WAGING WAR AND STAGING ROUNDTABLES: NORMATIVE SPACES OF VIOLENCE AND DIALOGUE IN COLOMBIA'S INDIGENOUS LANDS

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ABSTRACT

This Article argues that the coincidence of dialogue and violence that characterizes the Colombian political and legal landscape is not merely a factual circumstance or a logical necessity, but represents a government policy of "waging war and staging roundtables." The simultaneous use of dialogue and military action against a dialogue's participants extends beyond the internal armed conflict to stem civil protest, as well as to engage with the country's Indigenous population and its claims to autonomy. This Article explores the dynamics of these spaces of dialogue and violence, as well as the norms that structure them. Military confrontations between the Colombian Armed Forces and Indigenous peoples in Cauca, as well as simultaneous negotiations at a "Permanent Roundtable" in Bogotá are taken as examples. In these military confrontations, certain government officials portray military intervention as constituting the "limit" of dialogue, interrupting or suspending it when the law is broken. However, following Walter Benjamin, it is argued that military violence - as well as its suspension or threat - is not merely "law-preserving" but also "law-making." The policy of waging war and staging roundtables consolidates a power that promotes itself as democratic while being traditionally sovereign in the sense of deciding over citizens' lives and deaths.

INTRODUCTION

Since taking up office, the former President of Colombia—Juan Manuel Santos— implemented a strategy of simultaneous dialogue and military action to confront the internal armed conflict that plagued the country for more than fifty years. That conflict recently ended, at least formally and militarily, with regard to one of the country's subversive groups—the Armed Revolutionary

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Forces of Colombia—the People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) (FARC-EP or FARC).[1] On August 26, 2012, the Colombian Government and the FARC agreed to enter into peace negotiations. A peace agreement was reached on August 23, 2016, and on September 23, 2015, President Santos and FARC leader Rodrigo Londoño, alias Timochenko, signed a peace agreement and shook hands in Havana.[2] However, the Colombian population subsequently rejected this agreement in a plebiscite on October 2, 2016 with 50.21% voting against and 49.78% in favor.[3] The Colombian Congress approved an amended peace agreement on November 30, 2016.[4]

On August 7, 2010, in his inaugural speech, Santos had said that he "ask[ed] the new Command of our Armed Forces to continue to produce results and make convincing progress," while at the

1. The other active guerilla group in the country is the *Ejército de Liberación Nacional* (ELN). On March 30, 2016, the Santos Government and the ELN publicly announced the start of peace negotiations, having signed a preliminary agreement similar to the one concluded with the FARC. It provides for the establishment of a "roundtable of conversations" in Ecuador. The State and the ELN engaged in exploratory talks from January 2014 until March 2016, although there had been some communication since the peace process with the FARC started in 2012. *See* Mesa de Conversaciones, *infra* note 2 (the agreement reached between the Colombian Government and the FARC on August 26, 2012 invited, in general terms, "other guerilla organizations" to join the peace negotiations); *see also Gobierno inciciará proceso de paz con ELN*, El Espectador (June 10, 2014), http://www.elespectador.com/noticias/paz/gobierno-iniciara-proceso-de-paz-eln-articulo-497460 [https://perma.cc/9R2W-U266] (describing that, in December 2012, the ELN informed the President and the media that it would contribute to peace-building efforts); Alfredo Molano Jimeno, *Si es para la paz, cuentan con el ELN*, El Espectador (Mar. 24, 2013), http://www.elespectador.com/noticias/paz/si-paz-cuenten-el-eln-articulo-412337 [https://perma.cc/5H4U-3QQ6] (in March 2013, the ELN's commander-in-chief denied in an interview that the ELN was in exploratory talks with the Colombian Government, but not that there had been communications); El Espectador (June 10, 2014) (in June 2014, the government publicly announced that it had been communicating with the ELN since 2013 regarding possible peace negotiations and that the parties had started exploratory conversations in January 2014); Leon Valencia, *The ELN's Halting Moves Toward Peace*, *in* Colombia, Building Peace in a Time of War 95–109 (Virginia M. Bouvier ed. 2009) (describing previous efforts to establish peace between the Colombian government and the ELN).

2. *See* Mesa de Conversaciones, *Acuerdo general para la terminación del conflicto y la construcción de una paz estable y duradera*, El País (Aug. 26, 2012), http://www.elpais.com.co/judicial/acuerdo-general-para-la-terminacion-del-conflicto-y-la-construccion-de-una-paz-estable-y-duradera.html [https://perma.cc/K7JD-7LWT]; *Histórico apretón de manos entre Santos y Tomichenko en La Habana*, El Espectador (Sept. 23, 2015), http://www.elespectador.com/noticias/paz/historico-apreton-de-manos-entre-santos-y-timochenko-ha-articulo-588288 [https://perma.cc/69DA-K88Z].

3. See Plebiscito 2 de octubre 2016, Registraduría Nacional del Estado Civil, https://elecciones.registraduria.gov.co/pre_plebis_2016/99PL/DPLZZZZZZZZZZZZZZZZZ_L1.htm [https://perma.cc/U6EW-HPAA].

4. *See Congreso refrendó el nuevo acuerdo de paz, ahora viene la fase de implementación*, El Espectador (Nov. 30, 2016), http://www.elespectador.com/noticias/paz/camara-refrendo-el-nuevo-acuerdo-de-paz-articulo-668311 [https://perma.cc/4LXD-B37B].

same time affirming that "the door of dialogue is not locked" and his government was "open to . . . conversation" on the basis of certain "unchanging premises."[5] As the peace negotiations with the FARC progressed, the President said he "knew from the start that it would be difficult to explain," acknowledging the question that some would undoubtedly ask: "why are you talking in Havana of peace while continuing the war?"[6]

This Article suggests that the particular coincidence of dialogue and violence in Colombia is not merely a factual circumstance or a logical necessity, but rather represents a government policy of "waging war and staging roundtables" that extends beyond the internal armed conflict. This strategy was also used by the Santos Government to stem protest and civil unrest, as well as to engage with the country's Indigenous population and its claims to exercise autonomy over its lands. This Article explores the spaces of dialogue and violence in which government and Indigenous representatives encounter each other and analyzes the norms that structure these spaces.

When Santos took up the presidency, Colombia's Armed Forces had for some time been engaged in confrontations with Indigenous peoples in the Department of *Cauca*,[7] bordering on the Pacific Ocean. While these confrontations were heating up in the region, culminating in an unprecedented incident in July 2012 in the town of *Toribío* (see Part III.A), the Colombian State and Indigenous representatives negotiated simultaneously in Colombia's capital *Bogotá* at the Permanent Roundtable for Coordination with Indigenous Peoples and Organizations (*Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas*) (Permanent Roundtable). These particular spaces of violence and dialogue are explored as examples.

In Part I, the proliferation of roundtables (*mesas*) in Colombia is discussed as a means to facilitate dialogue and defuse violent incidents, including strikes and civil protests. It is argued that these

5. *Discurso completo de posesión de Juan Manuel Santos*, SEMANA (Aug. 7, 2010), http://www.semana.com/politica/articulo/discurso-completo-posesion-juan-manuel-santos/120293-3 [https://perma.cc/MY3E-DJNA] (stating these 'unchanging premises' were "the renunciation of arms, kidnapping, drug-trafficking, extortion, intimidation.").

6. "*Están jugando con candela y este proceso puede terminar*", SEMANA (July 29, 2014), http://www.semana.com/nacion/articulo/santos-les-advierte-las-farc-que-el-proceso-de-paz-se-puede-terminar/397394-3 [https://perma.cc/V7QR-SEDH].

7. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 286 (establishing that the Colombian national territory is divided in the following "territorial entities": departments, districts, municipalities, and indigenous territories).

roundtables bring into sharp relief the considerable divide that exists in the country between normative excess or exuberance and the horrors of conflict. The intimate relation between violence and dialogue is explored by reference to Walter Benjamin's ideas and more recent interpretations of that relation.[8]

Part II discusses the origins, normative structure, and dialogue in the Permanent Roundtable between State and Indigenous representatives through observations of some of its meetings and interviews carried out with participants and non-participants.[9] Some challenges facing the Permanent Roundtable are analyzed regarding delegation, representation, and the institutionalization of dialogue. The ways in which violence coincided with dialogue in this space in 2012 is explored, when the State's Armed Forces and Indigenous peoples were simultaneously engaged in military conflict in *Cauca*.

In Part III, the hostilities in *Cauca* are addressed, specifically the incident that took place in *Toribío* where the local Indigenous community confronted the State's Armed Forces over a military base that had been established on a sacred mountain.[10] The media's role as an interlocutor in dialogue is briefly referred to, as well as the normative structure of this space of violence in which concerns about Indigenous autonomy and national security collide.

In the Conclusion, it is argued that the Permanent Roundtable's existence as a space of dialogue has come to be regarded as its main achievement. Consequently, the focus is primarily on the dialogue itself rather than its subject matter. Although violence in this space of dialogue is characterized and managed as "pathologi-

8. *See generally* Walter Benjamin, *Critique of Violence*, *in* Reflections – Essays, Aphorisms, Autobiographical Writings 281–300 (Edmund Jephcott trans.) (describing Benjamin's belief that there is a necessary relation between violence on one hand, and law and justice on the other. In order to provide a critique of violence, it is therefore necessary to inquire into this relation. He challenges the idea of violence as only a means to a legitimate or illegitimate end and suggests that violence is both "law-preserving" and "lawmaking."); Slavoj Žižek, Violence (2d ed., 2009) (arguing that, when inquiring into violence, it is necessary to look beyond its obvious incarnations to the violence inherent in language, as well as to our economic and political systems); Christoph Menke, *Law and Violence*, 22 L. & Lit. 1, 5 (2010) (arguing, with recourse to Benjamin and ancient Greek writings, that law interrupts violence and, at the same time, constitutes a form of violence itself).

9. Observations of the Permanent Roundtable's meetings and interviews carried out by the author in Bogota, Colombia (Aug.–Oct., 2012); *see also* Marina Brilman, *Consenting to Dispossession, The Problematic Heritage and Complex Future of Consultation and Consent of Indigenous Peoples*, 49.2 Colum. Hum. Rts. L. Rev. 1 (2018).

10. *See* Mónica Franco Baquero & Marina C. Brilman, *Actividades militares en territorios indígenas en Colombia: la seguridad nacional y la autonomía indefensa*, 33 Revista de Derecho Público 7 (2014).

cal" and incidental, the systemic violence[11] of inequality that structures this normative space continues to exist and is re-enacted. Meanwhile, military intervention in *Cauca* is portrayed by government officials as constituting the "limit" of dialogue, supposedly interrupting or suspending such dialogue when the law is broken. However, following Benjamin, it is argued that military violence—as well as its suspension or threat—is not merely "law-preserving," but also "law-making."[12] It forms part of the dialogue between the State and its citizens and allows the government to assert its power and establish a certain normative order. Former President Santos' simultaneous recourse to dialogue and violence can be regarded as indicative of a policy that seeks to consolidate the government's power as both democratic and sovereign, in the traditional sense of deciding over the life and death of its citizens.[13]

I. Roundtables as Spaces of Violence and Dialogue

Since the adoption of the Constitution in 1991, prior to the Santos Government, various laws and decrees establishing mechanisms for participation in decision-making had already been emitted in Colombia.[14] The principal objective of these measures may have been to solidify governmental legitimacy and transparency; some

11. Žižek, *supra* note 8, at 1–2.

12. Benjamin, *supra* note 8, at 284.

13. *See* Michel Foucault, The History of Sexuality, vol. 1 136 (Robert Hurley, trans., 1978) (explaining the "right to *take* life or *let* live."). Eduardo Galeano referred to the form of the 'democratatorship.' *See* Jasmin Hristov, *Indigenous Struggles for Land and Culture in Cauca, Colombia*, 32:1 J. Peasant Stud. 90 (2005).

14. *See, e.g.*, L. 99, diciembre 22, 1993, Diario Oficial [D.O.] 41146 http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=297 [https://perma.cc/S4BJ-4K92]; (providing an example of consultation of indigenous peoples); Decreto 1320 de 1998, julio 13, 1998, Diario Oficial [D.O.] 43.340, https://www.mininterior.gov.co/sites/default/files/co-decreto-1320-98-consulta-previa-indigenas-_2.pdf [https://perma.cc/VQ87-NY39] (regulating prior consultation of Indigenous and Afro-Colombian communities regarding extraction of natural resources in their territories); Directiva Presidencial 10 de 2013, Guia para la realización de Consulta Previa con Comunidades Étnicas (Nov. 7 2013), http://wsp.presidencia.gov.co/Normativa/Directivas/Paginas/2013.aspx [https://perma.cc/6EMG-XUXL] (guide on how to conduct consultation procedures with ethnic communities for different Ministries); Decreto 2613 de 2013, noviembre 20, 2013, Por el cual se adopta el Protocolo de Coordinación Interinstitucional para la Consulta Previa, http://www.minambiente.gov.co/images/normativa/decretos/2013/dec_2613_2013.pdf [https://perma.cc/RLW7-CY8X] (decree by which a protocol is adopted for coordination between State entities on matters regarding consultation); Directiva Presidencial 1 de 2010, Garantía del derecho fundamental a la consulta previa de los grupos étnicos nacionales (Mar. 26, 2010), https://www.mininterior.gov.co/sites/default/files/13_directiva_presidencial_01_de_2010.pdf [https://perma.cc/N79K-SVZV] (presidential decree describing which activities require prior consultation with ethnic groups, and the consultation process to be followed by State entities at the national and regional levels).

of the participatory mechanisms seem to leave little room for effective participation or social transformation.[15] Under the Santos Government, such mechanisms were not merely employed as tools of governance, but also to defuse violent situations.[16] Many incidents that took place during that government, and attracted national interest, gave rise to the State's establishment of a specific roundtable.

The cartoonist Héctor Osuna captured this particular phenomenon of the proliferation of roundtables in Colombia that go by the name of "tables" (*mesas*) in his drawing entitled "Disintegrated Dialogues" (*Diálogos Desintegrados*).[17] It depicts the dove of peace leisurely sitting on—as yet—undesignated tables, one stacked upon the other, with its gaze directed at already existing roundtables, arranged from the smallest in size to the largest, according to the importance of its subject matter.

The cartoon depicts the "Coffee Table" (*Mesa Cafetera*) in reference to the "Roundtable for the Negotiation of the Coffee Strike" (*Mesa de Negociación del Paro Cafetero*), established by the government in response to strikes by coffee workers in February and March 2013.[18] The State and the workers reached an agreement on March 8, 2013 to establish more roundtables on specific matters, such as pricing and imports. When this agreement was announced, the government declared that dialogue strengthens the "principle of authority" that is exercised through "pluralist participation rather than through force."[19]

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15. Julieta Lemaitre, *Diálogo sin debate: la participación en los decretos de la Ley de Víctimas*, 31 Revista de Derecho Público 6, 12–15, 26 (2013); Sam Hickey & Giles Mohan, *Towards Participation as Transformation: Critical Themes and Challenges*, *in* Participation: From Tyranny to Transformation? Exploring New Approaches to Participation in Development 5–9 (Samuel Hickey & Giles Mohan eds., 2004) (describing how "participation" has been called upon to perform a wide range of functions in accordance with differing objectives and political projects, which can sometimes be regarded as tyrannical; reference is also made to community development movements that were arguably devised with "clear intentions to control rural populations").

16. *See* Almut Schilling-Vacaflor & Riccarda Flemmer, *Conflict Transformation Through Prior Consultation? Lessons From Peru*, 47 J. Lat. Amer. Stud. 811, 813 (2015) (exploring how "participatory governance," such as consultation mechanisms with indigenous peoples, may have the potential to prevent violent conflict).

17. Osuna, *Diálogos Desintegrados,* El Espectador (July 15, 2013), https://www.elespectador.com/opinion/caricaturista/osuna/dialogos-desintegrados-imagen-433658 [https://perma.cc/NN72-NKCE].

18. *See Acta de Acuerdo Cafetero,* Vicepresidencia de la República de Colombia (Mar. 8, 2013), http://historico.vicepresidencia.gov.co/Noticias/2013/Paginas/130308-acta-de-acuerdo-cafetero.aspx [https://perma.cc/26MD-SGF6].

