**When Justice Does Not Allow Peace:**
***The need to apply transitional justice measures to protect the isolated indigenous peoples of Ecuador***

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Over the last few decades, transitional justice processes have proliferated in response to the need to reconstruct societies following armed conflicts, dictatorial regimes, and grave human rights violations. Here I set out to explore the applicability of transitional justice measures in societies that are not in transition, in particular, as a response to conflicts between indigenous peoples.

Although Ecuador is not in a post-conflict or post-authoritarianism situation, indigenous peoples in the Amazon are dying from spearing without any significant reaction from the State, the international community, or the academy. Justice has only led to the deepening of the conflict. The urgency for preventing new deaths, which could mean the disappearance of the Tagaeri [1] and Taromenane[2] indigenous peoples, on top of the need to stop the criminalization of the Waorani[3] indigenous people, demands a rethinking of the limits of criminal punishment.

The conflict to which I will refer takes place in what is today the National Yasuní Park (*Parque Nacional Yasuní*) created in 1979 and declared a Biosphere Reserve by UNESCO in 1989. The territory is known for its unmatched biodiversity, which makes it an area of scientific and touristic interest. The richness of its natural resources, especially petroleum and wood, also make Yasuni into an area of enormous economic interest for the government and transnational companies. Added to this is the great cultural diversity of the Yasuni, where the Waorani, Kichwa,[4] and Shuar indigenous peoples live and the isolated Tagaeri and Taromenane

indigenous peoples take refuge. Without a doubt this is one of the richest and most coveted territories in the region, if not the world.

The violence occurs primarily between the Waorani, and the Tagaeri and Taromenane natives, although businesses, the State, groups dedicated to illegal tree felling, evangelical groups, indigenous organizations, and others have also played a role in the conflict. One of the peculiarities of the conflict, which becomes a methodological difficulty in analyzing the conflict, builds on the Waorani as recently contacted indigenous peoples, while the Tagaeri and Taromenane are indigenous peoples in isolation.

The Waorani call themselves “wao,” which means “the people,” in opposition to “cowode,” which comes to mean everyone else, the strangers, “the not people.” They are a recently or initially contacted indigenous people. “Initially” or “recently” should not be understood as the time transpired since their contact, but the small degree of contact and interaction that they have had with non-indigenous society.[5]

The Tagaeri and Taromenane are indigenous peoples who have not been submitted to a colonization process. Today, they do not have contact with the rest of society. Given the absence of contact, we do not know what they call themselves.

Taromenane is the way in which some Waorani refer to this indigenous group, meaning something like “other but equal.” For the Waorani, the Taromenane are a distinct but similar

group. Due to the similarities in culture and language of the Waorani and Taromenane, it is assumed that the Taromenane are uncontacted Waorani.

Tagaeri, in the Wao language, means “the people of Tagae.” This is a Waorani subgroup led by the descendents of the leader Tagae. From what we know, Tagae and his group decided to separate themselves from the main Waorani group, maintain their traditional way of life, and distance themselves from external, particularly missionary, influences. It is assumed that they decided to isolate themselves.

There is no consensus on the appropriate term for referring to peoples in isolation. One can find references to them under terms as diverse as peoples without contact, uncontacted, free, and hidden. The notion of “peoples without contact” is questioned because it puts emphasis on the accidentality of the condition of isolation. The term “uncontacted” peoples is also debated as, although they do not maintain regular contact with the rest of the population, they have certainly been contacted, threatened, and even murdered. The concept of “free peoples” attempts to underscore the autonomous character of these peoples in regards to processes of civilization and colonization. Beyond free, today these peoples find themselves enclosed within the border of colonization. And beyond “hidden,” they are “concealed away or made invisible.”[6]

The international community has adopted the concept of “indigenous peoples in voluntary isolation,” but this title is not pacifying, either. Above all, the use of the word “voluntary” is questionable, with the understanding that isolation has not been a voluntary choice but a survival strategy. Faced with the impossibility of determining if the decision to stay in isolation arises

from external pressures or is a manifestation of their free will, I will refer to them as peoples in isolation or isolated peoples.

The history of the Waorani, Tagaeri, and Taromenane indigenous peoples has always been told in terms of savagery/civilization. Even those who most carefully have studied their culture refer to them as "warriors, with an ancient and categorical tradition of aggression."[7] It occurs to me that, if the Waorani were to tell the history of the dominant society, they would describe us as violent human beings as well, for whom criminal punishment - with all the violence that it brings - has turned into a ritual.

In regards to the repeated deaths by spearing of natives in isolation, defenders urge for the punishment of the Waorani, demand justice, and question whether or not "reactions of legality" on the part of the State exist.[8] The application of criminal punishment is assumed to be a natural one, without any further reflection or criticism. But the situation challenges the criminal judicial response, demonstrates how criminal justice tends to aggravate the enormous social inequalities, and evinces how the punitive apparatus of the State serves the interests of the most powerful. The main impediment arises from the factual impossibility of criminally sanctioning the isolated indigenous peoples and the difficulty of legitimately imposing penal sanctions on uncontacted indigenous peoples or those recently contacted who have not internalized, let alone consented to, the norms of conducts that prevail over the rest of society. Perhaps this is a limit case, whose peculiarities could impede the extrapolation of reflections on other situations of violence or injustice. But if that is the case, despite all its peculiarities, and if it does not bring us to reassess the punitive punishment and look to alternatives to ordinary justice, what will?

Before continuing, I recognize that the main difficulty in this case study stems from the impossibility of taking off the lenses with which, from the outside, coming from foreign cannons and deep-seated prejudices, I observe the conflict between the Waorani and the Tagaeri and Taromenane indigenous peoples in isolation. My particular vision of the Waorani world and my limited understanding of the Tagaeri and Taromenane world will doubtlessly lead me to error. Although my main motivation is to propose solutions that would allow new deaths to be avoided, whether Waorani, Tagaeri, Taromenane, or tenant farmers (*colonos*), any solution that I propose will always be imposed from the outside and will not rely on the participation of the isolated peoples whose rights I seek to protect. In that sense, I note that the analysis of this case will contribute to its resolution with great difficulty. At most, I aspire to stimulate academic reflection (and hopefully reflection by justice operators) on the possible ways for responding to this reality.

## The conflict between indigenous peoples in isolation and indigenous peoples in initial contact in Ecuador

There are details about the conflict on which I consider it necessary to pause, even when space limitations demand that I simplify the facts.[9] We have known about the existence of these peoples from around the ‘60s, when the colonization of this part of the Amazon occurred and the evangelical mission of the Linguistic Summer Institute (*Instituto Lingüístico de Verano*) started. The discovery of petroleum, its social and environmental consequences, constituted and constitute the main threat to the life of these peoples. At the beginning, the “civilizing” duty or need to contact isolated native groups was questioned very little. The State delegated the “civilizing” role and the task of pacification and contact to religious missions; “although the

majority of Waorani were contacted, some families and groups known as Tagaeiri, together with other groups known as Taromenane, with whom they are culturally and linguistically related, have gone further into the jungle, fleeing from colonization, and remain in a vulnerable situation of isolation until today."[1011]

The history of contact with these peoples has never been peaceful. Some of the Tagaeri attacks go back to 1977, when they speared three petroleum workers from the Cepe company, and in 1980, when they attacked two security guards from the Braspetro company. "One particular characteristic of the Tagaeri and Taromenane peoples [...] is the aggression which they have repeatedly shown towards the outside world, and especially towards the intrusion of foreigners on their territory, since the petroleum boom."[12] The Capuchin bishop Alejandro Labaka was clear when he warned the Cepe and CGG petroleum company directorates about exploration on Taegaeri land: "we absolutely do not advise this operation. [...]. This is a different group, with whom no institution has been able to have friendly contact until the present day."[13]

