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Territory as a Victim of Armed Conflict

Alexandra Huneus* and Pablo Rueda Sáiz**

ABSTRACT[∞]

Colombia's peace jurisdiction has formally accredited the territories of indigenous and Black communities as victims of the armed conflict. But what does it mean for a territory to be treated not as the stage on which a conflict unfolds, but as its victim? The concept of territory-as-victim seeks to give a legal expression to the notion that it is not just human lives that are upended by armed conflict, but also relations with non-humans, including 'earth beings' such as rivers and mountains, and the spiritual world. Further, it is a tool through which indigenous peoples and Black Colombians gain greater control over their land. Transitional justice scholars and practitioners are just beginning to consider what the push to recognize non-humans in law could mean for a field that has its origins in the human rights movement. This article contributes to the debate, showing how Colombia's peace process is transforming territory from an object to a legal subject that suffers harm and is in need of repair.

KEYWORDS: Afro-Colombian, Colombian peace, indigenous peoples, Jurisdicción Especial para la Paz, rights of nature, territory, transitional justice

The *Jurisdicción Especial para la Paz* (JEP), established through the 2016 peace accord that ended Colombia's armed conflict, is pushing transitional justice into new terrain. Three of its main investigations are organized not according to types of crime, victim or perpetrator, but according to the places most affected by the violence, focusing especially on rural areas home to indigenous peoples and Black communities.¹ Additionally, the JEP has issued five resolutions which accredit the territories of indigenous peoples and Black communities as victims of the armed conflict. Thus, the Katsa Su, the Cxhab Wala Kile and the Eperera Euja – the territories of the Awá, the Nasa and the Sia people respectively – as well as the territories of the Black communities of Tumaco, have been transformed into legal subjects with rights to justice, truth and reparation, and the right to participate in each stage of the legal process.

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¹ Law 70 of 1993, which recognizes the rights of Black Colombians to collectively own and occupy their ancestral lands, uses the terms '*comunidades negras*' and '*tierras de comunidades negras*' to refer to the different types of communities of African descent. The law was drafted in part by multiple Black social movement organizations from different ideological orientations and origins. For this reason, we use the term 'Black communities.'

The concept of territory-as-victim seeks to give legal expression to the notion that it is not just human lives and relationships that are upended by armed conflict, but also relations with non-humans, including animals, plants, ecosystems and natural entities or 'earth beings' such as rivers and mountains, and the spiritual world.² In this sense, it forms part of the emerging law and jurisprudence from around the world that recognizes the legal personality of natural entities.³ The JEP resolutions represent only the second time that such a law has been issued in the context of a process of reconciliation. The first time was New Zealand's recognition of the Whanganui River and Te Urewera forest as having legal personality, part of the settlement of longstanding treaty disputes with two Māori tribes.⁴ The difference with the New Zealand laws is that the Colombia resolutions not only seek to address the abiding issue of the political status of indigenous peoples, but also form part of a national peace process that seeks transitional justice in the wake of an armed conflict.

Transitional justice scholars and practitioners are just beginning to consider what the push to broaden law beyond human relations could mean for a field that has its origins in the human rights movement and the dignity of the individual. This article contributes to the debate by showing how the JEP's resolutions expand the concept of territory, which lies at the core of many transitional justice practices and ideas. By declaring territory to be a victim, the JEP reconceives land from being an object that can be used as a means of reparation to a subject that *suffers harm* and is itself *in need of reparation*. This makes room for broader conceptions of harm and reparations that include not only the direct effects of acts of the armed conflict such as forced displacement, but also the disruption of socio-ecological relations, such as forms of subsistence farming and other cultural practices, as well as disruption of the spiritual world. The legal concept of the territory-as-victim is the product of long-standing efforts of indigenous and Black communities' social movements to make room for their perspectives in national law, and was shaped by the particularities of their political struggle, and of Colombia's long-running armed conflict. However, it has ramifications for how we conceive of harm and reparation in transitional justice more generally, and for the particular reparatory measures to be taken post conflict. The JEP resolutions are significant because they suggest new paths toward transitional justice in struggles that involve indigenous peoples, but also because they suggest paths toward centering the relationship of societies with their environment in transitional justice processes more generally.

Some may claim that declaring territories to be victims dilutes the notion of victim, or that it sidelines concern for human rights. Others may worry that granting rights and legal standing to territories will not make any difference on the ground, or worse, that it is a shiny distraction that will interfere with efforts to preserve environmental resources through regulatory law, or impede indigenous people from using

2 Marisol de la Cadena, *Earth Beings: Ecologies of Practice across Andean Worlds* (Durham: Duke University Press, 2015).

3 In this article, we do not engage directly with the "rights of nature" scholarship because we have limited space, and wanted to focus on the contribution of these Colombian resolutions to debates in the transitional justice literature. We hope to explore the connections and distinctions between territory-as-victim and rights of nature in our next article.

4 Craig M. Kauffman and Pamela L. Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand,' *Global Environmental Politics* 18(2) (2018): 43–62.

their resources while distorting their worldviews.⁵ Indeed, the JEP's resolutions do not hew to a single meaning of territory, and it is not yet clear whether and how the concept of territory-as-victim will reshape the ongoing investigations and subsequent reparatory measures. One might argue, therefore, that this article is premature. Nonetheless, we think it is important to understand where the legal figure of the territory-as-victim came from, and timely to explore the directions in which it could evolve, both within Colombia and beyond.

The article begins, in the next section, by reviewing scholarship that highlights the limitations of transitional justice involving indigenous peoples and placing that literature in conversation with the scholarship extending our understanding of justice beyond human relations. The third section turns to the historical context of struggles over land in Colombia. It shows how the armed conflict promoted or disrupted regional economic development projects and the ways this impacted how indigenous and Black communities lived in their territories. This section also shows how these groups mobilized to defend their territories by expanding our understanding of the ways that war causes harm to include these regional economic projects and by reconfiguring the legal meaning of ethnic territories. The fourth section analyzes the JEP's resolutions that declare territories to be victims. It shows how these resolutions transform the core concepts of harm and reparation through their dialogue with the indigenous peoples and Black communities of Nariño, Cauca and the central and upper regions of the Atrato and San Juan rivers. Like the JEP resolutions themselves, the section seeks to foreground the words of the indigenous peoples and Black communities' petitions. The fifth section concludes by analyzing the ways the concept of territory-as-victim challenges transitional justice scholars and practitioners to give greater consideration to the different ways all peoples relate to and interact with their land.

INDIGENOUS PEOPLES IN TRANSITIONAL JUSTICE

Recent scholarship presents several critiques of the way in which transitional justice interventions typically approach indigenous peoples.⁶ Settler colonial theorists in particular have been critical of the underlying liberal or neoliberal and Eurocentric assumptions of transitional justice models.⁷ When juxtaposed, these theories can be

5 See, for example, Brad Coombes, 'Nature's Rights as Indigenous Rights? Mis/recognition through Personhood for Te Urewera,' *Espace populations sociétés* 2020(1–2) (2020), <http://journals.openedition.org/eps/9857> (accessed 7 January 2021); Anna Grear, 'It's Wrong-headed to Protect Nature with Human-Style Rights,' Center for Humans & Nature, 18 March 2019, <https://www.humansandnature.org/it-is-wrongheaded-to-protect-nature-with-human-style-rights> (accessed 7 January 2021); Leah Tempe, 'Blocking Pipelines, Unsettling Environmental Justice: From Rights of Nature to Responsibility to Territory,' *Local Environment* 24(2) (2019): 94–112.

