the USO to confirm whether these communities identify themselves as tribal communities within the meaning of Article 1, paragraph 1(a) of the Convention...”

With regards to the restitution of the land, the Commission notes that:

“Subject to any comments that the Government may make, the Committee notes that if it is confirmed that these communities are covered by the Convention, it is necessary to give effect to *Articles 6, 7 and 15* respecting consultations and natural resources and *Articles 13 to 19* with regard to lands. In particular, the Committee refers to the right of these peoples to return to their traditional lands as soon as the grounds for relocation and transfer cease to exist (*Article 16, paragraph 3*, of the Convention) and the measures envisaged by the Government against any unauthorized intrusion in the lands of the peoples concerned or any unauthorized use by persons alien to them (*Article 18* of the Convention). **Noting that the communication refers on various occasions to threats, coercion and a climate of terror, as well as the lack of penalties against those responsible for violations of the right to life, integrity and freedom which gave rise to the forced displacement, the Committee also requests the Government to make all the necessary efforts to protect the life and integrity of the members of these communities.**”

In its commentary of 2007<sup>48</sup> on the personal scope of the Convention, the Committee “noted that the USO confirmed that the communities identify themselves as tribal. It also notes with satisfaction the Government’s statement that the Curbaradó and Jiguamiandó communities, which are of

<sup>41</sup> Review No 30510 C/. Rito Alejo Del Río Rojas. Supreme Court of Justice. Criminal Appeals Chamber. Judge: Yesid Ramírez Bastidas. Passed by the Agreement No. 074. Bogotá, D. C., March 11th 2009. The review was motivated by the public statements of several paramilitaries heads who confirmed to have linkages with General Rito Alejo.

<sup>42</sup> See <[www.rebelion.org/noticia.php?id=155023](http://www.rebelion.org/noticia.php?id=155023)> (last access October 3rd 2012).

<sup>43</sup> [Online] ILOLEX. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314). Entered in force on September 5th 1991 (last Access July 24th 2012)

<sup>44</sup> Up until 1 August 2011, the Convention had only been ratified by 22 States, but many of these have a considerable indigenous population. These countries are Argentina, the Multinational State of Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Spain, Fiji, Guatemala, Honduras, Mexico, Nepal, Nicaragua, Norway, the Netherlands, Paraguay, Peru, Central African Republic and the Bolivarian Republic of Venezuela.

<sup>45</sup> With regards to the Convention, see: ILO, *Indigenous & Tribal Peoples’ Rights in Practice*. Geneva, International Labor Standards Department, 2009; Anaya, S. James, *Los pueblos indígenas en el derecho internacional*. [Spanish translation from the second edition of *Indigenous Peoples in International Law*, New York, Oxford University Press, 2004] Madrid, Editorial Trotta - Universidad Internacional de Andalucía, 2005. pp. 96-101; Ulfstein, Geir, “Indigenous Peoples’ Right to Land”, *Max Planck Yearbook of United Nations Law*, Volume 8, 2004, pp. 11-31.

<sup>46</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations – CEACR – is composed of 20 independent experts in charge of examining the information submitted by employees and employers’ organizations.

<sup>47</sup> International Labour Conference, 95th Session, 2006. Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 1A). General Report and observations concerning particular countries. International Labour Office Geneva. 2006, pp. 452–454.

