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THE HIGHLIGHTS

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IN THIS ISSUE

ON THE COVER | Yushan Tribal College students

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LUKANKA

Lukanka is a Miskito word for "thoughts"

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RUDOLPH C. RŸSER
Editor in Chief
Fourth World Journal

The world's youthful states have much to learn from their mature nation parents. The world's nations originated the most suitable methods for creating shelters and clothing for different ecosystems to support human life. Over thousands of years, they tested and followed nutritional practices and identified and used medicines, and they conceived and implemented social organization, laws, documented plants and animals, practiced religions, and traced the cosmos while documenting their growing knowledge rooted in thousands of years of experience. The states are identifiable if they have de facto control over a territory or at least assert claims to such territory and imposed control; they have a population, a centralized government, claims sovereignty and the capacity to enter into relations with other states. These are classical terms that define the modern state today (they have been around for less than 400 years). The dynamic and evolving cultures of nations have graced the Earth for thousands of years. All of this reminds us that when local, regional and global crisis' surround families, communities and whole peoples it is valuable to turn to knowledge of our forebearers—grandmothers and grandfathers—to retrieve guidance to meet the tests before us.

The calendar year of 2020 just passed placed at the world's people's crisis piled on crisis testing human capacity to endure. Global disaster rears its ugly head as a result of radical changes in the climate brought on by two centuries of unrestricted human development dependent on fossil fuels, extractive industries and indiscriminate waste disposal. Economic near collapse brought on by a combination of climate changes and a global viral pandemic demonstrated how fragile is the concept of capitalism and its incessant demand for wealth for the few. Mass human migrations and internal and external refugees are resulting from unremitting violence committed by state's and non-state's forces and gangs demanding control over oil and gas, the sale of illicit drugs, enslavement of men and women, trafficking of women and children, combined with the consequence of climate changes producing droughts, floods and insect infestations destroying foods and medicines.

In "Making Peace with Nature, A Scientific Blueprint to tackle the climate, biodiversity and pollution emergencies" the United Nations Environmental Program Executive Director Inger Andersen issued this 2021 report describing the need for urgent efforts to apply new scientific information to protect and restore the planet. The UN Environmental Program report makes note of these shortcomings of political and institutional leaders:

- Biodiversity, ecological collapse: The current mode of development degrades the Earth's finite capacity to sustain human well-being.

- Unrestrained Development and use of fossil fuels: Society is failing to meet most of its commitments to limit environmental damage.

- Projected changes in climate, biodiversity loss and pollution: undermines the ability to achieve sustainable development goals.

- Reversing human activities that cause climate change, ecosystem degradation and pollution: must be advanced to reduce human health risks, including respiratory disease, water-borne, vector borne, and animal borne diseases, malnutrition, extreme, weather events and chemical exposure.

- All human institutions and all human beings must act: transforming social and economic systems for sustainable future.

The report notes that these imbalances in climate, biodiversity and spread of pollution contribute to increased migrations, environmental degradation and intensified competition for natural resources, "which in turn can spark conflicts, including between actors with power asymmetries where indigenous peoples or local communities are often vulnerable. The authors of the UNEP report note that indigenous peoples must become partners in the effort to achieve sustainability.

It is this latter recognition that indigenous peoples are part of the power challenge between peoples that must result in the 1.9 billion indigenous people becoming part of the global solution—equal partners in the effort to meet these critical crises that affect the very survival of all human beings. States and indigenous nations are critical to bringing the crises we all face to a neutral condition—no longer escalating out of control.

Retaining cultural life, territory and exercising self-determination stand at the heart of the ability of indigenous nations and states to come to the table and formulate and implement mutually beneficial solutions to the crises thus illuminated. States have failed to meet the challenges posed by the emergent crises ever since the 1972 Stockholm Conference convened to meet the "planetary emergency." The States have been collectively unable to define a path to human sustainability in the face of unrestrained development.

I submit that the missing piece of the decision-making puzzle for the last fifty years that must be respected by the states is a partnership with the peoples in the world that have the longest experience mitigating adverse effects of human created environmental threats are the world's indigenous nations. They must become equal

partners at the table holding and offering as they do the most effective solutions to the crises now plaguing the world.

In this issue of the Fourth World Journal our contributors describe some of the obstacles preventing the full and complete participation of indigenous nations defining and implementing solutions to the crises facing all of humanity. At the same time, contributors to this issue offer solutions and encourage proactive involvement of indigenous nations as equal participants in the process of defining, organizing and implementing solutions as mature societies.

Tom Younger, Policy Advisor on Peru to the Forest Peoples Programme writes in ***"Our Struggle Continues" Confronting the Dynamics of Dispossession in the Peruvian Amazon*** The Forest Peoples Programme (https://www.forestpeoples.org/en/staff-and-board) is based in England with a declared mission to advance "self-determination of peoples "by strengthening community governance, mobilization and representation, and the creation and use of political spaces where indigenous and forest peoples' voices can be heard." Younger's work reflects the mission of the Forest Peoples Programme with its added features of Access to Justice, Legal and Policy Reform and Building Solidarity in his article.

Dr. Muhammad Al-Hashimi's "***The Brazen Daylight Policy Murder of George Floyd and The Racist Origin of American Policing"*** is a startling revelation of the roots of American racist policing. Senior Lecturer at Euclid University in Washington, D.C., Al-Hashimi reveals with passion and intelligence the "back story" that spawned the institution of racially bigoted policing of communities in the United States. He draws an historical picture rooted in slavery introduced by the British and carried on by Americans to the present day as illustrated by the public murder by police officers of one man: an African American man named George Floyd killed on 25 May 2020. Al-Hashimi discusses at length how early American history shows the role of "slave patrols and militias" that actively and without restraint formed the basis for modern police practices in the United States.

Cora Moran, Dr. Rudolph Rÿser and Susan McCleary, in ***"Elevated Atmospheric CO2 Levels and Effects on Plant Nutrition and Health of Indigenous Peoples, a Review of Current Research"*** assess the current research describing elevated atmospheric CO2 levels effects on plants and animals and the consequent effects on nutrition and medicines beneficial to human beings. Noting that indigenous peoples depend on 40% to 80% of their diet sourced from wild plants and animals, they are at significant risk or malnutrition arising from the adverse effects of elevated CO2 in the atmosphere. The researchers call for more research to directly examine wild plants and animals on which indigenous peoples rely.

Zane Dangor, Special Advisor to the South African Minister of International Relations and Cooperation discusses in ***"Amending the Rome Statute and Peoples: Crimes Against Present and Future Generations (CPFG)"*** changes in the statutes on which the International Criminal Court (ICC) relies. Dangor points to what he considers to be a significant gap in the Rome Statute that fails to take into account

the conduct of crimes and harms committed by Corporations. Such crimes as economically fueled poverty and inequality Dangor points out are responsible for an estimated 21,000 persons that die each day due to hunger and malnutrition. Crimes associated with harmful economic activities and corporate criminal liability reach deeply into the lives and communities of indigenous peoples all over the world.

CWIS Associate Scholar **Dr. Amy Eisenberg** in ***"Mihumisang – Tribal Voices of Formosa"*** insightful commentary by individuals from Tao, a people on the south eastern coast of Formosa. She reports that the Tao are "unanimously" opposed to nuclear waste storage on their island and express their concerns and views in this narrative in the voices of individual members of the community.

Cambridge University doctoral learner **Sakshi** studying in the Department of Land Economy writes "***Denying Indigenous Environmental Justice: Experiences from Australia, Brazil and Canada."*** Sakshi discusses at length the legal challenges faced by indigenous peoples in Australia, Brazil and Canada in particular focused on environmental justice. The author urges that it an essential part of justice for indigenous environmental justice to be part of the legal principles issued within the state legal systems.

Rudolph C. Rÿser --- review of Ilan Stavans' ***"Popol Vuh, A Retelling"*** with a forward by Homero Aridjis. Stavans' "retelling" is discussed in terms of Dennis Tedlock's earlier translation of the Popol Vuh indicating a contrast between the "shadows" of the original text in contrast to the lighter narrative offered by Stavans.

Biodiversity Wars

Coexistence or Biocultural Collapse in the 21st. Century

By Dr. Rudolph Rÿser

Dr. Rÿser discusses the foundation for his proposal of a new international mechanism to bridge the economic, social, political and cultural gap between Fourth World nations and the world's 203 states.

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“Our Struggle Continues.” Confronting the Dynamics of Dispossession in the Peruvian Amazon

The case of Santa Clara de Uchunya and their fight to obtain justice and regain their territory

By Tom Younger
Forest Peoples Programme

National Geographic, Esri, Garmin, HERE, UNEP-EP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, Increment P Corp.p.

ABSTRACT

The Shipibo-Konibo community of Santa Clara de Uchunya is struggling against the dispossession and devastation of their ancestral lands due to the aggressive expansion of oil palm. This article discusses the social and cultural impacts of agribusiness-led deforestation on the community and their territory. The discussion focuses on the political and legal strategies they have developed together with allies to demand the restitution and remediation of their ancestral lands. Finally, we consider some of the critical successes and challenges the Shipibo-Konibo community faced during the past five years of this struggle.

Key Words: indigenous peoples, land titling, deforestation, agribusiness, palm oil, corporate accountability

When Santa Clara de Uchunya community members, a Shipibo-Konibo Indigenous community located on the banks of the Aguaytia River in the lowland rainforest of the Peruvian Amazon, talk about their ancestral territory, there is a before and after.

Luisa, a woman leader from the community, puts it this way:

> *"Before, we walked freely. Now we are like hunted animals. We have to take care whenever we walk anywhere, from fear."*

This rupture in time and in people's relationship with their territory occurred with the entry of a transnational oil palm company, Plantaciones de Pucallpa (today Ocho Sur P). Beginning in 2012, the company destroyed more than 7,000 hectares of forest and stripped the community of a vital part of their traditional lands. Practically overnight - in historical terms - the company's aggressive expansion of oil palm monoculture has forced radical changes in the community's way of life.

Wilson, a community authority now in his 40s, describes some of these changes:

> *"Before, we used to set out from here to go hunting and sleep in the forest. We would stay out for anywhere between eight and fifteen days. We would make our way there, set up our campfires and eat out there. Three or four families would go together to hunt there. We would build a campfire, and all eat together. That was our custom. It's not that today we no longer want to; now one cannot even walk there safely on the other side [of the river, where the plantation is now located] … Nowadays, if they see us, the people there, act like thugs, treating us as though we were thieves. We used to walk freely. They are putting an end to our customs. Who's responsible? The State."*

The Shipibo people have inhabited the lands to the west of the Aguaytia and Ucayali rivers for generations. Maps drawn up by missionaries such as "Exploraciones y fundaciones de los misioneros de Ocopa en la Montaña del Perú 1750 – 1825", which today hangs in the Franciscan Convent of Santa Rosa de Ocopa outside Huancayo, shows the location of "Sipibos." They occupy the lands which Santa Clara de Uchunya are struggling to reclaim today, several centuries later.

Despite this longstanding historical recognition of the Shipibo's traditional territoriality, the continuing structural oppression of Indigenous Peoples in Peru means that the community lacks full formal recognition of its ownership rights over the entirety of their ancestral territory.

Thus, when Plantaciones de Pucallpa's workers started destroying Santa Clara's traditional forests in 2012, the community only possessed a collective land title granted in 1986, covering 218 hectares. This site is a minuscule portion of the territory that the community has traditionally owned and occupied for generations, originally covering over 86 thousand hectares.

If the community's lifeways were previously oriented towards abundant and carefully tended forests, today, in a new context of scarcity created by the intense enclosure and dispossession of their lands, families from Santa Clara de Uchunya must depend more and more on the market economy to meet their needs.

As community members point out time and again about the game animals, fish, and other forest foods, plant medicines, construction

materials, and clean water that they previously provisioned themselves with from within their territory: ***"There is nothing left."***

A community member who just several years ago was able to construct the roof on his house using xebon leaf, harvested from nearby, must now buy corrugated iron sheets; gathering xebon leaf from the territory is no longer tenable due to invading land traffickers.

The same goes for traditional medicine.

"Our medicine was chuchuhuasi, clavohuasca, sangre de grado, copaiba resin," says Wilson. *"Our elders used to diet these plants for three days to a week to cleanse and heal their bodies."*

"Before, we didn't need injections or pills. Those who felt unwell would go into the forest. Our elders, who are around 80 years old, walk strong because they treated themselves with those medicines. Plant medicines were the best medicine we had. But today, there is no more."

The devastation of the living ecosystems that make up the community's territory and the loss of practices intimately linked to this place hinder the community's lifeways and well-being in the present and give rise to anxieties about the future.

In that sense, Fidel, a young man, asks, *"Our concern as young people is that if we do not know many animals at this age, what will it be like later for our children?"*

Luisa adds, *"Before, we had everything we needed. For us, our market was our territory. Now we can no longer walk for even an hour because we are under threat. That's why I'm concerned, because tomorrow, in the future, what will our children eat? How are they going to feed their children? I recall how my mother and father fed us, and we can no longer do that. And it's going to be much worse for them because now there's nothing. They're not even going to know what it is to turn a tree into a canoe, as is our custom. They're not going to know our medicines, because there are none left. Everything is being destroyed. Before we ate well, we grew to be strong and fat, but now, what happens to our children? They suffer from diarrhea, vomiting, dehydration."*

The company's arrival and continuing presence has driven fierce competition for control over lands between groups of non-indigenous/mestizo settlers from other regions of Peru dedicated to what is known locally as "land-trafficking." Dammert (2019) characterizes this phenomenon as *"the perverse and systematic use of State titling mechanisms to incorporate lands into market circuits and profit from them."*

Both individuals and organized groups occupy and take possession of lands that lack formal legal recognition and seek to obtain possession certificates from the regional agricultural agencies, typically clearing any forest on such lands in the process. Indeed, forest clearance is incentivized by Peru's essentially agrarian land-use classification system dating back to the 1970s. The classification system stipulates that people claiming land rights must demonstrate "economic activity," i.e., by clearing forest to install agropastoral systems. These possession certificates, which may subsequently be

converted into individual land titles, may be sold to commercial buyers (as was the case with Plantaciones de Pucallpa). This forms part of a more extensive and ongoing process across the Peruvian Amazon of the commodification of collectively held Indigenous lands and their forced incorporation into a commercial land market, ever-expanding commodity production, and international circuits of capital accumulation.

The consequences highlighted above have led to the reconfiguration and emergence of social hierarchies based on gender, race, and class.

These include:

- The destruction of Santa Clara de Uchunya's communal and household autonomy and non-monetary territorial provisioning systems. The losses force both men and women to seek waged work where possible, often outside of the community, increasing the burden of care work for women and elderly people who remain in the community.

- Men and women from the community have been divested of the power to decide over what happens within their lands, with decisions taken by mestizo men representing the Peruvian State in offices in the cities of Pucallpa and Lima, as well as the Euro-American men who direct Ocho Sur and its US-based investors. A stark example of such racialized discourses are comments made by the Ucayali Agrarian Agency's ex-director, Isaac Huamán Pérez, who repeatedly expressed his rejection of Indigenous Peoples' customary land rights. He argued in the case of Santa Clara de Uchunya that "ancestral property is a thing of the past" and unequivocally stating that Indigenous Peoples want to enforce "the law of the jungle." On the other hand, Huamán made numerous public announcements on the urgent need to recognize the 'customary possession rights' of settlers. Furthermore, he attempted to change prevailing forest laws to dissolve the 'permanent production forests' to achieve this goal, making clear the priority he attributed to non-indigenous people's rights and their uses (Forest Peoples Programme et al., 2018, p. 15).

- The Shipibo people's territoriality – comprising the multiple ways they relate to their territory – has been largely ignored by the State in its interventions, as will be expanded upon below. These interventions have tended to focus at best on important though narrowly conceived "environmental aspects" of the case, such as quantifying deforestation.

- The racialized hierarchies according to which the plantation itself operates are also worthy of remark. While white, Euro-American men hold power over the running of Ocho Sur P's plantation, Shipibo leaders have observed that many of the 1,700 workers whose labor is exploited there are themselves Indigenous people from Ucayali and neighboring regions such as Loreto.

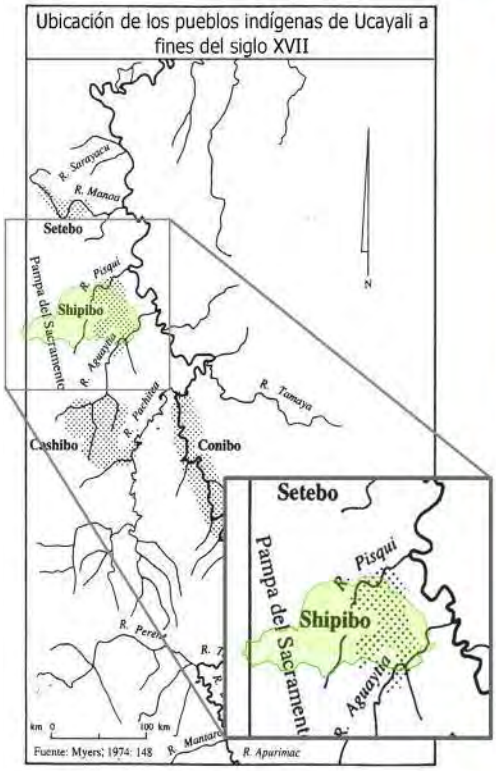
Mapas de ubicación del territorio tradicional de la comunidad shipibo-conibo de Santa Clara de Uchunya según fuentes actuales e históricas.

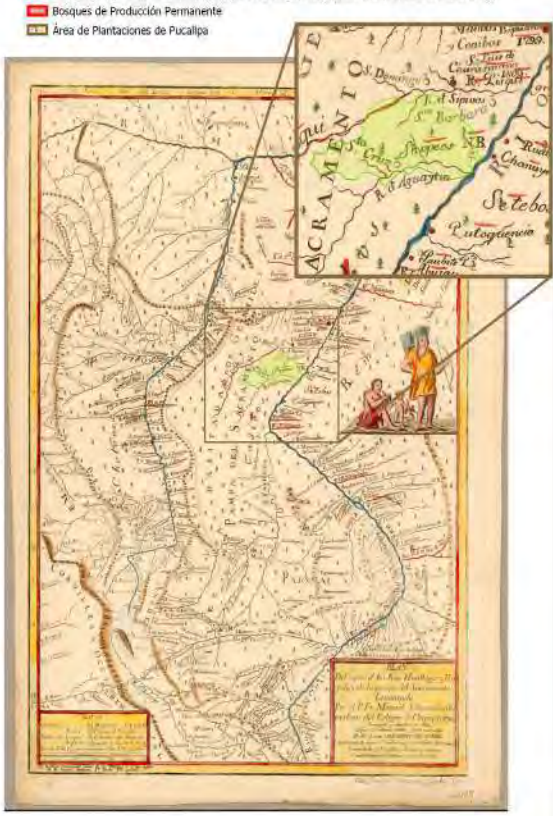
Fuentes/Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, © OpenStreetMap contributors, and the GIS User Community Copernicus Sentinel data Acquired 18/09/2018. Retrieved from ASF DAAC 10/2018, processed by ESA, Xabanete (2017), SERFOR (2017)

Leyenda

- Uchunya Territorio Tradicional de Uso Actual (92554 ha)
- Uchunya Territorio Tradicional (135685 ha)
- Ubicación de la comunidad titulada de Santa Clara de Uchunya (218 ha)
- Ampliación de Santa Clara propuesta por el Gobierno Regional de Ucayali, Dic 2017 (1318 ha)
- Bosques de Producción Permanente
- Área de Plantaciones de Pucallpa

Referencia Espacial
GCS: GCS WGS 1984
Datum: WGS 1984
Units Degree





Aclaración: Todos los mapas y datos que describen el territorio consuetudinario de la comunidad de Santa Clara de Uchunya en este documento son confidenciales y la propiedad intelectual de los miembros de la comunidad. Por ende, no deben reproducirse, publicar, distribuir, transmitir, mostrar o difundir de otra manera sin su permiso expreso dado; libremente, previamente, de manera informada y en forma escrita. La información sobre el área de uso actual y tradicional de la comunidad proviene del 'Estudio de la territorialidad de la comunidad nativa Santa Clara de Uchunya , XabaNete Marzo 2017. El estudio ha identificado y definido el 'Territorio Tradicional' de la comunidad como 'la superficie ocupada, por lo menos, desde los ancestros recientes, es decir dos generaciones antes de los actuales ancianos' y el 'Territorio Tradicional de uso actual', como el área que 'por diferentes razones de pérdida territorial, en la actualidad se encuentra reducido del Territorio tradicional'.

The resulting conflicts have exposed the Shipibo-Konibo community to intimidation, threats, and attacks. Community members, leaders, and allies who have made a stand to protect their territory against the spread of land grabbing and forest destruction have been subjected to verbal abuse, threatened and warned to abandon their homes, received death threats, and been shot at on multiple occasions. These abuses and threats have prevented community members from moving through their territory. People who have asserted their right to freely access their traditional lands have been met by groups of men wielding machetes, sticks, and firearms. Shipibo land defenders have also been targeted and defamed by regional authorities and regional press, and media (Forest Peoples Programme, 2020a, p. 14-16).

"We continue struggling" - strategies for resisting the dynamics of dispossession.

For the past six years, the community has been fighting to defend what remains of their forests, waters, and way of life, prevent further deforestation and oil palm expansion, and ultimately, to ensure legal and practical control over their ancestral territory. The community has taken direct action to intervene and halt further deforestation, protested, and denounced these violations and the devastation caused to their home locally and internationally.

The community has taken a series of legal actions to defend their territory, using criminal and constitutional judicial mechanisms. In May 2015, the community filed a criminal complaint against the palm oil company, Plantaciones de Pucallpa, for deforestation. The case was initially investigated by the First Corporate Provincial Prosecutor's Office Specialized in Environmental Matters of Ucayali before being transferred to the First Supra-provincial Corporate Specialized Prosecutor against Organized Crime in Lima. This was carried out after it was determined that the case involved organized crime. In January 2018, the Fourth National Preparatory Investigation Court issued a precautionary measure ordering the company to immediately suspend its activities. However, this injunction was never enforced, and five years after the original complaint was filed, the company continues its operations with impunity.

In May 2016, the community, together with their representative Indigenous organization, the Federation of Native Communities of Ucayali (FECONAU), presented a constitutional lawsuit against the company and the Regional Government of Ucayali public registry officials who facilitated the land grab. This lawsuit seeks the restitution, collective titling, and remediation of the community's ancestral lands. The claim was rejected by two courts in Ucayali before being admitted for consideration by Peru's highest Court, the Constitutional Tribunal, which in August 2018 announced that it would resolve the case. A hearing took place in September 2019. The community's claim was strengthened by an amicus curiae expert legal briefing provided by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, underscoring Peru's legal obligations to formally recognize the community's traditional lands (2019). The community is currently awaiting the Court's ruling on their case.

The community has also shared their testimonies and demanded solutions in international spaces, such as the Inter-American Commission on Human Rights (2018) and during a formal mission by the UN Special Rapporteur on the Situation of Human Rights Defenders to Peru in January 2020 (OHCHR, 2020).

While the actions mentioned above have been primarily directed towards the Peruvian State, the community and allies have also sought to hold accountable the companies involved by using non-judicial redress mechanisms. One of them is the complaints mechanism of the Roundtable on Sustainable Palm Oil (RSPO),[1] a global body that seeks to improve the sustainability of palm oil supply chains.

Both Plantaciones de Pucallpa and another plantation which expanded at the same time immediately to the south, Plantaciones de Ucayali, form part of a complex web of agribusiness companies that have used secrecy rules in overseas jurisdictions to avoid accountability for their activities. This corporate web has come to be known in Peru as the "Melka Group" of agribusiness companies, named after Czech-US businessman Dennis Melka. Melka, who was previously implicated in agribusiness-led deforestation and human rights violations as co-founder and joint CEO of Asian Plantations Ltd in Malaysia, gained notoriety in Peru and globally during recent years for industrial-scale deforestation and rights violations associated with his oil palm and cacao plantations in Ucayali and Loreto.

The community and allies have targeted formal complaints with the RSPO against Plantaciones de Pucallpa [2] and companies that have been buying and processing oil palm from their devastated lands, including the miller OLPESA and Peru's largest consumer goods company, Alicorp. [3]

Successes, challenges, and limitations

While the community is still fighting for a definitive solution to ensure the restitution and remediation of their territory, their unified stance and determination have resulted in some significant successes.

At great personal risk, community members have organized territorial patrols to monitor their lands and undertaken the self-demarcation of their territory (despite this being an obligation of the Peruvian State). Community members intervened on multiple occasions to prevent further logging of their forests by settlers, exercising their right to administer Indigenous justice in defense of their territory to confiscate logging equipment.

[1] https://www.rspo.org/ The RSPO describes itself in these terms: "… not-for-profit that unites stakeholders from the 7 sectors of the palm oil industry: oil palm producers, processors or traders, consumer goods manufacturers, retailers, banks/ investors, and environmental and social non-governmental organisations (NGOs), to develop and implement global standards for sustainable palm oil."
[2] https://www.forestpeoples.org/en/global-finance-trade-palm-oil-rspo/press-release/2017/press-rspo-ruling-condemns-plantaciones-de.
[3] https://www.forestpeoples.org/en/palm-oil-rspo/press-release/2019/amazonian-community-fights-lands-are-destroyed-sustainable-palm.

In September 2015, the Peruvian Ministry of Agriculture ordered Plantaciones de Pucallpa to suspend its operations.

In April 2016, the RSPO issued the company with a stop-work order.

The community's continued resistance and mounting legal actions are likely what precipitated the auction of Plantaciones de Pucallpa and Ucayali's plantations to Ocho Sur P and U in July 2016, with Plantaciones de Pucallpa subsequently withdrawing from the RSPO in October 2016.

In February 2017, United Cacao – another company linked to Melka and one of Plantaciones de Pucallpa's financiers - was excluded from the London Stock Exchange's Alternative Investment Market.

When the Constitutional Court agreed to resolve the community's claim for protection in August 2018, this marked the first time that the Court would decide on the titling of Indigenous territories. The Court's decision has the potential to set a vital precedent for Indigenous Peoples across the country -many of whom lack any form of official recognition of their traditional lands.

The community's defense of their territory gained a further boost in February 2020 when the Regional Government of Ucayali repealed a regional ordinance that sought to remove protections for more than 3.5 million hectares of rainforest and facilitate the invasion of Indigenous lands, including a significant part of the community's territory. Despite these significant milestones, the structures of impunity in Peru mean that the condemned plantation has been able to keep operating on the community's lands.

The legal actions started by the community – including both the criminal investigations and the constitutional lawsuit – have been subject to intense delays and setbacks. Administrative processes have faced similar obstacles. Despite the community and allies' best efforts, even a partial land title extension covering the community's lands between the river Aguaytia and the oil palm plantation is still yet to be fully formalized.

Community leaders who have taken a stand in defense of their lands have been subjected to criminalization, threats, and violence. Despite having reported these threats to various State entities – including members of Congress, the Human Rights Ombudsman, the Ministry of Agriculture, the Ministry of the Environment, the Ministry of the Interior, the Ministry of Justice and Human Rights, the Regional Government of Ucayali, the Regional Police of Ucayali, etc. – members of the community and FECONAU have not received effective protection measures.

All but two of the dozen personal security guarantees requested by community members since 2017 after receiving death threats have been rejected by the Ministry of the Interior, allowing the perpetrators to continue to act with impunity. Furthermore, complaints filed following shootings in December 2017 and July 2018 against members of the community, FECONAU, and legal support organization, the Institute of Legal

Defense, were thrown out due to the Interior Ministry's incapacity to identify those responsible persons. Community members who have exercised Indigenous justice by confiscating chainsaws and expelling land-traffickers from their lands have also been subject to further intimidation and repression. Traffickers who accuse them of crimes such as aggravated robbery, seeking damages and duress took actions in the form of malicious judicial proceedings. Responding to these spurious allegations compounds the psychosocial impacts experienced by community members and demands more of their limited energy and resources.

A significant barrier that impedes the community's access to justice is that they are not considered to be an affected party regarding the deforestation which has taken place in their territory. Peruvian law stipulates that forests constitute the "patrimony of the nation." Therefore, it is the State – and not the community – that is harmed by these crimes. Peru's position disregards the fact that it is frontline community members who are actively organizing to patrol and protect their territories and forests--something which the State does not do. Rather than supporting this community-led territorial defense, the State limits itself to offering community leaders who face death threats for undertaking this dangerous work ineffective and reactive protection protocols for human rights defenders. This also prevents the community from participating in and giving momentum to criminal investigations, which instead must depend on prosecutors who often lack the resources and personnel to investigate and resolve cases. Furthermore, this lack of regard for Indigenous Peoples' experiences means that such investigations and judgments usually fail to consider the social and cultural effects of environmental crimes.

Mounting resistance from the community and allies from 2014 onwards and the high-profile denunciations against Plantaciones de Pucallpa have been met with numerous company attempts to avoid accountability and to neutralize demands for justice. Amidst increasing economic disruption, Plantaciones de Pucallpa and Plantaciones de Ucayali used trusts and subsequent auctions organized irregularly in June 2016. Both plantations were sold for USD $62 million to two recently formed companies, Ocho Sur P and U.

The shares for both companies would appear to be owned by a third company, Peruvian Palm Holdings Ltd, incorporated in Bermuda a few weeks after the RSPO issued its stop-work order. The holding company's formation was initiated the day after news emerged that Peruvian authorities had verified and documented that Plantaciones de Pucallpa continued operating in violation of the stop orders. Melka, who previously directed Plantaciones de Pucallpa, was one of Peruvian Palm Holdings' directors until mid-2020.

Other Peruvian Palm Holdings directors include principals and partners from several US-based private equity firms specializing in agribusiness investments, including Anholt Services (USA) Inc. and AMERRA Capital Management LLC. The former also previously invested in United

Oils Ltd. SEZC, the original parent company of Melka's plantations in Ucayali, which was domiciled, like Melka's other company, United Cacao, in the Cayman Islands. AMERRA reports having made private debt investments initially in palm oil in Peru in September 2015, though it is unclear whether these investments related to Plantaciones de Pucallpa. This use of complex corporate structures and secrecy jurisdictions, such as the Cayman Islands and Bermuda, has made it very difficult to trace the owners and financiers of Ocho Sur and holding them accountable for these destructive investments proves an enduring challenge. This specific case of land tenure and human rights violations by Ocho Sur again raises legitimate questions over international investors and financiers' accountability to Indigenous Peoples and local communities, who are directly and indirectly harmed by actors and business operations receiving transnational finance credit.