19. *Id.*

Also depicted is the "Table of Catatumbo" (*Mesa de Catatumbo*) in reference to a space of dialogue established by the government in response to protests of approximately 4,000 farmers in June 2013, denouncing their situation of poverty and State neglect. These protests had initially been met with armed, and sometimes lethal, force by the national police.[20] Finally, the cartoon shows the largest and arguably most important of all roundtables: the "Roundtable of Conversations" in Havana under the framework of which the peace negotiations with the FARC were conducted. What Osuna's drawing captures is how the hope and expectation of peace seem to rely, at least in part, on the dialogue carried out in these roundtables. At the same time, it questions the efficacy of the government's policy of establishing a new roundtable for each issue or conflict that presents itself.

The Colombian writer and poet William Ospina seems to agree with this position. He suggests that in a country where violence has taken over dialogue, the latter becomes almost impossible.[21] At the same time, he seems to imply that an end to violence is only possible through a return to dialogue, noting as follows:

> [O]nly when every truth can be told, when we are no longer imprisoned in someone else's truth, we will once again learn to be polemical without killing anyone . . . . Sooner or later what was war will learn to become dialogue, what was violence will learn to become request and demand, what was silence shall be able to become story.[22]

Similarly, Walter Benjamin answered his own question on whether "any nonviolent resolution of conflict [is] possible" in the affirmative, referring to the "conference" as "a sphere of human agreement that is nonviolent to the extent that it is wholly inaccessible to violence: the proper sphere of 'understanding' [and] 'language'."[23]

Although Ospina directs his hope for peace at discourse and dialogue, he also suggests that the "passion for grammar" of the governing elite reveals an alliance between political power and the power of language.[24] In this sense, Žižek argued that "language itself, the very medium of non-violence, of mutual recognition,

20. Telesur, *Campesinos colombianos de Catatumbo exigen atención frente a pobreza*, YouTube (July 19, 2013), https://www.youtube.com/watch?v=zWB3reB-Qiw [https://perma.cc/24FF-NPSM].

21. *See* William Ospina, Pa que se acabe la vaina 236–37 (2013).

22. *Id.*

23. Benjamin, *supra* note 8, at 289. *See also* Žižek, *supra* note 8, at 51.

24. Ospina, *supra* note 21, at 175.

involves unconditional violence" because the "appearance of *egalité* [between actors in dialogue] is always discursively sustained by an asymmetric axis of master versus servant."[25]

This paradox of (in)equality that is sustained through language and dialogue is particularly noticeable in Colombia, where an excess of norms and emphasis on procedural formalities coexist with the most extreme violence.[26] It has been suggested that it is precisely the aesthetics of discourse and legal argumentation that is used to "ritually purge" the horrors of such violence.[27] An obvious example of this is the case law of Colombia's Constitutional Court in which argumentation is lifted to something of an art form, but ends up seeming introspective and imprisoned—not just in legal language but also in its self-reflexiveness and alienation from the outside world. As Ospina suggests: "[w]hat is important are not rights . . . . [but] formalities, rubber-stamped paper, pompous discourse; everything that fits in the punch of an eloquent turn of phrase, rather than in complex reality."[28]

Does discourse stem or purge violence or does it merely reflect and perhaps even exacerbate it? Is dialogue nothing more than the continuation of war by other means[29] and, if so, is its violence structural and foundational or disruptive and incidental? To understand how a space of dialogue operates and the various ways violence manifests itself in it, the dynamics of discourse in the Permanent Roundtable between State and Indigenous representatives is explored.

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25. Žižek, *supra* note 8, at 65.

26. César Rodríguez Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields,* 18 Ind. J. Glob. L.S. 1, 4 (2010); Julieta Lemaitre, *Love in Times of Cholera: LGBT Rights in Colombia*, 6.11 Sur J. 73, 79–80 (2009).

27. Julieta Lemaitre Ripoll, El derecho como conjuro – Fetichismo legal, violencia y movimientos sociales 290–91 (2009) (referring to the law as a means to ritually expulse violence, thereby seeking to avoid a confrontation with the violence that it *itself* is based on).

28. Ospina, *supra* note 21, at 45, all translations from Spanish into English are the author's (referring to Gabriel García Márquez' phrase in his book Los funerales de la Mama Grande, in which the inheritance that Mama Grande leaves is described in a seemingly endless enumeration of national treasures, ranging from "beauty queens" to "the free—but responsible—press" and "communist danger").

29. Hannah Arendt, On Violence 9 (1970) (citing an anonymous author: "instead of war being 'an extension of diplomacy (or of politics, or of the pursuit of economic objectives),' peace is the continuation of war by other means").

II. A Space of Dialogue: The Permanent Roundtable

The key is in dialogue!
¡The key is in participation and negotiation![30]

A. *The Origins of the Permanent Roundtable*

President Santos expressed the above-mentioned words during a meeting with Indigenous leaders in the municipality of *El Dovio* in the Department of *Valle del Cauca* in October 2010, just after assuming the presidency. In 1996, approximately fourteen years prior, a Permanent Roundtable between State and Indigenous representatives had been established. In August, 1996, the Colombian newspaper *El Tiempo* published an article regarding events that lead to that establishment, stating, "[o]ut of pure Indigenous malice, representatives of eighty native peoples of Colombia continue the peaceful occupation of the Bishops' Association (*Conferencia Episcopal*) headquarters in the west of *Bogotá*."[31] It explained that this occupation formed part of a protest in which sixteen Indigenous movements took part, from the regions of *Chocó*, *Risaralda*, *La Guajira*, *Montería*, *Puerto Inírida*, *Ibagué*, *Pasto*, and *Cauca*.

The newspaper article also reported that the Indigenous peoples refused to leave the occupied building until State authorities signed two decrees that had been agreed between State and Indigenous representatives at the negotiating table on a Friday night .[32] Additionally, it stated that while the negotiators worked late into the night during the final days, "the rest of the Indigenous people participating in the occupation huddled around a television, so as not to miss the slightest detail of the Olympic Games."[33]

During the occupation, the Bishops' Association sought to clarify its role in the events through a press release: "it is not true that people were trampled on, nor is it true that the access to food and medical attention was impeded."[34] To the contrary, "with a humanitarian objective and an intention to serve, the Presidency of the

30. Decreto Ley de Víctimas No. 4633 de 2011, Colección Cuadernos Legislación y Pueblos Indígenas de Colombia no. 3, 7 (July 2012), http://www.vicepresidencia.gov.co/programas/Documents/Decreto4633-2011-ley-de-victimas.pdf [https://perma.cc/HH4H-8UHZ].

31. *Continúa la toma indígena en la Conferencia Episcopal*, El Tiempo (Aug. 4, 1996), http://www.eltiempo.com/archivo/documento/MAM-460641 [https://perma.cc/FY9U-YC7C]; *see also* Libardo José Ariza, *Malicia Indígena: El Reconocimiento y la Desconfianza en la Puesta en Marcha del Regimen Multicultural en Colombia*, 31 Revista de Derecho Público 1, 5–8 (2013) (explaining the history and use of the expression "indigenous malice").

32. *Id.*

33. *Continúa la toma indígena en la Conferencia Episcopal*, *supra* note 31.

34. Brilman, *supra* note 9, at 7.

Association contacted the Human Rights Ombudsman (*Defensoría de Derechos Humanos*) and the Red Cross to arrange for adequate assistance for the Indigenous peoples."[35] At the same time, it pointed out that "although it concerns legitimate demands, the means employed—that is to say the occupation of the Association's headquarters—is unacceptable. The hope is, therefore, for a swift resolution to the current situation."[36]

The vice-minister of interior, who led the State's negotiating team, stated that "one of the positive aspects of the negotiation taking place in Bogotá, is that a group of Indigenous spokespersons has been formed with whom one can come to an agreement" and that "[a]t times, it was not because of a lack of will that negotiations failed, but because the Indigenous movement was very disintegrated."[37]

Years later, an Indigenous representative said that the protest had "come about almost without planning," but had expanded rapidly to the rest of the country once it started, resulting in the occupation of roads and public buildings in different regions.[38] The principal reason for the mobilization was the violent acts allegedly committed against Indigenous communities, as well as the government's perceived lack of compliance with the "promises" contained in the 1991 Constitution. Although two Indigenous senators participated in the elaboration of that Constitution and its Article 7 provided that "the State recognizes and protects the ethnic and cultural diversity of the Colombian Nation," it was allegedly never defined how Indigenous rights would be practically implemented.[39]

The forty-three days that the occupation lasted, resulted in the adoption of two decrees: Decree No. 1396 created the Commission on Human Rights of Indigenous Peoples (*Comisión de Derechos Humanos de los Pueblos Indígenas*) and Decree No. 1397 created the National Commission on Indigenous Territories (*Comisión Nacional de Territorios Indígenas*) and the Permanent Roundtable.[40]

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35. *Id.*

36. *Id.*

37. *Continúa la toma indígena en la Conferencia Episcopal*, *supra* note 31.

38. Brilman, *supra* note 9, at 1, 7; *Historia Mesa Permanente de Concertación*, Mesa Permanente de Concertación, http://www.mpcindigena.org/index.php/nosotros/historia-de-la-mpc [https://perma.cc/9Z7E-UZ5V].

39. Constitución Política de Colombia [C.P.] art. 77; *Historia Mesa Permanente de Concertación*, *supra* note 38.

40. Decreto 1396 de 1996, agosto 12, 1996, Diario Oficial [D.O.] 42.853, http://www.mpcindigena.org/attachments/article/79/Decreto_1396_de_1996.pdf [https://perma.cc/EA53-6TM2]; Decreto 1397 de 1996, agosto 12, 1996, Diario Oficial [D.O.] 42853,

One Indigenous representative expressed the belief that the entry into force of the 1991 Constitution would make it unnecessary to advance Indigenous rights "by way of fighting, blockades, or strikes," although the two decrees had not been emitted "because of the State's will, but through the struggle and organization of the Indigenous peoples."[41] In other words, if Indigenous peoples had not protested or organized less effectively, the State would not have entered into dialogue at all, let alone emit the decree that established the Permanent Roundtable. This indicates that, even if a space of dialogue is established to prevent or defuse violent situations, its origin can be found precisely in conflict and protest.

B. *The Permanent Roundtable's Structure*

The normative and institutional framework of the Permanent Roundtable as a participatory mechanism is set out in Decree No. 1397. According to Article 11, its objective is as follows:

> For [Indigenous peoples and organizations] and the State to agree on all administrative and legislative decisions that may affect the [former], to evaluate the implementation of State policy on Indigenous matters without prejudice to the State's functions, and to follow up on the compliance of agreements reached in this forum.[42]

Article 10 establishes the participants in the Permanent Roundtable. For the State, they are representatives from eight Ministries[43] and various State entities, such as the Colombian Institute of Rural Development (*Instituto Colombiano de Desarrollo Rural*) (INCODER), that participated in almost all meetings because its jurisdiction encompassed matters related to ancestral lands. Since INCODER's liquidation in 2015, the *Agencia Nacional de Tierras* and *Agencia de Desarrollo Rural* have assumed INCODER's functions.[44] Perhaps surprisingly, the Ministry of Defense is not represented at

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http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=40298 [https://perma.cc/7HLG-CNW4].

41. Programa de radio: Historia Mesa Permanente de Concertación, 2013 (on file with author) [hereinafter Programa de radio]; *Historia Mesa Permanente de Concertación*, *supra* note 38.

42. Decreto 1397 de 1996, *supra* note 40, art. 11.

43. *Id.* art. 10 (the decree refers to the Ministries of the Interior, Agriculture and Rural Development, Environment, Finance, Economic Development, Mining and Energy, Health, and Education).

44. On December 7, 2015, INCODER's liquidation was announced, which became effective one year later. INCODER was liquidated because it did not effectively carry out its functions (upon its establishment, INCODER had assumed the functions of four previously existing State entities). *See* María Alejandra Medina C., *Liquidación del INCODER terminó, dice el Ministerion de Agricultura*, El Espectador (Dec. 22, 2016), https://www.elespectador

the Permanent Roundtable. Although any minister can be invited in an *ad hoc* manner depending on the issues on the agenda, this exclusion seems to indicate from the outset that military activities in Indigenous territories will not be a subject for discussion with Indigenous authorities.

The Indigenous participants are the Indigenous senators who are currently in office, the former Indigenous senators who participated in the Constitutive Assembly of 1991, a representative of the National Indigenous Organization of Colombia (*Organización Nacional Indígena de Colombia*) (ONIC), the Organization of Indigenous Peoples of the Colombian Amazon (*Organización de Pueblos Indígenas de la Amazonía Colombiana*) (OPIAC), the Indigenous Tairona Confederation (*Confederación Indígena Tairona*), as well as a delegate for each of the five "macro-regions" selected by Indigenous organizations of each region[45] The decree establishes that the International Labor Organization (ILO), the Inter-American Commission on Human Rights, and the Bishops' Association may attend the meetings as observers.[46]

In practice, all eight Ministries are generally represented although the civil servants who attend the meetings may vary depending on the subject matter discussed.[47] During the Santos Government, the number of ministers present at the meetings increased.[48] Regarding the Indigenous representatives, only one of the three former Indigenous senators of the Constitutive Assembly participated in the meetings because one was deprived of his liberty at the time of writing and the other decided to no longer participate.[49] Since Decree No. 1397 does not provide for a possibility to replace these participants, only eleven of the thirteen Indigenous representatives take part in the Permanent Roundtable in practice. The same eleven participants are usually present,

.com/noticias/economia/liquidacion-del-incoder-termino-dice-el-ministerio-de-a-articulo-671690 [https://perma.cc/Q6WD-6A3T].

45. Decreto 1397, *supra* note 40, arts. 10, 20 (the latter establishes that the government will finance the costs of election meetings for the macro-regions, following prior agreement on budget in the Permanent Roundtable).

46. Decreto 1397, *supra* note 40, article 10.

47. Author's observations of Permanent Roundtable meetings in Bogota, Colombia (Aug. 3, 2012; Oct. 25, 2012) [hereinafter Permanent Roundtable Meetings Observations]; Interview by the author with an ONIC representative, Bogotá, Colom. (June 2013) [hereinafter Interview].

48. Interview, *supra* note 47.

49. Programa de radio, *supra* note 41.

although their assistants and accompanying experts may vary.[50] Decision-making is by consensus,[51] which may explain the deadlock that sometimes occurs when decisions need to be made.

The Permanent Roundtable meets in different hotel conference rooms in *Bogotá*, although the decree establishes the possibility to organize meetings in "any place in the country."[52] The secretariat of the Ministry of Interior sets the dates for the meetings and finalizes the agenda,[53] which usually depends on the availability of ministers and civil servants. It is also in charge of logistics, choosing the hotels where meetings take place, as well as making travel arrangements for Indigenous participants who live outside *Bogotá*. Although not provided for in Decree N° 1397, in practice subroundtables have been established in which specific issues are discussed in preparation for the official meetings.[54] Indigenous representatives call these "daughter roundtables" (*mesas hijas*), which have the same structure as the Permanent Roundtable, but are not open to the public.[55]

Since its establishment, meetings have taken place more or less frequently, depending on the government in power. For example, during the administration of the former President Uribe, meetings were allegedly held every six to eight months.[56] In November 2006, Indigenous peoples temporarily withdrew from all spaces of dialogue created by Decrees No. 1396 and No. 1397 because of the State's alleged incompliance with agreements reached and because the lower-level State representatives who attended the meetings lacked decision-making power.[57] In 2007, after the Colombian government abstained from voting on the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration),[58] meet-

50. Interview, *supra* note 47; Decreto 1397, *supra* note 40, art. 10 (establishes the possibility of such accompaniment).

51. Decreto 1397, *supra* note 40, art. 17.2.

52. *Id.* art. 17.5.

53. *Id.* art. 17.4; Interview, *supra* note 47 (explaining that after each meeting, participants decide on the subjects to be addressed during the next meeting).

54. Interview, *supra* note 47 (explaining that the Commission on Human Rights and the National Commission on Indigenous Territories, which were established simultaneously with the Permanent Roundtable, have the same structure as the latter and are called "sister tables" (*mesas hermanas*) by indigenous participants).