<sup>48</sup> International Labour Conference, 96th Session, 2007. Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 1A). General Report and observations concerning particular countries. International Labour Office Geneva. 2007. p. 550-552



African extraction, are covered by the Convention.”<sup>49</sup>

Concerning the lands, the Committee points out that:

“...the Convention protects not only lands that the peoples concerned already own but also lands that they traditionally occupy; and that according to the Convention, governments must take the necessary steps to determine the lands which the peoples concerned occupy traditionally and to guarantee effective protection of their rights of ownership and possession...”<sup>50</sup>

And notes with interest that:

“...Decision No. 0482 of 18 April 2005 by the Regional Autonomous Corporation for Sustainable Development of Chocó ordering the suspension of all activities carried on for the purpose of establishing the cultivation of either the African palm or the oil palm within the jurisdiction of the Department of Chocó ... specifically in the areas over which the Jiguamiandó and Curbaradó communities have collective title ..., without the appropriate authorization or concession granted by the primary regional environmental authority – CODECHOCO.”<sup>51</sup>

The Committee also points out:

“that according to *Article 15, paragraph 2*, “governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands”.”<sup>52</sup>

In its individual observation of 2008,<sup>53</sup> the Committee of Experts refers to allegations made by the inhabitants of the communities of threats and violations of the right to life and personal integrity of people of these communities:

“The Committee refers in particular to the following allegations contained

in the communication: (1) the presence of paramilitary groups in the community territory, including those known as *Aguilas negras* and *Convivir* and the allegation that they are tolerated by the official forces, and particularly army brigades XV and XVII. The paramilitary forces are reported to have established themselves in community lands in 2007 and to have made threats and accusations against the inhabitants of the communities of belonging to the guerrilla which, in view of the situation in the country, places their life at grave risk. The communication indicates that this intimidation is carried out as a result of the cultivation of the African palm and that all those obstructing the cultivation of palm oil in Curvaradó and Jiguamandó were threatened with being “cleaned up”; (2) impunity with regard to violations of the fundamental rights of members of the communities, such as the disappearance and murder in 2005 of Orlando Valencia, the leader of African extraction of Jiguamandó; (3) the “judicial persecution” of victims of human rights violations and the members of supporting organizations. The communication indicates that, even though there is sporadic guerrilla presence in the region, the communities are a civilian population and have decided to establish humanitarian zones which have been recognized by the Inter-American Court of Human Rights. The Committee urges the Government to take all the necessary measures without delay to guarantee the life and the physical and moral integrity of the members of the communities, to ensure that any persecution, threats or intimidation ceases and to ensure that effect can be given to the rights set out in the Convention in a climate of security.”

In the Observation of 2009,<sup>54</sup> the Committee reiterates its concern about the situation and the lack of response from the Colombian Government to its requests.

And in 2010,<sup>55</sup> in view of consistent reports by the United Nations Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on extrajudicial summary of

<sup>49</sup> *Ibidem* para. 2, p. 551

<sup>50</sup> *Ibidem*, para. 5, p.551

<sup>51</sup> *Ibidem*, para. 6, p.551.

<sup>52</sup> *Ibidem*, para 6, p.551

<sup>53</sup> CEACR: Individual observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Colombia (ratification: 1991). Published: 2008. Document No. (ilolex): 062008COL169, para. 2

<sup>54</sup> CEACR: Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Colombia (ratification: 1991). Published: 2009. Document No. (ilolex):062009COL169



arbitrary executions, the UN Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and on the situation of indigenous and Afro-descendants in Colombia:

“The Committee notes with serious concern the persistence of violence in the country. It is particularly worried to note that the indigenous and the Afro-Colombian communities are still the brunt of violence, intimidation, dispossession of lands and the imposition of projects on their territory without consultation or participation, and continue to suffer violations of the rights laid down in the Convention. It notes with regret that, according to the communications, the leaders of these communities and the organizations involved in defending the communities’ rights are often the victims of violence, threats, harassment and stigmatization because of their work and that, according to the allegations, the offenders often go unpunished.”

