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Challenges of Indigenous Data Sovereignty in Colombia's transitional setting

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Introduction

The Indigenous communities of Colombia have borne the brunt of the country's violent history. Since colonial times, the Indigenous communities of Colombia have endured different forms of violence that have caused systematic dispossession of their lands, displacement and the loss of their cultural identity.

On November 12, 2019, the *Jurisdicción Especial para la Paz* "Special Jurisdiction for Peace" (JEP) produced a ruling (JEP 079/2019) that recognized the Awá, an Indigenous community in southern Colombia, as victims of Colombia's 50-year armed conflict (JEP, 2019). The JEP is a transitional justice (TJ) tribunal that resulted from the Havana Peace Accords signed between the Colombian government and the largest and oldest guerrilla group of Latin America, the *Fuerzas Armadas Revolucionarias de Colombia* "Revolutionary Armed Forces of Colombia" (FARC) in 2016. This ruling by the JEP has a symbolic meaning that illustrates how "historical injuries" (Castillejo-Cuéllar, 2013a) are interpreted through legal mechanisms that seek to address questions of structural injustice.

Ruling JEP 079/2019 is an important attempt to shed light on the complexity surrounding the territorial disputes that have marked Colombia's history, the way such disputes have affected the livelihood of the Indigenous communities and the interrelation and interdependence between the Indigenous peoples and the land. A salient element of the ruling is that it declares that nature has been a victim of Colombia's conflict and therefore rivers and other elements of the affected ecosystems have gained legal protection (JEP, 2019) a decision which takes into account Indigenous ontologies.

Although the JEP's decision replicates the spirit of Constitutional Court Order 004/2009, in which the Colombian Constitutional Court established that 32 Indigenous communities of the country are facing cultural and physical extermination, the JEP challenges legalistic and mainstream understandings of harm by incorporating Indigenous perspectives into the legal realm and questions anthropocentric foundations that have informed the nation state paradigm and its sovereignty. As a consequence, it is important to observe how the data on harm interrelate with the two legal decisions and the contribution to accountability processes of structural injuries endured by Indigenous communities. For instance,

among the factors identified by Constitutional Court Order 004/2009 causing the disintegration, elimination and forced displacement of Indigenous communities in Colombia (Rodriguez et al., 2010), the court underscores that territorial dispossession has been caused by economic actors who, acting legally and illegally, have affected the livelihood of Indigenous communities dramatically. This draws attention to reparation policies and the accountability of economic actors involved in the Colombian conflict.

Against such a background, this chapter inquires into the legal representation of Indigenous communities in Colombia. In doing so, it reflects on the experience of an Indigenous community that—like the Awá people—has been considered to be a threatened community by Constitutional Court Order 004/2009: the Wayuu. It is of particular interest to us to inquire into the rationales that have recognized Indigenous victimhood and its meanings to counter the structural injustice that continues to mark Colombia's reality, despite the transitional discourse on peace purported by the Havana Accords.[1]

Based on the above-mentioned rulings (the JEP's Ruling 079 and Constitutional Court Order 004/2009), and the Victims Law of 2011, our analysis seeks to highlight the tension between the protection of Indigenous peoples and development discourse in contemporary Colombia. Addressing this tension is fundamental to understanding the way in which historical injuries are related to the expansion of the extractive economy in the Global South and highlighting the importance of Indigenous Data Sovereignty as a means of protecting endangered Indigenous peoples of Colombia, particularly with regard to their demands for territorial rights, food sovereignty and access to natural resources such as water.

Our analysis is concerned with the institutional ways in which Indigenous victims are defined through the lens of global dominant discourses related to conflict management such as transitional justice. Data sovereignty is contested in a transitional setting because states claim the right to control data in a very homogenous way, which replicates the idea of data "suzerainty" that characterized the colonial world (Pool, 2016). Suzerainty embodies the epistemic violence that endorsed colonial legal principles such as *terra nullius* which systematically denied the existence of Indigenous peoples and their epistemologies. Therefore, in this chapter, we argue that a meaningful policy on the historical redress of Indigenous peoples in Colombia's and other TJ settings of the Global South should include a broader discussion on development and Indigenous rights and their relationship with indigneous data. As Pool suggests, this policy should recognize that "before contact with imperial powers, Indigenous peoples had their own vibrant, meaningful bodies of data, over which they had DSov" (Pool, 2016, p57). Thus, this will prompt us to think about the temporalities informing the victimhood narratives surrounding TJ frameworks and their representation of Indigenous victims and structural injuries. By the same token, a broader understanding of Indigenous narratives would pose a challenge to the commodification of nature, which seems normalized in the global world and that justifies the creation of selective and exclusionary forms of control over access to resources such as water (Johnson et al., 2016).[2]

Structure

The chapter begins with conceptual frameworks and theoretical remarks and is then divided into three sections. In the first section, the historical representation of Indigenous peoples in Colombia is described. This section draws attention to the ways in which Indigenous communities have endured multiple forms of violence intensified by the racist discourses that marked the formation of the Colombian state and its policies regarding Indigenous communities. This section addresses the ways in which the foundational laws of the Colombian state reproduced violent elements of the colonial practices that characterized the conquest period.