55. *Id.*

56. *Id.*

57. *Id.*

58. G.A. Res. 61/295, Annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter U.N. Declaration]; *Voting Record Search*, UNBISNET, http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search&submenu=power#focus

ings were suspended for another two years.[59] However, in 2008, the Constitutional Court of Colombia referred specifically to the Permanent Roundtable and the necessity of the government to consult certain draft laws with Indigenous peoples.[60]

In August 2010, on the morning Santos took up the presidency, he participated in a ritual in the *Sierra Nevada* with leaders of the Indigenous peoples of *Kogui*, *Arhuaco*, *Kankuamo*, and *Wiwa*, and expressed his commitment to improve their situation.[61] During his presidency, the frequency of the Permanent Roundtable's meetings increased.[62]

C. *The Dynamics of Dialogue and Violence as a "Pathological" Occurrence*

Rather than focus on the participants in the Permanent Roundtable's meetings, it may be more instructive to follow the dialogue that takes place during such meetings.[63] In this Part C, two meetings of the Permanent Roundtable that took place on August 3 and October 25, 2012 are analyzed. Both meetings coincided with the heightened tension in *Cauca* between the State's Armed Forces and Indigenous peoples after the incident that took place at Berlín mountain in Toribió.[64] During each of these meetings, participants sat at a U-shaped table in a hotel conference room in the center of *Bogotá*, with State representatives on one side of the table

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[https://perma.cc/F6WJ-3K76] (search keyword "Declaration on the Rights of Indigenous Peoples").

59. *See* Brilman, *supra* note 9, at 8.

60. Corte Constitucional [C.C.] [Constitutional Court], Jan. 23, 2008, Sentencia C-030/08, http://www.corteconstitucional.gov.co/relatoria/2008/C-030-08.htm [https://perma.cc/CD3Y-EACH]. *See also* Corte Constitucional [C.C.] [Constitutional Court], Mar. 18, 2009, Sentencia C-175/09, http://www.corteconstitucional.gov.co/relatoria/2009/c-175-09.htm [https://perma.cc/AP9C-TQFJ] (the petitioners in this case, as well as the ONIC in an *Amicus Curiae*, argued that the failure to organize the Permanent Roundtable meeting to consult indigenous peoples on the draft Statute of Rural Development—*Estatuto de Desarrolo Rural*—proved a lack of consultation. The Constitutional Court established the unconstitutionality of that Statute for such a lack, but did not refer specifically to the Permanent Roundtable).

61. *Juan Manuel Santos comenzará su posesión con rito en la Sierra Nevada de Santa Marta*, El Tiempo (Aug. 5, 2010), http://www.eltiempo.com/archivo/documento/CMS-7845644 [https://perma.cc/J6F7-Y6U6].

62. Interview, *supra* note 47.

63. Niklas Luhmann, *What is Communication?*, 2 Comm. Theory 251 (1992) (describing how action and communication are generally attributed to individual actors, but that "*only communication can communicate* and that only within such a network of communication is what we understand as action created").

64. *See infra* Part III.B; *FFAA de Colombia recuperan base tomada por indígenas*, Reuters (July 18, 2012), http://lta.reuters.com/article/domesticNews/idLTASIE86H0EG20120719 [https://perma.cc/M9ZZ-8H7A].

and Indigenous representatives on the other. Although meetings are open to the public, the only people present besides the participants were assistants of State representatives, members of Indigenous peoples, and the occasional NGO representative or academic.[65]

The atmosphere during the meetings is generally cordial, but violence enters this space of dialogue in various forms, both implicit and explicit. Implicit violence manifests itself mostly in mutual distrust between the parties, as well as their inequality in terms of resources and bargaining power. It also appears in the form of barely veiled threats expressed by both parties during the meetings. More explicitly, violence enters dialogue in the Permanent Roundtable through references to specific violent incidents and to the simultaneous confrontations between the Armed Forces and Indigenous peoples in *Cauca*.

For example, regarding mutual distrust, a State representative said informally that some Indigenous participants were present at meetings to "take advantage" rather than to represent their respective communities in reference to the food and lodging provided by the State to participants who live outside *Bogotá*.[66] Similarly, Indigenous representatives express distrust towards their State counterparts, especially with regard to the State's perceived lack of political will to implement policies and comply with its obligations.[67]

Regarding implicit threats, the representative of the Ministry of Mining and Energy said an agreement would *have* to be reached during a meeting where a draft bill to reform the Mining Law was discussed. In the State representative's words, a previous law would re-enter into force whose effects were "much less favorable" for Indigenous peoples if no such agreement would be reached. The Indigenous representatives vigorously protested against what they regarded as coercion by the State.[68]

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65. Permanent Roundtable Meetings Observations, *supra* note 47. *See also* Marina Brilman, *Consenting to Dispossession: The Problematic Heritage and Complex Future of Consultation and Consent of Indigenous Peoples*, 49.2 COLUM. HUM. RTS. L. REV. 50–52 (2018) [hereinafter *Consenting to Dispossession*] (for, inter alia, the strategic employment by both parties of the "spanner in the works of progress" and "threat of State collapse" arguments).

66. Interview with a civil servant of the Ministry of Environment, in Bogotá, Colom. (July 2012); Decreto 1397, *supra* note 40, art. 17.6.

67. *Historia Mesa Permanente de Concertación*, *supra* note 38.

68. Permanent Roundtable Meetings Observations, *supra* note 47; *see also*, Brilman, *supra* note 9, at 10.

During that same meeting, the director of the Department of Prior Consultation (*Dirección de Consulta Previa*) of the Ministry of Interior[69] was present. The ONIC's representative mentioned that this director had been cited in the media stating that he felt "among friends" with CEO's of multinational companies.[70] He then asked the director how he felt "now that you are among indians" (*indios;* a pejorative term for Indigenous peoples used by persons who do not identify themselves as such).[71]

Regarding more explicit violence that enters this space of dialogue, a spokesperson for ONIC informed others at the beginning of one of the Permanent Roundtable meetings that an Indigenous representative had been assassinated the day before and that another usual participant in the Permanent Roundtable had been illegally detained. In response, the representative of the Ministry of Interior called the Public Prosecutor's Office to schedule a meeting for the next day.[72] These incidents were brought up in an ad hoc manner and were not on the agenda. This contributed to them being regarded as isolated or "pathological" incidents that disrupted the otherwise "normal" and peaceful discussions[73] The State's expeditious managing of the situation ensured that these violent incidents would not be the subject of further discussion or a threat to the continuity of the dialogue itself.

Apart from such particular violent occurrences, the Permanent Roundtable meetings that took place during the second half of 2012 played out against the structural backdrop of ongoing confrontations between the Armed Forces and local Indigenous peoples in *Cauca.* During one meeting when such confrontations were especially intense, the minister of interior himself was present.[74] Indigenous representatives reiterated previous requests for President Santos to attend the next meeting to discuss the confronta-

69. *See Flowchart*, Ministry of Interior (Colom.), https://english.mininterior.gov.co/institution/ministry/flow-chart [https://perma.cc/36HL-ULZZ] (this Department falls under the Vice-Ministry on "participation and equality of rights" of the Ministry of Interior); *see also* Brilman, *supra* note 9, at 42–45 (on some of the institutional challenges related to consulting indigenous peoples in Colombia).

70. Permanent Roundtable Meetings Observations, *supra* note 47.

71. *Id.*

72. *Id.*

73. Žižek, *supra* note 8, at 2 (describing subjective violence as a "perturbation of the 'normal', peaceful state of things").

74. *Gobierno instala mesa de concertación con pueblos indígenas*, El Espectador (Aug. 3, 2012), http://www.elespectador.com/noticias/politica/gobierno-instala-mesa-de-concertacion-pueblos-indigenas-articulo-364972 [https://perma.cc/GDQ2-2VZ8]; Permanent Roundtable Meetings Observations, *supra* note 47.

tions. However, the minister announced that the President and he would meet with local Indigenous leaders in the region. He did not address the conflict in *Cauca* any further, ended and left the meeting, and was immediately surrounded by journalists.[75] Almost two weeks after this meeting, President Santos and the minister effectively met with Indigenous representatives in *Cauca*.[76] The President was given the ceremonial baton of the Indigenous Guard (*Guardia Indígena*) and, holding it in his hand, took part in the singing of an Indigenous hymn. He reiterated that Indigenous peoples were never considered to be *guerrilleros* and added: "I too want peace, but I also know how to wage war, and until there is a different sign from the insurgency, things are unlikely to change."[77]

It is important to note that Indigenous representatives in the Permanent Roundtable in *Bogotá* wished to discuss the confrontations in *Cauca* as part of the dialogue, while State representatives made an effort to exclude the matter from such dialogue. Similarly, the occasional interruptions regarding particular incidents of violence were dealt with summarily to allow the dialogue to continue. It seems that explicit violence is purposefully excluded from the Permanent Roundtable's dialogue and is instead confined to the regions. In this way, violence is marginalized both discursively and geographically so that a supposedly peaceful dialogue is sustained.

Following Žižek, the explicitly violent incidents of assassination and arbitrary detention, as well as the confrontations in *Cauca,* can be regarded as "subjective" violence that is "directly visible" and "performed by a clearly identifiable agent,"[78] while the implicit violence of mutual distrust and threatening language can be regarded as manifestations of "objective" or "symbolic" violence that is "embodied in language and its forms" and remains largely "invisible."[79] Even if underlying issues such as inequality, economic dis-

75. Permanent Roundtable Meetings Observations, *supra* note 47.

76. Press Release, President Juan Manuel Santos, Presidente Santos califica como un paso muy importante reunión con comunidades indígenas en el Cauca (Aug. 18, 2012), http://wsp.presidencia.gov.co/Prensa/2012/Agosto/Paginas/20120818_02.aspx [https://perma.cc/43WW-HAFP].

77. Edinson Arley Bolaños, *La Paz con los indígenas,* El Espectador (Aug. 18, 2012) (referring to the difference with the situation in *Cauca* four years prior, when former President Uribe only reached agreement with indigenous peoples that the latter would not block the Pan-American highway and that the State would dismantle its military presence in areas where indigenous peoples were protesting).

78. Žižek, *supra* note 8, at 1.

79. *Id.* at 1–2.

advantage, and discrimination of Indigenous peoples form the context in which dialogue in the Permanent Roundtable takes place, participants address these matters less specifically. Nevertheless, such objective violence needs to be taken into consideration to understand violent incidents as more than merely "'irrational' explosions of subjective violence" that interrupt an otherwise peaceful dialogue.[80]

D. *The Virtues of Dialogue? The Adoption of Decree No. 4633 to the Victims' Law*

On December 9, 2011, Decree No. 4633 to the Victim's Law was emitted, which establishes the "integral reparation and restitution of territorial rights to victims [of the internal armed conflict] who are members of Indigenous peoples and communities."[81] The negotiation and adoption of this decree in the Permanent Roundtable is often regarded as setting an example for other State-instituted spaces of dialogue. In fact, the decree has been retroactively represented as the *raison d'être* for which the Permanent Roundtable was established in 1996 and as illustrative of the possibility for the State and Indigenous peoples to reach agreement on important matters through negotiation and dialogue.

For example, the United Nations Development Programme (UNDP) stated that "political recognition was given to Indigenous peoples and communities as key actors in a democracy and, at the same time, the importance of the consolidation of spaces and methodologies of agreement and consultation was shown."[82] Similarly, the Colombian NGO *Dejusticia,* which assisted the Indigenous peoples in the negotiations, described the process as follows:

> The Indigenous organizations that participated in the Permanent Roundtable took a revolutionary stance . . . to revindicate rights [as well as] . . . the process itself. They prepared themselves legally and politically and at every step took the initiative.

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80. *Id.* at 2; *see also* ARENDT, *supra* note 29, at 4–5 (referring to subjective violence as including an "additional element of arbitrariness" and an "all-pervading unpredictability").

81. Decreto Ley de Víctimas No. 4633 de 2011, Colección Cuadernos Legislación y Pueblos Indígenas de Colombia no. 3 (Dec. 9, 2011), http://www.vicepresidencia.gov.co/programas/Documents/Decreto4633-2011-ley-de-victimas.pdf [https://perma.cc/HH4H-8UHZ] (perhaps most noteworthy is that this decree recognizes indigenous territory affected by the conflict as "victim" and refers to collective reparations, particularly with regard to environmental and cultural damages suffered by indigenous communities).

82. Programa de las Naciones Unidas para el Desarrollo, La reparación integral de los pueblos indígenas: un enorme desafío, at 5 (Nov.–Dec. 2012), https://colaboracion.dnp.gov.co/CDT/Consejo%20Nacional%20de%20Planeacin/65.pdf [https://perma.cc/D5NT-CRWN].

> They presented the rules of the game on the basis of which they construed the consultation process regarding this norm. The concepts of reparation, displacement, damages, and others were woven [into the Decree] from an Indigenous perspective.[83]

State entities characterized the negotiation process of the decree as a "wide and democratic dialogue," emphasizing the "mutual recognition" between State and Indigenous representatives "as the country's political authorities."[84] They described how "more than . . . an emphasis on differences, a harmonization of affinities and common interests was sought" and even went so far as to suggest that "it was jointly reflected upon, revised, and clarified what the process of colonization and contact with non-Indigenous society has meant for Indigenous peoples."[85] This statement suggests that what is at stake is not only the successful negotiation of a specific decree, but a reaffirmation of the government's legitimacy as it seeks to achieve the aim—established in the Constitution of 1991—of Colombia as a multi-ethnic democracy.[86]

However, another part of the story about the Permanent Roundtable's success in adopting Decree No. 4633 is often forgotten or glossed over in the celebratory considerations of the "democratic" negotiation between State and Indigenous representatives. It is hinted at in the remark of State entities as follows:

> The decision made by Indigenous authorities to accept an exceptional procedure to realize the prior consultation process—and propose the inclusion of article 205 in the draft Victim's Law[87]—deserves special recognition. It gave legal certainty to that Law and made the subsequent adoption of the Decree, aimed at the country's ethnic groups, possible.[88]

This acknowledgement refers to the fact that no prior consultation regarding the Victims' Law had been carried out with Indigenous peoples. Moreover, the provisions of the Victims' Law failed

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83. Natalia Orduz Salinas, *El Decreto Ley de reparaciones de pueblos Indígenas*, SEMANA (Dec. 20, 2011), http://m.semana.com/opinion/articulo/el-decreto-ley-reparaciones-pueblos-indigenas/251079-3 [https://perma.cc/TTV9-VWGZ].

84. Decreto 4633 de 2011, *supra* note 81.

85. *Id.*

86. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 1, 7.

87. L. 1448, May 10, 2011, DIARIO OFICIAL [D.O.] 48.096, https://www.ictj.org/sites/default/files/subsites/colombia-linea-tiempo/docs/Ley1448/ley1448.pdf [https://perma.cc/6YGB-5KD4]. Article 205 of this law "provide[s] the President of the Republic with extraordinary and precise powers, for a period of six (6) months to be counted from the emission of this Law, to regulate—by means of Decrees with force of law—the rights and guarantees of victims who are members of indigenous peoples and communities, Roma and black, afro-Colombian, *raizales* and *palenqueras*," such decrees are to be consulted with indigenous and minority representatives. *Id.* art. 205.

88. Decreto 4633 de 2011, *supra* note 81, at 8.

to recognize the particular ways in which the conflict affected the Indigenous peoples and their lands. This absence in that law is remarkable considering that the conflict in Colombia to a considerable extent plays out in Indigenous territories. The lack of consultation regards a procedural oversight that could have led Indigenous authorities to denounce the unconstitutionality of the Victims' Law before the Constitutional Court of Colombia.[89]

However, they agreed to enter into negotiations with the State on a separate decree that would regulate the reparation of Indigenous victims of the conflict, thereby leaving the "legal certainty" of the Victim's Law intact. Most likely, Indigenous authorities did not wish to impede the adoption of the Victim's Law—an important piece of legislation for all victims of the internal armed conflict. In this way, they prevented being singled out once again as those who obstruct the Nation's progress to the prejudice of the rest of the population.[90] As one Indigenous representative put it, the decree was agreed upon in this way because it benefitted the Colombian population.[91] There was simply no alternative.