The Committee urges the Government to:

“(i) adopt without delay and in a coordinated and systematic manner all necessary measures to protect the physical, social, cultural, economic and political integrity of the indigenous and Afro-Colombian communities and their members and to guarantee full observance of the rights laid down in the Convention;

(ii) take urgent measures to prevent and punish acts of violence, intimidation and harassment against members of the communities and their leaders and to investigate the alleged offences efficiently and impartially;

(iii) immediately suspend the implementation of projects affecting indigenous and Afro-Colombian communities until an end has been put to all intimidation of the affected communities and their members and until the participation and consultation of the peoples concerned has been ensured through their representative institutions in a climate of full respect and trust, pursuant to Articles 6, 7 and 15 of the Convention;

And in particular with regards to the communities of Jiguamiandó and Curbaradó, the Committee notes that the legal offices of the Ministry of the Interior and Justice and the Ministry of Agriculture and Rural Development are taking action to achieve the physical restitution of the territories.”

### 3.4. The Action within the Inter-American human rights system

Prompted by the continuous monitoring of the Inter-American Commission on Human Rights<sup>56</sup> and the requests from the people affected, the Court has issued sentences and provisional measures to protect victims from violence and to hold Colombia responsible for violating the obligation to ensure the enjoyment of fundamental rights of individuals on equal terms.

The Inter-American Court has confirmed human rights violations in several judgments concerned with Colombia: Case of Caballero Delgado and Santana v. Colombia (1995)<sup>57</sup>; Case of Las Palmeras v. Colombia (2001)<sup>58</sup>; Case of the 19 Tradesmen v. Colombia (2004)<sup>59</sup>; Case of Gutiérrez-Soler v. Colombia (2005)<sup>60</sup>; Case of the Mapiripán Massacre v. Colombia (2005)<sup>61</sup>; Case of the Pueblo Bello Massacre v. Colombia (2006)<sup>62</sup>; Case of the Ituango Massacres v. Colombia (2006)<sup>63</sup>; Case of the Rochela Massacre v. Colombia (2007)<sup>64</sup>; Case of Escué-Zapata v. Colombia (2007)<sup>65</sup>; Case of Valle-Jaramillo et al. v. Colombia (2008)<sup>66</sup>; and Case of Manuel Cepeda-Vargas v. Colombia (2010).<sup>67</sup> Human rights violations have also been confirmed in many other judgments concerning provisional measures.<sup>68</sup> Section 63.2 of the American Convention on Human Rights provides that:

<sup>55</sup> CEACR: Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Colombia (ratification: 1991). Published: 2010. Document No. (ilolex): 062010COL169

<sup>56</sup> See, for example, the Report on the demobilization process in Colombia, OEA/Ser.L/V/II.120, Doc. 60; December 13, 2004.

<sup>57</sup> Merits. Judgment of December 8, 1995. Series C No. 22

<sup>58</sup> Merits. Judgment of December 6, 2001. Series C No. 90

<sup>59</sup> Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109

<sup>60</sup> Merits, Reparations and Costs. Judgment of September 12, 2005 Series C No. 132

<sup>61</sup> Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134

<sup>62</sup> Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140

<sup>63</sup> Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148.

<sup>64</sup> Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163

<sup>65</sup> Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165

<sup>66</sup> Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192





<sup>67</sup> Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010.

<sup>68</sup> See the Court's website : [http://www.corteidh.or.cr/pais.cfm?id\\_Pais=9&CFID=169885&CFTOKEN=89598634](http://www.corteidh.or.cr/pais.cfm?id_Pais=9&CFID=169885&CFTOKEN=89598634)

<sup>69</sup> See M. Belén Olmos Giupponi, "La protección de las comunidades afrodescendientes en el Sistema Interamericano: reflexiones a la luz del caso de las comunidades de Jiguamiandó y de Curbaradó", *Revista Electrónica Iberoamericana*, Vol.4, n°2, 2010. [http://www.urjc.es/ceib/investigacion/publicaciones/REIB\\_04\\_02\\_Belen.pdf](http://www.urjc.es/ceib/investigacion/publicaciones/REIB_04_02_Belen.pdf)

<sup>70</sup> Order of the Inter-American Court of Human Rights of February 7, 2006. Provisional Measures regarding Colombia. Matter of the communities of Jiguamiandó and Curbaradó.