The Peruvian State's unwillingness to resolve the case has continued effects on the community, their territory, and way of life. A satellite analysis published in October 2020 found that between 2012 and August 2020, some 15,721 hectares of the community's forests—an area three times the size of Bermuda—were destroyed (Forest Peoples Programme, 2020b). The oil palm plantation owned by Ocho Sur P SAC operates on at least 6,845 hectares of these lands, while deforestation of the lands surrounding the plantation continues to increase. While the highest deforestation rates occurred in 2013, during the initial clearance for the plantation, the second-highest rates were recorded in 2019. This more recent forest destruction has been happening in the community's territory to the west of the plantation. Rates of forest loss in mid-2020 during the pandemic lockdown were already 35% higher than for the same period in 2019.

Alternatives - Remain in the territory, regain the future.

"I feel worried, because five years have passed. It's because of corruption, I think, that they won't title us once and for all; they just continue to mess us around. But we as a community continue fighting to recover our lands, for our children."

-Efer Silvano, community leader from Santa Clara de Uchunya

This paper began by describing the consequences of massive deforestation and oil palm expansion on the community of Santa Clara de Uchunya's lifeways, practices, and their autonomy in terms of access to their territory, food, water, plant medicine, and other materials.

We discussed how the oil palm plantation's establishment was both facilitated by and has, in turn, accelerated local processes of land trafficking, based on the dispossession and commodification of collectively held Indigenous lands. In turn, these processes have led to the reconfiguration of social hierarchies based on gender, race, and class, often linked to control over the territory.

In response to this situation, the community and its allies have undertaken a series of resistance strategies, ranging from direct action and protest to legal court actions, from advocacy in international human rights fora to non-judicial redress mechanisms. Though these actions have successfully disrupted the company and halted the further expansion of the plantation, they have not met their goals of land

restitution and remediation, and violence and deforestation against the community continue. The Peruvian State has failed to support the community's efforts to defend its territory and protect community members and allies who face threats, attacks, and criminalization. Furthermore, the fact that frontline Indigenous communities such as Santa Clara are prevented from fully participating in investigations over deforestation is a significant obstacle to social and ecological justice and protection. Simultaneously, the company's destructive operations have been facilitated by the use of elaborate corporate structures and secrecy jurisdictions, which has posed significant practical challenges for holding these actors to account and raises key questions around corporate accountability for downstream business actors, investor companies, and financial institutions.

During 2020, the COVID-19 pandemic expanded across the Peruvian Amazon, infecting more than 10,000 Indigenous people and claiming the lives of many, including cherished Indigenous elders, knowledge-bearers, and leaders.

During the National State of Emergency, Ocho Sur did not cease its agro-industrial activities. On 5 June, when the Ombudsman's Office of Ucayali, together with the Regional Health Directorate of Ucayali and Public Prosecutors, arrived at Ocho Sur's facilities to monitor labor and health conditions, they discovered that 35 out of 39 workers – 90% - tested positive for COVID-19. [4]

A community member said, "In June, a health team entered Santa Clara de Uchunya and counted some 15 cases [of COVID-19]. There have been two deaths already, an elderly lady and a baby, with coronavirus symptoms(...) The company has got rid of our medicinal plants, our clinic. Where will we get medication during the pandemic? They've closed off the forest to us, and they treat us like thieves within our own territory. This is sad, and we want action to be taken now; the Court must return our land that we and our grandparents have taken care of for many years."

That Amazonian Indigenous Peoples find themselves on the frontlines of the pandemic and health crisis, as well as the ongoing dangerous struggle to protect their territories and forests of life during an unprecedented planetary climate and biodiversity emergency, makes visible the deep fractures of inequality and power which underlie the interconnected eco-social crises of our moment.

Confronting both the COVID-19 pandemic and the pandemic of violence and dispossession means putting Indigenous Peoples' rights and self-determination at the center of responses to the immense challenges faced by forest peoples and the whole of humanity. Crucially, this means recognizing Indigenous territories. As one collective of Amazonian Indigenous organizations put it in a statement issued from Yarinacocha in Ucayali in July 2020:

"We live in a system that has always relegated us and made us invisible. But today we say: Enough is enough! No more! It is time for change, justice, and equality!" [5]

[4] https://convoca.pe/investigacion/ucayali-el-90-de-los-trabajadores-de-ocho-sur-testeados-dieron-positivo-para-covid-
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El caso de Santa Clara de Uchunya y su lucha para obtener justicia y recuperar su territorio

Por Tom Younger

Programa para los Pueblos de los Bosques

Traducción de Inglés a Español por Aline Castañeda Cadena

National Geographic, Esri, Garmin, HERE, UNEP-EP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, Increment P Corp.p.

RESUMEN

La comunidad Shipibo-Conibo de Santa Clara de Uchunya está luchando contra el despojo y devastación de sus tierras ancestrales debido a la agresiva expansión de la palma aceitera. Este artículo analiza los impactos sociales y culturales de la deforestación liderada por los agronegocios en la comunidad y su territorio. La discusión se centra en las estrategias políticas y legales que han desarrollado junto con aliados para exigir la restitución y remediación de sus tierras ancestrales. Finalmente, consideramos algunos de los éxitos y desafíos críticos que la comunidad Shipibo-Conibo enfrentó durante los últimos cinco años de esta lucha.

Palabras clave: pueblos indígenas, título de la tierra, deforestación, agronegocios, palma aceitera, responsabilidad social

Cuando los miembros de la comunidad de Santa Clara de Uchunya, una comunidad indígena Shipibo-Conibo ubicada a orillas del río Aguaytia en la selva baja de la Amazonia peruana, hablan de su territorio ancestral, hay un antes y un después.

Luisa, una líder de la comunidad, lo pone de esta forma:

"Antes nosotros andábamos libremente. Ahora estamos como animales perseguidos. Tenemos que andar con cuidado, de miedo."

Esta ruptura en el tiempo y en la relación de las personas con su territorio se produjo con la entrada de una empresa transnacional de palma aceitera, Plantaciones de Pucallpa (hoy Ocho Sur P.) A partir de 2012, la empresa destruyó más de 7,000 hectáreas de bosque y despojó a la comunidad de una parte vital de sus tierras tradicionales. Prácticamente de la noche a la mañana, en términos históricos, la agresiva expansión de la empresa de monocultivo de palma aceitera ha forzado cambios radicales en la forma de vida de la comunidad.

Wilson, una autoridad comunitaria que ahora tiene 40 años, describe algunos de estos cambios:

"De acá, más antes, nos íbamos a montear, hasta hacer una cama. Allí parábamos ocho días, quince días. Nos íbamos allí, hacíamos candelas allí, allí comíamos. Se iban como tres o cuatro familias, a cazar allí. Hacíamos una candela, allí entre todos comer. Esa era la costumbre de nosotros. No es como si fuera que, hoy en día, ya nosotros no se quiera; ya ni siquiera al otro lado ya no se puede andar allí tranquilo… hoy en día, si nos ven, se ponen esas personas como matones, como si fuéramos ladrones. Libremente que andábamos. Se están acabando las costumbres de nosotros. ¿Quiénes son [responsables]? El mismo Estado."

El pueblo Shipibo ha habitado las tierras al oeste de los ríos Aguaytia y Ucayali durante generaciones. Mapas elaborados por misioneros como "Exploraciones y Fundaciones de los misioneros de Ocopa de la Montaña del Perú 1750-1825", que hoy cuelga en el Convento Franciscano de Santa Rosa de Ocopa en las afueras de Huancayo, muestra la ubicación de "Sipibos". Ocupan las tierras que Santa Clara de Uchunya lucha por reclamar hoy, varios siglos después.

A pesar de este reconocimiento histórico de larga data de la territorialidad tradicional de los Shipibo, la continua opresión estructural de los pueblos indígenas en Perú significa que la comunidad carece de un reconocimiento formal pleno de sus derechos de propiedad sobre la totalidad de su territorio ancestral.

Así, cuando los trabajadores de Plantaciones de Pucallpa comenzaron a destruir los bosques tradicionales de Santa Clara en 2012, la comunidad solo poseía un título de propiedad colectiva otorgado en 1986, que cubría 218 hectáreas. Este sitio es una porción minúscula del territorio que la comunidad ha poseído y ocupado tradicionalmente durante generaciones, originalmente cubriendo más de 86 mil hectáreas.

Si las formas de vida de la comunidad estaban orientadas anteriormente hacia bosques abundantes y cuidados, hoy, en un nuevo contexto de escasez creado por el intenso encierro y despojo de sus tierras, las familias de Santa Clara Uchunya deben depender cada vez más de la economía de mercado para satisfacer sus necesidades.

Como los miembros de la comunidad señalan una y otra vez sobre los animales de caza, el pescado y otros alimentos del bosque, las plantas medicinales, los materiales de construcción y el agua limpia que antes se aprovisionaban desde dentro de su territorio: **"No queda nada".**

Un miembro de la comunidad que hace solo unos años pudo construir el techo de su casa con hoja de shebon, cosechada en las cercanías, ahora debe comprar láminas de hierro corrugado; recolectar hojas de shebon del territorio ya no es sostenible debido a la invasión de traficantes de tierras.

Lo mismo ocurre con la medicina tradicional. *"Nuestra medicina era chuchuhuasi, clavohuasca, sangre de grado, resina de copaiba,"* comenta Wilson. *"Nuestros viejos iban a hacer dietas, una semana, tres días, a tomar las purgas de allí. A curarse el cuerpo."*

"Más antes no necesitamos una ampolla, no necesitamos una pastilla. El que se sentía un poco enfermo, iba al monte. Los abuelos que ya tienen 80 años caminan fuerte, porque ellos se trataban con esas medicinas. Las purgas de vegetales eran la mejor medicina que teníamos nosotros. Pero hoy en día ya no hay ya."

La devastación de los ecosistemas vivos que componen el territorio de la comunidad y la pérdida de prácticas íntimamente ligadas a este lugar dificultan la vida y el bienestar de la comunidad en el presente y generan inquietudes sobre el futuro.

En ese sentido, Fidel, un joven, pregunta: *"Nuestra preocupación como jóvenes es que, si nosotros no conocemos muchos animales a esta edad, ¿cómo será más adelante para nuestros hijos?"*

Luisa agrega: *"Antes teníamos todas las cosas. Para nosotros, era mercado nuestro territorio. Ahora no podemos ni caminar ni una hora, porque somos amenazados. De esa manera, yo me preocupo, mañana, más tarde, ¿qué comerán mis hijos? ¿Cómo ellos van a alimentar a sus hijos? Así como nos habían alimentado mi madre y mi padre a nosotros. Y ahora nosotros no podemos. Y ellos van a ser peor, porque ya no hay. Ni van a conocer cuál es palo para hacer canoa, como es nuestra costumbre. No van a saber qué es medicina, porque ya no hay. Todo lo están agotando. Antes comíamos bien, nosotros crecíamos fuerte, gordo, pero ahora nuestros hijos ¿qué pasa? Están con diarrea, con vómito, deshidratados…"*

La llegada y la presencia continua de la empresa ha impulsado una feroz competencia por el control de las tierras entre grupos de colonos no indígenas/mestizos de otras regiones del Perú dedicados a lo que se conoce localmente como "tráfico de tierras."

Dammert (2019) caracteriza este fenómeno como *"el uso perverso y sistemático de los mecanismos de titulación del Estado para incorporar tierras a los circuitos de mercado y lucrar con ellas."*

Tanto los individuos como los grupos organizados ocupan y toman posesión de tierras que carecen de reconocimiento legal formal y buscan obtener certificados de posesión de las agencias agrícolas regionales, típicamente talando cualquier bosque en dichas tierras en el proceso. De hecho, la tala de bosques está incentivada por el sistema de clasificación del uso de la tierra esencialmente agrario de Perú que se remonta a la década de 1970. El sistema de clasificación estipula que las personas que reclaman derechos sobre la tierra deben demostrar "actividad económica", es decir, talar el bosque para instalar sistemas agropastorales. Estos certificados de posesión, que posteriormente pueden convertirse en títulos de propiedad individuales, pueden venderse a compradores comerciales (como fue el caso de Plantaciones de Pucallpa). Esto forma parte de un proceso más extenso y continuo en la Amazonia peruana de mercantilización de tierras indígenas de propiedad colectiva y su incorporación forzada a un mercado comercial de tierras, producción de productos básicos en constante expansión y circuitos internacionales de acumulación de capital.

Las consecuencias destacadas anteriormente han llevado a la reconfiguración y al surgimiento de jerarquías sociales basadas en género, raza y clase. Éstos incluyen:

- La destrucción de los sistemas de aprovisionamiento territorial no monetario y de autonomía comunitaria y familiar de Santa Clara de Uchunya. Las pérdidas obligan tanto a hombres como a mujeres a buscar trabajo asalariado siempre que sea posible, a menudo fuera de la comunidad, lo que aumenta la carga del trabajo de cuidados para las mujeres y los ancianos que permanecen en la comunidad.

- Hombres y mujeres de la comunidad han sido despojados del poder de decidir sobre lo que sucede dentro de sus tierras, con decisiones tomadas por hombres mestizos representantes del Estado peruano en oficinas en las ciudades de Pucallpa y Lima, así como por los hombres euroamericanos que dirigen Ocho Sur y sus inversionistas con sede en Estados Unidos. Un claro ejemplo de esos discursos racializados son los comentarios del ex director de la Agencia Agraria de Ucayali, Isaac Huamán Pérez, quien expresó repetidamente su rechazo a los derechos territoriales consuetudinarios de los pueblos indígenas. Argumentó en el caso de Santa Clara de Uchunya que la "propiedad ancestral es cosa del pasado" y afirmó inequívocamente que los pueblos indígenas quieren hacer cumplir "la ley de la selva". Por otro lado, Huamán hizo numerosos anuncios públicos sobre la urgente necesidad de reconocer los "derechos consuetudinarios de posesión" de los colonos. Además, intentó cambiar las leyes forestales vigentes para disolver los "bosques de producción permanente" para lograr este objetivo, dejando en claro la prioridad que atribuía a los derechos de los pueblos no indígenas y sus usos (Forest Peoples Programme y otros, 2018, p. 15).

- La territorialidad del pueblo Shipibo, que comprende las múltiples formas en que se relacionan con su territorio, ha sido ignorada en gran medida por el Estado en sus intervenciones, como se ampliará a continuación. Estas intervenciones han tendido a centrarse, en el mejor de los casos, en importantes "aspectos ambientales" del caso, aunque estrechamente concebidos, como la cuantificación de la deforestación.

- Las jerarvquías racializadas según las cuales opera la propia plantación también son dignas de mención. Mientras que los hombres blancos euroamericanos tienen el poder sobre el funcionamiento de la plantación de Ocho Sur P, los líderes shipibos han observado que muchos de los 1,700 trabajadores cuya mano de obra es explotada son ellos mismos indígenas de Ucayali y regiones vecinas como Loreto.

Los conflictos resultantes han expuesto a la comunidad Shipibo-Conibo a intimidación, amenazas y ataques. Los miembros de la comunidad, los líderes y los aliados que se han pronunciado para proteger su territorio contar la extensión del acaparamiento de tierras y la destrucción de los bosques han sido objeto de abusos verbales, amenazados y advertidos de que abandonen sus hogares, han recibido amenazas de muerte y en ocasiones han recibido disparos. Estos abusos y amenazas han impedido a los miembros de la comunidad moverse en su territorio. Las personas que han afirmado su derecho a acceder libremente a sus tierras tradicionales se han encontrado con grupos de hombres que empuñan machetes, palos y armas de fuego. Los defensores de la tierra shipibo también han sido blanco de ataques y difamaciones por parte de las autoridades regionales, la prensa regional y los medios de comunicación (Forest Peoples Programme, 2020a, p. 14-16).

"Seguimos luchando"- estrategias para resistir la dinámica del despojo.

Durante los últimos seis años, la comunidad ha estado luchando para defender lo que queda de sus bosques, aguas y forma de vida, evitar una mayor deforestación y expansión de la palma aceitera y, en última instancia, garantizar el control legal y práctico sobre su territorio ancestral. La comunidad ha tomado medidas directas para intervenir y detener una mayor deforestación, protestó y denunció estas violaciones y la devastación causada a su hogar a nivel local e internacional.

La comunidad ha emprendido una serie de acciones legales para defender su territorio, utilizando mecanismos judiciales penales y constitucionales. En mayo de 2015, la comunidad presentó una denuncia penal contra la empresa de palma aceitera Plantaciones de Pucallpa por deforestación. El caso fue inicialmente investigado por la Primera Fiscalía Provincial Corporativa Especializada en Materia Ambiental de Ucayali antes de ser trasladado a la Primera Fiscalía Corporativa Especializada Supraprovincial contra el Crimen Organizado en Lima. Esto se llevó a cabo luego de que se determinó que el caso involucraba al crimen organizado. En enero de 2018, el Cuarto Juzgado

Nacional de Instrucción Preparatoria dictó medid cautelar ordenando a la empresa suspender de inmediato sus actividades. Sin embargo, esta medida cautelar nunca se hizo cumplir y cinco años después de que se presentó la denuncia original, la empresa continúa sus operaciones con impunidad.

En mayo de 2016, la comunidad, junto con su organización indígena representativa, la Federación de Comunidades Nativas de Ucayali (FECONAU), presentó una demanda constitucional contra la empresa y los funcionarios del registro público del Gobierno Regional de Ucayali que facilitaron el acaparamiento de tierras. Esta demanda busca la restitución, titulación colectiva y remediación de las tierras ancestrales de la comunidad. El reclamo fue rechazado por dos tribunales de Ucayali antes de ser admitido a consideración del Tribunal Supremo de Perú, el Tribunal Constitucional, que en agosto de 2018 anunció que resolvería el caso. En septiembre de 2019 se llevó a cabo una audiencia. El reclamo de la comunidad se vio reforzado por una sesión informativa legal experta *amicus curiae* proporcionada por la relatora especial de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas, Victoria Tauli-Corpuz, en la que se destacó la obligación legal de Perú de reconocer formalmente las tierras tradicionales de la comunidad (2019). Actualmente, la comunidad está a la espera del fallo de la Corte sobre su caso.

La comunidad también ha compartido sus testimonios y exigido soluciones en espacios internacionales, como la Comisión Interamericana de Derechos Humanos (2018) y durante una misión formal de la Relatora Especial de la ONU sobre la Situación de Defensoras y Defensores de Derechos Humanos de Perú en enero de 2020 (ACNUDH, 2020).

Si bien las acciones mencionadas anteriormente se han dirigido principalmente hacia el Estado peruano, la comunidad y aliados también han buscado responsabilizar a las empresas involucradas mediante el uso de mecanismos de reparación no judiciales. Uno de ellos es el mecanismo de denuncias de la Mesa Redonda sobre la Palma Aceitera Sostenible (RSPO),[1] organismo global que busca mejorar la sostenibilidad de las cadenas de suministro de aceite de palma.

Tanto Plantaciones de Pucallpa como otra plantación que se expandió al mismo tiempo inmediatamente hacia el sur, Plantaciones de Ucayali, forman parte de una compleja red de empresas agroindustriales que han utilizado reglas de secreto en jurisdicciones extranjeras para evitar la rendición de cuentas por sus actividades. Esta red corporativa ha llegado a ser conocida en Perú como el "Grupo Melka" de empresas agroindustriales, que lleva el nombre del empresario checo-estadounidense Dennis Melka. Melka, quien anteriormente estuvo

[1] https://www.rspo.org/ La RSPO se describe a sí misma en estos términos: "... organización no lucrativa que une a los accionistas de 7 sectores de la industria de la palma aceitera: productores de palma aceitera, empresas transformadoras o comerciantes, fabricantes de bienes de consumo, vendedores, bancos/inversionistas, y organizaciones no gubernamentales ambientales y sociales (ONGs), para desarrollar e implementar estándares globales para la palma aceitera sostenible."

implicado en la deforestación y violaciones de derechos humanos liderada por la agroindustria como cofundador y director ejecutivo adjunto de Asian Plantations, Ltd en Malasia, ganó notoriedad en Perú y a nivel mundial durante los últimos años por la deforestación a escala industrial y las violaciones de derechos asociadas con su petróleo, plantaciones de palma y cacao en Ucayali y Loreto.

La comunidad y los aliados se han centrado en quejas formales con la RSPO contra Plantaciones de Pucallpa[2] y empresas que han estado comprando y procesando palma aceitera de sus tierras devastadas, incluida la molinera OLPEAA y la empresa de bienes de consumo más grande de Perú, Alicorp.[3]

Éxitos, desafíos y limitaciones

Si bien la comunidad sigue luchando por una solución definitiva para garantizar la restitución y remediación de su territorio, su postura y determinación unificadas han dado como resultado algunos éxitos significativos.

Con gran riesgo personal, los miembros de la comunidad han organizado patrullas territoriales para monitorizar sus tierras y han emprendido la autodemarcación de su territorio (a pesar de ser una obligación del Estado Peruano). Los miembros de la comunidad intervinieron en múltiples ocasiones para evitar una mayor tala de sus bosques por parte de los colonos, ejerciendo su derecho a administrar justicia indígena en defensa de su territorio para confiscar equipos de tala.

En septiembre de 2015, el Ministerio de Agricultura de Perú ordenó a Plantaciones de Pucallpa suspender sus operaciones.

En abril de 2016, la RSPO emitió a la empresa una orden de suspensión del trabajo.

La resistencia continua de la comunidad y las crecientes acciones legales son probablemente lo que precipitó la subasta de Plantaciones de Pucallpa y las Plantaciones de Ucayali a Ocho Sur P y U en julio de 2016, y Plantaciones de Pucallpa se retiró posteriormente de la RSPO en octubre de 2016.

En febrero de 2017, United Cacao, otra empresa vinculada a Melka y una de las financieras Plantaciones de Pucallpa, fue excluida del Mercado de Inversiones Alternativas de la Bolsa de Valores de Londres.

Cuando la Corte Constitucional acordó resolver el reclamo de protección de la comunidad en agosto de 2018, fue la primera vez que la Corte decidirá sobre la titulación de territorios indígenas. La decisión de la Corte tiene el potencial de sentar un precedente vital para los pueblos indígenas de todo el país, muchos de los cuales carecen de cualquier forma de reconocimiento oficial de sus tierras tradicionales.

[2] https://www.forestpeoples.org/en/global-finance-trade-palm-oil-rspo/press-release/2017/press-rspo-ruling-condemns-plantaciones-de.
[3] https://www.forestpeoples.org/en/palm-oil-rspo/press-release/2019/amazonian-community-fights-lands-are-destroyed-sustainable-palm.

La defensa comunitaria de su territorio ganó un nuevo impulso en febrero de 2020 cuando el Gobierno Regional de Ucayali derogó una ordenanza regional que buscaba eliminar las protecciones para más de 3.5 millones de hectáreas de selva tropical y facilitar la invasión de tierras indígenas, incluida una parte significativa del territorio de la comunidad. A pesar de estos importantes hitos, las estructuras de impunidad en el Perú hacen que la plantación condenada haya podido seguir operando en las tierras de la comunidad.

Las acciones legales iniciadas por la comunidad, incluidas tanto las investigaciones penales como la demanda constitucional, han sido objeto de intensos retrasos y reveses. Los procesos administrativos se han enfrentado a obstáculos similares. A pesar de los mejores esfuerzos de la comunidad y sus aliados, aún no se ha formalizado completamente. Incluso una extensión parcial del título de propiedad que cubre las tierras de la comunidad entre el río Aguaytía y la plantación de palma aceitera.

Los líderes comunitarios que se han pronunciado en defensa de sus tierras han sido objeto de criminalización, amenaza y violencia. A pesar de haber denunciado estas amenazas a diversas entidades del Estado - incluyendo miembros del Congreso, la Defensoría del Pueblo, el Ministerio de Agricultura, el Ministerio de Ambiente, el Ministerio del Interior, el Ministerio de Justicia y Derechos Humanos, el Gobierno Regional de Ucayali, Policía Regional de Ucayali, etc. – miembros de la comunidad FECONAU no han recibido medidas de protección efectivas. Todas menos dos de la docena de garantías de seguridad personal solicitadas por miembros de la comunidad desde 2017 luego de recibir amenazas de muerte han sido rechazadas por el ministerio del Interior, lo que permite que los perpetradores sigan actuando con impunidad. Además, las denuncias presentadas tras tiroteos en diciembre de 2017 y julio de 2018 contra miembros de la comunidad, FECONAU y la organización de apoyo legal, el Instituto de Defensa Legal, fueron desestimadas debido a la incapacidad del Ministerio del Interior para identificar a los responsables. Los miembros de la comunidad que han ejercido la justicia indígena confiscando motosierras y expulsando a los traficantes de sus tierras también han sido objeto de más intimidación y represión. Los traficantes que los acudan de delitos como robo con agravantes, reclamo de daños y perjuicios y coacción tomaron medidas en forma de procedimientos judiciales maliciosos. Responder a estas falsas acusaciones agrava los impactos psicosociales experimentados por los miembros de la comunidad y exige más de su energía y recursos limitados.

Una barrera importante que impide el acceso de la comunidad a la justicia es que no se la considera parte afectada por la deforestación que se ha producido en su territorio. La ley peruana estipula que los bosques constituyen el "patrimonio de la nación". Por lo tanto, es el Estado – y no la comunidad – quien se ve perjudicado por estos delitos. La posición de Perú ignora el hecho de que son los miembros de la comunidad de primera línea quienes se están organizando activamente para patrullar y proteger sus territorios y bosques, algo

que el Estado no hace. Más que apoyar esta defensa territorial comunitaria, el Estado se limita a ofrecer a los líderes comunitarios que enfrentan amenazas de muerte por emprender esta peligrosa labor protocolos de protección ineficaces y reactivos para los defensores de derechos humanos. Esto también evita que la comunidad participe y dé impulso a las investigaciones penales, que en cambio deben depender de fiscales que a menudo carecen de los recursos y el personal para investigar y resolver los casos. Además, esta falta de consideración por las experiencias de los pueblos indígenas significa que tales investigaciones y juicios por lo general no toman en cuenta los efectos sociales y culturales de los delitos ambientales.

La creciente resistencia de la comunidad y los aliados desde 2014 en adelante y las denuncias de alto perfil contra Plantaciones de Pucallpa se han enfrentado con numerosos intentos de las empresas para evitar la rendición de cuentas y neutralizar las demandas de justicia. En medio de una creciente perturbación económica, Plantaciones de Pucallpa y Plantaciones de Ucayali utilizaron fideicomisos y subastas posteriores organizadas de manera irregular en junio de 2016. Ambas plantaciones se vendieron por $62 millones de dólares a dos empresas recientemente formadas, Ocho Sur P y U.

Las acciones de ambas empresas parecerían ser propiedad de una tercera empresa, Peruvian Palm Holdings Ltd., constituida en Bermudas pocas semanas después de que la RSPO emitiera su orden de suspensión de trabajo. La formación de la sociedad tenedora de acciones se inició un día después de que surgiera la noticia de que las autoridades peruanas habían verificado y documentado que Plantaciones de Pucallpa continuaba operando en violación de las órdenes de suspensión. Melka, quien anteriormente dirigió Plantaciones de Pucallpa, fue uno de los directores de Peruvian Palm Holdings hasta mediados de 2020.

Otros directores de Peruvian Palm Holdings incluyen directores y socios de varias firmas de capital privado con sede en Estados Unidos que se especializan en inversiones de agronegocios, incluidas Anholt Services (EUA) Inc., y AMERRA Capital Management LLC. El primero también invirtió anteriormente en United Oils Ltd., SEZC, la empresa matriz original de las plantaciones de Melka en Ucayalli, que estaba domiciliada, al igual que la otra empresa de Melka United Cacao, en las Islas Caimán. AMERRA informa haber realizado inversiones de deuda privada inicialmente en palma aceitera en Perú en septiembre de 2015, aunque no está claro si estas inversiones se relacionaron con Plantaciones de Pucallpa. Este uso de estructuras corporativas complejas y jurisdicciones secretas, como las Islas Caimán y las Bermudas, ha hecho que sea muy difícil rastrear a los propietarios y financieros de Ocho Sur y responsabilizarlos por estas inversiones destructivas es un desafío que perdura. Este caso específico de tenencia de la tierra y violaciones de los derechos humanos por parte de Ocho Sur plantea nuevamente preguntas legítimas sobre la responsabilidad de los inversionistas y financieros internacionales antes los pueblos indígenas y las comunidades locales, quienes son perjudicados directa e indirectamente por los actores y operaciones comerciales que reciben crédito financiero transnacional.

La falta de voluntad del estado peruano para resolver el caso ha continuado afectando a la comunidad, su territorio y su forma de vida. Un análisis satelital publicado en octubre de 2020 encontró que entre 2012 y agosto de 2020, unas 15,721 hectáreas de bosques de la comunidad, un área tres veces del tamaño de Bermuda, fueron destruidas (Programa para los pueblos de los bosques, 2020b). La plantación de palma aceitera propiedad de Ocho Sur P SAC opera en al menos 6,845 hectáreas de estas tierras, mientras que la deforestación de las tierras que rodean la plantación continúa aumentando. Si bien las tasas de deforestación más altas ocurrieron en 2013 durante el desmonte inicial de la plantación, las segundas tasas más altas se registraron en 2019. Esta destrucción forestal más reciente ha estado ocurriendo en el territorio de la comunidad al oeste de la plantación. Las tasas de pérdida de bosques a mediados de 2020 durante el cierre por la pandemia ya eran de un 35% más altas que para el mismo periodo en 2019.

Alternativas – Permanecer en el territorio, recuperar el futuro.

"Ahora yo me siento preocupado, porque ya pasaron 5 años. Por la corrupción, creo, no nos titulan rápido; nos pelotean. Pero nosotros como comunidad seguimos luchando para ganar nuestras tierras, para nuestros hijos."

Efer Silvano, líde comunitario de Santa Clara de Uchunya.

Este artículo comenzó describiendo las consecuencias de la deforestación masiva y la expansión de la palma aceitera en las formas de vida, prácticas y autonomía de la comunidad de Santa Clara de Uchunya en términos de acceso a su territorio, alimentos, agua, plantas medicinales y otros materiales.