The origin of Decree No. 4633 therefore lies in the exclusion of Indigenous peoples from the Victims' Law and, implicitly, from the shared suffering of the Colombian population in general. As an Indigenous *Nasa* leader said after the emission of the decree: "as regards the Victims' Law that reiterated the country's social

89. *See e.g.* Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-030/08, *supra* note 60 (In this case, the Constitutional Court declared the unconstitutionality of the Forest Law—*Ley Forestal*—because indigenous communities had not been consulted during its preparation. The Constitutional Court established that the lack of consultation did not constitute a formal error, but one that directly affected the substance of the law.). More recently, the Constitutional Court restricted the mandatory nature of consultation of indigenous peoples by distinguishing between legislative measures that "directly affect" such peoples and those that merely establish a general normative framework. *See* Corte Constitucional [C.C.] [Constitutional Court], May 3, 2012, Sentencia C-317/12, ¶¶ 4.1–4.2, http://www.corteconstitucional.gov.co/RELATORIA/2012/C-317-12.htm [https://perma.cc/7WLH-JGL5] ("Direct affectation" will be assumed if the proposed measure: (i) affects specific constitutional rights of indigenous peoples, (ii) relates to ancestral territories, (iii) regards a matter regulated by ILO Convention 169). *See also*, Corte Constitucional [C.C.] [Constitutional Court], May 18, 2012, Sentencia T-376/12, http://www.corteconstitucional.gov.co/relatoria/2012/t-376-12.htm [https://perma.cc/HVJ5-BBDM]; ONIC, Balance ONIC del Decreto Ley 4633/2011 y la Ley de Víctimas (June 2012), http://www.oidhaco.org/uploaded/content/article/706098658.pdf [https://perma.cc/33B3-7AEP] (noting that Article 205 of L. 1448, *see* discussion *supra* note 87, gave legal life to the consultation of indigenous peoples).

90. Brilman, *supra* note 9, at 50–53 (describing how the "spanner in the works of progress" argument has been used regarding prior consultation of projects for the exploitation of natural resources in ancestral lands, thereby reinforcing the already existing discrimination against indigenous peoples in Colombia).

91. Interview, *supra* note 47.

[problems] but excluded Indigenous issues, we have revindicated that we are part of the Colombian nation and that that should be articulated, because we are the most vulnerable population."[92] Another Indigenous leader referred to the State's treatment of Indigenous peoples as "though we represent a challenge to the Colombian conglomerate."[93]

A possibly negative effect of the decree's adoption is that it seemingly confirms that the exclusion of Indigenous peoples does not necessarily prejudice negotiations—that it has no important consequences, or at least none that cannot be remedied. This effect can also be observed in Permanent Roundtable meetings with regard to, for example, reform of the Mining Law. There seems to be a perception among State representatives that with sufficient pressure, little time, and capitalizing on the implicit threat of discrimination by the rest of the population, an agreement can always be reached with Indigenous peoples.

In this sense, the latter are arguably victims of the Permanent Roundtable's success. Their collaboration, even if granted under pressure, creates expectations and seems to confirm that this is how dialogue between the State and Indigenous peoples functions. The decree's problematic origin, as well as its negotiation and adoption, seems to be justified in hindsight by considering it as an example to be followed.

This belies the suggestion that the negotiation of Decree No. 4633 signified a shift in the balance of power between the State and Indigenous peoples in the Permanent Roundtable.[94] Although the State's eagerness to come to an agreement in light of the potential unconstitutionality of the Victim's Law undoubtedly gave Indigenous representatives more leverage in negotiations than they would otherwise have had, this was only temporary. It lasted until the State's objective was achieved and the decree was adopted, but otherwise left the structural inequality between the parties unchanged.[95] This was illustrated in August 2014 by a tem-

92. Brilman, *supra* note 9, at 14.

93. *Indígenas del Cauca entran en levantamiento para habitar tierras que consideran suyas*, El Espectador (Feb. 16, 2015), http://www.elespectador.com/noticias/nacional/indigenas-del-cauca-entran-levantamiento-habitar-tierra-articulo-544056 [https://perma.cc/S3JK-FCRQ].

94. Lemaitre, *supra* note 15, at 16.

95. John Gaventa, *Towards Participatory Governance: Assessing the Transformative Possibilities*, in Participation: From Tyranny to Transformation? Exploring New Approaches to Participation in Development 25 (Samuel Hickey & Giles Mohan eds.) (2004) (arguing that "simply creating new institutional arrangements for participatory governance will not necessarily be more inclusive or more pro-poor. Rather, much will depend on the nature

porary suspension of Indigenous representatives' participation in the Permanent Roundtable's meetings because of an alleged lack of implementation of Decree No. 4633 by the State.[96]

E. *Some Challenges of the Permanent Roundtable: Delegation, Representation, and the Institutionalization of Dialogue*

Three main challenges can be identified with regard to the Permanent Roundtable as a space of dialogue. The first challenge relates to the State's delegation and distribution of competencies, as well as the alleged lack of political will to implement Indigenous policies. For example, the responsibility of the Ministry of Interior to carry out prior consultation processes with Indigenous peoples is, in practice, often delegated to other State agencies.[97] Nevertheless, at least formally, jurisdictional boundaries are upheld, perhaps to prevent Colombian courts from ruling that a State agency's decisions are invalid because of procedural defects.[98]

Moreover, the continuous creation of new State agencies, the corresponding reassignment of responsibilities, and changes to the normative framework seem to contribute to the paralysis of dialogue at the Permanent Roundtable and impede the State's expeditious compliance with its obligations.[99] During meetings, it is not unusual for a State representative to inform the participants that his or her agency does not have the institutional jurisdiction to decide on a matter or that it lacks particular expertise.[100] This demonstrates a failure to assume responsibility and is also indicative of a lack of transparency, since it is not immediately obvious which entity should be held responsible for any deficiencies.

Apart from the confusion generated by the delegation of tasks between State entities, there is also an apparent failure to allocate

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of the power relations which surround and imbue these new, potentially more democratic, spaces.").

96. *Organizaciones Indígenas suspenden sesión de la MPC debido al no avance del gobierno en la implementación del Decreto Ley 4633 de 2011*, Mesa de Concertación (Aug. 6, 2014), http://www.mpcindigena.org/index.php/2014-01-09-07-38-36/actualidad-mpc-indigena/104-organizaciones-indigenas-suspenden-sesion-de-la-mpc-debido-al-no-avance-del-gobierno-en-la-implementacion-del-decreto-ley-4633-de-2011 [https://perma.cc/SZQ2-T27Y].

97. Interview by the author with a civil servant of the Ministry of Environment, in Bogotá, Colom. (July 2012).

98. *See* Brilman, *supra* note 9, at 44.

99. *Id.* at 39-45 (referring, for example, to the establishment of a Special Administrative Unit on Prior Consultation—*Unidad Administrativa Especial de Consulta Previa*—as part of a new consultation draft bill that would form part of the Ministry of Justice rather than the Ministry of Interior and take over some, or all, of the competencies the Department on Prior Consultation currently exercises).

100. *Id.* at 50; Permanent Roundtable Meetings Observations, *supra* note 47.

resources to specific issues, rather than a lack of resources itself.[101] A more fundamental criticism is that there is an absence of political will to implement agreements reached in the Permanent Roundtable. Indigenous representatives believe that their State counterparts are mostly trying to "make a good impression" and that Indigenous leaders are only invited to dialogue when the State "needs something," so that dialogue in the Permanent Roundtable "is wearing thin . . . . [E]ven if we define a lot, there is no political will."[102]

The second challenge faced by the Permanent Roundtable relates to Indigenous peoples' representation, the creation of an Indigenous interlocutor, and what could be called a national Indigenous interest.[103] For example, the OPIAC—one of the permanent participants identified in Decree No. 1397—is itself constituted by thirty-six Indigenous organizations. During meetings, one OPIAC delegate participates, accompanied by one or two local Indigenous leaders.[104] Therefore, the majority of Indigenous peoples in Colombia are only indirectly represented, including the *Wayuu* (one of the largest and most politically active Indigenous peoples in the country). The latter form part of a "macro-region" whose representative is from a different Indigenous community.[105] This method of representation may leave many Indigenous peoples disaffected and negatively affects the legitimacy of the Permanent Roundtable as a space of dialogue.

Due to such indirect representation and the fact that meetings are held in *Bogotá*, one of the ONIC's main objectives is the dissemination of knowledge about the Permanent Roundtable in the regions. One way to provide information is through the "daughter roundtables."[106] Although these are used for the preparation of negotiations with the State, they simultaneously serve as an educational space where matters can be explained to Indigenous authorities from the regions who travel to *Bogotá* as observers or accompanying experts. The ONIC also uses regional radio stations

101. Permanent Roundtable Meetings Observations, *supra* note 47.

102. Programa de radio, *supra* note 41.

103. *See generally* Mauricio Caviedes Pinilla, M. Oro a cambio de espejos: discurso hegemónico y contra-hegemónico en el movimiento indígena en Colombia 1982–1996 ch. 5 (doctoral dissertation Universidad Nacional de Colombia) (2011), http://www.bdigital.unal.edu.co/4019/1/Mauriciocaviedespinilla.2011.pdf [https://perma.cc/W6QM-HGF3] (discussing the first indigenous national congress organized in Colombia and the importance of the constitution of an indigenous identity for political mobilization).

104. Interview, *supra* note 47.

105. *Id.*

106. *Id.*

to inform people of the discussions taking place in *Bogotá*.[107] However, as one Indigenous representative said: "they give us tickets to participate in dialogue for two days, but not to [share (*socializar*) the results]" so that Indigenous peoples in *Cauca* believe "we [the permanent Indigenous participants] have sold ourselves to the State, because they never see the results of the dialogue carried out in the Permanent Roundtable."[108]

ONIC seeks a subtle balance between bringing the dialogue to the regions, while at the same time preventing the decentralization of the Permanent Roundtable. The latter could affect its functioning as a space to promote a national Indigenous interest, which itself largely remains to be defined. To a certain extent, such decentralization is already taking place when State representatives negotiate directly with local Indigenous communities regarding projects to be carried out in their regions. Sometimes it is only after the fact that Indigenous participants in the Permanent Roundtable are informed that an agreement has already been reached locally.[109] In this way, the established framework for Indigenous participation in decision-making with seasoned Indigenous negotiators is circumvented.

Another aspect of the challenge of effective Indigenous representation is a lack of expertise. One Indigenous representative stated, "at times discussions lack a [certain] technical level," so "we, Indigenous peoples, have to improve the level of proposition."[110] Perhaps this is not only caused by limited resources and education, but is also indicative of the absence of a "truly Indigenous policy" which, as an Indigenous representative said, "needs to be distinguished from an electoral policy."[111] The latter refers to the focus of Indigenous organizations in the last few decades on Indigenous political representation before State organs, starting with the Constitutive Assembly of 1991. Such efforts to be represented, in part required by domestic norms, have allegedly come to overshadow the formulation of an Indigenous policy.[112] What contributes to the absence of such a policy is that Indigenous peoples arrive

107. *Id.*

108. Programa de radio, *supra* note 41.

109. Permanent Roundtable Meetings Observations, *supra* note 47 (remark by an indigenous representative).

110. Marina C. Brilman, *La Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas – El Diálogo que es su propio fin*, 31 Revista de Derecho Publico 1, 17 (2013).

111. *Id.*.

112. Pinilla, *supra* note 103, at 274–75 (2011).

divided at spaces of dialogue like the Permanent Roundtable, as illustrated by the following remark of an Indigenous representative:

> We create . . . new organizations [apart from] the legitimate ones that were recognized by our traditional authorities, precisely because we do not listen to dissidence. Regional organizations have treated their Indigenous brothers badly, who—in turn—feel obliged to create separate 'tents.' In order to prevent this from happening, Indigenous organizations should focus and listen to their dissident brothers, so as to avoid a triumph of the Government's strategy to 'divide and conquer.'[113]

However, references to an Indigenous identity or a national Indigenous interest may also play down the importance of existing differences between the various Indigenous peoples in the country. For example, it has been noted how the "Amazon region does not seem to talk. The Andean region speaks for it. Only denouncements that relate to the Amazon region are heard, but never the voice of those who lead organizations in that region."[114]

Although there is some risk in the "discursive construction of a political subject"[115] that excludes certain Indigenous cultures, there are also considerable benefits to the creation and promotion of a shared Indigenous identity, policy, and national interest. For example, these may be used to organize a coherent and collective resistance to State initiatives.[116] The adoption of a discourse regarding the revindication of Indigenous rights has certainly contributed to the visibility of the Indigenous movement in Colombia.[117] In this sense, the Permanent Roundtable as a space where a shared Indigenous identity can be created, developed, and exercised, has been useful for Indigenous representatives, even if - during meetings - some participants only focus on issues of importance to their own region.

Indigenous representatives are not the only interested parties in the formulation of an Indigenous identity and policy. After the occupation of the headquarters of the Bishops' Association in 1996, the vice-minister of interior identified as one of the positive consequences of this occurrence that an Indigenous representation had emerged "with whom it is possible to come to an agree-

113. *See* Brilman, *supra* note 9, at 17.

114. Pinilla, *supra* note 103, at 240.

115. *Id.* at 285 (referencing Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy – Towards a Radical Democratic Politics (2001)).

116. *Id.* at 199.

117. *Id.* at 179.

ment."[118] The existence of an "Indigenous interlocutor" is very much in the State's interest.[119] In the absence of such an interlocutor, for example, it would be impossible for the State to carry out the prior consultation processes required by law for the implementation of certain projects.

Therefore, it could be said that both the State and Indigenous representatives negotiate Indigenous identity at the Permanent Roundtable. The former negotiates it to legitimize the State's projects and demonstrate good will regarding Indigenous matters, and the latter to promote a political or social program. The Permanent Roundtable is a space in which participants seek to promote apparently similar projects but with different motives and objectives.

The third challenge of the Permanent Roundtable relates to the institutionalization of dialogue. The Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR) indicated that "consultation is the instrument envisaged by [ILO] Convention [No. 169] to institutionalize dialogue with Indigenous peoples, ensure processes of inclusive development and prevent and resolve disputes."[120] Such an "institutionalization of dialogue"[121] between Indigenous and State representatives seems to have an intrinsically positive connotation because it implies continuous communication between the parties. In fact, the CEACR has determined that the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) requires such a "permanent dialogue."[122]

The rationale for this requirement is that a "permanent" or "institutionalized" dialogue prevents the exclusion of Indigenous peoples from decision-making processes that affect them. However, it also implies the "solidification" of some elements of dia-

118. El Tiempo, *supra* note 31.

119. Pinilla, *supra* note 103, at 197.

120. Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR), Int'l Labor Org., Observation - Adopted 2006, Published 96th ILC Session (2007), ¶ 3, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2262661 [https://perma.cc/6M66-27V7].

121. *Id.* (referring to "consultation [as] the instrument envisaged by the [ILO] Convention [169] to institutionalize dialogue with indigenous peoples").

122. Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR), Int'l Labor Org., Direct Request - Adopted 2005, Published 95th ILC Session (2006), ¶ 4, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2247763 [https://perma.cc/PV7N-LPCS] (expressing concern over the irregular functioning of participation and consultation mechanisms in Bolivia and determining that ILO Convention No. 169 requires a "permanent dialogue at all levels").

logue that may not necessarily be positive.[123] Institutionalized dialogue can reinforce existing inequalities. For example, an Indigenous *Arhuaco* leader said that "thanks to the two Decrees—No. 1396 and No. 1397—we have legal spaces to come to agreements; very important steps have been taken to the extent that Indigenous peoples can get closer to the decisions that the Government is going to take."[124] In other words, the Permanent Roundtable is still regarded as a space where the State unilaterally informs Indigenous peoples about its policy decisions, rather than a real space of negotiation and agreement.