<sup>71</sup> The case of the communities of the Jiguamiandó and the Curbaradó. Provisional measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia. Order of the Inter-American Court of Human Rights of March 6, 2006.

<sup>72</sup> The case of the communities of the Jiguamiandó and the Curbaradó. Provisional measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia. Order of the Inter-American Court of Human Rights of March 6, 2006 . 9<sup>th</sup> considering

"In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

The Court has repeatedly used the provisional measures on the grounds of this Section in cases in which people's lives have been in danger. In this way, the Inter-American Court of Human Rights has repeatedly intervened in connection with Jiguamiandó and Curbaradó.<sup>69</sup>

The Court bases the provisional measures on Section 1.1 of the Convention. This Section establishes the general obligation of the Parties to respect the rights and freedoms recognized therein and to ensure the free and full exercise of these rights and freedoms to all persons subject to their jurisdiction, which implies a duty to take the necessary security measures for their protection. It also remarks that "pursuant to Article 63.2 of the Convention it is mandatory for the State to adopt such provisional measures as this Court may order."<sup>70</sup>

In the case concerning the Jiguamiandó and Curbaradó communities, the Court ordered provisional measures in 2003, which required Colombia, among other things, "to adopt forthwith all necessary measures to protect the lives and safety of all the members of the communities composed of the Community Council of the Jiguamiandó and the families of the Curbaradó", as well as "all necessary measures to ensure that beneficiaries of those measures might continue living in their place of residence, free from any kind of coercion or threat" and to "ensure the necessary security conditions so that the members of the communities comprising the Community Council of the Jiguamiandó and the families of the Curbaradó, who

had been forcibly displaced to jungle zones or other regions, may return to their homes or to the "humanitarian refuge zones" established for these communities."<sup>71</sup> Despite their lack of success and their provisional nature, these measures have been renewed successively until 2011 by several orders.

In this case, as occurs in cases of widespread effects on members of a community, it is interesting to note that protection was provided to a group of persons that was not specifically determined, but identifiable:

"In this case, as indicated by the Commission, it is evident that the communities comprising the Community Council of the Jiguamiandó and the families of the Curbaradó, made up of approximately 2,125 persons, forming 515 families, constitute an organized community, situated in a specific geographical location in the municipality of Carmen del Darién, Department of Chocó, whose members can be identified and specified and who, because they form part of the said community, are all in a situation of equal risk of suffering acts of aggression against their safety and lives, as well as being forcibly displaced from their territory, a situation that prevents them from exploiting the natural resources necessary for their subsistence. Accordingly, this Court considers that it is appropriate to order provisional measures of protection for the members of the communities composed of the Community Council of the Jiguamiandó and the families of the Curbaradó that encompass all the members of the said communities."<sup>72</sup>

In connection with the case, the Inter-American Court of Human Rights analyzed the request for provisional measures in relation to the criminalization of members of the Inter-Ecclesiastical Commission for Justice

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<sup>73</sup> Matter of The Inter-Ecclesiastical Commission on Justice and Peace. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of 22 November, 2010, para. 23

and Peace and other organizations that support the communities of African descents, who are attributed to have direct links with the FARC and to be involved in the killings of other locals. The Court rejected the request of the Commission on Human Rights on the grounds that the requirements of extreme gravity and urgency and the need to avoid an irreparable damage to people were not met. However, it affirms that:

“States have the particular obligation to protect those persons who work in non-governmental organizations, to provide effective and adequate guarantees to human rights defenders so that they may freely carry out their activities, and to avoid actions that limit or impede such work. Human rights advocacy constitutes a positive and complementary contribution to the State’s own efforts as guarantor of the rights of all persons under its jurisdiction. Accordingly, the prevalence of human rights in a democratic state depends largely on the respect and freedom afforded to these defenders in their work.”<sup>73</sup>



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