Discutimos cómo el establecimiento de la plantación de palma aceitera fue facilitado y, a su vez, aceleró los procesos locales de tráfico de tierras, basados en el despojo y mercantilización de tierras indígenas de propiedad colectiva. A su vez, estos procesos han llevado a la reconfiguración de las jerarquías sociales basadas en género, raza y clase, muchas veces ligadas al control del territorio.

En respuesta a esta situación, la comunidad y sus aliados han emprendido una serie de estrategias de resistencia, que van desde la acción directa y la protesta hasta acciones judiciales, desde la incidencia en foros internacionales de derechos humanos hasta mecanismos de reparación no judiciales. Aunque estas acciones han interrumpido con éxito la empresa y han detenido la expansión de la plantación, no han cumplido sus objetivos de restitución y remediación de tierras, y la violencia y la deforestación contra la comunidad continúan. El Estado Peruano no ha apoyado los esfuerzos de la comunidad para defender su territorio y proteger a los miembros de la comunidad y aliados que enfrentan amenazas, ataques y criminalización. Además, el hecho de que las comunidades indígenas de primera línea cono Santa Clara no puedan participar plenamente en las investigaciones sobre la deforestación es un obstáculo significativo para la protección de la justicia social y ecológica. Al mismo tiempo, las operaciones destructivas de la compañía se

han visto facilitadas por el uso de estructuras corporativas elaboradas y jurisdicciones secretas, lo que ha planteado importantes desafíos prácticos para hacer que estos actores rindan cuentas y plantea preguntas clave en torno a la responsabilidad corporativa de los actores comerciales posteriores, las empresas inversoras y las instituciones financieras.

Durante 2020, la pandemia de COVID-19 se expandió a lo largo de la Amazonia peruana, infectando a más de 10,000 indígenas y cobrándose la vida de muchos, incluidos los queridos ancianos indígenas, portadores de conocimiento y líderes. Durante el Estado Nacional de Emergencia, Ocho Sur no cesó en sus actividades agroindustriales. El 5 de junio, cuando la Defensoría del Pueblo de Ucayali, junto con la Dirección Regional de Salud de Ucayali y el Ministerio Público, llegaron a las instalaciones de Ocho Sur para monitorizar las condiciones laborales y de salud, descubrieron que 35 de los 39 trabajadores, el 90% dieron positivo por COVID-19.[4]

Un miembro de la comunidad dijo: *"En junio una brigada de Salud entró a Santa Clara de Uchunya y se contabilizaron alrededor de 15 casos. Ya van dos fallecidos, una anciana y un bebé, con síntomas de coronavirus (...) La empresa ha eliminado nuestras plantas medicinales, nuestra clínica, ¿Dónde vamos a ir nosotros a sacar remedio ahora en tiempos de pandemia? Nos han cerrado el pase al bosque y nos tratan como ladrones en nuestro territorio. Eso es triste y nosotros queremos las acciones ya, el Tribunal debe darnos nuestras tierras que hemos cuidado por años, y nuestros abuelos también".*

El hecho de que los pueblos indígenas de la Amazonia se encuentren en la primera línea de la pandemia y la crisis de salud, así como la peligrosa lucha en curso por proteger sus territorios y bosques de vida durante una emergencia climática y de biodiversidad planetaria sin precedentes, hace visibles las profundas fracturas de desigualdad y poder que subyacen a las crisis eco-sociales interconectadas de nuestro momento.

Enfrentar tanto la pandemia del COVID-19 como la pandemia de violencia y despojo significa poner los derechos y la autodeterminación de los pueblos indígenas en el centro de las respuestas a los inmensos desafíos que enfrentan los pueblos de los bosques y toda la humanidad. Fundamentalmente, esto significa reconocer los territorios indígenas. Como lo expresó un colectivo de organizaciones indígenas amazónicas en un comunicado emitido desde Yarinacocha en Ucayali en julio de 2020: *Vivimos en un sistema que siempre nos ha relegado e invisibilizado, pero hoy decimos: ya basta, ya no más, es hoy tiempo de cambios, justicia y equidad."* [5]

[4] https://convoca.pe/investigacion/ucayali-el-90-de-los-trabajadores-de-ocho-sur-testeados-dieron-positivo-para-covid-.
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Tom Younger ofrece su perspectica como investigador active y antropólogo que ha trabahado en solidaridad con la comunidad de Santa Clara de Uchunya desde 2016. Desde 2017, Tom ha trabajado para el Programa de Pueblos de los Bosques, una organización internacional que apoya pueblos indígenas y de los bosques en la defensa de sus derechos y territorios en más de veinte países a lo largo de América Latina, Africa y el Sureste de Asia. El Programa apoya a pueblos indígenas y las luchas de las comunidades localesin para crear espacios politicos a través de los cuales defender sus derechos colectivos, gobernar sus territorios y determinar sus futuros. Tom vive en Glasgow, Escocia.

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The Brazen Daylight Police Murder of George Floyd and The Racist Origin of American Policing

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George Floyd, a 42-year-old African American man, and resident of Minneapolis, Minnesota, was apprehended on 25 May 2020 by four uniformed Minneapolis police for allegedly trying to make a purchase in a local store with a fake $20 bill. The police arrived, ostensibly after having been called by the store owner, as Mr. Floyd was about to drive away. A bystander caught the officers on video as they dragged Mr. Floyd from his car, handcuffed him, and threw him to the ground. At no point did Mr. Floyd offer any resistance. Of the four officers present, one proceeded to put his knee on the neck of Mr. Floyd while two of the other officers dug their knees into Mr. Floyd's back. The fourth officer stood guard to hold off the crowd that had gathered.

For the next 8 minutes and 46 seconds, the first officer, Derek Chauvin, dug his knee into Mr. Floyd's neck as Mr. Floyd repeatedly said he could not breathe. At one point, Mr. Floyd was so desperate that he called out for his mother, who was already deceased. Several of the bystanders pleaded with the officer to remove his knee, but to no avail.

After some 6 minutes or so, it was clear that Mr. Floyd was dead, but the officer kept his knee on Mr. Floyd's neck for another two minutes. People saw on social media across the world was the senseless suffering and pain of a man due to his skin color, a clear violation of fundamental human rights as enshrined in the United Nations' Universal Declaration of Human Rights. Mr. Floyd had been brazenly murdered in broad daylight by Officer Derek Chauvin, and his three accomplishes. Their wanton murder of a defenseless Black man resulted in the manifestation of a martyr.

Through the global network of Black Lives Matters (BLM), an anti-racist movement on behalf of the martyred George Floyd was launched worldwide!

George Floyd: A Global Martyr around Whom the World has mobilized

Of course, the video of the daylight murder incident went viral on social media. The result was a virtual spontaneous global outcry and protest movement against racism that no one could have foreseen or imagined. It exploded across the globe like an uncontrollable wildfire! In several cities, large and small, in Australia, France, Germany, Kenya, South Africa, South Korea, Tunisia,

the United Kingdom, the United States, and in cities in more than 50 other countries, crowds of protestors gathered to protest the murder of George Floyd, masses mobilized mainly by the international BLM movement.

In addition to its global spontaneity, the Black Lives Matters Movement manifested self-generating sustainability lasting for more than six months, from late May well into November. The spontaneity and self-sustainability factors exposed a third interesting factor to consider: This movement was primarily a youthful one where a significant number of white youths participated. The various media brought us protest gathering videos in different parts of the United States and the world where the white youth clearly outnumbered the non-white participants.

A fourth factor was most astounding to me: This movement took place amid the global coronavirus pandemic--more often referred to as COVID-19. This pandemic still ravages the world, as I wrote in December 2019. After breaking out as an infectious disease in the Wuhan province of China in December of 2019, it quickly spread across the globe, officially declared a pandemic by the World Health Organization on 11 March 2020. In December 2020, nearly 73 million cases of the virus were confirmed globally, resulting in almost 2 million deaths globally.

And yet, when global health officials repeatedly called for the world's populace to practice social distancing and stay indoors as much as possible to avoid contracting the disease, the young protestors disregarded this advice for safe behavior. They bravely gathered together across the globe daily to speak out against the racist murder of George Floyd in particular and racial injustice in general.

Global Outcry against Imperialism, Colonialism, and Slavery

The global BLM anti-racist outcry was not only against racism by way of police brutality. It sprung into an outcry against the historical evils of imperialism, colonialism, and slavery, as all of these institutions are inextricably connected to racism. As a result, statues commemorating these institutions' icons were torn down or desecrated in many parts of the United States and other parts of the world.

In the United States, the statues of General Robert E. Lee, the former military leader of the southern Confederate states, were desecrated or torn down in many southern states. The southern Confederate states seceded from the American union and then went to war to protect their economic investment in slavery.

This episode was known in American history as the American Civil War of 1861 to 1865. The Confederate states were ultimately defeated, and by 19 June 1865, the last of African slaves held in bondage were freed. Also, statues of Christopher Columbus came under attack because of his genocidal attacks on Indigenous populations in the Caribbean. In the southern American state of Virginia, a statue of Christopher Columbus was torn down, set on fire, and rolled into a nearby lake by anti-racist protestors.

In the American nation's capital, Washington, DC, Confederate General Albert Pike's statue was torn down and set afire by anti-racist protestors on 19 June 2020. Then, on 22 June, anti-racist protestors attempted to tear down the statue of one the most notorious racists in American history. This is none other than the statue of US President Andrew Jackson (served from 1829 – 1837) that stands in Lafayette Square, right across the street from the White House. In addition to owning several African slaves, Andrew Jackson signed the Indian Removal Act in 1830 in his capacity as the seventh president of the United States. Under this act, some 60,000 individuals of the Cherokee, Muskogee, and other Indigenous nations were removed from their lands in Alabama, Florida, Georgia, North Carolina, and Tennessee and forcibly marched several hundred miles to reservations in Oklahoma. Over the next several years, this series of forced marches conducted by the American army saw several thousand individuals die of whooping cough, typhus, dysentery, cholera, and starvation. This series of forced marches became known as the "Trail of Tears." The attempt to tear down the Andrew Jackson statue in Lafayette Park was unsuccessful as a police contingent moved in to force the anti-racist protestors away from the statue.

Not even statues of the so-called US government Founding Fathers were spared. A statue of Thomas Jefferson was torn down in Portland, Oregon, on 14 June 2020. Jefferson was a wealthy plantation slaveholder who signed the Declaration of Independence and the US Constitution, became the third president of the United States. Then on 18 June, a statue of George Washington, the slave-holding first president of the United States and a signer of America's founding documents, was also torn down by anti-racist protestors in Portland.

Statue removals became a world phenomenon. In Bristol's United Kingdom town, a statue of the slave trader Edward Colston was torn down by angry anti-racist protesters and rolled into nearby Bristol Harbor. In Belgium, a statue of the imperialist and colonial oppressor King Leopold II was removed by officials in Antwerp after being defaced by anti-racist protestors. In the Caribbean country of Barbados, anti-racist activists signed a petition to have the statue of Admiral Horatio Nelson removed from its capital, calling it an egregious affront to the Black population.

Philonise Floyd Goes Before UN Human Rights Council

Philonise Floyd, the brother of George Floyd, appeared before the United Nations Human Rights Council by way of a pre-recorded message on 17 June 2020, delivering a message to the Council's Urgent Debate on Racism. Mr. Philonise Floyd said, in part, the following:

> *The officers showed no mercy, no humanity and tortured my brother to death in the middle of the street in Minneapolis with a crowd of witnesses watching and begging them to stop, showing us black people the same lesson yet again: black lives do not matter in the United States of America.... You watched my brother die. That could have been me. I am my brother's keeper. You in the United Nations are your brothers' and sisters' keepers in America, and you have the power to help us get*

justice for my brother George Floyd. I am asking you to help him. I am asking you to help me. I am asking you to help us: Black people in America.

The Urgent Debate, only the fifth to take place since the Council began its work in 2006, was initiated by the Council's African Group, after a call from more than 600 rights groups to investigate alleged police violence resulting from George Floyd's death.[1]

Economic Fallout: Racist Logos Bite the Dust

Many producers of consumer items that have for decades carried racist logos on their products are running scared due to the BLM anti-racist movement. On 17 June, The Quaker Oats Company, makers of the Aunt Jemima brand of pancake mix, announced that it was retiring this 130-year-old brand and logo. They did so since the logo is a negative stereotypical depiction of a Black woman, Aunt Jemima, who appears to look like she might have been a house slave who was a cook in the kitchen of a white southern plantation owner. Of course, the fear here was that the Quaker Oats Company might become the target of the protests spawned by anti-racist activists. Better to get rid of Aunt Jemima's logo before this happens!

Even a professional sports logo was caught up in this fear because of economic reasons. The Washington Redskins, an 87-year-old member of the National Football League, is the winner of five national championships. A storied team that has produced several great players who have gone on to be elected to the National Football League's Hall of Fame is nevertheless a team that has been dogged by protests. In recent years protests were organized in opposition to the team's name of "Redskins" and the logo depicting an Indigenous warrior. From the Indigenous perspective, the word "redskins" has its origin in the genocidal effort of white colonial settlers to eradicate Indigenous peoples to steal their land. In the 1600s, colonial officials began offering rewards to white settlers who killed Indigenous people. Once killed, the settler cut off the dead individual's scalp and took it to the colonial officials for a monetary reward.

This process was a kind of incentivized, freelance killing of Indigenous people by any white settler looking to make extra money. The avaricious settlers gave a name to the mutilated and bloody corpses they left in the wake of these notorious scalp-hunts: redskins.[2]

Now, Daniel Snyder, the owner of the Washington Redskins, had said for years that he would not change the team's racist name despite continual protests from Indigenous activists and their supporters.

Abruptly, Mr. Snyder was approached by his corporate sponsors, who were apparently sensitive to the BLM anti-racist movement. They put pressure on Mr. Snyder to change

[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] See: An Indigenous Peoples' History of The United States by Roxanne Dunbar-Ortiz, p. 65.

the name, or else they would withdraw their sponsorship. As a result, Snyder announced a "review of the name" that by 13 July 2020 led to the official announcement that the team's offensive name and logo would be dropped. Since then, the football franchise has been called "the Washington Football Team."

A Bit of History: African Slavery and Indigenous Peoples' Land Theft are the Original Manifestations of Racism in America

El-Hajj Malik El-Shabazz—Malcolm X—often said, "Of all our studies, history is best qualified to reward our research." Thus, a look at the modern American police department's historical origin starts in the 17th century with the English slave trade with the importation of African slaves onto the colonial American mainland.

European settlers, mostly from the British Isles, had begun to establish colonies on America's eastern seaboard in the early 1600s.

These mainly English settlers also began importing African slaves from indigenous African Kingdoms and states—principally from the coastal regions of West Africa—to do the hard labor in these nascent colonies. At virtually the same time of forced enslavement of indigenous peoples from Africa, these same settlers were appropriating land, mostly by force, from the Indigenous communities they came in contact with. (Foot Note on Indian Slavery)

This forceful appropriation meant removing the Indigenous communities to make space for the continuous arrival of new settlers from the British Isles and Western Europe. This expansion would evolve into the so-called original 13 colonies. For the next 125 years, both the importation of African slaves and the forced appropriation of Indigenous lands continued until the dawn of the American Revolution in 1775.

Now, while the white colonial settlers were perpetrating their naked aggression against the Indigenous peoples and intensifying the oppression of African slaves, the colonial settlers themselves were experiencing, in turn, the economic coercion by their colonial masters, the imperialists representing the British monarchy. In due course, there began the rumblings of revolt by the burgeoning white settler population against their colonial master's economic oppression. By 1775—the same year the settlers revolted against the British Empire, thus precipitating the American Revolution—the colonial population of the 13 colonies had grown to an estimated 2.5 million inhabitants. Approximately 460,000 were African slaves. Concomitantly, this population of 2.5 million had expanded over some 375,000 square miles of Indigenous land, land forcibly taken from the people of the Indigenous nations who would eventually become known as "American Indians."

The Slave Patrols and The Militias

It is vital to understand that several decades before the American Republic's formal founding, the colonial slaveholders formed armed slave patrols to hunt down and round up African slaves who had managed to escape from colonial

plantations. Simultaneously, the colonists formed armed militias to force Indigenous peoples off their land that would be confiscated by the colony. It would be these slave patrols and militias that would be the foundations of the modern police departments. Dr. Roxanne Dunbar-Ortiz, writing in her book titled Loaded: A Disarming History of the Second Amendment, informs us of this relationship:

"Following the Rodney King riots in Los Angeles [29 April to 4 May 1992] and the development of Cop Watch groups in cities around the United States, along with the widespread incarceration of Black men in the 1990s, what had long been known by scholars, but rarely acknowledged in media or history texts, became increasingly clear on a national level: ***The origins of policing in the United States were rooted in slave patrols.... Black people escaping to freedom were hunted down to prevent labor loss to their white slavers, and also to send a message to those enslaved who might be strategizing to lose their chains through rebellion or insurrection"*** *(Bold emphasis added; p. 59, A Disarming History of the Second Amendment by Dr. Roxanne Dunbar-Ortiz).*

Dr. Dunbar-Ortiz goes on to offer insight into the anti-Indigenous militias and their interface with slave patrols:

> *By 1704, the* ***South Carolina colonial government had codified slave patrols and embedded them within the already existing volunteer militias, whose principle [sic] role was to repel Native Americans whose land they had appropriated. Members of slave patrols were drawn from militia rolls in every locale. The South Carolina structure of slave patrols was adopted in other colonies by the mid-eighteenth century and would remain relatively unchanged until the Civil War.*** *Following U.S. independence, this structure and practice was applied to what became the Cotton Kingdom, following the U.S. wars against the Muskogee peoples that ended in their forced relocation to Indian Territory.*
>
> *Virginia was the first of the thirteen English settler colonies in North America, but there were fewer enslaved Africans there, and they were more widely dispersed than in [other settler colonies such as] South Carolina, as Virginia settlements were long surrounded by resistant Native communities.* ***The Virginia militia was founded for one purpose: to kill Indians, take their land, drive them out, wipe them out. [White] European settlers were required by law to own and carry firearms, and all adult male settlers were required to serve in the militia...*** *[After establishing militias several years earlier,]* ***in 1705, the Virginia colony enacted its first slave code and established slave patrols... In 1727, the Virginia colony enacted a***

law requiring militias to create slave patrols, imposing stiff fines on white people who refused to serve.[3]

Abuses Meted out by the Slave Patrols and the Militias

Dr. Dunbar-Ortiz, quoting from an 1860 book titled The Practice at Law in North Carolina, informs us of the activities of the slave patrols that had been and continued to be standard across early America:

"The patrol shall visit the negro houses in their respective districts as often as may be necessary, ***and may inflict a punishment, not exceeding fifteen lashes, on all slaves they may find off their owner's plantations, without a proper permit or pass, designating the place or places, to which the slaves have leave to go…*** *The patrol shall also visit all suspected places, and suppress all unlawful collections of slaves, shall be diligent in apprehending all runaway negroes in their respective districts; shall be vigilant and endeavor to detect all thefts, and bring the perpetrators to justice, and also all persons guilty of trading with slaves;* ***and if, upon taking up a slave and chastising him, as herein directed, he shall behave insolently, they may inflict further punishment for his misconduct, not exceeding thirty-nine lashes."***[4]

The preceding practices were basic, standard punishment. Repeated attempts to escape the plantation by the same slave might have ultimately resulted in the amputation of part of the slave's foot, such as a toe, to significantly reduce the slave's ability to run away.

The militias had their own brand of brutality against Indigenous nations. For example, one Indigenous nation, the Tuscarora, were dealt with in the following manner by white settlers:

"During the first three decades of Virginia settler incursion, the colony's militia was used solely to attack and burn down Tuscarora towns, incinerate their crops, and slaughter the families who resided there. By 1722, the embattled Tuscarora joined [other Indigenous nations in] the Haudenosaunee (Iroquois Confederacy) and migrated north for protection from settler terrorists, while some communities remained in severely deteriorating conditions" (bold emphasis added; pp. 61-62).

Thus, the extreme brutality against African slaves and Indigenous peoples was unconscionable. This institution of immoral behavior and brutality has been passed down from generation to generation as the slave patrols and militias morphed into modern American police departments. This is what is meant by the institutionalized racism of American policing!

The Texas Rangers

One of the most celebrated and glorified police departments in America today is the Texas Rangers. The Texas Rangers as an institution was glorified in a TV show titled "Walker, Texas Ranger," starring Chuck Norris. The show originally ran for 8 years, from 1993 to 2001, on the CBS network.

[3] Bold emphasis added; pp. 60-61 of Loaded.
[4] Bold emphasis added; p. 63 of Loaded.

It now can be seen in reruns on various secondary TV stations. Underneath this veneer of celebration and glorification is a very dark history: "Like slave patrols in the Deep South, the Texas Rangers—formed primarily to kill Comanches, eliminate Native communities, and control colonized Mexicans to take their land—also hunted down enslaved Africans escaping to freedom. They [the Texas Rangers] began to operate in the 1820s" (bold emphasis added; pp. 65-66 of Loaded by Roxanne Dunbar-Ortiz). Thus, the Texas Rangers was a super militia and slave patrol organization, established initially to suppress and oppress all non-white individuals in the early Texas territory that would eventually become the 28th state in 1845.

The American Declaration of Independence and the American Constitution

In reading the original American Declaration of Independence of 1776, one will find that Indigenous peoples, more commonly called "American Indians," are called "savages." In the original American Constitution of 1787—Section 2 of Article 1—African slaves are referred to as 3/5th of a person. In other words, the seeds of racism are enshrined in the very documents that patriotic Americans regard as the epitome of human rights and justice.

Critics may say that the context in which these references are found to Indigenous people and African slaves does not necessarily imply racist attitudes. For me, the context is irrelevant; the moment you define a person as a savage or as a fractional being, you are relegating those individuals to a subhuman status. Consequently, you have taken a racist attitude toward these individuals.

While the lofty language generally of the Declaration of Independence and the Constitution may encourage one to regard these documents as great examples of human rights and justice, historically, these documents are nevertheless human rights failures. The Declaration of Independence and the American Constitution are human rights failures because these documents were intended only for white men! And here I mean "white men" quite literally, for even white women did not enjoy equality with their white male counterparts. This circumstance existed because they did not enjoy the right to vote until 1920, approximately 133 years after the original Constitution of 1787 was penned! That right was enshrined in the 19th Amendment to the Constitution.

Section 8 of Article 1 and the Second Amendment of the American Constitution

Section 8 of Article 1 of the American Constitution outlines several powers of Congress, among them the power of calling forth anti-Indigenous militias from which, as we have seen, the slave patrols were often selected:

"The Congress shall have Power… To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such

Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Then, four years later in 1791, the Second Amendment, which ensured the continuation of the militias by allowing their formation without an act of Congress, was added to the Constitution: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Notice how the original constitutional statement's lofty language and the subsequent Amendment hides the militias' original racist purposes. Dr. Dunbar-Ortiz clarifies this point as follows: "Although the U.S. Constitution formally instituted 'militias' as state-controlled bodies that were subsequently deployed to wage wars against Native Americans [i.e., Indigenous nations], the voluntary militias described in the Second Amendment entitled settlers, as individuals and families, to the right to combat Native Americans on their own.…**Slave patrols comprise… [the other part of] the story in the Second Amendment;…and slave patrols seamlessly evolved into modern police forces,…[and] have normalized racialized violence and affinity for firearms in U.S. society** (bold emphasis added; pp. 53 and 71 of Loaded).

Chief Justice Thurgood Marshall and The United States Constitution

No less a personage than the great Thurgood Marshall, the first African American to be appointed Chief Justice on the United States Supreme Court, realized that the American Constitution was originally for white men. In 1987, he turned down an invitation to attend a celebration marking the 200th anniversary of the Constitution's publication. In an article titled "Marshall on Constitution: 'Defective from Start'" written by David G. Savage, we learn the reasons why Chief Justice Thurgood Marshall refused to accept that invitation:

> D*istancing himself from the 'flag-waving fervor' and the spirit of celebration that has accompanied this year's 200th birthday of the U.S. Constitution, Supreme Court Justice Thurgood Marshall said [to a reporter] that the original government plan [i.e., the Constitution] was "defective from the start" and required "two turbulent centuries" to correct. "The true miracle was not the birth of the Constitution, but its life," Marshall, the first black to sit on the high court, said in a speech delivered to a legal convention in Maui, Hawaii. He pointed out that in 1787, the Constitution's framers left out a majority of Americans--women and blacks--when they wrote the phrase, 'We the People.'*

"[Marshall goes on to point out that] it took the Civil War and the three constitutional amendments that followed it--the 13th, 14th and 15th--to abolish slavery and give all citizens' equal protection of the laws,'…[while]…the 19th Amendment, ratified in 1920, gave women the right to vote…"

"Marshall said he hopes that this year's bicentennial celebration [of 1987] will not be a 'blind pilgrimage to the shrine of the original document,' **but rather will inspire "a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history."**[5]

Even though working in a major center of power as the Supreme Court, Chief Justice Thurgood Marshal was not mesmerized by an initially defective document he had been sworn to uphold. For him, the Constitution was only meaningful due to "its promising evolution through 200 years of history." And that evolution has not ended as the fight for freedom and justice continues in America to this very day.

Stolen Labor and Stolen Land: The Foundation of American Capitalism

A strong argument can be made that the cotton produced by African slaves was an essential pillar of the foundation of American capitalism. By 1803—62 years before the signing of the Emancipation Proclamation that ended de jure slavery in America—cotton was the leading American export. In fact, cotton would remain the top American export until 1937 under the de facto form of slavery known as sharecropping. During that time, Great Britain, the most powerful country in the world, imported 70 to 80 percent of its cotton from the cotton-producing slave plantations of America. This cotton powered British textile mills. Overall, slave-grown cotton counted for more than half of America's export earnings. On the global level, African slavery in America produced 60 percent of the world's cotton. **"Thus, slavery paid for a substantial share of the capital, iron, and manufactured goods that laid the basis for American economic growth."**[6]

Obviously, as slave cotton expanded, more land was required. Thus, there remained an ongoing thrust to forcibly divest Indigenous populations and nations of their lands by any means necessary.

By the 1850s, most native peoples in the south and southeast—the Cherokee, the Muskogee, the Choctaw, the Chickasaw, the Shawnee, and so many others—had been driven off their original homelands to small plots of land east of the Mississippi River to an area mostly located in what is now the state Oklahoma. Indeed, this area became known as "Indian Country," not to become part of the American Republic. The south and southeast lands were especially suited to raising cotton and, therefore, much coveted by slave masters and land speculators.

The slave patrols and the militias ensured that stolen labor and stolen land maintained their centrality in America's growth under capitalism.

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[5] Bold emphasis added; italicized excerpt taken from "Marshall on Constitution: 'Defective from Start'" by David G. Savage, online at https://www.latimes.com/archives/la-xpm-1987-05-07-mn-4540-story.html.

[6] Bold emphasis added; the quotation is taken from "Historical Context: Was Slavery the Engine of American Economic Growth?" by Steve Mintz at https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-was-slavery-engine-american-economic-growth; also see "Why Was Cotton King?" by Henry Louis Gates, Jr., at https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/why-was-cotton-king/.

After the American Civil War, though legal slavery had ended, it was replaced by sharecropping, an economic relationship between former slave master and former slave very close to actual slavery.

Meanwhile, the militias, often assisted by the American Army, continued to forcibly appropriate native lands west of the Mississippi River, pushing Indigenous peoples onto relatively smaller tracts of land called reservations until the Pacific Ocean was reached. This is because these lands west of the Mississippi, though not necessarily suitable for growing cotton, were, nevertheless, found to be rich in gold, silver, oil, and other resources.

Clearly, American capitalism is founded on the stolen labor of African slaves and the stolen land of the Indigenous nations. The slave patrols and the anti-Indigenous militias helped to maintain the institutions of stolen labor and stolen land. The slave patrols and anti-Indigenous militias themselves became institutions whose racist ideologies were passed down to our modern police departments. As a result of the heinous historical activities of the slave patrols and militias, America as a nation is guilty of crimes against humanity ranging from enslavement, physical mutilation, and rape all the way to the genocide of its non-white inhabitants for most of its history!

In Summary

In the preceding presentation, I have attempted to shed some light on three crucial points:

First of all, the institution of policing in America is based on the institutions of the African slave patrols and anti-Indigenous militias.

Secondly, the African slave patrols were designed to ensure the ongoing theft of African labor. The anti-Indigenous militias were designed to ensure the Indigenous nations' land's ongoing theft, forcibly removing Indigenous peoples from their lands, lands stretching from the Atlantic to Pacific Oceans.

Thirdly, stolen African labor and stolen Indigenous land were the two primary pillars of the American imperial project that established the American nation as we know it today.

The American imperial project is, in turn, the foundation of American corporate wealth. This fact will help to understand why modern policing instinctively protects American corporate property while oppressing non-white communities.

Finally, American corporate wealth as the foundation of English capitalism supports and drives the global American imperial project through the American military-industrial-commercial complex.

This is why America is guilty internationally of egregious and destabilizing activities. An example of such activity is the present-day military support by the United States of Saudi Arabia in its indiscriminate war in Yemen since the initial 2015 bombing of the Yemeni people. Also, the American foreign wars projecting the drone bombing program that has taken

thousands of innocent lives in Afghanistan, East Africa, and Yemen to pursue alleged terrorists. To launch its imperial power worldwide, America maintains some 800 military bases in more than 70 countries around the world. By comparison, Britain, France, and Russia combined have only 30 foreign installations globally.[7]

As We Look to The Future

As I have watched The Black Lives Matter anti-racist movement unfold, I have observed two things. First of all, some young activists have voiced the opinion that if the current peaceful protests do not work, a more militant approach may have to be taken. Secondly, it has been mentioned by some activists that they are very well aware of the fact that some police departments have been actively recruiting white nationalists. These individuals believe in white supremacy's primacy in the corridors of political and economic power in America. Thus, there are some very ominous signs lurking in the background.