Moreover, the fact that communication is continuous does not mean that it is necessarily productive. In fact, one could reach the opposite conclusion: if dialogue is continuous, then why hasten to come to an agreement? Žižek suggests that "prolonging communicative contact suggests the emptiness of such contact . . . [that then] has a propitious technical function as a test of the system itself."[125] Continuous communication is, in that case, above all a test to see "whether the channel is working."[126] At the same time, such communication also serves the government's objective of citizen participation[127] through mechanisms established by the State for that purpose.

F. *Dialogue for Dialogue's Sake or the Construction of a Public Realm?*

One Indigenous representative said that the creation of the Permanent Roundtable had, counterintuitively, increased the distance between the State and Indigenous peoples.[128] This could be attributed to the technical nature of the discussions or the physical distance between *Bogotá* and the regions. However, it is more probable that this feeling of alienation is partly caused by the recognition of Indigenous peoples that the Permanent Roundtable's dialogue contains its own end. The objective of this space of dialogue seems to be dialogue itself, so that its objective is always already fulfilled and there is a lack of urgency to achieve more. Indigenous peoples have been heard, regardless of whether any implementation is given to their suggestions. Implementation is,

123. *See* Brilman, *supra* note 9, at 54.

124. Brilman, *supra* note 9, at 19.

125. Žižek, *supra* note 8, at 67 (referring to Jakobson).

126. *Id.* at 67.

127. *Id.* at 183 (Žižek arguing that "[t]hose in power often prefer even a 'critical' participation, a dialogue, to silence—just to engage us in 'dialogue' to make sure our ominous passivity is broken").

128. Programa de radio, *supra* note 41.

after all, both exterior and posterior to dialogue. Therefore, the most important success of the Permanent Roundtable may be its existence, which is itself the result of dialogue—a dialogue achieved by Indigenous protest.

According to Žižek, "dialogue for dialogue's sake" may reflect a "culturalisation of politics" where the State "neutralizes" political and economic differences into cultural ones to avoid having to adopt lasting political solutions.[129] It could also be said that State-instituted participatory mechanisms aimed at Indigenous peoples or other minorities combine two logics that operate side by side in Colombia: a logic of colonialism based on violence between the victors and the vanquished, as well as a democratic logic of "social contract" where Indigenous peoples are regarded as citizens.[130] However, this coexistence of violence and democracy may not be particular to the Permanent Roundtable if one takes into account the foundational violence that allegedly lies at the root of any State's existence.[131]

Perhaps the Permanent Roundtable can be understood as being indicative of the absence of a "public realm" or shared reality between State and Indigenous representatives, and—at the same time—as an effort to construct it. As the philosopher and political theorist Hannah Arendt said: "[t]o live together in the world means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it."[132] In this sense, any roundtable, including the Permanent Roundtable, can be regarded as signifying a common space that "gathers together" its participants. Without a roundtable, or a space of dialogue, it becomes impossible to "relate and separate":

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129. Žižek, *supra* note 8, at 119.

130. Julieta Lemaitre Ripoll, ¡Viva nuestro derecho! Quintín Lame y el legalismo popular, in La Quintiada (1912–1925) La rebelión indígena liderada por Manuel Quintín Lame en el Cauca 221, 254–57 (2013) (pointing out that a "presumed consent to be governed" does not necessarily apply in the relation between State authorities and indigenous peoples and that the indigenous leader, Quintín Lame, at the beginning of the twentieth century, did not appeal to the Colombian State for the protection of indigenous lands on the basis of a "social contract." Rather, he appealed to such protection on the basis of an implicit agreement between victors and vanquished: in exchange for indigenous submission to colonizing violence, the State should respect limited self-rule in indigenous reservations.).

131. Arendt, *supra* note 29, at 35 (citing Max Weber); *Id.* at 40–41 (arguing that the social contract is a feeble construct because "support [of the laws to which the citizenry has given its consent] is never unquestioning" and "as far as reliability is concerned, it cannot match the indeed 'unquestioning obedience' that an act of violence can exact").

132. Hannah Arendt, The Human Condition 52 (Univ. of Chicago Press ed., 1958).

> The public realm, as the common world, gathers us together and yet prevents our falling over each other, so to speak. What makes mass society so difficult to bear is not the number of people involved, or at least not primarily, but the fact that the world between them has lost its power to gather them together, to relate and to separate them.
> The weirdness of this situation resembles a spiritualistic séance where a number of people gathered around a table might suddenly, through some magic trick, see the table vanish from their midst, so that two persons sitting opposite each other were no longer separated but also would be entirely unrelated to each other by anything tangible.[133]

Roundtables can be used to summon the idea of a shared world or public realm, especially if it is absent in practice.

III. A Space of Violence: Conflict in Cauca

> "The Government wants dialogue and respect but . . . [n]o one in Colombia should feel that they can break the law and think they have the arguments to do so, because sooner or later justice arrives and sooner or later the Armed Forces are obliged to act against those who break the law."[134]

A. *Confrontations Between the State's Armed Forces and Indigenous Peoples in Cauca*

While State and Indigenous representatives were engaged in dialogue in the framework of the Permanent Roundtable, confrontations were heating up between the parties in the Department of *Cauca*, a region with a long history of Indigenous activism and resistance. At the heart of the confrontations that took place in 2012, which continue to occur intermittently, lies a disagreement that can be briefly summarized as follows.[135]

Indigenous peoples believe that the State's Armed Forces, in their battle against guerrilla groups, should respect Indigenous autonomy over ancestral lands. This implies that military activities cannot be carried out in these lands without prior consultation

133. *Id.* at 52.

134. Radio interview with then-Minster of Defense, Juan Carlos Pinzón, *Todo tiene un límite: Santos a indígenas del Cauca*, Caracol Radio (July 17, 2012), http://www.caracol.com.co/noticias/regional/todo-tiene-un-limite-santos-a-indigenas-del-cauca/20120717/nota/1723700.aspx [https://perma.cc/859M-HLVH] (addressing the inhabitants of various municipalities in Cauca).

135. *See Por qué. protestan los indígenas del Cauca?*, Semana (Feb. 26, 2015) http://www.semana.com/nacion/multimedia/por-que-protestan-los-indigenas-del-cauca/419186-3 [https://perma.cc/H55V-U8C3] (providing an example of indigenous protests in the region and violent confrontations with the police).

with Indigenous authorities. Conversely, the State argues that guaranteeing national security is necessary for Indigenous peoples to enjoy their autonomy. The idea that the rights to life, integrity, and any other rights can only be guaranteed through strengthening national security was also central to the Uribe Presidency and his Policy of Defense and Democratic Security (*Política de Defensa y Seguridad Democrática*).[136] As a consequence, national security comes to trump everything else and military violence exercised in its name is rendered unquestionable.

According to the most recent national census on Indigenous peoples in Colombia, there are eighty-seven individuals living in 710 reservations in twenty-seven provinces and 228 municipalities.[137] The lands they inhabit extend to thirty-four million hectares in total, representing 29.8% of the national territory.[138] Not only are Indigenous lands of cultural importance to the peoples who live there, they also have great strategic, economic, and political value. The UNDP described how illegal armed groups use Indigenous territories as corridors for the trafficking of drugs, arms, and contraband, as well as for the movement of their troops.[139] This is why much active combat between the Armed Forces and the guerilla has taken place in ancestral lands, causing the displacement of Indigenous peoples and affecting their livelihoods.[140]

In *Cauca*, these elements of the conflict are clearly present.[141] The region is conveniently situated, with access to the Pacific Ocean through the harbor city of *Buenaventura* and inland to the

136. Ministerio de Defensa Nacional, Política Integral de DDHH y DIH, at 20 (2008) https://www.emavi.edu.co/sites/default/files/Politica_DDHH_MDN.pdf [https://perma.cc/KBZ6-2GZA].

137. Departamento Administrativo Nacional de Estadística (DANE), *Colombia una nación multicultural - su diversidad étnica*, at 20–23 (2007), https://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf [https://perma.cc/N3MY-GB2A] [hereinafter DANE].

138. DANE, *supra* note 137, at 23; *see also* Franco Baquero & Brilman, *supra* note 10, at 6.

139. Programa de las Naciones Unidas para el Desarrollo (PNUD), Pueblos Indígenas: Diálogo entre Culturas, at 37–38 (2011), http://www.co.undp.org/content/colombia/es/home/library/human_development/pueblos-indi_genas—dialogo-entre-culturas.html [https://perma.cc/H82L-8Z2U] [hereinafter PNUD]; *see also* Franco Baquero & Brilman, *supra* note 10, at 6.

140. PNUD, *supra* note 139, at 38.

141. Juan Charry Urueña, *Cauca: confluencia de problemas en búsqueda de soluciones institucionales,* Razón Pública (July 23, 2012), http://www.razonpublica.com/index.php/regiones-temas-31/3113-cauca-confluencia-de-problemas-en-bu8sca-de-soluciones-institucionales.html [https://perma.cc/JZF4-MFZP]; Hristov, *supra* note 13, at 93–95 (discussing the colonization of Cauca and the privatization of indigenous lands).

adjoining Departments of *Tolima* and *Valle del Cauca*.[142] The local Indigenous *Nasa* people have, for some time, protested against the presence of all armed actors in their lands, including the Armed Forces, through "civil resistance."[143] In July 2012, after the FARC launched numerous attacks on their territories, the Indigenous peoples of *Cauca* set an ultimatum demanding that all armed actors leave their ancestral lands.[144] When the FARC and the Armed Forces rejected this ultimatum, the Indigenous peoples warned that they would remove these actors from their territories by force.[145] They argued that the Armed Forces failed to control the territory and defend it from attacks by the FARC and that their presence only attracted more violence so that they would assume the defense of their territories themselves.[146]

On July 17, 2012, the Indigenous Guard,[147] which are the Indigenous security forces, took control of *Berlín* Mountain in the municipality of *Toribío*.[148] This is not only a sacred site for the local

142. Fernanda Espinosa Moreno, *Las razones detrás del conflicto en el Cauca*, Corporación Nuevo Arco Iris (July 14, 2012), http://www.arcoiris.com.co/2012/07/las-razones-detras-del-conflicto-en-el-cauca/ [https://perma.cc/7ZA5-VPN9].

143. PNUD, *supra* note 139, at 43; *see also* Esperanza Hernández Delgado, *La Resistencia Civil de los Indígenas del Cauca*, 11 Papel Político 177 (2006), http://www.scielo.org.co/pdf/papel/v11n1/v11n1a07.pdf [https://perma.cc/PR6Y-X6H8]; Comisión de superación de la violencia, Pacificar la paz - lo que no se ha negociado en los acuerdos de paz 83–91, 195–212 (1992) (referring to the situation in *Cauca* and violent actors in the region, as well as the situation and representation of indigenous peoples); Leslie Wirpsa, David Rothschild & Catalina Garzon, *The Power of the Baston, Indigenous resistance and peacebuilding in Colombia*, *in* Colombia, building peace in a time of war 233–37 (2009) (referring to the situation of indigenous peoples in *Cauca*); José Armando Cárdenas & Katrin Planta, *Two Sides of the Same Coin: Indigenous Armed Struggle and Indigenous Nonviolent Resistance in Colombia*, *in* Civil Resistance and Conflict Transformation – Transitions from Armed to Non-Violent Struggle (Véronique Dudouet ed., 2015).

144. *Se complica la situación en el Cauca, ultimátum de los indígenas se vence*, El Espectador (July 17, 2012), http://www.elespectador.com/noticias/judicial/se-complica-situacion-el-cauca-ultimatum-de-los-indigen-articulo-360495 [https://perma.cc/VY3G-QW3D].

145. *Cauca: respeto por nuestra guardia indígena, es lo único que aceptamos*, Asociación de Cabildos Indígenas del Norte del Cauca (July 14, 2012), https://www.alainet.org/es/active/56544 [https://perma.cc/LX89-SYEP].

146. The indigenous leaders of North Cauca stated in a joint declaration:

> If all resources that the Government is wasting in maintaining Armed Forces that only bring devastation and death would be designated, under the communities' autonomous control, to strengthen our life projects, a minimal proportion of what now only causes pain and misery would suffice to consolidate the Indigenous Guard. This [is] . . . what we have been fighting for over 500 years: the respect for our self-determination. *Id.*

147. Wirpsa, Rothschild & Garzon, *supra* note 143, at 234 (referring to the functioning of the Indigenous Guard in Cauca).

148. Iván Noguera, *La agresión indígena que hizo llorar al sargento García*, El Tiempo (July 17, 2012), http://www.eltiempo.com/archivo/documento/CMS-12040902 [https://perma.cc/P6KP-CNCB].

Indigenous community,[149] but also harbors a police outpost and military base where the Colombian Armed Forces guard telecommunication towers[150] against attacks from the FARC. After a confrontation with the Armed Forces, the Indigenous Guard occupied the mountain,[151] although it did not take long for the soldiers stationed there to regain control.[152] After this incident, the Santos Government announced the establishment of specific roundtables between the State and Indigenous peoples in *Cauca* to maintain peace in the region.[153]

The Indigenous peoples put forward the following demands to be discussed in these regional roundtables: (i) the soldiers' retreat from *Berlín* Mountain, (ii) the derogation of mining licenses granted in Indigenous territories, and (iii) the derogation of the Resolution that created the Organization of Indigenous Peoples of Colombia (*Organización de los Pueblos Indigenas de Colombia*) (OPIC).[154] The latter is a "parallel organization" that exists alongside the ONIC and was established by former President Uribe. The OPIC publicly supports the military presence in Indigenous territories. In one of the Permanent Roundtable meetings, an Indigenous representative said the OPIC was created "to divide and delegitimize the just struggle of our peoples."[155]

The incident in 2012 was not the first time *Toribío* was at the center of confrontations between Armed Forces and the local civilian population. Already in 2006, the U.N. Representative of the Secretary-General on the Human Rights of Internally Displaced Persons described the situation there as follows:

> In Toribio, Cauca, for instance, . . . the armed forces had installed their headquarters in the middle of the village, next to

149. *Gobierno e indígenas acuerdan mesas integrales para seguir diálogos*, Revista Semana (Aug. 15, 2012), https://www.semana.com/nacion/articulo/gobierno-indigenas-acuerdan-mesas-integrales-para-seguir-dialogo/263001-3 [https://perma.cc/PL4X-PNRB].

150. Noguera, *supra* note 148.

151. *See infra* Part III.B (describing this incident when the Indigenous Guard occupied the mountain).

152. *FFAA de Colombia recuperan base tomada por indígenas*, Reuters (July 18, 2012), http://lta.reuters.com/article/domesticNews/idLTASIE86H0EG20120719 [https://perma.cc/U3P7-U4XS].

153. *Gobierno e indígenas acuerdan mesas integrales para seguir diálogos*, *supra* note 149.

154. *Id.*

155. Edinson Arley Bolaños, *Indigenas del Cauca, en contravía*, El Espectador (Aug. 3, 2012), https://www.elespectador.com/noticias/politica/indigenas-del-cauca-contravia-articulo-364864 [https://perma.cc/8F3H-RQ79] (describing how an Army press officer announced a march by OPIC in support of the military presence. Resolution No. 73 of the Ministries of the Interior and Justice registered the OPIC in the records of the Department of Indigenous, Minority and Rom Affairs (*Dirección de Asuntos Indígenas, Minorías y Rom*)).

