

IN DEPTH

Decolonizing transitional justice from indigenous territories

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This text, the result of an intercultural and interdisciplinary dialogue between a Colombian Arhuaco lawyer, Belkis Izquierdo, and a European anthropologist, Lieselotte Viaene, states that indigenous norms and practices concerning justice, reparation and reconciliation deeply question the dominant paradigm of transitional justice and human rights that is embedded in anthropocentric acceptations. We argue that this encounter not only raises epistemological questions, but, above all, invites us to analyze this as an “ontological conflict”¹ that creates great legal disconformity among human rights defenders.

In countries such as Guatemala and Colombia, the indigenous population has been victim of gross human rights violations during the internal armed conflicts that have affected several Latin American countries for decades. In 1996 peace was signed between the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG) after 36 years of violence that left 200,000 victims of which, according to the Historical Clarification Commission, 83.3% belonged to the indigenous Mayan population. The Commission attributed 93% of the human rights violations to the State and concluded that that there had been acts of genocide. The Ladino sociopolitical and economic elite that governs the country has never sought, in these 20 years, either justice, reparation, truth nor reconciliation. Colombia, where peace was signed between the Government and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP) in 2016, has the opportunity to do things differently.

Belkis was born in Nabusímake, the political and spiritual capital of the Arhuaco people, located in the Sierra Nevada of Santa Marta. In 2014 she became the first indigenous Auxiliary Judge of the High Council of the Judiciary in Colombia, where she was responsible for the coordination and cooperation between indigenous justice systems and the ordinary justice system. Since January 2018 she has been a Judge in the Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conduct of the Special Jurisdiction for Peace (JEP), created within the framework of the Peace Agreements. While Lieselotte was born in the region of Flanders, Belgium, and since 2002 she has been collaborating with several Maya Q'eqchi' indigenous communities that survived the Guatemalan genocide, as part of her academic and policy research. The Q'eqchi' elders, spiritual guides, victims and former members of the civilian self-defense patrols, taught her to feel and understand beyond dominant acceptations within natural and social sciences.

Mountains, rivers, stones and sacred corn: living beings who are also victims

The international human rights regime, the Inter-American Court of Human Rights, the African Court of Human Rights and the Colombian Constitutional Court have gradually recognized and interpreted the scope of collective rights of indigenous peoples, such as the right to self-determination and to land, territory and natural resources. It is legally accepted that indigenous peoples have a “special relationship” – collective and multidimensional – with their land.

Despite this important progress, the hegemonic view of human rights has not yet dealt with the pressing challenges that provoke indigenous views because they question dominant modern ontology culture/nature, mind/body, human/non-human, belief/reality divides. For indigenous peoples the world is non-dual: everything is one, interrelated and interdependent. There is no separation between the material, the cultural and the spiritual. In addition, everything lives and is sacred: not just human beings, but also hills, caves, water, houses, plants and animals have agency.

“ The hegemonic view of human rights has not yet faced the indigenous views that question the divisions of the dominant modern ontology between culture/nature, mind/body, human/non-human, belief/reality ”

For the Q'eqchi' Maya living in Guatemala and Belize, who identify themselves as *aj r'alch'och* or “sons and daughters of Mother Earth”², everything human and non-human (*yo'yo*) lives and has a spirit, essence or energy (*mu*) that manifests itself in the heart (*ch'ool*). A common greeting in Q'eqchi' is *ma sa sa' la ch'ool*, which literally means “How is your heart?” In other words, the center of thought and feeling is not the mind located in the brain – a key acceptance in the dominant modern ontology – but in the heart of the bodies of humans and non-humans. For example, corn, a sacred food for the Maya (*loqlaj ixim*), generates knowledge, ideas and wisdom (*na'leb*), and positive and negative feelings from its *ch'ool*.

The Sierra Nevada of Santa Marta in Colombia, which is the highest coastal mountain range in the world and a unique ecosystem, is considered by the four indigenous peoples that inhabit it – the Arhuaco, Wiwa, Kogi and Kankuamo – the “heart of the world” or *U'munukunu*. This expression is not a romantic metaphor; it means that the Sierra Nevada is both a living physical entity (*guchu*) – the snowy peaks represent the head; the rivers, the veins; the vegetation, the hair – as well as sensory, immaterial or spiritual (*ñugwe*). According to the Mamos, their spiritual leaders, the relationship between humans and the Sierra Nevada is reciprocal and interdependent, both positively and negatively. In other words, when humans harm non-humans or nature, an energy imbalance is created which implies changes in physical life. Global warming, water scarcity, disease and land infertility will appear. .

This view is also reflected in the ways in which indigenous survivors perceive and act, or do not act, when dealing with the aftermath of serious human rights violations of an

armed conflict. As part of their scorched-earth policy, the Guatemalan army burned the indigenous communities' corn fields (*milpas*). This large-scale act of violence involved not only the destruction of their main food sustenance but also the violation and desecration (*muxuk*) of the sacred corn. "The corn is crying"³, as indigenous elders say, which is why the crops are no longer as productive as they were before the conflict.