The second section describes the TJ frameworks implemented in Colombia and analyzes the Indigenous victimhood narrative that informs them. Although our analysis draws on the ways in which Indigenous victims are defined by the legal frameworks, we suggest that this has an implication for the deployment of data related to the conflict and its memorialization.

The third section provides a historical account of the Wayuu community and its territorial organization since colonial times. The section also addresses the community's relationship with the TJ frameworks referred to in the previous section.

Our analysis suggests that despite their symbolic value, the TJ frameworks implemented over the past years have failed to address the structural injustice that has marked the unequal distribution of land in Colombia. In order to address this, we argue that the notion of Indigenous sovereignty as described in the United Nations Declaration on the Rights of Indigenous Peoples could play an important role in advancing accountability processes that elucidate the structural injuries endured by endangered Indigenous peoples of the country. Indigenous Data Sovereignty is crucial to understanding these injuries.

Conceptual frameworks and theoretical remarks

This chapter is rooted in the socio-legal approach to law. In particular, it uses elements of legal pluralism (Santos, 1995) to analyze how Indigenous sovereignty is understood in the context of global transitional justice. Our analysis is also informed by Global South scholarship and its critiques of development discourse. Specifically, we use the notion of coloniality (Quijano, 2000), which allows us to address the historical injustice faced by Indigenous peoples in contemporary Colombia. In combining these theoretical elements, the chapter attempts to problematize the ways data related to the historical injuries (Castillejo-Cuéllar, 2013b) experienced by Indigenous communities is treated within the legal and political arrangements that have informed Colombia's TJ processes over the past two decades. In this vein, the chapter follows Bengoetxea's contribution to this book, which shows that data related to victims in long-lasting periods of violence are contested. In our view, Bengoetxea's (2020) analysis is timely because it underscores the political uses of the data related to the victims of violent conflicts and their impact on the state's narratives about prolonged violence. In highlighting that the current politics of memory in Spain do not take into account the human rights violations that took place between 1936 and

1945—the period when most human rights violations occurred in Spain's recent history—Bengoetxea (2020) shows how the periodization of the violence of the past, in a transitional setting, gives rise to exclusionary practices that create hierarchies of victimhood. As will be seen, in the context of Colombia, Indigenous communities challenged the periodization of the conflict promoted by the state. From the perspective of Indigenous peoples, their territories have been affected since the conquest and therefore the historical injuries they have endured do not fit in the temporality of the violent past proposed by the state. This begs the question: is there a role for Indigenous sovereignty in a transitional setting? An affirmative answer to this question would necessarily imply a change in the way data related to historical injuries are stored by the state in a transitional setting. The politics of memory does not always account for historical redress and structural changes. Drawing on Bogoetxea's contribution, we argue that the sovereignty of the nation state in a political transition should coexist with the concept of Indigenous sovereignty. This means that interlegality (Santos, 1995), understood as the coexistence of multiple normative orders, should operate horizontally. Given that "ID sovereignty refers to the proper locus of authority over the management of data about Indigenous peoples their territories and ways of life" (Kukutai and Taylor, 2016), we cannot separate it from the right to self-determination of Indigenous peoples and their sovereignty (United Nations, 2007), which is under constant threat in Colombia, where ownership of the subsoil in Indigenous territories is claimed by the nation state—a form of legal deterritorialization (CCC Ruling 095/2018).[3] The data that emerge from long periods of violence are prone to reproduce dominant narratives about the conflict through the establishment of a nation state that controls data on the basis of sovereignty. Therefore, it is important to question the statistical portrayal of Indigenous victimhood and understand what it actually entails and who benefits from such representation (Walter, 2016). As Walter argues, a paradigm shift in the reductive and violent representation of Indigenous peoples within the nation state requires an epistemic and ontological disruption that values Indigenous narratives and knowledges (Walter, 2016)

As Bengoetxea (2020) maintains, dating a conflict is a contentious issue on its own. As a consequence, the criteria to define and use data can be politically instrumentalized by those who benefited from a specific periodization and narrative of the conflict, and therefore give way to a form of "victors' justice" in which historical justice cannot be considered; hence the relevance of the question: What is meant by Indigenous victims and whose suffering counts when it comes to defining victims in a TJ setting? Addressing this question is important for observing the global trajectories of victimhood narratives and their impact on the global discourse of TJ.