6 In this literature review, we foreground scholarship on indigenous peoples in transitional justice. This is due to the fact that, in Colombia, Black communities and Roma organizations have often adopted the frameworks and strategies developed by indigenous social movements.

7 See, for example, Augustine S.J. Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice,' *International Journal of Transitional Justice* 14(2) (2020): 260–279; Esme G. Murdock, 'Unsettling Reconciliation: Decolonial Methods for Transforming Social-Ecological Systems,' *Environmental Values* 27 (2018): 513–533; Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,' *International Journal of Transitional Justice* 8(2) (2014): 194–216; Michelle Bonner and Matt James, 'The Three R's of Seeking Transitional Justice: Reparation, Responsibility and Reframing in Canada and Argentina,' *International Indigenous Policy Journal*

divided along two strands. The first strand, which comprises what we refer to as structural-economic perspectives, argues that transitional justice fails to address the structural and economic roots of injustice, and focuses instead on the need to promote civil and political rights, especially focusing on periods of transition from authoritarianism to democracy. For this group of scholars, transitional justice is mostly a liberal-legalist model that addresses issues of individual accountability for human rights violations through prosecutions, without considering the underlying structural, economic logic that promotes or facilitates these violations in the first place. In this model, human rights violations are a sporadic anomaly – an unwarranted outcome in need of correction, rather than the expectable consequence of the ingrained injustice of the settler colonial system.

By contrast, the structural-economic model of transitional justice scholars sees human rights violations as a result of unjust economic conditions that are deeply embedded within settler colonial systems of governance which may or may not fall within traditional conceptions of authoritarian or totalitarian political regimes.⁸ Because the causes of these violations are structurally embedded, injustices outlive the colonial regimes well into what many have called postcolonial states.⁹ Structural injustices in the distribution of social and economic rights between indigenous and settler populations persist despite formal changes in the colonial political regime. For these scholars, the problem of systematic dispossession of indigenous populations by settlers, and reparations in the form of access to land, should be central to any transitional justice intervention seeking reconciliation with indigenous people.

The structural-economic approach to transitional justice has the advantage of focusing on the *longue duree*, and on systemically embedded, structural factors. This, in turn, facilitates the long-term sustainability of emerging, more inclusive political and legal regimes.¹⁰ However, structural perspectives that emphasize economic factors typically fail to recognize the importance of cultural, ideological and, especially, legal factors in legitimating or delegitimizing unjust structural arrangements.¹¹ Moreover, they tend to conceptualize land as a mere resource for economic growth, a view which many indigenous peoples reject. Structural approaches risk failing to fully understand, and therefore to adequately redress, indigenous claims to territory.

The second strand of the literature, which we call cultural-ideological, seeks a deeper recognition of cultural differences between indigenous peoples and settlers in transitional justice mechanisms.¹² This approach claims that despite their ancestral

2(3) (2011): 1–29; Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Nontransitional Society,' in *Identities in Transition: Challenges for Transitional Justice*, ed. Paige Arthur (Cambridge: Cambridge University Press, 2011); Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot: Ashgate, 2008).

⁸ See Park, *supra* n 6.

⁹ See Balint et al., *supra* n 6.

¹⁰ *Ibid.*

¹¹ Kirsten Anker, 'Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place,' in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 261–293.

¹² Angela Santamaría et al., 'Decolonial Sketches and Intercultural Approaches to Truth: Corporeal Experiences and Testimonies of Indigenous Women in Colombia,' *International Journal of Transitional Justice* 14(1) (2020): 56–79; Deborah McGregor, 'Reconciliation and Environmental Justice,' *Journal of Global Ethics* 14(2) (2018): 222–231; Khanyisela Moyo, 'Mimicry, Transitional Justice and the Land

relationship to their lands, transitional justice tends to construct indigenous peoples as Others, and seldom recognizes them in the founding myths of colonized nations. In other words, national space is a colonial space, not a native space. In an act of erasure that some refer to as epistemic injustice, it largely disregards indigenous geographies, histories, philosophies and land-based epistemologies or ontologies.¹³

The challenge for transitional justice, then, is how to incorporate indigenous worldviews. Further, this must take the form of something more than just the recognition that indigenous people have a special relation to their land.¹⁴ Transitional justice interventions must not only be cognizant of the distinctive way in which many indigenous people conceive of and relate to their territory and to the natural world, it must also treat these perspectives as legitimate, and seek to render justice in the terms of the people who are victims. For many indigenous peoples, this will mean that transitional justice should seek to restore broken relations not only between humans, but also between humans and non-humans. In analyzing the experience of the Truth and Reconciliation Commission of Canada, for example, Lorna McGregor argues that reparations should be informed by indigenous notions of ‘the good life,’ which incorporate duties toward ‘other orders’ and the ‘more than human world.’¹⁵ Similarly, several scholars argue that the recognition of the legal personality of the Te Urewera forest and Whanganui River was the gesture that finally allowed the government and Māori tribes to settle their century-long treaty dispute.¹⁶ Reflecting on the Colombian case, Daniel Ruiz Serna argues that transitional justice should help to restore the relationship of indigenous peoples to their territories, in part by acknowledging their relationships to the non-human beings, material and spiritual, that inhabit them.¹⁷

The cultural perspective has the advantage that it incorporates indigenous peoples’ worldviews, which will lead to more effective interventions and is in itself a step

Question in Racially Divided Former Settler Colonies,’ *International Journal of Transitional Justice* 9(1) (2015): 70–89; Victor Igreja, ‘Multiple Temporalities in Indigenous Justice and Healing Practices in Mozambique,’ *International Journal of Transitional Justice* 6(3) (2012): 404–422; Esme G. Murdock, ‘Unsettling Reconciliation: Decolonial Methods for Transforming Social-Ecological Systems,’ *Environmental Values* 27(5) (2018): 513–533; Esme G. Murdock, ‘Storied with Land: “Transitional Justice” on Indigenous Lands,’ *Journal of Global Ethics* 14(2): 232–239; Lieselotte Viaene, ‘Life Is Priceless: Mayan Q’eqchi’ Voices on the Guatemalan National Reparations Program,’ *International Journal of Transitional Justice* 4(1) (2010): 4–25; Belkis Izquierdo and Lieselotte Viaene, ‘Descolonizar la justicia transicional desde los territorios indígenas,’ in *Por la Paz. Afrontar el pasado, construir juntos el futuro* 34 (International Catalan Institute for Peace, 2018), 1–11, http://www.icip-perlapau.cat/numero34/articles_centrales/article_central_2/ (accessed 7 January 2021).

13 Murdock, *Journal of Global Ethics*, supra n 11 at 234; Daniel Ruiz Serna, ‘El Territorio como Víctima: Ontología Política y las Leyes de Víctimas para Comunidades Indígenas y Negras en Colombia,’ *Revista Colombiana de Antropología* 53(2) (2017): 85–113.

14 Izquierdo and Viaene, supra n 1111 at 2; see also United Nations Declaration on the Rights of Indigenous Peoples, adopted 13 September 2007, arts. 25–26.

