FOURTH WORLD JOURNAL

CENTER FOR WORLD INDIGENOUS STUDIES SUMMER 2020 VOLUME 20 NUMBER 1

THE HIGHLIGHTS

By Aranka Rohingya National Organization (ARNO)

IN THIS ISSUE

ON THE COVER

Photo of Yezidi children in Ezidikhan, credit Ezidikhan government

The Fourth World Journal is published twice yearly by DayKeeper Press as a Journal of the Center for World Indigenous Studies.

ISSN: 1090-5251

EDITORS

DAYKEEPER PRESS
Center for World Indigenous Studies
PMB 214, 1001 Cooper PT RD SW 140
Olympia, Washington 98502, U.S.A.

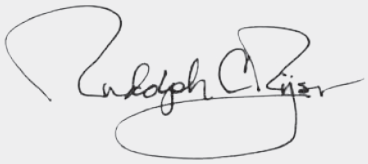
Other licensing agents:
EBSCO PUBLISHING, Inc. Ipswich, Massachusetts, USA GALE GROUP, Inc. Farmington Hills, Michigan, USA INFORMIT, RMIT PUBLISH, Ltd. Melbourne, AUS

LUKANKA

Lukanka is a Miskito word for "thoughts"

FWJ V20 N1 – SUMMER 2020

RUDOLPH C. RŸSER
Editor in Chief
Fourth World Journal



At this writing, the world is flooded by the 2020 COVID-19 Pandemic disrupting lives, forcing a reorganization of social, economic, political, and cultural practices. Globalization was thought by entrepreneurs and settled corporations to be a great boon to the accumulation of wealth and connecting enterprises for mutual advantage. With the breakup of service and product chains, economies are quickly falling apart. Fourth World nations worldwide are now experiencing enormous pressure from corporations and communities, turning their attention to exploit resources inside Fourth World territories. This trend is exposing peoples to COVID-19 and inundates and destroys forests, mountains for mining, and spoiling waterways with new pollution. Dramatic changes are afoot as we begin the 21st century marked by the global COVID-19 pandemic promising to wreak havoc on the world's most vulnerable for months into 2022. The global economy is in free fall, breaking down structures created since the 1980s' move toward globalization. Social unrest in countries around the world reflects the failures of states' governments to serve the public interest, ensure the common defense and maintenance of society under common law. Many states have, in their fearful state, reached out to autocrats and dictators to replace popular decision-making and the promotion of human and civil rights. Indeed, this is the opening of the 21st century.

Are we beginning the 21st century in 2020? I hear you cry! Yes! History reflects how great events affecting the world's peoples bring profound change.

Human society is frequently subjected to physical, social, psychological, and spiritual stress. When it is so stressed, the event that gave rise to the stress can fundamentally shift the society's trajectory. Fourth World nations throughout the world have too frequently known these "ground shifting" stresses that cause cultural norms to be abandoned and replaced by new norms that seem best suited to a world that has fundamentally changed. The agricultural system of the peoples located in and around what is now called Lake Pátzcuaro dramatically shifted generations ago before Spain invaded. A mountain exploded as volcanoes do and caused two tremendously momentous changes in human society: The peoples known as Otomi and the peoples known as Uacusecha joined, as they say, the "Sun and the Moon" to form the Purépecha. This nation

remains influential in Michoacán, Mexico, to this day. The second significant change was the shift of peoples in what is now Michoacán to a hillside system of agriculture that proved enormously successful.

When shocks to the social and cultural fabric of societies rip away the conventional wisdom, the opening is made for profound change. That is the time we live in now. What happens in the years to come must rely on recapturing the truth, confidence, and imagination. The Fourth World began that task, and the rest of the world must now join in.

Our splendid authors in this issue of the Fourth World Journal masterfully point to recapturing the truth with confidence and imagination. They await your attention!

In Russian Federation: Indigenous Peoples and Land Rights, **Ms. Liubov Suliandziga and Rodion Sulyandziga** compare the expanded rights of indigenous peoples across the globe to the once optimistic beginnings of indigenous peoples' policies in the Russian Federation that eroded into a path of division. The authors raise fundamental questions about current Russian policies toward the more than 189 indigenous peoples. The problems emerge from the Russian government's practices—in particular Russian exploitation of petroleum and mining regions of indigenous territories. Ms. Liubov Suliandziga is completing her studies at Kyushu University in Japan, having previously graduated from Moscow State Linguistic University as a specialist in international relations and social-political studies. She had been awarded with two Master Degrees in European Studies from Leuven University in Belgium and Comparative Studies and Administration in Asia from Kyushu University. Mr. Sulyandziga is a native of the Udege (Forest People) located in Eastern Siberia of the Russian Federation. He is the Director of the Center for Support of Indigenous Peoples of the North, an organization the Russian government has demanded close down and liquidate.

Moreover, he is an acting member of the United Nations Expert Mechanism on the rights of indigenous peoples. The authors bring concrete insights into the experience of indigenous peoples in the Russian Federation, revealing continuing Russian hostilities threatening the environment and the peoples' survival. Their article has been translated into the Spanish language and is therefore made available for Spanish speaking scholars.

Mr. Leonard Mukosi undertakes, in his article *Odawa Cultural Practices to Treat Substance Addictions: A Tour of the Healing to Wellness Court* how the Odawa employs recovery from addiction strategies by integrating cultural practices into the criminal justice system. The author provides a close-up examination of the Odawa Healing and Wellness Court (Waabshki-Miigwan) that sets aside the punitive punishments of conventional legal systems outside the Odawa society. Mr. Mukosi is an attorney with direct experience with the Waabshki-Miigwan system and considers it worthy of being incorporated into "Western-European-based biomedical practices" for the better treatment of American Indians. The author discusses how the criminal justice system has evolved in some situations since the 1980s to accommodate a "drug court" model that leans toward treatment instead of punishment. His discussion of the Waabshki Migwan Drug Court Program is compelling and well-reasoned and descriptive in a way that strengthens his presenta-

tion. Mukosi's essay is a well-written exploration of a subject so little explored from a legal and health perspective.

In their detailed documentation in *Human Rights Law and Fourth World Peoples in Asia: Catalysts for Change*, **Dr. Narissa Ramsundar** of Canterbury Christ Church University School of Law in the United Kingdom, **Regina Paulose** an International Criminal Law Attorney and Executive Director of The Common Good Foundation, Inc. in the United States; and **Ms. Tabitha Nice** deliver informative and accessible narrative on the application of the International Covenant on Economic, Social and Cultural Rights to five indigenous peoples.

The research team contributes remarkably incisive documentation and analysis with recommendations for remediation of state violations of the International Covenant on Economic, Social and Cultural Rights [1966] (ICESCR). The authors test whether persons representing the views of five Fourth World nations believe that they should enjoy the rights listed in the UN Declaration on the Rights of Indigenous Peoples (2007). However, four of these representatives concluded that none of the UNDRIP provisions were implemented by the respective state within which their people reside. Then the article turns to test against a matrix for the Covenant provisions whether the relevant state has complied with the Sentinelese [India], Tibetans [PR China], Uyghurs [PR China] Kachin [Burma, Thailand], and Rohingya [Burma]. The study is revealing of the extent to which compliance by states to international law (ICESCR) along with compliance with provisions of an international declaration, directly and indirectly, affect the status and rights of these Fourth World nations.

I have the pleasure of having worked with two wonderful scholars **Ms. Amelia AM Marchand and Deborah Parker**, who hail respectively from the Colville Confederated Tribes and the Tulalip Tribes—two Fourth World nations located in the northwest part of the United States. The article, *Cultural Genocide: Destroying Fourth World People* emerged from a joint presentation by the three of us during a webinar for the Washington State Bar Association World Peace through Law Section on 3 April 2020. The article asserts that "genocide" as a concept originated in the mind and research of Raphael Lemkin in the form of the effects of a dominating colonial power "destroying a people in whole or in part." This piece emphasizes the cultural destruction of a people that may not result in physical destruction, but "elimination nevertheless." We point out how Lemkin's 1920s-30s research on colonization resulted in his understanding of the word "genocide" as "the destruction of a people's culture." This theme is carried forward by the authors by discussing Lemkin's original intent when he sat with United Nations attorney's after the Holocaust in 1945 and the clear difference between the United Nations application of the term "genocide" and Lemkin's original intent. Cultural genocide is a controversial concept mainly since it differs from the definition of genocide associated with the Holocaust that dominates the discourse on the subject.

In his revealing essay *American Indian Male Maturation*, **Dr. Lloyd L. Lee** stands firmly in Diné culture and is an Associate Professor at the University of New Mexico. Growing into a mature person with a strong identity grounded in the purpose of life is, according to Dr. Lee, foundational to success in academic achievement in higher ed-

ucation and one's life. That American Indian men are underrepresented in academic institutions draws the author to explore the factors in identity, personal responsibilities foundational to national and cultural connections and Spirituality. He does this rooted in his cultural environment of the Diné. A young man's passage by a ceremony at puberty is regarded by Dr. Lee as an important to the whole range of factors giving meaning to the person. While proceeding from the perspective of Diné, the author demonstrates a full understanding of how the concepts he discussed extend into the realms of other Fourth World nations and their young men.

I express my sincere appreciation to the contributors to this issue of the Fourth World Journal. Their insights and their revelations can only constructively contribute to the change we are experiencing in 2020.

Biodiversity Wars

Coexistence or Biocultural Collapse in the 21st. Century

By Dr. Rudolph Rÿser

Dr. Rÿser discuss at length the need for a renewed effort to identify and advance an analysis and proposals for new mechanisms to bridge the economic, social, political and cultural gap between Fourth World nations and the world's 203 states.

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PEER REVIEWED

Russian Federation: Indigenous Peoples and Land Rights

By Liubov Suliandziga and Rodion Sulyandziga

"Indigenous land – its mountains, rocks, rivers, and specific places – may hold religious and ceremonial significance – comparable to the significance that the great religions place in their sacred places in Jerusalem or Mecca." (Downing et al., 2002, p. 9)

ABSTRACT

Within the course of the past decades, many achievements have been made with reference to indigenous rights standards, primarily through indigenous engagement and dedication within global society. After 50 years of active participation in the global arena, indigenous rights movements continue to gain momentum transforming into one of "the most visible civil society grouping across the UN" (Morgan, 2011, p.2). As a result of adoption of international standards and guidelines in addition to the establishment of institutions that specifically target the concerns of indigenous people, today indigenous peoples are more mobilized than any other time. With the notable exception (among the Arctic states) of the Russian Federation where despite a rather promising beginning of professional indigenous activism in the early 2000s, Russian indigenous groups saw even further division — yet more separate paths in contrast to international indigenous development (Eckert, 2012). While the protection of indigenous peoples' rights and interests is becoming an important global goal and the essential sphere of international cooperation, domestically there are still some fundamental imbalances in power, rights and inclusion of indigenous peoples in decision-making process.

This article is an attempt to raise fundamental questions about the nature of contemporary Russian policy towards its indigenous population and shed light upon the various characteristics that have come to define Russia's response to indigenous problematics.

Keywords: Indigenous peoples, indigenous rights, Russian Federation, Arctic, land rights, disempowerment, RAIPON

In 2011, the Russian mining company "Yuzhnaya" started its activities near Kazas settlement in Kemerovo region in Southwest Siberia – one of the major coal districts of the Russian Federation (see Figure 1 and Figure 2). Kazas, the territory of traditional residence of Russia's indigenous peoples - the Shors, has been subject to decades of environmental destruction and fatal effects of the coal industry (IWGIA et al., 2017). At the end of 2012, "Yuzhnaya" started buying households in Kazas to expand its industrial activities. By 2013, only five families refused to sell their houses and leave the ancestral lands. On 2 November 2013, at the meeting with the villagers, the CEO of the company threatened to set on fire all the remaining houses if the families refuse

to sell them to the company. The first house was burnt a week later. At the end of December, the second one was set on fire. In January 2014 two houses burnt down. The last one was struck in March 2014 (Sulyandziga, 2016).

Figure 1: Yuzhnaya Coal Mine next to Kazas (Photo by Anti-Discrimination Centre)

In 2012, Sergei Nikiforov, the leader of the Amur Evenki people, was sentenced to four years in prison for allegedly extorting money from the "Petropavlovsk" gold mining company after he led a protest movement against company's attempts to take over native reindeer pastures and hunting grounds (IWGIA et al., 2017).

In 2013, 1 million tons of oil was discovered on the bottom of Lake Imlor in Khanty-Mansi Autonomous Okrug, Russia's leading oil-producing region. The same year, Surgutneftegaz company obtained a license to explore oil and gas deposits under the lake which happen to be sacred for the indigenous Khanty people. With their land under threat and alternative job prospects, the majority of Khanty people has left the ancestral land. In 2015, Sergei Kechimov, a Khanty shaman, the only person left living near the lake, got accused of uttering death threats to a worker of Surgutneftegas oil company and sentenced to imprisonment (Stamatopoulou, 2017; Lerner et al., 2017).

Figure 2: Russian Exploitation of Indigenous Peoples

Just a couple of months before the launch of criminal investigation against Kechimov, the 113th Session of UN Human Rights Committee was attended by an unprecedented number of representatives of the Russian Federation, "presenting their shadow reports denouncing a wide range of human rights violations" (IWGIA, 2015). A couple of months after Kechimov's hearings in the court, the Russian Federation also attended the Third Committee of UN General Assembly, where it was stated that the "Russian Federation has always supported and continue to support indigenous peoples in full and effective implementation of their rights.... We are confident that the main instrument for the practical implementation of the UNDRIP provisions and the outcome document of the World Conference on Indigenous Peoples should be the goodwill of states, coupled with the daily hard work to support the indigenous population and protect their rights and freedoms, as it is done in Russia." (Statement by the

representative of the Russian Federation/Agenda Item 70 "Indigenous peoples rights" of the Third Committee of UN General Assembly, 2015). A closer look at Russian indigenous legislation, particularly that on land rights, would help to fall the described cases into place.[1]

Legal Disempowerment

Since the beginning of the 2000s, with the increasing presence of resource extraction activities on indigenous homelands in Russia (see Figure 3), discussions of management of nature use, industrial development of indigenous lands in the context of ethnic and environmental problems, the legacy of state development policies, indigenous participation in the management of their lands, and resources have been on the rise (Fondahl and Sirina, 2006; Xanthaki, 2004; O'Faircheallaigh, 2013; Wilson, 2003; Tulaeva and Tysiachniouk, 2017).

Figure 3: Yuzhnaya Coal Mine next to Kazas (Photo by Anti-Discrimination Centre)

[1] Among indigenous claims, one of the most significant presuppositions held by indigenous peoples is that their inalienable rights to lands and resources override the subsequent claims by dominant societies (Rogers 2000). In fact, land issues have always been fundamental in indigenous struggles with the restitution of indigenous lands seen as an act of overcoming historical injustice. This assertion is grounded in the fact that indigenous livelihoods are inseparable from the lands and resources, which form a basis for traditional activities such as hunting, fishing, gathering, and nomadism, as well as religious, spiritual, and ceremonial practices (Minde, 2008).
As James Anaya (2004, p. 396) states, as follows: "They are indigenous because their ancestral roots are embedded in the lands much more deeply than others. They are peoples because they represent distinct communities and have culture and identity that link them with their nations of the ancestral past."
In other words, many indigenous communities see themselves as part of the land they have resided on for centuries. Natural resources, in turn, are not only the sources of livelihoods for many indigenous peoples but also a source of their identity and a means to preserve their traditions and customs. The loss of land would thus mean the threat to their entire culture. Henceforth, securing access to these territories and natural resources and legal recognition of land tenure rights are an essential foundation to empower indigenous peoples with civil, social, cultural, political, and economic rights (Alcorn, 2013).
The indigenous peoples' strong attachment to the environment and surrounding ecosystems have resulted in complex and distinct tenurial arrangements, that are often at odds with the formal legal management regimes of the state. Whereas indigenous peoples have not operated under the concept of private land ownership (Berg-Nordlie, 2015), which means that indigenous land was instead governed by customary tenure based on the principles of long-term and uninterrupted land use, inheritance and oral agreements with neighbors (Kasten, 2005), governments viewed indigenous lands as terra nullius ("nobody's land") or previously ownerless, and, therefore, open for utilization by newcomers. Particularly, albeit indigenous peoples constitute one of the most vulnerable populations on earth as a result of centuries of marginalization and discrimination, their territories often contain abundant natural resources. As a result, indigenous territories become objects for land acquisition for agriculture, biodiversity conservation, appropriation by outside interests, and other development initiatives, both private and governmental ones (Alcorn, 2013). From the perspective of the industries in particular these lands are frequently regarded as a source of income generation "rather than as heritage to be cherished" (Glennie, 2014). Indigenous peoples, in turn, have to live adjacent to extractive facilities that generate enormous wealth for their owners and do not stand to gain economically or socially from the projects, neither collectively nor as individuals (O'Faircheallaigh, 2013). The compensation, that is sometimes provided by companies cannot cover the deterioration inflicted to the land, which frequently becomes unfit for indigenous practices (Stamatopoulou, 2017).

Historically, the question of indigenous land ownership has been complex. Indigenous territory has never been regarded as a form of private property by aboriginal population; instead, indigenous land was used and managed collectively (Kasten, 2005). With attention to Russia, the approach to land has been developed differently from other Arctic states, such as Canada or USA, where a legally-binding contractual evidence supporting indigenous peoples' rights to land exists. Contrary, Russian indigenous peoples had not been involved in legal relationships with the state on the matter of the land ownership; they had neither sold their lands, nor received any compensations or delegated the right to supervise their lands to a third party. Since there were never any treaties signed between indigenous peoples and the Russian Empire, the best outcome indigenous groups can hope for was a long-term lease, i.e. "the title to land is not even on the table" (Eckert et al., 2012, p.45). After the Russian revolution, all land was considered the state property. The Soviet Union, therefore, simply declared indigenous territories the state lands and managed them at its own discretion.[2] Henceforth, Russia's indigenous groups' claims are much more modest than those of indigenous communities in the West, focusing on the right to preserve a traditional lifestyle and some type of limited property rights to land and resources (ibid.).

First and foremost, the Russian legal framework does not employ a concept of "indigenous peoples". Instead, it proposes its own definition of "indigenous small-numbered people". These two categories are entitled to dramatically different conditions of peoples' legal imaging and protection. Definition "indigenous small-numbered people" is notably different from the UN and other international instruments' definitions which contain no reference to size and population of the given community, but instead emphasizes historical aspects such as discriminative experiences, and expression of indigenous self-identification (Rohr, 2014). Developed concept of "small-numbered peoples" points up the artificial legal category with rather "arbitrary demographic limit" that has been introduced by the state (Overland, 2005, p. 108). Such an exclusive term limits the recognition of indigenous rights to the smallest possible subset of ethnic groups and excludes peoples with larger populations that

[2] Although the Soviet Union was officially built on an ethnic principle and cemented on the concept of "nationalities," already in the second half of the 1930s a moderate ethnic discourse and an earlier toleration of the Russian state for the quasi-independence of indigenous societies was replaced with forced integration. The state priority was to assist the indigenous peoples into becoming modern Soviet nations, liquidate economic backwardness of aboriginal communities as well as economic and cultural inequality and unite all nations under the socialist state. Developed slogan "ethnic in form, socialist in content" implied eventual merge of all nationalities into a single Soviet nation and "brotherly family," that offered an alternative to "the world's prior imperial, colonial, caste-based, universalist, and melting-pot ideologies" (Moore, 2001, p.27). This Soviet identity meant to prevail over a narrower ethnic one (Kuzio, 2002). Official Soviet narratives celebrated ethnic differences through aggressive promotion of colorful folkloristic aspects of culture that emphasized the existing unity and friendship of the peoples of the USSR but—at the same time—concealed any forms of cultural difference that would threaten the state dominant discourse (The International Bank for Reconstruction and Development/ The World Bank, 2014). Assimilationist policies were presented as a nations-bonding based on voluntary, equality and brotherhood. Yet, while the USSR was conceived as a union of distinct nations, in reality it represented a multi-layered hierarchy with Russian ethnicity at the top (ibid). Within this discourse, Russians were attributed the status of the "elder brother" and the "leading nation" of the Soviet multi-national state. For indigenous peoples of Russia, the period from the 1940s to 1980s came to be referred to as the dark years of indigenous history (Vakhtin, 1992).

have expressed their self-identification as indigenous (Nikolaeva, 2017). According to Miller, "these sorts of bureaucratic circumscriptions of indigeneity are deployed by the states to control, manage, and contain indigenous populations in designated areas, minimizing the threat posed by their assertions of difference, reducing a number of beneficiaries, and necessarily causing a conflict between recognized indigenous and would-be but not yet recognized groups" (2003, p. 209). In this sense, the unambiguous and categorical recognition of indigeneity ignores the necessary complexities of indigenous experiences, consequently benefitting the interests of the state authorities, marginalizing and disregarding indigenous peoples' rights, their potential grievances and struggles (Nikolaeva, 2017).

Nevertheless, experts note that Russian legislation includes rather strong state obligations to protect indigenous peoples' rights. The Russian Federation adopted three national framework laws establishing the framework of cultural, territorial and political rights of indigenous communities (Federal Law on the Guarantees of the Rights of the Indigenous Small-Numbered Peoples of the Russian Federation adopted in 1999, Federal Law on General Principles of Organization of Obshchina of Small-Numbered Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation adopted in 2000, Federal Law on Territories of Traditional Nature Use of the Small-Numbered Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation" adopted in 2001). Russian Association of Small-Numbered Indigenous peoples of the North established in 1990 as a non-governmental umbrella organization served a critical role in developing above-mentioned laws. The solution to indigenous struggles was once seen in the hands of RAIPON as a representative of Russia's indigenous groups; organization was hoped to lead indigenous self-government (Monique Lerner et al., 2017; Semenova, 2007). In the 1990s and beginning of 2000s RAIPON assisted indigenous communities against industrial exploitation and the state apparatus and was perceived as "a political union to lead and guide the national movement of indigenous peoples and to transform political decisions into practical solutions" (ibid, p. 17). Already in 2009, RAIPON became the target of increasingly closer watch of the state (Berg-Nordlie, 2015). In 2012, Russian Ministry of Justice decided to stop all RAIPON activities. A year later, however, indigenous representative body was allowed to reopen after strong international pressure. In 2013, Gregory Ledkov, federal government's favored candidate, member of Putin's United Russia Party and the State Duma became RAIPON president (ibid.).

Originally, national framework laws guaranteed indigenous peoples' rights to use the land; to participate in the implementation of control over land use, and in decisions about protecting their traditional lands and way of life, economy, and activities through conducting ecological and ethnological expertise; and to be compensated for damages to their traditional lands resulting from industrial and economic activity (On Guarantees, Art.8). Although these laws have offered the basis for indigenous population to make claims to preferential use lands rights, recent years have been marked by intense efforts to legally disem-

power and exclude indigenous peoples from the management of their ancestral territories. Recent amendments to all these laws have made virtually impossible full implementation of indigenous peoples' collective rights to land and resources (Zaikov, Tamitskiy and Zadorin, 2017). Even already modest provisions that were included in these legislations, today lost their power.

Attempts to create a legal framework for indigenous peoples' land rights date back to the early 1990s when several Russian regions elaborated their own indigenous land rights regimes. The earliest attempt was the introduction of "patrimonial lands" adopted in 1992 in Khanty-Mansi Autonomous Okrug (On the Statutes of Primordial Lands of Khanty-Mansi Autonomous Okrug, 1992).[3] Later, in 2001, the state initiated the creation of the so-called "Territories of Traditional Nature Use" (TTNU) designed to protect indigenous land from industrial encroachment, exclude these lands from the real estate trade, and provide indigenous population with secure plots of land "in perpetuity" assigned to traditional economic sectors - reindeer herding, fishing, marine animal hunting, harvesting, etc. - that provide the main employment and main source of income for indigenous communities (Turaev, 1998; Colchester, n.d.; Miggelbrink, Habeck and Koch, 2016). Under the legislation, companies which pursue industrial activity within the officially designated TTNU should reach an agreement with the indigenous population about land use and are obliged to compensate for damaging traditional lands. The law also provides indigenous peoples the right to participate in assessments of sociocultural impact on the indigenous communities by extractive companies (Article 6.8).

In 2001, at the same time when the Law on TTNU was adopted, the Russian Federation enacted the Land Code, which ruled out any form of land tenure other than rented and private property: *"Citizens cannot be granted permanent (indefinite) use [rights] over plots of land. Judicial persons, except those named under item 1 of this provision are obliged to have their right to permanent (indefinite) use of land plots transferred into the right to rent the given plots or to obtain the plots as property"* (Article 20). This effectively means that indigenous lands can become the private or long-term leasehold property of industrial companies (Vinding, 2002). Given that nomadic indigenous communities typically migrate with their herd throughout the year in search of pastures following the cycle of reindeer herding and, hence, use substantial areas, up to several thousand hectares (300 hectares for 1 reindeer) (Etnic.ru, n.d.), neither purchase nor rent are financially viable options for indigenous groups (Basov, 2018).

The hierarchy of Russian legislation means that the Land Code – which does not recognize indigenous traditional resource or land rights – will override the indigenous rights legislation. Thus, in practice, if a traditional resource use area is threatened by an oil, gas or mining pro-

[3] Around 500 TTNU have been designated in 1992 in Khanty-Mansi Autonomous Okrug. Yet, although many territories have been marked for traditional natural resources use of indigenous groups, in recent years, 56% of these territories were withdrawn for extraction of mineral resources, with hundreds of extraction licenses issued to dozens of companies (Alferova, 2006).

ject, no real protection is offered by regulations (Murashko 2008; Wilson and Swiderska, 2019). Furthermore, in 2007 the word "in perpetuity" disappeared from the TTNU Law (Gilberthorpe and Hilson, 2014).[4] In 2014, the Land Code stipulated that lands in perpetuity can be granted to indigenous peoples only for the construction of building or other facilities needed for development and conservation of indigenous traditional lifestyle for the period of no more than ten years. The provision in Land Code that had explicitly stated that in places of indigenous traditional residence, authorities decide on location of industrial objects (i.e.: infrastructure, extraction facilities etc.), based on the results of information gathered from indigenous communities was removed at all (CESCR, 2017).

Another problem is that almost all lands that might be candidates for TTNU status are either partly or wholly situated on federal land (70% of Russia territory is categorized as forest fund, which is also federal property); therefore, local and regional organs do not have the authority to transfer control over such lands to indigenous peoples and determine the boundaries of all TTNU. Only the federal government has the authority to do so (Eckert et al., 2012). As a result, since the adoption of the law on TTNU by the State Duma in 2001, no TTNU has been designated on the federal level at all. And while regional authorities have, however, created over 500 TTNU, none of them has been confirmed by the federal government. The existing TTNU, therefore, have "no guaranteed legal status and no effective protection from being dissolved or downsized, as often happens." (CESCR, 2017, p.5). In effect, due to the government's failure to confirm existing TTNU, their status is open to changes at any time.[5]

The situation aggravated furthermore in 2013, when the federal law "On amendments to the federal law 'On specially protected nature areas' (Articles 5 and 6) was approved without public discussion, despite the positions from lawyers and ecologists One of the most significant pitfalls was the downgrading of the TTNU status from 'Specially Protected Conservation Areas' to 'Specially Protected Areas' (CESCR, 2017).[6] As a result, the word "conservation" (alluded to "nature") was removed from the TTNU definition. While "specially protected conservation areas" is a term stipulated in environmental legislation of the Russian Federation which creates the specific safeguards for indigenous participation and consultation rights, the designation "specially protected areas"

[4] All these contradictions in laws make it hard to reveal whether indigenous peoples pay for the use of land (IP representatives contend that they do pay such fees, and even if these are small, they nonetheless impose an economic burden on indigenous communities; In Sakha, for instance, they need to register their claim to use the land for traditional natural resource use, and bureaucracy around registration is complex. In order to register an area as a TTNU, an applicant needs to conduct a technical land assessment that costs $570 per hectare. Since commune cannot match the amount required, it leads to the failure to register the lands. (Gilberthorpe and Hilson, 2014).

[5] On 15 January 2015, the Court of Appeals rejected an appeal by the administration of Oleneksky district of the Sakha Republic challenging the legality of a license issued by the regional resource authority, Yakutnedra, for the exploration and extraction of mineral resources in TTNU that had been established by the local authorities in Oleneksky district. The court rejected the appeal because the boundaries of the specified TTNU had not been determined by the federal government. As noted above, this is true for all currently existing TTNU, such that they are all unprotected from similar encroachments.

[6] Two acts passed in 2014 significantly weakened the law on TTNU, these being Federal Law 171-FZ dated 23.06.2014 and 499-FZ, dated 31.12.2014.

does not exist in Russian law and, as such, is not identified in state legislation. As a result, now, allocation of land and projects for economic activity (construction of roads, pipelines and industrial facilities) are no longer subject for ecological assessment and evaluation of negative impacts on indigenous lives by industrial projects is no longer required (Miggelbrink, Habeck and Koch, 2016).

The amendment also changed the rules for the removal of land plots from TTNU. Originally, in the event of indigenous peoples' removal from their ancestral land, the state was obligated to provide indigenous communities with equivalent plot of territory and natural objects in exchange. After the revision, expression 'Compensation for losses in case of alienation of plots of land for state or municipal needs' disappeared from the entire land legislation.

When the Law on *obshchinas*[7] was introduced in 2001, many indigenous peoples organized into communes to pursue their traditional activities (Colchester, n.d.). The original intent behind the introduction of the *obshchina* concept was multifaceted: for one thing, *obshchinas* were supposed to carry out functions of local self-administration, participate in decision-making processes of the interests of indigenous peoples, provide services in the domain of culture and education and, at the same time, function as economic cooperatives through which indigenous peoples could pursue their traditional economic activities in a viable and sustainable manner (Rohr, 2014). *Obshchina* was seen as a rightful unit of property management. Initially, indigenous peoples had the right to use *obshchinas* lands in perpetuity and without charge (Miggelbrink, Habeck and Koch, 2016). In 2004 the law was changed; the notion "in perpetuity and without charge" has been revoked and the rent has been introduced. Since then, many communities have lost their rights to the lands granted to them for traditional subsistence practices (Evengard, Larsen and Paasche, 2015; Stamatopoulou, 2017). In many regions, indigenous *obshchinas* are now regarded as competitors by private businesses, especially in the fishing industry, some of which are affiliated with the local administrations and spare no effort to push indigenous communities out of business. Another troublesome aspect of the law is the restriction to pursue 'traditional' types of activity (which are determined by the state and outlined in the List of Forms of Traditional Activity of Indigenous Peoples). They can be terminated if they stop engaging in traditional economic activities (Eckert et al., 2012). In contrast to the initial idea, *obshchina* lands do not provide a comprehensive solution to either indigenous land rights nor environmental protection of indigenous homelands. More importantly, they cannot become self-governing bodies without given an authority over a territory, natural resources and economic independence (Turaev, 2018).

In like manner, the provisions on preferential allocation and free use of various categories of land by indigenous peoples, originally stipulated in the Land, Forest, and Water Codes of the

[7] Obshchina (or obshchinas for plural) is a form of kinship or territory-based community organization of indigenous peoples, usually translated as "community" or "commune" that is modeled after the pre-Soviet form of socio-territorial organizations of traditional economies of most indigenous peoples of the North.

Russian Federation, have been withdrawn. Originally, some provisions of sectoral legislation (e.g., land, forest, and water codes as well as acts on subsoil) stipulated the rights of indigenous peoples for preferential use of resources in areas of their traditional residence. With regard to one of the main economic activities of many indigenous communities, fishing, already in Soviet times, the interest in economically profitable fishing attracted the attention of business. As a result, indigenous communities have been gradually pushed out of the activity. The initial provision that gave a permission to indigenous peoples to preferential use lands for fishing without competition was recognized invalid (Article 39 FZ-166, 2004). Now fishing grounds now belong to people or business who won the quotas to pursue commercial activities (Mamontova, 2012).

In fact, since 2008 all indigenous territories for hunting or fishing have to be distributed through auctions only and there are no exceptions for the indigenous communities inhabiting those territories. Indigenous peoples are obliged to compete in commercial tenders for hunting and fishing grounds with usually more competitive private businesses who lease these lands for long-term tenure (up to forty-nine years). As a result, traditional fishing, reindeer herding and hunting grounds can now be shared with other users and many indigenous communities lost their traditional lands since that time. The above-mentioned amendments have created grounds for endless conflicts and lawsuits where indigenous peoples have to defend their right to pursue traditional activities on their lands. In realities where economic intensives outweighs the importance of indigenous interests, indigenous rights have been entirely ignored. By clearing a way for businesses opportunities, these provisions substantially endanger indigenous access to their sources of subsistence, food, and income, and have been identified as one of the principal obstacles preventing indigenous peoples from enjoying their rights. Needless to say, requiring indigenous peoples to purchase or rent their own ancestral lands clearly violates their most fundamental right to self-determination.

All in all, the period from the 2000s onwards has been referred to as "legal stagnation for indigenous rights" in Russia (Kryazhkov, 2012, p.29; Miggelbrink, Habeck and Koch, 2016). Major organs dealing directly with indigenous peoples in Russia have been liquidated as well. During the 1990s, responsibility for indigenous minority policy shifted rapidly between different State Committees and Ministries, leaving indigenous policy field institutionally "homeless" in the period 2000–2004. In 2001, the Ministry of Federal Affairs, National and Migration Policy was disbanded. In 2004, indigenous policy was handed to the Regional Development Ministry, which was responsible for elaboration of state policy on indigenous peoples and normative relations of socioeconomic development of indigenous groups in regions with indigenous population and also managed ethnic interrelations that for security reasons were much higher on the political agenda (Chyebotaryev et al., 2015). RAIPON and this ministry established relatively good working relations. In 2014, however, the Ministry was dissolved, its functions

were distributed between different Ministries (Berg-Nordlie, 2015) while indigenous policy was transferred to the Ministry of Culture. As it was stipulated by indigenous peoples, this change placed limitations on indigenous affairs, that were now framed within constraints of sponsorship for "singing and dancing", "whereas rights, land and development would be off the table" (IWGIA, 2014a). Martin (2011, p.13) described this approach as a strategy of depoliticizing ethnicity *"through the aggressive promotion of symbolic markers of national identity: folklore, museums, dress, food, costumes."* While specific programs are actively supported by both local and central governments, the measures are limited to cultural events without any rights granted. In other words, indigenous customs and traditions are treated as valuable, yet, they are not identified as sources of rights. Under those circumstances, permitted only to celebrate limited markers of identity, indigenous peoples in Russia have to "incarcerate themselves in a certain "traditional" lifestyle" (Donahoe, 2011, p.413). As such, the Russian state came to promote exclusionary categories of its ethnic diversity to narrowly frame indigenous rights by focusing on state support on traditional cultures while taking the focus away from more substantive discussions regarding the reclamation of indigenous territories, livelihoods, natural resources, and self-government (Corntassel, 2008). In this context, one can observe an enduring continuity of highly restrictive indigenous policy that is limited to cultural rights while indigenous demands for special representation and political rights have little room for maneuver – the suppressive strategy that was employed by the Soviet state and adopted by its successor (Etkind, 2014; Nikolaeva, 2017).[8] Legal stagnation created an organizational void and institutional capture of indigenous agency incapable of developing self-defense mechanisms. As of today, on the federal level, indigenous policy remains poorly institutionalized. Indigenous issues lost the ministerial level, and Federal Agency for Ethnic Affairs is responsible for all indigenous issues at the national level.