According to the Mamos, the use of chemicals and the fumigation of crops with glyphosate in the Sierra Nevada, in the context of the armed conflict, not only caused environmental damage⁴. There was also a reduction in the vital energies (*ánugwe*) of the mountains, lagoons, stones and animals that is reflected in an increase in diseases among humans.

Indigenous peoples and reconciliation: towards harmonization and personal and territorial balance

In Guatemala, the epicenter of the design of the various state and non-state transitional justice initiatives has been located mainly in the capital and these are, in addition, predominately guided by Western views of human rights despite the fact that the vast majority of victims are indigenous people living in rural areas⁵. It was not surprising that the National Reparations Program, created in 2007, encountered linguistic difficulties to find an adequate concept in Maya Q'eqchi' to translate "reparation" (*resarcimiento*) during the initial stage⁶.

On the basis of the experience gained in Guatemala, Colombia has great potential to become a laboratory where indigenous peoples, together with those responsible for public policies of transitional justice, transcend the limits imposed by the conceptual comfort zone and the practices of this dominant paradigm. At the legal level, Colombia demonstrated its willingness to decolonize transitional justice by incorporating views that were historically silenced and marginalized. First, it created a legal novelty when Decree-Law 4633 of 2011⁷, known as the Law of Victims for Indigenous Communities, incorporated the notion of territory as victim. This legislation, a political victory for the indigenous peoples' organizations, establishes that indigenous peoples have "special and collective ties" with "Mother Earth" (Article 3) and have the right to "harmonious coexistence in the territories" (Article 29). In addition, it recognizes that the territory is

“a living whole and sustenance of identity and harmony” and that it “suffers damage when it is violated or desecrated by the internal armed conflict” (Article 45). “Spiritual healing” is part of the integral reparation of the territory (Article 8). In other words, this recognition implies “more rights of the territory than rights over the territory”⁸.

Secondly, the Special Jurisdiction for Peace (JEP), a central component of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition created as part of the Peace Agreement, promotes restorative justice and would take into account “principles, logics and rationalities of the ethnic peoples’ justice systems with the aim of seeking truth through consciousness, reconciliation, healing and harmonization between victims and accused that allows for the strengthening of the community fabric, as well as the harmonization of the territory.” (Article 44 § 3, General Regulation 2018). In fact, the entire Peace Agreement has criteria that include a focus on gender as well as on human rights and ethnic diversity.

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However, the great challenge the Colombian transitional justice process faces is how to approach and put into practice these multiple views of harm, justice, reparation and reconciliation, embedded in indigenous ontologies. In other words, how can concepts of damage to mountains, hills and rivers be included into the legal arena? Can the territory speak when human beings go to the Special Jurisdiction of Peace?⁹ According to the indigenous peoples, of course the territory speaks and expresses its feelings. A mountain gets angry, it gets sad, and it expresses this through signs in the dreams of the elders, fire ceremonies or because accidents occur with people. But the harmonization with these spiritual forces and ancestors is not real and does not exist within the human rights and transitional justice fields. So, to what extent will judges be able to listen to and accept this indigenous knowledge in their analysis?

In addition, “controlled equivocation” can be created¹⁰: misunderstandings that arise when two interlocutors, indigenous communities and the promoters of transitional justice initiatives, are not talking about the same issue but do not know it. The idea that the territory has a heart can become a mask to put an indigenous face on a transitional justice process that continues to deny the existence of another reality. Ancestral practices and norms might become another tool of the transitional justice toolbox, which however promotes simplistic, romantic and disconnected notions of indigenous practices that would deny reparation or reconciliation of spiritual ties with non-humans.

Peace in indigenous territories after the Peace Agreements?

The imposition of natural resource extraction projects in indigenous territories in countries that have suffered violence during armed conflicts such as Guatemala, Colombia and Peru puts the indigenous people in a situation of continuous violations of their human rights. In Guatemala, more than 200 Q’eqchi’ Maya communities in the department of Alta Verapaz are being threatened by the Xalalá hydroelectric project¹¹, which would be the second largest dam in the country. More than 80% of this population still does not possess land tenure of the territories where they have historically lived. For the Q’eqchi’ Maya, this hydroelectric power plant implies another *nimla rahilal* – great suffering and physical, energetic and spiritual suffering – because, as one elder of the community said, “just as in the 1980s, we human beings, the sacred hills and valleys and Mother Earth are going to suffer a lot.” In other words, the transitional justice interventions did not sufficiently address the historical causes of the armed conflict: institutional and societal racism and discrimination against the Mayan peoples, and the concentration of land in the hands of a non-indigenous minority elite. In addition, Latin America is facing a dramatic increase in murders and threats against indigenous leaders and human rights defenders who promote peace and defend territories against extractivist projects.