If systematic racism in the American policing system is going to be tackled effectively, some dismantling and defunding of police departments must occur. This will be the only way to tackle the deeply embedded institutionalized racism that now prevails. However, this will require a sensible, workable plan to rebuild these dismantled, defunded institutions into new institutions where racist practices are minimized. They must be rebuilt in such a way as to handle legitimate policing activity that significantly reduces the occurrence, even the possibility of racist abuse of the non-white populace. In my opinion, this will go a long way to defuse the tension between both sides—the uniform police and the non-white public that they are supposed to be serving. Otherwise, the hardening of attitudes I mentioned above may lead to civil disturbances based on armed conflict, especially in the urban areas.

Dismantling and defunding police departments and replacing them with entirely new institutions meant to serve non-white communities, not abuse them, may be the last hope in America to peacefully bring about change in America's police institutions. May we all pray for and work for peaceful solutions.

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[7] See "Where in the World is the U.S. Military?" by David Vine at https://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321.

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Elevated Atmospheric CO_2 Levels and Effects on Plant Nutrition and Health of Indigenous Peoples; a Review of Current Research

By Cora Moran, Rudolph Rÿser & Susan McCleary

ABSTRACT

The extent to which current academic research has investigated the possibility that elevated levels of atmospheric carbon-based gases are affecting the health of indigenous peoples is a pressing issue. As described in the paper 'Traditional Foods and Medicines and Mounting Chronic Disease for Indigenous Peoples Worldwide', prior meta-analyses of extant literature have noted that "elevated CO_2 and other greenhouse gases in the atmosphere have negatively affected cultivars of various commercial crop species resulting in serious chronic disease consequences for human beings". This paper notes that there is a "dearth of information on the changing nutrition (protein, micronutrients, bioavailability) of wild plants and animals, which constitute from 40% to 80% of Fourth World peoples' diet and sources of medicine" which "suggests the need for further research". The effects of elevated carbon-based gases in the atmosphere may impact on the nutritional value of consumable plants and animals and consequently directly affect the health of indigenous peoples and other peoples in the world dependent on commercially cultivated foods and medicines.

As part of this call for further research, this paper seeks to investigate the extent to which current academic literature has investigated the possibility that elevated levels of atmospheric carbon-based gases are affecting the health of indigenous peoples. Gaining a clear picture of the state of such research will help to determine the particular vulnerabilities of distinct peoples from these changes, develop strategies tailored to assist indigenous peoples in mitigating any effects and determine any insights their káhlaculture based lifeways may present for adaptation to the effects of increasing atmospheric CO_2 levels for humanity generally.

A mixed methods analysis of relevant literature was conducted for this investigation, providing an overview of findings on the large scale social and ecological effects of increasing atmospheric carbon dioxide levels and reviewing the extent to which current academic research has investigated the possibility that elevated levels of atmospheric carbon-based gases are affecting the health of indigenous peoples specifically. In order to review current findings from research about this, a mixed

methods analysis of relevant literature was undertaken, providing a holistic overview of findings and the effects of elevated atmospheric carbon-based gas levels on indigenous communities. The findings from this provide an overview of the wider ecological and human health effects of rising atmospheric carbon-based gases and insights into where further research is required to address current gaps in the literature.

Key words: kálhaculture, Fourth World peoples, nutrition, chronic disease

"Kálhaculture" *A term derived from two words; the first is an Oneida word for "forest or woods", the second is from the Latin meaning "worshiping Earth" or tending to the earth. It succinctly describes the concept of the balanced use of nature that indigenous peoples carry out every day; producing foods and medicines from the natural world, whilst balancing the reciprocal needs of humans, plants, animals and the Earth's capacity to restore life.*

Are Fourth World Peoples [Indigenous peoples] "stewards" of the natural world?

This argument is often put forward in popular literature to romanticise the actual pragmatic relationship between Fourth World peoples and the natural world. Dependence on the natural world requires a practical commitment to sustain that world for personal nourishment and renewal. Long evolved cultural practices aimed at balancing human needs against maintaining the capacity of the earth's biosphere to provide for them in a sustainable fashion are a practical necessity for realistic prospects of continued survival. Sustaining the diversity of the biological world in turn means that indigenous peoples themselves are sustained. Some nations of course do not follow this maxim, but rather pursue an expansionist paradigm with wide scale unsustainable resource use contributing to excessive waste production including climate altering gases such as carbon dioxide [CO_2] into the atmosphere and oceans; the effect of this being to dramatically affect the natural balance of ecosystems and compromise the ability of life supporting plants and animals to survive.

There are more than 5000 distinct nations of indigenous cultures spread across the planet, reflecting the ingenious and successful adaptations human beings have made to the greatly varied ecosystems that support life. Indigenous nations inhabit almost every environment type on this planet from some of the richest and most fertile lands in the world, such as the region between the Tigris and Euphrates rivers in eastern Syria and Northern Iraq, to the most arid regions including the Sahara Desert. The cultural adjustments made by each successful community and its descendants in order to prosper in different ecosystems, as well as to varied climate conditions, is testament to the power of culture and enduring flexibility

of peoples. The very richness and diversity of life in the natural world is reflected in human diversity; cultural responses to the environment as demonstrated in the practice of Kálhaculture.

While the cultural variation present between societies is immense, one common theme can be said to unite indigenous peoples around the globe; that they predominantly respect the natural environment and exploit it only to the extent that the earth can replenish, they all practice kálhaculture[1] to some degree. This of course stands in direct contrast to the practices of metropolitan societies and the large-scale waste streams produced by industrialised nations, such as the emission of greenhouse gases that are altering the earth's biosphere on a global scale.

Elevated levels of Greenhouse Gases in the Atmosphere

Atmospheric levels of carbon dioxide have risen from 280 parts per million [ppm] in the preindustrial period (NASA 2020), to 415ppm at present, looking set to rise up to 750ppm at the end of this century (Marland and Boden 2002). It has been documented in a range of studies that rising CO_2 levels have effects on plants; namely that higher levels enable plants to grow more quickly, but what is often less noted is that higher levels of carbon dioxide have often been documented to have negative impacts on plant nutrition. The scale of the change in atmospheric CO_2 means that in addition to leading to rapid climate change, the increasing levels of the gas itself may have significant effects on human health globally as well as wider ecological effects. As such this phenomenon merits further investigation.

Whilst elevated atmospheric greenhouse gases will have an effect on the world population as a whole there are of course substantial disparities in wealth globally and diversity of life ways, which all affect the nature of people's diets. One noted risk from elevated CO_2 levels is many plants producing less protein (Conroy 1992, 445) and having reduced levels of certain micro and macronutrients (Dong, et al. 2018, 1). Such effects are most likely easiest to mitigate in the world's wealthy industrialized nations where higher levels of animal protein consumption in people's diets and the availability of multivitamins and a range of store-bought crops mean for a great deal of choice to maintain a balanced diet.

The majority of the world's population does not have the luxury of mitigating the adverse effects of elevated CO_2 levels, with economically impoverished people in urban areas and rural populations generally relying more on plant-based proteins in their diets (Solomons 2000, 41). In many parts of the world where these people predominantly rely on the industrial food system they also have access to a limited range of plant species for the majority of their caloric needs and only a few select cultivars of those species (FAO 2020). The homogeneity of such diets with their dependence on a limited range of plant species place such populations at heightened risk of inadequate nutrition from increasing CO_2 levels negatively impacting on the nutritional qualities of plants.

[1] The word Kálhaculture is derived from two words. The first is an Oneida word for "forest or woods" and the second word is from the Latin meaning "worshiping Earth" or tending to the earth. This word has been employed to provide a clear explanatory term for the concept of balanced use of nature that indigenous peoples carry out on a daily basis.

These two generalized groups, of course, omit a great deal of diversity within and between countries but provide a useful framework when reviewing the effects of rising CO_2 levels on the largest scale globally. Overlooked in such broad scale research and overview is the world's Fourth World [indigenous] peoples. While these different peoples predominantly reside in the global south or often live as marginalized communities in industrialized nations they often have a distinct nuance in their lifeways that provide invaluable insights. Namely, that though many of these groups often consume predominantly plant-based diets complimented by fish and wild caught animal protein sources, they typically eat a much broader range of species and many more varieties of more widely consumed crop plants of which only a few cultivars are grown commercially (Swiderska and Ryan 2020).

The genetic narrowing from most agricultural production leads to greater vulnerability of crops to ecological change, in addition to impacts from climate change (Swiderska and Ryan 2020). If the limited number of varieties of a few crops that are used to produce the majority of global calories are nutritionally affected by rising carbon dioxide levels there is relatively little scope within the system for any dynamic adaptation to a change in conditions. Traditional agricultural and horticultural methods with their greater genetic diversity, and dynamic cultivation practices that are responsive and adaptable to changing conditions are likely to have a greater capacity to maintain adequate nutrition in the face of change, especially for those living on a primarily plant-based diet (Swiderska and Ryan 2020).

Many Fourth World peoples employ Kálhaculture[2] methods to obtain sustenance from a much broader range of plant species than people in industrialized nations or many of the urban poor in the majority world. Alongside gathering, horticultural methods employed as part of such lifeways are arguably more biodiverse than mechanized agricultural practices; localized production and consumption means for much greater heterogeneity of plant breeds within even relatively small geographical areas. This diversity, combined with a more labour-intensive, relational system of food production means for much greater levels of plant diversity. There are, for example, a rich diversity of varieties of mahiz [Taino for the Spanish maize] in countries such as México (O'Leary 2016) , as opposed to a handful of varieties grown throughout the majority of the United States (Hwang 2017).

As described in the paper 'Traditional Foods and Medicines and Mounting Chronic Disease for Indigenous Peoples Worldwide', prior meta-analyses of extant literature have noted that "elevated CO_2 and other greenhouse gases in the atmosphere have negatively affected cultivars of various commercial crop species resulting in serious chronic disease consequences for human beings" (Rÿser 2019, 13).

[2] "Kálhaculture" is a word that means the production of foods and medicines from natural world, while balancing the reciprocal needs of humans, animals and the Earth's capacity to restore life. This term accurately refers to the methods employed by Fourth World nations emphasizing the reciprocal relationship between human beings and natural life support foods and medicines.

This paper notes that there is a "dearth of information on the changing nutrition (protein, micronutrients, bioavailability) of wild plants and animals, which constitute from 40% to 80% of Fourth World peoples' diet and sources of medicine" which "suggests the need for further research" (Rÿser 2019, 13). The effects of elevated CO_2 gases in the atmosphere may produce effects on the nutritional value of consumable plants and animals and consequently directly affect the health of indigenous peoples and other peoples in the world dependent on commercially cultivated foods and medicines

As part of this call for further research, this paper seeks to investigate the extent to which current academic research has investigated the possibility that elevated levels of atmospheric carbon-based gases are affecting the health of indigenous peoples. In order to gain a clear picture of current findings from research about this crucial issue, a mixed methods analysis of relevant literature was conducted for this paper, providing an overview of findings on the large scale social and ecological effects of increasing atmospheric carbon dioxide levels and reviewing the extent to which current academic research has investigated the possibility that elevated levels of atmospheric carbon-based gases are affecting the health of indigenous peoples specifically.

Gaining a clear picture of the state of such research will help to determine the particular vulnerabilities of distinct peoples from these changes, develop strategies tailored to assist indigenous peoples in mitigating any effects and determine any insights their káhlaculture based lifeways may present for adaptation to the effects of increasing atmospheric CO_2 levels for humanity generally. Furthermore, such research may provide deeper insights into the elevated CO_2 measures and the health and nutrition of all peoples.

Methodology

- Guided searches were conducted on Google and in the Center for World Indigenous Studies archive, with studies focused on changes in atmospheric carbon gases in relation to plants and/or animals within the last 30 years considered appropriate for analysis. Papers were selected randomly from this cohort to provide a representative sample of available literature for analysis.

- More than 100 individual studies and meta studies were selected and reviewed, with details noted for each paper according to pre-specified categories, selected to ensure information regarding each facet under evaluation could be noted. This was in order to evaluate where possible the relationship between geographic location, CO_2 levels, plant and animal characteristics and uses, changes in nutritional or medicinal values and indigenous nations. Details were also noted of author, copyright, publisher and funding of papers to review any potential author bias.

• Categories noting the relevant details from each paper selected according to the above criteria were;

Geo-location	CO_2 Levels referenced	Plant families referenced
Animal families referenced	Methodology of paper	Nutritional changes observed
Medical changes observed	Fourth World nation referenced	Reviewer Comments

• Those papers lacking robust methodological rigour or clear partisan bias were discounted as a first stage of analysis. Publications flagged up as such were reviewed by another investigation team member and any cases where there was disagreement over the status was put out to a third researcher to decide upon.

• In order to provide an overview summary of findings from reviewed papers with regards to the effects of the rise of atmospheric CO_2 levels since the Industrial Revolution, findings from papers were sub-categorised into 'wider ecological effects, general effects on crops and humanity globally' and the specific effects on changes in the nutritional quality of crop plant species on large-scale human demographic groups globally, 'industrialised nations', 'the majority world urban poor' and 'indigenous peoples and majority world rural poor' [see infographic 1]. These categories were selected to provide a holistic overview of background factors and large-scale demographic groups as described in the introduction.

• The overall set of papers was then analysed for their relevance to elevated atmospheric carbon-based gas levels and indigenous community health responses, with those prior identified as having clear methodological issues or political bias or funding issues excluded.

• The relationship between nutrition and consumption of plants and animals is directly associated with the health levels of human populations. With some indigenous communities wholly or partially reliant on non-commercial, non-cultivated foods, any difference in their health compared to the wider population who primarily subsist on domesticated crops in the context of globally increasing CO_2 levels is of note.

• Since indigenous peoples also rely heavily on plants and animals for medicinal support it is equally important to evaluate any changes in the beneficial effects from these sources owing to elevated CO_2.

• The health of indigenous peoples (in so far as chronic diseases are concerned) may be inferred from gas levels, plant types or animal types, nutritional changes in these sources of nutrition and any medicinal changes. Such factors may mean it can be concluded that there is a relationship between elevated atmospheric carbon-based gas levels and indigenous community health responses.

• In order to evaluate the extent to which current academic research has investigated this possibility, the below categories from reviewed

papers were selected and the extent to which they have noteworthy relevance to elevated atmospheric carbon-based gas levels and their effect on indigenous communities assessed.

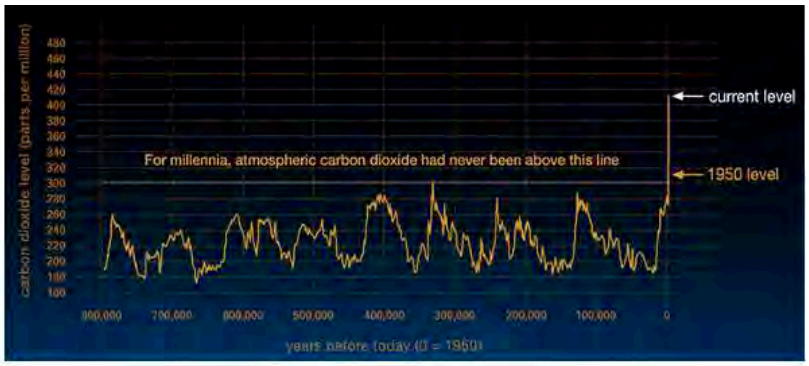
CO_2 Levels referenced	Plant families referenced	Animal families referenced
Nutritional changes observed	Medical changes observed	Fourth World nation referenced

• The details recorded in each category for each paper were rated from 0=not relevant, 1=possible relevance, 2=relevant to 3= highly relevant. Combined scores of values less than nine were deemed unsupportive or unrelated. Combined scores of 9 or greater were deemed as supportive. Papers were analysed and categorised independently by two researchers and any cases where there was disagreement over the status it was put out to a third researcher to decide upon.

• The selected papers reviewed as having noteworthy relevance to elevated atmospheric carbon-based gas levels and their effect on indigenous community health responses are reviewed below in conjunction with the wider background information summarised in infographic 1. This mixed methods approach providing a holistic overview of findings from relevant literature.

- Ocean acidification will negatively impact the productivity of marine ecosystems.
- Decline in biodiversity and biomass of wild plants and animals caused by wider background anthropogenic factors may be exacerbated by increasing CO_2 levels causing knock on ecological effects on terrestrial and marine ecosystems.
- Potential decline in metabolic health for humanity with increasing CO_2 levels, with rising levels of obesity.
- Protein and mineral concentration in plants will generally decrease, compounding other negative impacts on crop yields from anthropogenic climate change.

Image ref: (NASA 2020)



Effects on Industrialised nations	– Increase in carbohydrate content of crops and decrease in protein levels, combined with expected declines in micronutrient content of crops. – Increase in prevalence of toxic chemicals produced by moulds that grow on crops prior to harvest and during storage; increasing temperatures and drought making crops more susceptible to mould. – Expected increase in pesticide use would lead to greater levels of food toxicity.
Effects on Majority World Urban Poor	– With a rapid shift from a subsistence to an industrialised economy there have been notable dietary changes and declines in levels of physical activity that have led to rising obesity levels. The effects of elevated CO_2 on plant and human metabolic health may further exacerbate this trend. – Rising CO_2 generally reduces the nutritional value of C3 food crops. – Risks of health issues such as iron deficiency on a mainly plant based diet.
Effects on Indigenous Peoples and Majority World Rural Poor	– Indigenous peoples often have background issues of poor nutrition due to marginalisation which may be further exacerbated by climate change. – Changes in diet away from traditional sources are also causing health problems for many groups of indigenous people and the majority world rural poor. – Increasing ocean acidification affects an important food source for many indigenous peoples. – Many indigenous peoples source their protein from animals which may offer them more buffering to reduced nutrition in plant protein sources that others depend on. – They may however be adversely affected in terms of herbal medicine; there may be complex phytochemical changes that impinge on their traditional health systems and the availability of particular plant species with climate change. – There is also the issue of indigenous peoples' knowledge not being taken seriously; humanity as a whole all risk missing out on indigenous peoples' insights of the effects of climate change and potential solutions.

Infographic 1

Results & Analysis - Elevated atmospheric carbon-based gas levels and their effect on indigenous community health responses

Only a relatively small proportion of the papers in this study were deemed as highly relevant in the criteria, 22 papers out of 112, indicative of the need for further research in this area. These papers can broadly be distinguished into three themes; wider impacts on ecology from changes in plant physiology due to increasing levels of atmospheric carbon gases, the effects of this on human health generally and on indigenous peoples specifically.

For instance, (Williams 2010) describes that plants generally have lower protein levels in higher CO_2 concentrations, this has wider ecological effects on ecosystems but means humans have to eat more to obtain the same amount of protein from plants and for the majority of the world population eating a primarily plant-based diet this will present issues. In terms of ecosystems, lower protein nutritional quality of leaves may mean forest ecosystems can no longer support animals such as koala, possums and sugar gliders. Lower nutritional content of plants more broadly with higher plant toxicity loads also present issues for animals such as insects and affect general ecosystem health. This paper discussed issues presented by this phenomenon in the wider context of increasing food output globally whilst reducing inputs in the context of ecosystem degradation. Specific mention was also made of increased cyanide toxicity in plants such as cassava, which whilst concentrated in the peel of this plant still reduces its nutritive benefits. Findings corroborated by (Gleadow, et al. 2009).

Plants may gain some benefits from increasing CO_2 levels with plants having enhanced carbon uptake, general reduced water use, increased photosynthetic nitrogen use efficiency in C_3 plants, with legumes having the potential to respond maximally, and can also benefit non-legumes growing alongside them (Andres, et al. 2009). "C_4 photosynthesis is not directly stimulated by elevated [CO_2]. Nevertheless, there is significant potential for increased growth of C_4 plants at elevated [CO_2] to decrease water use and reduce drought stress, leading via this indirect mechanism to greater photosynthesis and yield" (Andres, et al. 2009, 2869). Such findings are also corroborated in (Conroy, Influence of Elevated Atmospheric CO_2 Concentrations on Plant Nutrition 1992).

There are also crop specific effects with regards to protein level changes grown at elevated [540–958 ppm] compared with ambient [315–400 ppm] CO_2, as described in (Taub, Miller and Allen 2007) for "wheat, barley and rice, the reduction in grain protein concentration was-10–15% of the value at ambient CO_2. For potato, the reduction in tuber protein concentration was 14%. For soybean, there was a much smaller, although statistically significant reduction of protein concentration of 1.4%" (Taub, Miller and Allen 2007, 565).

Changes in plant nutrition was not purely restricted to human food crops, perennial ryegrass and white clover showed rising atmospheric CO_2 levels from 380-670ppm increased the dry-matter yield of white clover/ryegrass also likely impacting upon its nutritive value which may have implications for grassland management (Schenk, Jäger and Weigel 1997).

Wider points were noted with regards to the effects of CO_2 on plant health, including potentially unforeseen effects on insects (Barbehenn, Karowe and Chen 2004) and important observations such as though the nutritional quality of C_3 plants will decline more under elevated atmospheric CO_2 than will the nutritional quality of C_4 plants, herbivorous insects did not increase their feeding rate on C_3 plants or increase their predation levels on currently less favoured C_4 plants due to their "lower nutrient levels, higher fiber levels, and greater toughness" (Barbehenn, Karowe and Spickard 2004, 86).

'Elevated CO_2 *effects on plant carbon, nitrogen and water relations: six important lessons from FACE'* also notes the limitations of such experiments; the [CO_2] 'fertilization' effect in FACE studies on crop plants is less than expected, "data from laboratory and chamber experiments systematically overestimate the yields of the major food crops, yet may underestimate the biomass production of trees" (Andres, et al. 2009, 2870). The potential limitations of lab-based field studies, complexity of interactions between different ecosystem components and the variation of effects on individual crop species as outlined above illustrates the need for further research.

The changes in plant's growth and composition due to elevated atmospheric CO_2 levels will likely have a range of effects on human nutrition beyond the lower protein levels detailed above as well as wider ecological effects. Staple crops that provide dietary iron and zinc for a large proportion of the global population are likely to have significantly reduced levels of these elements by mid 21st century anticipated atmospheric CO_2 levels, as detailed in (Dietterich, et al. 2015). This finding is corroborated in (Loladze 2014) and *'Food Safety, Nutrition and Distribution'* which notes that "rising CO_2 levels are very likely to lower the concentrations of essential micro and microelements such as iron, zinc, calcium, magnesium, copper, sulphur, phosphorus, and nitrogen in most plants (including major cereals and staple crops" (Ziska, Crimmins, et al. 2016, 197). In addition to such changes it notes increasing carbohydrate and decreasing proportional protein content are expected in many crops and that "an increase in dietary carbohydrates-to-protein ratio can have unhealthy effects on human metabolism and body mass" (Ziska, Crimmins, et al. 2016, 197).

The potential knock on effects of this are set out in *'Canaries in the coal mine: a cross-species analysis of the plurality of obesity epidemics'* which states that alongside the observed increase in obesity in humans, analogous increases in average mid-life body weights have been observed among primates and rodents living in research colonies as well as among feral rodents and domestic cats and dogs (Klimentidis, et al. 2010, 1626). This is evidenced by multigenerational assessments of animals with data from the 1970s & 80s to the present, during which time atmospheric CO_2 levels have increased from e.g. circa 340ppm in 1980 and <400ppm today. Findings also corroborated in (Hersoug, Sjödin and Astrup 2012).

Insights from research such as the above noting the effects on human health of changes to plant physiology due to increasing levels of atmospheric CO_2 also offer potential insights for methods of adaptation, maize for example may be able to maintain growth under higher CO_2 and mild drought (Yu-zheng and Zhou-ping 2016, 2775) making it a crop that may have better resilience growing in the face of climate change. Some crops also appear to maintain current mineral concentrations in elevated CO_2 concentrations, notably sorghum and potatoes showing no significant change in iron content (Smith, Golden and Myers 2017, 250). Such knowledge can inform selection of crops to grow for maximal nutrition in addition to growth resilience to changed conditions.

With regards to health effects on indigenous people specifically some papers noted general trends with regards to the effects on indigenous peoples, *'Northwest African and Middle Eastern food and dietary change of indigenous peoples'* noting there was good data on a regional level to demonstrate changing food patterns but less evidence regarding different peoples in the region and indigenous peoples' dietary changes (Kuhnlein and Johns 2003, 348-349). Likewise, *Indigenous Foods and Nutrition Security in India: A Case Study* regarding the Bhil people of India only discusses nutritional composition of plants with current CO_2 levels given rather than a future elevated scenario (Bhattacharjee, et al. 2009). Though it does provide recommendations for strengthening and promoted integrated home gardening through increased production and consumption of nutritious foods (indigenous leafy vegetables, fruits, herbs spices and other foods) with an emphasis on foods rich in micronutrients (Bhattacharjee, et al. 2009, 228).

Other papers have described wider ecological impacts of climate change and their effects in indigenous peoples' lifeways and food security. For example, *'The Impacts of climate change on tribal traditional foods'* notes that tribal harvesters for example, have noticed shifts in the harvesting times of traditional foods, climate change impacting on ecosystems and lifecycle processes in complex ways and that "if the timing of flowering plants and the presence of pollinators, such as birds and insects, become less synchronized, impacts can ripple throughout the food webs" (Lynn, et al. 2013, 546). Impacts on marine ecosystems and changes in the fruiting of berry plants as having substantial effects on traditional health practices were also observed (Lynn, et al. 2013, 548) . It also notes that "Tribes are experiencing declines in health that accompany traditional food use declines. Obesity, diabetes and cancer, rare in communities living on a traditional diet, are now increasing health problems in tribes across the U.S." (Lynn, et al. 2013, 547). Changes in local traditional food harvests were also observed in (Guyot, et al. 2006).

'Populations of concern' provides a detailed overview of the factors affecting demographic groups in the United States who will be negatively impacted by Climate Change (Gamble, et al. 2016). The various indigenous peoples of the country are mentioned as part of this, with specific case study examples provided for

particular groups. With regards to food security it notes climate change is projected to reduce the nutrient and protein content of some crops, like wheat and rice which will disproportionately affect marginalised groups;

"Examples of how climate changes can affect the health of Indigenous peoples include changes in the abundance and nutrient content of certain foodstuffs, such as berries for Alaska Native communities; declining moose populations in Minnesota, which are significant to many Ojibwe peoples and an important source of dietary protein;, rising temperatures and lack of available water for farming among Navajo people; and declines in traditional rice harvests among the Ojibwe in the Upper Great Lakes region. Traditional foods and livelihoods are embedded in Indigenous cultural beliefs and subsistence practices", "Climate impacts on traditional foods may result in poor nutrition and increased obesity and diabetes." (Gamble, et al. 2016, 253-254)

"In addition, oceans are becoming more acidic as they absorb some of the carbon dioxide (CO_2) added to the atmosphere by fossil fuel burning and other sources, and this change in acidity can lower shellfish survival. This affects Indigenous peoples on the West and Gulf Coasts and Alaska Natives whose livelihoods depend on shellfish harvests. Rising sea levels will also destroy fresh and saltwater habitats that some Indigenous peoples located along the Gulf Coast rely upon for subsistence food." (Gamble, et al. 2016, 254).

Changes in indigenous peoples' diet and the health effects were detailed, without specific allusions to elevated atmospheric carbon levels metabolic effects, in *'Arctic Indigenous Peoples Experience the Nutrition Transition with changing Dietary Patterns and Obesity'* (Kuhnlein, et al. 2004). Similar conclusions are drawn in *'Climate Change and health in Nunavik and Labrador: Lessons from Inuit knowledge'* (Furgal, Martin and Gosselin 2002).

In addition to these points, it can also be noted that there is a likely relationship between increased levels of chronic disease and reliance on commercially produced foods and lower levels of nutritive value in wild plant foods. As highlighted in Infographic 1, majority world urban poor populations have had notable dietary changes with increasing reliance on commercially produced foods contributing to rising obesity levels in the context of a rapid shift from a subsistence to an industrialised economy (Popkin 2004, 141-142). Changes in diet away from traditional sources are also causing health problems for many groups of indigenous people (Gordon and Oddo 2012, 9). This is in addition to elevated CO_2 potentially causing complex phytochemical changes in wild plant foods which may negatively affect their nutritive value (Wand, et al. 1999) and effectiveness when used in a medicinal context (Ziska, Emche, et al. 2005). In conjunction with this, wider effects of climate change have been noted to have effects on medicinal plant composition (Gairola , et al. 2010, 1826).

Conclusions and recommendations for further research

An overall picture of the ecological effects of rising atmospheric CO_2 levels can be drawn from current literature with regards to wider ecological effects, general effects on crops and humanity globally, with impacts on major demographic groups drawn out. Though limitations were noted such as those of lab-based field studies overlooking the complexity of interactions between different ecosystem components and the variation of effects on individual crop species which limits what can be concluded from such research methods.

Up to 80% of the world's 1.9 billion indigenous people either wholly or mainly depend on naturally produced foods and medicines or foods produced through kálhacultural practices. Traditional foods and medicines are essential to the diets of these many different peoples, yet evidence is building to indicate that as a result of unrestricted development pressures, elevate CO_2 in the atmosphere and forced removals of peoples from their territories indigenous peoples have become more reliant on commercially produced and distributed foods and medicines. And through studies conducted by the Center for World Indigenous Studies, Centre for Indigenous Peoples' Nutrition and Environment, Center for Traditional Medicine, the International Development Research Centre and the United Nations Food and Agriculture Organization evidence is growing to indicate that indigenous peoples in North America, parts of South America and Central Africa as well as Europe show dramatic trends toward higher levels of chronic disease—particularly diabetes, heart disease, kidney disease and cancers. Elevated levels of CO_2 and the consequent changes in nutritional content in plants may contribute significantly to these health changes combined with the increased dependence of indigenous peoples on commercially produced foods that contain higher levels of sugars and processed ingredients.

Only a relatively small proportion of the selected papers reviewed were deemed as having noteworthy relevance to the specific effects of elevated atmospheric carbon-based gas levels on indigenous community health responses. Whilst the effect of rising atmospheric CO_2 was mentioned in terms of its effect on ecosystems and indigenous people's wellbeing, relatively little mention was made of the specific impacts of its effect on reducing nutrition from plants and the implications for indigenous peoples' health in most selected papers. While the selected studies considered in this analysis did not directly focus on food and medicine by indigenous peoples' consumption other notable studies concerned with indigenous peoples' nutrition and health strongly suggest a connection between changes in atmospheric carbon gases and changes in plant nutritional value. As noted above researchers associate elevated CO_2 and other greenhouse gases in the atmosphere with adversely affecting cultivars of various commercial crop species resulting in increased incidents of chronic disease (Dietterich et al., 2015a; Loladze, 2014; Thompson & Cohen, 2012). Hence, indigenous peoples dependent on agriculture and shifting away from kálhaculture are particularly

vulnerable to the effects of elevated carbon gases in the atmosphere adversely affecting the nutritional values on plant-based and animal-based foods.