> a primary school, and had erected posts in the central square of town immediately next to a playground and a church centre. The Representative appreciates the difficulties inherently linked to counter-insurgency activities, but points out that such activities imperil the civilians by putting them in danger of being subjected to acts of retaliation and are counterproductive, since ultimately people would rather flee than stay put to be further pressured or suffer repercussions from the opposing side. In particular, the legitimate desire of the Colombian armed forces to protect civilians with their presence should not create situations where their mere presence in the midst of the villagers draws hostile fire to them and, thus, has the opposite effect from the one intended.[156]

It should be pointed out that the military presence among the civilian population in *Cauca* is not incidental. Rather, it formed part of a government program entitled the "Patriotic Plan" (*Plan Patriota*), established in 2003, which promoted the establishment of police outposts throughout communities in *Cauca* as a method of counterinsurgency.[157] Such outposts were often set up in the middle of villages, causing a "geographical confusion" between the battlefield—or "theatre of operations" (*teatro de operaciones*) as the military calls it—and territories inhabited by civilians.[158]

B. *The Incident on Berlín Mountain and the Media as Interlocutor in Dialogue*

The dialogue between the State and Indigenous peoples regarding the situation in *Cauca* not only took place in the Permanent Roundtable and regional roundtables but was also conducted indirectly through the media. For example, then President Santos stated in a declaration made in the town of *Toribío* that "under no circumstance can we demilitarize just one centimeter of our territory" even though he recognized the adverse effects that armed

156. Walter Kälin, Representative of the U.N. Secretary-General on the Human Rights of Internally Displaced Persons, *Implementation of G.A. Res. 60/251 of 15 March 2006 Entitled "Human Rights Council"*, U.N.Doc. A/HRC/4/38/Add.3 (Jan. 24, 2007), at ¶ 18, https://www.ohchr.org/EN/HRBodies/SP/Pages/AnnualreportsHRC4th.aspx [https://perma.cc/ZUL2-6TNK]; *see also* Mario Murillo, *Colombia's Indigenous Caught in the Conflict*, 39(4) NACLA Report on the Americas 1, 4–7 (2006) (on confrontations in Toribió between the FARC and the State's Armed Forces).

157. Wirpsa, Rothschild & Garzon, *supra* note 143, at 235 (referring to one particular attack by the FARC on a police outpost in Toribío); *Plan Patriota*, Semana (Feb. 5, 2006), http://www.semana.com/on-line/articulo/plan-patriota/70525-3 [https://perma.cc/QA5R-ZGTW].

158. Elias Sevilla Casas, *Confusa relación*, El Espectador (Aug. 4, 2012).

conflict had on the civilian population.[159] He argued that a permanent military presence was necessary in *Toribío* to defend all Colombians, including the Indigenous peoples, from attacks by the guerilla.[160] In fact, he announced that the military presence would be increased in areas heavily affected by the conflict such as *Cauca*. The President clarified that "our enemy is the terrorist group FARC, not the Indigenous peoples. However, everything has its limit,"[161] leaving some uncertainty over where that limit lies and the circumstances under which it would be crossed so that Indigenous peoples would come to be regarded as enemies of the State.

A month earlier, the commander-in-chief of the Armed Forces had accused a *Nasa* Indigenous leader of coordinating attacks against the military upon orders of the FARC, stating as follows:

> Those who are carrying out this aggression against the Armed Forces are infiltrated by the FARC. There are militants there . . . . What they want is for the Armed Forces to move out so that they have sovereignty there. All of this is happening because the FARC want to demilitarize ('*caguanizar*') *Cauca* using the argument of Indigenous autonomy.[162]

Around the same time, the minister of defense commented, "[t]his is not what we are saying, this is what the Indigenous community itself is saying. They say that it is without doubt that the FARC have influence, infiltration, in Indigenous movements and that there are members of that organization."[163]

While the President made some effort—at least publicly in the media—to distinguish between the FARC and members of Indigenous communities, the commander-in-chief and the minister of defense were both suggesting that no clear distinction could be

159. President Juan Manuel Santos, Declaración al concluir sesión del Consejo de Ministros en Toribío, Address Before Council of Ministers (July 11, 2012), http://wsp.presidencia.gov.co/Prensa/2012/Julio/Paginas/20120711_07.aspx [https://perma.cc/QBB4-CBSU].

160. *Id.*

161. Caracol Radio, *supra* note 134; *see also* Ricardo Cavalcanti-Schiel, *A política indigenista, para além dos mitos da Segurança Nacional*, 23 Estudos Avançados 149, 149 (2009) (referring to public statements made by military commanders in Brazil regarding a supposed "ethnic balkanization" in the Amazon region of that country and the threat posed to national security by indigenous peoples' allegedly "secessionist" tendencies).

162. Noguera, *supra* note 148. "*Caguanizar*" is a reference to the demilitarized zone established under the Presidency of Pastrana to carry out peace negotiations with the FARC.

163. El Colombiano, *Ministerio de Defensa dice que existe infiltración de las Farc en comunidades indígenas del Cauca* (July 16, 2012), http://www.elcolombiano.com/BancoConocimiento/C/cauca_ministro_de_defensa_dice_que_si_existe_infiltracion_de_las_farc_en_comunidades_indigenas/cauca_ministro_de_defensa_dice_que_si_existe_infiltracion_de_las_farc_en_comunidades_indigenas.asp [https://perma.cc/P9Z8-4TJV].

made. Their statements suggest that the FARC's presumed infiltration of Indigenous communities partly motivated the Santos Government to increase its military activities in Indigenous territories.

Indigenous peoples criticized the statements by State representatives, especially by the minister of defense, for contributing to the stigmatization of their leaders as FARC members or collaborators. In response, they reiterated their position of neutrality in the internal armed conflict.[164] More recently, an Indigenous leader explained the pressures from guerilla groups that his people face: the "armed intervention of leftist groups that regard us as their social base, because they have been here, because they supposedly have spoken for us and believe that we should be subordinated to the ideologies, projects, and programs they are proposing."[165]

A representative from the Association of Indigenous Leaders of North Cauca (*Asociación de Cabildos Indígenas del Norte del Cauca*) (ACIN) stated that "when the institutions, in the name of defending us, subject us to their projects and interests, they also violate our autonomy."[166] In other words, Indigenous peoples in the region believe that both the FARC and the Armed Forces impose their respective strategic objectives on them, impeding these peoples from governing their own territories.

Apart from the declarations made by State and Indigenous representatives in the media, journalists presented their own interpretation of events in *Cauca*, mainly focusing on the difficult position in which the Armed Forces allegedly found themselves. As the director of the Office of the High Commissioner on Human Rights in Colombia formulated it, "the Armed Forces seem to have an impossible mission . . . to protect a population that does not want to be protected by them."[167] Video images on national television illustrated this with the Indigenous peoples occupying the *Berlín*

164. *Indígenas rechazan declaraciones de Ministro de Defensa sobre alianza con guerrillas*, Revista Semana (Sept. 7, 2011), http://www.semana.com/nacion/articulo/indigenas-rechazan-declaraciones-inistro-defensa-sobre-alianza-guerrillas/246070-3 [https://perma.cc/35KN-D2Z9]. *See also Ministro de Defensa no debe estigmatizar a las comunidades indígenas*, Senado de la República (July 17, 2012), http://www.senado.gov.co/legales/item/14371-ministro-de-defensa-no-debe-estigmatizar-a-las-comunidades-indigenas-senador-senador-alexander-lopez-maya [https://perma.cc/53JL-4G2D] (Senator Alexander López Maya denouncing the minister of defense's statement).

165. El Espectador, *supra* note 93.

166. *Id.*

167. Todd Howland, *Pueden ustedes, por favor, pelear su guerra en otra parte?*, Semana (July 18, 2012), http://www.semana.com/opinion/articulo/pueden-ustedes-favor-pelear-su-guerra-otra-parte/261406-3 [https://perma.cc/4CBN-US47].

Mountain and forcefully removing soldiers to dismantle the military base established there.

During the incident, the Armed Forces did not use military force against the Indigenous peoples. In fact, it was reported that "in the images obtained [of this incident] one can see soldiers in a state of complete defenselessness."[168] One commentator argued in a national newspaper that "[t]he attitude of the Armed Forces was correct—not reacting to the erroneous means used by the Indigenous authorities, even if the soldiers had to put up with it and the indignation caused."[169] Such indignation was most apparent in an incident reported in a newspaper article entitled "The Indigenous Aggression That Made Sergeant García Cry" as follows:

> Perhaps the most serious [incident] had to do with Sergeant Rodrigo García, one of the hundred men of the Apolo taskforce. It was 10:30 in the morning when the Indigenous people demanded their withdrawal and exchanged words with him. A large group lifted him up by his arms and legs and carried him a few meters down the mountain, as a sign that he should comply with the [demand for] withdrawal. The soldier, once he had collected himself, could not avoid a few tears. 'This is humiliation. You cannot do this to a Colombian', he said afterwards.[170]

The images of the soldier being carried down the mountain by Indigenous people were broadcast on the evening news.[171] What is perhaps most noticeable in the Sergeant's words and media reports about the incident, is the apparent inversion of roles. It was the soldiers, not the Indigenous peoples, who were defenseless, humiliated, and full of indignation.[172]

After the Armed Forces recaptured *Berlín* Mountain, the soldiers who had been forcefully removed by the Indigenous peoples received medals from Congress for the respect they had shown for

168. Caracol Radio, *supra* note 134.

169. Urueña, *supra* note 141.

170. Noguera, *supra* note 148.

171. *Habla el sargento García del Ejército Nacional*, El Espectador (July 20, 2012), http://www.elespectador.com/noticias/nacional/habla-el-sargento-garcia-del-ejercito-nacional-video-361483 [https://perma.cc/UM5M-UAJD].

172. *See also* Rodolfo Arango, *Los Paramilitares y lo no negociable. Las emociones y los límites de la racionalidad*, 56 Análisis Político 151, 159 (2006) (arguing, inter alia, that envy, indignation, and resentment, partly due to the great social inequality in the country, are three emotions of particular interest with regard to the Colombian conflict and that an adequate evaluation of the role played by emotions in practical decision-making is a necessary condition for the success of any peace negotiation).

the Indigenous peoples' human rights.[173] The soldiers acted in an appropriate manner during the incident, maintaining a peaceful demeanor rather than injuring or killing the Indigenous protesters. Nonetheless, it is significant that they would be awarded a medal for something that is supposedly every soldier's professional duty: to protect the civilian population and not use force against it, especially when such force would be contrary to (inter)national norms. Unfortunately, the medals awarded are indicative that such behavior by the Armed Forces is the exception rather than the norm in Colombia.

If the military's peaceful response to a hostile situation seems exceptional, this raises the question of whether this renunciation of violence is indicative of a change in policy. Perhaps it regards a move from armed force to dialogue. However, as Arendt said, "violence appears where power is in jeopardy . . . ."[174] This suggests that the absence of violence confirms the State's power rather than its defenselessness. Not exerting violence may be the most effective means to demonstrate power. After all, its suspension implies that violence can be resumed at any time and with even more annihilating force. In this sense, Benjamin argued that "the moment of violence . . . is necessarily introduced . . . in the context of a conscious readiness to resume the suspended action under certain circumstances."[175]

The suspension of violence and the constant threat to exert it when necessary also lies at the heart of the minister of defense's statement cited at the beginning of this Part III, in which he said that the limits of dialogue could be found in the Armed Forces' intervention when the law is broken. The "law" is portrayed here as the opposite of "lawless" violence and its legitimacy precisely depends on the ability to constrain such violence. However, not only is violence often used to enforce the law,[176] violence itself is

173. *Condecoran soldados que resistieron agresión de indígenas en el Cauca*, El País (Oct. 29, 2012), http://www.elpais.com.co/elpais/valle/noticias/condecoraron-soldados-resistieron-agresion-toribio-por-parte-indigenas [https://perma.cc/56JP-DNUM].

174. Arendt, *supra* note 29, at 56. Arendt also notes that "[i]n a contest of violence against violence the superiority of the Government has always been absolute . . . [lasting] only as long as the power structure of the Government is intact . . . ." *Id.* at 48.

175. Benjamin, *supra* note 8, at 281–82. *See also* Žižek, *supra* note 8, at 9 (arguing that a "threat of violence" is what "sustains relations of domination and exploitation").

176. Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1609–10 (1986) (Cover refers in this regard to the violence of judges, of which "every prisoner displays its mark"; reminiscent of Benjamin, he refers to an "unseverable connection between legal interpretation and violence.").

arguably a structural condition of the normative.[177] Benjamin argued as follows:

> [T]he law's interest in a monopoly of violence vis-a-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.[178]

Perhaps it is this self-sustaining character of normative violence and the absence of any end other than its own continued existence that leads Colombians to refer to the period immediately preceding the internal armed conflict as "The Violence" (*La Violencia*). No origin of that violence can be clearly identified[179] but its self-generative force seems undeniable.

The parties' use of the media in the conflict, as well as the media's own coverage and interpretation of the incident on *Berlín* Mountain, demonstrates its role as interlocutor in dialogue. Not only do the media convey messages between the parties in the conflict and ensure that such messages enter the public domain for debate and discussion,[180] they also construct a certain perception of the conflict through "framing."[181] Apparently, framing that "elevate[s] public order concerns" reduces the public's tolerance for acts that potentially pose a threat to such order.[182] The media's coverage of any conflict generally resorts to elements of drama, tragedy and heroism,"[183] reminiscent of the Latin American *tele-*

177. *See* Menke, *supra* note 8 at 6 (arguing that "law and revenge, though formally different, in practice appear alike").

178. Benjamin, *supra* note 8, at 281.

179. Ospina, *supra* note 21, at 192; Michael Jacobs, The Robber of Memories – A River Journey Through Colombia 7 (2013).

180. Keith Tester, *Hidden Conflict, Visible World*, *in* Violence and War in Culture and the Media – Five Disciplinary Lenses 66–67 (Athina Karatzogianni ed., 2012) ("According to Hannah Arendt, 'it is the function of the public realm to throw light on the affairs of men by providing a space of appearances in which they can show in deed and word, for better and worse, who they are and what they can do.'").

181. Thomas E. Nelson, Rosalee E. Clawson & Zoe M. Oxley, *Media Framing of a Civil Liberties Conflict and Its Effects on Tolerance*, 91 Am. Pol. Sc. Rev. 567, 567–68 (1997) (explaining that "framing is the process by which a communication source, such as a news organization, defines and constructs a political issue or public controversy." It regards the presentation of content rather than the extent of coverage. Reference is also made to studies that show how framing affects public perception); *see also* Jorge Iván Bonilla Vélez & Camilo Andrés Tamayo Gómez, Las violencias en los medios, Los medios en las violencias 34 (2007) (arguing that the media control communication as a "rare and strategic resource that is fundamental for political-military management and the symbolic fixing of conflicts").

182. Nelson, Clawson & Oxley, *supra* note 181, at 575.

183. Vélez & Gómez, *supra* note 181, at 28.

novela. The extensive media coverage of Sergeant García's tears is an example of this.

It is clear that the media does not only disseminate information and convey messages, but are also implicated in the conflicts they report on[184] by representing the government's perspective (especially in a country like Colombia where political influence and ownership of media outlets go hand in hand),[185] doing precisely the opposite, or perhaps adopting a position somewhere in-between.[186] Any suggestion that the media could contribute to the "mediation" of conflicts in a polarized society[187] seems to be based on the debatable premise that the media's communications are themselves politically neutral and non-conflictive.[188]

C. *Between Indigenous Autonomy and National Security: Where Do the Limits of Dialogue Lie?*

1. Dialogue and Consultation on Military Activities in Ancestral Lands

Whereas Indigenous peoples in *Cauca* insist on their autonomy, the necessity of dialogue, and consultation on military activities carried out in their territories, the Colombian government argues that national security is paramount and that consultation is either unnecessary or impossible. To identify where the limits of dialogue

184. Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQUETTE L. REV. 251, 253 (2009).

185. *See* María Isabel Zapata & Consuelo Ospina de Fernández, *Cincuenta años de la Televisión en Colombia. Una era que Termina. Un Recorrido Historiográfico*, 28 HIST. CRIT. 116 (2005) (referring to Restrepo's argument that since the López Michelsen Government "each President or presidential [figure] was the owner, and one of his sons presenter, of a news outlet"); *see also*, María Luna, *Colombia: Audiovisual Media Landscape in the Age of Democratic Security*, 7 J. OF WAR & CULT. STUD. 82, 84 (2014) (on the variety of news channels in Colombia, their ownership, and coverage of the conflict); *La Dinastía de los Santos*, EL ESPECTADOR (June 26, 2010), http://www.elespectador.com/impreso/articuloimpreso-210505-dinastia-de-los-santos [https://perma.cc/ML3H-ZPVR] (recounting how the Santos family, to which the former President of Colombia belongs, owned the national newspaper *El Tiempo*).

186. Gadi Wolfsfeld, *The role of the news media in peace negotiations: variations over time and circumstance*, *in* CONTEMPORARY PEACEMAKING, CONFLICT, PEACE PROCESSES AND POST-WAR RECONSTRUCTION 132 (referring to a continuum that ranges from media as "government tools" to "unwelcome intruders" with the "informative intermediary" in the middle).