Due to the lack of normative and legal mechanisms that provide for indigenous rights' realization, the existing system of Russian domestic legal regulation is full of gaps, inconsistencies and contradictions and has yet to be redeveloped according to current international standards. Legislative decrees and presidential edicts are often left ignored by most regional jurisdictions. In other cases, authorities implement federal laws in a very selective way, especially with respect to natural resources and lands issues. In particular, even at times when indigenous peoples were seemingly backed up by already modest, yet existing, legislation, the state moved the finish line by withdrawing and changing the few laws designed for indigenous protection. Existing norms exist in isolation from each other and, often, fragmentary and sparse on both federal and regional levels. All in all, as Kryazhkov (2012, p.35) stated, "Russian

[8] Certain scholars argue that the demise of USSR has not led to the end of a political system that employed it (Inozemtsev, 2017). In fact, some researchers came to the conclusion that substituting one empire with another, Russian Federation found itself "between the dead empire and the newly emergent one": "a dynastic empire fell, a socialist one followed, and a third is now consolidating its institutions along familiar trajectories" (Spivak et al., 2005, p.830).

legislation concerning indigenous peoples could be characterized as unstable, contradictive, often imitational, only initially developed, and not enough adjusted with international law."

Summary Assessment

According to numerous scholars, recognition of land rights is prerequisite for the effective implementation of indigenous rights. Crucially, land is an integral part of indigenous peoples' self-determination which entails not only rights of autonomy, self-governance and political participation, but also rights to lands and resources and numerous economic, social and cultural rights.

Without land rights and rights over natural resources, the right of self-determination and other rights would be meaningless or merely become "paper" rights as happened in the case of Russia (Corntassel, 2008, p.108). Clear tenure helps to ensure and secure property rights, as well as the right to access natural resources. Land rights are also a basis for claiming benefits. Clear tenure facilitates their allocation and lowers the potential for conflicts over benefits linked to resources. Unclear or insecure tenure in turn has long been known as a factor that impedes proper natural resource management, whereas the conflicts over land are recognized as a barrier to indigenous empowerment.

While the Constitution of the Russian Federation allows for varied forms of land and natural resources ownership (private, state, municipal and otherwise), most of the land and subsoil resources in Russia remain under the state control.[9] Importantly, there is no the same sort of legally binding contractual evidence supporting indigenous peoples' rights to land that there is in the Canadian and US contexts. There were never any treaties signed, and the question of native title to land "is not even on the table" (Eckert et al., 2012, p.45). In other words, whereas indigenous peoples are afforded rights to use the land and its resources, title ownership remains with the state. At most, indigenous peoples participate in guarding the territories, they may use their lands, but they are not allowed to be in full control of the territory.

Federal laws do not grant any special rights that let indigenous peoples participate in the decision-making process concerning the lands and resources. Similarly, there is no regulated system ensuring cooperation, agreements, consultations with indigenous peoples on decisions affecting them and other forms of indigenous participation are not legally secured (Anaya, 2010).

TTNUs served as a guarantee for the future solid self-development of indigenous territories (Turaev, 1998). The original idea behind their creation was that these lands would be mostly off-limits to industrial development (Evengard, Larsen and Paasche, 2015). These lands were meant to be managed, or at a minimum co-managed, by indigenous communities. Importantly, TTNU and obshchinas were created not only to fulfill economic rights of indigenous

[9] 92% of Russian land is publicly owned, either at federal, regional or municipal level (the rest is held by legal entities and individuals) (OECD, 2015). Agricultural, forest, pasture and other land parcels utilized by private entities are primarily leased from the government.

groups by giving them possibility to ensure their traditional economic activities. Their creation reflected the existing link of indigenous culture and the traditional economy; as such, allocation of lands to indigenous groups was crucial to preservation of their unique traditions. In this regard, the TTNU was seen as an "indivisible foundation" of indigenous community aimed at preservation of environment in which that community has been formed. In the same vein, established obshchinas were seen as a sole subject of use (ownership) in TTNU management as an institution of economic autonomy and environmental management (Turaev, 1998). In practice, however, obshchinas have been formalized not as decision-making or land-owning bodies but something more akin to civil society formations instead of indigenous self-governing bodies (Øverland and Blakkisrud, 2006; Berg-Nordlie, 2015).

Neither the creation of TTNU, nor obshchinas was supported by a set of measures for the development of the traditional economy, and mechanisms for the socio-economic development of territories. As a result, the formation of the TTNU and obshchinas are seen mainly as a political action, turning out to be merely products of the era of the democratic "romanticism" of the 1990s.

Some regional regulations provide considerably more opportunities for indigenous participation. However, because of jurisdictional uncertainty and weak regional power vis-à-vis the federal government, the federal government usually overrides regional law in areas of shared jurisdiction – land use, natural resources, and indigenous peoples (Newman, Biddulph and Binnion, 2014). Thus, insufficient regulatory potential, lack of mechanisms to implement the declared rights, jurisdictional vagueness and non-concreteness, and authoritative federal power represent the biggest obstacles for indigenous communities seeking adequate protection (Anaya, 2010; Newman et al., 2014; Gladun and Ivanova, 2017). Exemptions to legal norms can be seen in companies' ignorance of obligations to assess possible negative impacts of projects on the traditional way of life of indigenous peoples or the permission to define, downsize and resize TTNU. Often, these exemptions are claimed to act upon federal approval.

By looking at the legislative system and existing institutions dealing with indigenous issues in the country, the major role of law in indigenous disempowerment becomes apparent. As a result, fragmented governmental systems, instead of providing an opportunity for responsive change, become an instrument for control (Cunneen, 2011).

Skyrocketed demand for natural resources has enabled a rapid advancement of the so-called "resource colonialism" defined as the rhetoric of development that benefits the extractive communities and "understood as economically driven discourses, programs, and policies promoting extractive activity" (Gritsenko, 2016). In this context, indigenous resource-rich lands have become one of the main platforms and the backbone of big business in Russia. In realities where industrial groups and interests

represent a majority in legislative bodies of state power, indigenous empowerment is doomed to failure. And as long as the interests of the indigenous peoples clash with the interests of big business, the government will side with business (Heininen, Sergunin and Yarovoy, 2014). This phenomenon has been referred to as "resource curse " or "ecology of the pipe", that uses "material, financial, and human resources with the purpose of strengthening the ruling elite, because the pipes demand an increasing number of managers, engineers, construction workers, and most of all guards, that are loyal to the regime" (Vladimirova, 2017, p. 301). By conveniently converting "resource curse" into "resource blessing," Kremlin actively promotes and pushes forward big extractive projects to cover growing social inequalities, highly unequal distribution of wealth, low life standards and economic malaise (Charron, 2017). Russia's dependence on the resource-rich regions with more than 55% of federal revenues derived from the use and export of natural materials, has resulted in the curious situation with Russian central regions feeding off a periphery that itself remains largely underdeveloped. On its steady way of becoming the largest oil and gas producer and increasing its production capacity of oil and gas pipelines (located primarily on indigenous lands) coupled with a powerful lobby of extractive industry and business representation in political structures, Russia's authorities have been largely unsuccessful in protecting indigenous rights (Nikolaeva, 2017).

It has been frequently observed that indigenous peoples have captured the world's attention and conscience (Watt-Cloutier, 2019). How does Russia's approach to its indigenous peoples fit in the four decades of what was labeled "the most progressive stage in the history of development of indigenous peoples' rights and freedoms"? Unfortunately, Russia's declarative laws do not translate into progress in its domestic indigenous policy. State and industrial actors do not hesitate to use a variety of instruments to disempower indigenous communities legally, economically and politically. Indigenous peoples are left without powerful counterbalance to dominant players, trapped between misplaced responsibilities of thirsty-for-profit companies and unactionable authorities (Petrov and Francis, 2015). With more companies circling closer and closer around indigenous territories and becoming richer, and government siding with business, indigenous peoples have become outcast on their own lands.

Indigenous empowerment is not a matter-of-course, but political achievement. Perpetual crisis that indigenous peoples found themselves trapped in, does not refer to the crisis of indigenous rights, struggles and determination per se, but points to a perpetual failure of policy reforms. A brief revival of rights-based conversations in the 1990s turned out to be a mere temporary detour.

Current Russia demonstrates the regression of indigenous peoples' rights; promising laws sooner or later were made ineffective, changed or withdrawn. Already modest and fragile progress made after the USSR demise has eroded away. Twenty-eight years after the disintegration of the Soviet Union, it is evident that the Russian Federation is not in a search for a more inclusive

indigenous policy, and what is more, it is neither an aspiration nor a political ideal of the federal government.

What is the future fate of Russia´s indigenous peoples? Some scholars claim that what is going to happen next is in the hands of indigenous peoples themselves, and depends on the path they choose. Is it true? In realities created by the Russian state that not only turns a blind eye to indigenous peoples, but nullifies any progress, indigenous groups are not in the position to lead decision-making processes in the country. Like no other peoples, indigenous communities depended "for their security and prosperity on the skills and good intentions of those who rule them" (Scott, 2009, p.324). The current indigenous policy seemingly aimed at the conservation of indigenous cultures, ignores the actual challenge indigenous peoples face - survival at a sheer physical level- and is doomed to failure. Even if communities have the greatest, and most direct, stakes in preserving their cultures, in Russian realities, they are often run into the kind of ill-will hidden in state strategies which claim to be to the benefit of indigenous peoples. As of today, Russia's approach to indigenous accommodation is characterized by the unrivaled subtlety, unmatched adroitness, or even malice of the state policies.

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This Article may be cited as:

Suliandziga, L. and Sulyandziga, R. (2020) Russian Federation: Indigenous Peoples and Land Rights. *Fourth World Journal*. Vol. 20, N1. pp. 1-19

ABOUT THE AUTHORS

Liubov Suliandziga

Liubov Suliandziga, prior to completing her Ph.D. at Kyushu University, Japan, graduated from Moscow State Linguistic University as a specialist in International Relations and Social-political Studies. She holds two Master Degrees in European Studies from Leuven University, Belgium and Comparative Studies and Administration in Asia from Kyushu University, Japan. She worked as a Research Associate at the Department of Integrated Science for Global Society, Kyushu University. Liubov is currently a member of the Young Arctic leaders in Research and Policy program supported by the Arctic-COAST NSF research coordination network, USA. Her current research interests include indigenous peoples' history and empowerment, indigenous rights and impacts of the extractive industries on indigenous peoples. Liubov has published articles in Polar Science Journal and several edited collections dedicated to issues of indigenous rights in Russia's Arctic.

Rodion Sulyandziga

Rodion Sulyandziga is an Udege ("Forest People"), one of the small-numbered indigenous peoples from the Eastern Siberia community of the Russian Federation. Their total population is 1587. Rodion Sulyandziga is a director of the Center for Support of indigenous peoples of the North, indigenous-led organization aiming to protect the rights of Northern peoples of the Russian Federation. He is an acting member of the United Nations Expert Mechanism on the rights of indigenous peoples. His main research and study are focusing on self-determination and self-governance issues, climate change impacts and sustainable development of Northern communities.

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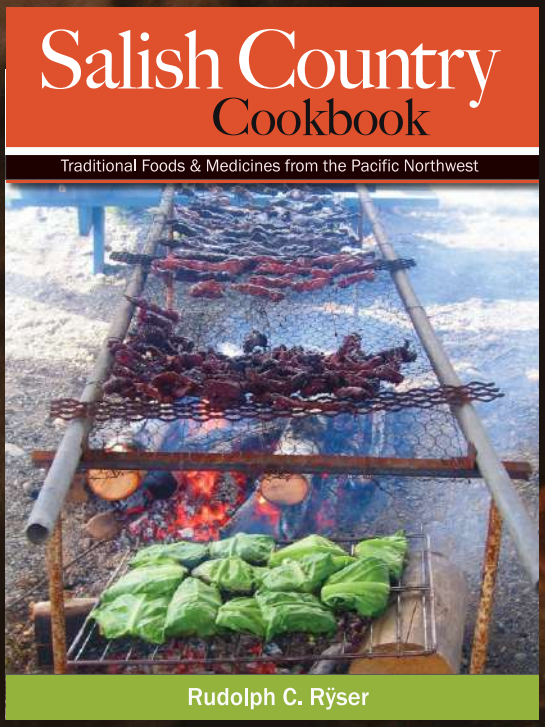

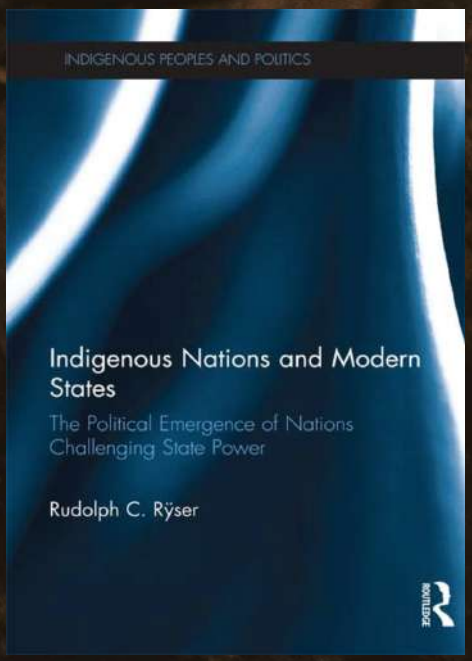

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"La tierra indígena – sus montañas, peñascos, ríos y sitios específicos – puede albergar importancia religiosa y ceremonial – similar a la importancia que las grandes religiones colocan en sus sitios sagrados en Jerusalén o la Meca." (Dowining y otros, 2002, p.9)

RESUMEN

Dentro del curso de las últimas décadas se han realizado muchos logros con referencia a los estándares de los derechos indígenas, principalmente a través del compromiso y dedicación indígena dentro de la sociedad globalizada. Después de 50 años de participación activa en la arena global, los movimientos de derechos indígenas continúan ganando impulso transformador en una de "las agrupaciones más visibles de la sociedad civil en las Naciones Unidas" (Morgan, 2011, p.2). Como resultado de la adopción de estándares internacionales y guías, además del establecimiento de instituciones que abordan específicamente las preocupaciones de los pueblos indígenas, hoy en día los pueblos indígenas se movilizan más que en cualquier otra época. Con la excepción notable (entre los estados del Ártico) de la Federación Rusa, donde, a pesar de un comienzo bastante prometedor de activismo indígena profesional a principios del año 2000, los grupos indígenas rusos vieron incluso más división – caminos aún más separados en contraste con el desarrollo indígena internacional (Eckert, 2012). Si bien la protección de los derechos e intereses de los pueblos indígenas es una meta global importante y la esfera esencial de la cooperación internacional, localmente aún hay desequilibrios fundamentales en el poder, derechos e inclusión de los pueblos indígenas en el proceso de toma de decisiones.

Este artículo es un intento de plantear interrogantes fundamentales sobre la naturaleza de las políticas de Rusia contemporánea hacia su población indígena y sacar a la luz las distintas características que han venido a definir la respuesta de Rusia a las problemáticas indígenas.

Palabras clave: pueblos indígenas, derechos indígenas, Federación Rusa, Ártico, derechos sobre la tierra, desempoderamiento, Asociación Rusa de Pueblos Indígenas del Norte (RAIPON, por sus siglas en inglés)

En 2011, la compañía minera rusa "Yuzhnaya" comenzó sus actividades cerca del asentamiento Kazas en la región de Kemerovo al suroeste de Siberia – uno de los principales distritos de carbón de la Federación Rusa (ver Figuras 1 y 2). Kazas, el territorio de la residencia tradicional de los pueblos indígenas de Rusia – los Shores, han sido víctimas de la destrucción ambiental y los efectos fatales de la industria del carbón por décadas (IGWIA y otros). A finales de 2012, "Yyzhnaya" comenzó a com-

prar hogares en Kazas para expandir sus actividades industriales. En 2013, sólo cinco familias se negaron a vender sus casas y dejar las tierras ancestrales. El 2 de noviembre de 2013, en la reunión con los aldeanos, el director general de la compañía amenazó con prender fuego a todas las casas restantes si las familias de negaban a vender sus casas a la compañía. La primera casa fue quemada una semana después. A fines de diciembre, la segunda. En enero de 2014 se quemaron dos casas. La última fue golpeada en marzo de 2014 (Sulyandziga, 2016).

Figura 1: Mina de Carbón Yuzhnaya junto a Kazas (Foto del Centro Contra la Discriminación)

En 2012, Sergei Nikiforov, el líder del pueblo Amur Evenki, fue sentenciado con cuatro años de prisión por presuntamente extorsionar con dinero a la compañía minera de oro "Petropavlovski" después de encabezar un movimiento de protesta en contra de los intentos de la compañía de hacerse cargo de controlar los pastizales de los renos y los terrenos de caza (IWGIA y otros, 2017). En 2013, se descubrieron 1 millón de toneladas de petróleo en el fondo del Lago Imlor en el área autónoma de Janti-Mansi, la principal región rusa productora de petróleo. El mismo año, la compañía Surgutneftegaz obtuvo una licencia para explorar depósitos de petróleo y gas bajo el lago, el cual es sagrado para los pueblos indígenas Janti. Con su tierra bajo amenaza y prospectos de trabajo alternativo, la mayoría de los Janti ha abandonado su tierra ancestral. En 2015, Sergei Kechimov, un chamán Janti, la única persona que vive cerca del lago, fue acusado de proferir amenazas de muerte a un trabajador de la compañía de petróleo Surgutneftegas y sentenciado a prisión (Stamatopoulou, 2017; Lerner y otros, 2017)

Figure 2: Explotación Rusa de Pueblos Indígenas

Sólo un par de meses antes de emprender una investigación criminal en contra de Kechimov, la décimo tercera sesión del Comité de Derechos Humanos de las Naciones Unidas fue asistida por un número sin precedentes de representantes de la Federación Rusa *"presentando sus informes sombra donde denunciaban una amplia gama de violaciones a los derechos humanos"* (IWGIA, 2015). Un par de meses después de las audiencias en la corta de Kechimov, la Federación Rusa también asistió al Tercer Comité de la Asamblea General de las Naciones Unidas, donde se declaró

que la *"Federación Rusa siempre ha apoyado y continúa apoyando a los pueblos indígenas en la total y efectiva implementación de sus derechos… Confiamos en que el principal instrumento para la implementación práctica de las disposiciones de la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas (UNDRIP, por sus siglas en inglés) y el documento final de la Conferencia Mundial de Pueblos Indígenas debería ser la buena voluntad de los estados, junto con el trabajo duro cotidiano para apoyar a los pueblos indígenas y proteger sus derechos y libertades, como se hace en Rusia."* (Declaración hecha por el representante de la Federación Rusa/Tema 70 "derechos de los Pueblos Indígenas" del tercer Comité de la Asamblea General de las Naciones Unidas, 2015).[1] Una mirada cercana a la legislación indígena de Rusia, en particular la relativa a los derechos sobre la tierra , ayudaría a poner en práctica los casos descritos.

Desempoderamiento Legal

Desde principios del año 2000, con la presencia cada vez mayor de actividades de extracción de recursos en los hogares indígenas en Rusia (ver la Figura 3), han aumentado las discusiones sobre el manejo del uso de la naturaleza, el desarrollo industrial de las tierras indígenas en el contexto de los problemas étnicos y ambientales, el legado de las políticas de desarrollo del estado, la partic-

[1] Entre las peticiones indígenas, una de las presuposiciones más significativas sostenida por los pueblos indígenas es que sus derechos inalienables sobre la tierra y recursos anula las peticiones subsecuentes por las sociedades dominantes (Rogers 2000). De hecho, los asuntos de la tierra siembre han sido fundamentales en las luchas indígenas con la restitución de las tierras indígenas vistas como un acto de superación histórica de inusticia. Esta afirmación está fundamentada en el hecho que los hogares indígenas son inseparables de las tierras y recursos, que forman una base para las actividades tradicionales tales como la caza, pesca, recolección y nomadismo así como prácticas religiosas, espirituales y ceremoniales (Minde, 2008).
Como expone James Anaya (2004, p. 396), a continuación: "Son indígenas porque sus raíces ancestrales están arraigadas en las tierras mucho más profundas que otras. Son pueblos porque representan distintas comunidades y tienen cultura e identidad que los ligan con sus naciones del pasado ancestral."
En otras palabras, muchas comunidades indígenas se ven a sí mismas como parte de la tierra en la que han vivido por siglos. Los recursos naturales, en cambio, no son sólo los recursos de los hogares para muchos pueblos indígenas sino Tambien una Fuente de su identidad y un medio para preservar sus tradiciones y costumbres. La pérdida de la tierra significaría una amenaza a toda su cultura. Por lo tanto, asegurar el acceso a esos territories y recursos naturales y reconocimiento lear de los derechos de la tenencia sobre la tierra son una base fundamental para empoderar a los pueblos indígenas con derechos civiles, sociales, culturales, políticos y económicos (Alcorn, 2013).
El fuerte apego al ambiente y a los ecosistemas circundantes de los pueblos indígenas han resultado en arreglos de tenencia complejos y distintos que a menudo están en desacuerdo con los regímenes formales de gestión legal del estado. Si bien los pueblos indígenas no han operado bajo el concepto de propiedad privada de la tierra (Berg-Nordlie, 2015), lo que significa que la tierra indígena estaba regida a su vez por la tenencia consuetudinaria basada en los principios de uso de la tierra a largo plazo e ininterrumpido, herencia y acuerdos orales con los vecinos (Kasten, 2005), los gobiernos vieron las tierras indígenas como terra nullius ("tierra de nadie") o sin propietario, y, por lo tanto, abiertas para ser utilizadas por los recién llegados. De manera particular, aunque los pueblos indígenas constituyen una de las poblaciónes más vulnerables de la tierra como resultado de siglos de marginación y discriminación, sus territorios a menudo contienen abundantes recursos naturales. Como resultado, los territorios indígenas se vuelven objeto de adquisición de tierra para la agricultura, conservación de la biodiversidad, apropriación por intereses externos y otras iniciativas de desarrollo, tanto privadas como gubernamentales (Alcorn, 2013). Desde la perspectiva de las industrias en particular esas tierras con frecuencia son vistas como una fuente de generación de ingresos "más que una herencia para atesorar" (Glennie, 2014). Los pueblos indígenas, en cambio, tienen una vida adyacente a la infraestructura extractive que genera enormes irquezas para sus dueños y no se benefician económica o socialmente de los proyectos, ni colectivamente ni como individuos (O'Faircheallaigh, 2013). La indemnización, que a veces es proporcionada por las compañías no puede cubrir el deterioro causado a la tierra, que con frecuencia se vuelve inadecuada para las prácticas indígenas (Stamatopoulou, 2017).

ipación indígena en el manejo de sus tierras y recursos (Fondahl y Sirina, 2006; Xanthaki, 2004; O'Faircheallaigh, 2013; Wilson, 2003; Tulaeva y Tysiachniouk, 2017).

Figura 3: Contaminación de Yuzhnaya en Kazas (Foto del Centro contra la Discriminación)

Históricamente, el asunto de la propiedad de la tierra indígena ha sido complejo. El territorio indígena nunca ha sido visto como una forma de propiedad privada por la población autóctona; en cambio, la tierra indígena ha sido utilizada y controlada de manera colectiva (Kasten, 2005). Con atención a Rusia, el enfoque a la tierra ha sido desarrollado de manera diferente a otros estados de Ártico, como Canadá o Estados Unidos, donde existe una evidencia contractual vinculada legalmente que apoya los derechos de los pueblos indígenas. Por el contrario, los pueblos indígenas de Rusia no han estado involucrados en relaciones legales con el estado en el asunto de la propiedad de la tierra; no han vendido sus tierras ni recibido ninguna compensación o delegado el derecho a supervisar sus tierras por una tercera persona. Ya que no ha habido ningún tratado firmado entre los pueblos indígenas y el Imperio Ruso, el mejor resultado que pudieron esperar los pueblos indígenas fue un arrendamiento a largo plazo, por ej., "el derecho a la tierra no está siquiera en la mesa" (Eckert y otros, 2012, p.45). Después de la Revolución Rusa, toda la tierra era considerada propiedad del estado. Por lo tanto, la Unión Soviética simplemente declaró a los territorios indígenas tierras del estado y las controló a su discreción.[2] A partir de ahora, los reclamos de los grupos indígenas de Rusia son mucho más modestos que los de las comunidades indígenas del Oeste, que se enfocan en el derecho a preservar un estilo de vida tradicional y algún tipo de derechos de propiedad limitada sobre la tierra y recursos (ibid.).

[2] A pesar de que la Unión Soviética se construyó oficialmente en un principio étnico y cimentada en el concepto de "nacionalidades", ya en la segunda mitad de 1930 un discurso étnico moderado y una temprana tolerancia del estado ruso por la casi independencia de las sociedades indígenas fue reemplazada con la integración forzada. La prioridad del estado era ayudar a los pueblos indígenas a convertirse en naciones soviéticas modernas, liquidar el retraso económico de las comunidades aborígenes así como la desigualdad cultural y económica y unir a toda las naciones bajo el estado socialista. Desarrolló el slogan "étnico en la forma, socialista en el contenido" conllevó a una eventual fusión de todas las nacionalidades en una sola nación soviética y "familia fraternal," que ofrecía una alternativa al "las ideologías imperiales, coloniales, basadas en castas, universalistas y crisol de culturas anteriores del mundo" (Moore, 2001, p.27). Esta identidad soviética pretendía prevalecer sobre una identidad étnica más estrecha (Kuzio, 2002). Las narraciones soviéticas ofiicales celebraban las diferencias étncias por medio de la promoción agresiva de coloridos aspectos folcróricos de la cultura que enfatizaban la unidad y amistad existentes de los pueblos de la URSS pero – al mismo tiempo – encubrían cualquier forma de diferencia cultural que pudiera amenazar el discurso dominante del estado (El Banco Internacional para la Reconstrucción y el Desarrollo / El Banco Mundial, 2014). Las políticas asimilacionistas fueron presentadas como una unión de naciones basadas en la fraternidad voluntaria, igualitaria. Con todo, si bien la URSS fue concebida como una unión de distintas naciones, en realidad representaba una jerarquía de mútliples capas con la etnicidad rusa hasta arriba (ibid). dentro de su discurso, se les atribuía el estatus de "hermano mayor" y la "nación líder" del estado multinacional soviético. Para los pueblos indígenas de Rusia, el periodo de 1940 a 1980 ha venido a conocerse como los años oscuros de la historia indígena (Vakhtin, 1992).

Primero y, ante todo, el marco legal ruso no emplea el concepto de "pueblos indígenas". En cambio, propone su propia definición de "pueblos minoritarios indígenas". Estas dos categorías están dotadas de condiciones dramáticamente diferentes de las representaciones y protección legal de los pueblos. La definición "pueblos minoritarios indígenas" es notablemente diferente de las definiciones de las Naciones Unidas y otros instrumentos internacionales que no hacen referencia al tamaño y población de la comunidad dada, en cambio enfatizan en los aspectos históricos como las experiencias discriminatorias, y la expresión de la auto identificación indígena (Rohr, 2014). Un concepto desarrollado de "pueblos indígenas minoritarios" hace hincapié en la categoría legal artificial con bastante "límite demográfico arbitrario" que ha sido introducido por el estado (Overland, 2005, p. 108). Un término tan exclusivo limita el reconocimiento de los derechos indígenas al subgrupo mínimo posible de grupos étnicos y excluye a los pueblos con poblaciones más grandes que han expresado su auto-identificación como indígenas (Nikolaeva, 2017). De acuerdo con Miller, "este tipo de circunscripciones burocráticas de indigenidad se implementan por los estados para controlar, dominar y contener a las poblaciones indígenas en áreas designadas, minimizar la amenaza planteada por sus afirmaciones de diferencia, reducir un número de beneficiarios, y causar un conflicto entre los indígenas reconocidos y grupos aún no reconocidos" (2003, p. 209). En este sentido, el reconocimiento inequívoco y categórico de indigenidad ignora las complejidades necesarias de las experiencias indígenas, beneficiando como consecuencia los intereses de las autoridades estatales, marginalizando e ignorando los derechos de los pueblos indígenas, sus potenciales reclamos y sus luchas (Nikolaeva, 2017)

Sin embargo, los expertos señalan que la legislación rusa incluye obligaciones estatales fuertes para proteger los derechos de los pueblos indígenas. La Federación Rusa adoptó tres leyes nacionales estableciendo el marco de los derechos culturales, territoriales y políticos de las comunidades indígenas (Ley Federal sobre las Garantías de los Derechos de los Pueblos Indígenas Minoritarios de la Federación Rusa adoptada en 1999, Ley Federal de los Principios Generales de la Organización de la Comuna Campesina *(Obshchina)* de Pueblos Indígenas Minoritarios del Norte, Siberia y el lejano Oeste de la Federación Rusa" adoptada en 2001). La Asociación Rusa de Pueblos Indígenas Minoritarios del Norte se estableció en 1990 como una organización paraguas no gubernamental e hizo un papel crítico en desarrollar las leyes antes mencionadas. La solución a la lucha indígena fue vista por primera vez en las manos de la Asociación Rusa de Pueblos Indígenas (RAIPON, por sus siglas en inglés) como representante de los pueblos indígenas de Rusia; se esperaba que la organización guiara el auto-gobierno indígena (Monique Lerner y otros, 2017; Semenova, 2007). En los 90's y principios del 2000 RAIPON asesoró a las comunidades indígenas en contra de la explotación industrial y el aparato de estado que era percibido como una "unión política para encabezar y guiar el movimiento nacional de los pueblos indígenas y para transformar las decisiones políticas en soluciones prácticas" (ibid, p. 17). Ya en 2009, RAIPON se volvió el blanco de vigilancia del estado (Berg-Nordlie, 2015). En

2012 el ministro de justicia ruso decidió detener todas las actividades de RAIPON. Sin embargo, un año después, le fue permitido a dicho órgano representativo de los indígenas reabrir después de una fuerte presión internacional. En 2013 Gregory Ledkov, el candidato favorecido por el gobierno federal, miembro del Partido Rusia Unida de Putin y el Duma Estatal se convirtió en presidente de RAIPON (ibid.).

Originalmente, las leyes del marco nacional garantizaban los derechos de los pueblos indígenas a utilizar la tierra; a participar en la implementación del control sobre el uso de la tierra, y en decisiones sobre proteger sus tierras tradicionales y estilo de vida, economía y actividades a través de la realización de experiencia ecológica y etnológica; y ser indemnizados por daños a sus tierras tradicionales resultado de la actividad económica e industrial (sobre Garantías, Artículo 8). A pesar de que esas leyes han ofrecido la base para que la población indígena realice peticiones para el uso preferencial de derechos sobre la tierra, los años recientes han estado marcados por los intensos esfuerzos para desempoderar legalmente y excluir a los pueblos indígenas del manejo de sus territorios ancestrales. Recientemente se han realizado modificaciones a todas esas leyes, haciendo imposible la completa implementación de los derechos colectivos sobre la tierra y recursos de los pueblos indígenas (Zaikov, Tamitskiy y Zadorin, 2017). Incluso las ya modestas disposiciones que se incluyeron en esas legislaciones han perdido su poder.

Los intentos por crear un marco legal para los derechos sobre la tierra de los pueblos indígenas datan de principios de los 90's cuando muchas regiones rusas elaboraron sus propios regímenes de derechos sobre la tierra indígena. El primer intento fue la introducción de "tierras patrimoniales" adoptado en 1992 en el área autónoma de Janti-Mansi (sobre los estatutos de Tierras Primordiales del área autónoma de Janti-Mansi, 1992).[3] Más tarde, en 2001, el estado inició la creación de los llamados "Territorios de Uso Tradicional de la Naturaleza" (TTNU, por sus siglas en inglés) diseñados para proteger la tierra indígena de la invasión industrial, excluir esas tierras del comercio de bienes raíces, y proporcionar a la población indígena terrenos seguros de tierra "a perpetuidad" destinados a sectores económicos tradicionales – renos de pastoreo, pesca, caza de animales marinos, cosecha, etc. – que ofrecen el principal empleo y principal fuente de ingresos a las comunidades indígenas (Tuarev, 1998; Colchester, n.d.; Miggelbrink, Habeck y Koch, 2016). Bajo la legislación, las compañías que desarrollan actividad industrial dentro de los TTNU (Territorios de Uso Tradicional de la Naturaleza) deberían llegar a un acuerdo con la población indígena sobre el uso de la tierra y estar obligados a indemnizar por daños a las tierras tradicionales. La ley también otorga a los pueblos indígenas el derecho a participar en evaluaciones de impacto sociocultural en las comunidades indígenas por medio de las compañías mineras (Artículo 6.8).

[3] Alrededor de 500 TTNUs han sido designados en 1992 en el área autónoma de Janti-Mansi. Sin embargo, a pesar de que muchos territorios han sido marcados por uso de recursos naturales tradicionales por grupos indígenas, en años recientes, el 56% de esos territorios fueron retirados para la extracción de recursos minerales, con cientos de licencias de extracción expedidas a decenas de compañías (Alferova, 2006).

En 2001, al mismo tiempo en que se adoptó la Ley sobre Territorios de Uso Tradicional de la Naturaleza, la Federación Rusa aprobó el Código de la Tierra, que excluye cualquier forma de tenencia de la tierra además de la propiedad privada y rentada: *"A los ciudadanos no se les puede otorgar el uso [derechos] permanente (indefinido) sobre parcelas de tierra. Las personas legales, excepto lo que sean nombrados bajo el artículo 1 de estas disposiciones están obligadas a tener su derecho a obtener las parcelas como propiedad"* (Artículo 20). Esto, efectivamente, significa que las tierras indígenas pueden convertirse en la propiedad privada o en renta a largo plazo de las compañías industriales (Vinding, 2002). Dado que las comunidades indígenas nómadas usualmente migran con su rebaño en busca de praderas siguiendo el ciclo de pastoreo de los renos y, por lo tanto, utilizan áreas considerables, varios miles de hectáreas (3000 hectáreas por cada reno) (Etnic.ru, n.d.), ni la compra ni renta son opciones financieramente viables para los grupos indígenas (Basov, 2018).