Section one: Historical representation of Indigenous peoples in Colombia

Independence from Spanish rule in 1819 did not bring about justice for the Indigenous peoples inhabiting present-day Colombia. Despite the formal changes in the laws of the new nation-state, the racist violence that justified the extermination of the Indigenous population of the Americas did not disappear. This is exemplified

by several laws implemented during the 19th and 20th centuries. For instance, Law 89/1890 established that the Colombian constitution of 1886 would not apply to the Indigenous populations. The law described the Indigenous peoples as savages and deprived them of political or civil rights. Furthermore, the law granted Catholic missionaries the right to "civilize" Indigenous communities, which meant deterritorialization and the loss of Indigenous cultures. This can be seen at the very beginning of the law, which stated: "The republic's legislation will not operate among the savages who will be subjugated to civilization through missions" (authors' translation).

This law replicates the racist spirit that justified cultural genocides that took place throughout the 19th and 20th centuries in different places globally that endured colonialism such as the US and Australia. In the name of nation-building processes, Indigenous children around the world were taken from their communities and forced to learn the official language and religion (See Indian Act of Canada, Australia's apology to the Stolen Generation, legislation in Argentina on Indigenous communities.)

In Colombia, the extermination of Indigenous peoples went hand in hand with criminalization processes promoted by laws that, despite having been passed by the new independent nation state, mirrored the colonial violence of the conquest period. For instance, Law 40/1868 established prison sentences for Indigenous peoples who opposed the territorial expansion of the republic. According to Article 4 of the aforementioned law: "the executive power shall determine the imprisonment of the Indigenous tribes who attack the settlements or the agricultural establishments or that hinder commercial activities and the free movement through the roads and rivers of the republic" (authors' translation).

By the 1920's, direct violence against Indigenous populations was institutionally legitimized as a result of the implementation of large-scale economic projects. Oil and rubber exploitation caused the deterritorialization and subsequent disappearance of several Indigenous communities in the Amazon and the northern region of Santander. Historical sources such as Roger Casement's (1911) "Putumayo Rubber and Blood" have documented the enslavement and assassination of thousands of Indigenous peoples by the rubber industry in the Amazon. In a similar vein, based on archival research, scholars Velasquez and Castillo (2006) have documented the relationship between the imposition of the first economic enclaves of the oil industry and the extermination of Indigenous communities such as the Yariguies in Santander. In their analysis of a worker's testimony, these scholars show how direct violence was used against Indigenous communities that tried to defend their territorial rights:

> The supervisors were authorized by the TROCO's (Tropical Oil Company) managers and supported by the State public forces to capture the Indians who opposed the opening of trails that would facilitate the exploration and exploitation of oil, as a matter of fact, a good ransom was offered for the head of Pascual, the most feared [Indian] at that time.
>
> (Velasquez and Castillo, 2006)
> (authors' translation)

These legal representations of Indigenous peoples are indicative of how the promise of liberation that informed the discourse surrounding independence from Spanish rule was tarnished. This was because the laws of the new nation adapted the very colonial rationality that justified the conquest of the Americas. Simply put, the new nation's laws did not question the racist representation of Indigenous peoples imposed by colonial laws. This situation falls within what Peruvian intellectual Anibal Quijano termed coloniality (Quijano, 2000). As a result, the racial power structures of colonialism remained largely intact; hence, it is no surprise that most official languages and religions of the newly independent nations—in much of the world today—coincide with those imposed by the colonial rulers.

Another fundamental expression of coloniality concerns the ways in which the relationship with the land was regulated after colonial rule. According to colonial legal doctrines, the colonizers had the right to settle and control the land that they colonized because territories located beyond the borders of the empires were considered *terra nullius* (Horn, 2014). The implementation of this legal principle deterritorialized Indigenous peoples and did not recognize them as human beings. After independence from the Spanish rule, as we have previously mentioned, territorial rights were not recognized. In fact, even in the 20th century, institutions like *terraje* obliged Indigenous peoples to work in large portions of land called *haciendas*. The owner of the *haciendas* did not have to pay the Indigenous communities working on their disposed lands (Vasco, 2008).[4]

Although the enactment of the 1991 constitution recognized Indigenous sovereignty, the current situation of endangered Indigenous communities shows that coloniality persists and is normalized by the imposition of the large-scale extractive economy in the country, which significantly affects these communities. The extractive economy promotes the idea that land is a commodity and therefore should be exploited for economic purposes. Although this idea undermines the Indigenous worldviews that consider human beings as part of the land who cannot be separated from it, the extractive economy has become a globalized practice endorsed by development discourses. The question that springs to mind is: why is the human cost of the expansion of the extractive economy not challenged in countries whose Indigenous communities are facing extermination? Considering this question, scholar Julia Suarez-Krabbe argues that the impact of colonial practices on places like Colombia is made invisible because "the force of colonial discourse lies in how it succeeds in concealing how it establishes and naturalizes ontological and epistemological perspectives and political practices that work to protect its power" (Suárez-Krabbe, 2016).