15 See McGregor, supra n 11 on pat. 224.

16 Kauffman and Martin, supra n 3; Catherine J. Iorns Magallanes, ‘Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand,’ *Vertigo - la revue électronique en sciences de l’environnement* Hors-série 22 (2015), <https://journals.openedition.org/vertigo/16199>.

17 Ruiz Serna, supra n 12 at 100.

toward rectifying epistemic injustice. Its limitation, of course, is that interventions that work exclusively at the level of ideas risk failing to alter the unjust conditions that affect many indigenous peoples.¹⁸ Jodoin et al. argue that, in certain ways, the Inuit peoples were very successful when they framed their experience of harm from climate change in the language of rights, claiming ‘the right to be cold.’¹⁹ Through this framing, they were able to receive an audience before the Inter-American Commission of Human Rights and gain international media attention, sparking a wave of climate litigation based on rights claims. However, the framing failed to secure structural change for the Inuit themselves, and the community eventually pursued other political strategies with more immediate connection to their day-to-day problems. Similarly, some scholars worry that the ground-breaking Colombian judgments recognizing the legal rights of the Atrato river and the Amazon forest, which have helped inspire similar judgments in other countries, will prove to be empty promises that fail to change conditions on the ground.²⁰

The next section shows how Colombia’s indigenous peoples and Black communities have struggled for decades to transform the legal concept of territory in Colombia to incorporate its multiple cultural dimensions. However, their campaigns do not limit themselves to the realm of culture and ideas. By claiming that territory is a victim, they also seek to create justice interventions that reduce the incursion of economic development based on extractivist industry on their land. In this way, their campaigns straddle cultural-ideological and structural-economic approaches.

THE CONFLICT OVER LAND

The JEP resolutions that declare territories as victims of Colombia’s armed conflict are not a top-down judicial interpretation of indigenous claims by the JEP. Instead, they are the result of persistent mobilization by indigenous peoples and Black communities’ organizations. This section describes the history of these social movements in the context of the armed conflict. The first part describes the role of land in Colombia’s armed conflict, and how armed groups promoted the regional inflow of economic activities into indigenous and Black communities’ territories, ultimately commoditizing these territories. The second part shows how indigenous and Black social movements mobilized to redefine the legal concept of territory as a way to resist these incursions. The section closes by showing how these new understandings were written into the Victim’s Law of 2011 and, later, into the laws that implement the 2016 Peace Accord with the Revolutionary Armed Forces of Colombia (FARC). These laws provide for the creation of the JEP and are the basis on which it declared indigenous and Black communities’ territories to be victims.

18 See Charles R. Hale, *Más que un Indio (More Than an Indian): Racial Ambivalence and the Paradox of Neoliberal Multiculturalism in Guatemala* (Santa Fe: School of American Research Press, 2006). See also Eve Tuck and K. Wayne Yang, ‘Decolonization Is Not a Metaphor,’ *Decolonization Indigeneity, Education and Society* 1(1) (2012): 1–40, at 5.

19 Sébastien Jodoin, Shannon Snow and Arielle Corobow, ‘Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming,’ *Law & Society Review* 54(1) (2020): 168–200, at 190.

20 María del Pilar García Pachón and Lisneider Hineiroza Cuesta, *El reconocimiento de los recursos naturales como sujetos de derechos. Análisis crítico sobre los fundamentos y efectividad de la sentencia del río Atrato* (Bogotá: Universidad Externado, 2020).

Land in the Colombian Armed Conflict

Throughout Colombia's armed conflict, which started in the 1960s, indigenous peoples and Black communities suffered as a result of the struggles to gain control of the countryside. The *Comisión Nacional para la Reparación y la Reconciliación* (CNRR), the official governmental entity created in 2005 to investigate the causes of Colombia's armed conflict, concluded that armed groups sought to control economic resources in key areas, so as to extract revenue from, or forge alliances with, economic actors.²¹ Paramilitaries generally sought to expand commercial agriculture, mining and oil or infrastructure projects, or were engaged in illegal mining or cocaine production. Guerrilla groups, in turn, sought to extract revenue from these same economic sectors by providing protection, extortion and kidnappings, or else by engaging in the same illegal activities themselves. Thus, armed groups involved in the conflict often sought to implement far-reaching, sequenced, structural transformation of the territories where they operated. For this purpose, armed groups sometimes would forcibly displace indigenous or Black communities from their land, which they would then repopulate with landless peasants, creating towns, and changing the ethnic and racial demographics of certain areas. This is what paramilitary forces did in the territory of the Black community of Curvaradó, northern Chocó, and in Pueblo Bello, located just outside the limits of the territory of the Arhuaco indigenous people.²²

Since indigenous peoples and Black communities combined have title over approximately 40% of Colombia's continental territory, conflicts over regional projects of economic development often embroiled indigenous peoples and Black communities in the armed conflict. In the department of Córdoba, paramilitary groups assassinated Embera indigenous leaders who mobilized to oppose the construction of the hydroelectric dams of Urra.²³ In other parts of the country, like Guajira, Cesar and Magdalena, paramilitary violence against indigenous groups was linked to their opposition to coal mining.²⁴ In the departments of Chocó and Nariño, massacres of both members of Black communities and Awá indigenous peoples have been linked to their opposition to illegal coca crops, and more recently, to their support of programs of voluntary eradication.²⁵ Similarly, in Chocó and northern Cauca, massacres

21 Comisión Nacional de Reparación y Rehabilitación, *El Despojo de Tierras y Territorios: Aproximación Conceptual* (Bogotá: Editorial Kimpres, 2009).

22 Ibid. See also César Rodríguez, Tatiana Alfonso and Isabel Cavalier, *El Desplazamiento Afro: Tierra, violencia y derechos de las comunidades negras en Colombia* (Bogotá: CIJUS, 2009).

23 Cabildo Embera Chami de los Guasirumas, 'Memoria de un Despojo,' in *Tierra Profanada: Grandes Proyectos en Territorios Indígenas de Colombia*, ed. ONIC-CECOIN (Bogotá: Disloque Editores, 1995); Paul Sanchez Puche and Ramiro Guzman Arteaga, 'Hidroeléctrica Rio Sinú: Una Propuesta Apocalíptica,' *Etnias y Política* 8 (2008): 196–199; Cesar Rodriguez Garavito and Natalia Orduz Salinas, *Adiós Rio: La Disputa por la Tierra, el Agua y los Derechos Indígenas en torno a la Represa de Urra* (Bogotá: Dejusticia, 2012).

24 Observatorio Indígena de Seguimiento a Políticas Públicas y Derechos Étnicos, 'La Nueva Conquista: Minería en Territorios Indígenas,' in *La Tierra Contra la Muerte: Conflictos Territoriales de los Pueblos Indígenas de Colombia*, ed. Juan Houghton (Bogotá: CECOIN, 2008), 345–364.