La jerarquía de la legislación rusa indica que el Código de la Tierra – el cual no reconoce los recursos tradicionales indígenas o los derechos sobre la tierra – anulará la legislación de derechos indígenas. Por lo tanto, en la práctica, si un área de uso de recurso tradicional está amenazada por un proyecto de petróleo, gas o minero, no se ofrece protección real por las regulaciones (Murashko 2008; Wilson y Swiderska, 2019). Además, en 2007, la palabra "a perpetuidad" desapareció de la ley sobre Territorios de Uso Tradicional de la Naturaleza (TTNU) (Gilberthorpe y Hilson, 2014).[4] En 2014, el Código de la Tierra estipuló que las tierras a perpetuidad pueden ser otorgadas a los pueblos indígenas sólo para la construcción de edificios u otras instalaciones necesarias para el desarrollo y conservación del estilo de vida tradicional indígena por un periodo no mayor a diez años. Las disposiciones del Código de la Tierra establecieron explícitamente que, en lugares de residencia tradicional indígena, las autoridades deciden sobre la ubicación de objetos industriales (por ej., infraestructura, instalaciones de extracción, etc.), basado en los resultados de información obtenida de las comunidades indígenas que fue eliminada (CESCR, 2017).

Otro problema es que la mayoría de las tierras que pudieron ser candidatas para un estado de los Territorios de Uso Tradicional de la Naturaleza (TTNU) son tanto parcial como completamente ubicados en tierra federal (70% del territorio ruso está categorizado como fondo forestal, que también es propiedad federal); por lo tanto, los órganos regionales y locales no tienen la autoridad de transferir control sobre tales tierras a los pueblos indígenas y determinar los límites de los TTNU. Sólo el gobierno federal tiene la autoridad para hacer eso (Eckert y otros, 2012). Como resultado, desde la adopción de la ley sobre TTNUs, por el Duma Estatal en 2001, ningún TTNU ha

[4] Todas estas contradicciones en las leyes hacen difícil revelar si los pueblos indígenas pagan por el uso de la tierra (representantes de Proveedor de Infraestrucura afriman que pagan tales derechos y que incluso si son pocos, aún así imponen una carga económica en las comunidades indígenas; en Sakha, por ejemplo, necesitan registrar su demanda para usar la tierra para utilizar recursos naturales tradicionales, y la burocracia alrededor del registro es compleja. Para registrar un área como TTNU, el solicitante necesita conducer una evaluación técnica de la tierra que cuesta $570 por hectárea. Ya que la comuna no puede juntar la cantidad requerida, eso conduce al fracaso para registrar las tierras. (Gilberthorpe and Hilson, 2014).

sido designado a un nivel federal. Sin embargo, si bien las autoridades federales han creado más de 500 TTNUs, ninguno de ellos ha sido confirmado por el gobierno federal. Los TTNU existentes, por lo tanto, "no tienen estatus legal garantizado ni protección efectiva de ser disueltos o reducidos, como sucede con frecuencia." (CESCR, 2017, p. 5). En efecto, debido al fracaso del gobierno de confirmar los TTNUs existentes, su estatus está abierto a cambios en cualquier momento.[5]

En 2013 la situación se agravó aún más cuando se aprobó la ley federal "sobre reformas a la ley federal "Sobre áreas naturales especialmente protegidas" (Artículos 5 y 6) sin discusión pública, a pesar de las posturas de los abogados y ecologistas. Una de las dificultades más significativas fue la degradación del estatus de los TTNU de "Áreas de Conservación Especialmente Protegidas" a "Áreas Especialmente Protegidas" (CESR, 2017).[6] Como resultado, la palabra "conservación" (que alude a "naturaleza") fue eliminada de la definición de la ley de los TTNUs. Si bien las "áreas de conservación especialmente protegidas" es un término estipulado en la legislación ambiental de la Federación Rusia, la cual crea las garantías específicas para la participación indígena y los derechos de consulta, la designación de "áreas especialmente protegidas" no existe en la ley rusa como tal, no está identificada en la legislación estatal. Como resultado, ahora, la adjudicación de la tierra y proyectos para la actividad económica (construcción de caminos, tuberías e instalaciones industriales) ya no son sujetos a análisis ecológico y ya no es necesaria la evaluación de impactos negativos en las vidas indígenas por los proyectos industriales (Miggelbrink, Habeck y Koch, 2016). Las reformas también cambiaron las reglas para quitar las parcelas de tierra de los TTNU. Originalmente, en caso de la expulsión de los pueblos indígenas de su tierra ancestral, el estado estaba obligado a proporcionar a las comunidades indígenas la parcela de territorio equivalente y objetos naturales como intercambio. Después de la revisión, la expresión "indemnización por pérdidas en caso de distanciamiento de parcelas de tierra por las necesidades estatales o municipales" desapareció de toda la legislación de la tierra.

Cuando se introdujo la ley sobre las Comunas Campesinas *(Obshchinas)*[7] en 2001, muchos pueblos indígenas dentro de las comunidades organizaron continuar con sus actividades tradicionales (Colchester, n.d.). El intento original detrás de la introducción del concepto de *obshchina* fue multifacético: por un lado, se consideraba que las obshchinas llevaran a cabo funciones de auto-administración local, participar en los procesos de toma de decisiones de interés a

[5] El 15 de enero de 2015, la Corte de Apelación rechazó una apelación por la administración del distrito de Oleneksky de la República Sakha desafiando la legalidad de una licencia expedida por la autoridad de recursos regionaes, Yakutnedra, para la exploración y extracción de recursos minerales en TTNU que se había establecido por las autoridades locales en el distrito de Oleneksky. La corte rechazó la apelación por los límites del TTNU específico no había sido determinado por el gobierno federal. Como se señala más arriba, esto es verdadero para todos los TTNUs actualmente existentes, de modo que todos estén desprotegidos de invasiones similares.

[6] Dos actos sucedieron en 2014 que debilitaron de manera significative la ley sobre TTNU, siendo la Ley Federal 171-FZ de fecha 23.06.2014 y 499-FZ, de fecha 31.12.2014.

[7] *Obshchina* (*obshchinas* en plural) es una forma de alianza u organización comunitaria basada en el territorio de los pueblos indígenas, usualmente traducido como "comunidad" o "comuna" que sigue el modelo de la forma pre-soviética de organizaciones socio-territoriales de economías tradicionales de la mayoría de los pueblos indígenas del norte.

los pueblos indígenas, proporcionar servicios en el ámbito de la cultura y la educación, y, al mismo tiempo, funcionar como cooperativas económicas por medio de las cuales los pueblos indígenas pudieran continuar con sus actividades económicas tradicionales de una manera viable y sostenible (Rohr, 2014). La *obshchina* era vista como una unidad legítima de control de la propiedad. Inicialmente, los pueblos indígenas tenían el derecho de utilizar las tierras de las *obshchinas* a perpetuidad y sin cargo (Miggelbrink, Habeck y Koch, 2016). En 2004 se cambió la ley; la noción "a perpetuidad y sin cargo" ha sido revocado y se introdujo la renta. Desde entonces, muchas comunidades han perdido sus derechos sobre las tierras otorgados a ellos por las prácticas de subsistencia tradicionales (Evengard, Larsen y Paasche, 2015; Stamatopoulou, 2017). En muchas regiones, las *obshchinas* indígenas actualmente son vistas por los negocios privados como competencia, especialmente en la industria pesquera, algunos de los cuales están afiliados con las administraciones locales y no escatiman en esfuerzos para sacar a las comunidades indígenas del negocio. Otro aspecto problemático de la ley es la restricción a continuar tipos de actividad "tradicionales" (las cuales están determinadas por el estado y descritas en la Lista de Formas de Actividad Tradicional de los Pueblos Indígenas). Pueden ser canceladas si dejan de participar en actividades económicas tradicionales (Eckart y otros, 2012). En contraste con la idea original, las tierras de las *obshchinas* no ofrecen una solución completa ni a los derechos sobre la tierra ni a la protección ambiental de los hogares indígenas. Más importante, no pueden ser organismos autónomos sin una autoridad sobre el territorio, recursos naturales e independencia económica (Turaev, 2018).

De igual manera, las disposiciones sobre adjudicaciones preferenciales y uso libre de varias categorías de tierra por los pueblos indígenas, estipuladas originalmente en los Códigos de Tierra, Bosque y Agua de la Federación Rusa han sido revocados. Originalmente, algunas disposiciones de la legislación sectorial (por ej., códigos de tierra, bosque y agua, así como actas sobre subsuelo) estipulaban los derechos de los pueblos indígenas sobre el uso preferencial de recursos en áreas de su residencia tradicional. Con respecto a una de las principales actividades económicas de muchas comunidades indígenas, la pesca, ya en tiempos soviéticos, el interés en la pesca económicamente redituable atrajo la atención comercial. Como resultado, las comunidades indígenas han sido desplazadas gradualmente de la actividad. Las disposiciones iniciales que dieron un permiso a las comunidades indígenas a las tierras de uso preferencial para pescar sin competencia fueron reconocidas como inválidas (Artículo 39 FZ-166, 2004). Ahora las zonas de pesca pertenecen a personas o compañías que ganaron las cuotas para desarrollar actividades comerciales (Mamontova, 2012).

De hecho, desde 2008 todos los territorios indígenas para cazar o pescar tienen que estar distribuidos a través de licitaciones únicamente y no hay excepciones para las comunidades indígenas que habitan esos territorios. Los pueblos indígenas están obligados a competir en concursos comerciales para zonas de caza y pesca con mayor cantidad de compañías privadas competitivas quienes rentan esas tierras por tenencia a largo plazo (más de cuarenta y nueve años). Como resultado, la pesca tradicional, pastoreo de renos y zonas de caza ahora pueden compartirse

con otros usuarios y muchas comunidades indígenas perdieron sus tierras tradicionales desde entonces. Las reformas antes mencionadas han creado las bases para conflictos interminables y demandas en donde los pueblos indígenas tienen que defender su derecho a continuar actividades tradicionales en sus tierras. En realidades en donde los incentivos económicos superan la importancia de los intereses indígenas, los derechos indígenas han sido totalmente ignorados. Al abrir un camino para las oportunidades comerciales, esas disposiciones dañan sustancialmente el acceso a sus fuentes de subsistencia, alimento e ingresos, y han sido identificados como uno de los principales obstáculos que impiden que los pueblos indígenas disfruten de sus derechos. Sin considerar que al requerir que los pueblos indígenas compren o renten sus propias tierras ancestrales claramente viola su derecho más fundamental a la auto determinación.

En resumen, el periodo del año 2000 en adelante ha sido denominado como un "estancamiento legal para los derechos indígenas" en Rusia (Kryazhkov, 2012, p. 29; Miggelbrink, Habeck y Koch, 2016). Los organismos principales que tratan directamente con los pueblos indígenas en Rusia han sido liquidados también. Durante los 90's, la responsabilidad por la política de minorías indígenas cambió rápidamente entre diferentes Comités Estatales y Secretarías, dejando al campo de políticas indígenas institucionalmente "sin techo" en el periodo de 2000-2004. En 2001, se disolvió el Ministerio de Asuntos Exteriores, Políticas Nacionales y Migratorias. En 2004, las políticas indígenas fueron traspasadas al Ministerio de Desarrollo Regional, que era el responsable de la elaboración de políticas de estado sobre pueblos indígenas y relaciones normativas de desarrollo socioeconómico de los grupos indígenas en regiones con población indígena y también controlaba las interrelaciones étnicas que por razones de seguridad eran mucho más altas en la agenda política (Chyebotaryev y otros, 2015). RAIPON y su ministro establecieron relativamente buenas relaciones de trabajo. En 2014, sin embargo, el ministerio fue disuelto, sus funciones fueron distribuidas entre diferentes ministerios (Berg-Nordile, 2015) mientras que las políticas indígenas fueron transferidas al Ministerio de Cultura. Como fue estipulado por los pueblos indígenas, este cambió estableció limitaciones a los asuntos indígenas, que ahora se enmarcaban dentro de las limitaciones del patrocinio para "cantar y bailar", "mientras que los derechos, tierra y desarrollo quedarían fuera de la mesa" (IWGIA, 2014). Martin (2011, p. 13) y describió ese enfoque como una estrategia para despolitizar la etnicidad *"a través de promoción agresiva a los marcadores simbólicos de la identidad nacional: folklore, museos, vestido, alimento, costumbres."* Si bien los programas específicos están apoyados activamente tanto por gobiernos centrales como locales, las medidas están limitadas a eventos culturales sin ningún derecho garantizado. En otras palabras, las costumbres y tradiciones indígenas son tratadas como valiosas, aunque aún no han sido identificadas como fuentes de derechos. Bajo esas circunstancias, permitidas sólo para celebrar marcadores de identidad limitados, los pueblos indígenas de Rusia tienen que "encarcelarse en cierto estilo de vida `tradicional`" (Donahoe, 2011, p.413). Como tal, el Estado Ruso vino a promover categorías ex-

cluyentes de su diversidad étnica para enmarcar estrechamente los derechos indígenas enfocándose en el apoyo estatal en las culturas tradicionales mientras aleja el enfoque de discusiones más sustanciales con relación al reclamo de los territorios indígenas, medios de subsistencia, recursos naturales y auto determinación (Corntassel, 2008). En este contexto, uno puede observar una continuidad permanente de políticas indígenas altamente restrictivas que están limitadas a los derechos culturales mientras que las peticiones indígenas de representación especial y derechos políticos tienen poco margen de maniobra – la estrategia represiva que fue empleada por el estado soviético y adoptada por su sucesor (Etkind, 2014; Nikolaeva, 2017).[8] El estancamiento legal creó un vacío de organización y captura institucional de agencia indígena incapaz de desarrollar mecanismos de auto defensa. A partir de hoy, a nivel federal, las políticas indígenas permanecen pobremente institucionalizadas. Los asuntos indígenas perdieron el nivel ministerial, y la Agencia Federal de Asuntos Étnicos es la responsable de todos los asuntos indígenas a nivel nacional.

Debido a la falta de mecanismos legales y normativos que posibiliten el cumplimiento de los derechos indígenas, el sistema existente de reglas domésticas rusas está lleno de vacíos, inconsistencias y contradicciones y aún tiene que ser desarrollado de acuerdo con los estándares internacionales actuales. Los decretos legislativos y edictos presidenciales con frecuencia son ignorados por la mayoría de las jurisdicciones regionales. En otros casos, las autoridades implementan leyes federales de una forma muy selectiva, especialmente con respecto a los recursos naturales y asuntos de la tierra. En particular, incluso en momentos en que los pueblos indígenas aparentemente estaban respaldados por una legislación, aunque modesta, pero ya existente, el estado movió la línea de meta al retirar y cambiar las leyes diseñadas para la protección indígena. Las normas actuales existen en aislamiento una de la otra, con frecuencia, fragmentarias y escasas tanto en el nivel federal como el regional. Resumiendo, como indica Kryazhkov (2012, p. 35), "la legislación rusa sobre los pueblos indígenas podría considerarse inestable, contradictoria, que con frecuencia imita, sólo desarrollada inicialmente, y no lo suficientemente adaptada a la ley internacional."

Resumen

De acuerdo con numerosos investigadores, el reconocimiento de los derechos sobre la tierra es un pre-requisito para la efectiva implementación de los derechos indígenas. Significativamente, la tierra es parte integral de la autodeterminación de los pueblos indígenas que conlleva no sólo derechos de autonomía, auto gobierno y participación política, sino también derechos sobre las tierras y recursos y numerosos derechos económicos, sociales y culturales.

Sin derechos sobre la tierra ni derechos sobre recursos naturales, el derecho a la autodeterminación y otros derechos no tendría sentido o sim-

[8] Algunos investigadores argumentan que la caída de la URSS no ha llevado a su fin al sistema político que la empleaba (Inozemtsev, 2017). De hecho, algunos investigadores llegan a la conclusión que sustituir un imperio con otro, la Federación Rusa se encontró a sí misma "entre el imperio muerto y el nuevo emergente": "un imperio dinástico cayó, siguió uno socialista y un tercero está consolidando ahora sus instituciones junto con trayectorias familiares" (Spivak et al., 2005, p.830).

plemente se volverían derechos de *"papel"* como sucedió en el caso de Rusia (Corntassel, 2008, p. 108). La tenencia ayuda a garantizar y asegurar los derechos de propiedad, así como el derecho al acceso a los recursos naturales. Los derechos sobre la tierra también son una base para reclamar beneficios. La tenencia facilita su alojamiento y disminuye el potencial de conflictos sobre ventajas relacionadas con los recursos. En cambio, la tenencia ambigua o insegura ha sido conocida como un factor que impide el control adecuado de recursos naturales, mientras los conflictos sobre la tierra son reconocidos como una barrera para el empoderamiento indígena.

Si bien la Constitución de la Federación Rusa permite diversas formas de propiedad de tierras y recursos naturales (privada, estatal, municipal y otras), la mayor parte de la tierra y los recursos del subsuelo en Rusia permanecen bajo el control del estado.[9] Muy importante, no existe el mismo tipo de evidencia contractual legalmente vinculante que respalde los derechos de los pueblos indígenas a la tierra que existe en los contextos canadiense y estadounidense. Nunca hubo tratados firmados, y la cuestión del derecho a la tierra "no está siquiera en la mesa" (Eckert y otros, 2012, p.45). En otras palabras, mientras los pueblos indígenas tienen derecho a utilizar la tierra y sus recursos, el derecho de propiedad permanece con el estado. Como máximo, los pueblos indígenas participan en proteger los territorios, pueden utilizar sus tierras, pero no se les permite estar en total control del territorio.

Las leyes federales no otorgan ningún derecho especial que deje participar a los pueblos indígenas en el proceso de toma de decisiones relacionado con las tierras y recursos. De manera similar, no existe un sistema regulado que asegure la cooperación, acuerdos, consultas con los pueblos indígenas sobre decisiones que los afectan y ninguna otra forma de participación indígena está asegurada legalmente (Anaya, 2010).

Los TTNUs sirvieron como garantía para el futuro autodesarrollo sólido de los territorios indígenas (Tuarev, 1998). La idea original detrás de su creación fue que esas tierras estarían en su mayoría fuera del alcance del desarrollo industrial (Evengard, Larsen y Paasche, 2015).
Esas tierras estaban destinadas a ser controladas, o como mínimo, co-controladas por comunidades indígenas. Muy importante, los TTNU y *obshchinas* fueron creados no sólo para cubrir los derechos económicos de los grupos indígenas al darles la posibilidad de asegurar sus actividades económicas tradicionales. Su creación reflejó la liga existente de la cultura indígena y la economía tradicional; como tal, la adjudicación de tierras a los pueblos indígenas fue crucial para preservar sus tradiciones únicas. A este respecto, los TTNUs eran vistos como una "base indivisible" de comunidad indígena con el fin de preservar el ambiente en el que se ha formado dicha comunidad. En el mismo sentido, las *obshchinas* establecidas eran vistas como un solo objeto de uso (propiedad) en el manejo de los TTNUs como una institución de autonomía económica y manejo ambiental

[9] El 92% de la tierra rusa es propiedad pública, ya sea a un nivel federal, regional o municipal (el resto es ocupado por entidades legales e individuales) (OECD, 2015). Las parcelas de tierra para la agricultura, el bosque y pradera y otras utilizadas por entidades privadas son rentadas principalmente por el gobierno.

(Turaev, 1998). En la práctica, sin embargo, las *obshchinas* habían sido formalizadas no como organismos de toma de decisiones o propiedad de la tierra sino más como formaciones de la sociedad civil en lugar de organismos de auto gobierno indígena (Øverland y Blakkisrud, 2006; Berg-Nordlie, 2015).

Ni la creación de TTNUs, ni las *obshchinas* estaban apoyadas por un conjunto de medidas para el desarrollo de la economía tradicional, y mecanismos para el desarrollo socioeconómico de los territorios. Como resultado, la formación de los TTNUs y *obshchinas* son vistos principalmente como una acción política, resultaron ser meros productos de la era del *"romanticismo"* democrático de los años 90's.

Algunas regulaciones regionales proporcionan considerables oportunidades para la participación indígena. Sin embargo, debido a la incertidumbre jurisdiccional y el débil poder regional con respecto al gobierno federal, el gobierno federal con frecuencia invalida la ley regional en áreas de jurisdicción compartida – uso de la tierra, recursos naturales y pueblos indígenas (Newman, Biddulph y Binnion, 2014). Por consiguiente, el potencial regulatorio insuficiente, la falta de mecanismos para implementar los derechos declarados, imprecisión jurisdiccional y no concreción y el poder federal autoritario representan grandes obstáculos para las comunidades indígenas que buscan protección adecuada (Anaya, 2010; Newman y otros, 2014; Gladun e Ivanova, 2017). Las excepciones a las normas legales pueden ser vistas en la ignorancia de las obligaciones de las compañías para evaluar posibles impactos negativos de proyectos en la forma de vida tradicional de los pueblos indígenas o el permiso para definir, reducir, ajustar el tamaño de los TTNUs. Con frecuencia, esas excepciones actúan con aprobación federal.

Viendo el sistema legislativo y a las instituciones existentes lidiando con asuntos indígenas en el país, el papel principal de la ley en el desempoderamiento indígena se vuelve aparente. Como resultado, los sistemas gubernamentales fragmentados, en lugar de proporcionar una oportunidad para un cambio consciente, se vuelve un instrumento para el control (Cunneen, 2011).

La petición disparada de recursos naturales ha permitido un rápido avance del "colonialismo de recursos" definido como la retórica del desarrollo que beneficia a las comunidades extractivas y "entendido como discursos, programas y políticas impulsados económicamente que promueven la actividad extractiva" (Gritsenko, 2016). En este contexto, las tierras indígenas ricas en recursos se han convertido en una de las mayores plataformas y el pilar de los grandes negocios en Rusia. En realidades donde los grupos e intereses industriales representan una mayoría en los organismos legislativos del poder estatal, el empoderamiento indígena está condenado al fracaso. Y mientras los intereses de los pueblos indígenas choquen con los intereses de la gran industria, el gobierno se irá del lado de la industria (Heininen, Sergunin y Yarovoy, 2014). A este fenómeno se le conoce como "recurso maldito" o "ecología del oleoducto", que utiliza "recursos materiales, financieros y humanos con el propósito de fortalecer la élite al mando, debido a que los oleoductos exigen un gran número de directores, ingenieros, trabajadores de la construcción, y sobre todo

vigilantes que sean leales al régimen" (Vladimirova, 2017, p. 301). Al convertir de manera conveniente el "recurso maldito" en "recurso bendito", el Kremlin promueve de manera activa e impulsa los grandes proyectos extractivos para cubrir el malestar económico (Charron, 2017). La dependencia de Rusia de las regiones ricas en recursos con más del 55% de los ingresos federales derivados del uso y exportación de materiales naturales, ha resultado en la curiosa situación con las regiones centrales de Rusia alimentando a una periferia que permanece en gran medida subdesarrollada. En su camino estable de convertirse en el mayor productor de gas y petróleo y aumentar su capacidad de producción de pipas de petróleo y gas (ubicadas principalmente en tierras indígenas) junto con un grupo de presión poderoso de industria extractiva y representación empresarial en las estructuras políticas, las autoridades rusas no han tenido éxito en la protección de los derechos indígenas (Nikolaeva, 2017).

Con frecuencia se ha observado que los pueblos indígenas han capturado la atención y conciencia mundiales (Watt-Cloutier, 2019). ¿Cómo encaja la propuesta de Rusia hacia sus pueblos indígenas en las cuatro décadas de lo que se ha etiquetado como "la etapa más progresiva en la historia del desarrollo de los derechos y libertades de los pueblos indígenas"? Desafortunadamente, las leyes declarativas de Rusia no se traducen en progreso en sus políticas indígenas domésticas. El estado y los actores industriales no dudan en utilizar una variedad de instrumentos para desempoderar legal, económica y políticamente a las comunidades indígenas. Las comunidades indígenas son abandonadas sin un contrapeso poderosos para los autores dominantes, atrapados entre responsabilidades sin fundamento de compañías sedientas de lucro y autoridades que no toman acción (Petrov y Francis, 2015). Con más compañías dando vueltas cada vez más cerca de los territorios indígenas y haciéndose cada vez más ricas, y el gobierno del lado de ellas, los pueblos indígenas se han vuelto marginados en sus propias tierras.

El empoderamiento indígena no es un asunto de rutina, sino de progreso político. La crisis política en la que se encuentran atrapados los pueblos indígenas, no se refiere a la crisis de los derechos indígenas, luchas y determinación per se, sino que apuntan a una falla perpetua de reformas políticas. Un breve renacimiento de las conversaciones basadas en los derechos en la década de los 90's resultó ser un mero desvío temporal.

La Rusia moderna demuestra la regresión en los derechos de los pueblos indígenas; las leyes esperanzadoras tarde o temprano fueron ineficientes, alteradas o revocadas. Un progreso ya modesto y frágil después de la desaparición de la URSS se desvaneció. Veintiocho años después de la desintegración de la Unión Soviética es evidente que la Federación Rusa no busca políticas indígenas más inclusivas y, lo que es más, no es ni inspiración ni un ideal político para el gobierno federal.

¿Cuál es el destino de los pueblos indígenas de Rusia? Algunos investigadores afirman que lo que va a suceder a continuación está en manos de los mismos pueblos indígenas, y depende del camino que escojan. ¿Es cierto? En realidades creadas por el estado ruso que no sólo no ve a los pueblos indígenas, sino que anula cualquier progreso, los grupos indígenas no están en posición de guiar los procesos de toma de decisiones en el país. Como ningún otro pueblo, las comunidades indígenas dependían "para su seguridad y prosperidad en las habilidades y

buenas intenciones de aquellos que los gobernaban" (Scott, 2009, p. 324). Las políticas indígenas actuales que aparentemente aspiraban a la conservación de las culturas indígenas, ignoran el desafío actual que enfrentan los pueblos indígenas – supervivencia a nivel físico – y están destinadas al fracaso. Incluso si las comunidades tienen la mayor y más directa participación en preservar sus culturas, en las realidades rusas, a menudo se topan con el tipo de mala voluntad oculta en las estrategias estatales que reclaman ser en beneficio de los pueblos indígenas. A partir de hoy, la propuesta de Rusia hacia la acogida indígena se caracteriza por la sutileza inigualable, la habilidad incomparable, o incluso la malicia de las políticas de estado.

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Este artículo debe citarse como:
Suliandziga, L. and Sulyandziga, R. (2020) Federación Rusa: Pueblos Indígenas y Derechos sobre la Tierra *Fourth World Journal*. Vol. 20, N1. pp. 21-39

ABOUT THE AUTHORS

Liubov Suliandziga

Liubov Suliandziga, antes de terminar su doctorado en la Universidad de Kyushu, Japón, se graduó de la Univesidad Estatal Lingüística de Moscú como especialista en relaciones internacionales y estudios sociopolíticos. Tiene dos maestrías en estudios europeos por la Universidad de Lovania, Bélgica y estudios comparados y administración de Asia por la Universidad de Kyushu, Japón. Trabajó como investigador adjunto en el Departamento de Ciencia Integrada para la Sociedad Global, en la Universidad de Kyushu. Actualmente, Liubov es miembro de los Jóvenes Líderes en Investigación del Ártico y el programa de políticas avalado por la red de coordinación en investigación de la Fundación Nacional para la Ciencia de la Costa del Ártico, Estados Unidos. Sus intereses de investigación actuales incluyen la historia y empoderamiento de los pueblos indígenas, derechos indígenas e impactos de las industrias extractivas sobre los pueblos indígenas. Liubov ha publicado artículos en la Revista de Ciencia Polar y varias colecciones editadas dedicadas a asuntos de derechos indígenas en el Ártico Ruso.

Rodion Sulyandziga

Rodion Sulyandziga es Udege ("Gente del Bosque"), uno de los pueblos indígenas minoritarios de la comunidad del Este de Siberia de la Federación Rusa. Su población total es de 1587.
Rodion Sulyandziga es director del Centro de Apoyo a los pueblos indígenas del Norte, una organización liderada por indígenas con el fin de proteger los derechos de los pueblos del Norte de la Federación Rusa. Es miembro interino del Mecanismo de Expertos de las Naciones Unidas sobre los derechos de los pueblos indígenas. Su principal investigación y estudio se enfocan en asuntos de autodeterminación y autogobierno, impactos del cambio climático y desarrollo sostenible de las comunidades del norte.

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Odawa Cultural Practices to Treat Substance Addictions
A Tour of the Healing to Wellness Court

By Leonard Mukosi, BSS, LL.B LLM, SJD

ABSTRACT

As the United States of America grapples with one of the worst addiction crisis of all time, the American Indian and Alaska Natives are reportedly the population affected most by drug and alcohol addiction.[1] Notably, American Indians are championing recovery from addiction by integrating their unique cultural practices into the criminal justice system, yet, the nature and impact of Indigenous cultural interventions has not been a focus of much legal scholarly attention.[2] This paper delineates the ethos and efficacy of Indigenous cultural interventions, as exemplified by the Traverse Bay Bands of Odawa Indians Healing to Wellness Court (Waabshki-Miigwan as in the Odawa language Daawaamwin). The paper further argues that Indigenous cultural practices should also be incorporated into Western European-based biomedical practices to promote American Indians' right to health.

Keywords: Addiction, Tribal Healing to Wellness Court, the right to health, Odawa tribe, Culture, traditional practices, International law, curative approach, incarceration, sobriety

American Indians and Substance Abuse

Any discussion about American Indians' involvement with alcohol or drugs would be wanting if it fails to dispel the prevailing assumption that substance abuse has always been a trait inherent in all American Indians. Before contact with the Europeans, American Indians in the Western Hemisphere

[1] Editorial Staff, Race Demographics Statistics on Alcoholism & Treatment, ALCOHOL.ORG (July. 30, 2019, 4:50 pm), HTTPS://WWW.ALCOHOL.ORG/ALCOHOLISM-AND-RACE/.
[2] Rowan Margo et al. Cultural interventions to treat addictions in indigenous populations: findings from a scoping study 41 (11) SS&M 1, 2 (1995).
[3] Race Demographics Statistics on Alcoholism & Treatment, supra, note 1. While the dominant narrative states that American Indians and Alaska Natives (AI/AN) tend to abuse substances more than other racial demographics, it neither traces the history of substance abuse by Native American nor disaggregate substance abuse data according to individual tribes.
[4] Alcohol in Colonial America: Earliest Beginnings ALCOHOL PROBLEMS AND SOLUTIONS (July. 30, 2019, 4: 55pm), https://www.alcoholproblemsandsolutions.org/alcohol-in-colonial-america-earliest-beginnings-in-the-new-world/.

were not overly exposed to or experienced with alcohol or drugs. Some peoples occasionally used weak fermented beers for ceremonial purposes[5] mushrooms, chocolate and tobacco leaves. Only after after American Indians encountered the Europeans on a sustained basis settling in North America that the distillation of potent and addictive forms of alcohol traded to Indians in exchange for such things as beaver pelts, fish, and weapons did they gradually came into wider use. Problematically, since peoples in the Western Hemisphere did not have social, legal, or moral taboos to regulate alcohol use and since hallucinogens (e.g. cannabis, tobacco, chocolate) were commonly controlled for ceremonial purposes by traditional healers and spiritual leaders; the addictive distilled drinks and illicit uses of hallucinogens often destructively hit individuals and communities very hard.[6]

Accompanying consumption of addictive substances and liquors are related morbidity and mortality, domestic violence and a compounded risk of serious health complications like heart disease as well as diabetes among American Indian populations[7] Addictive dependence on drugs by tribal members is often fueled by the intergenerational trauma[8] that American Indians have suffered as a result of socio-political, cultural and economic challenges like impoverishment, familial fragmentation and disintegration, discrimination, deprivation and so on.[9]

The Emergence of Healing to Wellness Courts

Since the late 1980s, the United States' criminal justice system has evolved to respond to the addiction crisis with a curative and less punitive approach.[10] This was done primarily to curb the increasing number of drug related offences and address the problem of overcrowding in jails and prisons.[11] Similarly, many American Indian tribes have expressed interest in adopting the drug court model and redesign it to meet the cultural needs of tribal members suffering from addiction.[12]

In 1997, the United States Department of Justice and Drug Courts Program found it necessary to extend the notion of the drug court to the tribal justice system to meet the specific needs of the Indian Nations; consequently, a culturally sensitive training program was introduced. With the help of National Association of Drug Court

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[5] Id. 'Except for several nations in the Southwest, Native Americans did not have alcohol beverages. The Apache and Zuni drank alcoholic beverages which they produced for secular consumption. The Pima and Papago produced alcohol for religious ceremonial consumption. Papago consumption was heavy. However, they limited it to a single peaceable annual ceremony. And the other tribes' drinking was also infrequent and didn't cause problems.'

[6] Fred Beauvais, American Indians and Alcohol, 22 ALCOHOL HEALTH & RESEARCH WORLD J. 254, 254-8 I (1998).

[7] Brady Magie Culture in Treatment, Culture as Treatment. A critical Appraisal of Developments in Addictions Programs for Indigenous North Americans and Australians 41 (11) SS&M. 1487. 1487-8 (1995).

[8] Christine Vestal Fighting Opioid Abuse in Indian Country https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/06/fighting-opioid-abuse-in-indian-country.

[9] Id.

[10] U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, DRUG COURTS PROGRAM OFFICE HEALING TO WELLNESS COURTS: A PRELIMINARY OVERVIEW OF TRIBAL DRUG COURTS (1999).

[11] Id.

[12] Id.