Later, Labaka himself presented Cepe with a *Plan for Friendly Contact with the Tagaeri People*. This is not the time to tell Labaka's story; suffice it to say that on July 20, 1987 Labaka died by spearing together with the nun Inés Arango, who was accompanying him on his visit to the Tagaeri huts. "The Tagaeiri and Taromenane maintain a state of war with every person foreign to their groups, even with the rest of the Waorani, with exception of a few sporadic contacts. The few instances of contact with the groups in isolation are almost always marked by violence."[14]

Very many records of violent confrontations exist between isolated indigenous peoples since the arrival of petroleum companies into the area, but "the situation has worsened over the last few years in relation to the pressure over these peoples' territory caused by illegal wood extraction, legal petroleum extraction, and the expansion of the agricultural border."[15] The most recent attacks occurred in 2003, 2005,[16] 2006,[17] 2008,[18] 2009,[19] 2013, and 2016. In particular, I will refer to the events in 2003, 2013, and 2016 as they facilitate an understanding of the complex relationship between the Waorani, Tagaeri, Taromenane, and *Cowori*.[20]

In describing the 2003 and 2013 occurrences, I will extensively and literally refer to testimony from the Capuchin monk Miguel Ángel Cabodevilla, perhaps the most authoritative researcher in explaining this complicated phenomenon. He has already depicted it completely and in detail, and I would do a disservice to try and recount it again. I note that I will include some details about the killing which may seem morbid, but which I find indispensable for understanding the conflict.

In order to understand the 2003 massacre, I must introduce Babe, a Waorani to whom the effort to "civilize" the groups without contact is attributed.[21] Babe recounts that in 1993 he made various forays onto the territory of the isolated peoples, and during one of them he kidnapped a woman named Omatuki. After a few days in Babe's community, she was returned as a peace offering. The isolated peoples, however, did not understand it as such and during her return they speared Carlos Omene, Babe's son.

On May 28, 2003, Waorani from Babe's clan forayed into the jungle and killed more than twenty indigenous people, the majority women and children. After returning to the jungle, they showed to all who would look the head of one of the victims. They were received as heroes for having "killed the savages," although the photos of the mutilated bodies and of the burnt communal Taromenane house were successful in influencing public opinion.

According to the first public notification, they killed around thirty isolated natives, among them women and children. After the Public Prosecutor's intervention, the same sources began to alter the statistics on the victims. The Prosecutor managed to locate the bodies of one of the decapitated men, four women, and five children.[22]

Some highlight that the Babeiri or Babe people never forgot the confrontation in which Babe's child died and consequently they reaped revenge ten years later. Vengeance for the death of family members is a traditional impulse within the Waorani clans.[23] On the other hand, one of Babe's older brothers stated: "Babe ordered the attack. [...] Babe promised silver to whomever killed the Taromenani. He had a lot of it because he gets it from three sides: oil workers, wood merchants, and tourists."[24] Thus the killing could have been motivated not only by vengeful native efforts but also by external interests. Through Cabodevilla we know that in the killing they only not used spears but also firearms. For some, this demonstrates that there was an external influence from people linked to wood felling and oil companies. For others, there is nothing odd about them possessing guns, "Do you think there's anything that fascinates them more?"[25] There is a lingering doubt whether the responsible parties were native warriors, motivated by their ancestral tradition, or mere murderers, motivated by economic interests.

In order to explain the 2013 massacre, I must introduce Ompure, one of the most well known elders among the Waorani natives. We know that "he likes living away from the noise of Yarentaro, the village where a good deal of his large family resides, descendents from his two wives, Buganey and Ana, sisters themselves."[26] In addition, we know that "he was not accustomed to his descendents' new ways of life. He had two inner-jungle houses, one several hours from the village, on the bank of the Dikaro, and the other more than a day's walk away."[27]

Ompure had relatively frequent encounters with the Taromenane. In March 2012, Ompure recounts on video about one of his encounters, in which the Taromenane told him: "Warn the people from the outside that we live there, and tell them not to enter. No one should cross to this side of the river. On this side of our area, no one can search; if they search, we will kill. That's what we do. If they cross, they are going to die (...). We will visit again another time. Do not let more Cowori enter. Protect this area. We, on the other side, will keep watch and we will not let that happen. We have already killed Cowori, a woman and a man. We are brave, we are not afraid."[28] They gave Ompure an impossible task[29]: the protection of the Taromenane territory. If anyone penetrated their territory, there would be death.

Ompure recounted that, during this exchange, the Taromenane also told him: "We want to see Dabo and Yeti to hurt them the same way they hurt our family. If you know them, warn them. They killed with guns."[30] Dabo and Yeti were the oldest among the Waorani to go in and kill the isolated peoples in 2003. It was clear that revenge for those acts was (or is) impending.

On March 5, 2013, Ompure and his wife Buganey died by spearing by a group of Taromenane, exasperated by small planes and helicopters flying over their houses. “Nine thick spears, more than three meters long, marvelously crafted, adorned with bright, multi-colored feathers and hardened wood got”[31] Ompure, while “four spears pierced” Buganey “in the chest and stomach and she stayed alive for more than an hour after with the enormous spears stuck in her body.”[32] Several videos and photographs exist of the moment in which Ompure and Buganey were found after the attack. In one of the video, one can see Buganey in agony and hear “the furious voice of one of her children, who screams ‘I’m going to kill everyone! I am going to kill all the Taromenane!’ He is screaming and crying at the same time.”[33] The warning, this time by the Waorani, was clear.

According to Cabodevilla, the Waorani affected by spearing have “the sacred duty of vengeance” in their spirits.[34] After the death of Ompure and Buganey, there was a meeting between petroleum workers from Repsol and their community contacts that know the Waorani, as well as members from NGOs working at the location. They all agreed that the Waorani were going to kill the Taromenane.[35] In the words of Milagros Aguirre, “some act of revenge was totally foreseeable.”[36] But the government officials didn’t believe these accounts.[37]

A few days later, Waorani headed to the city to acquire guns and ammunition. None of this got the attention of the government. The Ministry of the Interior, José Serrano, was warned by the Vicary that an expedition was being organized to seek revenge on the Taromenane and about the purchase of guns and ammunition. His reaction was limited to an e-mail in which he announced: “We will act immediately.”[38]

19 days after Ompure and Buganey's deaths, on March 24, a Waorani expedition set out in search of the Taromenane. They were well equipped, with guns and ammunition, flashlights, utensils, food and drink, to survive for several days in the jungle. One of them carried a camera on which he documented the whole expedition. 74 photographs detail the most relevant scenes of this tragedy, which the government attempted to conceal for a long time.