Interdisciplinary research addressing these factors will provide more comprehensive insights into and potential solutions for the issue and address the gaps in current research literature. Such new research may focus specifically on any changes in nutritional content in foods obtained through kálhaculture and health changes in subject populations.

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Chi miigwetch to my mentor, and to everyone involved in the program."

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Amending the Rome Statute and Peoples: Crimes Against Present and Future Generations (CPFG)

By Zane Dangor

ABSTRACT

The Rome Statute, which established the International Criminal Court (ICC), in 2002, sought to end the impunity associated with mass crimes. After decades of negotiations in the international community, the ICC emerged to establish an apex court able to investigate and prosecute individuals most responsible for crimes of concern to the international community[1]. These crimes include Genocide, War Crimes, Crimes Against Humanity, and Crimes of Aggression.

Key Words: corporate conduct, corporate human rights obligations, ICC, international crimes and permanent damage to the environment, poverty and environmental harms, international criminal law and environmental harms, harmful economic systems

A significant gap in the Rome Statute is that it does not cater to mass crimes or harms committed by Corporations. Corporate conduct and its role in human rights abuses and actions that give rise to and sustain poverty have come under renewed scrutiny. The United Nations and human rights advocacy organizations have focused on corporate use and support of sweatshop labor in the footwear and apparel industries, permanent damage to the environment, and the destruction of peoples' livelihood capabilities through the extractive industries.[2] International criminal law is being investigated as a legitimate enforcement tool concerning corporate human rights obligations and as a means to curtail corporate impunity.[3]

Studies have indicated that approximately 21,000 people die every day from hunger-related causes. This number of deaths is over 7.5 million people per annum every year. Poverty is the principal cause of hunger, underpinned by harmful economic systems that fuel poverty and inequality through the ordinary and accepted global economic and political systems.

Harmful economic systems and practices promote large-scale environmental degradation that is responsible for the spread of killer diseases, giving rise to new killer diseases.[4]

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Environmental related illnesses caused by polluted water, deforestation, and environmentally damaging agricultural processes kill the equivalent of a jumbo jet full of children every 30 minutes. [5]

Poverty and environmental-related mass deaths are ordinarily not seen as part of the major crimes of concern to the global community. Even though in scale, they exceed the numbers caused by genocides, war crimes, and crimes against humanity. This scale level is because individuals and institutions that drive harmful economic systems are generally within the most powerful bloc of countries in the developed world and sections of the developing world. Global politics and the exercise of power through international institutions may be one reason that harms associated with the process of impoverishment and destruction of the environment are not under the jurisdiction of the ICC.

Human Rights Theory and the Conceptual Barriers to Criminalising the Harms Associated with Harmful Economic Activities and Corporate Criminal Liability

State-based International Human Rights Law

> *The root causes of the business and human rights predicament today lies in the governance gaps created by globalization*––between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.[6]

The statement above by John Ruggie, the UN Special Rapporteur on Business and Human Rights, suggests that globalization has contributed to powerful corporations operating within weak states leading to governance gaps concerning human rights. The governance gap in relation to corporations' accountability for human rights abuses is intertwined with international human rights law history.[7] The origins of international human rights law were arguably a market-based theory of rights, with the first human rights to emerge being the right to private property. Muchlinksi argues that this early protective role over corporations frames the contextual barrier to extending human rights obligations to corporations.

Diplomats formalized the state-based international human rights architecture in the aftermath of World War II to protect individuals from the excesses of public state power. [8] This focus on the state served to crystalize the idea within state-based international human rights law that States were the only duty bearers for human rights.[9] The strengthening of economic globalization in the 1970s and 1980s cemented this conceptual barrier through more overt measures to protect business interests.

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[5] S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute.
[6] J. Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2008) UN DOC A/HRC/8/5 1,12.
[7] P. Muchlinksi' Human Rights and Multinationals: Is there a Problem' in International Affairs (2001) HeinOnline 31, 33.
[8] L Van Den Herik and J Cernic (Note 4 above) 727.9
[9] Ibid 734.

The hegemony of ideas and policies linked to free trade has given Corporations more power than they had at any time in history.

The state-centred conceptual barrier concerning human rights accountability and its underlying supportive ideology has also narrowly defined what constitutes human rights. Following World War II, the collective international moral outrage led to the strengthening of political and civil rights as legally enforceable rights.[10] Though, much of the developed world continues to question whether social and economic rights are genuine human rights. McCorquodale and Fairbrother suggest that explicit recognition of especially economic rights as a human right would strengthen arguments that business entities as powerful actors able to positively or negatively impact the fulfilment of these rights should be direct duty bearers.[11]

Overcoming the theoretical obstacle for corporate accountability for human rights is still the subject of significant debate and negotiation in the international arena.

State-based International Criminal Law

The limitation of state-based international criminal law lies in the limited scope of the international crimes of concern to the international community. Crimes associated with human rights abuses with a nexus in economic, social, and cultural rights are excluded. The basis for this exclusion is primarily due to the same factors that have given rise to states being treated as the primary duty bearer for human rights. The international and domestic enforcement gaps in relation to human rights abuses by MNCs also allows for the normalization of harmful economic policies and operations that harm people and their environments. These policies include globalized economic policies that often result in increased unemployment levels, poverty, and reduced access to basic needs such as water and critical services such as health care and education.[12] There is enough evidence that the harms associated with economic and financial transactions are crimes that should be of concern to the international community. The severity of injury to human rights that result from harmful economic practices justifies the addition of a crime under the ICC jurisdiction to prosecute those most responsible for these harms.

The perpetrators of the crimes associated with harmful economic activities should include states and non-state actors, especially corporations. As discussed earlier, for corporations to be held accountable for human rights abuses, a conceptual shift is required. This change is a paradigm shift that acknowledges and codifies the idea that non-state actors can be human rights duty bearers and the direct subjects of criminal law.[13]

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[10] M. Perry The Morality of Human Rights (2013) 50 San Diego Law Review 775, 778.
[11] R. McCorquodale and R. Fairbrother Globalisation and Human Rights (1999) 21 Human Rights Quarterly 731, 743.
[12] ibid 748.
[13] Clapham in a paper entitled, Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups (2008) has written that the Universal Declaration of Human Rights (UDHR), through articles 40 and 29(2) provides for duties to respect human rights to be found in society, the state, groups and individuals. Van den Herik and Ceric (2015), however, indicate that aside from the preamble and provisions within the UDHR, which is a non-binding instrument, there are no international covenants that include provisions for correlative private duties.

Unlike international human rights law, international criminal law does offer opportunities for bringing corporations into the accountability loop. The duty holder in international criminal law is the individual or natural person. Therefore, the paradigm shift from a natural person to a legal person as the subject of law in international criminal law is entirely possible. The Nuremberg and Tokyo Criminal Tribunals laid the basis for corporate criminal liability with the effect that under international criminal law, there is an extraterritorial exercise of jurisdiction over individuals. Individuals linked to corporations are also already under the jurisdiction of the ICC.[14] As Slye suggested, the ICC could also become the vehicle to 'reassert' the veil of organizational responsibility for international crimes.[15] I shall discuss arguments for an additional crime under the ICC jurisdiction, and then I shall discuss non-derivate liability for corporations next.

An Additional Crime of Concern to the International Community

The Evolving Consensus on Subject Matter Jurisdiction of the ICC

States' governments established the International Criminal Court to facilitate international cooperation and enhance the prosecution and prevent crimes of international concern. For jurisdiction, the state parties to the statute agreed that the ICC jurisdiction would be solely on the crimes described as 'most serious crimes of concern to the international community'.[16] The documents reviewed on the research, legal opinions, and the submissions of member states on what constitutes the 'most serious crimes of concern to the international community' indicate that the ratified Rome Statute has four crimes under its jurisdiction. Previous reports of the International Law Commission, the International Commission of Jurists, and the submission of member states suggest that the possible crimes that could have been considered to be under the jurisdiction of the ICC could have been much broader.

After years of negotiations, the uncomfortable consensus reached at the end of the Diplomatic Conference in Rome was that the ICC's subject matter jurisdiction would be the four core crimes defined as international crimes. The agreement on these crimes facilitated a Rome Statute wherein all State Parties to the statute recognized their inherent jurisdiction. State Parties, therefore, also accepted that they had a responsibility to prosecute individuals suspected of perpetrating these crimes either directly or as accomplices. Such prosecution would be done at the municipal level, failing which the ICC would do the prosecution of perpetrators in the Hague.

The Crimes Under the Jurisdiction of the ICC

The four crimes that the ICC has jurisdiction over the most serious crimes are genocide, crimes against humanity, war crimes, and crimes of aggression.

[16] International Law Commission Draft Statute for an International Criminal Court with Commentaries 1994 UN Doc , in Yearbook of the International Law Commission, Vol II, Part two (1994) 27.

The nexus between gravity and power allowed for agreement on the four horses of the apocalypse.

The Core ICC Crimes as International Crimes

Terje Einarsen, in a paper exploring the concept of Universal Crimes, writes that universal crimes are those crimes that are so grave that they 'shock the consciousness of human beings'.[17] This nexus between gravity and universal crimes is reflected in the preamble to the ratified Rome statute as 'atrocities that deeply shock the conscience of humanity.'[18] Einarsen further opines that crimes that shock the consciences of humanity and societies must also be protected by the international community's norms and institutions.[19]

In the context of adding crimes under the jurisdiction of the ICC, the following definition of international crimes offered by Einarsen is useful:

> Universal crimes are certain identifiable acts that constitute grave breaches of rules of conduct usually committed, organized, or tolerated by powerful actors. According to contemporary international law, they are punishable whenever and wherever they are committed; and that requires prosecution and punishment through fair trials, or in exceptional cases, some other kind of justice, somewhere at some point.[20]

In developing his definition of international crimes, Einarsen undertook a detailed literature review on the subject by leading international criminal law scholars. Einarsen's study included the writings of Zahar and Sluiter, Cassesse, Werle, Bassiouni, Schabas, and Cryer.[21] Schabas and Cryer's writings, as cited by Einarsen, are particularly instructive in discussing the criteria for international crimes. Schabas writes that the reference in the ICC preamble on the notion of the 'most serious crimes' and 'grave crimes' suggests a qualitative criterion for inclusion of crimes for inclusion under the jurisdiction of the Rome Statute.[22] For Schabas, within the context of the ICC, the precise definitions of the gravity or seriousness of crimes were not as important as considering whether such crimes are effectively prosecuted at national levels.

The implication of the suggestion by Schabas is that a crime ceases to be one that has to be of concern to international justice if it is effectively prosecuted at national levels. The stance taken by Schabas is contradicted by the ICC's Office of the Prosecutor that regarded the introduction of the principle of complementarity to be one that would make the ICC more effective. The effectiveness is measured by the willingness and abilities of State Parties to prosecute people accused of the core crimes in national jurisdictions.[25] In essence the principle of complementarity numerically expands the potential jurisdictions of the ICC to every State Party.

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[17] Terje Einarsen (Note 46 above) 23.
[18] Ibid.
[19] ibid 62.
[20] ibid 123.
[21] ibid 150 – 163.
[22] Ibid 156.
[23] Ibid 156.
[24] Morten Bergsmo Informal Expert Paper: The Principle of Complementarity in Practise ICC-OTP (2003) 4. Available at www.icc-cpi.int

The principle of complementarity was not intended as a means to exclude or include certain serious crimes from the jurisdiction of the ICC.

The issue as raised by Schabas is interesting. However, the United States (US) opposed direct criminal liability for corporations under the ICC jurisdiction based on the principle of complementarity. The US argued that the weak national jurisdictions dealing with non-derivative corporate criminal liability within the context of the principle of complementarity would render its inclusion in the ICC statute unworkable. The US argument is the opposite of that offered by Schabas but indicates that political considerations rather than purely legal arguments may have been at play. [25]

A discussion on the addition of a possible new crime under ICC jurisdiction needs to be concerned with the issues of 'gravity' and the harmful impacts on people of possible acts and commissions. Such consideration will allow for an assessment of whether the proposed crime linked to harmful economic systems meets the competing requirements based on gravity, the legal basis for its criminalization based on international legal prescripts. The negotiations on the ICC's material jurisdiction resulted in a consensus, which Schabas summarises as 'the court is designed to try nothing but crimes of extreme gravity and the most heinous offenders'.[26] Einarsen writes that the necessary and sufficient conditions for a crime to be of concern to the international community are to contain an inherent gravity clause. He cites Article 8 bis of the revised ICC statute, which deals with the crime of aggression to illustrate the elements of gravity–'to qualify as [a crime of aggression] an act of aggression must by its character, gravity, and scale, constitute a manifest violation of the Charter of the United Nations.[27]

The Gravity of Crimes that Contribute to Poverty and Permanent Damage to the Environment

Given the above discussion, it is therefore imperative to outline just how 'grave' the impacts of poverty and permanent damage to the environment are. At the beginning of this paper, I indicated that approximately 21,000 people die every day from hunger-related causes, which amounts to more than 7.5 or amounts to 7.665 million people per annum every year. Also, environmental-related illnesses caused by polluted water, deforestation, and environmentally damaging agricultural processes kill the equivalent of a jumbo jet full of children every 30 minutes.[28] The consequences of harmful economic practices are even direr for children based on reports from the United Nations Children's Fund (UNICEF). Approximately 22000 children die every day due to poverty-related illnesses and hunger due to poverty.

[25] The issue of non-derivative corporate liability is discussed in more detail in the next chapter.
[26] William Schabas An introduction to the International Criminal Court Cambridge University Press (2004) 167.
[27] Terje Einarsen (Note 46 above) 253.
[28] S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute 12.

To put the deaths of children due to causes attributable primarily to poverty into perspective: it could perhaps be better understood in the context of international criminal law where it can be compared with the three more prominent genocides. Approximately 11 million people were killed in the holocaust that essentially contributed to framing the modern definitions of the crime of Genocide and Crimes Against Humanity. Approximately 900 000 people were killed in the Rwandan Genocide and approximately 7000 people in the former Yugoslavia. These genocides and crimes against humanity gave rise to the ad-hoc criminal tribunals and helped frame the jurisprudence for the ICC's subject matter jurisdiction. These atrocities almost appear small compared to the deaths of 8.1 million children every year due to poverty-related causes.

The harms from climate change and related pollution are just as catastrophic. Kofi Annan's Global Humanitarian Forum has conservatively estimated that climate change causes 300,000 deaths a year and leaves over 325 million people vulnerable to the effects of climate change.[29] Leileveld et al. suggest that outdoor air pollution leads to 3.3 million deaths per year globally.[30] The World Health Organisation (WHO) estimates that indoor and outdoor pollution's combined effect contributes to approximately 7 million deaths globally per annum.[31]

These statistics indicate that poverty is the norm for most of the world's people and countries. The combined impacts of poverty and environmental damage contribute significantly to mortality rates across the globe. The mortality rates and other harms associated with poverty and environmental degradation disproportionately affect poor people in developing countries. People did not choose to live in poverty, and neither is it natural. Poverty, inequality, and permanent degradation of the environment result from powerful people and institutions' decisions and actions. (Intent)

Harmful economic systems have multiple features. The role that Illicit Financial Flows (IFFs) plays have recently rightfully come under scrutiny.

The Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment.

There have been previous efforts for adding an additional crime under the jurisdiction of the ICC. Academics and activists have developed drafts of possible crimes, which have been discussed at international forums, but thus far, they have not been submitted by any state part. For this paper, the Draft Crimes Against Present and Future Generations (CPFG) provide the most appropriate template for additional crime. Its stated objectives are to end impunity related to harmful economic systems, environmental damage, and corruption. The draft Crime Against Present and Future Generations was written by

[30] J. Lelieveld et al., 'The Contribution of Outdoor Air Pollution Sources to Mortality on a Global Scale'. Available at www.nature.com Accessed on 16 September 2015.
[31] WHO statistics available at www.who.org Accessed on 15 November 2015.

Sebastian Jodoin of the Center for International Sustainable Development Law and was commissioned by World Future Council.[32] The CPFG contains elements of the Crime of Ecocide[33] and suggests the criminalization of corruption. Therefore, it is not explicit enough on these matters, and I suggest amendments to include activities linked to IFFs and corruption. For the title of the actual proposed crime, both proposed 'Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment' and Jodoin's framing relating to 'present and future generations' is appropriate. A more precise and accurate formulation of the crime can be arrived at in follow up discussions and deliberations.

The CPFG as amended[34]

The Crimes Against Present and Future Generations template is the main body of the text in this section. Following the manner in which documents are amended through negotiations in multilateral organisations, changes to the original text will be denoted as follows:

Additions will be bracketed and in italics.

Deletions will be struck through and in bold font.

Proposed changes to the text will be explained in footnotes.

1. Crimes against Present and Future Generations means: any of the following acts within any sphere of human activity including, inter alia political, military, economic, (social) cultural, or scientific activities, when committed with the knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of (livelihood and) survival of any identifiable group or collectivity. *(The CPFG seeks to prevent and end impunity crimes associated with the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, tax evasion, tax avoidance and tax competition that have the effect of depriving states with the resources to reduce poverty to provide adequate health, social and other services that would enhance the well-being of its people):*[35]

(a) Forcing (through public policy, business policy, and practice) any members of any identifiable group or collectivity to work or live-in conditions that seriously endanger their health or safety, including forced labor (enforced unpaid labor), (wages below minimum wages rates as legislated by states), enforced (sex work) and human trafficking;[37]

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[32] S. Jodoin (Note 47 Above).
[33] Read A. Gray, The International Crime of Ecocide (1990) CWSL Scholarly Commons.
[34] S. Jodoin (Note 47 Above).
[35] Based on preambular paragraph 3 of the United Nations Convention Against Corruption (2003).
[36] Original footnote as used by Jodoin to explain the term 'any identifiable group or collectivity': The expression "any identifiable group or collectivity" means any civilian group or collectivity defined based on geographic, political, racial, national, ethnic, cultural, religious, or gender grounds or other grounds that are universally recognized as impermissible under international law.
[37] The additions of measures related to wages are central to efforts that seek to reduce the impacts of harmful economic systems. The insertion of the word 'sex work' as opposed to prostitution is based on personal preference. The terms' prostitution' and 'sex work' are subject to intense debate internationally based on ideological differences in women's rights and agency concerning sex work.

(b) Unlawfully appropriating or acquiring the public or private resources and property of members of any identifiable group or collectivity, including the large-scale embezzlement, misappropriation, or other diversions of such resources or property by a public official;

(c) The bribery of national public officials, foreign public officials and officials of public international organizations and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official.[38]

(d) Trading in influence, money laundering of the proceeds from corruption; and the concealment of corrupt practice through accounting and book-keeping offenses; the abuse of functions and illicit enrichment by public officials, private citizens and legal persons.[39]

(e) Bribery in the private sector when committed intentionally in the course of economic, financial, and commercial activities).[40]

(d) Deliberately depriving members of any identifiable group or collectivity of objects indispensable to their survival, including by impeding access to water and food sources, destroying or severely depleting water and food sources, or contaminating water and food sources by harmful organisms or pollution;

(e)Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner;

(f) Imposing measures that seriously endanger the health of the members of any identifiable group or collectivity, including by impeding access to health services, facilities, and treatments, withholding or misrepresenting information essential for the prevention or treatment of illness or disability, or subjecting them to medical or scientific experiments of any kind which are neither justified by their medical treatment nor carried out in their interest;

g) Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational, and higher education;

(h) Causing ecocide, meaning widespread, long-term, and severe damage to the natural environment, including by destroying an entire species, sub-species, or ecosystem;

[38] Based on articles 15, 16, and 17 of the UN Convention Against Corruption (2003).
[39] Based on Articles 18, 19, 20, and 21 of the UN Convention Against Corruption (2003). The reference to legal persons is based on the general reference to legal persons' liability as defined by article 26 of the Convention Against Corruption.
[40] Based on article 21 of the Convention Against Corruption (2003).

(i) Polluting air, water or soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;[41]

(j) Other acts of a similar character gravely imperiling the health, safety, or means of survival of members of any identifiable group or collectivity;

(k) Any of the above acts which cause serious, widespread, and long-term harm to human health and future generations of an indiscriminate and uncontrollable nature.

2. Crimes Against Future Generations shall also include any acts which cause, or have a strong possibility of causing, any of the effects identified in Section 1 (a) – (k) and undertaken without due diligence as to the probability of such effects (precautionary principle).

While there may be scope to include other aspects of harmful economic systems, permanent damage to the environment and corruption, the elements included in the draft crime outlined above are more likely to find favor. I conclude this point based on the fact that almost all of the elements are based on existing conventions, soft law, and treaties. Together with the apparent gravity of the outcomes of policies and practices associated with the harmful economic systems, damage to the environment, the additional crime to be included, as part of the subject matter jurisdiction of the ICC, would provide the basis for effective negotiations by state parties to the ICC. Detailed work on the elements of the crimes outlined above would need to be done but are outside this paper's scope.

Including the Liability of Legal Persons within the Jurisdiction of the ICC

As discussed in Section II, juristic persons may not be the subjects of International Law, including International Criminal Law. However, their inclusion has been on the international community's agenda for decades. The reason for this is that all of the international crimes, including the proposed crime as proposed in this paper, agree on the premise that powerful individuals, states, and institutions generally perpetrate these crimes. At the very least, there is the recognition that powerful individuals, states, and institutions facilitate the commission of international crimes through their control of economic, financial, military, and political resources. The centrality of powerful actors in the commission of international crimes was core to Einarsen's attempts to define Universal Crimes:

> Universal Crimes are individually identifiable acts that constitute grave breaches of rules of conduct: and that committed, organized or tolerated by powerful actors: and that, according to current international law, is punishable whenever and wherever they are committed: and that require prosecution and punishment through fair trials, or in exceptional cases, some other kind of justice, somewhere at some point.[42]

[41] The use of the word 'unlawfully' in the original CPFG template is not helpful as pollution may take place lawfully and be permitted by states.
[42] Terje Einarsen (note 46 above) 22.

I contend that all the powerful actors capable of being involved in the commission of international crimes should be liable for prosecution under the ICC. A rolling text on individual criminal liability prepared by the Preparatory Committee chaired by Adrian Bos in the run-up to the Rome Diplomatic Conference provides a window to the debate on the liability of legal persons.[43] The rolling text, hereafter referred to as 'Rolling Text X', was then dealing with individual criminal liability under Article 23. Paragraph 5 of Rolling Text X reads as follows:

> When a natural person has been convicted by the court, the court shall also have jurisdiction over the legal persons or other organisations for criminal conduct under this statute if:
>
> - The convicted person was an agent, representative or an employee of that legal person or organisation, and,
>
> - The crime was committed by the natural person acting on behalf of [and with the consent or acquiescence of] [and with the assent of] that legal person or organisation [and][or] in the course of its regular activities.
>
> - For the purposes of this statute, 'legal persons or other organisations' mean corporations or private organisations, whose objective is for the private gain. [44]

The Rolling Text X hints at the opposition to the inclusion of corporations made by the many delegations led by the United States, based on the argument that it would render the principle of complementarity unworkable. The premise of this argument was that corporate criminal liability was not yet universally recognized by states.

The arguments for excluding legal persons from non-derivate liability under the ICC are essentially political and further explored.

In a paper that deals specifically with the potential of international law to prosecute corporations criminally, Clapham questions the principle of *'societas delinquere non protest'*, which means that enterprises cannot be criminal.[45] Clapham further suggests that the Adhoc Criminal Tribunals and the International Criminal Court that focus on individuals as their jurisdictions' subjects can be adjusted to exercise jurisdiction over legal persons, including corporations. Clapham emphasizes the effectiveness principle and argues that if international law is to be effective, all actors, whether individuals or non-state actors, should be prohibited from assisting states in violating human rights principles.[46] The effectiveness principle holds true for all the crime areas under the ICC jurisdiction. However, it is imperative concerning the recommended crime where the primary perpetrators are most likely to be MNCs.

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[43] ICC Preparatory Committee, Rolling Text on Article 23 (undated). Available at PURL:https://www.legal-tools.org./doc/f77746. Accessed on 29 September 201.
[44] ibid para 5.
[45] A Clapham' Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 899. Accessed at http://jicj.oxfordjournals.org/cgi.
[46] Ibid 901.

The current international legal framework limits corporate criminal liability to being a participant or, more specifically, being complicit in the commission of crimes. This reliance on complicity as the means to hold corporations accountable is linked to the practice in international law that states are the subjects of human rights obligations and individuals the subjects of criminal liability.

The elements of complicity indicate the limits of using international criminal law to hold corporations accountable even as accomplices for crimes of concern to the international community. As suggested by Schabas, an arms supplier or the Managing Director of an airline that transports prohibited weapons can only be charged if there is a direct and substantive link with the commission of crimes committed that are regarded as international and under the jurisdiction of the ICC.

While participation in international crimes may be carried out through a corporate shell, the current legal framework will only prosecute individuals associated with the company. An example of this is that the supplier of Zyklon B was convicted of war crimes. At the same time, the manufacturers of Zyklon B successfully pleaded ignorance of the intended use of the product by the end-user. While this piercing of the corporate veil is important to prosecute those most responsible, it also ironically leaves the corporation to continue to produce and participate in international crimes.

Schabas and the ICJ are of the view that legal reform should take place to prosecute the corporation itself. Failure to do so will leave corporate complicity at the level of being only theoretically possible. Ironically, in contrast to some delegations' negotiation stance concerning the principle of complementarity, it may provide the solution to this problem. The principle of complementarity in the ICC context would allow state parties to enable national legal systems to proceed with legal persons' prosecutions, especially corporations. In contrast, legal persons in states that are unable and unwilling to prosecute could be prosecuted in the Hague. Those states without the requisite laws would be patently unable, and this would also open the possibility for states with the requisite legal systems to exercise universal jurisdiction.

While this is ideal, I would propose the formulation as contained in what I refer to as Rolling Text X in the paper, is used as a means to ensure that legal person that are perpetrators in relation to crimes associated with harmful economic systems, permanent damage to the environment and corruption, are brought to book. The formulation of Rolling Text X allows for ICC to have jurisdiction over a legal person if the convicted natural person was an agent, representative, or an employee of that legal person. It also confers ICC jurisdiction over a legal person if the convicted natural person acting on behalf of, with the consent of that legal person's assent. This formulation would allow for the prosecution of a legal person associated with a natural person convicted for crimes associate with harmful economic systems, permanent damage to the environment, and corruption.

In Sum

The grave consequences on humanity as a result of the harmful economic systems are undeniable. The statistics related to mortality

rates, illness, poverty, and deprivation cannot be disputed. In terms of scale, the harms resulting from permanent damage to the environment, a process that gives rise and sustain poverty and corruption, dwarf those of some of the most horrendous genocides and other crimes of concern to the international community. Based on its grave negative impacts, the cluster of crimes associated with the policies and 'normal' operations of harmful economic practices earn the dubious status as crimes that should shock the international community's consciousness. If the global community is serious about ending global impunity by powerful people and institutions that engage in actions or facilitate the actions they know would lead to depriving people of life-saving livelihood opportunities--acts that lead to widespread death and destruction of people and the environment, then their acts should be criminalized.

Given the relatively weak governance systems in many countries, especially the developing world where people are most affected by the consequences of harmful economic systems, the ICC offers a reasonable option for the global community to hold those most responsible to account. Therefore, this paper sought to make a case for adding to the ICC's menu of crimes of concern to the international community that deny people social, cultural, and economic rights. I have argued that legal persons and in particular, MNCs should be held criminally liable for such crimes given that powerful institutions and individuals carry out the perpetrators of the suggested crimes associated with harmful economic systems. Given the anticipated difficulty gaining state parties' agreement to the ICC applying non-derivative liability for corporations, I have suggested that the formulation described in a document, which I refer to as Rolling Text X provides a reasonable compromise. This approach may be acceptable to most state parties. Rolling Text X was a product of the negotiating process towards the finalization of the Rome Statute. It makes provision for corporations to be prosecuted. Notably, this prosecution occurs if a natural person acting as an agent of that corporation is convicted by the ICC for any crime under the ICC jurisdiction.

I have used differing terminologies for the additional cluster of crimes to be included under the ICC jurisdiction. That being said, the formulation of 'Crimes Against Present and Future Generations' (CPFG) as offered by Sebastian Jodoin of the Center for International Sustainable Development Law on behalf of the World Futures Council is perhaps the most relevant. I used the CPFG as a template and amended it to include crimes related to corruption and Illicit Financial Flows (IFFs). As is the case with the World Futures Council, this paper should be seen as a contribution to the debate on seeking justice for crimes associated with harmful economic systems.

I did not offer a definitive nomenclature for the proposed crimes. This identifying terminology can be established through negotiations by state parties and the inevitable additional investigations done as part of such negotiations.

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[22] Resolution Adopted by the Human Rights Council on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 UN Doc (6 July 2011).

[23] Rome Statute of the International Criminal Court, ICC (17 July 1998).
S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute.
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[24] UN Inter Agency Group Levels and Trends in Child Mortality Report 2010 UNICEF (2010).

[25] United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court at the 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome Italy,(July 1998.) UN Doc A/CONF.183/2.

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Modificar el Estatuto de Roma y los Pueblos: Crímenes contra las Generaciones Presentes y Futuras

Por Zane Dangor

Traducción de Inglés a Español por Julie Noreene Bautista

RESUMEN

El Estatuto de Roma, que estableció la Corte Penal Internacional (CPI), buscaba poner fin a la impunidad asociada con los crímenes masivos. Después de décadas de negociaciones en la comunidad internacional, la CPI surgió para establecer un tribunal superior que pueda investigar y enjuiciar a las personas más responsables de los crímenes que preocupan a la comunidad internacional.[1] Estos crímenes incluyen genocidio, crímenes de guerra, crímenes contra la humanidad y crímenes de agresión.