Professionals and the Tribal Advisory Committee, the tribal Healing to Wellness Courts program was launched.[13]

In many ways, Healing to Wellness Courts resemble the conventional drug court structure,[14] however, merged with specific tribal customs and traditions that help the tribal members regain and maintain sobriety. The Healing to Wellness Courts' primary focus is on the underlying reasons for one's criminal conduct, where substance abuse was a factor, rather than focusing on the criminal act itself. The Healing to Wellness Court also involves family, extended family, and community members in the healing process.[15]

The Waabshki-Miigwan (White-Feather) Drug Court Program

The Waabshki-Miigwan Drug Court of the Little Traverse Bay Bands of Odawa Indians[16] exemplifies the relevance and effectiveness of tribal Healing to Wellness Courts.[17] The Little Traverse Bay Bands of Odawa is one of the twelve federally recognized tribes in the State of Michigan, five of these tribes have reportedly adopted Healing to Wellness Courts, and the Waabshki-Miigwan is possibly one of the most comprehensive and well organized programs.[18]

The Waabshki Migwan Drug Court Program has jurisdiction over Odawa members from Charlevoix and Emmet counties who are recommended for a drug court sentence following a plea agreement entered by the participant's Defense Counsel and Tribal Prosecutor. A participant is admitted into the Healing to Wellness Program after being screened for eligibility by the Waabshki Miigwan Program Coordinator.[19]

Alternatively, participants who are charged with Violation of Probation are referred to the program by the Tribal Probation Officer, the Tribal Court, Defense counsel or the Prosecuting Attorney.[20] In order to be eligible, participants must

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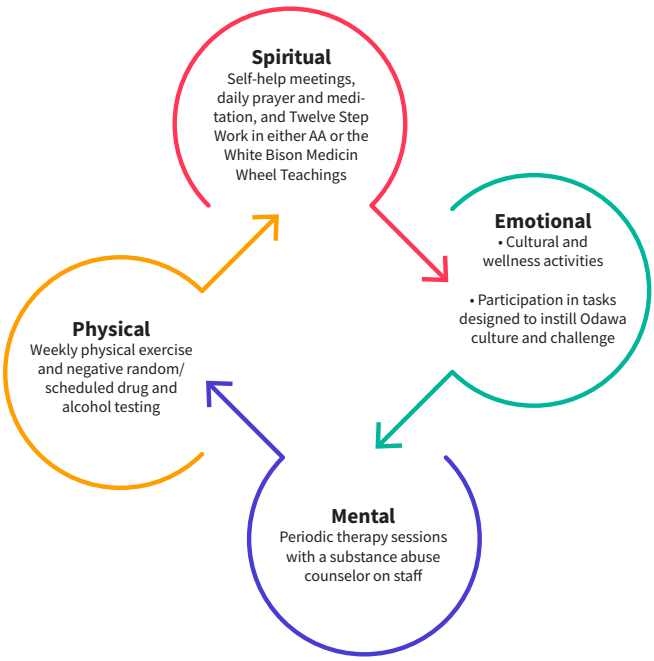
[13] Id.
[14] see Id.
[15] Id.
[15] The Little Traverse Bay Bands of Odawa are an Anishinabeg related to but distinct from Ojibway people. The Odawa migrated, as did other Anishinabeg peoples from the East Coast of North American in ancient times settling on Manitoulin Island, near the northern shores of Lake Huron, and the Bruce Peninsula in the present-day province of Ontario, Canada. They considered this their original homeland. In the 18th century, they also settled along the Ottawa River, and in the states of Michigan and Wisconsin, as well as through the Midwest south of the Great Lakes in the latter country.[3] In the 21st century, there are approximately 15,000 Odawa living in Ontario, and Michigan and Oklahoma (former Indian Territory, United States).
[16] The Little Traverse Bay Bands of Odawa are an Anishinabeg related to but distinct from Ojibway people. The Odawa migrated, as did other Anishinabeg peoples from the East Coast of North American in ancient times settling on Manitoulin Island, near the northern shores of Lake Huron, and the Bruce Peninsula in the present-day province of Ontario, Canada. They considered this their original homeland. In the 18th century, they also settled along the Ottawa River, and in the states of Michigan and Wisconsin, as well as through the Midwest south of the Great Lakes in the latter country.[3] In the 21st century, there are approximately 15,000 Odawa living in Ontario, and Michigan and Oklahoma (former Indian Territory, United States).
[17] About the Waabshki-Miigwan Drug Court Program, LTBB, http://www.ltbbodawa-nsn.gov/Tribal%20Court/DrugCourt/White%20Feather%20Story.html (last visited Jul.27, 2019).
[18] Id.
[19] LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL COURT, WAABSHKI MIIGWAN POLICY BOOK 3-4 (2011).
[20] Id.

not have committed violent crimes. While the tribal drug court assumes civil jurisdiction, the trial/criminal court retains criminal jurisdiction over the offenders who will now be personally and publicly accountable for treatment progress.[22]

Participants in the Waabshki-Miigwan are required to take part in a forty-four week program, which utilizes Odawa values and teachings to encourage them to adopt a healthy, and balanced lifestyle as envisioned by the Odawa ancestors.[23] In order to prevent those students living in isolated rural locations from missing attendance, the WMDCP facilitates the issuance of restricted driver's licenses to students who may have lost their driving privilege due to alcohol or drug related driving offences.[24] This is a major incentive for such students given that shortage of public transportation is a problem yet to be solved in the rural parts of Michigan where most of the tribal members reside.

Indigenous peoples generally take a holistic approach to wellness that goes beyond just physical wellbeing; they strive for a balance among one's tradition, culture, language, and community.[25] This is contrary to Western European biomedical approaches that treat wellness predominantly as physical wellbeing, characterized by the absence of diseases, while treating the mind and body separately in the treatment of addiction.[26] For American Indians, spiritual, emotional and mental wellbeing should complement physical wellbeing in order for one to achieve wellness to the fullest.[27] In situations of addiction, tribes aspire to regain sobriety through connecting with the spirit, culture and identity in sound mental shape. Using this approach, the Waabshki Miigwan program curriculum encompasses activities, which are designed to promote spiritual, emotional physical and mental wellness.[28]

The diagram below summarizes how spiritual, emotional physical and mental wellness are incorporated in the weekly meetings that the participants are expected to attend throughout the Waabshki Miigwan Program.[29]



[21] see Id. The Waasbshshki Miigwan program receives federal-funding and must comply with the Violent Participant requirement. Due to congressional mandate, federally funded Wellness Courts cannot accept cases involving a violent participant.
[22] Id.
[23] Curriculum Summary, http://www.ltbbodawansn.gov/Tribal%20Court/DrugCourt/Curriculum%20Summary.html WAABSHKI MIIGWAN PROGRAM (last accessed July 26, 2019).
[24] Interview with Michael Wolf, LTBB Court Administrator In Petoskey MI (June. 18, 2019).
[25] Margo et al. supra note 2, at 2.
[26] Id.
[27] Joseph Thomas et al Tribal Healing to Wellness Courts: Key Components, 2nd ed. TRIBAL LAW AND POLICY INST. 32 (2014)
[28] Id.
[29] About the Waabshki Miigwan Drug Court Program, supra note 15.

During the weekly meetings, participants are given the opportunity to individually reflect upon the journey to sobriety, looking back to where they came from and acknowledging the noticeable improvements in their lifestyle and personality attributable to participation in the Waabshki Miigwan program, and ultimately pledging commitment to a life of sobriety. [30]

Participants are expected to complete these weekly spiritual, emotional, physical, and mental health activities simultaneously. [31] The successful completion of the assigned tasks determines whether a student advances to the following week's assignments or not. Compliant participants are usually rewarded as a way of recognizing and reinforcing progress.[32] Conversely, failure to complete all assigned tasks not only impedes a student from proceeding to the following week, but also subjects him/her to different kinds of sanctions for instance, community service or a fine payable to the tribal drug court.[33]

The Healing to Wellness Court utilizes an interdisciplinary team approach comprising of the judge, Waabshki Miigwan Court Coordinator, LTBB Adult Tribal Probation Officer, Cultural Resource Advisor and Tribal Law Enforcement.[34] It is through an amalgamation of skills from each of the above parties that a participant's progress is monitored and supported.[35] For the purposes of this discussion, focus shall be placed on the Tribal Cultural Resource Advisor, and the central role of culture and spirituality in America Indian peoples' journey to wellness.

The Role of Culture in the Healing to Wellness Court

The incorporation of American Indian cultural and traditional practices into tribal drug courts is what distinguishes such courts from the conventional drug court systems. Tribal drug courts are designed to instill a sense of direction, vision, and purpose using culture and spirituality as the primary tools. This point was elaborated by the Waabshiki Miigwan Cultural Resource Advisor who said; "The opposite of having an addiction problem is having a connection with your culture, a sense of belonging and direction…because when a person gets addicted to alcohol or drugs he/she turns away from the community and loses touch with culture while finding solace in being alone."[36]

In order to inspire the sense of direction, vision, and purpose within the Waabshki Miigwan participants, the Cultural Resource Advisor plays a significant role. The Cultural Resource Advisor is a cultural coordinator who uses folklore to teach the students about the tribe's cultural roots,

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[30] Id. The weekly activities mainly comprise of All the projects and assignments laid out in the WMDCP week-by-week workbook, Attendance at all assigned counseling, probation, court, and self-help meetings assigned in the WMDCP week-by-week planner; and Compliance with all the WMDCP rules and regulations with an emphasis on maintaining sobriety and clean time.

[31] Id.

[32] WAABSHKI MIIGWAN POLICY BOOK, Supra, note; 17 at 4. Some of the rewards include encouragement and praise from the Drug Court Judge, decreased drug court testing and frequencies for court appearances, while sanctions may range from warning to escalation of periods of jail confinement.

[33] Id.

[34] About the Waabshki-Miigwan Drug Court Program, supra note 15.

[35] Id.

[36] Interview with Antony Davis LTBB Cultural Resource Advisor in Petoskey MI (June. 18, 2019).

giving them knowledge on certain values developed and upheld by their predecessors. A perfect example of such values is the Waabshki-Miigwan (white feather) program itself, which was built in honor of an elderly LTBB Appellate Justice, Hon. Rita Gasco-Shephard who during her lifetime made significant contributions to the development of tribal values and also inspired a culture of tolerance towards addiction.[37]

The late Honorable Rita Gasco-Shepard developed the belief that the community can still accept a person suffering from addiction regardless of how irredeemable he/she may appear, and help them become clean, just like how a "dirty and mangled feather can be picked from the muck and then transformed into a beautiful clean feather."[38] Subsequently, the Honorable Rita's white feather teaching along with other important Odawa tribal teachings, like the Medicine Wheel Teaching, help the participants internalize that regaining and maintaining sobriety is a very achievable goal.[39]

The Medicine Wheel Teaching

The Medicine Wheel Teaching is based on the belief that Living Beings and their communities are governed by a system of circles that repeat and renew in ever-changing ways.[40] The Medicine Wheel teaches about the four cyclic directions of human growth—emotional, mental, physical, and spiritual.[41] These four can take place simultaneously when experienced from the vantage point of the center.[42]

The teaching continues, it is the disharmony or imbalance between human life and the natural principles, laws, and essential values of life worth that trigger challenges like addiction, disturbing the functionality of the cycles in human life. However, because situations taking place in human life are believed to be interdependent, interrelated and joined,[43] addiction is viewed as an inevitable life 'conflict' which is actually not an enemy but a necessary friend that is needed, for it precedes clarity. The clarity is found in community or an individual to find resolution to a problem like addiction. [44]

Cultural and spiritual wellbeing are complemented by physical wellbeing which manifests itself in a healthy body free from ailments. The body's main function is housing the spirit, moving, living and contributing to the community.[45] Both physical and mental wellness enable the person to listen to the spirit, which nurtures their understanding about the meaning of life through intuition.[46] Harmoniously, emotional well-being helps the physical being foster his/her relationship with, culture, other living beings, like animals and plants, thereby attaining wellness through connections to other people, land and creation in their lives.[47]

After complying with the ten month, Four Phase program, the participants will graduate and an event to celebrate the participant is held.[48]

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[41] Id at 1933.
[42] see Id.
[43] Id.
[44] Id.
[45] Margo et al supra note 2 at 4.
[46] Id.
[47] Id.
[48] WAABSHKI MIIGWAN POLICY BOOK supra note 17 at 8

The graduating participant narrates his/her recovery story and will be conferred with a certificate of completion.[49] Alumni from the program can optionally attend the drug court hearing and graduation ceremonies from time to time providing encouragement and serving as living examples of the effectiveness of the Healing to Wellness court to the current students.[50]

It would be careless of me not to mention that Healing to Wellness Courts face impediments that diminish their strength.[51] As tribal civil and criminal jurisdiction is usually construed very narrowly, the jurisdictional barrier extends to Healing to Wellness Court hampering the courts' ability to implement an effective drug court process.[52] Adding to that, the Healing to Wellness Courts face other logistical constraints like isolated rural locations, lack of resources and services, and so on.[53]

More so, a general set back that all drug courts, either Western or Tribal face is stigmatization. The longstanding stigma around addiction has persisted, even though scientific basis has been established to support the theory that addiction is a disease.[54] For some, addiction still remains a moral failing to which incarceration not treatment is the most appropriate response.[55] Consequently, platforms that provide a compassionate and less punitive response to substance addiction, like the Healing to Wellness Courts, are not adequately embraced by both individual members of the society and institutions that regard addiction as a crime.[56]

Indigenous Cultural Interventions, a Human Rights-Based Approach

International human rights laws and concepts have constantly been redefined to guarantee Indigenous wellness by encouraging States to use culturally focused health practices for indigenous people. [57] Groundbreaking scientific studies have proved that addiction is a chronic brain disorder that impedes the right to health.[58] Accordingly, Indigenous cultural interventions should be integrated not only into the criminal justice system but also into the conventional biomedical health care practices to cater for all American Indians with addictions.

Regionally, one of the most recent comprehensive human rights instruments for indigenous people in the Americas, the American Declaration on the Rights of Indigenous Peoples enjoins States to promote intercultural systems or practices in the medical and health services provided in indigenous communities, including training of indigenous technical and professional health care personnel.[59]

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[49] Id.
[50] Id.
[51] U.S. D.O.J PROGRAMS supra, note 9 at 2.
[52] Id.
[53] Id.
[54] Avery Appelman, New Study Proves Addiction is a Brain Disease. APPELLEMAN LAW FIRM. LLC July 30, 2019,4:40 pm), https://aacriminallaw.com/scientists-prove-addiction-brain-disease/.
[55] Margo et al supra note 2 at 4.
[56] Interview with Antony Davis supra note 34; During this interview Mr. Davis mentioned that the health care system is one of the main sources of the stigma against addicts.
[57] Siegfried Wiessner The Cultural rights of indigenous Peoples: Achievements and continuing challenges,22 E.J.I. L 122, 127 (2011).
[58] Appelman, supra note 52.
[59] G.A Res. 288 (XLVI-O/16, American Declaration on the Rights of Indigenous Peoples (June. 15, 2016) at Art XVIII (4)

At United Nations level, the United Nations Declaration on the Rights of Indigenous People, also a milestone in the advancement of indigenous peoples' rights globally, recognizes indigenous peoples right to use health practices that they find suitable.[60] Fortifying this notion is the International Labor Organization Convention 169[61] which mandates member states to provide adequate and, where possible, community based health services to the indigenous peoples.[62]

In the same spirit, the Manual on the International Labor Organization Convention 169 requires that cultural conditions, traditional preventive care, healing practices and medicines be taken into account when providing indigenous health services.[63] The Convention additionally acknowledges that wellness for indigenous peoples constitutes more than just physical well-being, or freedom from diseases, but also spiritual and emotional wellbeing in harmony with nature.[64]

The World Health Organization (WHO) and the Pan American Health Organization (PAHO) adopted a resolution in 2006 urging member states to embrace and incorporate traditional indigenous health systems and perspectives into the attainment of the Millennium Development Goals and national health policies.[65] Other member states of Organization of American States such as Nicaragua, have since aligned their health care systems with international human rights standards by integrating a "cosmovision" of the communities into practice, to define the cultural-specific meaning of full wellness and complete health.[66]

The United States' criminal justice system has commendably promoted the development of tribal drug courts to meet the specific needs of Indian Nations. In turn, American Indian tribal governments are making the most of their self-determination to combat the growing drug and alcohol addiction among tribal members through incorporating their cultural practices in the Healing to Wellness Court. Given the demonstrated success of a culturally relevant approach used in the Healing to Wellness Court, such practices should not only be used to curb overcrowding in prisons but to also promote and protect American Indians' right to health by being incorporated into the conventional health care system to curb the addiction epidemic among all American Indians.

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60 G.A. Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct.2, 2007).
61 Indigenous and Tribal Peoples Convention, C169, June 27 1989.
62 Id at Art 25.2; 'Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.'
63 The International Labor Organization: Development Cooperation Internal Governance Manual" https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_452076.pdf
64 see Id.
65 WHO & PAHO Res. 2006/18 (September. 8, 2006).
66 Heather Carrie et al Integrating Traditional Indigenous Medicine and Western Biomedicine into Health Systems: A Review of Nicaraguan Health policies and Miskitu Mealth Services INT J EQUITY HEALTH 2015; 14: 129.The Nicaraguan Ministry of Health has created "revitalize popular and traditional medicine" as a necessary response to the high costs of imported pharmaceutical materials. Creation of an intercultural healthcare division (National Centre of Popular and Traditional Medicine) that is responsible for organizing traditional medicine research; training health care providers in traditional medicine practices; and commercializing the production of medicinal plants.

This Article may be cited as:
Mukosi, L. (2020) Odawa Cultural Practices to Treat Substance Addictions
A Tour of the Healing to Wellness Court. *Fourth World Journal*. Vol. 19, N2. pp. 41-49.

ABOUT THE AUTHOR

Leonard Mukosi

Leonard, 'Leo' Mukosi is a Doctor of Juridical Science (SJD) Candidate in the Indigenous Peoples Law and Policy Program at the University of Arizona - James E Rogers College of Law. Leo is originally from Zimbabwe; he graduated from Rhodes University, South Africa with a Bachelor of Social Sciences and a Bachelor of Laws (LLB). Afterward, he moved to the U.S where he received a Master of Laws (LL.M) from Michigan State University. Leo has worked in the U.S, Zimbabwe and Kenya with different organizations that advocate for the rights of children and Indigenous peoples. During summer 2019, Leo worked with the Michigan Indian Legal Services (MILS), an organization that provides legal services to income-eligible individuals and Tribes in the state of Michigan. While at MILS, Leo worked on a grant funded domestic violence project, creating an awareness of legal avenues available to tribal victims of domestic violence as well as aligning tribal domestic violence codes with the Violence Against Women Act. During this period, he also attended several tribal court sessions including the Little Traverse Bay Bands of Odawa Indians Healing to Wellness Court (Waabshki-Miigwan).

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Human Rights Law and Fourth World Peoples in Asia: Catalysts for Change

By Dr. Narissa Ramsundar, Regina Paulose & Tabitha Nice

Photo credit: Aranka Rohingya National Organization (ARNO)

ABSTRACT

This is a report specifically focusing on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and questions whether or not these rights have been provided to Fourth World peoples in Asian countries. This report examines five specific peoples with the purpose of determining whether they have been afforded the rights enshrined under the ICESCR. This report aims to highlight the Fourth World peoples in the Asian region that have been severely affected by the implementation or lack of effective implementation of the ICESCR. While the authors acknowledge that the States mentioned in this report may have undertaken to officially consider the implementation of economic, social and cultural rights as prescribed under international law. This report flags violations of the Covenant that require urgent attention to ensure compliance with international law. The report further identifies recommendations that

aim to alert the United Nations and relevant institutions that action to encourage compliance is needed. The States discussed in this report should also take note of the fact that any failure to comply with the Covenant can and should be immediately corrected as a matter of priority.

Keywords: human rights, indigenous, peoples, Fourth World, Martinez Cobo, Tibetans, Uyghurs, Kachin, Sentinelese, civil rights, United Nations. UNDRIP

Eighteen years after the Universal Declaration on Human Rights was adopted by the United Nations in 1948, two treaties were drafted to enshrine the rights contained in that Declaration as new international state law. The first of these was the International Covenant on Civil and Political Rights (ICCPR - 1966) that came into force in March 1976. The ICCPR commits states' governments to respect the civil and political rights of individuals. The second human rights affirming law was the International Covenant on Economic, Social, and Cultural Rights (ICESCR - 1966) that came into force in January 1976. The ICESCR was adopted into law to provide a framework to protect economic, social, and cultural rights to grant economic, social and cultural rights to non-self-governing territories and individuals.

The recognition of economic, social and cultural rights has been identified as one of the core aims outlined in Article 1(3) of the Charter of the United Nations.[1] These aims have been reinforced by the United Nations in its 2030 Agenda for sustainable development.[2] The Office of the United Nations High Commissioner for Human Rights (OCHR) recognizes these rights as "economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education."[3] The OCHR has listed worker's rights, protection of and assistance to the family, the right to adequate standard of living, the right to health, the right to education and the right to participate in cultural life and to benefit from scientific advancement as well as the protection of moral and material interests from literary and artistic production as examples of this unique groups of rights.[4] Economic, social and cultural rights (ESCR) as recognised under the ICESCR[5] are unique in that they are not automatically granted to individuals, but are realised progressively through State undertakings in a prompt and effective manner. This report identifies clear areas of violation of State obligations in this quest for progressive realisation of economic, social and cultural rights.

Methodology

An informal working group was created in July 2019 and was comprised of Regina Paulose,

[1] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[2] Transforming our World: The 2030 Agenda for Sustainable Development available at < https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> last accessed 24 January 2020.
[3] OHCR "Frequently Asked Questions" Fact Sheet 33 available at <https://www.ohchr.org/Documents/Publications/FactSheet-33en.pdf > last accessed 24 January 2020.
[4] Ibid
[5] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171). Hereinafter, referred to as ICESCR.

International Criminal Law Attorney of the Common Good Foundation, Dr. Narissa Ramsundar of Canterbury Christ Church University, and Ms. Tabitha Nice. The working group aimed to:

- Gather a diverse group of indigenous peoples together from Asian countries to discuss economic, social, and cultural rights in their homeland;
- Learn more about the landscape of these particular rights and celebrate successes, discuss potential violations, and find shared solutions;
- Create a report of the information that has been presented by indigenous groups in Asia and disseminate that report to relevant UN Rapporteurs;
- Present that report at the Human Rights Council session in Geneva, Switzerland in March 2020.

This research group examined whether indigenous peoples living in Asian States can access economic, social, and cultural rights that are guaranteed under the UN treaty framework to which the States are party. The research group proposed to rigorously examine a group of states that have so far not been subject to detailed scrutiny on the question economic, social, and cultural rights regarding indigenous groups. In so doing this report aims to advance the development of human rights compliance by States in Asia.

The working group hosted a workshop at Canterbury Christ Church University from October 26- 27, 2019. Before this event, a call for participation was sent to indigenous nations in Asia. Leaders from these nations were contacted and invited to attend a two-day workshop. Of those representatives invited, three nations' representatives participated in the workshop at Canterbury Christ Church University: the Uyghurs, the Kachin and the Rohingya. The authors listened to presentations from representatives of the different groups. These narratives were then placed in tables that presented information from the narratives describing infringements preventing attainment and enforcement of ESCR. The findings from the workshop thus informed the preparation and presentation of this report scheduled for the March 2020 Human Rights Council session in Switzerland.

Two further representatives from different indigenous groups, the Tibetans and Sentinelese contacted the working group. Regina Paulose worked to obtain information regarding the Sentinelese, and Tabitha Nice, and Narissa Ramsundar interviewed the Tibetan representative establishing five nations as sources. All of the information presented to the research group was then analyzed and entered into comprehensive table that documented information about infringements of the ESCR committed against the subject indigenous nations.

Once the information was compiled, the research group then analyzed the data and wrote recommendations based on what was presented. The representatives participated anonymously study for this report so they could speak freely

without fear of political repercussions from ruling countries should that arise. This report does not infer that it is a likely result, but notwithstanding, the working group adopted this security measure.

The authors presented recommendations to the United Nations for improvement and further realization of the rights enshrined within the ICESCR after the narratives for each indigenous nation narrative towards the end of the report.

The UN Declaration on Indigenous Peoples Rights

Increasing attention to and protecting the rights of indigenous peoples has been a focus of the United Nations since the 1970s. In 1971 the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Special Rapporteur Jose Martinez Cobo. Special Rapporteur Cobo published a report of his study titled "The Study of the Problem of Discrimination against Indigenous Populations."[6] After this report was issued, the UN took concerted actions to elevate discourse regarding indigenous issues, with the notable appointment of a Special Rapporteur on Indigenous Rights in 2001 and, in 2007, finally agreed to the creation of the Expert Mechanism on the Rights of the Indigenous Peoples (EMRIP) and adopted the UN Declaration on Indigenous Peoples Rights (UNDRIP). EMRIP is a vital subsidiary body that provides expertise and advice on the rights of indigenous people and promotes and assists states' parties with protecting the rights espoused under UNDRIP.

The UN General Assembly adopted the UNDRIP on September 13, 2007. It contains 46 articles that proclaims guarantees to protect and emphasize the individual rights of indigenous peoples. Since it is a Declaration, it is not legally binding on states' parties. However, there are other treaties and covenants that are recognized to have binding force that complement the UNDRIP articles. In addition to the International Covenant on Economic, Social and Cultural Rights the other treaties and covenants include:

- The International Labour Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989) which replaces The International Labour Convention on the Rights of Indigenous and Tribal, and Semi-Tribal Populations in Independent Countries, No 107. [7]
- The International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention on the Biological Diversity (CBD)

The UNDRIP contains several articles that are also enshrined in the ICESCR. The right to self-determination, protecting children's rights, right to education, and economic development, joins these included articles.

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[6] Jose Martinez Cobo, "Study of the Problem of Discrimination against Indigenous Populations" Volume V, UN NY 1987, E/CN.4/Sub.2/1983/21/Add.8.

United Nations Special Rapporteur Rodolfo Stavenhagen issued a report in 2007 [8] about indigenous peoples in Asia, specifically discussing human rights: civil, political, economic, and social and cultural rights. Stavenhagen highlighted several important points that are worth noting in this report. First: throughout Asia "states differ in the legal recognition and status that they grant to indigenous peoples in their own countries, and also in the terminology applied to refer to these groups in their domestic policies and legislation."[9] Stavenhagen also pointed to the loss of indigenous lands and territories, forced relocation as a result of national development projects or conflict, and violence either from conflict or targeted violence towards women and children through crimes such as human trafficking.

The nations that participated in this study, and we report here, were asked whether they identified as something near or akin to the term "indigenous." All groups reported that they have a term that they use which is equivalent to the meaning of "indigenous" under UNDRIP framework. This reference to self-identification is based in part on the terminology used by Special Rapporteur Victoria Tauli Corpuz in her 2019 Report on her Mission to Brazil. In her earlier report in 2014 on the Rights of Indigenous Peoples she discussed that the concept of "indigenous peoples" is an elusive one and that definitions can be either over or under inclusive. To this end, Special Rapporteur Corpuz noted that there is no definition of indigenous peoples and a definition of the term does not appear in the UNDRIP.

In discussing the UNDRIP with the participating groups, the groups indicated that all of the articles contained in the UNDRIP did not apply to the peoples based on the way they were treated in the status quo. As indicated in the following table, when the participants were asked about whether they enjoyed the rights enumerated within the articles in the UNDRIP, their response was straightforward.

UN Declaration on Rights of Indigenous Peoples Assessment by Representatives of Groups

UN Declaration on the Rights of Indigenous People	Uyghurs	Kachin	Rohingya	Tibetans	Sentinelese
Article 1: Full rights	•	•	•	•	Yes*
Article 2: Free and equal– free from discrimination	•	•	•	•	Yes*
Article 3: Right to self-determination	•	•	•	•	Yes*
Article 4: Right to autonomy or self-government in matters relating to their internal and local affairs	•	•	•	•	Yes*
Article 5: Right to maintain distinct e/s/c/p rights	•	•	•	•	Yes*
Article 6: Right to nationality	•	•	•	•	Yes*
Article 7: Right to life, collective right to freedom	•	•	•	•	Yes*

[7] This report was written prior to the release of the ILO Assessment Report on the status of Indigenous and Tribal People Convention.
[8] Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development" 1 November 2007, A/HRC/6/15/Add.3.
[9] Id para 6 and 7

UN Declaration on the Rights of Indigenous People	Uyghurs	Kachin	Rohingya	Tibetans	Sentinelese
Article 8: No forced assimilation or destruction of their culture. Mechanisms of redress.	•	•	•	•	Yes*
Article 9: Right to belong	•	•	•	•	Yes*
Article 10: No forcibly removed from territories or lands	•	•	•	•	Yes*
Article 11: Right to practice cultural traditions, mechanisms to protect culture, religious, and spiritual property	•	•	•	•	N/A cannot return items
Article 12: Right to religion, repatriation of ceremonial objects/remains	•	•	•	•	Yes* repatriation N/A
Article 13: Right to transfer and revitalize language and traditions, states must protect this right	•	•	•	•	Yes*
Article 14: Control over education	•	•	•	•	Yes*
Article 15: Right to dignity	•	•	•	•	No
Article 16: Right to media	•	•	•	•	N/A
Article 17: Right to enjoy full rights	•	•	•	•	N/A
Article 18: Right to participate in decision making matters	•	•	•	•	N/A
Article 19: states to consult	•	•	•	•	N/A
Article 20: Right to maintain political, economic, and social institutions	•	•	•	•	Yes*
Article 21: improvement of economic and social conditions	•	•	•	•	N/A
Article 22: Attention shall be paid to elderly, women, children, and disabled	•	•	•	•	N/A
Article 23: Right to development	•	•	•	•	N/A
Article 24: Right to traditional medicines	•	•	•	•	N/A
Article 25: Right to spiritual relationship with the lands	•	•	•	•	Yes*
Article 26: Right to land	•	•	•	•	No
Article 27: Due process	•	•	•	•	N/A
Article 28: Right to redress	•	•	•	•	N/A
Article 29: Right to conservation and protection of the environment	•	•	•	•	N/A
Article 30: No military activities	•	•	•	•	Yes
Article 31: Right to maintain and control cultural heritage	•	•	•	•	Yes
Article 32: Right to development of lands	•	•	•	•	N/A
Article 33: Right to customs and traditions	•	•	•	•	Yes
Article 34: Right to promote customs	•	•	•	•	Yes
Article 35: Right to determine responsibilities	•	•	•	•	Yes
Article 36: Right to maintain and develop across borders	•	•	•	•	N/A
Article 37: Right to recognition of treaties	•	•	•	•	N/A

With regards to the Sentinelese people it was noted that, in some cases, it was difficult to determine whether or not the UNDRIP was followed as they are a non-contacted tribe. Of interest to the research team was that most of these groups were unaware that the UNDRIP contained articles of this nature. When asked in the Working Group Session whether the UNDRIP articles were honored by the states they resided in, the repre-

sentatives of the Uyghurs, Rohingya, and Kachin, collectively responded "all of it was violated." Sadly, it appears that nothing has changed since the last focused UN report on indigenous groups within Asia. Moreover, as this report will continue to show, the ICESR which is legally binding on state parties is not providing the additional layer of protection it should afford to these communities, regardless of whether or not these groups are legally recognized as such by the state parties discussed in this report.

Key Take-Away

During the course of the Fact-Finding process, it was made clear to the research team by therepresentatives of these self-identified indigenous nations that almost all articles (where applicable) contained in the UNDRIP are not recognized by the state governments. In fact, participants acknowledged that the laws towards these particular indigenous nations enforced by these state governments do exactly the opposite of what the spirit and intent of UNDRIP promotes.

International Covenant on Economic, Social, and Cultural Rights

The ICESCR establishes a framework for the progressive realisation of core ideals recognised in the United Nations Charter[10] and the Universal Declaration of Human Rights[11] regarding economic, social and cultural rights. The Preamble to the Covenant proclaims that the "inherent dignity and ... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." It also recognises that these inalienable rights derive from the inherent dignity of the human person."[12] Although the Treaty recognises that these freedoms and rights represent an ideal, "it identifies that the means for this ideal to be achieved is through the creation of conditions "whereby everyone may enjoy ... economic, social and cultural rights, as well as ... civil and political rights."[13] To this end, the Convention emphasizes State obligations towards the creation of conditions for the enjoyment of all rights. The Covenant has articulated ten core rights that relate to the economic, social and cultural life of an individual. These are:

- The right to self-determination[14];
- The right to work[15];
- The right to enjoy just and favourable working conditions[16];
- The right to form and join a trade union of choice[17];
- The right to social security, including social insurance[18];
- Protection to the family[19];
- The right to an adequate standard of living[20];
- The right to the highest attainable standard of physical and mental health[21];

[10] Charter, note 1.
[11] Universal Declaration of Human Rights, adopted 10th of Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, U.N. Doc. A/810 (1948).
[12] The Preamble to the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171).
[13] Ibid.
[14] Article 1 ICESCR
[15] Article 6(1), Article 6(2) ICESCR
[16] Article 7 ICESCR
[17] Article 8 ICESCR
[18] Article 9 ICESCR
[19] Article 10(1) ICESCR
[20] Article 11 ICESCR
[21] Article 12 ICESCR

- The right to education,[22]; and
- The inherent right of peoples to utilise their natural wealth and resources.[23]

The "concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time."[24] Nonetheless, that recognition does not mean ESCR rights are devoid of content. To the contrary, the concept of "progressive realization" demands that while there is a recognition of the realities of the "real world,"[25] States, nevertheless, have an obligation to move "expeditiously and effectively" to accomplish that goal.[26]

Article 2(1) of the ICESCR articulates three undertakings that States must perform, in order to progressively achieve the full realisation of these economic, social and cultural rights. These are:

- To take steps individually and through international cooperation, especially economic and technical;
- To utilize maximum available resources
- To employ all appropriate means, particularly the adoption of legislative measures.

Article 2(2) further provides that States undertake to apply these rights in a non-discriminatory manner, so that all the rights enunciated in the ICESCR will be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 provides further protection against discrimination by requesting states to undertake that both men and women equally enjoy the rights enshrined in the ICESCR.

The undertaking to "take steps" is not an aspirational one. General Comment No. 3 states that the undertaking is not qualified or limited by other considerations.[27] Moreover, steps towards progressive realization of economic, social and cultural rights must be "deliberate, concrete and targeted as clearly as possible" and must be taken relatively quickly after the ICESCR entry into force for the State. "While the full realization of the relevant rights may be achieved progressively, steps towards that goal must nonetheless be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the ICESCR.

The undertaking to "utilise maximum resources" is also not an aspirational one. General Comment No. 3 identifies that there are quantifiable markers to assess this. General Comment suggests that there are minimum essential levels of ESCR that States must provide. States bear an onus of proof regarding this obligation. If they fail to meet at least minimum core obligations, then they must demonstrate that at least every effort must have been made to satisfy these minimum

[22] Article 13 ICESCR
[23] Article 15 ICESCR
[24] CESR General Comment No.3 " The Nature of States Parties Obligations" (Art 2 para 1) Adopted at the Fifth Session of the Committee Economic, Social and Cultural Rights E/1991/23 (14 December 1990) para 9.
[25] Ibid
[26] Ibid
[27] CESR General Comment No.3 " The Nature of States Parties Obligations" (Art 2 para 1) Adopted at the Fifth Session of the Committee Economic, Social and Cultural Rights E/1991/23 (14 December 1990) para 2.

obligations. While there is not a precise marker, assessments of objective markers such as analyses of fiscal spending, taxation frameworks and benefits from corporate entities can be taken into account.[28]

Judicial oversight of these ESCR in domestic courts has supported the progressive realization of these rights.[29] Beyond this, a further level of protection has been provided under the Optional Protocol [30] with the creation of the Committee on Economic, Social and Cultural rights (CESR) to address claims regarding the provision and realisation of ESCR.[31] Much reliance is thus placed on monitoring mechanisms and the timely reporting or breaches or violations of these obligations. As some authors have opined, "progressive realization" requires a rational devotion of state effort to achieve rights within the maximum of available resources, in the shortest possible time, while preserving a minimum irreducible core of rights and safeguarding the most vulnerable." [32]

States owe compliance with these rights to all peoples. An important aspect of the ICESCR is that the provision of these ESCR rights is addressed holistically across the society so that one group does not benefit at the expense of the other. Special Rapporteur on the rights of Indigenous Groups Corpuz identified indigenous groups as vulnerable in the 2014 report. [33]

According to her report, indigenous groups have "nearly disadvantageous social and economic conditions of indigenous peoples as compared to the majority of the population in the societies in which they live present barriers to the full exercise of the population in the societies in which they live..."[34] Her report concluded that indigenous persons fared worse than non-indig-

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[28] Ben Saul, David Kinley and Jacqueline Mowbray ' Introduction' in Ben Saul, David Kinley and Jacqueline Mowbray The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials (Oxford Scholarly Authorities on International law 2014) available at< https://opil.ouplaw.com/view/10.1093/law/9780199640300.001.0001/law-9780199640300-chapter-1> last accessed 15 January 2020.