They encountered them on March 30. One of the Waorani narrated the moment in which they surprised the Taromenane: "There was a firefight, bullets were flying and they were falling. Much blood was flowing, a ton of blood; blood was flowing like water. A lot of people ran. [...] There were a lot of them. One of them took a bullet to the eye. We killed them like those fat, fat peccaries (*guanganas*), that's how we killed them, just like peccaries. We let the skinny ones alone. The blood was like a gushing of water. (...) Now there were some of us who laughed while they were killing; several were laughing when they killed. "V" kept stepping on a Taromenani against the ground; they put a spear through him from below and it came out through his mouth, like with Ompure. We were dizzy. From all the people we killed, we were nearly dizzy. I think that they cut the head off of one of them, they hit a few heads with a branch and that's how they crushed two men."[39]

It is still unclear how many died. In their initial accounts, the Waorani spoke of several dozen. We also know from their stories that among the victims were more children than adults. Among the most shocking images of the massacre is that of a woman killed by shotgun fire to the back and pierced through by a spear, together with a barely three-year-old child, knocked to the

ground, pinned by a spear. When the Prosecutor arrived, some Waorani refused to offer information, "they insisted that the response to such an insult was their own business. No one from the outside had anything to do with what was to happen next."[40]

In the sequence of photos following the bodies, two Taromenane girls appear, who were taken as spoils of war back to the Waorani community. One witness recounted that "when they were done finishing off the wounded, and several Waorani started looking through the Taromenani's things in the house for their booty, suddenly, a young woman appeared near the house with her two daughters. (...) The three of them must have been outside of the house before the attack. (...) The woman turned herself over to one of the veteran warriors, who had been trying to take her with him. They didn't let him, telling him he couldn't be in charge of her, that he was too old to keep her from running away. So one of them killed her right then, in front of her daughters' eyes."[41]

The two Taromenani girls whom the Waorani brought with them live apart today. The one who was about 3-years-old stayed in Yarentaro with her captors and the one that was about six-years-old was taken to Bameno, one of the most outlying Waorani communities from the petroleum blocks. They live among those responsible for the massacre of their family and their people.

There are details which I cannot omit from this story. In their version of the story to the Prosecutor the kidnapped girls said that an aircraft flew overhead and dropped food which several Taromenane ate, and that they later died from poisoning.[42] The girls' version is not untrue. The Waorani who came in to kill the Taromenane in 2013 found and photographed dozens of cans of tuna among the objects belonging to the *Cowori*, such as necklaces made from

beer bottle caps. The cans of tuna could have been a gift from Ompure or collected by the isolated peoples when they approached the Waorani and tenant farmers' houses. But one doubt remains: could a company, or the government, have thrown poisoned food to "clean up" such coveted territory from the natives in isolation?

In any case, it would seem that we cannot continue to call them uncontacted or isolated. "The objects with which they decorated their spears (cracker wrappers, papers, pieces of cloth, nylon thread) indicate that they are less isolated than once thought, that is, their peaceful sporadic contacts, the proximity of wood felling and other encampments, and their crossing through communities like Unión 2000 [...], indicate their situation, not of isolation, but of total enclosure."[43]

We do not know the exact motives which led the Waorani and the isolated peoples to kill one another. But the extraction of natural resources in this territory has already claimed too many victims. The most vulnerable are the isolated indigenous peoples who find themselves in grave danger of disappearing off the map.

We know that some are still alive through sightings, and because in January 2016, Caiga Baihua, a 46-year-old Waorani, was shot by several spears and died on the bank of the Shiripuno River while his wife, Onenka Ñama, 33, managed to escape in the motor canoe that brought them to their community, although she sustained a spear to the leg and another to the back.[44] The deaths will continue. The story will be repeated. And it appears there is little we can do to avoid it.

**Reactions from society, the state, and the international community**

A large part of Ecuadorian society attributes these occurrences to the "ancestral violence" of the Waorani and looks the other way. Tenant farmers, oil, and tree fellers have taken it upon themselves to paint a picture of the indigenous peoples in recent contact and in isolation as primitive or barbaric. Companies have maximized the external factors that exacerbate the tension among the peoples. Many activists, faced with the impossibility for peoples in isolation to defend themselves, have adopted a defense position for their rights, which borders on paternalism.[45]

The measures adopted by the State in response to this situation are diverse. Firstly, they have adopted measures to protect the territory. In 1999, the State created an untouchable conservation zone for the Tagaeri and Taromenane peoples in voluntary isolation.[46] Demarcation was slow. Just five years after a technical commission was created to mark out the untouchable zone.[47] In 2007, the State managed to mark off the so-called Untouchable Tagaeri-Taromenane Zone, an area of about 758,051 hectares.[48] A buffer zone of 10 kilometers contiguous to the tangible zone was established, where all extractive activity of forest products for commercial ends, the granting of mining concessions, and infrastructure projects were prohibited. The indigenous Waorani communities settle in the buffer zone are authorized to perform moderate and controlled tourism activities.

They also adopted a Cautionary Measures Plan, designed in response to the precautions ordered by the Inter-American Commission on Human Rights in 2006. The plan includes forest control measures; military oversight of the highways; control of the entry of people headed to the area;

establishing a medical attention area; hiring indigenous monitors as park rangers; among other things.[49]

The failed Yasuní ITT initiative,[50] also mentioned the need to protect indigenous peoples in voluntary isolation among its proposals. Faced with the paltry international enthusiasm that this proposal generated, President Rafael Correa decided to exploit petroleum in the Yasuní (modifying for this purpose the maps that the government itself had presented to demonstrate the existence of isolated peoples in the area).[51]

Additionally, legislative measures have been adopted. In the 2008 Constitution, Ecuador defined itself as an intercultural and plurinational State. Article 57 of the Constitution recognizes 21 rights specific to indigenous peoples, including the right to maintain, develop, and freely enrich their identity, sense of belonging, ancestral traditions, and forms of social organization. Regarding indigenous peoples in voluntary isolation, the Constitution states: “The territories of peoples in voluntary isolation are of irreducible and untouchable ancestral possession, and any type of extractive activity on them is prohibited. The State will adopt measures to guarantee their lives, make sure their self-determination and will to remain in isolation are respected, and safeguard the observance of their rights. Violation of these rights will constitute a crime of ethnocide, which shall be classified by law.” The constitutional disposition is also textually repeated in the Organic Code of Territorial Organization, Autonomy, and Decentralization (2010).

Reactions at the political level cannot remain outside of this analysis, either. After the massacre in March of 2013, President Correa's first declaration in his weekly Saturday speech was to deny that the conflict is related to the petroleum activities in the area. "The petroleum workers there have nothing to do with it, it is a problem between the clans," he announced. In June of the same year, he ordered the formation of a commission to investigate the case.[52] One of this Commission's recommendations was to create a Directorate for the Protection of Indigenous Peoples in Isolation and Initial Contact, under the Ministry of Justice. Another recommendation was the creation of a Culture of Peace Agenda with the Waorani community.

The kidnapped girls held the status of protected witnesses by the Public Prosecutor, although they live with their captors. When the State finally admitted the girls existed, it could not think of a better idea than to land two helicopters in the community, so that two masked men with firearms, who did not speak their language, could take the older girl to a hospital filled with germs against which she did not have immunity. I cannot imagine what this bare six-year-old girl must have felt when they put her inside that noisy contraption and flew her to an unknown place.

I am chiefly interested in focusing on the reaction from the justice sector regarding this account. And I cannot imagine anything crueler for these peoples in initial contact than for their first contact with society to be loss of freedom. Detention conditions which for us are so close to torture are, for these people with such a close relationship to nature, disproportionately grave.

After the 2003 killing, the Public Prosecutor announced that it would not permit impunity and opened a prosecutorial case.[53] The investigations did not yield any further results and the case

was not adjudicated. At the same time, given that the 1998 Constitution already recognized the ability of indigenous authorities to apply their own justice mechanisms, the ONHAE[54] announced that those responsible for the deaths of the Taromenane would be punished by way of indigenous, not ordinary, justice. The ONHAE decided to pardon them after the nine responsible individuals swore not to continue the war. The organization explained that "they were pardoned because it was the first time, but that if it were repeated, we ourselves would capture those responsible and turn them over to the police."[55]

The justice sector's reaction was different in 2013, under the legal framework applicable from the establishment of the 2008 Constitution, in which "article 1 of the Constitution in defining Ecuador as a plurinational State, obligates justice operators to consider, in every question which so merits it, the special cosmovision of indigenous peoples with respect to all their ways of life, **including judgment of criminal offenses.**"[56] In addition, the Constitution recognizes the right of indigenous peoples to self-organize and indigenous justice as a valid mechanism for conflict resolution, although the Constitutional Court has limited this ability to non-criminal cases.[57]

Criminal proceedings were initiated in response to the events of 2013.[58] In the charge formulation hearing that took place on November 27, 2013, it was decided that the prosecutorial instruction would open surrounding the suspected crime of genocide and preventive detention was ordered for the Waorani involved, as a precautionary measure. It was not difficult to locate the responsible parties, as they themselves had taken on the duty of offering declarations concerning their actions, not with regret but filled with warrior's pride and convinced of their own heroism. Six Waorani who have probably never heard the world genocide were immediately

arrested. A few days later another was arrested. The rest went into hiding to avoid preventive detention.