Bearing this discussion in mind, in the second section of this chapter we will outline Colombia's TJ framework and its representation of the historical injuries endured by Indigenous communities. In doing so, we seek to present the complex interplay of Colombia's TJ setting; specifically we will refer to the Peace and Justice Law of 2005, the Victims Law of 2011 and the decrees that defined Indigenous victims in 2011. In these laws and decrees victims become data of the conflict. We relate these data on Indigenous victimhood to other legal mechanisms

that have addressed Indigenous victimhood such as Constitutional Court Order CCC Order 004/2009 which defined endangered Indigenous communities. We are compelled to observe that one of the major challenges of the JEP would be the legal use and interpretation of these data.

Section two: A TJ framework in a context of inter-legality

Colombia's TJ framework comprises various laws and institutions that resemble different global discourses on reparations, human rights and victimhood. TJ discourse began in 2005, with the enactment of the Peace and Justice Law (Law 975/2005), which resulted from a political arrangement between the government at the time and one of the major actors of Colombia's conflict: the *Autodefensas Unidas de Colombia* "United Self-Defenders of Colombia"(AUC). The AUC were a right-wing paramilitary organisation that advanced violent securitization and anti-insurgency campaigns throughout the country; they committed massacres, extrajudicial killings and displacement. Similar to other actors in the conflict, such as the FARC, the paramilitaries fought for territorial control, impacting Indigenous communities through forced displacement, extrajudicial killings and massacres.

The handling of victims' right to truth has been one of the elements of the Peace and Justice Law that has been criticized at both local and international levels and the law is marked by contestation. Some victims groups have been critical of the truth delivery mechanisms established by the law (Castillejo-Cuéllar, 2013a) and others have rejected the state narrative surrounding the necessity of the law as an instrument to end paramilitary violence (Burnets, 2018). Regarding Indigenous sovereignty, the Peace and Justice Law did not have a component for Indigenous victims.

Social mobilization and also the state's requirement to meet human rights standards for foreign investment led to the enactment of the Victims Law in 2011 (Law 1448/2011). This law created a land restitution programme for victims of the conflict, which in some cases has allowed forcibly displaced people to return to their lands.[5] However, despite its symbolic meaning, the recognition of Indigenous sovereignty was not a priority for the policy makers supporting the Victims' Law, which was discussed in Congress without the presence of Indigenous communities (ONIC, 2012). Thus, after ONIC expressed discontent for not being invited to the congressional discussions in which the Victims Law was approved, which could have caused a constitutional challenge on the basis of Indigenous communities' right to prior consultation, the government decided to include an article that permitted the regulation of Indigenous victims through the enactment of a presidential decree (Decree-Law 4633/2011) (Aponte and Lopez, 2013). Unlike what happened with the creation of the Victims Law, representatives of Indigenous communities were consulted about Decree–Law 4633/2011. However, as Aponte and Lopez show, this consultation was implemented as a formal requisite and not as an instrument to guarantee the rights of Indigenous peoples and the recognition of legal pluralism (Aponte and Lopez, 2013).

The relationship between the Decree 4633/2011 and CCC Order 04/2009 referred to at the outset of the chapter is another problematic feature of the representation of Indigenous victims in Colombia's transitional setting. As we have previously mentioned, CCC Order 04/2009 declared the physical and cultural endangerment of Indigenous communities of the country. The order recommended the creation of 'safeguard plans' (*planes de salvaguarda*) for the protection of these peoples. In these plans, some Indigenous communities have denounced the systemic violation of their rights and have demanded the recognition of their territorial rights, which date back to the colonial period. In an attempt to bring closure to the conflict, Decree 4633 establishes that Indigenous peoples can be recognized as victims from 1985 onwards. This begs the question: are the Indigenous victims of CCC order 04/2009 different to those addressed by decree 4633/2011? And more importantly: can these communities construct a victimhood narrative that also respects their sovereignty and experiences? The interpretation or use of these data on Indigenous victimhood poses an important challenge for the JEP, which according to the Havana Accords will have jurisdiction for ten years.

By creating a specific temporality for the recognition of Indigenous victims, Colombia's TJ framework resembles what Rosemary Nagy has described as an isolationist approach to truth (Nagy, 2012). Nagy refers to this approach when analyzing the narrative that emerged from the South African Truth and Reconciliation Commission (SATRC). For Nagy and other scholars critical of the SATRC (Wilson, 2001), the truth produced by this commission was decontextualized and underestimated the systemic violence that characterized the apartheid regime. As a result, the state's responsibility in the systemic racism that informed the apartheid regime was erased and this did not allow for an adequate understanding of white settlement and its relationship with the structural injustice of apartheid. In this vein, Nagy argues that "the SATRC was vulnerable to claims that torture and killings were randomly committed by a few bad apples" (Nagy, 2012, p.350).