[29] There is no dearth of examples of judicial application for enforcement of ESCR in domestic and regional courts. Some examples are for instance European Federation of National Organisations Working with the Homeless (FEANTSA) v France (Complaint No. 39/2006), Merits, 5 December 2007 (European Committee of Social Rights) on the right to housing, and also European Roma Rights Centre v Greece (Complaint No. 15/2003), Merits, 8 December 2004; European Roma Rights Centre v Italy (Complaint No. 27/2004), Merits, 7 December 2005; European Roma Rights Centre v Bulgaria (Complaint No. 31/2005), Merits, 18 October 2006. Cases have also been brought in domestic courts for eg in India see Shanti Star Builders v Narayan K Totame (1990) 1 SCC 520, [9]–[11] and in Africa see Republic of South Africa v Grootboom et al (Case CCT 11/00), 2000 (11) BCLR 1169 (CC), 4 October 2000.. Several cases on the right to self-determination has also arisen before the HRC. See Chief Bernard Ominayak and Lubicon Lake Band v Canada, CCPR/C/38/D/167/1984, Human Rights Committee (HRC), 26 March 1990 available at: https://www.refworld.org/cases, HRC, 4721c5b42.html [accessed 24 January 2020].

[30] The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008, entered into force 5 March 2013, C.N.869.2009. TREATIES-34)

[31] Article 1 The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008, entered into force 5 Mat 2013, C.N.869.2009.TREATIES-34.

[32] Ben Saul David Kinley and Jacqueline Mowbray ' Introduction' in Ben Saul, David Kinley and Jacqueline Mowbray The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials (Oxford Scholarly Authorities on International law 2014) available at< https://opil.ouplaw.com/view/10.1093/law/9780199640300.001.0001/law-9780199640300-chapter-1> last accessed 15 January 2020.

[33] Report of the Special Rapporteur on the Rights of Indigenous Peoples" UN A/HRC/27/52 (Victoria Tauli Corpuz 2014)

[34] Ibid para 42

enous persons with regard to poverty, health, education, unemployment, housing conditions, clean water and sanitation.[35]

In her report she noted that challenges indigenous peoples face with regard to ESCR was related to their history of being denied self-determination, land and resources.[36] Their deprivation of land and resources has been to the benefit of other groups and according to Corpuz, for there to be an improvement in the delivery of state obligations on ESCR to them, their unique history must be taken into account. There must be "some restoration of what has been lost including sufficient land to ensure a sufficient basis for development."[37] Further, while most states have organised delivery of ESCR by moving groups to urban areas, the attachment of indigenous groups to their lands require design of programmes to allow access to ESCR in their traditional lands.[38] She has advocated increasing input from indigenous groups on economic decision making for growth outcomes[39] and as well measure be put in place by States so that indigenous groups do not loose important aspects of their culture, ways of life, access to lands and that their access to ESCR right be taken into this broader context.[40]

Key Takeaway

The ICESCR has outlined obligations on States to create conditions that allow all peoples to have access to the economic, social and cultural rights it defines. States must ensure that indigenous peoples have equal access to their rights under the ICESCR. They must not be disadvantaged in the allocation of resources. Further, ICESCR requires that positive action be taken to ensure that steps are taken to ensure that all means are exhausted to maximise resources for ESCR, so that there is a progressive realisation of these rights.

This requires detailed State policy that allows for indigenous groups to consult on development issues and further for their unique histories and traditional relationships to the land be factored into all ESCR developments. States are under an obligation further to guard against any type of abuse of these particular rights.

The next sections examine the obligations owed under the ICESCR. This information was presented by representatives of the groups as on-going ECSR violations under the ICESCR.

Indigenous Peoples of Asia

Sentinelese

The Sentinelese tribe resides on North Sentinel Island that is part of the Andaman Islands, considered part of India. The Sentinelese people for the most part have been left alone for centuries,[41] which is why they are labeled a "non-contacted" tribe. They have made it expressly clear the situation should remain this way. India classifies the Sentinelese as "Particularly Vulnerable Tribal Groups" (PVTG). The tribe came into the public's attention when a young missionary attempted to proselytize the Sentinelese people. A debate

[35] Ibid
[36] Ibid para 44
[37] Ibid
[38] Ibid para 45
[39] Ibid
[40] Ibid at 45-46
[41] Adam Goodheart, The Last Island of the Savages, The American Scholar, Autumn 2000, 69(4):13-44.

ensued whether or not the tribe should be contacted in order to find the missionary—who is likely dead.[42] Besides the issues relating to missionaries and tourists who may want to come into contact with the Sentinelese, poachers are also now attempting to pillage resources from tribal sanctuaries. [43]

While the questions presented to researchers regarding the application of the ICESR appears positive for the Sentinelese, the difficulty in assessing the true application of the ICESR is that it is an un-contacted tribe. For now, it appears India has acknowledged and continues to preserve the Sentinelese right to self-determination as enshrined in the ICESR. The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples stated, "one must respect the principle of no contact…"[44] as this is an expression of self-determination. Absent contrary information at this juncture, the authors work under the assumption that the tribe governs itself according to its own cultural and social norms and laws without undue influence. However, it is clear that the Indian government could cause the extinction of this particular tribe if tourism and other types of contact go unchecked.[45]

The following table highlights the rights violations of the ICESCR of non-contacted tribes as reported by Survival International, a NGO that works closely to protect the rights of non-contacted tribes. This information was reported to the research team.

ICESR Application Sentinelese

Article	Content	Violation
Article 1	The right of self-determination.	Yes, their right to remain uncontacted is respected and they are entirely self-governing
Article 2	Undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	Since the tribe is self-governing unable to measure this
Article 3	Ensure the equal right of men and women.	N/A
Article 6	Right to work.	N/A
Article 7	Right to enjoy just and favorable working conditions. Remuneration, fair wages and equal treatment for work of equal value, decent living for self and family, safe and healthy working conditions, equal opportunity to be promoted, rest and leisure and periodic holidays with remuneration for public holidays.	N/A
Article 8	Right to form and join a trade union of their choice.	N/A

[42] PTI, "Restricted Area permit may be reimposed in North Sentinel Islands" The Hindu, November 28, 2018, https://www.thehindu.com/news/national/restricted-area-permit-may-be-re-imposed-in-north-sentinel-islands/article25615015.ece

[43] Survival International, "Serial poacher's arrest exposes failure to protect world's most isolate tribe" August 3, 2017, https://survivalinternational.org/news/11764

[44] Jose Martinez Cobo, "Study of the Problem of Discrimination against Indigenous Populations" Volume V, UN NY 1987, E/CN.4/Sub.2/1983/21/Add.8

[45] Scott Wallace, "Death of American missionary could put this indigenous tribe's survival at risk" National Geographic, November 28, 2019, https://www.nationalgeographic.com/culture/2018/11/andaman-islands-tribes/#close

Article	Content	Violation
Article 9	Right to social security, including social insurance.	N/A
Article 10	Protection to the family, particularly while responsible or the care and education of children. Marriage should be entered into with free consent. Special protection to mothers before and after child birth.	N/A
Article 11	Right to an adequate standard of living.	N/A
Article 12	Right to the highest attainable standard of physical and mental health.	N/A
Article 13	Right to education.	N/A
Article 14	If at the time of becoming a state party there is no primary education it will, within two years, adopt a plan of action for progressive implementation.	N/A
Article 15	Right to take part in cultural life.	Yes (there is no interference in their cultural life)
Article 25	Nothing shall be interpreted to impair the inherent right of peoples to utilise their natural wealth and resources.	

The Uyghurs

The Uyghurs identify themselves as an indigenous people native to East Turkestan. This region is commonly referred to and identified as the Xinjiang province of China. The Uyghurs have identified that under the ICESCR, which China ratified in their rights have continued to be violated. Several states have called upon China to revisit the framework of protection it offered the Uyghurs. [46]

During the Universal Periodic Review (UPR) for 2018 China declared in its submission to the United Nations "the linguistic and educational rights and interests of ethnic minorities are protected."[47] China specifically called attention to its success in the Xinjiang region noting that "Year of Building People's Livelihood" initiatives has allowed for an increase in disposable income, an increase in housing areas, and free education programs have been implemented across Southern Xianjiang.[48] China stated in this same submission that it aims to "accelerate the development of ethnic minorities and ethnic areas, strive to eliminate gender discrimination…"[49] No other reference was made regarding the Uyghurs in China's submission. In March 2019, several countries stated their concerns over the human rights situation in Xinjiang. China responded to the Human Rights Council stating that "Xinjiang and Tibet were valued economic regions, and all ethnic groups lived there in peace. A number of vocational training centers had been built, but only to combat extremism."[50]

[46] Human Rights Council, "Report of the Working Group on the Universal Periodic Review" A/HRC/25/5, December 4, 2013.
[47] Human Rights Council, "National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 CHINA" A/HRC/WG6/31/CHN/1* August 20, 2018, Para 73
[48] Ibid Para 75
[49] Ibid Para 89
[50] UN Geneva, "Human Rights Council Begins General Debate on Human Rights Situations that Require the Council's Attention" March 12, 2019, https://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/4FD54EF-0CB531A83C12583BB006969D5?OpenDocument

A month later, the High Commissioner for Human Rights, Michelle Bachelet, specifically asked China to abolish "all forms of arbitrary detention, including extra-legal detention facilities in the Xinjiang Uygur Autonomous Region." Further, the High Commissioner called upon China to take "urgent steps to respect the rights of persons belonging to ethnic minorities, including the rights to peaceful assembly and to practice religion and culture, in particular in Xinjiang" and to strengthen protection against all forms of discrimination and violence against minorities.[51]
Unfortunately, the noted successes highlighted by China in Xinjiang have not translated into any apparent or tangible benefit for the Uyghur population and appear tantamount to violations of nearly all international covenants and treaties.

The following table highlights the rights violations of the ICESCR as reported by the Uyghur representatives to the research team.

ICESR Application
Uyghurs

Article	Content	Violation
Article 1	Self-determination and the pursuit of ESCR.	• Political participation is not allowed • Self-determination is in the process to be destroyed. Identity is at risk to be lost. China wants Uyghurs to accept the identity as Han Chinese
		• Uyghurs have to speak their (Han Chinese) language, wear their clothes, practice their religion, and participate in any activities organized by communist party
Article 2	Apply Covenant without discrimination.	• Discrimination applied across the whole nation • Uyghurs are not allowed to practice their religion, fast, celebrate religious events, or go to mosque • Every 100 meters Uyghurs are stopped for search ID is required
Article 3	Equal rights to men and women.	• Uyghur men and women have no rights that could be equally applied • The majority of people in camps are men (tortured) • Women are taken to camps for either prostitution (rape), organ harvesting or to be used as labour to produce some trade stuff
Article 6	Right to work.	• Uyghurs have limited rights to work. The Chinese Government has decided to restructure everything in Xinjiang (East Turkestan) by making transfers • Uyghurs who were at higher positions have been moved from cities to villages or completely taken from the post or detained in camps • The population proportion of Han Chinese increases so all good positions are taken by Chinese officials • Uyghurs are not able to make their choices of work

[51] Michelle Bachelet, "Letter to HE Mr. Wang Yi Minister of Foreign Affairs China" April 29, 2019, https://lib.ohchr.org/HRBodies/UPR/Documents/Session31/CN/LetterChina.pdf

Article	Content	Violation
		• In concentration camps Uyghurs work for free like slaves • Many Long working hours • Allowed to go out once a week or month • Uyghurs are not allowed to move to find job
Article 7	Right to just and favorable conditions of work.	• No rights to choose jobs • Government makes sure good posts are taken by Han Chinese • Poor working conditions, lack of facilities • All sharp equipment are chained (for example butchers places have all knives chained due to fear of Uyghurs)
Article 8	Right to form trade unions.	• No rights to join any trade unions. If any to exist Chinese government applies its rules
Article 9	Right to social security and insurance/adequate standard of living (food and shelter).	• None of the Uyghurs are secured from becoming homeless or end up in concentration camps • Chinese government confiscates properties or demolishes. Including mosques, graveyards (centuries old), squares • No benefits available
Article 10	Wide protection accorded to family, mothers before and after child birth and children.	• Uyghur families have been split apart. New born babies allowed to stay with mother until 1 year old. If a mother is considered to attend a concentration camp, she leaves home when her child is 1 • If grandparent is alive, child can stay with them. If not a place arranged at an orphanage
Article 11	Right to work.	• Uyghurs are forced to eat pork, drink alcohol • No access permitted to migrate to other areas for food •Food might not be accessible due to prices • Lots of fields damaged by chemicals using to grow food
Article 12	Right to highest standards of physical and mental health.	• Uyghurs are facing difficulties to attend hospitals, clinics • Wrong diagnosis, treatments have been applied. People are dying at young ages • Lack of medication • People unable to buy medicine – too expensive • Organ harvesting (many organs from detained parties)
Article 13 & 14	Right to education. If no system is in place, state party undertakes to plan one within two years.	• Uyghur schools are closed • Education performed in Chinese • Uyghurs are not allowed to speak their language • The community party forces Uyghurs to learn all about community Chinese regime • Uyghurs are not considered for any education for qualification • Uyghurs are used as a source of free labour and live in concentration camps.
Article 15	Right to take part in cultural life.	• All cultural and traditional events are not happening anymore

Article	Content	Violation
		• Uyghur people need to add Chinese culture and traditions to theirs. Therefore- all traditions closed–in order to have a Chinese element in it • Weddings, all sorts of group events happening in Chinese • Forces marriages to Chinese officials under threats. All happening according to Chinese culture
Article 25	Nothing in the Covenant should impair the inherent right of peoples to enjoy and utilise their natural wealth and resources.	• Uyghurs land has been taken over by Chinese with all its resources and natural wealth. Oil, drainage controlled by Chinese • All other resources taken too. Chinese government feeds the rest of the country (mainland China) by selling and using all resources in Xinjiang • All officials (Uyghurs) who were in charge of controlling and maintaining these resources have been taken away from their posts or in camps

The Rohingya

The Rohingya identify themselves as an indigenous group that resides in the Arakan state (now known as the Rakhine) in Burma. Burma is now recognized by the international system of states as Myanmar. The Rohingya representatives reported that they were once able to express themselves through their own language, culture and had their own lands. After the military coup basic rights were stripped, their identity was diminished and an apartheid system was put into place. In 1982 a Citizenship Law was put into place, which rendered the Rohingya "stateless." They are stripped of basic rights, for instance, they cannot vote since they are not listed as citizens of Burma. The Rohingya representatives reported that there are other laws in place, which prevent them from realizing basic economic, cultural, and social rights. The Marriage Act limits the number of children a Rohingya family can have. There are restrictions in place on social movement, medical care, and education. Although there are built structures for schools, many teachers do not attend lessons thereby making education hard to access, even if it may be available in some areas. The Rohingya representatives stated that young adults also have no access to college and universities.

There is a lack of job opportunities given the apartheid system. Further, restrictions on land for Rohingya who currently live in the Arakan and confiscation of the land from those who left the territory make many of the rights within the ICESR untenable for the Rohingya people. When the authors discussed employment opportunities, the Rohingya representatives continually described how their people were enslaved through forced labor by the Burmese military, which is still occurring today.

Although waves of violence and forced displacement have occurred throughout the history of the Rohingya in Burma, the international community began devoting attention to their plight in 2017 when over 700,000 Rohingya people fled from violence, rape, and murder to become

refugees in Bangladesh. [52] The Rohingya refugee camps in Bangladesh are overcrowded and sanitation is sparse. There is rampant disease and a lack of social mobility which makes the camps feel like an open-air prison as the Rohingya representative reported. Many of the people attempt to escape by taking the perilous journey out to sea to find a way to escape state sponsored violence in the Arakan. On January 23, 2020 the International Court of Justice in its Order for Provisional Measures indicated that the Rohingya people were an "extremely vulnerable" group.[53]

The following table highlights the rights violations of the ICESCR as reported by the Rohingya representatives to the research team.

ICESR Application Rohingya

Article	Content	Violation
Article 1	The right of self-determination.	• Considered to be absent • Their identity as an indigenous group is inherently linked with the land. Territory, therefore, forms a critical part of their identity rendering this right existential because they have no territorial integrity • Identity is needed for self-determination but restrictions on marriage and children diminished the identity needed
Article 2	Undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	All laws are applied in a discriminatory way
Article 3	Ensure the equal right of men and women.	Women are subjected to rape as a weapon of war
Article 6	Right to work.	• Forced labour has been present for a long time • Refusal to engage in labour leads to punishment • Farmers were deprived of the right to work
Article 7	Right to enjoy just and favorable working conditions. Remuneration, fair wages and equal treatment for work of equal value, decent living for self and family, safe and healthy working conditions, equal opportunity to be promoted, rest and leisure and periodic holidays with remuneration for public holidays.	Not applicable (not allowed to work)
Article 8	Right to form and join a trade union of their choice.	Not applicable (not allowed to work)
Article 9	Right to social security, including social insurance.	Due to the discrimination suffered there are no such rights

[52] Fact Finding Mission, "Report of the detailed findings of the Independent International Fact – Finding Mission on Myanmar" Human Rights Council, September 2018, para 883

[53] International Court of Justice, "Order APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE" The Gambia v. Myanmar, January 23, 2020, para 72

Article	Content	Violation
		The price of produce is artificially increased, then decreased so that the ability to provide is never realized
Article 10	Protection to the family, particularly while responsible or the care and education of children. Marriage should be entered into with free consent. Special protection to mothers before and after child birth.	Marriage Act restricts the number of children within a marriage to two
Article 11	Right to an adequate standard of living.	• Imperceptible • Military can be present at all times and the restriction on movement means that standards of living are underdeveloped • They have 100 of their own dishes which they cannot produce
Article 12	Right to the highest attainable standard of physical and mental health.	• Those living as refugees suffer PTSD and malnourishment • They are constantly living in fear • The main issue is to find and secure food, so anything beyond that is luxury and the pervasive sense is one of fear which mitigates against mental and physical healt
Article 13	Right to education.	They are physically restricted to their village, so secondary school and university are not possible
Article 14	If at the time of becoming a state party there is no primary education it will, within two years, adopt a plan of action for progressive implementation.	They are physically restricted to their village, so secondary school and university are not possible
Article 15	Right to take part in cultural life.	• Rohingya radio program was removed when the military took over • No sharing of cultural and social traditions so intergenerational continuity is threatened
Article 25	Nothing shall be interpreted to impair the inherent right of peoples to utilise their natural wealth and resources.	• Lands have been confiscated, burned down and turned into new camps for the military so the demographic has totally changed • The villages are used by external companies. They bring non-locals to the village, like ex criminals, creating “natal villages” • Loss of multi-billion dollar investments with no consent at all

The Kachin

Kachin people identify themselves as an indigenous people from the Kachin state located in North Burma. The Kachin state borders China and India. Most Kachin live in Burma and India. The Kachin people have their own language, are mainly Christian in their religious practices, and have lived on the Northern parts of Burma since before 1885, when British colonisers came to Burma. Independence as the Republic of Burma was achieved in 1948 as the British colonial empire receded. In 1947 the negotiated Panglong Agreement came into effect, which gave the Kachin, Chin, and Shan autonomy in their territories.[54]

[54] Panglong Agreement, February 12, 1947, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_470212_Panglong%20Agreement.pdf

The Kachin people enjoyed independence for ten years. However, during that period, they struggled to communicate with the Central Government. In 1960 the Kachin Independence Organisation (KIO) was created by students at Rangoon University (Kachin Independence Army is the military wing of the KIO). Conflict broke out between the Burma and the KIA and lasted for approximately 33 years.[55] A ceasefire was eventually put into place, but the Burmese government continued to exert its control over Kachin areas. In 2011, conflict broke out between Kachin armed forces and the Burmese military. The Kachin state continues to remain in a precarious and delicate situation as reported by the United Nations Independent International Fact Finding Mission on Myanmar report.[56]

The control imposed by the Burmese government has manifested in various ways to limit economic, social, and cultural rights. Kachin representatives gave some examples of this. They reported that the Burmese government continually exploits natural resources in the area, for projects such as Myitsone Dam, and jade and gold mining, where no benefits are given to the peoples. Kachin representatives also emphasized the destruction of religious institutions such as churches by the Burmese government. They reported the building of Buddhist pagoda's to erase Kachin identity These examples and more are further detailed in the UN Fact Finding Mission on Myanmar report.[57] As reported by the United Nations the conflict in the state has left people internally displaced. Kachin representatives reported that while the international community sends aid for internally displaced people, the aid to the vulnerable people is blocked by the Burmese government.

The following chart highlights the rights violations of the ICESCR as reported by the Kachin representatives to the research team.

ICESR Application Kachin

Article	Content	Violation
Article 1	The right of self-determination.	• Group engaged in struggle over the creation of a separate state and bore arms in this struggle • Although there is a Kachin State, there is a strong Burmese military presence in the Kachin State • Kachin do not have strong roles in Burmese Parliament • Group unable to properly identify as a separate state with clear political voice • Cultural identity of the Kachin is not taught at schools • Kachin are Christian and there are land marks that celebrate other religions; for example, a Dragon on the snow-capped mountains and pagodas in their lands which undermine their ability to express their own religious or cultural identity

[54] Panglong Agreement, February 12, 1947, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_470212_Panglong%20Agreement.pdf
[55] Carine Jaquet, The Kachin Conflict, July 3, 2018, Occasional Paper – Investigation Series 02, DOI: 10.4000/books.irasec.241
[56] Fact Finding Mission, "Report of the detailed findings of the Independent International Fact – Finding Mission on Myanmar" Human Rights Council, September 2018, para 106
[57] Ibid, para 111 and 112.

Article	Content	Violation
		• Unable to celebrate Kachin heroes but instead must revere Burmese heroes so unable to express Kachin identity properly or teach children of their own heroes • Kachin do not have the ability to articulate their own voice and participate with other groups as equals in the government or have their culture or religion integrated into their lives
Article 2	Undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	• Discriminatory Legislation, specifically enacted - "Race and Religion Laws" • Discriminatory quality of the legislation as it permits required for inter religious or inter racial marriage • Discrimination against students and individuals with Kachin accents
Article 3	Ensure the equal right of men and women.	• Discriminatory legislation specifically enacted –" Race and Religion Laws" • Buddhist women cannot marry Muslim or Christian men without approval • Women cannot marry freely • Non Buddhist men cannot marry freely • Kachin men not able to freely marry • Kachin women targeted as "weapons of war" as women are vulnerable, reports of rapes by Burmese military • Kachin women being sex trafficked to China • Men and women not free to exercise own personal choices
Article 6	Right to work.	• Kachin less likely to get work in Burmese military service • Kachin accent mocked • Government policies do not create conditions so that Kachin have access to different kinds of jobs • Access to particular jobs is prevented
Article 7	Right to enjoy just and favorable working conditions. Remuneration, fair wages and equal treatment for work of equal value, decent living for self and family, safe and healthy working conditions, equal opportunity to be promoted, rest and leisure and periodic holidays with remuneration for public holidays.	• Not commented on by representatives
Article 8	Right to form and join a trade union of their choice.	• No trade unions in the Kachin State
Article 9	Right to social security, including social insurance.	• Not commented on by representatives
Article 10	Protection to the family, particularly while responsible or the care and education of children. Marriage should be entered into with free consent. Special protection to mothers before and after child birth.	• Representatives commented on early child death rates • High malnutrition rates for children • There is a drug abuse problem among young persons which representatives attribute to low cost of heroin and ease of trafficking into the Kachin State • No social structures in place to rehabilitate or protect against drug abuse and these drug problems negatively impact on the development of good family life

Article	Content	Violation
		• The Race and Religion Laws compromise the ability for individuals to marry freely as a permit is required for marriage to Burmese individuals by other groups • Conditions are not supporting protection of family life
Article 11	Right to an adequate standard of living.	• Low income among the Kachin group • Low income would impact on the ability to maintain an adequate standard of life
Article 12	Right to the highest attainable standard of physical and mental health.	• High early child death rates • Lack of adequate medical supplies in State Hospitals • No systems in place to address mental health resulting from drug abuse • Right violated as conditions not created to support progressive development of health care, both physical and mental
Article 13	Right to Right to education.	• Kachin accent is mocked in schools • Curriculum does not reflect Kachin histories • Rural schools • Lack of Kachin teachers • Very hard for Kachin to acquire qualifications for Higher Education or even complete education • Much indoctrination on Burmese life in schools • Full access to all levels of education not achievable and conditions for indigenous education not facilitated
Article 14	If at the time of becoming a state party there is no primary education it will, within two years, adopt a plan of action for progressive implementation.	• Not commented on by representatives
Article 15	Right to take part in cultural life.	• Unable to organize cultural activities • Unable to celebrate Kachin heroes, must instead revere Burmese heroes • Conditions prevent the free celebration of cultural practices and identities
Article 25	Nothing shall be interpreted to impair the inherent right of peoples to utilise their natural wealth and resources.	• There is massive exploitation of jade and timber on Kachin lands • The extent of mining has rendered mountainous regions hollow as the speed of exploitation is destructive • Historic lands used to grow crops to export to China and India • An economic zone has been set up without the consent of the Kachin people on Kachin lands • Inherent right of the Kachin to use and develop their own natural resources has been prevented by large scale exploitation

The Tibetans

Tibetans originated from a nomadic clan originally occupying the current Tibetan territory more than 2000 years before the present. Until 1959 the Tibetans had their own language, culture, tradition, script, national flag, currency

and postal service. After what the Tibetans refer to as the invasion of their country[58] the lifestyle of Tibetans was significantly changed. According to the Tibetan representative, population numbers affected are disputed; Tibetans say there are six million Tibetans, China says there are three million.

The representative who described Tibetan history with the working group considers Tibetans to be those who live in Tibet but since the invasion, the territory has been divided into 5 divisions. Some Tibetans are in Gansu province, and there are Tibetans in Qinghai province, Sichuan province, and Yuan province. Tibet's autonomous region ("TAR") is the only one that China does not claim. This is why the People's Republic of China claims there are 54 nationalities inside China; some come from Tibet itself and are Tibetan, but other Tibetan people live in areas that are claimed by China. They are indigenous in the area bordering with Burma. The term indigenous is not necessarily political but it means that they have been there since time immemorial. They are native to the land. They have been there since well before the invasion from China.

Originally, the population was monastic (made up of monks and nuns) and 70% were nomads. They moved to places to pasture their animals, with life depending on their herds. After the invasion, the Tibetan lifestyle was affected. Religion is crucial to the Tibetan identity. Tibetans have a reincarnation system, which is part of Tibetan Buddhism. When someone dies, they leave marks or indications/prediction letters, omens and signs saying where they will be reborn. There are three main Dali Lamas who reincarnate. Sun (Dali Lama), Moon (Panchen Lama) and Star (Karma pa lama). The Karma pa Lama is the 17th incarnation. The Dali Lama chose him at the same time endorsed by the Chinese Communist Party (CCP), so this posed no problems for the Tibetans. However, the Representative stated that the Karma Pa Lama was "wanted as a puppet," so he did not remain but instead "managed to escape." The Panchen Lama was abducted as a child and is nowhere to be seen; April 25, 2019 was his 30th birthday. The CCP say he is safe and leading a normal life. The current Dalai Lama is also in exile. Tibetan lifestyles center on religion and are organized around religious structures. The key religious leaders are not able to lead them and this strikes at the heart of their way of life.

The following chart highlights the rights violations of the ICESCR as reported by the Tibetan representative to the research team.

ICESR Application Tibetans

Article	Content	Violation
Article 1	Self-determination and the pursuit of ESCR.	• Genuine autonomy within China is hard to practice because you can't be autonomous without being free. The Dali Lama identifies that they don't have genuine autonomy at the moment • The Dalai Lama says that autonomy within China is acceptable but there is disagreement with this view among some Tibetans.

[58] The Chinese Communist Party (CCP) refers to this as a peaceful liberation.

Article	Content	Violation
Article 1		• Buddhism is an important aspect of Tibetan identity. The religion is monastery dependent so if you destroy monasteries, you destroy the religion. • Monasteries were destroyed in 1959 so that aspect of identity is only now being rebuilt. • There is a weakening of the authority of the Lamas and the issues surrounding the abduction of the Karma Pa lama further attacks the expression of self through religion. • Tibetans have their own script and language which is 2500 years old. The language is now banned. It is not taught so it is becoming useless. Government has Mandarin or Cantonese policy, so that all government jobs are in one of those languages. • There group's identity is inextricably linked to religion and there are attacks on religious institutions, individuals and ways of life. • The "guides" that tour guides deliver to tourists are scripted by China. There is no allowance to deviate from the script and much of it is written by China with little cultural accuracy for Tibetan history, and for instance says that Tibet has been part of China for hundreds of years. If they choose to talk about the actual history they will have their license revoked.
		Tibetan history, and for instance says that Tibet has been part of China for hundreds of years. If they choose to talk about the actual history they will have their license revoked. • Ancestral link to lands destroyed. No access to pastoral land, animals automatically go to the government and group must accept their conditional settlement. • Group cannot exercise expertise in husbandry.
Article 2	Apply Covenant without discrimination.	• Discrimination is embedded in teaching practices • Demeaning references that "Tibetans live in tents" because they don't know how to build houses, it prevents an understanding of the identity of the people. They lived in tents because they are a nomadic population, not because they are unable to learn • Conditions are being created to stereotype Tibetans and misunderstand them
Article 3	Equal rights to men and women.	• Access to jobs depend on the ability to communicate in Chinese languages • Although traditional Tibetan society engages a separation based on gender, in relation to roles within a nomadic community fewer exiled women have access to Chinese language lessons and so they are unable to learn the language and obtain employment. For instance, in 2018 three women passed the tests needed to be a tour guide but 40 men did

Article	Content	Violation
Article 6	Right to work.	• There is a prohibition on native language, and the requirement for Chinese languages to be spoken • This prohibits access to government jobs, and most jobs are government controlled • In order to secure jobs you have to be cadre, a comrade and to denounce the Dali Lama as a separatist, and you have to denounce Buddhism "as a poison to society" • Some are very restricted. Sale of Buddhist photos or objects are limited to particular areas
Article 7	Right to just and favorable conditions of work.	• The policy of denouncement of the Dalai Lama is required. You do it by producing a booklet explaining why the Dali Lama and Buddhism is "poison to society" • Tibetans have their own script and language which is 2500 years old. However, government has Mandarin or Cantonese policy, and government jobs are in one of those languages • If someone gets a job, however, they have to work under the same conditions as the Han Chinese
Article 8	Right to form trade unions.	• There are TUs in China but there are none in Tibet. The structure exists in China but not in Tibet or Chinese occupied areas with Tibetan communities • You can join a trade union if you are a member of the CCP • If you are offered membership in the CCP you cannot decline it • No right to join a TU. Membership in a TU is hinged on political factors such as the relationship to the CCP
Article 9	Right to social security and insurance/adequate standard of living (food and shelter).	• The standard of living seems to be adequate as conditions are created to support appropriate housing. They are a nomadic community who has been forced to work but in order to make money they have built houses and in the main city they upgraded their houses and rented them to Chinese to gain income • Social security was not commented on
Article 10	Wide protection accorded to family, mothers before and after child birth and children.	• Improvements since 1959 • Communities have village based trained nurse who is likely to be Chinese
Article 11	Right to adequate standard of living (food).	• The standard of living and access to food seems to be adequate • Tibetans have stable food, barley, and out of that they make tsampa which is roasted barley flour, they have wool, hide, etc., and they trade with other Tibetans who are farming wheat, barley, peas, tropical fruit like apricots and fruit. It was a simple life • Use of identity cards to access health care • Distinction between Tibetan And Chinese medicine, and access to Tibetan medicine is limited • Suspected organ harvesting

Article	Content	Violation
Article 12	Right to highest standards of physical and mental health.	• Groups speak of forced sterilization • Family planning is heavily promoted and embedded in the media • There is a violation of the right here as forced sterilization, suspected organ harvesting and reliance on family planning as opposed to good maternal care is not achieving high health standards
Articles 13 & 14	Right to education. If no system is in place, state party undertakes to plan one within two years.	• Discrimination to women in Higher education (HEA) as the centers for this learning are not in the communities • Fear of living in a Chinese community alone prevents HEA learning among women • Schools use Chinese languages • Tibetans are allowed one spouse only, notwithstanding it is a polygamous group. Further there is a one child policy as well. The CCP does not impose the one child policy on Tibetans, but when children get to school age the CCP only allow one child to be educated. Education for the second child is either a huge fee or they are sent to a monastery or they get adopted. This applies to Tibet and all of the provinces as well • Boys are favored in the education system • There is a violation of this right as access to education is difficult and discriminatory
Article 15	Right to take part in cultural life.	• Buddhism and social organization around Buddhism is critical to cultural identify of this group • Buddhism is banned. Pictures of the Dali Lama are prohibited in homes and monasteries. Whereas in the past they were allowed alongside the Buddha • After 1959 the social structures changed. Religion was considered “poison” and not allowed • Monastic communities were not allowed to share power and take roles in government. The Buddhist society is a theocratic one, and this powerless of these institutions affect cultural life • Tibetans are also nomadic. Substantial parts of Tibetan population used to be nomadic. Now there are geographical limits with boundaries made in barbed wire so animals are unable cross boundaries and move freely
Article 25	Nothing in the Covenant should impair the inherent right of peoples to enjoy and utilise their natural wealth and resources.	• Hydro power projects have compromised access to ancestral lands; • Hydro power projects have also resulted in nomadic resettlement programme • Mining/logging projects initiated by China; sulphur, gold copper, lithium • Confrontation where the nomads resist mining and they are killed • Chinese do not need visas to travel around but Tibetans do

Article	Content	Violation
		• The Chinese first had an incentive to move to Tibetan land such as being given loans and help setting up a restaurant. The Chinese/ Tibetan population it is now 50/50 in all major cities in Tibet • These incentives have destroyed cultural links to the land • There is much displacement and hardship caused on the group by logging, mining and hydro power projects

Recommendations to parties

Based on the information contained within this report and as presented to the research group, the following recommendations are made. The most important recommendation that can be made at this juncture by the research group is the immediate cessation of all hostilities towards these and all other Asian indigenous groups that were not highlighted in this report. The remaining recommendations fall within three categories; UN recommendations, national recommendations, and regional recommendations.

Recommendations to the United Nations

• Treaty bodies within the United Nations should coordinate information and responses to violations of ESCR as these rights are enshrined in multiple treaties.