25 'Tumaco Encerrado entre Sustitución y Erradicación de Cultivos,' *Verdadabierta.com*, 6 October 2017, <https://verdadabierta.com/tumaco-atrapado-entre-sustitucion-y-erradicacion-de-cultivos-ilicitos> (accessed 7 January 2021); Sinar Alvarado, 'Los coccaleros en Colombia buscan a sus muertos,' *New York Times* (Spanish version), 17 October 2017.

and assassination attempts against Black community leaders, like Goldman Prize-winner Francia Márquez, are closely related to their opposition to illegal mining.²⁶

Mobilizing for Territory

In face of rampant displacement and land loss, indigenous and Black communities have resorted to a strategic combination of protests, litigation and political alliances. Indigenous mobilizations during the late 1980s coincided with a larger social mobilization calling for a constitutional assembly, and indigenous people strongly supported the need for far-reaching constitutional reform. Indigenous organizations were able to participate in the assembly that wrote the Constitution of 1991, and successfully introduced important constitutional provisions defining Colombia as a multicultural and pluralist polity; protecting the lands of ethnic groups by making them inalienable, and granting indigenous authorities greater control over their territories.²⁷ Although the participation of Black communities' organizations in the constitutional assembly was less salient, the constitution did recognize their right to obtain formal title over lands they have been occupying for centuries.²⁸ As a result, the 1991 Constitution recognizes the unique bond that Black communities have to their territories, and provides a different legal regime for them.²⁹ Their lands are held collectively, there are restrictions on their sale and the communities are recognized as environmental authorities within their territories.³⁰

Since 1991, both indigenous peoples and Black communities have expanded their rights by resorting to a combination of litigation, strategic political alliances and protests. One key area has been the struggle against extractive industries in their territories. In 1991, the Colombian government ratified the International Labor Organization 169 Convention on the Rights of Indigenous and Tribal Peoples of 1989. This international treaty establishes the right of indigenous and tribal peoples to be consulted prior to any resource extraction from their lands, and prior to the adoption of any laws or regulations that may affect them directly. In 1997, the Constitutional Court established that the right to prior consultations was a fundamental constitutional right of indigenous peoples.³¹ Any law affecting indigenous rights without free, prior and informed consent would be declared unconstitutional. This decision promoted an explosion of litigation that ultimately helped to enrich the legal concept of territory. The Court distinguished the property rights of

26 'Atentan contra Francia Marquez, líder social ganadora del "Nobel de Medio Ambiente,"' *El Espectador*, 4 May 2019, Judicial section.

27 Virginie Laurent, *Comunidades Indígenas, Espacios Políticos y Movilización Electoral en Colombia, 1990–1998: Motivaciones, Campos de Acción e Impactos* (Bogotá: ICANH-IFEA, 2005).

28 This right, established in the transitory article 55 of the Colombian Constitution, was later defined in Law 70 of 1993 and Decree 1745 of 1995.

29 See Libia Grueso, Carlos Rosero and Arturo Escobar, 'El Proceso Organizativo de Comunidades Negras en Colombia,' *Ecología Política* 14 (1997): 47–64.

30 For an analysis of how Black social movement organizations in Colombia stressed ethnic differences rather than claims to equality, see Tianna S. Paschel, 'The Right to Difference: Explaining Colombia's Shift from Color Blindness to the Law of Black Communities,' *American Journal of Sociology* 116(3) (2010): 729–769.

31 Constitutional Court of Colombia, Decision SU-039 (1997). The right to consultation of Black communities was recognized later by Decision T-955 (2003).

indigenous peoples and Black communities based on the special relationship that they have with their lands, characterizing this relationship as involving constitutionally protected historical, cultural and spiritual dimensions that the ordinary property regime lacked.³² In 2004, the Constitutional Court issued a landmark judgment ordering the government to issue a comprehensive public policy to address the situation of internally displaced persons, even as the armed conflict continued.³³ As a result, Congress passed the *Ley de Víctimas*, focused on the non-ethnically differentiated peasant population. In parallel, the government began processes of prior, informed consultations with indigenous peoples, Black communities and Roma groups to formulate rules to address displacement for those groups. These processes resulted in three decrees, each reflecting the different way in which these groups were harmed by displacement, and their distinct relation to the land.³⁴

The decrees focused on indigenous and Black victims introduce two innovations. First, the decree focused on indigenous lands goes much further than prior laws and the 1991 Constitution in acknowledging indigenous worldviews and in conveying their understandings of territory. The law acknowledges indigenous peoples' territory as a living entity that suffers harm as a consequence of the armed conflict.³⁵ However, the law stops short of formally recognizing the territory as a victim, erecting a line between indigenous worldviews and state law.³⁶ Black communities did not ask to have their territories acknowledged as victims in the decree, but the law acknowledges that environmental damage affects cultural identity.³⁷ Secondly, both decrees stress that harm to the territory includes not only the harms directly caused by armed groups, but also harm caused by economic factors 'underlying or associated with' the armed conflict.³⁸ Therefore, this allowed judges to suspend environmental licenses granted in indigenous peoples' and Black communities' territories.³⁹

In 2014, during the negotiation of the peace accord, indigenous and Black social movement organizations again played a key role.⁴⁰ Article 35 of the law that created the JEP recognizes indigenous and Black Colombian justice systems and establishes that the JEP must coordinate with them in matters over which they have jurisdiction. The protocols and agreements arrived at between the various organs of the transitional justice system and indigenous and Black Colombian organizations went even further in securing their demands. Not only did they explicitly establish that their

32 The Constitutional Court established the fundamental character of the right of indigenous peoples to their territory in 1991. See Constitutional Court of Colombia, Decision T-188 (1993).

33 Constitutional Court of Colombia, Decision T-025/0 (2004).

34 The four laws are: Law 1448 of 2011 (for the non-ethnically differentiated population), and Legislative Decrees 4633 (for indigenous peoples), 4634 (for Roma peoples) and 4635 (for Black communities), all of 2011.

35 Legislative Decree 4633 of 2011, art. 3, para. 3.

36 Ibid.

37 Legislative Decree 4635 of 2011, art. 9.

38 See Legislative Decree 4633 of 2011, arts. 52, 55, 59, 126(h), 134, 144 and 158, among others.

39 Legislative Decree 4635 of 2011, art. 117; Legislative Decree 4633 of 2011, art. 151.5.

40 The Peace Accord between the government and FARC has an 'ethnic' chapter, which establishes safeguards to the multidimensional character of indigenous and Black communities' territories. Section 6.1.12.3 of the Peace Accord guarantees respect for environmental, cultural and spiritual dimensions of ethnic lands and prohibits expropriation of these lands. Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [hereinafter 'Peace Accord'], signed 24 November 2016.

territories were victims of the armed conflict,⁴¹ they also adopted the broader view of the causes of harm to include economic and structural factors ‘underlying and associated with’ the armed conflict. These protocols also establish that the JEP may use provisional measures to suspend environmental licenses granted to explore or extract resources from their territories.⁴² Secondly, any JEP decision regarding indigenous or Black Colombian territories would need to be taken in consultation with the authorities of that territory.

By the time the JEP opened its doors in 2018, then, indigenous and Black Colombian organizations had succeeded in establishing a differential property regime for their territories, and had started the process of re-shaping the meaning of their territories within Colombian law. The following section examines the next step in this process, providing an analysis of the way in which the JEP formally pronounced five territories to be victims of the armed conflict.