“ The challenge is how to put into practice the multiple views of harm, justice, reparation and reconciliation, embedded in indigenous ontologies. According to the indigenous peoples, of course the territory can speak and express its feelings ”

In the light of this extractivism, indigenous survivors have at their disposal a new legal argument in the defense of their territories. New Zealand is a world pioneer in granting legal personality to elements of nature. As a result of more than 140 years of legal negotiations between the Maori people and the state, in 2017 Whanganui River¹² and Mount Taranaki¹³ received legal rights because of their spiritual and ancestral relationship with the local Maori. Meanwhile, the Colombian High Courts have recently recognized in historical rulings the Atrato River¹⁴ and Amazonia¹⁵ as rights subjects with the aim of providing reparation for environmental damages and to protect nature. In other words, we argue that this emerging legal concept can be invoked from indigenous ontologies: the life of mountains, rivers, stones and sacred corn must be protected with the right to life enshrined in the Universal Declaration of Human Rights.

The task of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition of Colombia is not easy. In order that its mechanisms will be meaningful for indigenous survivors, public policies of transitional justice must be organized in such a way they recognizes historically silenced realities and, at the same time, strengthen survivors and indigenous communities from their own territories. This requires not only a decolonization of the legal and social knowledge that informs the field of transitional justice, but, above all, the will to promote deep discussions about “the pluriverse of worlds”¹⁶ with an open mind and a receptive heart.

*Disclaimer: The opinions expressed belong to the authors and do not necessarily reflect the position of the Special Jurisdiction for Peace (Colombia)

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1. M. Blaser, 2013 'Ontological Conflicts and the Stories of Peoples in Spite of Europe. Toward a Conversation on Political Ontology', *Current Anthropology*, Vol. 54, No. 5, pp. 547-568 y M., De la Cadena 2015, *Earth Beings. Ecologies of Practice across Andean Worlds*, Durham, Duke University Press.
2. See L. Viaene (2015), *La Hidroeléctrica Xalalá en territorios maya q'eqchi' de Guatemala ¿Qué pasará con nuestra tierra y agua sagradas?*
3. See L. Viaene (2010), *The internal logic of the cosmos as 'justice' and 'reconciliation': Micro-level perceptions in post-conflict Guatemala*.
4. Confederación Indígena Tayrona (CIT), *Caracterización de Afectaciones Territoriales de la Zona Oriental y de Ampliación del Resguardo Arhuaco*, document prepared for the Land Restitution Unit, p. 110-111.
5. L. Viaene, 2018, *Nimla Rahilal. Pueblos indígenas y justicia transicional: reflexiones antropológicas*, Bilbao, Universidad de Deusto, in press.
6. This concept does not exist in the Q'eqchi' language. After consultations, the Office translated "reparation" as *xiitinkil li rahilal*, which literally means "to mend the suffering, the pain". But the verb *xiitink*, in its everyday use refers to mending any broken fabric and does not reflect what the survivors feel because what they suffered during the conflict was not something minor that can be patched up. See: L., Viaene, 2010, 'Life is Priceless: Mayan Q'eqchi' Voices on Guatemalan National Reparations Program', *International Journal of Transitional Justice*, Vol 4, No. 1, pp 4-25. This problem of the translatability of hegemonic legal concepts expressed in Spanish to the indigenous Q'eqchi' language have their origin in the legal tradition of imposing unidirectional translation processes from legal language to non-hegemonic languages, such as indigenous languages.
7. Decree-Law 4633 of 2011

8. D. Ruiz Serna, 2017, 'Territorio como víctima. Ontología política y las leyes de víctimas para comunidades indígenas y negras en Colombia', *Revista Colombiana de Antropología*, Vol. 53, No 2, pp. 85-113.

9. Cfr. G. Spivak, 1988, 'Can the subaltern speak?', in Nelson, C. and Grossberg, L. (eds), *Marxism and the Interpretation of Culture*, Basingstoke, Macmillan Education, pp. 271-313.

10. E. Viveiros de Castro, 2004, 'Perspectival Anthropology and the Method of Controlled Equivocation', *Tipity Journal of the Society for the Anthropology of Lowland South America*, Vol. 2, No. 1, pp. 3-22.

11. Veure L. Viaene (2015), *La Hidroeléctrica Xalalá en territorios maya q'eqchi' de Guatemala ¿Qué pasará con nuestra tierra y agua sagradas?*

12. *Te Awa Tupua Bill* (Whanganui River Claims Settlement) 2017.

13. *Te Anga P?takerongo*, a Record of Understanding for Mount Taranaki, Pouakai and the Kaitake Ranges, signed between the Crown and Ngā Iwi o Taranaki on 20 December 2017.

14. Constitutional Court ruling T-622/16, published in April 2017.

15. Supreme Court ruling STC4360-2018.

16. A. Escobar, 2012, 'Más allá del desarrollo: postdesarrollo y transicionales hacia el pluriverso', *Revista de la Antropología Social*, Vol. 21, pp. 23-63.

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