• The United Nations should do targeted education campaigns through social media and other methods to educate civil society on what ESCR are and entail.

• The CESR should be strengthened so as to encourage stronger investigations and reporting on violations of ESCR.

• UN should continue to monitor human rights on the Asian continent by initiating a regular reporting requirement to the UN by Asian States and further establish regular visits by UN observer missions.

• The UN should continue to work to resolve and dismantle all forms of discriminatory legislation, particularly those that are aimed at those groups which identify as indigenous.

Recommendations to the States

• State parties should ensure that their national and local legislations are aligned with their ratification of treaties.

• State parties should assess, given their history with colonialism, whether their current structures duplicate the same oppressive mechanisms that were created by colonial entities on their nationals, specifically indigenous peoples.

• State parties should ensure the protection of natural resources and natural resource heritage which in most cases are identified as belonging to the indigenous groups.

• State parties should call for the immediate cessation of all religious discrimination and destruction of religious buildings, artifacts, and freedom to worship, per indigenous cultural beliefs.

• State parties should integrate the history of indigenous groups and education on unique cultures on all educational curriculum so that students learn all cultures and histories in their States.

• State parties should use social media and other methods to educate civil society on indigenous peoples and work on raising awareness to their heritage.

• State parties should enable indigenous persons to access all jobs by ensuring they can access all levels of education and training by setting up scholarships and job opportunities where necessary.

• State parties should ensure that rural areas have access to all levels of scholarship. Where provisions of teachers are not possible, use of remote blended methods such as virtual learning should be used.

• Where multiple languages are needed for employment, systemized language lessons need to be provided in all areas so all persons can qualify.

• State parties should support indigenous theatres, street theatres, artists, performers in a systemized manner so that indigenous culture is given a platform.

• State parties should review all discriminatory legislation and put an end to use of the law to embed and entrench discriminatory practices.

Regional Recommendations

• The Association of South East Asian Nations (ASEAN) and related regional entities should create human rights-based courts so that rights are enforced through regional methods, similar to the African Union Court of Human Rights and the Inter-American Commission on Human Rights.

• ASEAN should collectively enforce reporting by its state parties on a regional level of progress and realization made on the twin treaties, the ICESCR and ICCPR.

• ASEAN should create a mechanism to identify and monitor risks, for example, an Early Warning System, to prevent gross human rights violations from escalating into mass atrocities for peoples within Asia, with a particular focus on indigenous groups, who are at risk of cultural extinction.

• ASEAN should create a monitory mechanism that reviews discriminatory legislation and work with States to put an end to these laws.

• ASEAN should work with State parties to reform discriminatory legislation and ensure that legislative frameworks address progressive realization of ESCR and Human rights in general.

This Article may be cited as:
Ramsundar, N., Paulose, R., Nice, T., (2020) Human Rights Law and Fourth World Peoples in Asia: Catalysts for Change, Fourth World Journal Vol. 20 N1 pp. 51-77

ABOUT THE AUTHORS

Narissa Kashivi Ramsundar

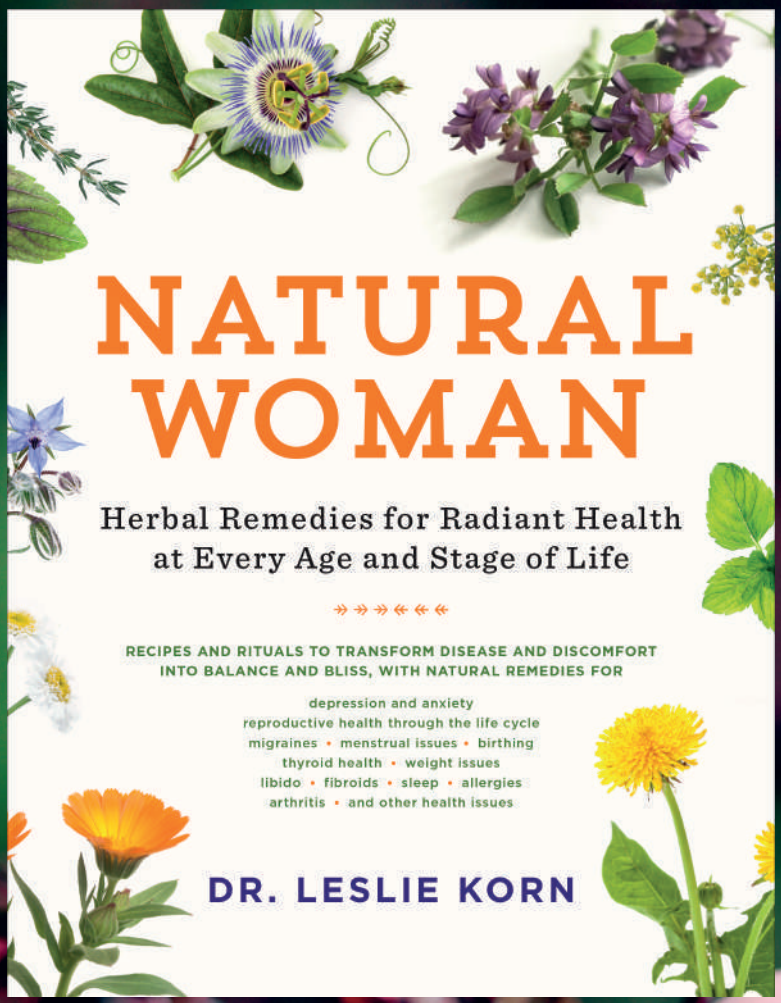
PhD (2017) Queen Mary University of London, is a Senior lecturer at Canterbury Christ Church University.
www.canterbury.ac.uk

Regina M. Paulose

International Criminal Law Attorney (US), Executive Director, The Common Good Foundation, Inc.
www.acontrarioicl.com

Tabitha Nice

Lawyer and mediatior practicing in London (participated in this project in a pro-bono, non legal capacity)



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Cultural Genocide: Destroying Fourth World People

By Rudolph C. Rÿser, Ph.D., Amelia A.M. Marchand, M.A., and Deborah Parker, M.A.

[Presentation delivered by a three-member panel (Dr. Rudolph C. Rÿser, Amelia Marchand, and Deborah Parker) on the topic of Cultural Genocide at the World Peace through Law Section, Washington State Bar Association education session, April 3, 2020.]

ABSTRACT

Raphael Lemkin invented the word "genocide" after spending decades researching the consequences of kingdoms and states colonizing peoples in Africa, the Americas, Asia, Melanesia and the Pacific Islands from the 15th century to the present. He concluded that colonization had the effect of destroying peoples "in whole or in part" by destroying their cultures. In this essay the authors introduce and examine the major characteristics of cultural destruction, or in Lemkin's words, "cultural genocide." Recognizing that when the United Nations debated and adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 it did so to implement the significant Universal Declaration on Human Rights containing provisions such as, "Everyone has the right to freely participate in the cultural life of the community…". The authors note that the provision of the 1948 Convention on Genocide includes neither the word "culture" nor the word "people" in the text. Lemkin's primary definition of genocide ("the destruction of a people's culture") is ignored in favor of defining genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group" – killing, causing bodily harm, physical destruction, prevention of births, and the forcible transfer of children. Lemkin argued that the domination of a people with the intent of destroying or replacing their culture in whole or in part is the first stage of genocide that can lead to violent killings and bodily harm. This essay comprises an overview of the development of Cultural Genocide as a concept, Heritage Elimination and Cultural Cleansing.

Keywords: Lemkin, state-based law, nation-based law, indigenous community, UNESCO, Fourth World, traditional knowledge, language, UN Declaration on the Rights of Indigenous Peoples, Uyghurs, Salish, Māori.

State-based domestic and international law has dominated the legal framework offering stability and continuity of states. Since the negotiation of the Treaty of Westphalia in 1648 and Emer de Vattel's 1758 documentation of the Law of Nations (the Law of Nature applied to the conduct of affairs of nations

and sovereigns), the "rule of law" serves as the touchstone for a desired and secured system of states. The emphasis on state-based law has aimed to ensure the permanence of the state and the recognition of individual rights within a state under international law. Nation-based domestic and international law, however, is rooted in the customary, traditional, natural, and common law of nations emphasizing the maintenance of national cultural traditions and security of a people. The state system has subordinated nation-based law to state-based law due, in no small measure, to state monopolies over the exercise of centralized force. Consequently, to minimize the potential for violent conflict, nation-based law frequently interweaves fundamental national law with state statutes that often conflict with national cultures. This conflict becomes evident in the matter of prosecuting intentional acts of cultural genocide and crimes against humanity.

Since the end of World War II in 1945, state-based domestic and international humanitarian law has characterized acts of genocide dominated by the discourse on human rights. The emphasis on human rights that points to individual rights, including genocide as a "type of human right" violation, is inconsistent. This inconsistency is evident since acts of genocide refer to the intentional destruction of whole peoples, communities, societies, groups, or collectives that are defined by their cultural or national identity. The anomalous placement of genocide within the framework of human rights policy and law creates a fundamental conflict that obstructs the process of accurately and effectively prosecuting violations of individual human rights or acts of genocide that concern collectives or peoples.

Individual human rights violations must be adjudged as distinct encroachments on individual liberties and rights well within the purview of state-based domestic and international law. This narrow focus is evident by the actions of the International Criminal Court's rulings based in the 1948 (into force 1951) Convention on the Prevention and Punishment of the Crime of Genocide. The crime of genocide must be accurately defined to include the intentional and systematic destruction of a society, community, or a peoples' culture—a violation of collective rights.

The legal norms within a state frame the prosecution of crimes committed against individual rights. However, collective rights or commission of crimes by a political institution (nation or state) must logically depend on the nation-based law.

Since the end of World War II Crimes of Genocide and crimes violating the norms of humanity have focused on "human rights" with the main emphasis on individuals. Acts of genocide and crimes against humanity are, however, concentrated on acts against "groups" of human beings—or, more precisely, intentional acts to destroy a people in whole or in part. During the 1920s and 1930s the Polish attorney Raphael Lemkin conducted studies about historical acts destroying entire peoples. He concluded that committing genocide against a people need not necessarily mean the violent and mass killing of a people though that may occur. As he wrote in his book, "Axis Rule in Occupied Europe" (1943):

> "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by

> mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."

Lemkin's emphasis provides a significant explanation of genocide that is ignored in the International Genocide Convention and the International Criminal Court. Lemkin coined the term "genocide," given his understanding of the intentional destruction of a "nation's culture" through undermining and eliminating or replacing political, social, and cultural institutions as well as language and more. Cultural Genocide is, therefore, this intentional and coordinated effort to eradicate the foundations of life for nations with "the aim of annihilating the groups themselves"—primarily by substituting the dominating influence of a controlling power.

Indigenous nation leaders condemned genocide against indigenous peoples —culturally and physically—as a matter far more serious than violations of human rights. This point is made in the decisions of the International NGO Conference on Discrimination Against Indigenous Populations convened in Geneva, Switzerland by the United Nations Sub-Committee on Racism, Racial Discrimination, Apartheid, and Decolonization under the Economic and Social Council (Geneve, Switzerland 1977). Indigenous leaders from throughout the Americas participated and formulated recommendations to the UN. They urged the inclusion of language at the United Nations stating that the ulterior purpose of cultural violence is the disappearance of the indigenous community, and that individual acts made with the intent of disrupting cultural and social bonds, including separation of children from families are acts that must be acknowledged. The destruction of lands, waterways and the introduction of industrial facilities that disrupt the natural world are acts of genocide. The assembly noted that the laws of indigenous nations prohibit such acts and that the laws of indigenous nations must be respected including how the jurisdiction of these nations applies their laws and customs. In the final resolution of the Conference delegates stated that while situations may vary from country to country, the roots of genocide are in "brutal colonization to open the way for plunder of
(traditional) lands by commercial interests seeking maximum profits." The Conference recommendations and Resolution became foundational to the language and principles entered into the draft UN Declaration on the Rights of Indigenous Peoples of 1994.

The Global Preparatory Conference convened for more than 400 delegations of indigenous nations representing the regions of the world met in Alta, Sami land [Norway] in June 2013 and delivered recommendations to the United Nations. The World Conference on Indigenous Peoples convened in September 2014 urging respect and

recognition of indigenous peoples' traditional governing systems and cultural practices. The UN High-Level Meeting of the General Assembly produced an Outcome Document that recognized that the Alta Conference had presented recommendations, but none of the recommendations relating to culture, governance or genocide were noted.

The Genocide Convention adopted by the UN in Paris in 1948 defines genocide without the precursors and persecution that Lemkin noted in his definitions. The Convention defines genocide as follows:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

"Article III: The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

The intentional and organized destruction of culture and all the attributes of a nation is absent in this definition, as the narrow and individual focus of the Genocide Convention and the International Criminal Court seeks to prosecute individuals "after the fact" of cultural genocide. The United Nations persists in its failure to recognize cultural genocide. Domestic state-law mirrors this fatal flaw and thus permits genocide when intentional and organized acts aimed at the elimination of cultural heritage and cultural practice are tolerated. Cultural heritage (sacred sites, burial grounds, language, history, etc.) and the removal of cultural identity (education, language, spiritual practices, architecture, arts, political systems, food systems)—cultural cleansing or cultural genocide—are the subjects of our further discussion.

Heritage Elimination – The Destruction of the Legacy, Artifacts, and Symbols of Human Society

In 2003, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted a Convention for the Safeguarding of the Intangible Cultural Heritage. "Intangible Cultural Heritage (ICH)" is defined by UNESCO as the practices, representations, expressions, knowledge, skills – as well as the instruments, objectives, artifacts, and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. It is transmitted from generation to generation, constantly evolved by communities and groups in response to their environment, interactions with nature and unique histories, and provides identity and continuity. Intangible Cultural Heritage includes, but is not limited to: a) oral traditions and expressions, including language as a vehicle for cultural heritage transmission; b) performing arts; c) social prac-

tices, rituals, and festive events; d) knowledge and practices concerning nature and the universe; and e) traditional craftsmanship.[1]

The most common terminology used to express ICH by Fourth World (Indigenous) peoples is traditional knowledge. (I use Fourth World and Indigenous interchangeably) Traditional Knowledge broadly refers to Fourth World communities' ways of knowing that both guide and result from their community members' close relationships with and responsibilities towards the landscapes, waterscapes, plants, and animals that are vital to the flourishing of Fourth World communities.[2] They are transmitted primarily through intergenerational oral tradition and physical practices. This place-based knowledge grounds members of the society in a deep understanding of humanity's role, and specifically, their cultural group and their individual role in the world. Because the knowledge is transmitted through multiple generations, it contains thousands of years of knowledge and is cumulative of evolving, adapted, long-term observations and technologies.[3]

Worldviews provide a point of reference for how knowledge, and therefore values, are transmitted throughout a society's system. Fourth World peoples' worldviews are holistic in nature, mimicking symbiotic and reciprocal relationships throughout their society's structure.[4]

By contrast, the worldview of Western colonialists maintains compartmentalized sectors, with only give and take relationships of benefits and gains (see Figure 1).

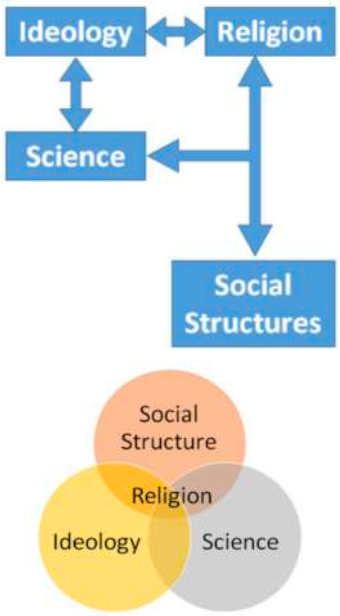

Figure 1: Indigenous World View (Source: Amelia Marchand)

Understanding the concept of Traditional Knowledge and how it is transmitted in Fourth World societies is key to understanding indigenous cultural heritage and identity.

Language is the principal vehicle through which living heritage is kept alive via culture, knowledge, values, and identity. Indigenous languages make up the majority of the world's estimated 7,000 languages and their loss repre-

[1] United Nations Educational, Scientific and Cultural Organization (UNESCO). (2018 Edition). Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. Available at: https://ich.unesco.org.
[2] Climate and Traditional Knowledges Workgroup (CTKW). (2014). Guidelines for Considering Traditional Knowledges in Climate Change Initiatives. Available at: http://climatetkw.wordpress.com/. The term "traditional ecological knowledge (TEK)" is also sometimes used interchangeably with TK.
[3] Watson, Julia. (2020). Lo-TEK, Design by Radical Indigenism. Cologne, Germany: TASCHEN.
[4] Wall Kimmerer, Robin. (2015). Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants. Minneapolis, MN: Milkweed Editions.

sent an impoverishment for humanity as a whole.[5] However, with forty percent of global indigenous languages in danger of disappearing, there is a real threat to the heritage and identities of entire societies.[6]

The importance of indigenous languages, names, taxonomies, and oral traditions and practices is directly related to the ecological systems within which they thrive. If language is the principal vehicle of heritage, then surely the food and water, which sustain our existence, make up the second pillar. The word *túm* translates to "mother" in *nsexlcin* (Interior Salish Language of the Okanogan, Arrow Lakes, and Colville Tribes); while the word *túmx^{w}lax^{w}* is used to refer to the land and all its diversity, which we derive our existence from, and without which we would not survive or thrive. This simple truth links the food, water, and ecological health of systems together with societies and cultures (see Figure 2).

Figure 2: Aspects of Indigenous Heritage and Identity (Source: Amelia Marchand)

When functioning ecological systems are disrupted or broken, the health and culture of societies are also impacted, triggering a cascade of sociological repercussions.[7] It is recognized by the World Health Organization (WHO) that disparities stemming from colonialism, the social and cultural disruption of indigenous lives, lands, resources, cultural practices and transmission broaden socioeconomic inequalities and health disparities.[8]

Article 1 of the UNESCO Convention identifies its primary purpose to safeguard ICH, while Article 2 is to ensure respect for ICH of the communities, groups and individuals concerned. In 2015, Ethical Principles for Safeguarding ICH were adopted by the Convention's Intergovernmental Committee and were intended to serve as a basis for the development of specific codes of ethics and tools adapted to local and sectoral conditions.

Importantly, the Convention recognizes that globalization and social transformation provide avenues for intolerance, grave threats of deterioration, and the disappearance and destruction of ICH around the world.[9] In developing the Ethical

[5] UNESCO. (January 25, 2019). Launch of International Year of Indigenous Languages 2019. Available at: https://en.unesco.org/news/launch-international-year-indigenous-languages-2019.
[6] UNESCO. (2019). International Year of Indigenous Languages. Available at: https://en.iyil2019.org/about#about-1.
[7] Gilio-Whitaker, Dina. (2019). As Long As Grass Grows: The Indigenous Fight for Environmental Justice from Colonization to Standing Rock. Boston: Beacon Press.
[8] Neufeld, et al. (February 5, 2020). Exploring First Nation Elder Women's Relationships with Food from Social, Ecological, and Historical Perspectives. Current Developments in Nutrition.
[9] Ibid. Note 1.

Principles for Safeguarding ICH, the Convention identified nine (9) threat categories to ICH: negative attitudes, demographic issues, de-contextualization, environmental degradation, weakened practice and transmission, cultural globalization, new products and technologies, loss of objects or systems, and economic pressure. The Convention also identified forty-six (46) different risks to ICH, which were each placed within one of the threat categories (see Figure 3).[10]

None of these threats or risks addresses the imperialist and colonialist roots of the Western worldview, which result in the systematic and institutional exclusion of Fourth World peoples' values and knowledge. Additionally, none of the threats or risks addresses the capitalism and globalization impacts of the Western worldview's legal, social, and political framework against Fourth World peoples.[11] These threats result from the collective destruction of indigenous heritage, identity, ownership, governance, religion, and ultimately, exclusion and removal.

The Ethical Principles for Safeguarding ICH actually put the burden of cataloging, identifying, mapping, transmitting, communicating, and protecting ICH on indigenous peoples themselves—albeit with funding providing for activities that merit UNESCO's framework for capacity building.[12] Time and again, indigenous people collectively and cumulatively report the negative impacts of imperialism, colonialism, capitalism, and globalization to their heritage, identity, culture, values, lifeways, environments, and bodies. Where nations, states or parties to the Convention are involved in one or more of the nine threats or forty-six risks to ICH, there is no legal framework identified to report, cease, mitigate, reprimand, hold accountable, or suspend those activities.

Negative Attitudes	Demographic Issues	New Products & Techniques
Repressive policies Intolerance Disrespect Conflicts	Rural-urban migration Population influx Degraded habitat	Industrial production Surge of new technologies Use of modern materials
Decontextualization	**Cultural Globalization**	**Loss of Objects or Systems**
Touristification Theatrification Over commercialization Misappropriation Freezing	Educational standardization Mass media Rapid socio-cultural change Social media	Loss of ancestral language Loss of cultural spaces Loss of knowledge Material shortage
Weakened Practice & Transmission		**Environmental Degradation**
Aged practitioners Diminishing participation Diminishing youth interest Few practitioners Halted transmission Hampered transmission Loss of significance Reduced practice Reduced repertoire		Water pollution Urban development National disasters Mining Invasive husbandry Degraded ecosystems Deforestation Climate change

Figure 3: Threats and Risks to Intangible Cultural Heritage, UNESCO 2018

This staggering lack of accountability within global legal frameworks pinpoints the significant need to name, define, and codify acts of cultural genocide as threats and risks to indigenous heritage and identity and intangible cultural heritage. The existing legal framework of international cultural property addresses many scenarios: armed conflict, offenses committed by individual persons, export and transport of cultural properties which pre-date

[10] Ibid. Note 1.
[11] Ibid. Note 7.
[12] UNESCO. (2019). "Living Heritage and Indigenous Peoples." The Convention for the Safeguarding of the Intangible Cultural Heritage. Available at: https://ich.unesco.org/en/indigenous-peoples.

modern political boundaries, foreign sovereign immunity, recoveries, restitutions and claims.[13] None of these laws were made without cause, and now is the time for legal scholars to recognize the call to action for indigenous peoples: heritage elimination has been occurring against indigenous peoples for centuries under the intentionally blind eye of justice; not because it has been just or ethical or moral, but because it has fit the worldview of imperialist and colonialist expansion. Today's global society and information transmission have brought to a wider audience the shadow cast by the genocidal tendencies of humanity, which consistently target indigenous communities.

UNESCO's Ethical Standards for Safeguarding ICH are only worthy if they come with the burden on nations and states to be accountable to their histories—and ongoing heritage elimination practices—of genocide against indigenous peoples. Unraveling the historical, social, legal, and environmental determinants of this paradigm shift may take time; but the burden cannot be on indigenous peoples alone to support and guide political and legal recommendations. A more just and equitable world for all starts with strategies that support indigenous heritage, identity, and survival—and labeling all threats and risks to them as cultural genocide.

Cultural Cleansing--The Destruction of the Relationship between the People, the Land and the Cosmos

There is no legal definition of cultural cleansing, cultural genocide, or ethnic cleansing. This reality renders claims of such acts committed against peoples experiencing such acts a controversial matter. Yet, the concepts are recognized in public claims by various peoples, political literature, scholarly analysis, and political discourse. Ethnic cleansing is, however, sometimes associated with "crimes against humanity" or "war crimes" within the framework of the 1948 Genocide Convention, and the subject is hotly debated among legal scholars. The UN Declaration on the Rights of Indigenous Peoples in Article 8 proclaims, "Indigenous nations have the right not to be subjected to forced assimilation or destruction of their culture." Still, this pronouncement is considered "aspirational" by political and legal scholars and not determinative.

The Uyghurs of East Turkistan in western Peoples' Republic of China protest the Chinese government's reeducation camps holding hundreds of thousands of Uyghurs as "cultural genocide." In a September 2019 interview Nury Turkel, a prominent Uighur-American lawyer, and human rights campaigner, said, "China is carrying out a 'cultural genocide' against his people. So, why isn't the world working to stop it? Why aren't we doing more to stop it?" Nallein Sowillo, Justice Minister for the indigenous government of Ezidikhan said to the press in February 2020, "Yezidi and Mandaean peoples in northern Iraq are protesting the Iraqi government's forced removal of their families and substituting them with Arab settlers. These acts are cultural genocide."

Among the Salish peoples in southwestern Canada and northwestern United States and many native peoples around the world, the practice of "cultural cleansing" is a cultural practice

[13] Gerstenblith, Patty (ed). (2010). International Cultural Property. Yearbook of Cultural Property Law. Left Coast Press.

carried out through smudging and sweating to restore emotional and mental balance, and regain physical health and confidence. However, the kind of "cultural cleansing" or "cultural genocide" that is not part of the Tulalip tradition is a starkly different reality. Nations like one author's Tulalip Reservation in Washington State have experienced what Tulalips recognize as forced reeducation, relocations, regulated and controlled tribal governance, and in years past regulated movement on and off the reservation controlled by US government officials. Virtually all native peoples in North America have experienced and, in many instances, continue to experience cultural genocide—acts perpetrated by the US government and other institutions intending to radically alter tribal cultures. Nevertheless, there is no legal or other institutional recourse to obtain justice and accountability for the damages done to indigenous communities or for the traumas still experienced by individual tribal members.

Raphael Lemkin (1900-1959), the Jewish attorney widely credited with coining the word "genocide", was deeply concerned about the destruction of whole societies through what he initially referred to as "cultural cleansing." He conducted intensive research and, in his later book, he focused on his plans for further studies. For example, he listed studies entitled "Genocide by the Germans against Native Africans," "Genocide against the American Indian," "Genocide against the Aztec," "Genocide against the Māoris of New Zealand," and "Genocide against the Armenians," documenting the experiences of indigenous nations in history and in modern times. In some of his unpublished papers, he came to recognize acts of colonization as the central concept of "genocide."

Lemkin's studies in the 1920s and 1930s developed concepts of cultural destruction, later documented in his book "Axis Rule in Occupied Europe" (1944) where he wrote:

> "Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressors' own nationals."

In other words, Lemkin defined genocide as the destruction of a culture, a people, in whole or in part, resulting from intentional and systematic techniques of assimilation, forced replacement of peoples' social, economic, political institutions, and ways of life—cultural genocide. Dr. Michael McDonnell, at the University of Sidney, authored a 2005 article with A. Dirk Moses in the Journal of Genocide Research examining Lemkin's published and unpublished works. Their article, entitled "Raphael Lemkin as historian of genocide in the Americas," reveals that Lemkin was primarily concerned with massive destruction of cultures and peoples' social order. His term "genocide" became attached to the Holocaust in Europe in the 1930s and 1940s only after mass murders were discovered. Cultural genocide was dismissed as controversial at the United Nations since many of the UN Member states were indeed colonizing states and they wished not to be identified as perpetrators of genocide. Lemkin's unpublished papers call attention to the "cultural death of

societies" committed by occupying and oppressive foreign powers engaging in acts that "destroyed or permanently crippled them, that is, they were genocidal."

Legal scholars and genocide studies scholars have failed to accurately represent Lemkin's thinking by ignoring his primary emphasis on the cultural destruction of peoples and instead characterizing "genocide" as "mass killing" and totalitarianism. The international community's concern about the "Holocaust" in Europe and the quick punishment of perpetrators of the horrific mass killing of Jews, Catholics, homosexuals, Roma and others led legal and political actors at the United Nations to apply the word "genocide" to such mass killings despite the fact that Lemkin never held this view and certainly did not use the word "holocaust." Lemkin was concerned with the destruction of cultures and noted that such intentional acts of destruction and violence against peoples often came after cultural genocide.

Fourth World nations agree with Lemkin's analysis and his characterization of cultural genocide. State-based law has virtually ignored the actual meaning of "genocide" at the expense of whole peoples and individuals among those peoples who have suffered and continue to suffer from the terror of cultural genocide.

The Australian government for generations "assumed legal guardianship" over the lives of Aboriginal children and removed a large number of children from their families with the avowed intent of "assimilating" them into Australian society.

Sinclair, Littlechild, and Wilson in a 2015 article[14] documented the statement by Canada's first prime minister John Alexander McDonald, who admitted Canada's intent to commit a massive crime against the native peoples in what would become Canada. McDonald said in 1887, "The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."

Between 1991 and 1996, Canada's Royal Commission on Aboriginal Peoples produced a 4,000-page report containing 440 recommendations for new policies to guide relations between the First Nations, Metis, and the government of Canada.

The Truth and Reconciliation Commission,[15] organized and undertaken between 2008 and 2015, was one product of the Commission's report that focused on the cultural, social and emotional effects of Canada's Residential School System. As reported in the Washington Post on June 5, 2015, the Commission recognized that the residential school system is evidence of cultural genocide defined in this way:

> "Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States

[14] Sinclair, M., Littlechild, W., and Wilson, M. (2015). "Aboriginal policy to assimilate, civilize, Christianize, not applied in uniform manner." Truth and Reconciliation Commission, Government of Canada. Justice Murray Sinclair, Commissioner Chief Wilson Littlechild and Commissioner Marie Wilson served on the Truth and Reconciliation Commission releasing its report on December 15, 2015.

[15] The Truth and Reconciliation Commission operating between 2008 and 2015 was initiated as a result of the Indian Residential Schools Settlement Agreement.

> that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next."

Oppressively destroying or substituting the social, economic, political, and cultural practices, values, and physical heritage of one society by another with the intention of eliminating the oppressed society is cultural genocide. It is a form of genocide since the intentional and systematic acts perpetrated result in the destruction of a people in whole or in part.

In India, the February 2019 decision of the Supreme Court ordered the eviction of more than a million tribal families (as many as eight and a half million people) from their traditional lands. This is a clear act of intentional destruction of whole peoples to advantage Indian Government forest management officials and various businesses.

The United States came into being after the French, English, Spanish and the Dutch established settlements from 1603 through 1755 along the eastern coast of North America. While they mainly acted to take land by acts of war and treaties, the formation of the United States in 1787 resulted in the American military, governmental and community militias directly attacking and engaging in massacres against scores of Indian nations along with systematic and intentional removals. The Trail of Tears (Cherokee —1836-39) as part of the Indian Removal Act of 1830 forced Cherokee, Choctaw, Seminole, Potawatomi, Chickasaw other nations out of their homelands into "Indian Country" otherwise known as Oklahoma—a state never to be included in the Union of States. Indian nations in the Pacific Northwest were forced by military acts to move to so-called 'reserved lands' and give over to the United States vast lands that would become occupied by American citizens and other foreign settlers. In the present day, the US government's Bureau of Indian Affairs (BIA) educational system systematically strips away traditional values and cultural practices while installing American values and norms.

Cultural genocide, as experienced today by Indian nations in North America and the rest of the Western Hemisphere and by many other indigenous nations in Europe, Asia, Africa, and the Pacific Islands, continues to be carried in the Spirit and psyche of individuals and communities. No government, other institutions, or individuals have been held accountable for the damage to the many nations colonized and oppressed and forever altered. No law or counter policy has been authored under state-based domestic or international legal institutions to hold accountable those who have perpetrated cultural genocide.

What is important to understand is that cultural genocide, genocide, crimes against humanity, war crimes, and torture are not merely theoretical constructs. In essence, they must be understood as concrete acts committed by governments, agents of governments, groups, and individuals that fundamentally violate the continuing existence of human societies. These are not abstrac-

tions, but specific acts of violent force that can no longer be permitted by democratic societies in the 21st century.

It is said quite repeatedly that democratic societies are "ruled by laws and not by men." This sentiment is also thought equally true of indigenous nations all over the world. They practice nation-based laws rooted in their cultures. When acts of cultural genocide are perpetrated, and there is no accountability for the adverse effects, then no society, no nation or any state is safe. State-based law and nation-based law must be formulated jointly to hold accountable what must be understood as crimes—as immoral acts—that are prohibited by all civilized societies.

Some indigenous nations, working with the Center for World Indigenous Studies, have formally enacted statutes—laws—prohibiting acts of genocide, cultural genocide, ecocide, and crimes against humanity. The nation of Ezidikhan enacted just such a law in 2018. It recognizes that their people, the Yezidi, continue to suffer from cultural genocide committed by the Kurds, Iraqi, the Turkish government, and Syria's government and the genocide committed by the Islamic State, resulting in the death of 10,000 Yezidi in over just a few days in August 2014. The Q'anjob'al of Guatemala have enacted a cultural genocide law, and the Uyghurs of East Turkistan are working on enacting such a law as well.

It is long past due for countries like the United States and many other UN member states to draft and enact laws making cultural genocide punishable—enforceable under state-based and nation-based international law. Yes, governments, agencies of governments, groups, and institutions must be held accountable. If they are not, then there is no meaning to "human rights" or "genocide." State-based international law begins as domestic law as does nation-based international law. Officers of the court must step forward to help facilitate the development and enactment of new laws with defined punishments to affirm justice and accountability for the crime of cultural genocide.

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This Article may be cited as:
Rÿser, C. R., Marchand, A., Parker, D. (2020) Cultural Genocide: Destroying Fourth World People. *Fourth World Journal*. Vol. 20, N1. pp. 79-92.