187. Laplante & Phenicie, *supra* note 184, at 272.

188. VÉLEZ & GÓMEZ, *supra* note 181, at 77 (arguing that the idea that the media can mediate conflict, privileges scenarios of "social harmony" in which "conflicts would only be communicative (let's talk more, communicate better . . . [which] will result in a better life, a more just and equal society) and not of interests, appropriation of material and symbolic resources, legitimacies and identities between social sectors and categories that fight for the definition of social order.").

lie, the limits of Indigenous autonomy must first be established. Article 3 of the U.N. Declaration establishes the right to self-determination of such peoples by virtue of which they "freely determine their political status and freely pursue their economic, social and cultural development."[189] Article 4 provides that this right implies a "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[190] Similarly, ILO Convention No. 169 refers to the "control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, *within the framework of the States in which they live* . . . ."[191]

The latter limitation of Indigenous autonomy is reiterated and clarified in Article 1(3) of ILO Convention No. 169, which provides that "[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."[192] Therefore, Indigenous autonomy regards self-government within the limits of the national territory, the integrity of which is controlled by the State and defended by the State's Armed Forces. Similarly, the United Nations Human Rights Committee (U.N. HRC) clarified that the enjoyment of cultural rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR), applicable to minorities and Indigenous peoples, "does not prejudice the sovereignty and territorial integrity of a State."[193]

Another limit to Indigenous autonomy, apart from the territorial integrity of the State, is that the State or third parties may carry out certain activities in ancestral lands. The U.N. HRC has deemed a limitation of rights under Article 27 of the ICCPR to be permissible as long as any measures taken have "a certain limited impact on the way of life of persons belonging to a minority" and do not amount to a "denial" of their right to enjoy their culture.[194] In *Poma Poma v. Peru,* it reiterated the standard of the "denial" of a right but sub-

189. U.N. Declaration, *supra* note 58, at 3.

190. *Id.* at 4.

191. International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries pmbl., June 27, 1989, 1650 U.N.T.S. 383 (emphasis added).

192. *Id.* art. 1, ¶ 3.

193. U.N. Human Rights Comm., General Comment No. 23 (International Covenant on Civil and Political Rights art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 3.2 (Apr. 26, 1994).

194. Ilmari Länsman et al. v. Finland, U.N. Human Rights Comm., U.N. Doc. CCPR/C/52/D/511/1992, ¶ 9.4 (Nov. 8, 1994).

sequently lowered this threshold by referring to the fact that any activities should not have a "substantive negative impact" and subsequently found a violation of Article 27 of the ICCPR for the first time.[195] To assess a possible violation of Article 27 of the ICCPR, the U.N. HRC takes into account, inter alia, whether effective participation by minorities in decision-making has taken place.[196] The State's obligation of prior consultation with Indigenous peoples is established, most notably, in Articles 6 and 15 of the ILO Convention No. 169 and Article 19 of the U.N. Declaration and has been further defined, especially in the case law of the Inter-American Court of Human Rights.[197]

Regarding specifically the consultation of military activities carried out in Indigenous territories, the U.N. Declaration refers to "the contribution of the demilitarization of the lands and territories of indigenous peoples to peace"[198] and establishes in Article 30 as follows:

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.[199]

Since Article 30(1) is formulated in an alternative manner, military activities could arguably be carried out when "justified" by a "relevant public interest" without having been agreed upon or solicited by Indigenous peoples. It is likely that national security considerations would constitute sufficient justification, especially since the State would define in first instance what constitutes a "relevant public interest." Nevertheless, Colombia abstained from vot-

195. Poma Poma v. Peru, U.N. Human Rights Comm., U.N. Doc. CCPR/C/95/D/1457/2006, at ¶¶ 7.5–7.7 (Apr. 24, 2009).

196. *Länsman v. Finland*, ¶ 9.5; U.N. Human Rights Comm., General Comment No. 23, *supra* note 193, ¶ 7.

197. *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 245, pt. III (June 27, 2012); Saramaka People v. Surinam, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007); *see also* Brilman, *supra* note 9, for a discussion of the right to consultation with reference to these cases.

198. U.N. Declaration, *supra* note 58, at pmbl.

199. U.N. Declaration, *supra* note 58, at 30.

ing on the adoption of the U.N. Declaration,[200] referring in an accompanying statement specifically to Article 30 as follows:

> Under the mandate set out in our constitution, the State security forces must be present throughout the national territory to provide and guarantee to all inhabitants[']protection of and respect for their lives, honour and property, both individual and collective. Protecting the rights and integrity of rights and integrity of indigenous communities depends to a great extent on security in their territories. In that connection, instructions have been issued to the security forces to . . . protect the rights of those communities . . . [Article 30] of the Declaration contradicts the principle of the necessity and effectiveness of the State security forces, preventing the fulfillment of their institutional mission. This is not acceptable to Colombia.[201]

The State therefore argued that the protection of Indigenous rights depends on compliance by the Armed Forces with their constitutional mandate to guarantee security in Indigenous territories. However, Indigenous representatives point out that—paradoxically—such security brings with it a considerable amount of insecurity. After all, the Armed Forces guarantee national security through combat with illegal armed groups in ancestral territories. Therefore, the condition of possibility for the enjoyment of Indigenous rights is simultaneously that which threatens the peaceful exercise of such rights.

In this regard, the ACIN and the Regional Indigenous Council of *Cauca* (*Consejo Regional Indígena del Cauca*) (CRIC)[202] stated that, between 2006 and 2012, 15,000 soldiers were sent to *Cauca* to combat the FARC.[203] However, the situation of Indigenous peoples in the region improved only slightly while the number of anti-personnel mines planted by the FARC in their territories increased. This led them to conclude that "security as a consequence of militarization is an illusion."[204]

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200. *Voting Record Search*, *supra* note 58.

201. José Fernando Gómez-Rojas, *Argument Analysis of the Position of Colombia Regarding the UN Declaration on the Rights of Indigenous Peoples*, 16 Int'l L: Revista Colombiana de Derecho Internacional 143, 151 (2010), http://www.scielo.org.co/pdf/ilrdi/n16/n16a06.pdf [https://perma.cc/BB6Z-L9Z7].

202. Hristov, *supra* note 13, at 96 (discussing the establishment of the CRIC in 1971 in Toribió and its role with regard to the conflict).

203. *Pronunciamiento de las autoridades indígenas del Norte del Cauca organizadas en la Cxhab Wala Kiwe – ACIN y el CRIC al Presidente Juan Manuel Santos*, Asociación de Cabildos Indígenas del Norte del Cauca (July 11, 2012), http://anterior.nasaacin.org/index.php/documentos-nasaacin-82/4326-colombia-documento-a-santos-y-ministros [https://perma.cc/ZM32-EB3X].

204. *Id.*; James Anaya, Rep. by the Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, U.N. Doc. A/HRC/15/37/Add.3,

The U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples reported in 2010 that Indigenous peoples in Colombia denounced the "occupation" without consultation by Armed Forces of Indigenous sacred sites and schools.[205] With reference to Article 30 of the U.N. Declaration, he argued that consultation is necessary and agreement should be sought "on the conditions of any military presence within [Indigenous] territories" and that "[r]espect for the autonomy and the traditional decision-making structures of Indigenous communities is extremely important."[206]

Indigenous leaders do not only perceive the failure to consult as a violation of the right to consultation, collective property or cultural identity, but also as a denial of Indigenous autonomy as such and implicitly as a failure to recognize Indigenous peoples as legitimate interlocutors of the State. In this sense, Indigenous leaders in *Cauca* argued that the "de-institutionalization of Indigenous authority by the national Government [starts] with the Olympic failure to recognize that military intervention requires consultation and prior consent."[207] They also referred to a "systematic campaign of actions to discredit Indigenous authority and our justice systems," using the government's "evaluation" of the "legality of the autonomous institution of the Indigenous Guard" as an example.[208] Indigenous representatives consider the strengthening of the Indigenous Guard as a viable alternative to the security problem in their territories. Each community would have its own security force constituted by its members and responsible for

¶ 19 (May 25, 2010) (referring to anti-personnel mines planted in indigenous territories by the FARC and other illegal armed groups).

205. Anaya, *supra* note 204, ¶ 25.

206. *Id.* ¶ 28.

207. *Pronunciamiento de las autoridades indígenas del Norte del Cauca*, *supra* note 203.

208. *Id.*; *see also* Casas, *supra* note 158 (describing how the State's failure to define the relation between its authority and forms of indigenous authority, such as the Indigenous Guard, has left the latter in a state of legal limbo and thereby contributed to the tensions between the State and indigenous peoples in Cauca); Permanent Forum on Indigenous Issues, Resumen del informe y recomendaciones de la misión a Colombia del Foro Permanente, ¶ 67, U.N. Doc E/C.19/2011/3 (Feb. 8, 2011), http://www.un.org/esa/socdev/unpfii/documents/E_C19_2011_3%20.pdf [https://perma.cc/MP9T-NVY7] (emphasizing the importance of recognizing the Indigenous Guard and strengthen its effectiveness through financing without detriment to its autonomy. Colombia was also recommended to avoid military activities in indigenous territories, unless requested by the inhabitants); Anaya, *supra* note 204, ¶ 24 (describing how, during his mission to Colombia, he "noted another useful mechanism—the Indigenous Guard's, or traditional security and protection units" and stated that "the Government should respect, support and legitimize in the [sic] role in order to ensure their effective functioning").

maintaining peace.[209] However, from the State's perspective, the Armed Forces' presence is required to ensure peace in indigenous territories.

2. The Normative Framework in Colombia and Military Violence as "Law-Making"

How does the normative framework in Colombia balance the recognition of Indigenous autonomy, dialogue, and consultation with the necessity to maintain public order and national security? A variety of norms regulate Indigenous autonomy and its limits with regard to military activities in ancestral lands. The Colombian Constitution recognizes Indigenous lands as "territorial entities" with autonomy over the "management of their interests" within the limits of the law and the Constitution.[210] An alleged failure to regulate these territorial entities has led to uncertainty regarding the legal status of Indigenous institutions like the Indigenous Guard.[211] Article 330 of the Constitution establishes the functions of the Governing Councils in Indigenous territories, which include "collaborat[ion] with the maintenance of public order within the territory *in accordance with the instructions and dispositions of the national Government*."[212]

Article 246 of the Constitution recognizes the existence of an Indigenous jurisdiction alongside the national justice system to the extent that it is exercised in Indigenous territories and is not contrary to the Constitution and national laws.[213] According to the Colombian Constitutional Court, the "structure of Article 246 [of the Constitution] . . . reflects an evaluative conflict between diversity and unity."[214] The Constitutional Court referred to Indigenous jurisdiction and its capacity to establish its own norms and procedures as the "nucleus of [Indigenous] autonomy."[215]

Other legal instruments that relate to Indigenous autonomy are, for example, the National Development Plan (*Plan Nacional de*

209. *See also* Franco Baquero & Brilman, *supra* note 10, at 24.

210. Constitución Política de Colombia [C.P.] arts. 286, 287 (such autonomy includes government by their own authorities, exercise of corresponding competencies, administration of resources, and establishment of levies necessary for the compliance of their functions).

211. Casas, *supra* note 158.

212. Constitución Política de Colombia [C.P.] art. 330(7) (emphasis added).

213. *Id.* art. 246.

214. Corte Constitucional [C.C.] [Constitutional Court], Apr. 9, 1996, Sentencia C-139/96, http://www.corteconstitucional.gov.co/relatoria/1996/C-139-96.htm [https://perma.cc/4PUF-QUME].

215. *Id.*

Desarrollo), which provides for resources to be designated to Indigenous lands for investment projects in accordance with their inhabitants' customs.[216] Moreover, Decree No. 2164 of 1995 establishes that traditional authorities will administer Indigenous reservations (*resguardos*) in accordance with their customs.[217] Decree No. 1397 of 1996 that created the Permanent Roundtable provides that "non-Indigenous authorities shall respect the autonomy of Indigenous peoples, authorities, and communities, and will not intervene in the sphere of Indigenous government and jurisdiction."[218] In addition, Decree No. 4633 of 2011 establishes that the State shall guarantee Indigenous peoples' protection in armed conflict through strengthening their government and self-determination in ancestral territories.[219]

The requirements for prior consultation with Indigenous communities are included in a patchwork of different norms, ranging from articles in the Constitution to laws, decrees, and presidential directives.[220] In May 2012, the Constitutional Court established that the State had an obligation to adopt a clear legislative frame-

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216. L. 1450, June 16, 2011, 48102 Diario Oficial [D.O.] art. 13 http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=43101 [https://perma.cc/MG2C-6SRX] (this article does not clearly establish the decision-making capacity of indigenous authorities. While reference is made to the "free designation" of resources, such resources may only be allocated to investment projects included in (i) administration contracts with municipalities and departments, and (ii) a cost classification provided by law); *see also Consenting to Dispossession*, *supra* note 65, at 49–50 (describing criticisms voiced by indigenous representatives regarding the lack of implementation of the National Development Plan, as well as comments made by a representative of the Ministry of Finance regarding difficulties in budget allocation).

217. L. 2164, Dec. 16, 1995, 42140 Diario Oficial [D.O.] art. 22, http://www.mininterior.gov.co/sites/default/files/1_decreto_2164_de_1995.pdf [https://perma.cc/4ZJ7-J848].

218. L. 1397, Aug. 12, 1996, *supra* note 40, art. 14.

219. L. 4633, Dec. 9, 2011, *supra* note 81, art. 33.

220. Constitución Política de Colombia [C.P.] art. 330; L. 99, Dec. 22, 1993, Diario Oficial [D.O.] 41146, art. 76, http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=297 [https://perma.cc/S4BJ-4K92]; Decreto 1320 de 1998, July 13, 1998, Diario Oficial [D.O.] 43.340, https://www.mininterior.gov.co/sites/default/files/co-decreto-1320-98-consulta-previa-indigenas-_2.pdf [https://perma.cc/MB2Z-2JHH]; Directiva Presidencial 10 de 2013, Guia para la realización de Consulta Previa con Comunidades Étnicas (Nov. 7, 2013), http://wsp.presidencia.gov.co/Normativa/Directivas/Paginas/2013.aspx [https://perma.cc/RWJ4-H48B]; Decreto 2613 de 2013, noviembre 20, 2013, Por el cual se adopta el Protocolo de Coordinación Interinstitucional para la Consulta Previa, https://www.minambiente.gov.co/images/normativa/decretos/2013/dec_2613_2013.pdf [https://perma.cc/RLW7-CY8X]; Directiva Presidencial 1 de 2010, Garantía del derecho fundamental a la consulta previa de los grupos étnicos nacionales (Mar. 26, 2010), https://www.mininterior.gov.co/sites/default/files/13_directiva_presidencial_01_de_2010.pdf [https://perma.cc/QB2W-R88Y].

work regarding such consultation.[221] Since then, the Ministry of Interior has been elaborating a draft bill. A leaked version of that bill was commented on in the national newspaper *El Espectador*[222] and another such version circulating on the internet provides in its Article 101 that prior consultation is *not* required in case of "[l]aws and administrative acts intended to guarantee public order and national security" and "[l]aws and administrative acts intended to preserve the life, security and defence of the nation . . . ."[223]

Apart from the national normative framework, the Colombian Constitutional Court established in its judgment T-523 of 1997 that the State needs to marry its obligation of preserving peaceful coexistence and guarantee its citizens' rights with the recognition of the particular necessities of members of different cultural groups.[224] In judgment C-139 of 1996, it recognized that ethnic and cultural diversity has the "character of a constitutional principle," so that "for a limitation of that diversity to be constitutionally justified, it needs to be based on a constitutional principle of a higher value."[225] The Constitutional Court subsequently specified that only a "high degree of autonomy" makes "cultural survival" of Indigenous peoples possible, so that only restrictions to Indigenous autonomy are admissible that are "indispensable to safeguard interests of a higher hierarchy," referring to "internal security" as an example.[226]

The Constitutional Court was also called upon to consider a case regarding the installation of a radar by the Air Force in an Indige-

221. Corte Constitucional [C.C.] [Constitutional Court], May 7, 2012, Sentencia C-317/12, ¶ 4.2.2.

222. *See Si no hay concertación, decide el Estado*, El Espectador (Aug. 2, 2014), http://www.elespectador.com/noticias/politica/si-no-hay-concertacion-decide-el-estado-articulo-508262 [https://perma.cc/8WS8-UNJH] (arguing that some of its provisions set out a decision-making process of some sorts wherein indigenous communities have no actual say).