In the Colombian experience the temporality established by the decree on Indigenous victims entails the systemic denial of the historical injuries endured by Indigenous peoples from the colonial times until 1985. This means that historical injuries that have remained unaddressed during the country's republican history and that have a direct connection to the current predicament of Indigenous communities are not important for the Indigenous victimhood narrative informing the law (Lopez et al., 2019). Furthermore, the periodization established by the Indigenous decree has a second component that refers to the reparation measures related to violations of territorial rights. According to the decree: "restitution measures related to territorial affectations shall only proceed for events that occurred from January 1, 1991 onwards" (Decree 4633 2011). This means that major historical injuries caused by the deterritorialization of Indigenous peoples such as the Wayuu will not be considered in the transitional setting, nor will the genocides caused by the extraction of rubber in the Amazon nor the missions in Putumayo (Lopez et al., 2019), all of which happened prior to 1991.

Colombia's TJ framework, and its reductive treatment of Indigenous victims is illustrative of the ways in which data related to prolonged conflict benefit ahistorical understandings of suffering and justice. The framework also shows the global dynamics surrounding the legal knowledge production of the post-cold war period, which is characterized by a constant tension between understandings of Indigenous sovereignty and development.[6] Thus, although International law conventions such as ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples protect Indigenous sovereignty, the moral force of these conventions is tarnished by the international investment law regime, which favors the interest of local business elites and transnational corporations. It is a situation of coloniality, through which Indigenous territories continue to be considered as *terra nullius*, in which natural resources are solely viewed as commodities. As a consequence inter-legality is instrumentalized discursively because it is operationalized through the nation state, which becomes the source of authority in a transitional setting, as in the case of the regulation of Indigenous peoples without taking into account their demands for historical justice. In this vein, Indigenous peoples of Colombia would benefit from a broad approach to truth (Nagy, 2012) that locates their historical injuries on a continuum of violence that has marked and continues to mark the very nature of the Colombian state. This broad approach seems to have influenced the JEP's recognition of nature as a victim of the conflict (JEP, 2019) as described in our introduction, but it remains to be seen if the ruling brings about social and political consciousness with regard to the harm caused not only by the war but also by the normalization of the extractive economy in the country. Similarly, the TJ discourse on enduring peace and non-repetition should engage with discussions about climate change and food security which have been advanced by Indigenous peoples of the country. At stake is the politics of data—in this case Indigenous victimhood narratives—and whether statistics related to prolonged conflict can counter the nation state dominant representation of Indigenous peoples which has historically benefited the status quo as Walter (2016) points out.

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Thus far, we have described Colombia's TJ framework and its problematic representation of Indigenous victimhood. The remaining part of the chapter is concerned with the interpretation of the historical demands of the Wayuu within the legal arrangements that have regulated their Indigenous sovereignty. Specifically, we will analyze elements of the safeguard plan of the community and its relationship with the victimhood narrative of the TJ framework. At the end of this section, we will also refer to a recent effort of the community to counter the state's notion of development discourse: the autonomous consultation.

Safeguard plans emerged from CCC Order 004/2009. Through these plans, endangered Indigenous communities have the opportunity to share their experiences of violence and explain how displacement and other related crimes have affected their existence. In this vein, safeguard plans are a historical attempt to

shed light on the violation of the collective rights of Indigenous communities. In the Wayuu safeguard plan (Asociacion de Autoridades Tradicionales de la Guajira 2014), the community advances demands for historical redress questioning the periodization of victimhood that has informed Victims Law (Law 1448/2011).

Section three: The Wayuu

The Wayuu are the largest Indigenous community of Colombia. They are mostly located in La Guajira, the northernmost department of Colombia and the border state of Zulia in neighboring Venezuela. In 2018, a national population survey established that the Wayuu population consists of 380,460 people (DANE, 2019), with the majority of them living in *rancherías*, collective systems of communitarian organization. *Rancherías* are characterized by having traditional orchards, irrigation systems and even graveyards. Similar to other border regions inhabited by Indigenous communities like Putumayo, La Guajira's territory has been historically treated as a marginal place. La Guajira is one of the poorest departments of the country, with 28% of the population living in extreme poverty.

Colonization has marked the historical formation of La Guajira. As a result of colonial violence, the Indigenous population of the Americas dropped significantly by the year 1600. This prompted the colonial powers to bring millions of slaves to the new world to continue with the extraction of minerals that characterized the colonial period. However, some of these slaves escaped to places far from the colonial metropolis and formed their own social systems. In La Guajira, their settlements were known as *rochelas*, and Afrodescendants, Wayuu and mestizo people lived there for many centuries after settling by the banks of the Ranchería River. *Rochelas* became essential for the irrigation systems used in *rancherías* by the Wayuu people and other ethnic groups of la Guajira (Ramírez et al., 2015).

Rancherías are fundamental to understanding the history of the Wayuu. As a communitarian system of territorial organization, the *rancherías* are an example of ancestral inter-legality and coexistence of different social orders, which dates back to colonial times. The historical injuries endured by the Wayuu community are related to the non-recognition of their territorial rights, as illustrated by the violent interventions such as the extractive project of the Cerrejon mine, and by the incursion of illegal and legal armed groups.