TERRITORY AS SUBJECT TO HARM AND IN NEED OF REPAIR

Within the JEP, the ‘Chamber for Acknowledgement of the Truth, Responsibility, and the Determination of Facts and Conducts’ has the task of selecting and investigating the most emblematic cases or situations of the armed conflict. It has selected seven cases to process, each encompassing hundreds or thousands of individual crimes. The seven cases are structured according to two different logics. Four of the cases focus on specific patterns of criminal behavior that were particularly salient in the course of the Colombian conflict, such as kidnappings or recruitment of child soldiers. By contrast, three of the cases (Cases 02, 04 and 05) operate on a different logic: they are organized by place, focusing on the effects of the armed conflict in three remote, hard-hit regions. The geographically organized cases include indigenous peoples, Black communities and peasant communities as victims, both collectively and as individuals.

In a victory for the indigenous and Black communities, these cases also include as victims five territories.⁴³ This section analyzes the resolutions that declare territories to be victims of the internal armed conflict and draws from other legal documents and conversations with lawyers and activists in order to show how the JEP, through its dialogue with indigenous peoples and Black communities, is expanding the notion of territory so that it is a subject, and not only an object, of national law. They also show us how a territory can suffer harm, and point to the ways this harm can be repaired.

41 See, for example, the Protocol for the Coordination, Interjurisdictional Articulation and Intercultural Dialogue between the Special Indigenous Jurisdiction and the JEP (Bogota, 24 July 2019), arts. 5, 6, 31, 33; see also Methodology for Truth Recognition of Crimes against Indigenous Peoples (Bogota, 30 October 2018), p. 34.

42 Protocol for the Coordination, Interjurisdictional Articulation and Intercultural Dialogue between the Special Indigenous Jurisdiction and the JEP, *supra* n 40, art. 33.

43 In Colombian law, indigenous territories ‘are those areas regularly and permanently occupied by an indigenous community, partiality or group, and those which albeit not occupied in such way, constitute the traditional context of their social, economic and cultural activities’ (Decree 2164 of 1995, article 2). The lands of Black communities are those lands in the basins of rivers of the Pacific Ocean, and other similar areas, ‘which they have been occupying according to their traditional production practices’ (Law 70 of 1993, article 1).

The Territories That Are Subjects of Law

The department of Nariño is home to indigenous peoples, Black communities and *campesinos*, or traditional peasant communities of mixed ancestry. It includes rainforest, river delta and alpine ecosystems, and a large variety of unique plant and animal species. It was one of Colombia's regions most ravaged by the armed conflict and is the focus of JEP Case 02, opened in July 2018, which investigates violations of human rights and international humanitarian law committed by the FARC and the armed forces of Colombia between 1990 and 2016 in three municipalities.

In November 2019, JEP Judges Belkis Izquierdo and Judge Ana Manuela Ochoa Arias, both indigenous women, issued a resolution accepting the Awá people's request for 'the acknowledgment and accreditation of the territory as a victim, considering . . . that it has identity and dignity that constitute it as a subject of rights.'⁴⁴ The resolution reproduces the Awá peoples' own description of their territory, the Katsa Su:

This conception of territory is clearly distinct from the Western notion of territorial management, control, planning, or ordering, which presumes that between human beings and nature there exist relations of dominion subject/object, when, in reality, for the Awá social relations are not limited to human relations. The environmental management of the Awa is the product of tense and complex relations between different beings of nature, with whom, through constant negotiation and respect for norms that regulate the material and symbolic use of nature, we construct a balanced cohabitation. The notion of the human as the only being responsible for taking decisions about the future of the natural world is alien to the Awa cultural logic . . . For these reasons . . . when we speak of the territory of the Awa indigenous peoples we refer—even without Western society being fully aware of it—to the entirety of collective and individual fundamental rights that should be respected and fostered.⁴⁵

In January 2020, the JEP issued a resolution granting victim status to the territory of the Nasa people, the Great Nasa Territory of the Cxhab Wala Kile, which is part of the investigation in Case 05. The resolution covers over 100,000 victims organized into 31 smaller governing units in another region of Colombia. In explaining the meaning of territory, this resolution also gives voice to the Nasa people's own submission to the JEP:

For indigenous peoples and especially for the Nasa, the *Uma Kiwe* (territory) is conceived as a living being that forms an integral part of the Nasa; she feels, she must be nourished and cared for . . .⁴⁶

44 JEP, Resolution SRVBIT – 079 (Bogotá, 12 November 2019) at para. 5 (hereinafter 'Awá Resolution'). All translations are by the authors.

45 Ibid., para. 85

46 JEP, Resolution SRVR – Caso 005-002 (Bogotá, 17 January 2020) at para. 13.5 (hereinafter 'Nasa Resolution').

In June 2020, the JEP granted victimhood status to the Eperara Euja, the ‘world-territory’ of the Sia peoples of Nariño. The resolution quotes at length the Sia’s own description of their territory:

In the world of the Siapidaara the figure of the ‘Tachi Euha, Tachi Trua,’ our mother earth, our world, dominates the activity of humans and their relations with nature, with animals, with other human beings. The earth, mother and origin of all human goods, is also the central element in the Sia worldview. The earth is the place where for hundreds of years our people have lived and worked. We have constructed our homes using and caring for natural resources. In our territories there exist places of which we tell stories that occurred long ago. In them our predecessors lived, and therefore we have a right to live, [as we are] its sons and daughters.⁴⁷

The JEP has also granted victim status to the territories of two Black communities, both in the Department of Nariño. The resolutions emphasize the history of these communities, founded in the 17th century by people escaping slavery, and in particular, their struggle in recent decades for political and legal recognition of their collective identity and for legal title of their collectively held territory. The resolutions also highlight these peoples’ relationship to their territory:

[The Black communities of Tumaco] have established a permanent link with the rivers of the gulf and its estuaries, which integrate the populated centers with the remote settlements . . . As the Hileros Organization has said, ‘for Black communities, territory has a special meaning; it is the place where their worldview and cultural logic is created, and above all it is the space necessary for the survival of the collective subject of the Black people [Pueblo Negro].’⁴⁸

Taken together, the resolutions do not convey a single meaning of territory. Rather, they seek to convey the meaning each territory holds for the peoples who have requested recognition of *their* territory as a victim. An important aspect of the resolutions then is the acknowledgement of each territory as a distinct subject with unique features and cultural meaning. There are nonetheless shared themes. In all of the resolutions, the concept of territory points not only to material relations, such as the relations between the different components of an ecosystem as viewed through the lens of biology, or to the geographical space as delineated in a map, but also to cultural meanings. Each resolution views the peoples’ very existence as rooted in the territory, foregrounding the unique and inextricable bond that the indigenous peoples and Black communities have to their territory.