The case progressed slowly while they remained in prison, isolated, in a small cell, with very limited visitations. Their defense attorney proposed substitutive measures to preventive detention on three occasions. The judge denied them. They also denied them *habeas corpus*.

In the context of these genocide proceedings, on April 16, 2014, the judge elevated the case to consultation before the Constitutional Court,[59] in order for the Court to resolve the constitutionality of the criminal offense of genocide. In the judge's opinion, "sufficient motives exist to generate a reasonable doubt and motivation with respect to the constitutionality of the application in the present case, [...] concerning the sanction by the commission of the crime of genocide."[60] At hearing, the case judge explained that in his opinion the application of this criminal offense would be contrary to his obligation to keep the customs and cosmovision of indigenous peoples in mind.

The Public Prosecutor did not agree: "just as we *mestizos* have made a considerable effort to understand those facts, I think that it also corresponds to the Waorani people to make an effort to understand our culture. Our culture respects life. Our culture respects peaceful cohabitation. And what the Prosecution aspires to, your honor deciding judge, is precisely that whatever resolution you decide, ensures firstly that the facts do not go unpunished."[61]

In its own right, the Public Defender proposed at hearing that the case be resolved through three paths: the denial of competency in favor of the indigenous peoples; establishing a lowered sentence based on intercultural interpretation; or an intercultural and consensual "negotiated out" between the Constitutional Court and the Waorani authorities.[62]

The Waorani's defense attorney expressed that from the world vision of the Waorani, it was inconceivable as to how the facts deserved sanctions: "how is it that under the pretext of social peace we wish to force them to accept a law or norm or sanction they have not even understood."[63]

In its decision, the Constitutional Court presented interesting reflections, although this was a long way from providing a solution to the conflict. The Court stated that after analyzing if the members of the indigenous Waorani people committed genocide, the elements of the criminal offense "must be considered and interpreted from an intercultural perspective" and recognized that although the criminal offense in itself does not present constitutional faults, "its application to the concrete case would generate an effect on the collective rights of the ancestral peoples who do not know the context of the norm as it is foreign to their ancestral cosmovision."[64] In the Court's opinion, it was enough to analyze the case "utilizing criteria of interculturality."[65] According to the Court, "it would be the case judge's duty, through anthropological and sociological findings, as well as of every necessary element of conviction, to determine to what degree the alleged offenders were unaware of the context of the norm which contains an offense whose responsibility they are accused of, as well as if within their culture there is evidence that

these practices are acts specific to their culture or if, on the contrary, they are adverse to it and thus an object of criminal law."[66]

Beyond the resolutory aspect, perhaps the greatest contribution from the Constitutional Court is found in the paragraph in which it emphasizes, "when sanctioning conduct, the judge or judges should persevere in giving preference to types of sanctions other than imprisonment, coordinating with the main indigenous authorities appropriate to the case."[67] Nevertheless, the Court did not go into detail about the possible alternatives to deprivation of freedom that could be applied, which, as we see it, has created confusion among the authorities.

After the Constitutional Court's ruling, the judge decided to absolve the charged Waorani, who are now free. The Public Prosecutor, who tirelessly repeats that it will not permit impunity concerning these events, appealed the judge's decision, and until today there has been no definitive announcement from the criminal chamber of the Provincial Court. The way in which the Prosecutor has approached the case, despite its attempts to be innovative in including intercultural criteria, shows the total inertia with respect to the need to apply criminal penalties to the indigenous Waorani.

Meanwhile, due to the most recent attack that took place in 2016, the Public Prosecutor has once more achieved little by shedding light on the occurrence and, what is worse, has taken shaky steps to prevent a new act of vengeance. The events happened on January 25, 2016 and February 11, 2016, the brothers of the victim, Bartolo and Otobo, and their father, Omayihue, were arrested in El Coca when they concealed two rifles and ammunition among the supplies that they

were taking to their community. Perhaps they were going to use them to hunt, but it is also possible that they were planning their revenge.

As the Public Prosecutor pointed out, it did not have any clearer ideas when looking for alternatives to preventive detention. It immediately accused them of transporting firearms without a permit and ordered them on house arrest. Facing the inability to guard them in the deep jungle where they live, the Prosecutor decided to keep them in a Capuchin priests' home in el Coca. They remained imprisoned there for 15 days, while the Prosecutor and the Ministry of Justice agreed on substitutive measures to the three or five years in prison which the crime of carrying firearms without a permit entails. "In the end, they conditioned them to come before the court once a month to take a class on human rights, do community service, and submit to a periodic weapons check, and most importantly, they restricted them from entering into the Tagaeri-Taromenani territory."[68]

The judges and national prosecutors have not been the only ones to come up against the difficulties involved in this conflict. The response from international bodies has also left much to be desired.

On May 4, 2006 the Inter-American Commission on Human Rights (IACHR) received a petition that alleged the international responsibility of the Ecuadorian State for human rights violations against the Tagaeri and Taromenani indigenous peoples in voluntary isolation and its members. The facts referred specifically to the killings in 2003 and 2006. Together with the petition, an application of precautionary measures was also sent. On May 10, 2006, the IACHR adopted

precautionary measures and asked the Ecuadorian State to "adopt effective measures to protect the live and personal integrity of the members of the Tagaeri and Taromenani people, particularly measures which are necessary for protecting the territory in which they live, including the required actions to stop the intrusion of third parties."[69]

Since then, various acts of violence have occurred without any further reaction from the IACHR, beyond requests for information from the State. When the 2013 attack occurred, the Commission insisted for months in information requests that the State answered. The Ecuadorian State had already publicly express that it did not recognize the ability of the Commission to order precautionary measures, and that only the Court had that ability, but the Commission insisted.

Given the evidence of fatal victims among the beneficiaries of its precautionary measures, the IACHR was able to request that the Court immediately adopt provisional measures. But it did not want to run the risk of the Court denying this request. It was not until January 19, 2014 that the IACHR came to send the Court a request for provisional measures, only with regard to the situation of the kidnapped girls. On March 31, 2014, the Court denied the request for provisional measures, keeping in mind that the information which the State sent it was substantially different from that which the Commission used as the basis for its requirement. What is more, by the time the Court had adopted its decision it had been a year since the kidnapping of the girls, and according to the Court the State had "taken concrete measures that have mitigated the situation from extreme seriousness, urgency, and possibility of consummation of irreparable damage which was initially presented by the Commission in its request."[70] In other words, the damage to the girls was already consummated and there was no room for preventive measures.

In November of that year, the Commission finally adopted its admissibility report.[71] Eight years had to pass from the presentation of the initial petition. Until today a statement from the IACR on the substance of the petition does not exist.