The Cerrejon mine

In the 1980's, the Colombian state granted licenses for the exploitation of coal in the Cerrejon mine, the largest open-cast mine in South America. Today, the extractive project produces 32 tons of coal per year which is exported worldwide yet the profitability of the mining project has not improved the living conditions of the Wayuu community. On the contrary, according to the community's narrative, the extraction of coal has dried their lands and affected the irrigation systems of their territories significantly. This situation has resulted from the mine's

unnatural use of the Ranchería River, which has been deviated to supply the water required by the mine for the process of coal extraction. The Ranchería River was the only source of water in the mid and low Guajira, which are semi-desert regions (Molano, 2012). Data from a recent ruling by the Inter-American Commission of Human Rights (IACHR Resolution 60/2015) show that 4770 Wayuu children have died of malnutrition during the past decade, which is due in part to the lack of water because they cannot irrigate their crops. The community also maintains that inadequate access to drinking water has played an important role in this tragedy. In addition to water scarcity, the Wayuu people have also suffered from respiratory diseases caused by the polluted air that circulates in their territories and have suffered massive displacement, as discussed below.

This stark reality prompts us to reflect on the human costs of development projects promoted by the extractive economy in the Global South. Rather than bringing equality and better living conditions to La Guajira, the mining project has caused a humanitarian crisis in the department.

Bahia Portete massacre

In April 2004 a paramilitary unit cut off the heads of Wayuu midwives and tortured various other Wayuu women (Verdad Abierta, 2011). The paramilitaries were fighting for control of the port, which has historically been of great importance for the smuggling of goods, especially cocaine (Molano, 2012). The assassination of three Wayuu women and the forced disappearance of two others affected the social fabric of the community significantly. The Wayuu have a matrilineal hierarchy in which women represent authority within the community (ONIC). As a result of the paramilitary incursion which has been described as the *Bahía Portete Massacre*, 888 members of the Wayuu community were forcibly displaced mostly to places such as Uribia, Maicao in the Colombian side of La Guajira and Maracaibo in the Venezuelan side (Verdad Abierta 2011, CNMH, 2010). Later, a TJ tribunal created by the Peace and Justice Law revealed that the Bahia Portete massacre resulted from an alliance between paramilitary and state forces in La Guajira.[7]

This heinous event illustrates the persistence of the colonial treatment of Indigenous peoples and their territories throughout the existence of Colombia as a republic (1819–2019). As we mentioned in the introduction, in the colonial period, Indigenous peoples were dispossessed because their territories were considered *terra nullius*, that is, territories without trace of humanity and no property relations. Places located on the margins of the Colombian state such as La Guajira continue to embody the structural injury caused by the colonial principle of *terra nullius*. In these places, state sovereignty has only been exercized through militarization and extractive projects of natural resources. This is representative of the strategic relation of "inclusive exclusion", used by the Colombian state to control those places alien to the nationhood narrative (Uribe, 2017). The massacre was conducted by a paramilitary organization that was connected to state forces, thus allowing the state to continue its militarization of Wayuu territory while also

claiming innocence and lack of knowledge because the campaign was conducted by an illegal armed group, not directly by Colombian soldiers.

The two above-mentioned events pose a challenge to the transitional justice frameworks implemented in the country. The challenge lies in the fact that the systemic harm endured by the Wayuu and other ancestral communities inhabiting La Guajira represents a form of structural violence that the legalistic character of TJ can hardly address. As a consequence, the Wayuu community became official victims of Colombia's conflict after the TJ tribunal ruling revealed that the Bahia Portete massacre resulted from an alliance between paramilitary and state forces in La Guajira. However, the notion of victim informing the TJ discourse constrains the legal investigation to the events related to the massacre. Accountability for the event will hardly address the systemic violation of the Wayuu's territorial rights, which would necessarily bring to the fore the role of the Cerrejon project. Overall, the difficulty resides in the differing interpretations of systemic suffering and the ways in which TJ discourse defines Indigenous victims in the country. Furthermore, the possibility of Indigenous sovereignty remains uncertain because in *terra nullius* places, different armed groups, including the state forces, continue to fight for territorial control (Lemaitre, 2015).