47 JEP, Resolution SRVBIT – 094 (Bogotá, 10 June 2020) at para. 82 (hereinafter ‘Sia Resolution’).

48 JEP, Resolution SRVBIT – 018 (Bogotá, 24 January 2020), at para. 116 (hereinafter ‘Tumaco Resolution’).

How Territories Suffer Harm

By stressing the particularity of each people's relationship to their territory, these resolutions convey that the harm of the armed conflict was the severing of indigenous peoples' and Black communities' 'special link' to 'mother earth.'⁴⁹ In this vein, the Nasa resolution states:

Our ancestral and sacred territory has suffered violations, alterations, mutilations, occupations and harms, product of the armed internal conflict, that have negatively transformed the bond that the indigenous communities had with their territory, violating the balance, harmony, and autonomy of the Nasa indigenous people of the Northern Cauca . . .⁵⁰

The Sia resolution similarly refers to 'the inseparability of the territory and the people who inhabit it. This interdependence is what obliges Transitional Justice to recognize [territories] as victims of the armed conflict.'⁵¹

An example of this idea is in the harm caused by forced displacement. Colombia has the second largest internally displaced population in the world, and the Nariño and Nasa communities were not spared. The Sia resolution denounces the forceful taking of collective territories by armed groups, and the 'emptying and de-territorialization of ancient grounds, and the loss of autonomy.'⁵² This led in turn to the loss of traditional values, the fragmentation of traditional authority, poverty and 'social anomaly.'⁵³

The loss of the ancestral territory has put in danger the cultural integrity of the communities and the transmission of culture between generations . . . [T]he young people, as they do not have land on which to establish themselves, are recruited by the armed actors in the area, or, in the best of cases, they become day laborers in the farms that were the product of the theft of their territories.⁵⁴

However, the harm of de-territorialization extends beyond these social harms to the disruption of relations with non-human entities. In other words, the harm of displacement is not only that the people lose their land, but that the land loses its people. An example from Chocó exemplifies this idea. In 1996 and 1997, the people of the Black communities of Curvaradó and Jiguamiandó were victims of forced displacement and dispossession due to joint actions between the Colombian army and paramilitary. These operations displaced over 15,000 people and were allegedly backed by a project to transform their collective territory into a palm oil-producing area.⁵⁵ This region has abundant rivers and one of the

49 Nasa Resolution, *supra* n 44 at para. 23.

50 *Ibid.*, para. 13.5.

51 Sia Resolution, *supra* n 45 at para. 98.

52 *Ibid.*, para. 92.

53 *Ibid.*

54 *Ibid.*

55 Defensoría del Pueblo, *Resolución Defensorial No. 25*, October 2002; See also 'Operación Genesis fue denunciada ante la Corte Interamericana de Derechos Humanos,' *Verdadabierta.com*, 26 July 2011,

highest levels of rain in the world, and the banks of the rivers need constant clearing of debris to avoid floods in the surrounding fields. However, once the community was displaced, there was no one to clear the river. The displaced people sued the state, demanding that the state repair the situation in their territory. The Supreme Court ordered the Ministry of Transportation to fix the problem, but the order was never carried out due to the steep cost, and parts of their territories became permanently flooded.⁵⁶ This example illustrates how the same criminal act, forced displacement, harms not only individuals and communities, but also their land, by disrupting the bond between communities and their land.

The concept of territory-as-victim also makes space for consideration of acts that might otherwise be ignored by postconflict processes. Specifically, the resolutions highlight the incursion of new economic activities into ancestral territories, listing as a harm the introduction of economic models that run ‘contrary to subsistence economies and collective forms of association,’ including industrial-scale mining projects, infrastructure and commercial mono-crop farming.⁵⁷ These activities introduce ways of interacting with the land that are foreign to these communities. Many of the resolutions mention aerial spraying of crops with Glyphosate, a carcinogen, which contaminated ‘sacred sites, the meadows with medicinal plants and subsistence crops,’ harming the population’s food sources as well as their health.⁵⁸ These activities were not caused by direct acts of war, and some were legal; indeed, the crop eradication campaigns were run by the government. However, as described above, the internal conflict made these incursions into indigenous and Black communities’ territories possible, in part through their displacement. Again, the emphasis is on the disruption of the balance in which indigenous peoples and Black communities live with their territory.

Additionally, the concept of territory-as-victim helps focus attention on a dimension of harm that is often overlooked. In their petitions, the peoples of Nariño and the Nasa conveyed how the armed conflict disrupted their connection to the spiritual realm. As the Awá petitions explains:

In the Katsa Su, the Awá develop their spiritual life, they become harmonious with their spirits and ancestors, and they undertake rituals according to their law of origin. It is a territory abundant in sacred sites and medicinal plants that give breath, orientation, resistance and sustenance to the Awá . . . everything lives and is sacred, not only human beings, but also the hills, the caves, the water, the houses, the plants and the animals that have agency.⁵⁹

Similarly, for the Sia, the harms of the armed conflict include ‘the disappearance of enchantments, of protective spirits or spiritual parents . . . when humans harm non-humans, or nature, they create an energetic imbalance that includes changes to

<https://verdadabierta.com/operacion-genesis-fue-denunciada-ante-la-corte-interamericana-de-derechos-humanos/> (accessed 7 January 2021).

56 Supreme Court of Colombia, Criminal Cassation Panel, Tutela decision of 1 June 2010 (*Manuel Denis Blandon v. Ministry of Transportation*).

57 Sia Resolution, supra n 45 at para. 111.

58 Ibid.

59 Awá Resolution, supra n 42 at para. 81.

material life.⁶⁰ Of course, people are able to articulate how acts of war affected their spiritual lives even without the concept of territory-as-victim. Here, however, the emphasis on territory allows these communities to convey the harm to their spiritual lives as they experienced it – as the disenchantment of their territory.

Repairing the Harm

The JEP resolutions do not yet indicate how the harm will be repaired. That will come at a later stage, once the Chamber for the Acknowledgement of the Truth completes the investigations and attributes responsibility. Further, as noted above, the resolutions often do not distinguish between harm to the three different types of victims: the individual, the collective subject and the territory. This makes sense, as their emphasis is on the interdependence of the three. It is likely that the reparations similarly will not distinguish between the three types of victims but will rather address all three simultaneously. Drawing on the example of forced displacement above, a reparative measure that allows the return of a people to their territory would repair at once the individual, the collective and the territorial subjects.

Nonetheless, an examination of the laws and resolutions of the peace process thus far, coupled with conversations with the actors involved, suggests that the reparations will be guided by the concept of territory-as-victim in particular ways. First, defendants who cooperate with the JEP are eligible to benefit from '*sanciones propias*,' or alternative sanctions. In lieu of carceral punishment, they are able to propose undertaking projects, individually or collectively. This is one of the main forms that JEP reparations will take. These include works that directly address the material harm suffered by individuals and by the people as a whole. They will also include works that address material harm suffered by the territory, such as reforestation and landmine removal in indigenous and Black communities' territories.⁶¹

Second, it is important to recall that the notion of reparations in the Colombian peace process is an ambitious one. The law that regulates the JEP states that 'sanctions imposed by JEP panels should incorporate transformative reparations, reestablishing the balance and harmony of the ethnic groups.'⁶² Thus, the reparations will not be limited to returning victims to the situations they were in before the armed conflict; rather, they should aim at structural change. To this end, the JEP tribunal may be able to issue structural injunctions in order to implement more ambitious reparatory programs focused on restoring material harm to territories. Further, as noted above, the JEP has the faculty of issuing provisional measures that block outside actors from engaging in extractive projects on the territories under its jurisdiction.⁶³

Third, the legal framework of the peace process provides that reparations must include spiritual healing in accordance with the cultural and ancestral tradition of each people.⁶⁴ Indeed, the JEP has already held sessions which include spiritual rituals. In

60 Sia Resolution, supra n 45 at para. Sia Resolution, supra n 54 at para. 98.

61 Peace Accord, supra n 39 at 179.

62 Law 1922 of 2018, art. 70.

63 See Protocol Between Indigenous Peoples and JEP, supra n 40 at art. 33.

64 Peace Accord, supra n 39 at 173. See also Legislative Decree 4633, supra n 34.

receiving the petition for accrediting the Nasa people and their territory as victims, for example, the JEP held a ritual of harmonization with the Consejo Regional Indígena del Cauca (CRIC), an organization that unites nine indigenous peoples in that department.⁶⁵ Moving forward, the JEP may issue provisional measures in this vein, or otherwise fashion reparatory measures that involve rituals of healing for the territory or order the construction of commemorative art, with the approval and in accordance with the traditions of the peoples involved.⁶⁶

Each of these measures has been tried in other settings, and thus one might object that we can arrive at them even without the concept of territory-as-victim. In this sense, the concept may work more as an organizing principle, guiding thinking around reparations in ways that foreground the bond between communities and their territory. It makes room for issuing measures that focus on repairing ecosystems even when they have no apparent use value or exchange value.