In the United Nations' framework, there have been some statements from the Special Rapporteurs,[72] among other initiatives.[73] The vision of the Rapporteurs has been one of "no committed crime can go unpunished," although "in order to ensure the adjudication of these occurrences with full respect for the Waorani culture and for human rights from an intercultural perspective {...} we ought to explore the existence of applicable norms and procedures from the indigenous justice system and, in any case, we should establish intercultural dialogue between the indigenous justice authorities and the operators of ordinary justice."[74] The vision of the Office of the High Commission for Human Rights has also highlighted the importance of "defining application mechanisms to be able to put an end to impunity in cases of aggression towards these peoples" and has even called for "including the **criminal charge** for acts of forced contact with anyone from these groups and the legal protection of indigenous patrimony."[75] It emphasizes, again, the obsession with criminal punishment.

The IACHR's recommendations in its thematic report on the topic also gesture to the need to "adopt suitable and culturally appropriate judicial resources in the internal legal framework for the protection of the rights of indigenous peoples in voluntary isolation and initial contact."[76]

**The insufficiency of responses**

The fact that, in spite of all of the adopted legislative, administrative, and judicial measures, the conflict continues, is at least an indicator of the insufficiency of the responses adopted up until now.

Without a doubt, territorial delimitation was an important step. Nevertheless, the creation of imaginable limits which impede the entrance and exit on certain territory contributes little to the protection of the peoples if they don't take into consideration uses of the soil, transit corridors, harvest periods, hunting seasons, climatic changes, among others. Those who have studied the untouchable zone from a geographic point of view, agree in stating that "many of the accidents with/by the Tagaeri Taromenane occur 'outside' of the Untouchable Zone."[77] For obvious reasons, the Tagaeri and Taromenane are not up-to-date on the demarcation, either. The existence of such diverse levels of legal protection in the area[78] and map inconsistencies do not help, either.[79] One need not be a geographer or cartographer to notice that a map overrun by straight lines probably does not reflect the realities of these isolated peoples' movements.

Measures like the buffer zone to prevent access by third parties onto the territory have not been effective, either. Perhaps abstaining from granting licenses to carry out extractive activities in the zone would have had a greater impact on the protection of the Waorani and isolated peoples, but it proved easier for the government to modify the maps in order to proceed with the exploitation of the Yasuní.[80]

The governmental authorities, from the executive as much as the judicial branches, as well as the Inter-American Commission, have been notified every time that the events arise that there will be a new attack against the isolated groups. Preventative measures have either not been taken or have failed.

The justice system, through its acts and omissions, and particularly through its natural inclination towards deprivation of liberty measures, has only managed to deepen the conflict among the Waorani, the Tagaeri and Taromenane, and deepen the inequality between the indigenous peoples and the dominant society. Under the premise that multiculturalism is not a basis for justifying violence, authorities automatically apply the Ecuadorian Penal Code norms without measuring the consequences of its criminal repression against the Waorani. The result of its intervention will inevitably generate an escalation in violence against isolated indigenous peoples.

The problem with the solution that the Constitutional Court provided, based on criminal justice with intercultural elements, is that it is centered on the need for proving knowledge or ignorance of criminal norms, as well as evidence that practices are ancestral or non-external. But the dilemma is not only the lack of knowledge, but also the questionable legitimacy of applying a criminal punishment to persons belonging to groups that have had no participation in the norm formation process.

The acts of violence produced by and against peoples in isolation challenge the limits of justice and law, even in a pluralist nation. We are not confronted with issues isolated from violence,

which could be resolved by ordinary justice with an intercultural perspective. We are in the presence of a conflict between indigenous peoples in recent contact and indigenous peoples in isolation, which has lasted for decades.

The instances of violence deserve answers, but we cannot forget that there are conditions and preconditions for criminal punishment, although they may have intercultural criteria. How can I apply criminal charges like genocide to indigenous peoples in recent contact who have been marginalized from the society that approved those norms? How could the State react in the face of Tagaeri and Taromenane deaths and look the other way when the Waorani are the victims? If the Waorani had some conscience about the criminal consequences of their actions, would they have photographed their homicides, registering each participant and victim? If what is being punished is not the infraction of a foreign norm but of a universal norm that every human being has internalized, would it not be that certain external actors managed to disorient the Waorani when they celebrated their own heroism and the trophies of war that they brought after every massacre? And, most gravely, how could the State which, through its acts and omissions also plays a part in the responsibility for these attacks, attempt to apply all of its machinery of violence against one of the parties to the conflict?

We have naturalized criminal punishment as the only possible response to violence. Authorities seem to be unable to resist when faced with the impulse to punish. The Public Prosecutor does not think twice about the fact that the norms they seek to impose on them have not resulted from a deep agreement in which the recipients of punishment have participated.

Duff is clear when stating that "a normative theorization of criminal law should be in a state to explain the authority of the law over those whom it is affirmed to oblige, as well as its relationship with them."[81] We are facing a situation in which victims and victim groups are permanently and systematically excluded from participation in political life, and we seek to apply to them a "law whose voice appears foreign, which is not and could not be theirs."[82]

If tomorrow the state authorities were to witness an attack from isolated peoples against Waorani or *Cowori*, would they immediately stop them after having committed a flagrant offense? Would we let jail be the first contact between isolated peoples and the rest of society? So, why did we allow it with respect to peoples in recent contact?

"The Huaorani have not come to understand the keys points by which Cohuori society is run: what is good and evil to them, prohibited or legal, praised or repudiated."[83] After the 2003 killing, the Waorani "heard talk of jail threats while the Prefect of Orellana, nearby oil workers, journalists, and other curious parties brought them gifts. They called them criminals and at the same time offered them incredible (for them) quantities of money to let themselves be photographed naked (when they did not do that anymore), to show off stolen weapons [...] Who could decipher all of this at the same time?"[84]

This is not about a conflict among clans in which we ought not to intervene. But "if criminal law intends to be legitimately democratic, it should be a law that belongs to citizens in the political system as their own law: a law that they can see as their own, which they can call their own."[85]

As long as those conditions do not exist, we must look for an answer in places other than criminal law.

Gargarella, following Hilb, affirms that "in these grave cases, we need more than ever – and no less – that criminal doctrine intervene and help us think about how to act. We might ask ourselves, for example: are we to inculpate every involved individual or do we prefer to restrict the use of criminal law to sentences which are necessary such that the event does not occur again? Should we bet on a response that privileges obtaining 'truth,' or for one that maximizes the 'punishment'?"[86]

I add that we could think about responses that do not involve the application of criminal law. From my perspective, criminal theory has not offered satisfactory answers for confronting this type of conflict. Neopunitivism, according to which criminal sanction would have a messianic power and greater and more severe punishments would reach all corners of social life, has already been applied in this case without the exemplifying effect having had the capacity to prevent new acts of violence. Criminal justice with intercultural criteria[87] has also been applied in this case, and although it consists of a more respectful solution to the indigenous cosmovision, it has not achieved anything beyond aggravating the conflict and alienating the Waorani. Restorative justice does not prove applicable while the personal interaction between the victim and the offender is a guiding principle for this alternative. I do not think that it would suffice to apply a moderate dose of criminal law, either, as minimalism would have. Not only because it would have a real dissuading capacity, but also simply because if the application of criminal justice is unjust, we should reject it.

In spite of the gravity of acts of violence, I do not find a way to justify criminal punishment in these cases. If what we seek, in the end, is to discourage violent practices, I am convinced that prevention and non-repetition can be reached through avenues that do not come through the deliberate imposition of a criminal charge on the responsible parties.

**Why not apply transitional justice measures in response to conflict between indigenous Waorani, Tagaeri, and Taromenane peoples?**

Until now, the need for "transition" (to democracy, or to peace) has been prevalent as part of the justification for transitional justice measures. I wonder if powerful motivations exist by which transitional justice should have a conceptual limit that keeps its application to cases of transition in which it is necessary to break with the past, speak of a before and an after. Perhaps we should allow ourselves to redefine the reach of injustices which transitional justice can include.