Palabras clave: conducta corporativa, obligaciones de derechos humanos de las corporaciones, CPI, crímenes internacionales y daño permanente al medio ambiente, pobreza y daños al medio ambiente, ley penal internacional y daños al medio ambiente, sistemas económicos dañinos

Una brecha significativa en el Estatuto de Roma es que no se ocupa de los crímenes masivos o los daños cometidos por las corporaciones. La conducta empresarial y su papel en los abusos de los derechos humanos y las acciones que generan y mantienen la pobreza han sido objeto de un nuevo escrutinio. Las Naciones Unidas y las organizaciones defensoras de los derechos humanos se han centrado en el uso corporativo y apoyo a la explotación laboral en las industrias de calzado y confección, el daño permanente al medio ambiente y la destrucción de las capacidades de subsistencia de las personas a través de las industrias extractivas.[2] El derecho penal internacional está siendo investigado como una instrumento de ejecución legítimo para cumplir las obligaciones de derechos humanos de las empresas y como un medio para reducir la impunidad de las empresas.[3]

[1] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst An Introduction to International Criminal Law and Procedure (2010) 146.
[2] D. Lima Business and International Human Rights (2009) Heinonline 18,18.
[3] L Van Den Herik and J Cernic: Regulating Corporations under International Law: From Human Rights to International Law and Back (2010) Heinonline 720, 725.

Los estudios han indicado que aproximadamente 21.000 personas mueren todos los días por causas relacionadas con el hambre. Este número de muertes supera los 7,5 millones de personas al año. La pobreza es la principal causa del hambre, sustentada por sistemas económicos dañinos que estimulan la pobreza y la desigualdad a través de los sistemas económicos y políticos globales ordinarios y aceptados.

Los sistemas y prácticas económicas dañinas promueven la degradación ambiental en gran escala que es responsable de la propagación de enfermedades mortales, dando lugar a nuevas enfermedades mortales.[4] Las enfermedades relacionadas con el medio ambiente causadas por el agua contaminada, la deforestación y los procesos agrícolas que ambientalmente dañinos matan al equivalente de un jumbo jet lleno de niños cada 30 minutos.[5]

La pobreza y las muertes masivas relacionadas con el medio ambiente no se consideran parte de los mayores delitos que preocupan a la comunidad mundial. Aunque en escala, superan las cifras causadas por genocidios, crímenes de guerra y crímenes contra la humanidad. Este nivel de escala es porque los individuos y las instituciones que impulsan los sistemas económicos dañinos generalmente están dentro del bloque más poderoso de países del mundo desarrollado y secciones del mundo en desarrollo. La política global y el ejercicio del poder a través de instituciones internacionales puede ser una de las razones por la que los daños asociados con el proceso de empobrecimiento y destrucción del medio ambiente no están bajo la jurisdicción de la CPI.

La Teoría de los Derechos Humanos y las Barreras Conceptuales para Criminalizar los Daños Relacionados con las Actividades Económicas Nocivas y la Responsabilidad Penal Corporativa

Ley Internacional sobre los Derechos Humanos basada en el Estado

"Las causas fundamentales de la situación actual de las empresas y los derechos humanos radican en las brechas de gobernabilidad creadas por la globalización, entre el alcance y el impacto de las fuerzas y los actores económicos, y la capacidad de las sociedades para gestionar sus consecuencias adversas ".[6]

La declaración anterior de John Ruggie, el relator especial de la ONU sobre empresas y derechos humanos, sugiere que la globalización ha contribuido a que las corporaciones poderosas operen en estados débiles, lo que ha inducido brechas en la gobernabilidad en materia de derechos humanos. La brecha de gobernabilidad en relación con la responsabilidad de las empresas por los abusos de los derechos humanos está entrelazada con la historia de la ley internacional de los derechos humanos.[7]

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[4] L. Van Derslice Harmful Economic Systems as a Cause of Hunger and Poverty (2015) 34 disponible en www.world hunger.org./harmfuleconomicsystems.htm.
[5] S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute.
[6] J. Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2008) UN DOC A/HRC/8/5 1,12.
[7] P. Muchlinksi' Human Rights and Multinationals: Is there a Problem' in International Affairs (2001) HeinOnline 31, 33.

Los orígenes de la ley internacional de los derechos humanos fueron, posiblemente, una teoría de los derechos basada en el mercado, y con el primer derecho humano que surgió fue el derecho a la propiedad privada. Muchlinksi sostiene que este papel protector temprano sobre las corporaciones enmarca la barrera contextual para extender las obligaciones de derechos humanos a las corporaciones.

Los diplomáticos formalizaron la arquitectura internacional de derechos humanos basada en el estado después de la Segunda Guerra Mundial para proteger a las personas de los excesos del poder público estatal.[8] Este enfoque en el estado sirvió para cristalizar la idea dentro de ley internacional de derechos humanos basada en el estado de que los Estados eran los únicos garantes de derechos humanos.[9] El fortalecimiento de la globalización económica en las décadas de 1970 y 1980 consolidó esta barrera conceptual a través de medidas más evidentes para proteger los intereses comerciales. La hegemonía de ideas y políticas vinculadas al libre comercio le ha dado a las corporaciones más poder del que tuvieron en cualquier momento de la historia.

La barrera conceptual centrada en el estado con respecto a la responsabilidad de los derechos humanos y su ideología de apoyo subyacente también ha definido de manera estricta lo que constituyen los derechos humanos. Después de la Segunda Guerra Mundial, la indignación moral colectiva internacional condujo al fortalecimiento de los derechos políticos y civiles como derechos legalmente exigibles.[10] Sin embargo, gran parte del mundo desarrollado sigue cuestionando si los derechos sociales y económicos son derechos humanos genuinos. McCorquodale y Fairbrother sugieren que el reconocimiento explícito de los derechos especialmente económicos como un derecho humano fortalecería los argumentos de que las entidades comerciales, como actores poderosos capaces para impactar positiva o negativamente el cumplimiento de estos derechos, deberían ser garantes directos de obligaciones.[11]

Superar el obstáculo teórico para la responsabilidad corporativa por los derechos humanos sigue siendo el objeto de importantes debates y negociaciones en el ámbito internacional.

Ley Penal Internacional basada en el Estado

La limitación de la ley penal internacional basada en el estado radica en el alcance limitado de los crímenes internacionales que preocupan a la comunidad internacional. Se excluyen los delitos asociados con abusos a los derechos humanos con un nexo en los derechos económicos, sociales y culturales. La base de esta exclusión se debe principalmente a los mismos factores que han dado lugar a que los Estados sean tratados como los principales responsables de los derechos humanos. Las brechas en la

[8] L Van Den Herik and J Cernic (Note 4 above) 727.
[9] Ibid 734.
[10] M. Perry The Morality of Human Rights (2013) 50 San Diego Law Review 775, 778.
[11] R. McCorquodale and R. Fairbrother Globalisation and Human Rights (1999) 21 Human Rights Quarterly 731, 743.

aplicación de la ley nacional e internacional en relación con los abusos de los derechos humanos por multinacionales también permiten la normalización de políticas y operaciones económicas nocivas que perjudican a las personas y su medio ambiente. Estas políticas incluyen políticas económicas globalizadas que a menudo resultan en mayores niveles de desempleo, pobreza y menor acceso a necesidades básicas como agua y servicios críticos como salud y educación.[12] Hay pruebas suficientes de que los daños asociados a las transacciones económicas y financieras son delitos que deberían preocupar a la comunidad internacional. La gravedad de las lesiones a los derechos humanos que resultan de prácticas económicas nocivas justifica la inclusión de un delito bajo la jurisdicción de la CPI para procesar a los principales responsables de estos daños.

Los perpetradores de los delitos asociados con actividades económicas nocivas deben incluir actores estatales y no estatales, especialmente corporaciones. Como se discutió anteriormente, para que las corporaciones sean responsabilizadas por los abusos de los derechos humanos, se requiere un cambio conceptual. Este cambio es un cambio de paradigma que reconoce y codifica la idea de que los actores no estatales pueden ser garantes de derechos humanos y sujetos directos del derecho penal.[13]

A diferencia del derecho internacional de los derechos humanos, el derecho penal internacional ofrece oportunidades para incorporar a las empresas en el círculo de la rendición de cuentas. El responsable en la ley penal internacional es el individuo o la persona física. Por tanto, el cambio de paradigma de una persona física a una persona jurídica como sujeto de ley en el ley penal internacional es totalmente posible. Los Tribunales Penales de Nuremberg y Tokio sentaron las bases para la responsabilidad penal corporativa con el efecto de que, según el derecho penal internacional, existe un ejercicio extraterritorial de jurisdicción sobre las personas. Las personas vinculadas a empresas también están ya bajo la jurisdicción de la CPI.[14] Como sugirió Slye, la CPI también podría convertirse en el vehículo para "reafirmar" el velo de la responsabilidad organizacional por crímenes internacionales.[15] Discutiré los argumentos para un crimen adicional bajo la jurisdicción de la CPI, y luego discutiré la responsabilidad no derivada de las corporaciones.

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[12] ibid 748.

[13] Clapham en un artículo intitulado, Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups (2008) ha escrito que la Declaración Universal de Derechos Humanos (UDHR, por sus siglas en inglés), por medio de los artículos 40 y 29(2) contempla que las obligaciones a respetar los derechos humanos se encuentran en la sociedad, el estado, grupos e individuos. Van den Herik y Ceric (2015), sin embargo, indican que aparte del preámbulo y disposiciones dentro de la Declaración Universal de Derechos Humanos que es un instrumento no obligatorio, no hay convenios internacionales que incluyan disposiciones para responsabilidades privadas correlativas.

[14] L Van Den Herik and J Cernic (Note 4 Above) 740-743.

[15] R Slye Corporations, Veils and International Criminal Liability (2008) 33 Brook J. International Law 955, 965.

Un Crimen Adicional que Concierne a la Comunidad Internacional

El Consenso en Evolución sobre la Jurisdicción en materia de la CPI

Los gobiernos de los estados establecieron la Corte Penal Internacional para facilitar la cooperación internacional y mejorar el enjuiciamiento y prevenir crímenes de preocupación internacional. Por jurisdicción, los estados interesados del estatuto acordaron que la jurisdicción de la CPI sería únicamente sobre los crímenes descritos como "los crímenes más graves que preocupan a la comunidad internacional".[16] Los documentos examinados sobre la investigación, las opiniones legales y las presentaciones de los Estados miembros sobre lo que constituyen los "crímenes más graves que preocupan a la comunidad internacional" indican que el Estatuto de Roma ratificado tiene cuatro crímenes bajo su jurisdicción. Informes anteriores de la Comisión de Derecho Internacional, la Comisión Internacional de Juristas y la presentación de los Estados miembros sugieren que los posibles crímenes que podrían haber sido considerados bajo la jurisdicción de la CPI podrían haber sido mucho más amplios.

Después de años de negociaciones, el incómodo consenso alcanzado al final de la Conferencia Diplomática en Roma fue que el objeto de CPI serían los cuatro crímenes básicos definidos como crímenes internacionales. El acuerdo sobre estos crímenes facilitó un Estatuto de Roma en el que todos los Estados Interesados en el estatuto reconocieron su jurisdicción inherente. Por lo tanto, los Estados Interesados también aceptaron que tenían la responsabilidad de enjuiciar a las personas sospechosas de haber cometido estos delitos, ya sea directamente o como cómplices. Ese enjuiciamiento se haría a nivel municipal, de lo contrario, la CPI se encargaría de procesar a los perpetradores en la Haya.

Los Crímenes bajo la Jurisdicción de la CPI

Los cuatro crímenes sobre los cuales la CPI tiene jurisdicción son genocidio, crímenes contra la humanidad, crímenes de guerra y crímenes de agresión. El nexo entre la gravedad y el poder permitió un acuerdo sobre los cuatro caballos del apocalipsis.

Los Principales Crímenes de la CPI como Crímenes Internacionales

Terje Einarsen, en un artículo que explora el concepto de crímenes universales, escribe que los crímenes universales son aquellos crímenes que son tan graves que "sobresaltan la conciencia de los seres humanos".[17] Este nexo entre la gravedad y los crímenes universales se refleja en el preámbulo del estatuto de Roma ratificado como 'atrocidades que sobresaltan profundamente la conciencia de la humanidad'.[18] Einarsen opina además que los crímenes que sobresaltan la

[16] International Law Commission Draft Statute for an International Criminal Court with Commentaries 1994 UN Doc, en el anuario de la Comisión Legal Internacional, Vol II, Parte dos (1994) 27.
[17] Terje Einarsen (Nota 46 arriba) 23.
[18] Ibid.

conciencia de la humanidad y las sociedades también deben ser protegidos por la normas e instituciones de la comunidad internacional.[19]

En el contexto de agregar crímenes bajo la jurisdicción de la CPI, la siguiente definición de crímenes internacionales ofrecida por Einarsen es útil:

Los delitos universales son actos determinados identificables que constituyen graves brechas de las normas generalmente asignadas, organizadas o toleradas por actores poderosos. Según la ley internacional contemporánea, son punibles cuando y donde se cometen; y eso requiere enjuiciamiento y castigo a través de juicios justos, o en casos excepcionales, algún otro tipo de justicia, en algún lugar en algún momento.[20]

Al desarrollar su definición de crímenes internacionales, Einarsen emprendió una revisión detallada de la literatura sobre el tema por académicos principales de la ley penal internacional. El estudio de Einarsen incluyó los escritos de Zahar y Sluiter, Cassesse, Werle, Bassiouni, Schabas y Cryer.[21] Los escritos de Schabas y Cryer, citados por Einarsen, son particularmente instructivos para discutir los criterios para crímenes internacionales. Schabas escribe que la referencia en el preámbulo de la ICC a la noción de "crímenes más graves" y "crímenes graves" sugiere un criterio cualitativo para la inclusión de crímenes para su inclusión bajo la jurisdicción del Estatuto de Roma.[21] Para Schabas, en el contexto de la CPI, las definiciones precisas de la gravedad de los crímenes no eran tan importantes como considerar si esos crímenes se enjuiciaban efectivamente a nivel nacional.

La implicación de la sugerencia de Schabas es que un crimen deja de ser un delito que debe ser motivo de preocupación para la justicia internacional si se enjuicia efectivamente a nivel nacional.[23] La postura adoptada por Schabas se contradice con la Oficina del Fiscal de la CPI, que consideraba que la introducción del principio de complementariedad haría que la ICC fuera más eficaz. La eficacia se mide por la voluntad y la capacidad de los Estados Interesados para procesar a las personas acusadas de los delitos fundamentales en las jurisdicciones nacionales.[24] En esencia, el principio de complementariedad expande numéricamente las jurisdicciones potenciales de la CPI a cada Estado Interesado.

La cuestión planteada por Schabas es interesante. Sin embargo, Estados Unidos opuso la responsabilidad penal directa de las empresas bajo la jurisdicción de la CPI basado en el principio de complementariedad. Estados Unidos argumentó que la debilidad de las jurisdicciones nacionales encargadas de la responsabilidad penal corporativa no derivada en el contexto del principio de complementariedad harían inviable su inclusión en el estatuto de la CPI. El argumento de Estados Unidos es el opuesto al ofrecido por Schabas, pero indica que consideraciones políticas más que argumentos puramente legales pueden haber estado en juego.[25]

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[19] ibid 62.
[20] ibid 123.
[21] ibid 150 – 163.
[22] Ibid 156.
[23] Ibid 156.
[24] El artículo expert informal de Morten Bergsmo : The Principle of Complementarity in Practise ICC-OTP (2003) 4. Disponible en www.icc-cpi.int
[25] La cuestión de la responsabilidad corporativa no derivada se discute con mayor detalle en el siguiente capítulo.

Una discusión sobre la adición de un posible nuevo crimen bajo la jurisdicción de la CPI debe atenderse por las cuestiones de "gravedad" y los impactos dañinos sobre las personas de posibles actos y comisiones. Dicha consideración permitirá evaluar si el delito propuesto vinculado a sistemas económicos nocivos cumple con los requisitos en competencia basados en la gravedad, la base legal para su criminalización basada en prescripciones legales internacionales. Las negociaciones sobre la jurisdicción material de la CPI dieron como resultado un consenso, que Schabas resume como "la corte está diseñada para juzgar nada más que crímenes de extrema gravedad y los más atroces perpretadores".[26] Einarsen escribe que las condiciones necesarias y suficientes para que un crimen sea motivo de preocupación para la comunidad internacional deben contener una cláusula de gravedad inherente. Cita el artículo 8 bis del estatuto revisado de la CPI, que trata del crimen de agresión para ilustrar los elementos de la gravedad: 'calificar como [un crimen de agresión] un acto de agresión debe, por su carácter, gravedad y escala, constituir una violación manifiesta de la Carta de las Naciones Unidas.[27]

La Gravedad de los Delitos que Contribuyen a la Pobreza y el Daño Permanente al Medio Ambiente

Dada la discusión anterior, es imperativo describir que tan "graves" son los impactos de la pobreza y el daño permanente al medio ambiente. Al comienzo de este trabajo, indiqué que aproximadamente 21.000 personas mueren cada día por causas relacionadas con el hambre, lo que equivale a más de 7,5 o asciende a 7,665 millones de personas al año cada año. Además, las enfermedades relacionadas con el medio ambiente causadas por el agua contaminada, la deforestación y los procesos agrícolas que dañan el medio ambiente matan el equivalente a un jumbo jet lleno de niños cada 30 minutos.[28] Las consecuencias de las prácticas económicas nocivas son aún más graves para los niños según los informes del Fondo de las Naciones Unidas para la Infancia (UNICEF). Aproximadamente 22000 niños mueren cada día debido a enfermedades relacionadas con la pobreza y el hambre debido a la pobreza.

Para poner en perspectiva las muertes de niños por causas atribuibles principalmente a la pobreza: quizás podría entenderse mejor en el contexto del derecho penal internacional, donde se puede comparar con los tres genocidios más destacados. Aproximadamente 11 millones de personas murieron en el holocausto que esencialmente contribuyó a enmarcar las definiciones modernas del crimen de Genocidio y Crímenes de Lesa Humanidad. Aproximadamente 900 000 personas murieron en el genocidio de Ruanda y aproximadamente 7 000 personas en la ex Yugoslavia. Estos genocidios y crímenes de lesa humanidad dieron lugar a tribunales penales ad-hoc y ayudaron a enmarcar la jurisprudencia para la jurisdicción de la CPI sobre la materia. Estas atrocidades casi parecen pequeñas en comparación con las muertes de 8,1 millones de niños cada año debido a causas relacionadas con la pobreza.

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[26] William Schabas An introduction to the International Criminal Court Cambridge University Press (2004) 167.
[27] Terje Einarsen (Nota 46 arriba) 253.
[28] S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute 12.

Los daños del cambio climático y la contaminación relacionada son igualmente catastróficos. El Foro Global Humanitario de Kofi Annan ha estimado de manera conservadora que el cambio climático causa 300.000 muertes al año y deja a más de 325 millones de personas vulnerables a los efectos del cambio climático.[29] Leileveld y otros sugieren que la contaminación del aire exterior provoca 3,3 millones de muertes por año en todo el mundo.[30] La Organización Mundial de la Salud (OMS) estima que el efecto combinado de la contaminación interior y exterior contribuye a aproximadamente 7 millones de muertes en todo el mundo por año.[31]

Estas estadísticas indican que la pobreza es la norma para la mayoría de las personas y países del mundo. Los impactos combinados de la pobreza y el daño ambiental contribuyen significativamente a las tasas de mortalidad en todo el mundo. Las tasas de mortalidad y otros daños asociados con la pobreza y la degradación del medio ambiente afectan de manera desproporcionada a las personas pobres de los países en desarrollo. La gente no eligió vivir en la pobreza, y tampoco es natural. La pobreza, la desigualdad y la degradación permanente del medio ambiente son el resultado de las decisiones y acciones de personas e instituciones poderosas. (Premeditación)

Los sistemas económicos dañinos tienen múltiples características. El papel que desempeñan los flujos financieros ilícitos (IFF, por sus siglas en inglés) recientemente ha sido objeto de un legítimo escrutinio.

Los Crímenes de los Sistemas Económicos Nocivos y la Destrucción Deliberada del Medio Ambiente.

Ha habido esfuerzos previos para agregar un crimen *adicional* bajo la jurisdicción de la CPI. Académicos y activistas han elaborado borradores de posibles delitos, los cuales han sido discutidos en foros internacionales, pero hasta el momento, no han sido presentados por ninguna parte estatal. Para este documento, el Proyecto de Crímenes contra las Generaciones Presentes y Futuras (CPFG, por sus siglas en inglés) proporciona la plantilla más apropiada para delitos adicionales. Sus objetivos declarados son poner fin a la impunidad relacionada con sistemas económicos dañinos, daños ambientales y corrupción. El proyecto de Crimen contra las Generaciones Presentes y Futuras fue escrito por Sebastian Jodoin del Centro para el Derecho Internacional del Desarrollo Sostenible y fue encargado por el Consejo Mundial del Futuro.[32] El CPFG contiene elementos del crimen de ecocidio[33] y sugiere la criminalización de la corrupción. Por lo tanto, no es lo suficientemente explícito sobre estos temas, y sugiero enmiendas para incluir actividades vinculadas a los flujos financieros ilícitos y la corrupción. Para el título

[29] Foro Global Humanitario 'Anatomía de una Crisis Silenciosa' (Ginebra) 2015.
[30] J. Lelieveld y otros, 'The Contribution of Outdoor Air Pollution Sources to Mortality on a Global Scale'. Disponible en www.nature.com Fecha de acceso 16 de septiembre de 2015.
[31] Estadísticas de la OMS disponibles en www.who.org Fecha de acceso 15 de noviembre de 2015.
[32] S. Jodoin (Nota 47 arriba).
[33] Leer A. Gray, The International Crime of Ecocide (1990) CWSL Scholarly Commons.

del crimen propuesto real, tanto el propuesto "Crímenes de Sistemas Económicos Dañinos y la Destrucción Deliberada del Medio Ambiente" y el marco de Jodoin relativo a las "generaciones presentes y futuras" es apropiado. Se puede llegar a una formulación más precisa y exacta del crimen en futuras discusiones y deliberaciones.

El Proyecto de Crímenes contra las Generaciones Presentes y Futuras en su forma enmendada[34]

El modelo del proyecto de crímenes contra las generaciones presentes y futuras es el cuerpo principal del texto de esta sección. De acuerdo con la forma en que se modifican los documentos mediante negociaciones en organismos multilaterales, los cambios al texto original se denotarán de la siguiente manera:

> Las adiciones estarán entre corchetes y en cursiva.
>
> Las eliminaciones estarán tachadas y en negrita.
>
> Los cambios propuestos al texto se explicarán en notas a pie de página.

1. Crímenes contra las generaciones presentes y futuras significa: cualquiera de los siguientes actos dentro de cualquier esfera de la actividad humana, incluidas, entre otras, actividades políticas, militares, económicas, (sociales) culturales o científicas, cuando se cometan con el conocimiento de la probabilidad sustancial de sus graves consecuencias sobre la salud, la seguridad o los medios de (sustento y) supervivencia a largo plazo de cualquier grupo o colectividad identificable. *(El CPFG busca prevenir y acabar con los delitos de impunidad asociados a la transferencia de fondos de origen ilícito, derivados de actos de corrupción, incluyendo el lavado de fondos, la evasión fiscal, la elusión fiscal y la competencia fiscal que tienen el efecto de privar a los estados de los recursos reducir la pobreza para proporcionar servicios adecuados de salud, sociales y de otro tipo que mejoren el bienestar de su población)*[35]*:*

> (a) Forzar (a través de políticas públicas, políticas comerciales y prácticas) a cualquier miembro de cualquier grupo o colectividad[36] identificable a trabajar o vivir en condiciones que pongan en grave peligro su salud o seguridad, incluido el trabajo forzoso (trabajo forzado no remunerado), (salarios inferiores a tasas de salario mínimo según lo legislado por los estados), impuesto (trabajo sexual) y trata de personas;[37]

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[34] S. Jodoin (Nota 47 arriba).
[35] Con base en el párrafo preambular 3 de la Convención de las Naciones Unidas Contra la Corrupción (2003).
[36] Nota a pie original como la utilizó Jodoin para explicar el término 'cualquier grupo o colectividad identificable': La expresión "cualquier grupo o colectividad identificable" significa cualquier grupo o colectivo de civiles definido y basado en terrenos geográficos, políticos, raciales, nacionales, étnicos, culturales, religiosos, o de género u otros terrenos que son reconocidos universalmente como impermisible bajo la ley internacional.
[37] Las adiciones de medidas relacionadas a sueldos son esenciales para los esfuerzos que buscan reducir los impactos de sistemas económicos dañinos. La introducción de la palabra 'trabajo sexual' opuesto a prostitución se basa en una preferencia personal. Los términos 'prostitución' y 'trabajo sexual' son sujetos de gran debate internacional que se basan en diferencias ideológicas sobre los derechos de las mujeres y la agencia relacionada con el trabajo sexual.

(b) Apropiarse o adquirir ilegalmente los recursos públicos o privados y la propiedad de miembros de cualquier grupo o colectividad identificable, incluida la malversación a gran escala, la apropiación indebida u otras desviaciones de dichos recursos o propiedad por parte de un funcionario público;

c) El cohecho de funcionarios públicos nacionales, funcionarios públicos extranjeros y funcionarios de organizaciones internacionales públicas y funcionarios de organizaciones internacionales públicas, malversación, apropiación indebida u otro desvío de bienes por parte de un funcionario público.[38]

(d) Tráfico de influencias, lavado de dinero producto de la corrupción; y el encubrimiento de prácticas corruptas mediante delitos contables; el abuso de funciones y el enriquecimiento ilícito por parte de funcionarios públicos, ciudadanos privados y personas jurídicas.[39]

(e) Soborno en el sector privado cuando se cometa intencionalmente en el curso de actividades económicas, financieras y comerciales).[40]

d) Privar deliberadamente a los miembros de cualquier grupo o colectividad identificable de objetos indispensables para su supervivencia, incluso impidiendo el acceso a las fuentes de agua y alimentos, destruyendo o agotando gravemente las fuentes de agua y alimentos, o contaminando las fuentes de agua y alimentos con organismos nocivos o contaminación;

e) Desalojar por la fuerza a miembros de cualquier grupo o colectividad identificable de manera generalizada o sistemática;

(f) Imponer medidas que pongan en grave peligro la salud de los miembros de cualquier grupo o colectividad identificable, incluso impedir el acceso a servicios, instalaciones y tratamientos de salud, retener o tergiversar información esencial para la prevención o el tratamiento de enfermedades o discapacidades, o sometiendo a los experimentos médicos o científicos de cualquier tipo que no estén justificados por su tratamiento médico ni se realicen en su interés;

(g) Impedir que miembros de cualquier grupo o colectividad identificable accedan a la educación primaria, secundaria, técnica, vocacional y superior;

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[38] Con base en los artículos 15, 16, y 17 de la Convención de las Naciones Unidas en Contra de la Corrupción (2003).
[39] Con base en los artículos 18, 19, 20, y 21 de la Convención de las Naciones Unidas en Contra de la Corrupción (2003). La referencia a personas legales se basa en la referencia general a la responsabilidad de personas legales como se define en el artículos 26 de la Convención de las Naciones Unidas en Contra de la Corrupción.
[40] Con base en el artículo 21 de la Convención en Contra de la Corrupción (2003).

(h) Causar ecocidio, es decir, daños generalizados, a largo plazo y graves al medio ambiente natural, incluida la destrucción de una especie, subespecie o ecosistema completo;

(i) Contaminar el aire, el agua o el suelo liberando sustancias u organismos que pongan en grave peligro la salud, la seguridad o los medios de supervivencia de los miembros de cualquier grupo o colectividad identificable;[41]

(j) Otros actos de carácter similar que pongan en grave peligro la salud, la seguridad o los medios de supervivencia de miembros de cualquier grupo o colectividad identificable;

(k) Cualquiera de los actos anteriores que causen daños graves, generalizados y de largo plazo a la salud humana y a las generaciones futuras de forma indiscriminada e incontrolable.

2. Los crímenes contra generaciones futuras también incluirán cualquier acto que cause, o tenga una fuerte posibilidad de causar, cualquiera de los efectos identificados en la Sección 1 (a)-(k) y que se lleve a cabo sin la debida diligencia en cuanto a la probabilidad de tales efectos (principio de precaución).

Si bien puede haber margen para incluir otros aspectos de los sistemas económicos dañinos, el daño permanente al medio ambiente y la corrupción, es más probable que los elementos incluidos en el proyecto de delito descrito anteriormente sean favorecidos. Concluyo este punto con base en el hecho de que casi todos los elementos se basan en convenciones, leyes blandas y tratados existentes. Junto con la aparente gravedad de los resultados de las políticas y prácticas asociadas con los sistemas económicos dañinos, el daño al medio ambiente, el delito adicional que se incluirá, como parte de la jurisdicción de la CPI, proporcionaría la base para negociaciones efectivas por los Estados Interesados de la CPI. Sería necesario realizar un trabajo detallado sobre los elementos de los crímenes descritos anteriormente, pero están fuera del alcance de este documento.

Incluir la Responsabilidad de las Personas Jurídicas dentro de la Jurisdicción de la CPI

Como se discutió en la Sección II, las personas jurídicas pueden no ser sujetos del Derecho Internacional, incluido el Derecho Penal Internacional. Sin embargo, su inclusión ha estado en la agenda de la comunidad internacional durante décadas. La razón de esto es que todos los crímenes internacionales, incluido el crimen propuesto como se propone en este documento, concuerdan en la premisa de que individuos, estados e instituciones poderosos generalmente perpetran estos crímenes. Por lo menos, existe el reconocimiento de que

[41] El uso de la palabra "ilegalmente" en el modelo original no es útil como la contaminación puede tomar el lugar legalmente y ser permitida por los estados.

individuos, estados e instituciones poderosos facilitan que se cometan crímenes internacionales a través de su control de los recursos económicos, financieros, militares y políticos. La centralidad de los actores poderosos en la comisión de crímenes internacionales fue fundamental para los intentos de Einarsen de definir los crímenes universales:

> Los Crímenes Universales son actos identificables individualmente que constituyen infracciones graves a las reglas de conducta: y que los cometidos, organizados o tolerados por actores poderosos: y que, según el derecho internacional vigente, son punibles donde y cuando se cometan: y que requieren enjuiciamiento y sanción a través de juicios justos, o en casos excepcionales, algún otro tipo de justicia, en algún lugar en algún momento.[42]

Sostengo que todos los actores poderosos capaces de estar involucrados en la comisión de crímenes internacionales deberían ser procesados bajo la CPI. Un texto evolutivo sobre la responsabilidad penal individual preparado por el Comité Preparatorio presidido por Adrian Bos en el período previo a la Conferencia Diplomática de Roma ofrece una ventana al debate sobre la responsabilidad de las personas jurídicas.[43] El texto evolutivo, en lo sucesivo denominado "Texto Evolutivo X", trataba entonces de la responsabilidad penal individual en virtud del artículo 23. El párrafo 5 del Texto evolutivo X dice lo siguiente:

Cuando una persona física ha sido condenada por el tribunal, el tribunal también tendrá jurisdicción sobre las personas jurídicas u otras organizaciones por conducta delictiva en virtud de este estatuto si:

- La persona condenada era un agente, representante o empleado de esa persona jurídica u organización, y,

- El delito fue cometido por la persona física que actuó en nombre de [y con el consentimiento o aquiescencia de] [y con el consentimiento de] esa persona u organización jurídica [y] [o] en el curso de sus actividades habituales.