ABOUT THE AUTHORS

Rudolph Rÿser, PhD

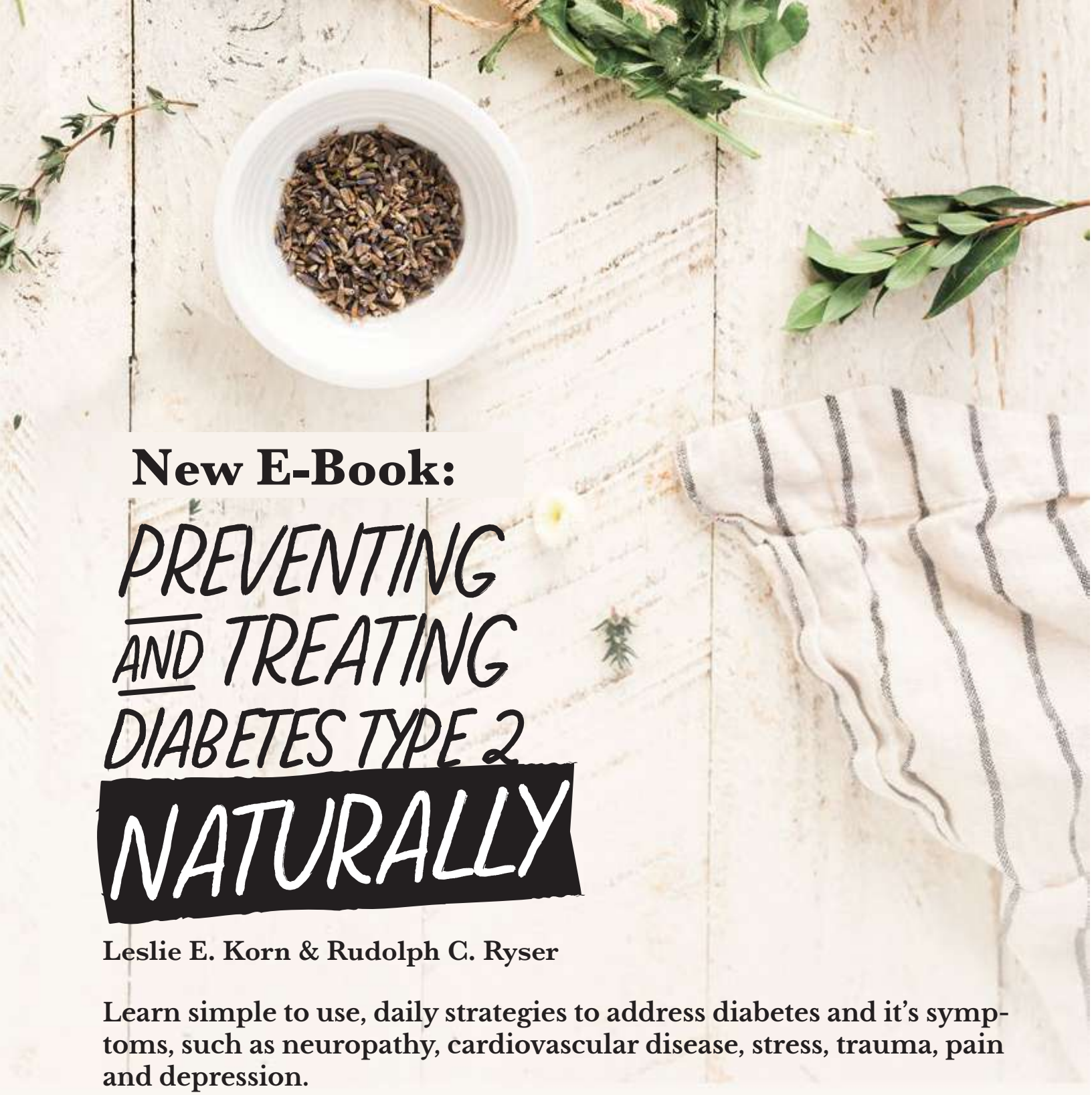
Dr. Rudolph C. Rÿser grew to maturity in the Cowlitz Indian culture on the US Pacific Northwest coast though he is of Cree/Oneida descent on his mother's side and Swiss descent on his father's. He earned his doctorate in international relations and has served as the Founding Chair of the Center for World Indigenous Studies since 1979. He is widely recognized around the world as the principle architect of theories and the practice of Fourth World Geopolitics. He is the author of the seminal book "Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power" (2012), the Fourth World Geopolitical Reader and the currently released "Biodiversity Wars, Coexistence or Biocultural Collapse in the 21st Century" (2019). He has for more than fifty years worked in the field of Indian Affairs as a writer/ researcher/ and advisor to political leaders of Fourth World nations throughout the world.

Amelia Marchand, MA

Amelia Marchand is a citizen of the Colville Confederated Tribes. She holds a BA in anthropology and an MA in environmental law and policy and resides on the lives with her husband three children. She is a Director on the Center for World Indigenous Studies Board of Directors, and volunteers with Conservation Northwest, Hearts Gathered, and the Nez Perce Wallowa Homeland. Throughout her professional career, Amelia has been the first woman and the first indigenous person to serve in four government positions with her Tribe. She is an alumnus of Presidential Classroom and the Ronald E. McNair Scholars Program. Amelia is a wife, daughter and granddaughter of U.S. Army veterans, and a descendant of U.S. prisoners of war and the U.S. boarding school system. Her personal experiences and family history have increased her passion for indigenous rights, environmental justice, and implementing socially equitable solutions for climate change adaptation and mitigation that not only honor values of community and reciprocity; but also heal wounds from intergenerational trauma and institutional colonialism.

Deborah Parker, MA

Deborah Parker is the former vice chair of the Tulalip Tribes government and a nationally recognized advocate and activist for the rights of Indigenous Nations. Most notably during her tenure as vice chair, Deborah played a prominent role in the advocacy for the inclusion of the tribal jurisdiction provision in the US government's Violence Against Women Act. Deborah is a frequent speaker at conferences and symposia related to the restoration of tribal sovereignty, justice and safety for Indigenous Nations.



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Culturicidio: Destruyendo a los Pueblos del Cuarto Mundo

Por Rudolph Rÿser, Amelia A. M. Marchand y Deborah Parker

Traducción de Inglés a Español por Aline Castañeda Cadena

[Presentación realizada por un panel de tres miembros (Dr. Rudolph C. Rÿser, Amelia Marchand y Deborah Parker) sobre el tema de Culturicidio en la Sección Mundial de Paz a través de la Ley, Asociación de Abogados del Estado de Washington, Sección Educativa, 3 de abril de 2020.]

RESUMEN

Raphael Lemkin inventó la palabra "genocidio" después de pasar décadas investigando las consecuencias de reinos y estados colonizando pueblos en África, América, Asia, Melanesia y las Islas del Pacífico desde el siglo 15 al presente. Concluyó que la colonización tenía el efecto de destruir pueblos "total o parcialmente" destruyendo sus culturas. En este ensayo, los autores introducen y examinan las características principales de la destrucción cultural, o en palabras de Lemkin "culturicidio". Reconocer que cuando las Naciones Unidas debatieron y adoptaron la Convención para la Prevención y la Sanción del Delito de Genocidio en 1948 lo hicieron para implementar la significativa Declaración Universal sobre los Derechos Humanos que incluye cláusulas tales como "cada individuo tiene el derecho de participar libremente en la vida cultural de la comunidad…". Los autores señalan que las cláusulas de la Convención para el Genocidio no incluyen la palabra "cultura" ni la palabra "pueblo" en el texto. La definición principal de genocidio para Lemkin ("la destrucción de la cultura de un pueblo") se ignora en favor de definir genocidio como "actos cometidos con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso" – asesinando, causando daño físico, destrucción física, prevención de nacimientos, y el traslado forzado de niños. Lemkin argumentaba que la dominación de un pueblo con la intención de destruir o reemplazar su cultura total o parcialmente es la primera fase del genocidio que puede conducir a asesinatos violentos y daño físico. Este ensayo comprende un resumen del desarrollo del culturicidio como concepto, eliminación del patrimonio y limpieza cultural.

Palabras clave: Lemkin, ley estatal, ley nacional, comunidad indígena, UNESCO, Cuarto Mundo, conocimiento tradicional, lenguaje, Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas, Uigures, Salish, Māori.

La ley estatal nacional y la ley internacional han dominado el marco legal ofreciendo estabilidad y continuidad a los estados. Desde la negociación del Tratado de Westfalia en 1648 y el documento de Emer de Vattel de 1758 sobre la Ley de Naciones (la ley de la naturaleza aplicada a la conducta de asuntos de

naciones y soberanías), el "imperio de la ley" sirve como referente para un sistema de estados deseado y seguro. El énfasis en la ley estatal aspira a asegurar la permanencia del estado y el reconocimiento de los derechos individuales dentro del estado bajo la ley internacional. Sin embargo, la ley nacional y la ley internacional, tienen sus raíces en la ley de naciones consuetudinaria, tradicional, natural y el derecho común enfatizando la conservación de las tradiciones culturales nacionales y la seguridad de un pueblo. El sistema estatal ha subordinado la ley nacional a la ley estatal debido, en no menor medida, a los monopolios estatales sobre el ejercicio de la fuerza centralizada. Por consiguiente, para minimizar el potencial para el conflicto violento, la ley nacional con frecuencia entreteje la ley nacional fundamental con los estatutos estatales que muchas veces están en conflicto con las culturas nacionales. Este conflicto se hace evidente cuando se procesan actos de culturicido y crímenes de lesa humanidad.

Desde el final de la Segunda Guerra Mundial en 1945, la ley humanitaria internacional y la ley nacional han distinguido actos de genocidio dominados por el discurso de los derechos humanos. El énfasis en los derechos humanos que señala a los derechos individuales, incluyendo el genocidio como un "tipo de violación de derecho humano", es inconsistente. Esta inconsistencia es evidente ya que los actos de genocidio se refieren a la destrucción intencionada de pueblos enteros, comunidades, sociedades, grupos o colectivos que están definidos por su identidad cultural o nacional. La colocación anómala del genocidio dentro del marco de las políticas y la ley de derechos humanos crea un conflicto fundamental que obstruye el proceso de enjuiciar adecuada y efectivamente violaciones de derechos humanos individuales o actos de genocidio que atañen a colectivos o pueblos.

Las violaciones a los derechos humanos individuales deben juzgarse como invasiones distintas de las libertades y derechos individuales dentro del ámbito de la ley estatal nacional y la ley internacional. Este estrecho enfoque es evidente por las acciones de las resoluciones del Tribunal Penal Internacional basadas en la Convención para la Prevención y la Sanción del Delito de Genocidio de 1948 (en vigor en 1951). El crimen de genocidio debe ser definido adecuadamente para incluir la destrucción intencional y sistemática de una sociedad, comunidad o la cultura de un pueblo – una violación de un conjunto de derechos. Las normas legales dentro del estado enmarcan el enjuiciamiento de crímenes cometidos en contra de los derechos individuales. Sin embargo, los derechos colectivos o comisión de crímenes por una institución política (nación o estado) debe, por lógica, depender de la ley nacional.

Desde el final de la Segunda Guerra Mundial los crímenes de genocidio y los crímenes que violan las normas de la humanidad se han enfocado en "derechos humanos" con un énfasis principal en individuos. Actos de genocidio y crímenes de lesa humanidad están, sin embargo, concentrados en actos en contra de "grupos" de seres humanos – o, más precisamente, actos intencionados para destruir un pueblo total o parcialmente. Durante los años 20's y 30's el abogado polaco Raphael Lemkin realizó estudios sobre actos históricos que destruían pueblos enteros. Concluyó que cometer

genocidio en contra de un pueblo no necesariamente tiene que ser violento y asesinar en masa a un pueblo, aunque puede ocurrir. Como escribió en su libro "El Dominio del Eje en la Europa Ocupada" (1943):

> "Generalmente hablando, el genocidio no necesariamente significa la destrucción inmediata de una nación, excepto cuando es realizada con asesinatos en masa de todos los miembros de una nación. En cambio, implica un plan coordinado de diferentes acciones con el objetivo de destruir los fundamentos esenciales de la vida de grupos nacionales, con la finalidad de aniquilar a los mismos grupos. Los objetivos de tal plan serían la desintegración de las instituciones políticas y sociales, de la cultura, el idioma, sentimientos nacionalistas, religión y la existencia económica de grupos nacionales, y la destrucción de la seguridad personal, la libertad, la salud, la dignidad e incluso las vidas de los individuos que pertenecen a dichos grupos."

El énfasis de Lemkin proporciona una explicación de genocidio que es ignorada en la Convención Internacional de Genocidio y el Tribunal Penal Internacional. Lemkin acuñó el término "genocidio", dada su comprensión de la destrucción internacional de la "cultura de una nación" al debilitar y eliminar o reemplazar las instituciones políticas, sociales y culturales, así como el idioma y más. El culturicidio es, por lo tanto, ese esfuerzo intencionado y coordinado para erradicar los fundamentos de vida para las naciones con "la finalidad de aniquilar a los mismos grupos" – principalmente sustituyendo la influencia dominante de un poder controlador. Los líderes de naciones indígenas condenaron el genocidio contra los pueblos indígenas – cultural y físicamente – como un asunto mucho más serio que las violaciones a los derechos humanos. El punto está hecho en las decisiones de la Conferencia Internacional de ONG sobre Discriminación contra Poblaciones Indígenas organizada en Ginebra, Suiza por el sub-comité sobre Racismo, Discriminación Racial, Apartheid y Descolonización bajo el Consejo Económico y Social de las Naciones Unidas. Líderes indígenas de toda América participaron y formularon recomendaciones a las Naciones Unidas. Exhortaron la inclusión de un lenguaje declarando que el propósito ulterior de la violencia cultural es la desaparición de la comunidad indígena, y que los actos individuales hechos con la intención de romper los vínculos culturales y sociales incluyendo la separación de los niños de sus familias son actos que deberían ser reconocidos. La destrucción de tierras, vías marítimas y la introducción de instalaciones industriales que alteran el mundo natural son actos de genocidio. La asamblea señala que las leyes de las naciones indígenas prohíben tales actos y que las leyes de las naciones indígenas deben ser respetadas incluyendo cómo la jurisdicción de esas naciones aplica sus leyes y costumbres. En la resolución final de la Conferencia, los delegados afirmaron que, si bien las situaciones pueden variar de país a país, las raíces del genocidio están en "la brutal colonización para abrir el camino de saqueo de tierras (tradicionales) por intereses comerciales en busca de máximos beneficios." Las recomendaciones, así como la resolución de la Conferencia se volvieron fundamentales para el lenguaje y

principios concretados en el proyecto Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas de 1994.

La Conferencia Global Preparatoria que convocó a más de 400 delegaciones de naciones indígenas que representan las regiones del mundo se reunió en Alta, tierra Sámi [Noruega] en junio de 2013 y realizó recomendaciones a las Naciones Unidas. La Conferencia Mundial sobre Pueblos Indígenas organizada en septiembre de 2014 exhortó a respetar y reconocer los sistemas de gobierno de los pueblos indígenas y prácticas culturales. La reunión de alto nivel de la Asamblea General creó un Documento Final que reconocía que la Conferencia Alta había presentado recomendaciones, pero que ninguna de las recomendaciones relacionadas con la cultura, gobierno o genocidio se habían tomado en cuenta.

La Convención para la Prevención y la Sanción del Delito de Genocidio adoptada por las Naciones Unidas en París en 1948 define el genocidio sin antecedentes y persecución que Lemkin señaló en sus definiciones. La Convención define el genocidio de la forma siguiente:

"Artículo II: en la presente Convención, se entiende por genocidio cualquiera de los actos cometidos a continuación, perpetrados con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso, como tal:

(a) Matanza de miembros del grupo;
(b) Lesión grave a la integridad física o mental a los miembros del grupo;
(c) Sometimiento intencional del grupo a condiciones de existencia que hayan de acarrear su destrucción física total o parcial;
(d) Medidas destinadas a impedir los nacimientos en el seno del grupo;
(e) Traslado forzado de niños del grupo a otro grupo.

"Artículo III: Serán castigados los actos siguientes:

(a) El Genocidio;
(b) La asociación para cometer genocidio;
(c) La instigación directa y pública a cometer genocidio;
(d) La tentativa de genocidio;
(e) La complicidad en el genocidio."

La destrucción intencional y organizada de una cultura y todos los atributos de una nación está ausente en esta definición, como el enfoque limitado e individual de la Convención para la Prevención y la Sanción del Delito de Genocidio y el Tribunal Penal Internacional busca procesar individuos "a posteriori" del culturicidio. Las Naciones Unidas insisten en no reconocer el culturicidio. La ley estatal nacional reproduce este fatal error y por lo tanto permite el genocidio cuando se toleran actos intencionales y organizados con el fin de eliminar el patrimonio y prácticas culturales. El patrimonio cultural (sitios sagrados, cementerios, lengua, historia, etc.) y la eliminación de la identidad cultural (educación, lengua, prácticas espirituales, arquitectura, artes, sistemas políticos, sistemas alimenticios) – limpieza cultural o culturicidio – son el tema de nuestra siguiente discusión.

Eliminación del Patrimonio – la Destrucción del Legado, Artefactos, y Símbolos de la Sociedad Humana

En 2003, la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO) adoptó una Convención para la Salvaguardia del Patrimonio Cultural Inmaterial. La UNESCO define el "Patrimonio Cultural Inmaterial (ICH)" como las prácticas, representaciones, expresiones, conocimiento, habilidades – así como los instrumentos, objetivos, artefactos y espacios culturales relacionados con los mismos – que las comunidades, grupos, y, en algunos casos, los individuos reconocen como parte de su patrimonio cultural. Se transmite de generación en generación, evolucionando constantemente por las comunidades y grupos en respuesta a su medio ambiente, interacciones con la naturaleza e historias particulares, y ofrece identidad y continuidad. El Patrimonio Cultural Inmaterial incluye, pero no está limitado a: a) tradiciones orales y expresiones; incluyendo el lenguaje como un vehículo de la transmisión del patrimonio cultural; b) artes escénicas; c) prácticas sociales, rituales y eventos festivos; d) conocimiento y prácticas relacionada con la naturaleza y el universo; y e) artesanías tradicionales.[1]

La terminología más común utilizada para expresar el Patrimonio Cultural Inmaterial por los pueblos del Cuarto Mundo (indígenas) es conocimiento tradicional. (Utilizo Cuarto Mundo e Indígena indistintamente). El conocimiento tradicional se refiere ampliamente a las formas de conocimiento que guían y resultan de las relaciones cercanas de los miembros de la comunidad del Cuarto Mundo con y la responsabilidad hacia los paisajes, los paisajes acuáticos, plantas y animales que son necesarios para el florecimiento de las comunidades del Cuarto Mundo.[2] Se transmiten principalmente a través de la tradición oral intergeneracional y las prácticas físicas. Este conocimiento basado en el lugar proporciona a los miembros de la sociedad conocimientos básicos sobre un entendimiento profundo del papel de la humanidad, y específicamente, su grupo cultural y su papel individual en el mundo. Debido a que el conocimiento es transmitido a través de múltiples generaciones, contiene miles de años de conocimiento y es acumulativo en observaciones y tecnologías en evolución, adaptadas y de larga duración.[3] Las cosmovisiones proporcionan un punto de referencia sobre cómo el conocimiento y, por lo tanto, los valores, son transmitidos a través del sistema de la sociedad. Las cosmovisiones de los pueblos del Cuarto Mundo son holísticas en su naturaleza, imitando relaciones simbióticas y recíprocas a través de su estructura social.[4] En contraste, la cosmovisión de los colonialistas occidentales mantiene sectores compartimenta-

[1] La Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO). (Edición 2018). Textos Fundamentales de la Convención para la Salvaguardia del Patrimonio Cultural Inmaterial de 2013. Disponible en: https://ich.unesco.org.
[2] Grupo de Trabajo sobre el Clima y Conocimientos Tradicionales (CTKW). (2014). Guidelines for Considering Traditional Knowledges in Climate Change Initiatives. Disponible en: http://climatetkw.wordpress.com/. El término "conocimiento ecológico tradicional (TEK, por sus siglas en inglés)" también se utiliza como "conocimiento tradicional (TK, por sus siglas en inglés)".
[3] Watson, Julia. (2020). Lo-TEK, Design by Radical Indigenism. Cologne, Germany: TASCHEN.
[4] Wall Kimmerer, Robin. (2015). Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants. Minneapolis, MN: Milkweed Editions.

dos, con relaciones de toma y daca de beneficios y ganancias (ver la Figura 1)

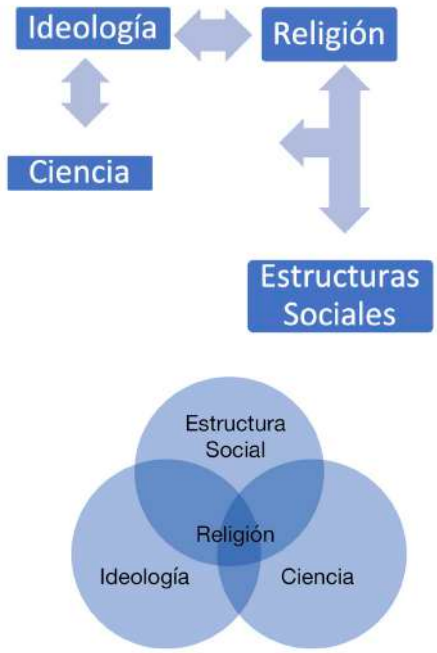

Figura 1: Visión Mundial Indígena (Fuente: Amelia Marchand)

Entender el concepto de Conocimiento Tradicional y cómo se transmite en las sociedades del Cuarto Mundo es clave para entender el patrimonio cultural indígena y la identidad.

El lenguaje es el primer vehículo a través del cual el patrimonio vivo se mantiene activo mediante la cultura, el conocimiento, los valores, y la identidad. Las lenguas indígenas constituyen la mayoría de las lenguas del mundo estimadas en 7,000 y su pérdida representa un empobrecimiento para la humanidad como un todo.[5] Sin embargo, con el cuarenta por ciento de las lenguas indígenas del mundo en peligro de desaparecer, existe una amenaza real al patrimonio e identidades de sociedades enteras.[6]

La importancia de las lenguas indígenas, nombres, taxonomías y tradiciones y prácticas tradicionales están directamente relacionados con los sistemas ecológicos dentro de los cuales se desarrollan. Si el lenguaje es el principal vehículo del patrimonio, seguramente el alimento y el agua, que sostienen nuestra existencia, constituyen el segundo pilar. La palabra túm se traduce como "madre" en nsexlcin (Lengua Salish del interior de Okanogan, Lagos Arrow, y las Tribus Colville); si bien la palabra túmxWlasW se utiliza para referirse a la tierra y a toda su diversidad, de la que deriva nuestra existencia, y sin la cual no sobreviviríamos o prosperaríamos. Esta simple verdad liga el alimento, el agua y la salud ecológica de los sistemas junto con las sociedades y las culturas (ver figura 2).

- ☐ Sistema de alimentos y agua
  - ☐ Acceso y disponibilidad
  - ☐ Pureza y diversidad
- ☐ Sitios sagrados de los orígenes y derecho consuetudinario
  - ☐ Paisajes legendarios
  - ☐ Alimentos, agua, medicina y fuentes minerales
  - ☐ Tumbas sagradas, y sitios ceremoniales
- ☐ Ritos y prácticas de vida y muerte
  - ☐ Nacimiento, madurez, transiciones y elementos de paso
  - ☐ Toma de decisiones, resolución de conflictos y comunicación
  - ☐ Lazos familiares y responsabilidades de gobierno
- ☐ Arquitectura y tecnología
  - ☐ Educación de adaptación
  - ☐ Historia local
  - ☐ Sostenible y resistente al clima

Figura 2: Aspectos del Patrimonio Indígena e Identidad (Fuente: Amelia Marchand)

[5] UNESCO. (January 25, 2019). Launch of International Year of Indigenous Languages 2019. Available at: https://en.unesco.org/news/launch-international-year-indigenous-languages-2019.
[6] UNESCO. (2019). International Year of Indigenous Languages. Available at: https://en.iyil2019.org/about#about-1.

Cuando se alteran o rompen los sistemas ecológicos funcionales, la salud y la cultura de las sociedades también se ven afectadas, provocando una cascada de repercusiones sociológicas.[7] La Organización Mundial de la Salud (OMS) reconoce que las disparidades derivadas del colonialismo, la ruptura cultural y social de las vidas indígenas, las tierras, recursos, prácticas culturales aumentan las desigualdades socioeconómicas y las disparidades de salud.[8]

El artículo 1 de la Convención de la UNESCO identifica su primer propósito de salvaguardar el patrimonio cultural inmaterial, mientras que el artículo 2 asegura el respeto por el patrimonio cultural inmaterial de las comunidades, grupos e individuos afectados. En 2015, se adoptaron los Principios Éticos para Salvaguardar el Patrimonio Cultural Inmaterial por el Comité Intergubernamental de la Convención que identifica como propósito principal salvaguardar el Patrimonio Cultural Inmaterial, mientras que para el Artículo 2 es asegurar el respeto por el Patrimonio Cultural Inmaterial de las comunidades, grupos e individuos afectados. En 2015, se adoptaron los Principios Éticos para el Patrimonio Cultural Inmaterial por el Comité Intergubernamental de la Comisión y tenían la finalidad de servir como base para el desarrollo de los códigos específicos de la ética y las herramientas adaptadas para las condiciones locales y sectoriales.

Muy importante, la Convención reconoce que la globalización y la transformación social proporcionan vías para la intolerancia, amenazas graves de deterioro, y la desaparición y destrucción del Patrimonio Cultural Inmaterial alrededor del mundo.[9] Al desarrollar los Principios Éticos para Salvaguardar el Patrimonio Cultural Inmaterial, la Convención identificó nueve (9) categorías de amenaza hacia el Patrimonio Cultural Inmaterial: actitudes negativas, asuntos demográficos, descontextualización, deterioro ambiental, práctica y transmisión debilitadas, globalización cultural, nuevos productos y tecnologías, pérdida de objetos o sistemas, y presión económica. La Convención también identificó cuarenta y seis (46) riesgos diferentes para el Patrimonio Cultural Inmaterial, que se colocaron dentro de una de las categorías de amenaza (ver Figura 3).[10]

Ninguno de estos riesgos o amenazas abordan las raíces imperialistas y colonialistas de la visión occidental, que resulta en la exclusión sistemática e institucional de los valores y conocimiento de los pueblos del Cuarto Mundo. Adicionalmente, ninguno de los riesgos o amenazas abordan los impactos del capitalismo y la globalización de la visión legal, social y el marco político occidental en contra de los pueblos del Cuarto Mundo.[11] Estas amenazas resultan de la destrucción colectiva del patrimonio indígena, identidad, propiedad, gobierno, religión y finalmente, la exclusión y eliminación.

De hecho, los Principios Éticos para Salvaguardar el Patrimonio Cultural Inmaterial ponen la carga en catalogar, identificar, cartografiar, transmitir, comunicar y proteger el Patrimonio Cultural Inmaterial en los mismos pueblos indígenas – aunque con fondos para actividades que merecen el marco de la UNESCO para el desarrollo de capacidades.[12]

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[7] Gilio-Whitaker, Dina. (2019). As Long As Grass Grows: The Indigenous Fight for Environmental Justice from Colonization to Standing Rock. Boston: Beacon Press.
[8] Neufeld, et al. (5 de febrero de 2020). Exploring First Nation Elder Women's Relationships with Food from Social, Ecological, and Historical Perspectives. Current Developments in Nutrition.
[9] Ibid. Nota 1.
[10] Ibid. Nota 1.
[11] Ibid. Nota 7.
[12] UNESCO. (2019). "Patrimonio Vivo y Pueblos Indígenas." La Convención para la Salvaguardia del Patrimonio Cultural Inmaterial. Disponible en: https://ich.unesco.org/en/indigenous-peoples.

El tiempo y, nuevamente, el pueblo indígena, colectiva y acumulativamente, reporta los impactos negativos del imperialismo, colonialismo, capitalismo y globalización para su patrimonio, identidad, cultura, valores, formas de vida, ambientes y organismos. Donde están involucrados las naciones, estados o partes para la Convención en una de las nueve amenazas o cuarenta y seis riesgos para el Patrimonio Cultural Inmaterial, no existe marco legal identificado para reportar, interrumpir, mitigar, amonestar, exigir responsabilidad, o suspender esas actividades

Actitudes Negativas	Asuntos Demográficos	Nuevos Productos & Técnicas
• Políticas represoras • Intolerancia • Falta de respeto • Conflictos	• Migración rural-urbana • Flujo de Población • Hábitat deteriorado	• Producción industrial • Surgimiento de nuevas tecnologías • Uso de materiales modernos
• Descontextualización	• Globalización Cultural	• Pérdida de Objetos o Sistemas
• Turistificación • Teatralización • Sobre comercialización • Apropiación indebida • Congelamiento	• Normalización educativa • Medios de Difusión • Cambio socio cultural rápido • Redes sociales	• Pérdida del lenguaje ancestral • Pérdida de espacios culturales • Pérdida de sabiduría • Escasez de Material

Práctica debilitada & Transmisión	Degradación ambiental
• Practicantes ancianos • Reducir participación • Reducir interés juvenil • Pocos practicantes • Transmisión estancada • Transmisión obstaculizada • Pérdida de significado • Repertorio reducido	• Contaminación del agua • Desarrollo urbano • Desastres nacionales • Minería • Agricultura invasiva • Ecosistemas deteriorados • Deforestación Cambio climático

Figura 3: Amenazas y riesgos para el Patrimonio Cultural Inmaterial, UNESCO 2018

Esta asombrosa falta de responsabilidad dentro del marco legal global identifica la necesidad significativa de nombrar, definir y codificar actos de culturicidio como amenazas y riesgos para el patrimonio indígena, la identidad, y el patrimonio cultural inmaterial. El marco legal existente de la propiedad cultural internacional aborda muchos escenarios: conflicto armado, ofensas cometidas por individuos, exportación y transportación de propiedades culturales anteriores a la fecha de los límites políticos modernos, inmunidad soberana extranjera, recuperaciones, restituciones y reclamos.[13] Ni una de estas leyes fueron hechas sin causa, y ahora es tiempo para que los académicos legales reconozcan la llamada a la acción para los pueblos indígenas: la eliminación del patrimonio ha estado ocurriendo en contra de los pueblos indígenas por siglos bajo el ojo ciego intencional de la justicia; no porque haya sido justo o ético o moral, sino porque se ha adaptado a la visión de la expansión imperialista y colonialista. La sociedad global actual y la transmisión de información ha traído a una audiencia más amplia la sombra de las tendencias genocidas de la humanidad, que consistentemente apuntan a las comunidades indígenas.

Los estándares éticos para salvaguardar el patrimonio cultural inmaterial de la UNESCO sólo valen la pena si vienen con la carga de la responsabilidad de las naciones y estados por sus historias – y las prácticas de eliminación del patrimonio en curso – de genocidio en contra de los pueblos indígenas. Resolver los determinantes históricos, sociales, legales y ambientales de este cambio de paradigma puede tomar tiempo; pero

[7] Gerstenblith, Patty (ed). (2010). International Cultural Property. *Yearbook of Cultural Property Law*. Left Coast Press.

la carga no puede estar sólo en los pueblos indígenas para respaldar y guiar las recomendaciones políticas y legales. Un mundo más justo y equitativo para todos los comienzos con estrategias que respalden el patrimonio indígena, la identidad y supervivencia – y etiquetar todas las amenazas y riesgos hacia ellos como culturicidio.

Limpieza Cultural – La Destrucción de la Relación entre el Pueblo, la Tierra y el Cosmos

No existe definición legal para la limpieza cultura, culturicidio o limpieza étnica. Esta realidad hace que se cometan tales actos en contra de los pueblos que experimentan tales actos un asunto controvertido. Sin embargo, los conceptos son reconocidos en peticiones públicas por varios pueblos, literatura política, análisis académico y discurso político. La limpieza étnica está, sin embargo, algunas veces relacionada con "crímenes de lesa humanidad" o "crímenes de guerra" dentro del marco de la Convención para la Prevención y Sanción del Delito de Genocidio de 1948 y el asunto se debate acaloradamente entre académicos legales. La declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas en su artículo 8 declara, "las naciones indígenas tienen el derecho de no ser sujetos de integración forzada o destrucción de su cultura." Aún así, este pronunciamiento es considerado "ambicioso" por los académicos políticos y legales y no es determinante.

Los uigures de Turkestán del Este en la República Popular de China de occidente consideran "culturicidio" a los campos de reeducación del Gobierno de China que mantienen a cientos de miles de uigures. Nury Turkel, un prominente abogado uigur americano, activista de derechos humanos, dijo en una entrevista realizada en septiembre de 2019, "China está llevando a cabo "culturicidio" en contra de su gente. Así que, ¿Por qué no está haciendo nada el mundo para detenerlo?" Nallein Sowilo, ministro de justicia para el gobierno de Ezidikhan dijo a la prensa en febrero de 2020, "los pueblos yazidíes y mandaeanos en el norte de Irak están manifestando la expulsión forzada del gobierno iraki de sus familias y sustituyéndolos con pobladores árabes. Estos actos son culturicidio."

Entre los pueblos Salish en el suroeste de Canadá y el noroeste de Estados Unidos y muchos pueblos nativos alrededor del mundo, la práctica de "limpieza cultural" es una práctica cultural llevada a cabo a través de manchar y sudar para restaurar el equilibrio emocional y mental, y recuperar la salud física y la confianza. Sin embargo, el tipo de "limpieza cultural" o "culturicidio" que no es parte de la tradición tulalip es una realidad claramente diferente. Las naciones como la reserva de tulalip en el estado de Washington han experimentado lo que los tulalip reconocen como reeducación forzada, reubicaciones, gobierno tribal regulado y controlado, y en años pasados, movimiento regulado dentro y fuera de la reserva controlada por oficiales del gobierno de los Estados Unidos.

Virtualmente todos los pueblos nativos en América del Norte han experimentado y, en muchos casos, continúan experimentando culturicidio – actos perpetrados por el gobierno de los Estados Unidos y otras instituciones con la intención de alterar radicalmente a las culturas

tribales. Sin embargo, no hay un recurso legal o institucional para obtener justicia y responsabilidad por los daños ocasionados a las comunidades indígenas o para los traumas que aún experimentan miembros de la tribu.

Raphael Lemkin (1900-1959), el abogado judío, quien acuñó la palabra "genocidio", estaba profundamente preocupado por la destrucción de sociedades enteras a través de lo que inicialmente nombró como "limpieza cultural". Llevó a cabo una extensiva investigación y, en su último libro, se enfocó en futuros estudios. Por ejemplo, registró estudios intitulados "Genocidio por los alemanes en contra de los nativos africanos", "Genocidio en contra de los Amerindios", "Genocidio en contra de los Aztecas", "Genocidio en contra de los Māoris de Nueva Zelanda", y "Genocidio en contra de los armenios", documentando las experiencias de las naciones indígenas a través de la historia y en tiempos modernos. En algunos de los artículos no publicados, llegó a reconocer actos de colonización como el concepto central del "genocidio".

Los estudios de Lemkin en los años 20's y 30's desarrollaron conceptos de destrucción cultural, documentados más tarde en su libro "El Dominio del Eje en la Europa Ocupada" (1944) donde escribió:

> "El genocidio tiene dos fases: una, la destrucción del modelo nacional del grupo oprimido; la otra, la imposición del modelo nacional del opresor. Esta imposición, en cambio, debe ser realizada sobre la población oprimida, a quien se le está permitido permanecer, o sólo sobre el territorio, después de la eliminación de la población y la colonización del área por parte de los ciudadanos del opresor."

En otras palabras, Lemkin definió el genocidio como la destrucción de una cultura, un pueblo, total o parcialmente, resultado de técnicas de integración intencionales y sistemáticas, reemplazo forzado de instituciones sociales, económicas, políticas y formas de vida de los pueblos – culturicidio. El Dr. Michael McDonnell, de la Universidad de Sidney, escribió en 2005 un artículo con A. Dirk Moses en el Journal of Genocide Research en donde examinan los trabajos publicados y no publicados de Lemkin. Su artículo intitulado "Raphael Lemkin as Historian of Genocide in the Americas", revela que en un principio Lemkin estaba interesado principalmente en la destrucción masiva de culturas y el orden social de los pueblos. Su término "genocidio" estaba unido al holocausto en Europa de los años 30's y 40's sólo después de descubrirse los asesinatos en masa. El culturicidio fue descartado como controversial en las Naciones Unidas debido a que precisamente muchos de los miembros estaban colonizando estados y no deseaban ser identificados como responsables de cometer genocidio. Los artículos no publicados de Lemkin llaman la atención por la "muerte cultural de las sociedades" cometida por los poderes extranjeros ocupantes y opresivos participando en actos que "los destruían o paralizaban de manera permanente, es decir, que fueran genocidas."