However, if transitional justice could be applied to other conflicts, what characteristics should these conflicts have, to merit alternative measures to ordinary justice? Maybe one of the criteria that could help justify the need for transition measures is that we are not facing isolated acts of violence but a permanent conflict. The case of peoples in isolation is a permanent and complex conflict in which diverse indigenous peoples, as well as other actors, fight one another to concretize their objectives and interests, and they have unleashed a violent reaction that continues to escalate. Behind this conflict is the defense of the territory in the face of economic interests of natural resource exploitation, and indigenous peoples' right for survival against the survival of an extractive economic model.

We need a model of justice that allows us to overcome and not deepen the conflict. The application of transitional justice measures, such as: the search for truth; reconstruction of historic narrative; revaluing indigenous culture and language; restitution; remembrance; compensation; pardons; reparation; institutional reforms, among others, could bring multiple benefits if applied to this conflict.

Transitional justice is especially equipped to respond to the demands of legal pluralism.[88] Processes of transitional justice in such distinct places as Australia,[89] Canada,[90] Guatemala,[91] or Colombia[92] have allowed responses to specific needs of indigenous peoples. A compromise with the legal structure would permit the growth in the ability of transitional justice to recognize and respond to structural injustices in colonization contexts.[93] Transitional justice could offer a chance to respond to historical injustices and structural inequalities in a manner which the ordinary journey has not been able to.

Transitional justice could allow an approach to this conflict that goes beyond acts of violence, in order to respond to historic abuses, persecution, and discrimination that these peoples have confronted. In addition, it would allow us to overcome barriers that criminal law cannot breach. For example, it could approach a much broader period of time than the one covered by criminal law norms, owed to prescriptive norms. Through transitional justice, it would be possible to determine the responsibility of the State and of related businesses, something that escapes criminal law, as well. In addition, transitional justice could provide a space to articulate

principles derived from indigenous norms, ordinary penal justice, and the international human rights regime.

Transitional justice could possibly lead to the growth of legitimacy for Waorani instances of decision-making, whose authority is fractured. An inclusive process of transitional justice could even help to raise awareness about the true identity and fight of indigenous peoples for their territory.

In definite terms, transitional justice could facilitate our concentrating on objectives which ordinary justice has neglected: the territory in which indigenous isolated peoples and those in recent contact live is a territory in which a series of interests and conveniences are superimposed; it is imperative that we resolve limitation problems, environmental consequences of exploitation, deforestation, expansion of the agricultural border, among others.

Above all, transitional justice could offer an opportunity for reconciliation. The main question that we should ask ourselves at this point is not how do we punish such serious acts? But rather, how do we return to a life in harmony between and with indigenous peoples in the Amazon?

The chief critique to the proposal of applying transitional justice measures in response to this conflict in Ecuador will probably come from anti-impunity movements that call for justice. The difficulty will lie in showing that transitional justice is not equal to impunity. The dominant society seems to have assumed as irrefutable the idea that criminal punishment is a social duty to honor victims. The challenge will be in convincing them that there are methods of reproach that

do not go through criminal punishment, and that the objective of transitional justice is not to forget, but the truth.

An additional response that the proposal to apply transitional justice measure could receive is that it could mean the silencing of isolated peoples' voice and ignoring their rights as victims. Applying these measures could be understood as a way of minimizing the respect that their lives deserve. Nevertheless, history has shown that it is a very useful framework for fairly responding to grave and systematic human rights violations. In addition, in the process of truth reconstruction, it could help us to recognize that Waorani are also victims. They are not only victims of peoples in isolation, but also of the pressure that the government, oil companies, timber fellers, tourist companies, and religious groups have put on them and on their territory.

Another possible criticism to this proposal may affirm that not criminally punishing would bring the State to ignore its international obligations. It is true that the Inter-American Court seems to have taken a position according to which one single way would exist in which the State ought to respond to acts of violence: criminal sanctions.[94] As Filippini notices, when the Court affirms the need to pursue criminal punishment, it reworks "a series of assumptions about the function of the punishment that at this level of regional development may merit some type of qualification on the part of the bodies of human rights protection systems. Essentially, the legal discourse - and that of the IA Court on Human Rights is no exception - continues to easily assimilate ideas of reproach, sanction, and punishment, naturalizing, in large part, that prison is the form of reference for expressing the maximum social reprobation in a community."[95] Hopefully when the petition presented in favor of indigenous peoples in voluntary isolation arrives at the Court,

which could still take another arrive, the Court takes advantage of the chance to reflect on its misguided vision of criminal punishment. That the State ought to protect victims does not mean that the only way to do so is through criminal punishment.

An additional legitimate concern could be set forth in these terms: If it is possible to supply ordinary justice with tools for cultural diversity, why turn to other forms of justice? My answer would be: because ordinary justice, even with intercultural criteria, deepens exclusion and does not allow us to incorporate other responsible parties into the solution, such as businesses and state accord. Criminal justice with an intercultural perspective has focused on indigenous people to the point where it has ensured impunity for other responsible groups.

One challenge which I cannot leave out is the impossibility that transitional justice be a participative process at the same time that we are unable to contact isolated peoples. It is clearly that any transitional justice measure must respect the principle of no contact, we cannot intervene in its decision to stay in isolation. So then, how can we know what they want? How do we mollify their spirit of revenge? It only seems to be that a transitional justice process must rely on the participation and consultation not only from Waorani organization but also other indigenous organization capable of representing not their own interests, but those of isolate peoples. I warn that this does not seem a sufficient solution.

We have not arrived at a perfect solution. But let us not discard the possibility of finding a balance between justice and peace.

**By way of conclusion**

I have not managed to establish a theoretical basis that allows us to understand the conflict of the indigenous peoples that inhabit the Yasuní with all of their ethical, legal, and practical complexity. I have merely sought to call attention to this case and to the importance of considering the applicability of transitional justice measures to contexts that are not strictly transitional. That is, to redefine what we understand as transition.

I recognize that this reflection needs deepening. But it is also possible that it is time to change the logic. Instead of having to justify to satisfaction why it would be necessary to apply a measure distinct from a criminal one to punish violent acts, we could demand that it justice beyond a reasonable doubt why one must resort to criminal punishment when such or more appropriate alternative exist than punitivism.

Our obsession with sanction and punishment has not contributed to protecting the life of these indigenous peoples in isolation, or the indigenous peoples in recent contact. At most, it has deepened the Waorani people's spirit of revenge, placing the subsistence of peoples in isolation at risk. Criminal punishment constitutes the use of legitimate violence on the part of the State, but there is no such legitimacy if it seeks to apply to people or groups who have not remotely been participants in the democratic mechanisms for forms the penal norm. In this case, the State does not have legitimacy to offer responses when it has not fulfilled its duty as guarantor. When criminal punishment is inserted into a sphere of non-questionability and becomes a straitjacket from which judges cannot escape, the most affected parties are always the weakest

ones. If we want to protect the survival of indigenous peoples in Ecuador, perhaps we should put justice aside, and seek cohabitation, peace, and reconciliation.