The concept of territory-as-victim also works in another way. It allows the JEP to describe and approach the harm as the victims experience it. Some may worry that a focus on harms to the territory will take away from efforts to assist individual human victims. For the indigenous peoples and Black communities, however, the idea is that the two are not competing but entwined such that the individual and the community cannot heal without the territory also healing.

In this way, as argued by Daniel Ruiz Serna, the legal recognition of a particular territory as a subject that has suffered harm is in itself a reparatory act.⁶⁷ It acknowledges the way of thinking of indigenous peoples and Black communities of Colombia and brings it into being in the formal system of law. This aspect of reparations is echoed in one of the resolutions that quotes an elder Sia woman in a testimony submitted to the JEP:

Now that some of us are close to being reunited with our ancestors, we feel that we leave with a profound sorrow, because the *khapiria* man does not pause and is accelerated; he does not stop in his path to listen to and look at his errors. You have the duty to make sure that our words are not consumed, nor our voices.⁶⁸

Part of the reparatory work of the JEP, in other words, is to convey the worldviews of indigenous peoples and Black communities, and to treat these ideas not as the curiosities of a dying culture but as a way to question and recast the thinking of the majoritarian Colombian legal culture, and Western legal concepts more generally.⁶⁹

65 Ariel Cabrera, 'En ritual de armonización la JEP recibe acreditación de las víctimas de los pueblos indígenas,' *Radio SantaFé*, 7 December 2019, <http://www.radiosantafe.com/2019/12/07/en-ritual-de-armonizacion-la-jep-recibe-acreditacion-de-las-victimas-de-los-pueblos-indigenas/> (accessed 7 January 2021).

66 Peace Accord, *supra* n 39 at 180.

67 See Ruiz Serna, *supra* n 12.

68 Sia Resolution, *supra* n 45 at para. 115.

69 Ruiz Serna, *supra* n 12.

RETHINKING TRANSITIONAL JUSTICE THROUGH TERRITORY

The concept of territory-as-victim is a legal invention rooted in Colombia's history. It is the product of a contingent political process through which indigenous and Black social movements were able to gain greater legal recognition and autonomy. It is also a work in progress. We do not yet know what reparations that redress territory's harm will look like, and the JEP resolutions themselves do not converge on a single meaning of territory, emphasizing instead the unique bond of different peoples to their land. The idea of territory-as-victim will continue to evolve as the dialogue between the JEP and the indigenous peoples and Black communities continues to unfold. At the same time, these efforts may collide against the reality that legal and illegal resource extraction and territorial degradation continue in spite of the orders of the JEP, and that rural violence also continues.⁷⁰

Despite these uncertainties, there are certain ways in which the inchoate concept of territory-as-victim already unsettles transitional justice and contributes to its enrichment as a field of thought and practice. It challenges us to consider justice as encompassing non-humans in the context of indigenous and other non-Western peoples, even as it suggests ways of re-imagining transitional justice more generally in face of climate change.

Transitional Justice and Indigenous Peoples

Scholars have argued that transitional justice interventions in conflicts involving indigenous peoples have fallen short in two main ways: they fail to address ongoing structural conditions that subjugate indigenous peoples, and they fail to adequately recognize and engage with indigenous peoples' knowledge and worldviews. The legal figure of the territory-as-victim speaks to both concerns.

The resolutions emphasize the way in which the armed conflict upset the balance and harmony of their lives and territory. Yet the harms to which they refer, including the incursion of extractive and other development projects on their lands, are harms that extend beyond particular acts of war to structural relations with large economic actors and the state. Reimagining territory as a victim provides a legal concept through which transitional justice initiatives, in engaging with indigenous peoples and Black communities, can create ambitious measures that address the ongoing and concurrent harms unleashed by extractive economic models that create pressure on indigenous and Black communities' territories. This is not to say that postconflict processes will be able to reconcile indigenous peoples to their settler nations.⁷¹ However, reimagining territory as a victim allows postconflict processes to acknowledge that the vulnerability of indigenous territories extends beyond acts of war. This is particularly the case in Colombia, where the internal conflict has lasted for over half a century and thus is entwined with the political and economic status of indigenous peoples, but it is true of other settings as well: as Balint et al. argue, 'it is the structural injustice of settler colonialism, and colonialism generally, that continues as

70 Office for the High Commissioner of Human Rights, *Informe de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre la situación de Derechos Humanos en Colombia durante el año 2019*, UN Doc. A/HRC/43/3/Add.3 (26 February 2020).

71 Tuck and Yang, *supra* n 17.

the core injustice into the present.⁷² More ambitiously, in acknowledging the relationship of indigenous people to their territory this new legal concept of territory also fortifies indigenous sovereignty, which responds to criticisms that transitional justice interventions tend to fortify the national government, at the expense of indigenous sovereignty.⁷³

The notion of territory-as-victim also challenges transitional justice to engage seriously with the views and understandings of peoples whose truths traditionally have been relegated to the realm of myth or otherwise 'made savage.'⁷⁴ In this way, this new legal figure of territory-as-victim is itself a form of epistemic justice which gestures toward rectifying the past subjugation of non-Western systems of knowledge.⁷⁵ Under pluralistic legal conditions, 'different notions of space and spatially grounded rights and obligations become pitted against one another in strategic interactions over contested forms of political authority in the (sometimes violent) fight for control over resources.'⁷⁶ The figure of the territory-as-victim is a hybrid product born of this contest of ideas. Through it, indigenous peoples and Black communities are able to articulate a concept of territory that resonates with their worldviews even as it is cognizable within western legal systems.⁷⁷

Further, this is not just the recognition by a multicultural liberal society that indigenous peoples as Others have different worldviews. Writing two years prior to the JEP resolutions, Daniel Ruiz Serna criticized the 2011 Victims' Law for working under the relativist logic of a light form of multiculturalism that treats different views with respect, yet without engaging with them on equal footing.⁷⁸ In his view, the Victims' Law treats the concept of territory-as-victim as an expression of indigenous culture that must be tolerated rather than as an opportunity to learn from indigenous systems of knowledge.⁷⁹ It thereby misses an opportunity to truly accept that 'human rights and the impacts on people are not enough to refer to the effects that the armed conflict has generated.'⁸⁰ However the JEP resolutions go further than the 2011 law.⁸¹ They are what J.L. Austin calls a performative utterance: through the formal accreditation of the territory-as-victim, these territories are created as legal entities with rights and standing under the Colombian peace accord and the laws

72 Balint et al., *supra* n 5 at 214. For a similar argument made in the context of climate change, see Kyle Powys Whyte, 'Indigenous Climate Change Studies: Indigenizing Futures, Decolonizing the Anthropocene,' *English Language Notes* 55 (1–2) (2017): 153–162.