223. Proyecto de Ley No. ___ de 2017, "Por la cual se adopta el procedimiento administrativo de consulta previa, se ordena la creación de la Unidad de Consulta Previa en el Ministerio del Interior, y se dictan otras disposiciones" (Sept. 2017), https://redjusticiaambientalcolombia.files.wordpress.com/2017/09/proyecto-de-ley-consulta-previa.pdf [https://perma.cc/4HYN-22SS].

224. Corte Constitucional [C.C.] [Constitutional Court], Oct. 15, 1997, Sentencia T-523/97, ¶ II. 2.1, http://www.corteconstitucional.gov.co/relatoria/1997/T-523-97.htm [https://perma.cc/R3DR-LF3M].

225. Corte Constitucional [C.C.] [Constitutional Court], Apr. 9, 1996, Sentencia C-139/96, ¶ 6.2.2, http://www.corteconstitucional.gov.co/relatoria/1996/C-139-96.htm [https://perma.cc/LHU4-XBKZ].

226. Corte Constitucional [C.C.] [Constitutional Court], Aug. 8, 1996, Sentencia T-349/96, ¶ II.2.2, http://www.corteconstitucional.gov.co/relatoria/1996/T-349-96.htm [https://perma.cc/PVD7-FDXM].

nous reservation to control the use of national airspace by drug-traffickers in the Amazon and lower *Caqueta* regions.[227] In its judgment, it referred to a "possible conflict of interests" between – on the one hand - the State's interest and the Armed Forces' constitutional obligation[228] to maintain national sovereignty and public order, as well as guarantee the security of Colombia's inhabitants, and – on the other - the Indigenous community's interest in having its property and cultural rights respected .[229] The Constitutional Court considered that the State's interest prevailed, taking into account the radar's location six kilometers away from the nearest Indigenous community and the fact that "the presence of military troops, their specific activities and the permanent nature of the radar [did] not demonstrate an irreparable harm."[230] Therefore, it decided the case did not merit a judgment "that would be absurd, in the sense of ordering the immediate displacement of the troops and the suspension of the radar's functioning."[231]

Nonetheless, the Constitutional Court recognized that the armed conflict in Colombia threatens the cultural and physical survival of Indigenous peoples and has been a principal factor in their displacement, as illustrated by the following:

> All who have participated in this armed conflict, principally guerilla and paramilitary groups—but also, at times, units and members clearly identified as forming part of the Armed Forces— . . . participate in a complex war pattern and having entered by armed force into the ancestral territory of some Indigenous peoples that inhabit the country, [their presence] has transformed

227. Corte Constitucional [C.C.] [Constitutional Court], Sept. 23, 1993, Sentencia T-405/93, ¶ III.3, http://www.corteconstitucional.gov.co/relatoria/1993/t-405-93.htm [https://perma.cc/589W-2LW3]. *See also* Franco Baquero & Brilman, *supra* note 10, at 21–22.

228. Constitución Política de Colombia [C.P.] art. 217 (establishing that "the Armed Forces will have as their primary objective the defense of sovereignty, independence, integrity of the national territory and the constitutional order").

229. Corte Constitucional [C.C.] [Constitutional Court], Sept. 23, 1993, Sentencia T-405/93, ¶ I.

230. *Id.* ¶ III.3 (finding that although the radar's installation did not violate the community's cultural rights, nor put in danger its integrity, life, or subsistence, its operations did have serious effects on the environment and natural resources to the community's detriment); Decreto No. 2591, Nov. 19, 1991, Diario Oficial [D.O.] 40.165, http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php [https://perma.cc/Y6KU-57E4] (amended by Corte Constitucional [C.C.] [Constitutional Court], Jan. 25, 1993, Sentencia C-018/93, http://www.corteconstitucional.gov.co/RELATORIA/1993/C-018-93.htm [https://perma.cc/4AZR-W2UB]) (Article 8 refers to the requirement of "irreparable harm").

231. Corte Constitucional [C.C.] [Constitutional Court], Sept. 23, 1993, Sentencia T-405/93, ¶ III.3.c. The Court also refers to the *tutela* as a "summary" proceeding for the "immediate protection" of a fundamental right. *Id.* ¶ III.1.

> into a certain and imminent danger to the very existence [of these peoples]; to their individual processes of ethnic and cultural consolidation, and the effective enjoyment of the fundamental individual and collective rights of their members.[232]

Apart from the normative framework and case law of the Colombian Constitutional Court, the Ministry of Defense has emitted directives and regulations that govern military activities in ancestral territories. Perhaps the most important is the Integral Policy of Human Rights and International Humanitarian Law (*Política Integral de Derechos Humanos y Derecho Internacional Humanitario*) introduced in 2008 by Juan Manuel Santos, then minister of defense in the Uribe government.[233] The document's objective is to guide the Armed Forces' behavior in carrying out operations and establishes five "lines of action": instruction, operational discipline, defense, attention to "special groups," and cooperation with other institutions (specifically the justice system).[234] In general, it proposes regulation and restraint in the use of force.[235] Regarding Indigenous peoples as a "special group," the document explains how the recognition of Indigenous autonomy "does not suppose that the Armed Forces cannot operate in [ancestral] territories."[236] Rather, it explains that the Armed Forces need to "adapt" to Indigenous peoples' necessities and seek their collaboration. As the document points out, Indigenous peoples have the constitutional duty to collaborate with the maintenance of public order in their territories.[237] It regards a unilateral collaboration by Indigenous communities, as provided by Article 330(7) of the Constitution, "in accordance with the instructions and dispositions of the National

232. Corte Constitucional [C.C.] [Constitutional Court], Jan. 26, 2009, Auto 004/09, ¶ I.1, http://www.corteconstitucional.gov.co/relatoria/autos/2009/a004-09.htm [https://perma.cc/WAH9-NF82]; *see also* Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention (Colom.), ¶ 14, U.N. Doc. CERD/C/COL/CO/14 (Aug.28, 2009), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/COL/CO/14&Lang=En [https://perma.cc/Y4Z2-2DVN] (stating that "while illegal armed groups bear significant responsibility for violations, reports continue to indicate the direct involvement or collusion of State agents in such acts and that members of the armed forces have publicly stigmatized Afro-Colombian and indigenous communities.").

233. *Derechos Humanos y Derecho Internacional Humanitario quieren entrar en serio a las FFMM*, Semana (Jan. 29, 2008), http://www.semana.com/on-line/articulo/derechos-humanos-derecho-internacional-humanitario-quieren-entrar-serio-ffmm/90735-3 [https://perma.cc/8Y2N-EXT6]. *See also* Franco Baquero & Brilman, *supra* note 10, at 18.

234. Ministerio de Defensa Nacional, *supra* note 136, at 24.

235. *Id.* at 21.

236. *Id.* at 30.

237. *Id.* at 30.

Government"[238] and not a mutual coordination between State and Indigenous authorities.

The Ministry of Defense also emitted Permanent Directive No. 16 of 2006 (*Directiva Permanente*),[239] which regulates the Armed Forces' recognition of Indigenous peoples' rights. It establishes, inter alia, that military personnel shall "refrain from making unfounded declarations" that could affect the integrity of Indigenous communities' members.[240] This would include statements suggesting a relation between Indigenous peoples and illegal armed groups.

The Directive also refers to the designation of a point of contact or "liaison officer" (*oficial de enlace*) for communication between Indigenous and military authorities in every region, who is responsible for receiving Indigenous peoples' complaints and information, as well as for promoting mutual trust.[241] A civil servant of the Ministry of Defense in charge of Indigenous affairs when the conflict in *Cauca* took place in 2012 explained that these officers familiarize themselves with the communities to which they are assigned and design codes of conduct for their fellow soldiers that reflect the particularities of each community.[242] When planning military operations, the communities to be affected and their leaders are identified to establish contact. The Ministry of Defense also considers using members of the Indigenous communities themselves as liaison officers[243] with the aim of limiting misunderstandings caused by cultural and language differences.

The Directive reflects Colombia's position regarding Article 30 of the U.N. Declaration in establishing that "upon entering Indigenous territory, the Commander shall contact the relevant Indigenous authority to inform of his presence, unless the nature of the operation does not permit it."[244] Therefore, no prior consultation is necessary and the requirement of "informing" is met when such informing takes place *after* military forces have already entered

238. Constitución Política de Colombia [C.P.] art. 330(7).

239. Ministerio de Defensa Nacional, Directiva Permanente No.16, *Política sectorial de reconocimiento, prevención y protección a comunidades de los pueblos indígenas* (Oct. 30, 2006), http://adsdatabase.ohchr.org/IssueLibrary/Directivas%20DDHH%20NUMERO%2007%20DE%202007.pdf [https://perma.cc/KAQ7-SMMM] [hereinafter Directiva Permanente No. 16].

240. *Id.* ¶ 4.2.

241. *Id.* ¶ 4.b(3); *see also* Ministerio de Defensa Nacional, *supra* note 136, at 30, 62–63; Franco Baquero & Brilman, *supra* note 10, at 23.

242. Franco Baquero & Brilman, *supra* note 10, at 23.

243. *Id.*

244. Directiva Permanente No.16, *supra* note 239, ¶ 4.b(2).

ancestral lands. Moreover, the Directive does not establish which officer in the chain of command decides if the nature of an operation permits sharing such information. In practice, it seems to be the commanding officer of the relevant brigade.[245]

Colombia's official position regarding consultation of military activities carried out in ancestral lands seems to be based on the premise that, since it is impossible to provide strategically sensitive information on military activities, no consultation of such activities is required or possible.[246] Furthermore, as prior consultation would impede the "surprise factor" that is essential to many military operations, only an obligation to inform *ex post facto* regarding the Armed Forces' presence is recognized, but not an obligation to inform regarding the activities that will be carried out in ancestral lands. This means that the figure of prior consultation, which is in itself already permissive,[247] is rendered largely ineffective when national security considerations are involved.

Much of the normativity and case law in Colombia, therefore, "indefinitely limits" dialogue and Indigenous autonomy through references to public order and national security. These concepts are sufficiently absolute and undefined to allow for limitation of dialogue whenever necessary or desirable. Thus, in practice, the limits of dialogue are defined each time on the battlefield in accordance with a military commander's discretion.

The minister of defense argued, in the statement cited at the beginning of this Part III, that dialogue would be interrupted whenever military force intervenes in response to a violation of the law. However, as Benjamin argued, military violence has a "dual function."[248] It is not only "law-preserving"[249] as the minister suggests but also "law-making"; military violence "establishes a law far more than it punishes for the infringement of one already existing."[250] In this sense, such violence resembles a "mythical violence" that is "[n]ot a means to their [the Gods'] ends, scarcely a

245. Franco Baquero & Brilman, *supra* note 10, at 23.

246. Urueña, *supra* note 141 (arguing that "it would be a serious error to accept prior consultation in matters of public order").

247. *See generally,* Brilman, *supra* note 9, at 4 (arguing that "[c]onsultation and consent are not prohibitive or preventive notions that necessarily deter harmful activities of states and companies. Rather, they are enabling and permissive notions that make such activities possible and give them apparent validity.").

248. Benjamin, *supra* note 8, at 284.

249. *Id.*

250. *Id.* at 294.

manifestation of their will, but first of all a manifestation of their existence."[251]

Military force in its law-making capacity represents a form of dialogue and an increase in its intensity suggests a decision "to intensify the efficacy of its messages."[252] However, military violence may be more effective when it is not exercised (as in the example of the incident that took place on *Berlín* Mountain).[253] The ritual celebration of a ceasefire could increase this efficacy, as Benjamin notes:

> Even in cases where the victor has established himself in invulnerable possession, a peace ceremony is entirely necessary. Indeed, the word 'peace', in the sense in which it is the correlative to the word 'war' [. . .] denotes this *a priori*, necessary sanctioning, regardless of all other legal conditions, of every victory. This sanction consists precisely in recognizing the new conditions as a new 'law.'[254]

Peace, especially when ceremoniously celebrated, announces a new order imposed by the victor or, in case of a victor in "invulnerable possession," the re-affirmation of a certain political and social order.

Conclusion

It was argued that the Santos Government in Colombia simultaneously resorted to dialogue and military force. This constituted a policy of what may be called "waging war and staging roundtables," which extended beyond the internal armed conflict in the country. This policy was employed not only to stem protests and strikes, but also to engage with Colombia's Indigenous peoples and their claims for recognition of autonomy. Under the Santos government, various participatory mechanisms proliferated in the form of roundtables. Such roundtables were used to defuse situations of violence and civil unrest, even if the State's Armed Forces simultaneously used violence.

As an example of a space of dialogue, this Article discussed the Permanent Roundtable between State and Indigenous representatives. Violence emerged in this space in various guises. First, it appeared as violent incidents representing "pathological" interrup-

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251. *Id.*

252. Vélez & Gómez, *supra* note 181, at 78 (citing Gonzalo Medina & Walter García, *Estado del arte de los estudios sobre comunicación y violencia*, *in* 331 Balance de los estudios sobre violencia en Antioquia 360 (Pablo Angarita Ed, 2001)).

253. *See supra* Part III.B.

254. Benjamin, *supra* note 8, at 283.

tions of an otherwise peaceful dialogue. Second, it could be perceived in implicit threats by both parties, as well as through the exclusion of Indigenous peoples resulting in Decree No. 4633 to the Victim's Law. Lastly, violence emerged through references to confrontations between the Armed Forces and Indigenous peoples in *Cauca*. The Permanent Roundtable was itself established as a result of negotiations between the State and Indigenous representatives—negotiations allegedly only entered into as a result of Indigenous protests. This space of dialogue can be regarded as an example of the former President's commitment to govern from a "crystal ballot box" (*urna de cristal*)[255] and employ dialogue and participation in decision-making as a tool of governance, while simultaneously resorting to a not always carefully calibrated armed force against the dialogue's participants.

As an example of a space of violence, this Article addressed the confrontations between Indigenous peoples and the Armed Forces in *Cauca*, focusing on the incident that took place on *Berlín* Mountain in July 2012. It was discussed how the national normative framework and case law demonstrate that dialogue and Indigenous autonomy are indefinitely limited by national security concerns, which are as absolute as they are undefined. Following Benjamin, this Article argued that military violence in Colombia is not only "law-preserving"—interrupting dialogue when the law is broken to restore order, as the government suggested—but also "law-making." Rather than a simple exercise of force, the recourse to military violence—as well as its threat or suspension—represents a government policy through which traditional sovereign power is consolidated and reaffirmed while the simultaneous establishment of various roundtables enables the government to represent itself as democratic.

In conclusion, the government's power seems self-sufficient and self-sustaining; it remains largely unaffected by either violence or dialogue. The substantive content of dialogue and the outcomes of the various participatory mechanisms do not seem to be of much consequence. This is perhaps why García Márquez referred to a

255. *Discurso completo de posesión de Juan Manuel Santos*, *supra* note 5. In his inaugural speech, Santos declared that his government would apply principles of good governance, namely "efficiency, efficacy, transparency and accountability." *Id.* *See also Que es Urna de Cristal?*, URNA DE CRISTAL, http://www.urnadecristal.gov.co/qu-es-urna-de-cristal [https://perma.cc/E5F8-FDXF] (the government platform "Urna de Cristal" was established to promote citizen participation and governmental transparency).

"state of perpetual alarm"[256] as that which most resembles peace in Colombia. Even if a peace agreement has been signed in the country, it regards a peace that is always vigilant of the power asserted and conscious of its own fragility. It is a restless peace, complicit in sustaining a power founded on the violence of inequality.

256. GABRIEL GARCÍA MÁRQUEZ, VIVIR PARA CONTARLA 56 (2010) (2002) ("[b]elow the weight of regrets and frustrated illusions of a better world, a state of perpetual alarm was . . . the most similar thing to peace").