- A los efectos de este estatuto, "personas jurídicas u otras organizaciones" significan corporaciones u organizaciones privadas, cuyo objetivo es el beneficio privado.[44]

El Texto Evolutivo X insinúa la oposición a la inclusión de corporaciones hecha por las numerosas delegaciones encabezadas por Estados Unidos, basándose en el argumento de que haría inviable el principio de complementariedad. La premisa de este argumento era que la responsabilidad penal corporativa aún no estaba reconocida universalmente por los estados.

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[41] El uso de la palabra "ilegalmente" en el modelo original no es útil como la contaminación puede tomar el lugar legalmente y ser permitida por los estados.
[42] Terje Einarsen (nota 46 arriba) 22.
[43] Comité Preparatorio de la CPI, Rolling Text on Article 23 (sin fecha). Disponible en PURL:https://www.legal-tools.org./doc/f77746. Fecha de acceso 29 de septiembre de 2001.
[44] ibid para 5

Los argumentos para excluir a las personas jurídicas de la responsabilidad no derivada bajo la CPI son esencialmente políticos y se exploran más a fondo.

En un documento que trata específicamente del potencial del derecho internacional para enjuiciar penalmente a las empresas, Clapham cuestiona el principio de "societas delinquere non protest", lo que significa que las empresas no pueden ser criminales.[45] Clapham sugiere además que los Tribunales Penales Ad Hoc y la Corte Penal Internacional que se centran en las personas como sujetos de sus jurisdicciones pueden ajustarse para ejercer jurisdicción sobre las personas jurídicas, incluidas las corporaciones. Clapham enfatiza el principio de efectividad y argumenta que para que el derecho internacional sea efectivo, todos los actores, ya sean individuos o actores no estatales, deberían tener prohibido ayudar a los estados a violar los principios de derechos humanos.[46] El principio de efectividad es válido para todas las áreas delictivas bajo la jurisdicción de la CPI. Sin embargo, es imperativo en lo que respecta al delito recomendado en el que es más probable que los autores principales sean empresas multinacionales.

El actual marco legal internacional limita la responsabilidad penal corporativa a ser partícipe o, más específicamente, ser cómplice en la comisión de delitos. Esta confianza en la complicidad como medio para responsabilizar a las empresas está vinculada a la práctica en el derecho internacional de que los Estados son sujetos de obligaciones de derechos humanos y los individuos sujetos de responsabilidad penal.

Los elementos de complicidad indican los límites de utilizar el derecho penal internacional para responsabilizar a las empresas incluso como cómplices de crímenes que preocupan a la comunidad internacional. Como sugirió Schabas, un proveedor de armas o el Director Gerente de una aerolínea que transporta armas prohibidas solo pueden ser acusados si existe un vínculo directo y sustantivo con la comisión de crímenes cometidos que se consideran internacionales y bajo la jurisdicción de la CPI.

Mientras la participación en delitos internacionales puede llevarse a cabo a través de un caparazón corporativo, el marco legal actual sólo enjuiciará a personas asociadas con la empresa. Un ejemplo de esto es que el proveedor de Zyklon B fue condenado por crímenes de guerra. Al mismo tiempo, los fabricantes de Zyklon B alegaron con éxito la ignorancia del uso previsto del producto por parte del usuario final. Si bien esta perforación del velo corporativo es importante para enjuiciar a los más responsables, también deja irónicamente a la corporación para que continúe produciendo y participando en crímenes internacionales.

Schabas y la ICJ opinan que debería llevarse a cabo una reforma legal para enjuiciar a la propia empresa. No hacerlo dejará la complicidad empresarial al nivel de ser sólo teóricamente posible. Irónicamente, en contraste con la

[45] A Clapham' Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 899. Visitado en http://jicj.oxfordjournals.org/cgi.
[46] Ibid 901.

posición de negociación de algunas delegaciones sobre el principio de complementariedad, puede proporcionar la solución a este problema. El principio de complementariedad en el contexto de la CPI permitiría a los Estados Interesados permitir que los sistemas jurídicos nacionales prosigan con los enjuiciamientos de personas jurídicas, especialmente de empresas. Por el contrario, las personas jurídicas de los estados que no pueden o no quieren enjuiciar podrían ser procesadas en La Haya. Aquellos estados sin las leyes necesarias serían evidentemente incapaces, y esto también abriría la posibilidad de que los estados con los sistemas legales requeridos ejerzan la jurisdicción universal.

Si bien esto es ideal, propondría que la formulación contenida en lo que denomino Texto Evolutivo X en el documento se utilice como un medio para asegurar que las personas jurídicas que son perpetradores en relación con delitos asociados con sistemas económicos dañinos, daños permanentes al medio ambiente y la corrupción, se llevan a libro. La formulación de Texto Evolutivo X permite que CPI tenga jurisdicción sobre una persona jurídica si la persona física condenada era un agente, representante o empleado de esa persona jurídica. También confiere jurisdicción a la CPI sobre una persona jurídica si la persona física condenada actúa en nombre de, con el consentimiento del consentimiento de esa persona jurídica. Esta formulación permitiría procesar a una persona jurídica asociada a una persona natural condenada por delitos asociados a sistemas económicos nocivos, daño permanente al medio ambiente y corrupción.

En suma

Las graves consecuencias para la humanidad como una resulta de sistemas económicos dañinos son innegables. Las estadísticas relacionadas con las tasas de mortalidad, enfermedades, pobreza y privaciones no se pueden discutir. En términos de escala, los daños resultantes del daño permanente al medio ambiente, un proceso que genera y mantiene la pobreza y la corrupción, eclipsa a los de algunos de los genocidios más horrendos y otros crímenes que preocupan a la comunidad internacional. Sobre la base de sus graves efectos negativos, el conjunto de delitos asociados con las políticas y las operaciones “normales” de las prácticas económicas nocivas se ha ganado el dudoso estatus de delitos que deberían conmocionar la conciencia de la comunidad internacional. Si la comunidad mundial se toma en serio el fin de poner fin a la impunidad mundial por parte de personas e instituciones poderosas que participan en acciones o facilitan las acciones que saben que llevarían a privar a las personas de oportunidades de subsistencia que les salvan vidas, actos que conducen a la muerte y destrucción generalizadas de personas y medio ambiente, entonces sus actos deben ser criminalizados.

Dados los sistemas de gobernabilidad relativamente débiles en muchos países, especialmente en el mundo en desarrollo, donde las personas se ven más afectadas por las consecuencias de los sistemas económicos dañinos, la CPI ofrece una opción razonable para que la comunidad mundial haga que los más responsables rindan cuentas. Por lo tanto,

este documento buscaba argumentar para agregar al menú de la CPI de crímenes que preocupan a la comunidad internacional que niegan a las personas los derechos sociales, culturales y económicos. He argumentado que las personas jurídicas y, en particular, las empresas multinacionales deberían ser responsables penalmente de tales delitos, dado que las instituciones e individuos poderosos llevan a cabo a los autores de los delitos sugeridos asociados con sistemas económicos dañinos. Dada la dificultad anticipada para obtener el acuerdo de los Estados Interesados para que la CPI aplique la responsabilidad no derivada de las corporaciones, he sugerido que la formulación descrita en un documento, al que me refiero como Texto Evolutivo X, proporciona un compromiso razonable. Este enfoque puede ser aceptable para la mayoría de los Estados Interesados. El Texto Evolutivo X fue producto del proceso de negociación hacia la finalización del Estatuto de Roma. Dispone la posibilidad de que las empresas sean procesadas. En particular, este enjuiciamiento ocurre si una persona física que actúa como agente de esa corporación es condenada por la CPI por cualquier delito bajo la jurisdicción de la CPI.

He utilizado diferentes terminologías para el grupo adicional de delitos que se incluirán bajo la jurisdicción de la CPI. Dicho esto, la formulación de "Crímenes contra las generaciones presentes y futuras" (CPFG) ofrecida por Sebastian Jodoin del Centro de Derecho Internacional del Desarrollo Sostenible en representación del Consejo para el Futuro del Mundo es quizás la más relevante. Usé el CPFG como plantilla y lo modifiqué para incluir delitos relacionados con la corrupción y los flujos financieros ilícitos (IFF, por sus siglas en inglés). Como es el caso del Consejo para el Futuro del Mundo, este documento debe verse como una contribución al debate sobre la búsqueda de justicia para los delitos asociados con sistemas económicos dañinos.

No ofrecí una nomenclatura definitiva para los delitos propuestos. Esta terminología de identificación puede establecerse a través de negociaciones por parte de los estados y las inevitables investigaciones adicionales realizadas como parte de dichas negociaciones.

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Zane Dangor actualmente ejerce como Consejero Especial del Ministri de Relaciones Internacionales y Cooperación de Sudáfrica. Antes de unirse a DIRCO trabajó como Jefe de Operaciones en Soul City. Dangor trabajó en el Fondo de Poblaciones de las Naciones Unidas (FPNU) como representante interino de la Unión Africana y Comisión Económica de África em 2017. Antes de unirse al FPNU se desempeñó como Director General del Departamento Nacional de Desarrollo Social de Sudáfrica. Dangor también se desempeñó como Director General Adjunto en el Departamente de Desarrollo Social donde sirvió por más de 12 años. Esto incluyó ser adscrito para servir como consejero especial de dos ministros de Desarrollo Social. Dangor trabajó con el Grupo Jurídico Internacional de Derechos Humanos con sede en Washington DC enfocándose en asuntos de justicia transicional en el Oeste de África. Tarbajo en Sociedad civil y como asesor de diversas capacidades. Fue director, incluyendo Director Ejecutivo en el Centro de Recursos de Desarrollo por 10 años, donde contrinutó al trabajo de derechos humanos y desarrollo nacional e internacionalmente. Fue el socio director de una compañía de consultoría social, Sonke Consulting. Actualmente se desempeña como Presidente del Consejo del Instituto de Justicia Económica, una organización sin fines de lucro con sede en Johanesburgo, Sudáfrica. Dangor tiene una maestría en derecho internacional y una maestría en dirección de desarrollo público, las dos por la Universidad de Witwatersrand en Sudáfrica.

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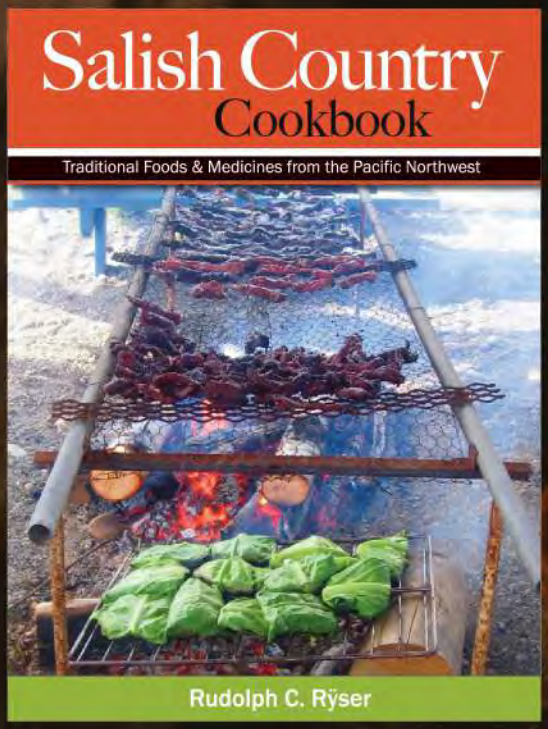

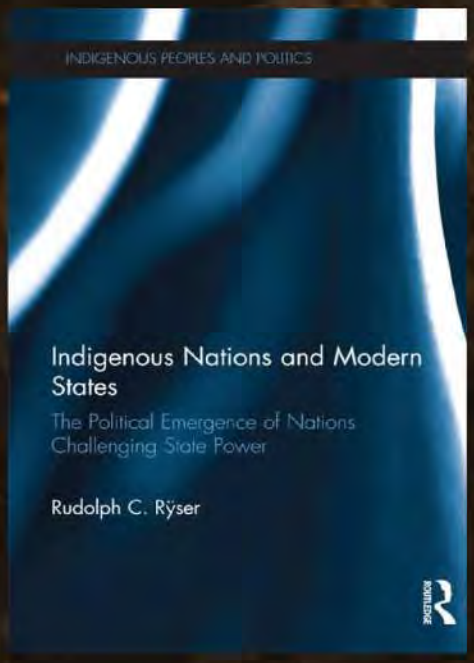

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—Erich Steinman, Pitzer College

Mihumisang-Tribal Voices of Formosa

By Amy Eisenberg, Ph.D. CWIS Associate Scholar

I was Research Fellow and International Conservation Liaison for developing national parks in the Central Mountains of Formosa with the Bunun tribe, whose sacred homeland is Yushan National Park and well beyond the park's borders. After witnessing, reporting and publishing the desecration of a Bunun tribal cemetery by Taiwanese hotel developers in the Bunun hot springs village of Tungpu (Eisenberg 2015), I was invited to serve as Research Fellow and Professor at Yushan Tribal College with the First Peoples of Formosa (Figure 1). It was a great privilege and an honor to live and work with Formosan Native Peoples who are proactively engaged in practicing and invigorating their cultural heritage. They deeply enriched my life and our world with their creativity, wisdom, grace, kindness and generosity. The First Peoples of Formosa are linguistically Austronesian and today they are approximately 2.3 percent of the population of the island, Formosa, which is largely Chinese. I asked my students to consult with their elders and write from the heart.)

Figure 1. Yushan Tribal College students

Ilha Formosa in Portuguese means "Beautiful Island." Formosa represents the Austronesian Indigneous Peoples' intact cultures and languages before Formosa was occupied in 1895 by the Japanese, and before the Chinese take over. It is believed that the large Austronesian language family and the Austronesian peoples originated on Formosa. The Austronesian cultures and ethnic

groups began on Formosa. They migrated to Madagascar, in the Indian Ocean, Rapan Nui, in the Pacific, Hawai'i, New Zealand, Melanesia, Micronesia, as well as other Pacific islands. This beautiful and large Austronesian language family of the seafaring Polynesian Austronesian peoples of Southeast Asia - Oceania, East Timor, Indonesia, Malaysia, and the Philippines is one of the most geographically far and widespread language families in the world. European peoples, in search of spices, colonized most of the Austronesian nations in the Asia-Pacific region.

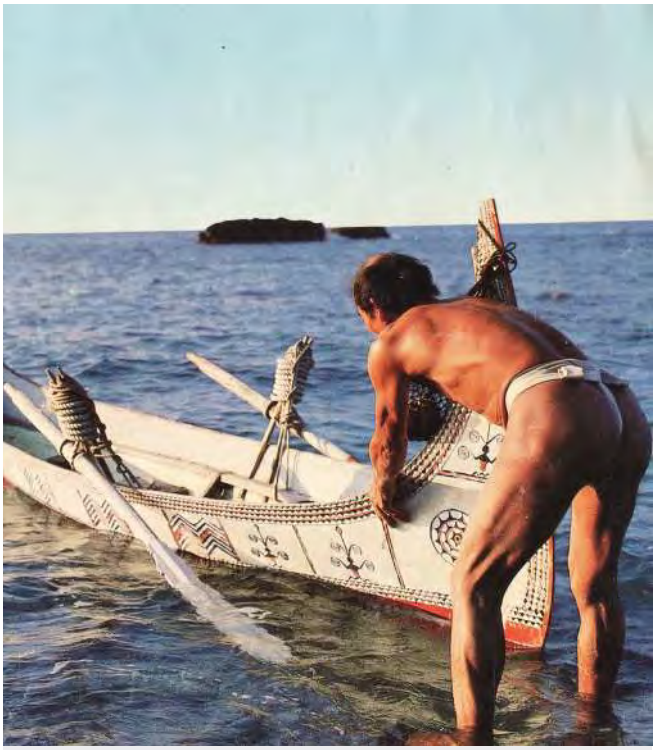

Figure 2. Pongso no Tao

The Tao live on beautiful Pongso no Tao – Island of the People, off the southeastern coast of Formosa (Figure 2). The Chinese call them Yami and their island Lanyu, Orchid Island. There are fewer than 4,000 Tao tribal people today. Pongso no Tao, which is about 45 square kilometers, is volcanic, mountainous, and tropical. The Taiwan Power Company installed a large Nuclear Waste Dump on the Tao's wet taro agricultural land and fishing grounds in 1982 (Figure 3). There are numerous earthquakes in the region, which can damage the 98,000 rusting metal receptacles in which the nuclear waste is stored. Tremendous earthquake activity exists in this archipelago, from the Ryukyu Islands to the Philippines. The saline and humid marine environment is rusting the metal drums of nuclear waste.

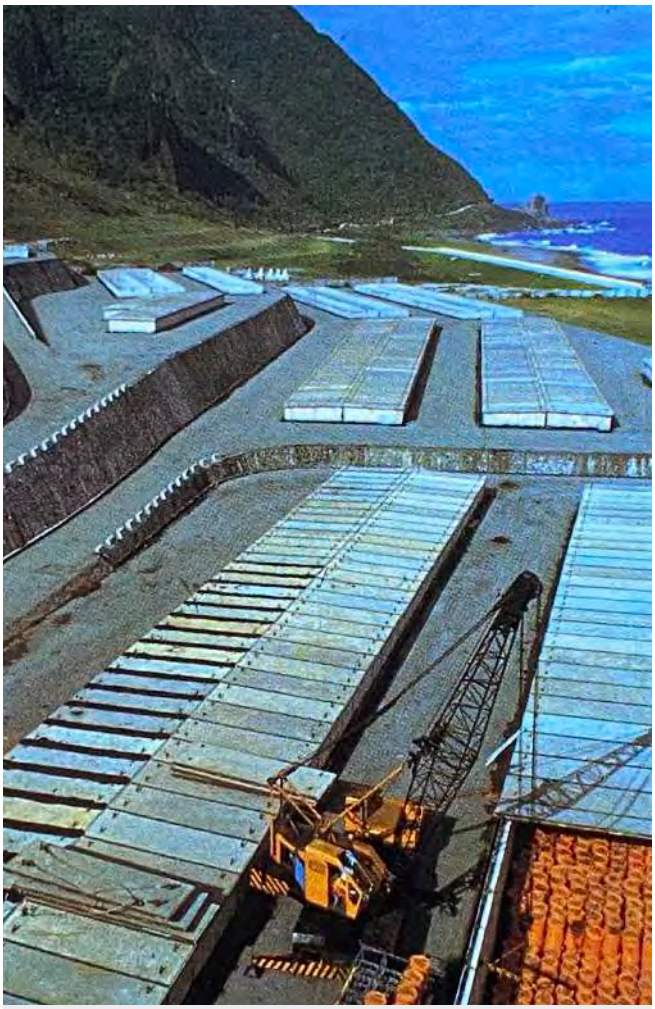

Figure 3. Nuclear Waste Dump

The Tao people are unanimously opposed to the nuclear waste storage on their island and have vehemently expressed their concerns. Many demonstrations have taken place with significant support from the Formosan tribes, scientists, and the academic community voicing opposition to the precariously stored nuclear waste (Figure 4). When the Taiwan government constructed the nuclear waste dump, Taiwan officials blatantly lied to the Tao people by telling them that a cannery was being created, which would employ the Tao people. Another falsehood told was that this was a temporary storage site for nuclear waste, and the Taiwan government would remove it shortly to a distant location. There was not a hospital on Pongso no Tao when the nuclear waste was deposited on the island.

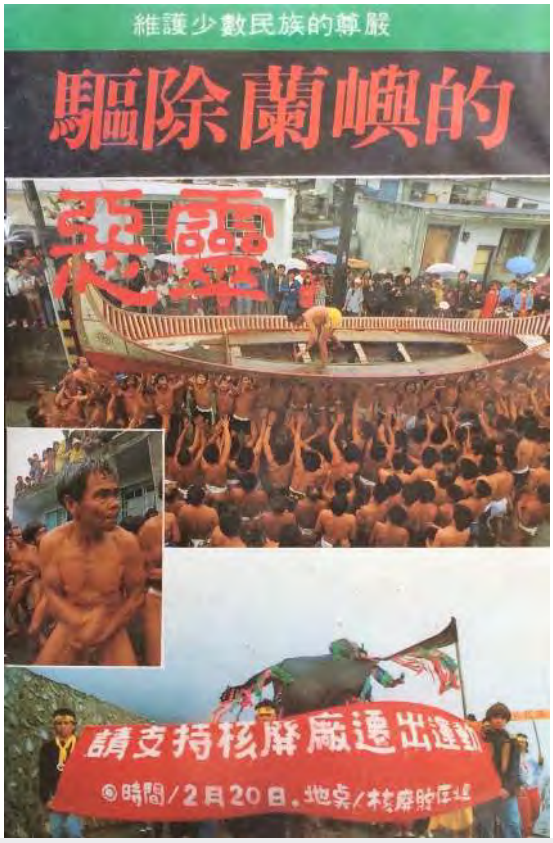

Figure 4. Pongso no Tao Anti-Nuclear Waste Demonstration

Following years of protests, concerns heightened about Taipower's storage of the rusting barrels of nuclear waste on Pongso no Tao, after the 2011 Fukushima Daiichi nuclear disaster in Japan. A radioactive leak was detected outside the facility. In 2012, hundreds of people protested outside the nuclear waste storage facility, calling on Taiwan Power Co. to remove the nuclear waste as soon as possible.

In March 2012, thousands of people staged an anti-nuclear demonstration in Taipei following Japan's massive earthquake and tsunami. Indigenous protesters demanded the removal of the rusting barrels of nuclear waste stored on Pongso no Tao. Authorities failed to deliver.

On November 29, 2019, Tao people and anti-nuclear activists protested in front of the Executive Yuan in Taipei, demanding that the government move its nuclear waste storage facility off Pongso no Tao.

In the Voice of the Tao:

> "It is a tragedy that Tao children are being born into a radiation-filled environment."
>
> *-Tao spiritual leader*

The Taiwan government's planned park on Pongso no Tao is a camouflage of a beautiful landscape covering a most noxious thing. Now we are being forced to fear our beloved natural environment. It's impossible to relocate nuclear waste. We are very angry about this. It's dangerous for our territories, for our ownership and for the environment around the island. We see it as an ethnic problem because the Taiwan

government didn't care about the Tao people, but when we began to protest, they began to think about our problem.

- Syaman Rapongan, Tao tribe

The government stated that it would remove the nuclear waste by 2016 but this did not occur. The Tao people have repeatedly expressed that the nuclear waste must be removed from Pongso no Tao. The nuclear waste dump has caused unceasing pain and trauma for the Tao people…

Although the storm at sea is dangerous, we can see the waves and feel the wind, to fight the storm. We cannot see or feel this nuclear radiation. How can we fight something we cannot see or feel? We know it can destroy our land, our life.

– Tao tribesman

Dear Amy, Thanks so much for your kindness. You help my people to be strong. We will continue to fight the nuclear waste. All the Tao people oppose the nuclear waste on Pongso no Tao. We hope that the Taiwan government nuclear officer does not put that waste in my village, and that they will take out that nuclear waste right away. When the Taiwan government put that nuclear waste on Pongso no Tao, they lied to my people, and now we know that it is very dangerous for the human body. But the Taiwan government still says don't worry about nuclear waste. We want the government to not deceive us. We ask them to take out the nuclear waste otherwise it will beget war for them.

- Syaman Vongayan, Tao tribe Convener of the Mobilization of Pongso no Tao's Anti-Nuclear Movement.

I feel for Taiwan Indigenous people. We are people too and equal in God's eyes. We need respect and freedom in society. I hope to help my tribe. I want to teach them to care for ourselves and our tribes. If the government is bad to us indigenes, I hope they take their opinion to protect indigenous people. Let indigenes not be slighted again.

– Lawen, Pangcah tribe

My dear teacher Amy, I am glad to share my feelings about my hopes, dreams and goals for my life and society, and our world. I will go back to the Indigenous village to serve God and my people. I wish to help them when they have troubles. So, while I am at school, I hope I can develop the sense of responsibility to my people and myself. For our society and our world, I hope we have truth, democracy and freedom in Taiwan's society. Then all of the tribes can have respect for each other, and all parties will have love. I hope the people on the earth will protect the earth because we are only one earth.

All of the indigenous people in Taiwan must help each other and unite together when we are in trouble. I want to teach science and confess to the government how to know and treasure indigenous people because indigenous peoples are especially intelligent. No body or group can threaten our freedom. Indigenous people do not hope other people will help us when we are in trouble.

– Hisul, Bunun tribe

I was born in the world as a Tayal girl and minority. My ideas glowed day by day. I found Taiwan's society was full of inequity. So, we must appreciate our indigenous sense and enhance human rights on Taiwan.

– Mei-Liang, Tayal tribe

Taiwan is a racist society. Indigenous cultures, land, woods and so on are almost approaching destruction…Let us awaken…and change our thinking, our lives, after teaching our daughters, our sons, our friends, our brothers and sisters. Every indigenous life in Taiwan must not lose our cultures, lands and woods, and we ask the people of Taiwan to give us our cultures, land, freedom, peace and justice for Taiwan indigenous peoples.

I am 21 years old. Until now, I understood little by little the meaning that people lived in the world. There was an important speech and idea on my mind before I entered Yushan, that we were inferior to other people; our tribe and culture were inferior. So, I aspired to be another "people"- I mean Taiwanese. They say they've got 5,000 years of good history and they offered us liberty, peace, equality and righteousness. We can own the fortune like them. So, I loved them more than I loved myself, my family, and my tribe.

This changed when I entered Yushan. I finally know that the dream I belonged to is terrible… We can see so many Native People living in an unrighteous society. There is a large percentage of our people involved in prostitution, unsung heroes on the ocean, developed heroes in the mines, and the poor man in the factory. Should we face the unrighteous treatment?

Now I know that my tribe is great and lovely (Figure 5). Native People are important figures in Taiwan's history. So now I will say that I like to be a Native person. On the earth, we are as other people. We are great and valuable, and we should have dignity, liberty, and real equal and righteous treatment.

Figure 5. Paiwan friend, Edan in his home

Maybe in the world, some other peoples are in the same situation as us, and under pressure they make the same statements. But we are united by a dream, a hope and a goal that we are real people. That is, give us that which we need, and for that we pray.

- Legai, Paiwan Tribe

I shall tell about Atayal society with my hopes. In ancient times, our ancestors were blessed because they were friendly (when no other country came to Taiwan). But the Chinese people and other countries came here. Our ancestors fell! Our backbone became weak! This is due to different cultures' or civilizations' imposing circumstances.

Now, the Atayal tribe is not able to adjust to a new life, so we cannot balance it and are not able to break through for betterment. So, we have many societal problems now. I hope to settle all kinds of problems one day… So, first I must study much wisdom and learn very well. The Atayal tribe must pray every time for Native people. All Native people must be of one heart. Dear tribes, we must stand up by ourselves.

– Por-lo, Atayal tribe

A History about Tayal

Tayal is a kindhearted people. We live in beautiful Taiwan. When the Han Chinese people came here, Tayal's family was broken…

First, Han Chinese people brought politicians. Second, they made us become poor. The most important is that they killed our culture. They want all of the mountain peoples' cultures to become Chinese culture. Now I think we must build a new country. Let's break through it.

– Por-lo, Atayal tribe

Language is a feeling that's hard to forget. It has affected every people's lifeline. It has also spread in every epoch's life experiences. Paiwan language contacts the feeling between me, and my parents and sisters. It lifts up my grandmother's failing heart again. Paiwan is my first language. It makes me feel kind. I love it so much.

–Vais, Paiwan tribe

This is my dream - To learn more of my native culture and to help my people in the mountain settlements. We should not abandon wisdom. It will love, protect, and keep us safe.

- Lo Shang, Atayal tribe

Now I study at Yushan so I must know clearly my own identity, responsibility and the mission that I will bear. I hope we can see the real suffering of Native people and I will try my best to help them. I believe our life is concerned with everybody's life. So, we must pray for others who meet suffering every day. I feel that I'm not enough; everybody is not enough too. So, we must accept each other, help each other, share glory and bear hard for each other. At last, I wish, teacher, pardon our weaknesses. We love you forever.

– Loyo, Sediq tribe

I love my tribe and am most concerned with my tribesmen. The world is in a period of change and the humans' hearts are in a bad way… I love children very much. I respect childhood education and hope for compulsory education in my tribe.

– Rahah, Atayal tribe

High in the mountains, deep in thought are Indigenous Peoples. Where is justice flowing like a stream and righteousness like a riverine place? Taiwan indigenous people are in a tug-of-war. Our indigenous peoples' situation is very difficult. It is not fair to use the standards of one culture to measure another. We should cultivate an open-minded attitude, and rather than rejecting or disparaging people different from ourselves, we should work toward more fully understanding them.

- Su-Lang, Sediq tribe

I accepted the Chinese education system when I was a child but now, I feel it is to lose myself, my vision…The education system for me created

many problems. I can't believe myself. I can't believe our government because they limited our thought. I hope our government gives mountain tribes lots of freedom.

Today's government calls itself "democratic", but we don't have freedom really. Why do some people walk on the street demonstrating? Today's government calls, "To protect Taiwan tribal people." But we are "open" for them to exploit our human rights. So, Taiwan tribal people want to stand up! We do not want to let a government succeed with our extermination. We want to protect our cultures. Let it be continuous (Figure 6).