73 Balint et al., *supra* n 5.

74 Tuck and Yang, *supra* n 17 at 5.

75 Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (New York: Taylor & Francis, 2014); Edward W. Said, *Orientalism* (Princeton: Vintage Books, 1979).

76 Franz von Benda-Beckmann, Keebet von Benda-Beckman and Anne Griffiths, 'Space and Legal Pluralism: An Introduction,' in *Spatializing Law: An Anthropological Geography of Law in Society*, ed. Franz von Benda-Beckmann and Keebet von Benda-Beckman (New York: Routledge, 2009), 7.

77 Arturo Escobar, 'After Nature: Steps to an Antiessentialist Political Ecology,' *Current Anthropology* 40(1) (1999): 1–30.

78 Legislative Decree 4633, *supra* n 34 and Legislative Decree 4635, *supra* n 36.

79 See also Paulo Ilich Bacca, 'Indigenizing International Law and Decolonizing the Anthropocene: Genocide by Ecological Means and Indigenous Nationhood in Contemporary Colombia,' *Maguare* 33 (2018): 139–169, at 144.

80 Ruiz Serna, *supra* n 12 at 106.

81 *Ibid.*, 105.

that implement it.⁸² From now on, all the legal actors who participate in this process will have to speak of the Katsa Su as a rights-bearing entity and treat it as such. They will have to respect and uphold its rights, whether or not they share the underlying Awá view of it as a living being.⁸³

In considering the impact that the figure of territory-as-victim may have, it is also useful to recall that the UN Declaration on Indigenous Peoples emphasizes the bond between peoples and their collectively held territory as a core feature of indigenous peoples of the world, and declares that states have a duty to respect and protect this bond.⁸⁴ The legal figure of the territory-as-victim provides a symbolically powerful way for states to acknowledge this bond in the context of postconflict settings.

Transitional Justice and More-than-Human Justice

In transforming land from an object to a subject that has suffered harm and is in need of reparations, the resolutions challenge those involved in transitional justice to rethink the categories of harm and reparations more generally, even beyond land involving indigenous peoples. In suggesting this, we are mindful of our position as non-indigenous scholars situated in the United States. For us to propose that a concept forged by Colombia's indigenous people should carry over into non-indigenous law risks recreating exploitative relations through cultural appropriation.⁸⁵ In particular, it is important not to dilute Colombia's indigenous peoples' and Black communities' achievement of gaining differential treatment that is based on an acknowledgement of the distinctive way in which they conceive of, live with and are co-constituted by their territory.

However, the JEP resolutions, which are authored by two indigenous judges, and the petitions submitted by the Awa, Nasa and Sia in particular, themselves hold the suggestion that there is something about the spiritual link between Colombia's rural people and their land from which even peoples who do not identify as indigenous or Black Colombian can learn. The resolutions straddle the ideas that, on the one hand, these ethnic groups are distinct from the majority and must be treated with difference, and, on the other, there is something universal, if forgotten, in the link to the land that they articulate. This is implicit in the way the indigenous petitioners juxtapose their views with those of the 'occident,' or compare their care of the land to the harm caused by Western ways of relating to the land. And it is also, at times, explicit:

One of our great contributions to humanity is the form in which our peoples relate to natural resources. While the so-called 'developed cultures' have abused and destroyed nature . . . we reaffirm and resolve the relation of living together, of respect and dignity with all the beings that inhabit this earth.⁸⁶

82 J.L. Austen, *How to Do Things with Words* (Oxford: Clarendon Press, 1962).

83 But see Faith Simon, 'Los Derechos de la Naturaleza en la Constitución Ecuatoriana Del 2008: Alcance, Fundamentos y Relación con los Derechos Humanos,' *Revista Esmat* 11(17) (2019): 231–270.

84 United Nations Declaration on the Rights of Indigenous Peoples, *adopted* 13 September 2007, art. 25.

85 Zoe Todd, 'An Indigenous Feminist's Take on the Ontological Turn: "Ontology" Is Just Another Word for Colonialism,' *Journal of Historical Sociology* 29(1) (2016): 4–22. See also Tuck and Yang, *supra* n 17.

86 JEP, Resolution SRVBIT – 094 (Bogotá, 10 June 2020) at para. 82 (translation by the author).

In what specific ways, then, might reimagining territory as a victim broaden transitional justice? The prior section related a few of the concrete reparatory measures that will likely be undertaken by the JEP, such as rituals that acknowledge the harm done to the indigenous spiritual world, and measures that seek to fortify protection against extractive projects. However, the importance of understanding territory as a victim in the transitional justice field more broadly will also be in the realm of organizing principles. An important strand of research on conflict studies focuses on the ways in which natural resources fuel armed conflicts, while much of the transitional justice literature treats land as a resource that can be divided and redistributed for reparations.⁸⁷ However, these literatures assume that land and nature are commodities appropriated by armed groups to maintain their conflict. By contrast, the concept of territory-as-victim seeks to express in law that it is not just humans and the relationships between them that are disrupted by armed conflict. It brings to the fore a concern with how territory, a non-human entity, suffers the harms of armed conflict, and a need for crafting reparations to address this harm. In this sense, it forms part of the emerging law and jurisprudence from around the world that recognizes the legal subjectivity of natural entities, and which does so in the context not only of indigenous but also non-indigenous peoples, including suburban communities in the United States.⁸⁸

Further, the resolutions implicitly suggest that transitional justice in a time of an environmental crisis created by humans is different. It must foreground the problem of environmental degradation, and consider it alongside or as part of the social problems it seeks to resolve. But this is not about conservation of land and nature through a suspension of human activity. In the Anthropocene, there is no nature free of the influence of humans – it is always already shaped by humans, just as human history is shaped by nature.⁸⁹ Environmental studies scholars argue that ecological systems and social systems are not separate sets of structured interactions, but together form complex social-ecological systems. In order to create viable conservation or sustainability plans for a particular ecosystem, therefore, one must understand the surrounding social system in which it is already historically rooted.⁹⁰ Conversely, in order to create a viable transitional justice intervention, the surrounding ecosystem must be understood and incorporated. The concept of territory-as-victim demands that transitional justice prioritize the relation of human communities to their land in the wake of conflict. The focus must be on the restoration of a balanced relationship, not in the sense of excluding humans, nor in the sense of using land only as a resource for development. What this means in action, of course, has yet to be articulated. This article will have succeeded if it helps to spur that process.

87 See, for example, the special edition dedicated exclusively to this topic in *The Journal of Conflict Resolution* 49(4) (2005).

88 Kauffman and Martin, *supra* n 3; Erin Fitz-Henry, 'Challenging Corporate "Personhood": Energy Companies and the "Rights" of Non-Humans,' *PoLAR* 41(S1) (2018): 85–102.

89 Dipesh Chakrabarty, 'The Climate of History: Four Thesis,' *Critical Inquiry* 35(2) (2009): 197–222.

90 Fikret Berkes and Carl Folke, 'Linking Social and Ecological Systems for Resilience and Sustainability,' in *Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Resilience*, ed. Fikret Berkes and Carl Folke (Cambridge: Cambridge University Press, 1998), 1–27.