Académicos legales y académicos de estudios de genocidio han fallado en representar adecuadamente el pensamiento de Lemkin al ignorar el énfasis principal en la destrucción cultural de los pueblos y en vez de eso caracterizan al "genocidio" como "asesinatos en masa" y totalitarismo. El interés de la comunidad internacional sobre el

"holocausto" en Europa y el rápido castigo de los responsables del asesinato en masa de los judíos, católicos, homosexuales, gitanos y otros, dejan a los actores políticos y legales en las Naciones Unidas que apliquen la palabra "genocidio" para tales asesinatos en masa a pesar del hecho que Lemkin nunca mantuvo esa visión y, de hecho, no utilizó la palabra "holocausto". A Lemkin le interesaba la destrucción de las culturas y señalaba que tales actos intencionados de destrucción y violencia en contra de los pueblos con frecuencia venían después del culturicidio.

Las naciones del Cuarto Mundo concuerdan con el análisis de Lemkin y su caracterización de culturicidio. La ley estatal ha ignorado virtualmente el significado real de "genocidio" a expensas de pueblos enteros e individuos entre esos pueblos que han sufrido y continúan sufriendo del terror del culturicidio.

Por generaciones, el gobierno australiano "asumió la custodia legal" sobre las vidas de los niños aborígenes y alejó a un gran número de niños de sus familias con el intento admitido de "integrarlos" a la sociedad australiana.

En un documento[14] de 2015 Sinclair, Littlechild y Wilson documentaron la declaración del primer ministro de Canadá John Alexander McDonald, quien admitió el intento de Canadá de cometer un crimen masivo en contra de pueblos nativos en lo que se convertiría en Canadá. McDonald dijo en 1887, "la gran finalidad de nuestra legislación ha sido acabar con el sistema tribal e integrar al pueblo indio en todos los aspectos con los demás habitantes del Dominio tan rápido como estén listos para el cambio."

Entre 1991 y 1996, la Comisión Real sobre los Pueblos Aborígenes de Canadá realizó un reporte de 4000 páginas que contenía 440 recomendaciones para nuevas políticas que guiaran las relaciones entre los pueblos originarios, los métis, y el gobierno de Canadá. La Comisión para la Verdad y la Reconciliación[15] , organizada y realizada entre 2008 y 2015, fue un producto del reporte de la Comisión que se enfocó en los efectos culturales, sociales y emocionales del Sistema de Escuela Residencial de Canadá. Como lo reportó el Washington Post el 5 de junio de 2015, la Comisión reconoció que el sistema de escuela residencial es evidencia del culturicidio definido de esta manera:

> "El culturicidio es la destrucción de aquellas estructuras y prácticas que permiten a un grupo continuar como tal. Los estados que realizan culturicidio proponen destruir las instituciones políticas y sociales del grupo específico. La tierra es incautada, y las poblaciones son desalojadas por la fuerza y se limitan sus movimientos. Se prohíben las lenguas. Los líderes espirituales son perseguidos, se prohíben las prácticas espirituales, y los objetos de valor espiritual son confiscados y destruidos. Y, lo que es más importante para el problema en

[14] Sinclair, M., Littlechild, W., and Wilson, M. (2015). "Aboriginal policy to assimilate, civilize, Christianize, not applied in uniform manner." Comisión para la Verdad y la Reconciliación, Gobierno de Canadá. Justicia Murray Sinclair, Commisionado Wilson Littlechild y Commisionado Marie Wilson participaron en la Comisión para la Verdad y la Reconciliación y publicaron su reporte el 15 de diciembre de 2015.

[15] La Comisión para la Verdad y la Reconciliación que operaba entre 2008 y 2015 se inició como resultado del Acuerdo de Liquidación de Escuelas Residenciales Indias.

cuestión, se rompen las familias para prevenir la transmisión de valores culturales e identidad de una generación a otra."

Destruir de manera opresiva o sustituir las prácticas sociales, económicas, políticas y culturales, valores y patrimonio físico de una sociedad por otra con la intención de eliminar a la sociedad oprimida es culturicidio. Es una forma de genocidio ya que los actos intencionales y sistemáticos cometidos resultan en la destrucción total o parcial de un pueblo.

En India, la decisión del Tribunal Superior del 19 de febrero ordenó el desalojo de más de un millón de familias tribales (alrededor de ocho y medio millones de personas) de sus tierras tradicionales. Este es un evidente acto de destrucción intencionada de pueblos completos para beneficiar a los funcionarios de manejo forestal del gobierno indio y a varias empresas.

Los Estados Unidos surgieron después de que los asentamientos franceses, ingleses, españoles y alemanes se establecieran desde 1603 hasta 1775 por toda la costa este de Norteamérica. Si bien, actuaron principalmente para tomar la tierra por medio de actos de guerra y tratados, la formación de los Estados Unidos en 1787 resultó en las milicias militares y comunitarias estadounidenses atacando directamente y participando en masacres en contra de naciones indias junto con expulsiones intencionadas y sistemáticas. El Sendero de Lágrimas (Cheroqui – 1836-39) como parte de la Ley de traslado forzado de los indios de 1830 forzó a los cheroquis, choctawas, seminoles, potawatomis, chickasaws y otras naciones fuera de sus tierras hacia el "País Indio" también conocido como Oklahoma – un estado que nunca se incluirá en la Unión de Estados. Las naciones indias en el noroeste del pacífico fueron forzadas por actos militares a mover las llamadas "tierras reservadas" y entregar a los Estados Unidos vastas tierras que serían ocupadas por ciudadanos americanos y otros pobladores extranjeros. Hoy en día, el sistema educativo de la Oficina de Asuntos Indígenas del gobierno de los Estados Unidos quita los valores tradicionales y las prácticas culturales mientras instala valores y normas estadounidenses.

El culturicidio, como se experimenta hoy en día por las naciones indígenas de América del Norte y el resto del hemisferio occidental y por muchas otras naciones indígenas de Europa, Asia, África y las Islas del Pacífico, continúa llevándose a cabo en el espíritu y psique de individuos y comunidades. A ningún gobierno, otras instituciones o individuos se les ha considerado responsables por el daño a las muchas naciones colonizadas y oprimidas y por siempre alteradas. Ninguna ley o política de oposición ha sido autorizada por instituciones estatales nacionales o internacionales para exigir responsabilidad a aquellos que han cometido actos de culturicidio.

Lo que es importante entender es que el culturicidio, genocidio, crímenes de lesa humanidad, crímenes de guerra, y tortura no son únicamente constructos teóricos. En esencia, deben ser entendidos como actos concretos cometidos por gobiernos, agentes de gobierno, grupos e individuos que fundamentalmente violan la existencia continua de sociedades humanas. Estas no son abstracciones, sino actos específicos de fuerza violenta que las sociedades democráticas del siglo 21 ya no pueden permitir.

Se dice constantemente que las sociedades democráticas están "dominadas por leyes y no por hombres". Este sentimiento también es cierto para todas las naciones indígenas del mundo. Practican leyes nacionales arraigadas en sus culturas. Cuando se cometen actos de culturicidio, y no hay responsables por los efectos adversos, entonces ninguna sociedad ni nación o estado está a salvo. Las leyes nacional y estatal deben ser formuladas conjuntamente para exigir responsabilidad de lo que debe entenderse por crímenes – como actos inmorales – que están prohibidos por todas las sociedades civilizadas.

Algunas naciones indígenas, junto con el Centro de Estudios Indígenas del Mundo (CWIS, por sus siglas en inglés) han promulgado leyes de manera formal donde se prohíben actos de genocidio, culturicidio, ecocidio, y crímenes de lesa humanidad. La nación de Ezidikhan promulgó una ley así en 2018. Reconoce que su pueblo, los yazidíes, continúan sufriendo culturicidio en manos de los kurdos, el estado islámico, el gobierno turco y el gobierno de Siria y el genocidio cometido por el estado islámico, que resultó en la muerte de 10,000 yazidíes en unos pocos días en agosto de 2014. Los Q'anjob'al de Guatemala han promulgado una ley de culturicidio, y los uigures de Turkestán del Este están trabajando para promulgar dicha ley también.

Hace mucho tiempo que países como Estados Unidos y muchos otros estados miembros de la ONU redactan y promulgan leyes que hacen que el culturicidio sea penado – aplicable bajo la ley estatal, nacional e internacional. Si, los gobiernos, agencias de gobierno, grupos e instituciones deben rendir cuentas. Si no, entonces los "derechos humanos" o "genocidio" no tienen significado. La ley internacional estatal comienza como ley nacional, así como la ley internacional nacional. Los funcionarios del tribunal deben dar un paso adelante para ayudar a facilitar el desarrollo y entrada en vigor de nuevas leyes con castigos definidos para afirmar la justicia y responsabilidad por el crimen de culturicidio.

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This Article may be cited as:

Rÿser, C. R., Marchand, A., Parker, D. (2020) Culturicidio: Destruyendo a los Pueblos del Cuarto Mundo. *Fourth World Journal*. Vol. 20, N1. pp. 94-108.

SOBRE LOS AUTORES

Rudolph Rÿser, PhD

El Dr. Rudolph Rÿser creció hasta la madurez en la cultura Cowlitz en el noroeste del pacífico de los Estados Unidos aunque es descendiente Cree/Oneida por el lado de su madre y suizo por el lado de su padre. Obtuvo su doctorado en relaciones internacionales y sirvió como el Presidente Fundador del Centro de Estudios Indígenas del Mundo desde 1979. Es mundialmente reconocido como el principal arquitecto de las teorías y práctica de la Geopolítica del Cuarto Mundo. Es autor del influyente libro "Indigenous Nations and Modern State: The Political Emergence of Nations Challenging State Power" (2012), "Fourth World Geopolitical Reader" y el recién publicado "Biodiversity Wars, Coexistence or Biocultural Collapse in the 21st Century" (2019). Tiene más de cincuenta años trabajando en el campo de los Asuntos Indígenas como escritor/investigador y consultor de líderes politicos de las naciones del Cuarto Mundo alrededor del mundo.

Amelia Marchand, MA

Amelia Marchand es ciudadana de las Tribus Confederadas colville a citizen of the Colville Confederated Tribes. Tiene una licenciatura en antropología y una maestría en derecho y políticas ambientalales. Vive con su esposo y tres hijos. Es miembro del Consejo de Administración del Centro de Estudios Indígenas del Mundo (CWIS, por sus siglas en inglés) y hace trabajo voluntario con Conservation Northwest, Hearts Gathered, y el hogar Nez Perce Wallowa. A lo largo de su carrera professional, Amelia ha sido la primer mujer y la primer persona indígena en servir en cuatro posiciones de gobierno con su tribu. Es alumna de la Clase Presidencial y el programa de Académicos de Ronald E. McNair. Amelia es esposa, hija y nieta de los veteranos del ejército de los Estados Unidos y descendiente de prisioneros de guerra estadounidenses y el sistema de internados de los Estados Unidos. Sus experiencias personales e historia familiar han aumentado su passion por los derechos indígenas, la justiciar ambiental, y la implementación de soluciones socialmente igualitarias para la adaptación y mitigación del cambio climático que no solo honran los valores y la reciprocidad de la comunidad sino que sanan heridas del trauma intergeneracionesl y el colonialismo institucional.

Deborah Parker, MA

Deborah Parker es ex vicepresidente del gobierno de las tribus Tulalip y una abogada reconocida a nivel nacional y activista por los derechos de las naciones indígenas. En particular, durante su mandato como vicepresidenta, Deborah desempeñó un papel destacado en la defensa por la inclusión de la disposición de jurisdicción tribal en el Acta en contra de la Violiencia hacia la Mujer del gobierno de los Estados Unidos. Deborah es una oradora frecuente en conferencias y simposios relacionados con la restauración de la soberanía tribal, justicia y seguridad para las Naciones Indígenas.

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American Indian Male Maturation

By Lloyd L. Lee, Ph.D.

ABSTRACT

Less than one percent of baccalaureate-and-above degrees are awarded to American Indians and Alaskan Native students in the United States. In order for this to change, universities and colleges will need to do a better job of graduating American Indian men. While some universities and colleges have developed programs to recruit, retain, and graduate American Indian and Alaskan Native men, the goal of sustaining Native identity and working toward developing maturation has to be a part of any approach implemented. With identity and maturation, Native men and the idea of masculinities is grounded in the people's and community's thought and way of life. This grounding leads to maturation, the purpose of life. This article is an examination into American Indian male identity and maturation helping to succeed in higher education and life.

Keywords: American Indian, Male, Maturity, Identity, Higher education, Cultural knowledge, Relations, Language, Thought/philosophy, Space/place, Way of life

American Indian men continue to be underrepresented at all levels of higher education from associate to doctorate degrees. In 2010, American Indians and Alaskan Natives comprised 1.7% of the total U.S. national population, but received less than 1.0% of baccalaureate-and-above degrees awarded by several thousand schools in the United States (Bitsóí, Sharma, & Sibbett, 2013). The task of getting more American Indian students to graduate from college rests upon higher education institutions across the United States, particularly, colleges and universities in eleven states. More than sixty percent of American Indians and Alaska Natives live in Alaska, Arizona, California, Florida, Michigan, New Mexico, New York, North Carolina, Oklahoma, Texas, and Washington. College students tend to matriculate in the state of their original residence thus universities and colleges in these eleven states have a key role in helping to get more American Indians students to graduate from college (Bitsóí, Sharma, & Sibbett, 2013).

Colleges and universities will need to recruit, retain, and graduate American Indian men. While some institutions have implemented programs to achieve these aims, identity and maturation should be a part of any approach undertaken. Native American recruitment, retention, and graduation of men can be strong if the institution establishes programs and services whose goals and objectives are about helping to sustain Native male identity and working to help a young male mature as he pursues a higher education degree. For instance, several universities have established a young male of color or Native American male group. These support groups help young men of color learn about various topics

impacting young men such as racism, discrimination, life goals, and health. Identity and maturation have to be a part of any college approach. As a Navajo scholar, I discuss and analyze how a Navajo man's identity can help him mature and succeed in college and in life.

Identity Markers

Identity is distinct for each American Indian community and nation, however there are similar strands such as thought, language, cultural knowledge, relations, way of life, and space/place. These strands are different for each American Indian man as it demonstrates each man's experience and livelihood. The following paragraphs will discuss and analyze each strand.

S3'3h Naagh17 Bik'eh Hózh==n (SNBH) is a Navajo foundational principle of the universe. The phrase is heard in Navajo ceremonies as part of the prayers and songs. The phrase connotes a meaning of living a good everlasting beautiful life. SNBH exemplifies values, beliefs, and represents an animated and living journey. It is a static dimension, active dimension, thought, speech, male, and female. SNBH is the central animating powers of the universe, and as such, it produces a world described as hózh=, the ideal environment of beauty, harmony, and happiness (Witherspoon, 1977, p. 25).

SNBH also represents a four-part planning and learning process central to Navajo way of knowing. The process is comprehensive and includes the following: *nitsáhákees* (thinking), *nahat'á* (planning), *iiná* (living), and *siihasin* (reflecting). To contemplate SNBH, a person starts in the east going in a circle proceeding sunwise through all four cardinal directions. SNBH also encompasses the four sacred mountains of the Diné people (Mount Blanca, Colorado—East; Mount Taylor, New Mexico—South; San Francisco Peaks, Arizona—West; and Mount Hesperus, Colorado—North), four sacred minerals associated with the four sacred mountains, four parts of the day (Dawn—White Shell, Day—Turquoise, Evening or Sunset—Abalone, Night—Black Jet), four seasons of the year (Spring, Summer, Fall, Winter), and the lifespan of an individual (Birth, Adolescence, Adulthood, and Old Age). Each part of the principle provides and expounds on the meanings within the four-part planning and learning process. To fully engage with and comprehend SNBH, the person must think and speak in the Diné language.

Language is pivotal because everything in an American Indian way of life such as thoughts, prayers, songs, ceremonies, and rituals are based on how a person thinks, interprets, analyzes, and synthesizes life through language. Studies by Deborah House, Evangeline Parsons-Yazzie, and Tiffany S. Lee confirm Diné language shift. Joshua A. Fishman's *Reversing Language Shift*, James Crawford's "Endangered Native American Languages: What is to be done, and why?," Teresa L. McCarty, Mary Eunice Romero-Little, and Ofelia Zepeda's "Native American Youth Discourses on Language Shift and Retention: Ideological Cross-currents and their Implications for Language Planning," and numerous other articles and books have documented a language shift in American Indian communities. Even with language shift, many American Indians such as

the Wampanoag, Cherokee, and numerous others see how critical language is to their identity and way of life.

Language is a core trait of past and current identity. Many American Indian communities and nations are attempting to revitalize and maintain their native languages. It is a challenge, but success stories are happening in Hawaii, among the Māori in New Zealand, the Wampanoag in Massachusetts, and in other Native communities and nations.

Language and thought are usually taught and learned through a storytelling approach. American Indian communities and nations have creation scriptures and journey narratives. These narratives on emergence, cultural heroes, and others exemplify for to the American Indian men how to live and understand their responsibilities to themselves, their families, and communities. The image of an ideal American Indian man originates from these stories, but actual life experiences have proven that not all men can achieve this image.

Creation scriptures and journey narratives illustrate for American Indian men several core values such as responsibility, reciprocity, love, compassion, courage, strength, and self-sufficiency. In many American Indian communities, men lived with their extended family. Family in American Indian communities consisted of the nuclear unit, extended family units, clans, the earth, and the universe. American Indian women also learn core values and principles from the narratives. Their extended family networks are the core and foundation of their way of life. In fact, both men and women understand the interdependence between them through the narratives.

For many American Indians, identity is grounded in their relations with the land, their ancestors, and their people. They understand relationality in terms of an individual's connection to peoples and places. For instance, Shawn Wilson, in his *Research is Ceremony*, writes about Lewis Cardinal's friend's perspective on relational quality of existence:

> That's right, I mean most Indigenous societies will always introduce themselves as, "I am Lewis Cardinal, my grandparents are these people, my father is this person, my mother was this person." They put themselves into an orientation. I think that is a real foundational thing, to say who I am. Who I am is where I'm from, and my relationships (Wilson, 2008, p. 80)

Relations are both individual and group-oriented. American Indian men are connected to their communities through their relations.

In Navajo communities, relations are known as *K'é* and *K'éí*. *K'éí* is the clan system. Each Navajo man and woman has four clans representing his/her mother, father, maternal grandfather, and paternal grandfather. It acknowledges the relationships between biological, related, and clan-related family members. Every Navajo person has a family and is never alone. *K'é* helps men and women understand their place on the earth and in the universe and how they are interrelated to all things. It provides needed support and protection against life's challenges.

Relations connect American Indians to the community and set parameters for marriage. For many American Indian communities, men and women cannot date or marry if they are of the same clan, family, society, or longhouse. In Diné communities, a Diné man who is related to a Diné woman in any of the four clans should not marry. While some Diné individuals make exceptions for the maternal and paternal grandfather's clans, many do not. Traditionally, marriage in some Native communities was arranged. Nowadays, very few Diné and American Indian families arrange marriages for their children. They allow their children to decide for themselves who they want to date and marry, although some families still discourage their children from dating and/or marrying someone who is clan-related, because this is the underlying principle of *k'é*.

K'é teaches Diné people they are family to each other even if they are not related biologically. For instance, a person who has a nephew/niece on his/her maternal side of the family is a mother/father to the nephew/niece. Even if a person lives or works over a thousand miles away from home, he/she sincerely takes responsibility for his/her nephew/niece. He/she strives to communicate with his/her nephew/niece and to be a part of his/her family.

In many American Indian communities and nations, including Navajo, men lived with their wife's family because of the rules their communities established in regarding tradition and way of life. While not all American Indian communities and nations practiced this custom, many did, and space/place was integral to a man's life experience and way of life. Space/place frames and bounds a family's and community's thought, way of life, language, and relations. Thus, narratives, language, and thought are tied to the experiences and observations of a specific space/place. Entities, energies, and phenomena occurred for American Indian communities in the locations they lived, migrated, hunted, farmed, and prayed. These spaces/places help maintain a sense of connection to other human beings, strengthen identity, provide a sense of belonging, as well as increase political, social, and cultural power of the peoples.

Among Navajo communities, stories about Mount Blanca, Mount Taylor, San Francisco Peaks, and Mount Hesperus demonstrate to Diné people how their ceremonies and rituals were created and how they need to be conducted and maintained. Diné healers and medicine peoples go to these mountains to acquire the necessary materials such as herbs, plants, rocks, etc. to conduct healing ceremonies such as the Hózhó=j7 (Blessing Way). These mountains and other natural landmarks represent space/place to the individual's and community's identity. As language and thought are being challenged, the sacred land of the Diné is also experiencing similar struggles. For instance, the San Francisco Peaks has been damaged. The Arizona Snow Bowl ski resort won legal battles against Native Nations including Navajo to ensure man-made snow from reclaimed wastewater is used to produce snow for their business. In addition, uranium extraction companies want to mine uranium in and around Mount Taylor. Currently, five Native Nations as well as environmental groups are in opposition to uranium mining.

Professor Renya Ramirez proposed a space/place concept known as *native hub*. A native hub offers Native peoples a mechanism to support their culture, community, identity, and sense of belonging. It is a geographical concept incorporating activities on and off the reservation and represents actual places. Gathering sites or hubs include cultural events, such as pow-wows and sweat lodge ceremonies, as well as social and political activities, such as meetings and family gatherings (Ramirez, 2007, p. 3). Space/place is interwoven with language, thought, way of life, relations, and native hub. Thus, a native hub is a cultural, social, and political concept with the potential to strengthen Native identity and provide a sense of belonging as well as increase the political power of Indigenous peoples (Ramirez, 2007, p. 3).

History

In a related vein to a native hub, the Diné stories of First Man, the Hero Twin warriors/protectors, and others exemplify for Diné men how to live, understand their responsibilities to their families and communities, and emphasize *k'éí*. For instance, the story of the Hero twin warriors/protectors who searched for their father illustrates for Diné men several core values. The Hero Twins took responsibility for their actions and protected the people from monsters who roamed the earth at the time and even though they were afraid to confront these monsters, they were triumphant. The Hero Twins were independent, but with a strong connection to family, and continue to epitomize how a Diné man should live. A Diné man must be knowledgeable and smart, he cannot be afraid of responsibility and commitment, and he must protect his family and community.

Traditionally, Diné men lived with their extended family networks and made all possible efforts to sustain their families and communities. Most daily activities for a Diné man in the past included finding and fetching water, collecting firewood, finding and hunting game, maintaining crops, teaching and serving as a role model, while protecting his wife, children and extended family. In their marriages, Diné men and women lived an egalitarian and autonomous way of life. They integrated their work roles. Gender equity was the norm in social life, and both men's and women's contributions were equally valued.

Both Diné men and women were leaders. Many leaders were men, although a significant number were women, too. Men in leadership positions lived ethical and humble lives. They were role models for the rest of the community, and were relied upon to make good decisions for everyone. If a leader was immoral or unethical, the people let him know and if necessary, removed him. Male leaders were supposed to follow the examples set forth in the creation scripture and journey narratives.

Diné men understood their roles and responsibilities in life and in the extended/clan families. However, not all men supported their families, as some were selfish individuals who took advantage of people. Often, these selfish men lived alone. Overall, most men made sure their families and communities were prosperous and happy. They were responsible, respectful, hospitable, knowledgeable, and healthy. They advocated subsistence, self-sufficiency, respect, love, and humility.

From the seventeenth through the early twentieth centuries, there were significant European and American cultural impacts on material goods, languages, values, and livestock. Navajo families, Europeans, and Americans interacted consistently. Diné men added new roles and responsibilities such as a horse handler (*akáá[ii' sk[ee'i*) and shepherd. While Diné men continued to live a subsistence way of life, warfare and livestock affected how men interacted with women, other Native communities, and with Europeans and Americans. Warfare increased dramatically and violence became a part of the way of life.

With the use of the horse, Diné men began to forage more frequently for extended periods of time. Diné men adapted very well in utilizing the horse for trading, protection, and travel (Clark, 2001). The horse raised men's economic capacity, social status, and ambition. Diné men with horses traveled to find food, trade, and interact with other peoples. Diné masculinities were connected to how men maintained and cared for their horses. Diné men showed responsibility in their caretaking of their horses, and in turn, it enhanced their status within their communities, while, as expected, those without a horse had low status in many cases. The overall effect was that Diné man was able to demonstrate to all, including his future wife and family, that he was dependable and capable of providing for a family.

In addition to the horse, raising sheep also shaped Diné communities. Sheep provided security, it was an integral part of one's identity as well as of the community, and influenced how Diné social groups were organized (Iverson, 2002, p. 23). Sheep ownership helped people cooperate and become interdependent. Sheep herding became the main mechanism to teach the values of a Diné way of life—responsibility, respect, love, hospitality, knowledge, and wellness. Perhaps most importantly, raising sheep strengthened Diné male and female interdependency since both were capable of animal husbandry.

Diné men were hunters, farmers, teachers, storytellers, traders, protectors, and healers. Diné masculinities were tied to language, thought, cultural knowledge, way of life, relations, and space/place. Men lived the principles of *iiná*—to live well, to know the history of the people, to live an SNBH path, to use the four elements (water, air, fire, and land) to survive, to know and practice *K'é* and *K'éí*, and speak Diné. Diné men played a very important role in a boy's initiation ceremony by providing instruction, knowledge, and wisdom for their boys, much the same way other Native people do. Diné boys went through a puberty ceremony to learn what it meant to be a young man. They learned stories, prayers, songs, and cultural knowledge. The attributes of traditional Diné masculinities still exist, but it is not universal among all Diné men in the present.

Male Foundation

Each Diné man is expected to have a foundational image representing his responsibilities, expectations, and commitments. This image is made up of four distinct components: spiritual, common, social, and physical. Each component is interwoven with one another. To understand a more detailed description of each component, one must dialogue with a medicine person in the Diné language. In lieu of such a conversation, the following paragraphs provide a general description of each component.

The spiritual image is the first component. It is metaphorically located in the East and is represented by the entities of Talking God, Dawn Boy, and Dawn Girl. Spirituality explains a man's existential appearance and is born of this image. From this image, a person experiences the force of natural law. It helps a person experience positive energy, happiness, and laughter. This can be applied to all people to enjoy life and develops a good attitude and behavior to motivate oneself. A person's motivation gains the necessary energy to direct their needs and desires in life. Humans need to understand this energy in order to control it. This image can direct you toward the positive interests you have as a human being. As good emotions and thoughts are developed, a Diné man's outlook on life and the approach he takes derive from a positive spiritual image.

The second component is a common image. It is located in the South and is represented by Talking God, Blue Twilight Boy, and Blue Twilight Girl. It represents the "normal" way a person feels and acts. He/she can develop a good or bad common image. While the spiritual image relates to the abstract, the common focuses on how a person presents him/herself. It symbolizes the way a person is viewed by the world. It is tangible and visible. A person's childhood, belief system, and lifestyle create a common image, and different life experiences will shape and mold a person's common image and life pattern.

Social image is the third component. It is located in the West and is represented by Second Talking God, Yellow Evening Boy, and Yellow Evening Girl. The social image concerns a person's outlook on life within a Diné cultural framework. A person's interactions with all the elements of the world, such as mountains, rivers, seasons, animals, plants, beliefs, and values, dictate a social image. Through this image, a person learns how to interact with other humans and non-humans. From this interaction, a Diné man comprehends his own personality. All of this understanding takes place within Diné thought. This image also allows for Diné people to learn from cultural teachings, stories, prayers, and songs. For example, *K'éí* represents the clanship system to help people know and understand their relations. It establishes a family network and instills in all Diné families support and protection. The social image is a process in progress, with each new interaction a man continuously developing his social image. At times, a man will have conflicts with his social image, so each man should take a careful and cautious approach in life. A balance must be achieved with the social image, if not, a man can suffer and venture into areas harmful for human beings. It is the most vulnerable of all the components, yet it establishes the values a man follows in life.

The fourth component of a man is the physical image. It is located in the North and is represented by Second Talking God, Folding Darkness Boy, and Folding Darkness Girl. In the creation narratives, the holy entities created human beings in this world and they created the physical image of a person in darkness. A person's physical image focuses on the outside appearance, the way a person looks, and the way human physical features are put together. Humans do not control the physical image. The other three components are considered more important than the physical

image, since physical features should not be a significant concern for a person if he/she understands the other three. If a Diné man accepts his physical appearance, he will understand his own foundation. A person's physicality represents the behaviors and attitudes each lives by daily.

To help a Diné man understand his personhood and the four components of his image, going through a rite of passage and a puberty ceremony is encouraged. However, many young Diné boys have never gone through a male initiation ceremony. The main lesson of the ceremony is to learn the necessary skills to live in this world and to ensure the person and community's well-being.

Male Initiation Ceremony

The male initiation ceremony is a two-part ceremony and can take place any time of the year. Boys train before the ceremony and, as the boy transitions from child to young adult, his family and relatives prepare him for the ceremony and general life. When a boy's voice changes, it is time for the boy to partake in the ceremony. The first part of the ceremony takes place over four days and the oldest maternal uncle guides the ceremony. His uncle will prepare the sweat lodge (*táchéii*) and collect herbs for the ceremony. The boy awakens before dawn every day during the four-day ceremony to run in each cardinal direction and is given herbs to make him vomit in order to purify himself. The young boy spends a significant amount of time in the *táchéii* and learns songs, prayers, stories, and lessons. He also learns confidential teachings for a man, he learns about life's complexities, and learns about being sincere, and having humor. Inside and outside of the *táchéii*, the boy is massaged especially on the joints, to ensure he is physically strong. He also runs during the day around noon, despite the heat in the summer, and he is told to think about what he should do for the day and make plans on how to make sure he achieves his objectives during the morning hours of the day. Another important lesson is learning parenting skills (Begay, 2005).

The second ceremony takes place a month later and is similar to the first ceremony with the addition of a Blessing Way rite, Hózhó=j7. It is designed to bring happiness and protection to the young man. Mountain tobacco is used for this part of the ceremony and the purpose is to open and clear the mind of the young man. This aspect is derived from the Twin Heroes protection story. In the story, the Sun gave his twin sons tobacco to test whether or not they were indeed his sons. After the twins smoked the tobacco, their father massaged them with ashes. It is done the same way for a boy undergoing the puberty ceremony. Tobacco is used in the male ceremony even though it is not used in all Hózhó=j7 ceremonies. After the ceremony is complete, a boy begins a new stage in his life as a young man (*dinéé́h*).

Upon completion of the ceremony, the young man receives an arrowhead, a sacred corn pollen bag, and a bow with arrows for hunting and protection (Begay, 2005). He will eventually learn how to hunt game, usually deer. All of this takes place when he is between the ages of eleven and fourteen. In a short amount of time, he will marry with the help of his family. In the past, only two questions were asked of a future marriage partner: what are your clans? and did the person go through a puberty ceremony? If the answer is yes

to the second question and the individuals are not related to each other, then on many occasions a marriage is arranged.

The question regarding the puberty ceremony allows for potential mates to make sure they are a good match for each other. A male initiation ceremony strengthens and guides a man's adult life and helps him live a prosperous life for himself, his family, and his community. Without the ceremony, a man does not begin to learn the necessary skills and knowledge to live a Diné way of life. Oscar Tso, in Maureen Trudelle Schwarz's *Molded in the Image of Changing Woman: Navajo Views on the Human Body and Personhood,* describes his puberty ceremony experience:

> They built a sweat for me, and they talked to me about my responsibilities as a man. And then, what I need to do to take care of myself. They talked about how I should be when I get married. What should I know and how I should be towards a woman, because I have a mother, I have sisters. And I have to have respect for my mother, my sisters, and then have that same respect for a woman that I will marry. And then all the daughters that I will have, or granddaughters that I will have. So, those kinds of things are explained to you. And then about how you need to keep yourself real strong, try to stay with one woman for a long time, you know. Have one set of children. And they can really preach, you know, and talk to you about a lot of things. And those are some things that are explained to boys. And then, how you have to be strong, what kind of herbs you have to take from time to time to purify and cleanse your body. To keep your mind and body strong, and have a sense of purpose as you go about living this life. So, I had the sweat done for me, as well as the Beauty Way, the Hoozhonee done for me (Schwarz, 1997, p. 159).

Conclusion

Diné identity establishes what it means to live a balanced, healthy, happy, mature, and successful life. It can guide boys toward becoming men who are mature, happy, and successful in life and in college. American Indians are fighting to maintain and revitalize their languages and their ways of life so it is imperative for communities to establish language revitalization and culture programs. This way, American Indian children can be bilingual and bicultural. It has been found that biculturalism (i.e., the ability to adapt to majority cultural norms while remaining grounded in one's own culture) serves to buffer American Indian youth against negative outcomes such as substance abuse. It is believed bicultural competence allows these youth to combine what is best from both cultures as a source of strength in the face of adversity (LaFromboise, Gerton, & Gerton, 1993).

What American Indian and Diné people went through in their history continues to impact and influence them. American Indian and Diné men continue to overcome the consequences of colonialism. Native identity helps American Indian men overcome their personal challenges. Not very many American Indian and Diné boys go through a rite of passage and fewer know about the foundational image of American Indian and Diné masculinities. American Indian and Diné

communities will need to revitalize and regenerate their rites of passage and cultural knowledge. While some communities are doing this now, every American Indian community needs to help boys going through a puberty ceremony learn the responsibilities and commitments they have to themselves, their families, communities, and native nations.

Thought, language, cultural knowledge, way of life, relations, and space/place are the foundational pillars of Diné and American Indian identity. A Diné and American Indian man builds and shapes his identity through his way of life. A Diné and American Indian man who is strong and knowledgeable of his identity will be confident, happy, and successful in life. While some Diné and American Indian men are confident, happy, and successful they may choose not to attend and/or graduate from college. Happiness, maturation, and success are distinct in Diné and American Indian communities. It may mean men do not get a higher education degree although many Diné and American Indian men do want to be happy and prosperous in life and the acquisition of a college degree is an element to this pursuit. Colleges, universities, tribal colleges, and American Indian communities will need to work together to help men succeed in college. This collaborative effort will be different but Native identity will play a significant role for each community and native nation.

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This Article may be cited as:
Lee, L. L. (2020) American Indian Male Maturation. *Fourth World Journal*. Vol. 20, N1. pp. 110-121

ABOUT THE AUTHOR

Lloyd L. Lee

Lloyd L. Lee, Ph.D. is an enrolled citizen of the Navajo Nation. He is Kinyaa'1anii (Towering House), born for T['11sch77 (Red Bottom). His maternal grandfather's clan is !sh88h7 (Salt) and his paternal grandfather's clan is T1b22h1 (Water's Edge). He is an Associate Professor and the Faculty Graduate Director in the Department of Native American Studies at the University of New Mexico in Albuquerque, New Mexico USA. His email address is: triplel@unm.edu.