Wayuu safeguard plan

Although the conflict of the Wayuu community with the Cerrejon mine has been widely researched (Chomsky et al., 2007; Archila et al., 2015; Rojas-Páez, 2017; Avilés, 2019), it continues to exemplify the chronic impunity (Rojas-Páez, 2017) of the crimes of the powerful (Pearce, 1976). In fact, according to Avilés, between 2007 and 2017, the child mortality rate in Guajira exceeded "the deaths of Colombia's long running internal war during the same period" (Avilés 2019, p.1751). This situation illustrates the human cost of large scale extractive projects, through which the use of resources is decided by the interests of local and global investment elites rather than by the ancestral communities inhabiting the territories where resources are located. As Chomsky et al. (2007) show, deterritorialization of the Wayuu community is related to the beginning of the mining project, for which the construction of a railroad was necessary at the beginning of the 1980's. The communities were not consulted about the construction of the railroad because at that time ILO Convention 169 did not exist. In fact, when the convention was ratified by Law 21/1991, more than 1000 members of the community had already been displaced according to Wayuu anthropologist Weildler Guerra (2007). The construction of the railroad meant the destruction of sacred graveyards and the community was forced to excavate them and take the bones of their ancestors with them (Guerra, 2007). Nearly all the communities of La Guajira—15 out of 21—have been displaced since 1976 due to the expansion of the mine, with 700 Wayuu people resettled. How are these data related to the transitional setting and its narrative regarding victimhood of Indigenous victims?

In the community's safeguard plan, the Wayuu maintain that their territorial organisation differs from the reservation model established by Law 89/1890.

As mentioned earlier, this law was discriminatory because it characterized the Indigenous peoples as savages who should be civilized by missionaries. The law also established that the communities should be territorially organised into reservations (*resguardos*) in which Indigenous councils could be formed. Despite its racist grounds, these two elements of the law have been strategically used by the communities in their territorial disputes against landowners throughout the 20th century (Lemaitre, 2015; Vasco, 2008). For example, the lands of the reservations were difficult to sell because, according to the law, the "savages" inhabiting them lacked the capacity to exercise property rights.

Historically, the Wayuu have organized themselves through clans, which were not legally recognized for prior consultation. This resulted in the community's strategic adaptation to the reservation model, which is the only form of territorial organisation recognized by the state to use prior consultation. The safeguard plan shows that as a result of forced displacement many members of the community had to form settlements far from their territory, which has given way to a situation of deterriolization. Only the Wayuu who have organized through reservations and have been granted the respective legal recognition can be called victims according to the framework of the Victims Law. This shows how the attempt of TJ to establish a definition of Indigenous victims is arbitrary and divisive. As Nagy puts it, "drawing a line on the past denies continuities of violence and, in turn, colludes with understandings of reconciliation that seek to maintain the status quo" (Nagy, 2012, p. 360)

One major problem the community faces is caused by the Cerrejon mine, particularly the deviation of the Ranchería River for the construction of the Cercado dam. The community was not consulted with about this project. The dam provides the necessary water for mining and has dramatically restricted the community's access to the river. Colombia's Attorney General's words illustrate this situation "The Ranchería River in spite of being a good of public use, its water can be found in a dam to which the Wayuu would not have access" (Aviles 2019). Thus, the Wayuu's current situation challenges the restricted narrative surrounding the TJ discourse and calls for a broader understanding of structural injuries in which the human cost of development is scrutinized.

Autonomous consultation

Autonomous consultation is an internal decision-making practice, through which the Wayuu community expressed their dissent to the consultation process of the Cerrejon mine. This exercise of Indigenous sovereignty occurred within the initial phase of consultation about the Cerrejon project: the pre-consultation. The community was consulted about the deviation of 26 kilometers of the Ranchería River, which would provide the water for the extraction of coal. Initially the community's response to the representatives of both the government and the mining project was that they would consider the proposal and come up with an answer but they needed to dream about it first. In fact, their answer to the institutional actors of the consultation was: "Let us dream first. If the dream we have is a bad one, we will have to think about things more" (Guariyu, 2015, p 18).

Through the internal consultation the community realized that the extractive project would imply a resettlement of the community, which would mean that the community would have to live far from the Ranchería River. This was not an option for the community for several reasons. According to Wayuu cosmogony, the Ranchería River is the vein and heart of the community; therefore, the deviation of the river would mean the death of the entire community. Furthermore, their sacred medicinal plants grow along the river. In the end, the community asserted that they could not dream and thus were not able to give an answer. In their response they stated: "We cannot continue dreaming, because our dreams are not clear any longer … with the arrival of the mine we have lost the capacity of dreaming...we should only dream again when mining leaves our territory" (Guariyu, 2015, p 23).

As mentioned above, the deviation of the Rancheria River occurred and this gave way to a complex situation for the community, with events that illustrate the genocidal and ecocidal sides of development. The internal consultation is not legally recognized by the Colombian state. However, if we understand Indigenous data (ID) sovereignty as the proper locus of authority over the Indigenous territories and ways of life as Kukutay and Tylor describe it (Kukutai and Taylor, 2016), it would be fundamental that justice bodies such as JEP do not lose sight of the epistemic and moral basis surrounding the justice demands made by the Wayuu and other Indigenous communities exercising their sovereignty.

Concluding thoughts

In this chapter, we have discussed the ways in which narratives related to Indigenous victimhood have emerged in Colombia's transitional setting. We have argued that the legal framework of the transitional setting does not account for structural injuries endured by Indigenous communities of the country. This is mainly due to the temporalities established by the legal frameworks that have informed Colombia's transitional setting. These temporalities fail to address the structural dynamics of the conflict which have a close relationship with the colonial representation of Indigenous peoples, which has not changed much in today's globalized world.