**Translation**: Hayden Rodarte

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[1] In some texts, cited in this essay, they are also called Tagaeiri.
[2] In some texts, cited in this essay, they are also called Taeromenani or Taeromenane.
[3] In some texts, cited in this essay, they are also called Huaorani and Huaurani. Pejoratively, the colonizers called them Aucas.
[4] They are also called Quichua.
[5] CIDH. *Pueblos Indígenas en Aislamiento Voluntario y Contacto Inicial en las Américas: Recomendaciones para el pleno respeto a sus derechos humanos.* OEA/Ser.L/V/II.Doc.47/13 (2013), par. 14.
[6] On the most appropriate concept in referring to isolated peoples, see: Milagros Aguirre. "Ocultados! La Bitácora de unas Muertes Anunciadas". *Una Tragedia Ocultada*. Cicame (2013), p. 92; See also: José Proaño y Paola Colleoni. *Caminantes de la Selva: los pueblos en aislamiento de la Amazonía ecuatoriana*. Informe 7. IWGIA (2010); and also: Alonso Zarzar, Tras las huellas de un antiguo presente. *La problemática de los pueblos indígenas amazónicos en aislamiento y en contacto inicial. Recomendaciones para su supervivencia y bienestar.* Defensoría del Pueblo, Lima (1999).
[7] Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), p. 62.
[8] Id. p. 27.
[9] Multiple sociological and anthropological studies exist which deeply discuss this conflict. I suggested seeing, in particular: Verónica Silva, Franklin Ramírez Gallegos y Joshua Holst. "Colonial Histories and Decolonial Dreams in the Ecuadorean Amazon" en *Latin American Perspectives* Vol 43, Issue 1, (2015): 200 - 220; Mary-Elizabeth Reeve y Casey High. "Between Friends and Enemies: The Dynamics of Interethnic Relations in Amazonian Ecuador" en *Ethnohistory* (2012) 59(1): 141-162; Miguel Ángel Cabodevilla. *Tiempos de Guerra*. Abya Yala (2004); Soraya Constante. *Dos tribus y una vieja rivalidad: vuelven tiempos de guerra a la Amazonía* (2016). The CICAME editorial has also closely followed the conflict through its various publications: *Noticias históricas y territorio. La nación waorani* (2010); *La selva de papel* (2010); *Otra historia de violencia y desorden, Lanzas y muerte en Los Reyes* (2009); *Zona Untouchable, ¡Peligro de muerte!* (2008); *¡A quién le importan esas vidas! Un reportaje sobre la tala ilegal en el Parque Nacional Yasuní* (2007); *Pueblos no contactados ante el reto de los derechos Humanos* (2005); *El exterminio de los pueblos ocultos* (2004).
[10] José Proaño y Paola Colleoni. *Caminantes de la Selva: los pueblos en aislamiento de la Amazonía ecuatoriana*. Informe 7. IWGIA (2010), p. 8.
[11] Ibid.
[12] Ibid.
[13] Miguel Ángel Cabodevilla. *El exterminio de los pueblos ocultos*. Cicame (2009), p. 75.
[14] Philip Gondecki. *Entre retirada forzosa y autoaislamiento voluntario: reflexiones sobre pueblos indígenas aislados y estrategias de evitación en el manejo de conflictos en la Amazonía occidental*. Indiana, num. 28 (2011), p. 143.
[15] José Proaño y Paola Colleoni. *Caminantes de la Selva: los pueblos en aislamiento de la Amazonía ecuatoriana*. Informe 7. IWGIA (2010)
[16] The confrontation was with timber felling workers.
[17] The attack occurred during the visit to Ecuador by the United Nations Special Rapporteur for Indigenous Peoples. We know that two Taromenane women were murdered by gunshot by the timber fellers, although rumors mentioned that there were up to forty victims.
[18] In March 2008, a settler by the named of Luis Castellanos died by spearing, who together with a Waorani named Wane Cawiya worked in illegal timber felling. In response, Wane and his family entered the

Taromenane territory and approached a house of Taromenanes where they had a very violent exchange. The details of this episode are narrated in Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), p. 44.
[19] The spearing occured in August 2009 at the precooperative Los Reyes. A mother and dos children from a rural family (settlers) died after a spear attack. It was the first time that attack occurred outside of the forest, on a recently opened highway. Some details are narrated in Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), p. 44.
[20] Cowori (in some texts also translated as Cohuori) is the term that the Waorani use to refer to anything non-Waorani, to drifters.
[21] Miguel Ángel Cabodevilla. El exterminio de los pueblos ocultos. Cicame (2009), p. 16.
[22] Ministerio Público de Pastaza. Expediente fiscal 347-2003.
[23] Miguel Ángel Cabodevilla. El exterminio de los pueblos ocultos. Cicame (2009), p. 22.
[24] Id., p. 17.
[25] Id., p. 18.
[26] Id., p. 30. Cabodevilla also mentioned Ompure frequently in his text *Los huaorani en la historia de los pueblos del Oriente*. Navarra: CICAME-COCA, 1994. In additional, Alejandro Labaka, from the Capuchin mission in Coca, repeatedly names him in the field journal from his first contact with the Waorani in 1976, since Ompure was son of the family that took the missionary in. See: *Crónica Huaorani*. Cicame (2003).
[27] Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), p. 30.
[28] Id., pp. 53-54.
[29] It was not the only impossibile thing they asked of Ompure: they also demanded women, as they had no more partners.
[30] Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), p. 56.
[31] Id., p. 31.
[32] Id., p. 32.
[33] Id., p. 32.
[34] Id., p. 74.
[35] Id., p. 66.
[36] Milagros Aguirre. "Ocultados! La Bitácora de unas Muertes Anunciadas". *Una Tragedia Ocultada*. Cicame (2013)
[37] Ibid.
[38] Ibid.
[39] Miguel Ángel Cabodevilla. *Una Tragedia Ocultada*. Cicame (2013), pp. 95-97.
[40] Id., p. 35.
[41] Id., pp. 106-107.
[42] Id., p. 62.
[43] Milagros Aguirre. "Ocultados! La Bitácora de unas Muertes Anunciadas". *Una Tragedia Ocultada*. Cicame (2013), p. 188.
[44] Soraya Constante. *Dos tribus y una vieja rivalidad: vuelven tiempos de guerra a la Amazonía* (2016)
[45] One notable exception are the Yasunidos, an environmentalist youth group that amanged to collect almost 800,00 firms (30% of the necessary firms) to call a popular consultation to stop the extraction of natural resources in the National Yasuní Park. The National Electoral Council (*Consejo Nacional Electoral*), with the support of the Constitutional Court, rendered this citizen initiative without effect
[46] Decreto Ejecutivo 552 (1999)
[47] Acuerdo Ministerial 092 (2004).
[48] Decreto Ejecutivo 2187 (2007)
[49] See: Informe de actividades realizadas por el Estado ecuatoriano en virtud de la medida cautelar a favor de los pueblos indígenas en aislamiento voluntario tagaeri y taromenane (2013).
[50] According to the initiative, the Ecuadorian State has a duty to indefinitely leave around 856 million barrels of petroleum underground in the ecological reserve of Yasuní in exchange for compensation from the international community through unperceived economic income related to the decision to not explore petroleum resources.
[51] Today the government sustains that there is no presence of groups without contact in block 43 or in block 31. Until 2010, the Cautionary Measures Plan for the Protection of the Tagaeri Taromenane Peoples had reported the presence of Indigenous Peoples in Isolation in the armadillo block.
[52] Decreto Ejecutivo 17 (2013).