We have discussed how historical injuries are related to the expansion of the extractive economy in Colombia, drawing on the Wayuu experience as a case study, and have highlighted the importance of Indigenous Data Sovereignty as a means of protecting endangered Indigenous peoples of Colombia, particularly with regard to their demands for territorial rights and food sovereignty. Although the 1991 constitution recognized Indigenous sovereignty, the colonial narrative persists and is normalized by the imposition of the large scale extractive economy in the country, which significantly affects these endangered communities. As a result, inter-legality works in a complex interplay in which investors' interests prevail over progressive legal frameworks such as the UN Declaration on the Rights of Indigenous peoples and ILO Convention 169.

Due at least in part to the expansion of the extractive economy, the Wayuu people have lost their territorial rights, food sovereignty, and access to water.

Despite their symbolic value, the TJ frameworks implemented over the past years have failed to address the structural injustices in Colombia, including unequal distribution of land, and much of the forced displacement that occurred before 1985. By creating a specific temporality for the recognition of Indigenous victims, the state's responsibility in the systemic and structural injustice is erased and does not allow an adequate understanding of the complexities of the conflict or the violence that began in colonial times and that continue to affect Indigenous people today. If the state is really engaged with the promise of enduring peace informing the TJ discourse, it should not ignore the historical injuries endured by Indigenous peoples from the colonial times until 1985. Here lies a major challenge for the JEP but also for international justice bodies.

The notion of Indigenous Data Sovereignty could play an important role in advancing accountability processes that shed light on the structural injuries endured by endangered Indigenous peoples of the country. By taking into account the temporality as perceived by the Indigenous peoples themselves, as well as their narratives of resistance to extractive projects, we could reach a more accurate understanding of what they have suffered during the conflict. This could be fundamental to stopping the systemic violence against Indigenous communities in Colombia.

Notes

1 At the moment of writing this chapter, Indigenous peoples of Colombia have advanced a campaign against the recent assassinations of many of their members. According to the UN, 56 Indigenous persons have been killed in the Cauca region this year and 11 of those 56 people were human rights defenders. According to a report produced by ONIC, 135 Indigenous people have been assassinated since 2018. The name of the campaign is illustrative of this disturbing rate: STOP THE GENOCIDE.

2 Based on the literature of green criminology, Johnson et al. (2016) show that mainstream legal doctrines on property undermine the universal realization of the fundamental right to water because international legal arrangements protect corporate interest over human rights. The authors bring to the fore a fundamental problem of legal epistemology: corporations cannot be tried for human rights violations nor for ecocide.

3 Radical changes in the jurisprudence related to territorial rights and ownership of natural resources is one of the major challenges for Indigenous and *campesino* communities of Colombia. For instance CCC Ruling SU-095/2018 restrains the use of popular consultations related to extractive projects. In previous rulings the court endorsed the use of popular consultations as a mechanism of democratic participation (CCC Ruling T-445/2016).

4 *Terraje* was a feudal practice used by large landowners who occupied and disposed Indigenous territories from colonial times until 1970. The Indigenous communities were forced to work for free in their disposed territories. In exchange they could live in small portions of the large Haciendas. See Vasco 2008.

5 The law created a mechanism for the registration of victims Registro Único de Víctimas (RUV). Only 986,961 out of 8,816.30 victims registered have received reparations. This accounts for only 11% of the victims registered. See https://www.elheraldo.co/barranquilla/victimas-aun-falta-por-reparar-el-89-en-el-pais-dice-el-ruv-642068

6 This tension has been recently addressed by scholar M.L Böhm who analyzes eight Latin American cases in which human rights violations and environmental degradation are committed by transnational corporations. The cases documented by Böhm are illustrative of what she terms "the crime of maldevelopment", which is defined as the cause and result of interrelated forms of violence (structural, physical and cultural) endured by historically marginalized groups such as Indigenous communities. Although the outcomes of the cases seem to show that large victims groups seem irrelevant for the justice system, Böhm calls for a broader understanding of harm that revisits the human cost of the global deregulation of the economy. Böhm's suggestive work is a salient attempt to shed light on the invisibility of the communities affected by the crime of maldevelopment. In her words: "The impression that large victim groups are anonymous does not mean that they actually are. Every malnourished child has a name, every displaced indigenous person is an irreplaceable member of an ancestral group and each severely polluted lake is one fewer natural sources of water for a specific community" (Böhm, 2019 p. 2).

7 This uneasy link was common in places where extractive mining and energy activities took place. As a securitization strategy the government created mining and energy battalions. By 2014, there were already 21 batallions composed of 80.000 troops. See https://wri-irg.org/en/story/2014/colombia-militarisation-serving-extraction

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