[53] Ministerio Público de Pastaza. Expediente fiscal 347-2003
[54] Organización de la Nacionalidad Huaorani de la Amazonía Ecuatoriana
[55] Miguel Ángel Cabodevilla. *El exterminio de los pueblos ocultos*. Cicame (2009), p. 61.
[56] Corte Constitucional. Sentencia No. 004-14-SCN-CC. Caso No. 0072-14-CN. August 6, 2014, p. 24 (the underlined part is my own)
[57] Corte Constitucional del Ecuador. Sentencia No. 113-14-SEP-CC en Caso No. 0731-10 (La Cocha). 30 July, 2014.
[58] Proceso Penal No. 223-2013
[59] The question in cases of doubt around the constitutionality of the application of a norm is not foreseen in article 428 of the Constitution of Ecuador and article 142 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.
[60] Corte Constitucional. Sentencia No. 004-14-SCN-CC. Caso No. 0072-14-CN. August 6, 2014, p. 4.
[61] Id., p. 6
[62] Id., p. 7
[63] Id., p. 8
[64] Id., pp. 18-19
[65] Id., p. 19
[66] Id., p. 21
[67] Corte Constitucional. Sentencia No. 004-14-SCN-CC. Caso No. 0072-14-CN. August 6, 2014, p. 22, citing itself in case No. 0731-10-EP, sentencia No. 113-14-SEP-CC
[68] Soraya Constante. *Dos tribus y una vieja rivalidad: vuelven tiempos de guerra a la Amazonía* (2016)
[69] CIDH. MC 91-06, Pueblos Indígenas Tagaeri y Taromenani (Ecuador), May 10, 2006.
[70] Corte IDH, *Asunto respecto a dos niñas del pueblo indígena Taromenane en aislamiento voluntario, medidas provisionales respecto de Ecuador*. Resolution from March 31, 2014.
[71] CIDH, Report No. 96/14, Petition 422-06. Admissibility. *Pueblos Indígenas en aislamiento Tagaeri y Taromenan*i. Ecuador. November 6, 2014.
[72] Concerning the situation of indigenous peoples in isolation: Rodolfo Stavenhagen. *Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, Misión a Ecuador*. A/HRC/4/32/Add.2. (2006), p. 2. S. James Anaya. *Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas*, A/HRC/9/9 (2008), pars. 18-43 y James Anaya, "*Ecuador: experto de la ONU pide el fin de la violencia entre indígenas Tagaeri-Taromenane y Waorani*", Communication from May 16, 2013.
[73] One strategy for protection was also included in the *Programa de las Naciones Unidas para la Conservación y el Manejo Sostenible del Patrimonio Natural y Cultural de la Reserva de Biosfera Yasuní*, executed in conjunction with PNUD, FAO, UNESCO, UNIFEM, OMT y UN-Habitat. I should also mention the publication, bu the ACNUDH, in cooperation with the AECID, of the *Directrices de Protección para los Pueblos Indígenas en Aislamiento y en Contacto Inicial de la Región Amazónica, el Gran Chaco, y la Región Oriental de Paraguay.* (2012)
[74] Special Rapporteur for the United Nations on the situation of human rights and fundamental liberties of the indigenous peoples, Prof. James Anaya, "*Ecuador: experto de la ONU pide el fin de la violencia entre indígenas Tagaeri-Taromenane y Waorani*", Communication from May 16, 2013.
[75] ACNUDH, in cooperation with the AECID. *Directrices de Protección para los Pueblos Indígenas en Aislamiento y en Contacto Inicial de la Región Amazónica, el Gran Chaco, y la Región Oriental de Paraguay* (2012), par 71. The underlined part is my own.
[76] CIDH. *Pueblos Indígenas en Aislamiento Voluntario y Contacto Inicial en las Américas: Recomendaciones para el pleno respeto a sus derechos humanos.* OEA/Ser.L/V/II.Doc.47/13 (2013)
[77] Massimo De Marchi. "Presentación: un recorrido entre escalas cartográficas y geográficas". *Zona Untouchable Tagaeri Taromenane y Expansión de las Fronteras Hidrocarburíficas. Miradas a diferentes escalas geográficas*. Cicame - Funcación A. Labaka (2015), p.13.
[78] The untouchable zone, the buffer zone, the territory of Waorani nationality, the Yasuní biosphere reserve, and the Yasuní National Park, each enjoy a different level of legal protection.
[79] Paola Maldonado and Braulio Hidalgo, from the collection "Geografía Crítica: geografiando para la resistencia" have created maps registering incidents with indigenous peoples in isolation in the Waorani territory and in the Yasuní National Park. The maps clearly show the territorial complexity of the Waorani

territory. The maps are available at: https://geografiacriticaecuador.org/2016/02/26/mapa-de-la-tension-en-torno-al-territorio-waorani/

[80] The IACHR itself has recognized that "en Ecuador, según un mapa del Ministerio de Recursos Naturales No Renovables, el Bloque 31 se encontraría parcialmente sobrepuesto a la Zona Untouchable Tagaeri Taromenane, mientras que los Bloques 16 y 17 llegarían hasta la frontera de la zona untouchable, creando una especie de cerco, e incluso se sobrepondrían a la zona de amortiguamiento." CIDH. *Pueblos Indígenas en Aislamiento Voluntario y Contacto Inicial en las Américas: Recomendaciones para el pleno respeto a sus derechos humanos.* OEA/Ser.L/V/II.Doc.47/13 (2013)

[81] Antony Duff. *Sobre el castigo. Por una justicia penal que hable el lenguaje de la comunidad.* Siglo veintiuno editores. Buenos Aires (2015), p. 28.

[82] In such terms Anthony described the situation in which the application of the punishment is questionable. Duff, cited by Roberto Gargarella, in: *Castigar al Prójimo. Por una refundación democrática del derecho penal.* Siglo veintiuno editores (2016) p. 134.

[83] Miguel Ángel Cabodevilla. El exterminio de los pueblos ocultos. Cicame (2009), p. 36.

[84] Ibid.

[85] Antony Duff. *Sobre el castigo. Por una justicia penal que hable el lenguaje de la comunidad.* Siglo veintiuno editores. Buenos Aires (2015), p. 35.

[86] Roberto Gargarella*. Castigar al Prójimo. Por una refundación democrática del derecho penal.* Siglo veintiuno editores (2016) p. 54.

[87] In all, intervention by anthropological investigators has been applied. It would be interesting to explore other forms of applying intercultural justice. In Argentina valuable experiences of the application of intercultural jury exists. One could also study the way in which the criminal disposition has been applied in Peru on the error of culturally conditioned understanding.

[88] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* (2009), p. 24.

[89] Jennifer Balint, Julie Evans, Nesam McMillan. "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach". *Int J Transit Justice* 2014; 8 (2): 194-216.

[90] Courtney Jung, *Canada and the Legacy of the Indian Residential Schools: transitional justice for indigenous people in a non- transitional society* (2009). Aboriginal Policy Research Consortium International (APRCi). Paper 295, p. 11.

[91] On the experience of Peru and Guatemala, see: Rubio-Marín, Ruth, Claudia Paz y Paz Bailey, y Julie Guillerot. "Indigenous Peoples and Claims for Reparation: Tentative Steps in Peru and Guatemala". En: Paige Arthur (Ed.). *Identities in Transition: Challenges for Transitional Justice in Divided Societies.* Cambridge: Cambridge University Press, 2010.

[92] On the experience in Colombia, see: Rodríguez-Garavito, César, and Yukyan Lam. *Etnorreparaciones: la justicia colectiva étnica y la reparación a los pueblos indígenas y comunidades afrodescendientes en Colombia.* Bogotá: Dejusticia, 2011.

[93] Jennifer Balint, Julie Evans, Nesam McMillan. "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach". *Int J Transit Justice* 2014; 8 (2): 194-216.

[94] From its first contentious case, the Court interpreted that the guarantee obligation for rights includes prevention, investigation, sanction, and reparation for the offense. And by sanction the Court seems to only admit the use of the criminal apparatus of the State, remaining obsessed with the deprivation of liberty of the involved parties.

[95] Leonardo Filippini, "Reconocimiento y justicia penal en el caso 'Gelman'." En *Anuario de Derechos Humanos*, Santiago de Chile (2012)