- Vungad, Bunun tribe

Figure 6. Bunun bingad pounding maduh

I feel my tribe is absent of Native people's names. Parents call their children by their Chinese name. I hope Tayal people will stand up in this society.

– Chi-was, Tayal tribe

I hope to serve my tribe all of my life. This isn't easy, but it is full of many hardships that I must endure. When I see many evil incidents in Taiwan's society, let me find the cause that becomes a handicap to my tribe. I sense that our government does not appreciate native tribal cultures and despises native tribal life. I expect our government to have appreciation for native tribal life. The government is not doing what it can to preserve and enhance human rights on Taiwan. As far as I know, we are in a racial crisis. Taiwan's society is full of iniquity. Taiwan's minority peoples are impoverished. We must appreciate our indigenous sense and be respected by the majority.

– Umas Tamapema, Bunun tribe

In our days, the country is evil and brings our death. Some are not above telling lies and abusing power. In this age, we have death, but we have hope and life. In the evil world, it is like we are losing ourselves. One finds oneself in a dangerous situation. We are like losing servants. I am Sediq. We are peaceful people. We have a need for peace in the nation.

– Taymo, Sediq tribe

I am always dreaming that our country is a democracy with liberty and equality. By this, we can face the right treatment and not be despised as minority people. So, I always hope that Native

people will stand by our selves. Don't be bounded by the situation of society. Let us keep society's peace and the country's equality. Don't be controlled by others again. I am so glad that I am a Native person because I love my tribe.

- SaVan, Paiwan tribe

Our tribe will die by the Han Chinese people because they oppressed our people. They don't let us read about our culture and use our language in school, so we are losing our culture. We are the same as the bear that lost its roots. We are special, of God's chosen people. We must study hard any lesson, so we can help and teach our people.

– Mwakay, Paiwan tribe

I'm an indigenous Sediq person. I never liked myself and my tribe. I never thought my tribe was of wonderful, lovely, kind and great people. So, I was feeling ashamed of my tribe and my heart. I knew that I should take up my responsibility for indigenous peoples of all nations…We should not despise our own cultures, and to encourage everyone, "Love thy neighbor as thyself." (Figure 7). I think the cultures of Taiwan Native People are best worthwhile, and we are anxious to know the languages of every tribe. To reduce a language of any tribe is a loss because our languages are a favor of God. So, we can't slight maintaining ourselves, our own languages. Thank you very much, my teacher. You give me wisdom.

– Shyounghay Tada, Sediq tribe

Some people say: The indigenous peoples like drinking wine very much. Actually, they weren't originally drinkers at all. The drinking habit was

Figure 7. Sediq tribal elder

introduced from the lowlands. Do not let anyone look down on us because everyone has to be free and powerful. I want to make efforts to help the maltreated native people in Taiwan, with love for all who suffer hardships. I am very much concerned about the lives of native people in Taiwan, particularly if they are bullied or maltreated. The native people were the first to live in Taiwan and to receive suppression by the Kuomintang. We have not freedom and freedom of speech. It is not a good government. So, we have to raise one's self independently and self-confidently, and to act -We, the indigenous peoples of Taiwan.

– E sour, Atayal tribe

Brothers, Begin

Brothers, awaken to the errors. Begin to deliver self and clansmen because after over thirty years, the Pangcah clansmen's language may disappear without a trace. Only .5 percent of three-year-old children to twenty years of age young women and men can speak Pangcah language and only 15

percent of twenty to thirty-five-year old Pangcah people can speak our language. This is our crisis. Now all Pangcah clansmen's families will be assimilated by the Chinese. Compatriots, awaken. We must unite together to exalt our own culture. Therefore, we want to begin from self and family. Parents and children, when we chat in the family, we must all use our own clansmen's language, and promptly teach children to speak Pangcah.

– Kilang, Pangcah tribe

I hope Taiwan's people will understand impartiality and human rights, but Taiwan hasn't these now. I dream that one day, Taiwan will be impartial for the Native peoples, but Taiwan's Native Tribes are not respected by the government. God gave us sense to manage our world and to put into operation God's just laws, but we haven't this equality. The government oppresses and deceives people. Original Natives live in Taiwan, but Natives are not much unlike the majority. In Taiwan's society, we are disappearing…God created humans and classified races of humans. These people must be respectful together. But Taiwan's Natives are wronged and are not venerated and esteemed…Taiwan is a beautiful place, but Taiwan changed by polluting the air, etc. and nuclear waste use. I hope Taiwan will have good ethics and will respect human rights and protect Native peoples. Afresh, anew. Get back to the beautiful island, Formosa!

- Hagau Dunuh, Atayal tribe

All Indigenous People are Superior Too

My tribe is Paiwan. We are peaceful people. Every man likes to hunt animals. In the evil world, we find ourselves in a dangerous situation. We are like bonded servants. Every people (tribe) is equal in God's eye. In Taiwan, although it is a large and complex government, it does not come true to protect the weak and small tribes. It forces us and robs us of our ancestral lands, woods, and much capital that we depend on for the life of our people. I feel that we must be brothers, though we are weak and too small. But we have the same beliefs: concern for our brothers and sisters, to protect our land, culture and capital. Still, we die. The land is my father's sweat and blood! The earth is my mother's heaven. Don't rob us of this.

- Kual, Paiwan tribe

I know that the Taiwan Indigenous Peoples' situation is not good at this time. So, I must endeavor to finish my learning responsibility and then go back to Native society to serve my tribe. I hope I can help my village and Native People when I enter my work. I do not belong to myself…I belong to my society…and I seek a social theory that is suitable to me from this special knowledge, take it and fulfill it in our society to bring benefit for Native Peoples.
I hope Native Peoples and our society will become more harmonious, independent and more beautiful. The origin of this is built by many people who love their own tribe."

- Kual, Paiwan tribe

My tribe's name is Sediq. I like to live in the country. All of my family live in Jaming, a beautiful place. Dason is my neighboring village. Since the government used abnormal acts to impose and acquire this village for constructing an airdrome, the people's life is agony, embarrassment and resentment about this significant problem. Although the government looks down upon their power,

they acquired the village. Indigenous peoples or anyone cannot be indifferent. Let us seek assistance together for this problem. Can the village be free of trash for their life every day?

- Mijue, Sediq tribe

When I was a child, my grandfather spoke about the origin of the Tayal Tribe to me. He said, "Once upon a time there was a big btunux (stone in Tayal language) that rose up from the ground in Nantau. This is the origin of Tayal. Out of this stone was born one man and one woman, who are the ancestors of the Tayal Tribe."

– Mizu, Tayal tribe

My best hope and dream is to finish my studies…It is my greatest purpose that I go back to Native society and teach them how to help our society by ourselves and how to love our country. Tell them how to earn our place in this changing society. Minority people are mankind too. We must have our own places, rights and life.

I Love my Homeland

Land is life. So, I love my homeland and more, and love every Native people. We have been living in Taiwan for over ten thousand years. I saw many people that were oppressed by different ethnos. I want to struggle for our tribal people and homeland forever.

– Mizu, Tayal tribe

Long ago, in Taiwan, sightseeing places were all very clean and beautiful. But nowadays those sightseeing places that are special in the mountains, everywhere, any one of them, we'll see garbage influence and air pollution. Now, my village was originally a quiet, beautiful place. Because of an era's "progress" we hear and look at all unpleasant noise and dust, rarely to hear birds singing songs. Noise! I hope we could better these bad points. Let my village turn back to God's so- called mountain flower garden. Because I love nature, it makes my mood pleasant (Figure 8).

– Rth rth me, Rukai tribe

Figure 8. Rukai weaver, southern Formosa

To live in the mountains, people are reenergized. A city life affects many young men. Genuine people may be deceived or taken in. Bring back the mountain. Keep mountain peoples' original usages. Let us enjoy life with prosperity and contentment. Enjoy God's grace for our country.

– BeFuy, Atayal tribe

Be Proud of Your Heritage

I lived in Taipei for 19 years. When I was six years old, my family moved to Taipei from Ping-ton. For almost all of my life, I have lived in the city, so I didn't have much contact with our Paiwan culture. I can't speak Paiwan language well, so I am shy about that! But, every time someone asks me, "Are you Native People?" I always answer proudly, "Yes, I am!" Really, I am proud of my identity. We are a beautiful tribe. Our society is full of kindness, honesty and peace. Our ancestors hunted in the forest, planted on the land and had peaceful days. But it changed when Taiwan's government came here. They set some strange rules: No hunting, no planting on the land and even to enter our own place, we need a pass card. It is nonsense!

In fact, the assimilation policy of the government influenced all of Native society. It made us persecuted, caused loss of cultural heritage, economic collapse and it despised morals. So, we have a crisis that Native society will become extinct. When Amy talks about Native people, some didn't pay attention. We must restudy ourselves! This is our problem. We must wake up at once, and not be passive. I hope everyone considers our problem seriously.

At last, I will say thanks to Amy. I admire your courage and justice, and you stick to your principles. Moreover, you care so for our lives. Thank you very much. Really, we learned and got so much from you. You are our best friend. If you get a chance, we hope you come back to Taiwan and "fight back" with us. We love you!

-Amos, Paiwan tribe

Inspired by Eisenberg, Amy. 2015. Desecration of a Bunun Tribal Cemetery in Tungpu, Taiwan. Intercontinental Cry - a publication of the Center for World Indigenous Studies. 7 April, 2015. https://intercontinentalcry.org/desecration-of-a-bunun-tribal-cemetery-in-tungpu-taiwan/

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Dr. Amy Eisenberg earned her Ph.D. in Interdisciplinary Arid Lands Resource Sciences: Ethnoecology and Native American Studies from the University of Arizona. She has an MS and BS in Biology: Botany and Scientific and Fine Art. Amy is a scientific artist whose work is in the Hunt Institute for Botanical Documentation and has been exhibited internationally and nationally. She is a steward in the Tohono O'odham Haki:dag - sacred homeland of the Tohono O'odham Nation, and a botanist, ethnoecologist, organic sustainable agriculturist and agroforester and Associate Scholar with Center for World Indigenous Studies.

Amy teaches at the University of Arizona and was Licensed Researcher with the Hopi Tribe – Cultural Preservation Office on the International Repatriation of Hopi and Pueblo Human Remains and Sacred Funerary Offerings, which were taken from Mesa Verde and exported without permit or permission. They were in the National Museum of Finland since 1909 and came home in September 2020 for proper and rightful ceremonial reburial back in Mesa Verde where they were once laid to rest.

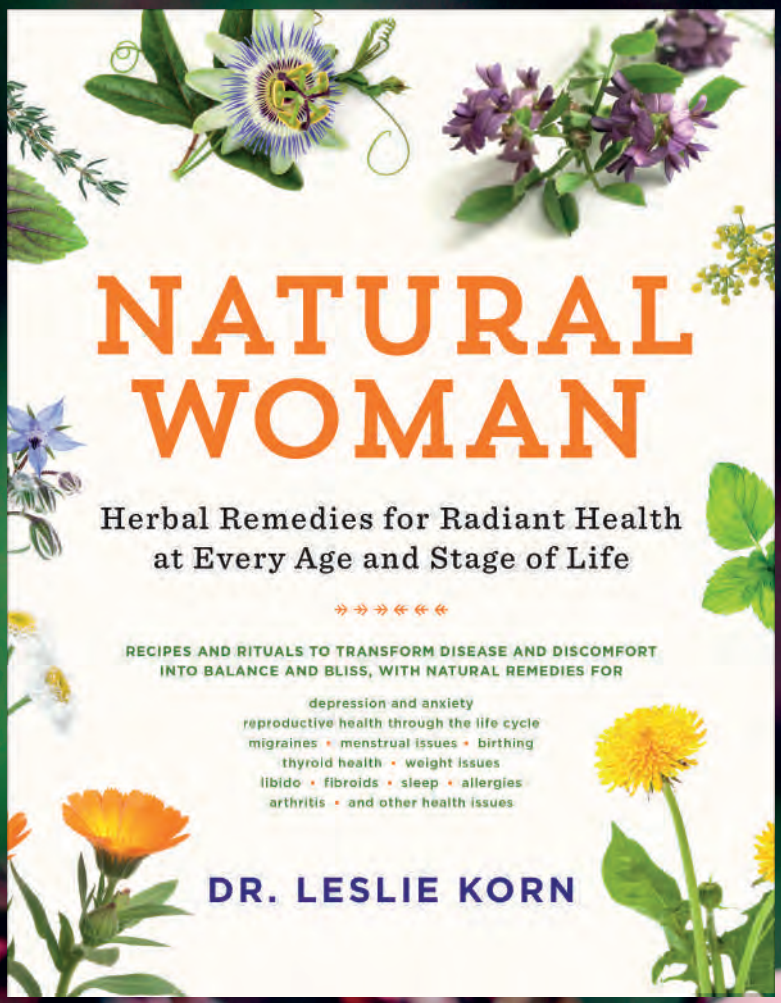
Amy was International Conservation Liaison and Research Fellow for Yu Shan National Park and Professor at Yushan Tribal College, Formosa.

Amy was Earth Island Institute Director of Conservation in the Yaeyama Islands of Japan.

Amy conducted participatory research with the Aymar Marka (Aymara Nation) in the Andes of Arica y Parinacota, Chile through USAID and the International Cooperative Biodiversity Group Project.

Amy was Agriculture and Community Development Cooperative Research and Extension Agent at Northern Marianas College and Organic Sustainable Agriculture and Agroforestry Researcher at the College of Micronesia.

As International Expert at the Research Institute of Anthropology and Ethnology and Visiting Professor in the Department of Biology and Environmental Sciences, Jishou University in Xiangxi Tujia – Miao Autonomous Region of China, Amy conducted collaborative UNESCO-LINKS UNPFII UNDESA research with the Kam people of China and ministries responsible for ethnic development.



NATURAL WOMAN

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Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada

By Sakshi

ABSTRACT

This paper deliberates on the nature of justice in Indigenous engagement with settler-colonial legality. I use the case law-based evidence from the three jurisdictions, Australia, Brazil, and Canada, to reflect on the abstract and material representations of Indigenous environmental justice in contemporary settler-colonial societies. There are two elements at play here. While some of the constituent elements of 'Indigenous environmental justice' may remain undefined in the legal system, they function as an invitation to the courts for interpreting them widely. How far has this been used, and in what manner speaks to the nature of juridical engagement with indigeneity? Second, the need for certainty and procedural integrity within the legal interpretation often belies the assumption of neutrality. This is pronounced when political and historical questions are antecedents to the legal questions to be determined by a court. Settler colonial nations illustrate this contradiction by laying bare the past and present historical injustices that accompany Indigenous rights and sovereignty. To think about 'justice' in these cases requires principle-led juridical innovations. I argue that courts are yet to recognize their key role in identifying and remedying the violence scripted by the law on Indigenous people. While it may be a difficult and complex task to develop a radical jurisprudence without violating the separation of power, courts continue to be the final altars of justice with a wide range of creative and untapped powers. The responsibility to articulate Indigenous environmental justice as a legal principle in the Anthropocene[1] calls for deploying those powers.

Key Words: indigenous peoples, sovereignty, environmental justice, courts, environmental litigation.

In the last week of May, the mining conglomerate Rio Tinto destroyed 46,000 years old Aboriginal site during the expansion of its operation in Western Australia's Juukan Gorge.[2] Rio Tinto may

[1] Anthropocene is the term coined by Crutzen and Stoermer in 2000 to capture how human beings are now the dominant force on the planet, whose actions are constituting the new geological period, following the Holocene. The term has since then evolved to include political, social, environmental effects of human actions alongside its geological connotation. Cf: Crutzen PJ (2006), "The "Anthropocene", in Ehlers E & Krafft T (eds) Earth System Science in the Anthropocene, 13-18 (Springer).

have hoped for the furor to die in due course, given the corporation had a nefarious history of getting away with environmental destruction elsewhere, especially in Bougainville.[3] Yet, the aftermath of the destruction in Juukan Gorge lasted longer and drew international attention to the routine treatment of Indigenous heritage and rights in a settler-colonial country. While the crucial lessons are drawn in this destruction involved reckoning with Western Australian heritage law's inadequacies to uphold Indigenous heritage, reflections on the unfailing nature of the violence of the law and settler-colonial legality lingered alongside. The destruction of the ancient Aboriginal site in Juukan Gorge was not a simple event. It mirrored the many sub-structures of the superstructure called settler colonialism that keeps the cycle of dispossession and erasure of indigeneity alive.[4] The experience of the destruction is not unique to Australia, even though its magnitude drew attention to the workings of extractive industries in the country. The 'event' testified to the operations of the 'structure' and is an experience that is replicated worldwide where Indigenous sovereignty has been on the decline.

Understanding Environmental Injustices

Defining what is an 'environmental injustice' ought to precede any attempts to understand Indigenous environmental justice. Existing environmental justice scholarship has studied the intersectional nature of environmental harms, especially with respect to race and class. Similar work needs to be done with greater thoroughness in places where indigeneity, settler colonialism, and environmental injustices have crossed paths. For instance, the framing of environmental justice has undergone several transformations since its genesis in the critical inquiries around environmental regulatory laws. While the 1980s in the US mark the inception of attempts to define environmental justice in the backdrop of racial inequalities, the subsequent decades have witnessed a substantial expansion in its meaning.[5] Robert Bullard's classic Dumping in the Dixie in 1990 opened up the conversation based on distributional inequality stemming from racial inequalities and leading towards the formulation of environmental racism.[6]

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[2] "Pilbara mining blast confirmed to have destroyed 46,000yo sites of 'staggering' significance". https://www.abc.net.au/news/2020-05-26/rio-tinto-blast-destroys-area-with-ancient-aboriginal-heritage/12286652 (Last accessed: 23 November 2020). In the Rio Tinto case, the blasts were a part of the expansion of the iron ore mine. Rio Tinto was shown to be aware of the significance of the site. Yet, it obtained permission to carry out the blast under S.18 of the Aboriginal Heritage Act, 1972 (WA), which neither requires consultation with traditional owners of the land nor a review of the permission at a later stage. The ongoing inquiry has heard evidence to the effect that Rio Tinto had even made efforts to prevent the Indigenous group from bringing an injunction against the blasting.

[3] "Rio Tinto accused of violating human rights in Bougainville for not cleaning up Panguna mine". https://www.theguardian.com/world/2020/apr/01/rio-tinto-accused-of-violating-human-rights-in-bougainville-for-not-cleaning-up-panguna-mine (Last accessed: 29 November 2020).

[4] Veracini L (2010), Settler colonialism: A Theoretical Overview. Palgrave Macmillan.

[5] Bullard, Robert D., and Evans, Bob (eds.) (2003). Just Sustainabilities: Development in an Unequal World. Cambridge, MA: MIT Press.

[6] Bullard, Robert (1990). Dumping in Dixie: Race, Class, and Environmental Quality. Boulder, CO: Westview Press; (1993). Robert Bullard, Confronting Environmental Racism: Voices from the Grassroots. Boston, MA: South End Press.

Post-1990s, following Bullard's theorization of environmental justice, Laura Pulido,[7] David Pellow,[8] Julian Agyeman,[9] and others contributed to the strengthening of discussions on environmental racism by elaborating the power relations embedded in social and political inequities and examining its contributions to the disproportionate environmental impact on marginalized communities. Their contribution aimed to emphasize that environmental injustice. It was not merely a distributional problem but an amalgamation of diverse forms of environmental harms mirrored in cultural oppression and erasure, with economic forces perpetuating domination, exploitation, and material inequalities.[10]

As the idea of environmental justice emerges from a broad and ever-evolving understanding of intersectional injustices, it did not merely remain as a definition. Instead, it transformed into a coherent concept distilled by a theoretical understanding of race and capital-led inequalities. The concept in itself is so versatile that it found purchase in juridical analysis, making its way into cases and informing judicial decisions. Arguably, material representations of environmental justice in international and domestic legal instruments provided it with a sense of essential principles that courts and other decision-making bodies can fall back on clarity and consistency. The definition of environmental justice by The United States Environmental Protection Authority[11] and the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters in 1998 ("Aarhus Convention") are some examples in this regard.

Should one look for such a clear trajectory of Indigenous environmental justice concerning a well-conceived definition and application in the legal realm, it would end in disappointment. The difficulty lies not so much in inventing the concept as much in giving it a form outside of its known expressions. A significant body of Indigenous scholarship has already elaborated on the idea of Indigenous environmental justice as an inevitable extension of Indigenous sovereignty and identities. Yet, the iterations of the concept in juridical spaces as an analytical tool and an end in legal reasoning are in the nascent stage.

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[7] Pulido, Laura (1996). Environmentalism and Social Justice: Two Chicano Struggles in the Southwest. Tucson, AZ: University of Arizona Press.
[8] David Pellow, What is Critical Environmental Justice, (Cambridge: Polity Press, 2017).
[9] Agyeman, Julian (2005). Sustainable Communities and the Challenge of Environmental Justice. New York: New York University Press.
[10] Randolph Haluza-Delay et al.(eds), Speaking for Ourselves: Environmental Justice in Canada, (2009).Vancouver: UBC Press.
[11] "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." http://www.epa.gov/environmentaljustice/

Settler Colonialism as Environmental Harm

Every discourse on Indigenous environmental justice must begin with the recognition and contextualization of settler colonialism as a structure within which State and its legal apparatus are embedded. As Kyle Whyte argues, settler colonialism is the main form of environmental injustice. Whyte examines the ecological impact of settler colonialism in the context of Canada's Anishinaabe peoples and the means through which it works systematically to undermine the 'social resilience and self-determining collectives' of the Indigenous peoples.[12] Settler Colonialism tries to absorb the land into a new sovereign arrangement and occupy it spatially and disrupts several social, cultural, spiritual, and economic relationships that characterize the First Nations.[13]

While documenting the Standing Rock movement, Nick Estes elaborates that the Indigenous resistance has been at the intersection of multiple environmental injustices.[14] Standing Rock movement was conceived against the proposed Energy Transfer Dakota Access Pipeline running between Northern Dakota and Illinois because it adversely affected drinking water and irrigation near the Indigenous reserves. Besides, it also threatened to destroy the burial sites and sites of cultural significance. The environmental justice movement at Standing Rock also became the face of Indigenous sovereignty as they contested the pipeline project in the District Court in a prolonged legal battle.[15] These injustices arise out of the operation of settler colonialism that ghettoes First Nations into 'reserves' while also promoting tropes of development that disregard environmental risks disproportionately affecting the community's health, welfare, and sovereignty. A similar sentiment is reflected in Eve Tuck's work. It studies settler colonialism's disruption of Indigenous land relations with 'profound epistemic, ontological, and cosmological violence'.[16] Environmental injustices in settler colonialism would then be invariably seen as a clash of sovereignties between Indigenous peoples and the Settler.

Settler Colonialism as a Disruptive Force

Patrick Wolfe and Lorenzo Veracini speak about the violent interjections of settler colonialism and the means through which it distinguishes itself from colonialism and capitalism.[17] Settler colonialism differs from the latter in how it

[12] Kyle Whyte (2018) "Settler Colonialism, Ecology, & Environmental Injustice" Environment & Society 9, 125-144.
[13] Kyle Whyte (2018) "Indigenous Experience, Environmental Justice and Settler Colonialism" in Nature and Experience: Phenomenology and the Environment. Edited by B. Bannon, 157-174 Rowman & Littlefield (2016).
[14] Nick Estes, Our History is the Future. Verso Books.
[15] Standing Rock Sioux Tribe et al. v US Army Corps of Engineers et al. Civil Action No. 16-1534 (JEB).
[16] Tuck, Eve, and K. Wayne Yang (2012) "Decolonization Is Not a Metaphor." Decolonization: Indigeneity, Education and Society 1 (1).
[17] Patrick Wolfe (2006) Settler colonialism and the elimination of the native, Journal of Genocide Research, 8:4, 387-409; (Wolfe 2016) Lorenzo Veracini (2015) The Settler Colonial Present. Palgrave Macmillan.

uses both time and space on occupied lands. It uses the environment as a resource while systematically erasing the people who occupy the land and the relations that define the human and the nonhuman world. These spatial and temporal acts of erasure justify Wolfe and Veracini's articulation of settler colonialism as a structure that is ongoing than a single identifiable event.[18] Deborah McGregor, while defining EJ in her work, draws on the idea of responsibility, observes:

> ...(environmental justice) is about justice for all beings of Creation, not only because threats to their existence threaten ours but because from an Aboriginal perspective justice among beings of Creation is life-affirming...In the Anishinaabe world view, all beings of Creation have spirit, with duties and responsibilities to each other to ensure the continuation of Creation. Environmental justice in this context is much broader than 'impacts' on people. There are responsibilities beyond those of people that also must be fulfilled to ensure the process of Creation will continue.[19]

Together, these existing interplays of meanings between settler colonialism and environmental injustice form a framework within which Indigenous environmental justice must come to life, especially in specific contexts such as environmental litigation. Justice is best articulated when the realities of physical erasure and cultural and spiritual erasure of Indigenous peoples are recognized and acknowledged in the juridical space. Contemporary forms of liberal constitutions only partly fulfill 'recognition' within the Indigenous rights framework. As Glen Coulthard and Audra Simpson[20], amongst others, observe, politics of recognition in settler colonies is limited to acknowledging Indigenous peoples' cultural differences.[21] This process goes only so far as setting apart the First Nations for certain kinds of treatment, however inclusive it may be, without acknowledging the extent of the inherent violence of the structure or the question of land-based sovereignty.

Land, Sovereignty, and Environmental Injustice

It is imperative to understand the centrality of the land and First Nations sovereignty in judicial decision-making, especially in environmental and cultural heritage litigation. Building on Wolfe and Veracini's arguments around the nature of settler colonialism, physical dispossession, and erasure (manifest through numerous modes, such as genocide) are accompanied by cultural and spiritual erasure. Often, in popular vocabulary, this translates into ideas such as *cultural genocide*.[22] While it may be hard to define these

[18] Lorenzo Veracini (2010) Settler Colonialism: A Theoretical Overview. Palgrave Macmillan.
[19] Deborah McGregor (2009) "Honouring Our Relations: An Anshinaabe Perspective on Environmental Justice." In Agyeman et al, Speaking for Ourselves: Environmental Justice in Canada. UBC Press.
[20] Simpson, Audra. 2014. Mohawk interruptus : political life across the borders of settler states.Durham: Duke University Press.
[21] Coulthard, Glen Sean. 2014. Red skin, white masks : rejecting the colonial politics of recognition.Indigenous Americas. Minneapolis: University of Minnesota Press.
[22] Davidson L (2012) "Cultural Genocide". Rutgers University Press; Kingston, L "The Destruction of Identity: Cultural Genocide and Indigenous Peoples" (2015) Journal of Human Rights 14(1).

in certain terms, it is precisely this difficulty of capturing intangible and incommensurable losses generated from systematic dispossession. Contemporary scholarship on ecocide and cultural genocide attempted to capture this erasure resulting from violent operations of settler colonialism have also elaborated on the complicit of law in it.[23] For instance, Andrew Woolford terms this as an 'ontological destruction,' where Indigenous and more-than-human relationship, Indigenous cosmologies, and knowledge forms are gradually eroded by settler-colonial interventions.[24] A telling example would be Rio Tinto's destruction of Juukan Gorge that was carried on under the aegis of a capitalist State, whose laws were not equipped to protect the special relationships shared between the Indigenous communities of Western Australia and their heritage. Suppose Juukan Gorge tells us how a collaboration between extractive capitalism and settler colonialism can destroy First Nation sovereignty. The recent destruction of Djab Wurrung sacred tree in favour of developing a highway project testifies to the fact that the liberal State can be as corrosive as an extractive industry.[25]

Indigenous environmental justice is as complicated as it is intergenerational. It is difficult, nigh impossible, to develop a linear understanding of environmental and cultural harm to determine the redressal or compensation. Indigenous cosmologies, place-based pedagogies, non-linear conception of time, amongst others, are defining features of indigeneity. They are experienced most intimately in the past and carried on to the present and the future with the same rigour. An interruption in this continuity implies that the harm is felt not just by this temporality but the one emerging as well. Environmental wrongs are an incremental contribution to the historical processes and must form an essential backdrop for Indigenous environmental litigation. This sense of settler-colonial environmental injustices informs the plausible remedies suitable in the case. In his work *The Trouble with Tradition*, Simon Young elucidates how Native title jurisprudence has evolved in Australian courts to incorporate the demand for an expansive understanding of Aboriginal rights.[26] Inferring from a diverse corpus of case laws, Young argues that the Australian courts are now mindful of the absence of Aboriginal Title versus Aboriginal Rights distinction more than ever. The latter demands a broader and more generous reading than the former. A similar exercise ought to be carried out in the environmental context. In the absence of a clear distinction between land, environmental, and sovereignty claims, judicial decision making must straddle the past and the present and see these components differently. In the absence of an innovative judicial reading of Indigenous claims, the gulf between normative construction of Indigenous environmental justice radical rights jurisprudence's actual evolution would be intensified.

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[23] Short, Damien. 2016. Redefining genocide : settler colonialism, social death and ecocide.Zed Books Limited.
[24] Andrew Woolford (2009) "Ontological Destruction: Genocide and Canadian Aboriginal Peoples," Genocide Studies and Prevention: An International Journal, 4(1).
[25] Sakshi Aravind (2020) "Justice Beyond Recognition: What Djab Wurrung Trees Tell Us". https://arena.org.au/justice-beyond-recognition-what-djab-wurrung-trees-tell-us/ (Last accessed: 29 November 2020).
[26] Young Simon (2005). Trouble with the Tradition, 28-32. Federation Press.

Courts and Indigenous Environmental Justice

An informed deployment of judicial discretion and creativity in developing jurisprudence of Indigenous environmental justice is neither novel nor an unprecedented leap. Some of these efforts have already been made to acknowledge that environmental/climate litigation requires unique treatment in the Anthropocene.[27] The contemporary social and economic realities of a highly capital-driven, market-centered liberal economies make it apparent that the resource pressures and distributive elements of social welfare are unevenly distributed. In its all-encompassing role, law often finds itself obliged to rethink the frameworks and ethical and moral compulsions on which the legal system rests. Although criminal liability for environmental harms and offenses against Indigenous peoples has not made its mark outside of critical legal scholarship, jurists have emphasized that even criminal law must be open and self-reflective to the values that sustain it.[28] While these propositions may appear abstract, a degree of abstraction and theorization has been vital to developing a robust Indigenous rights jurisprudence. In most cases, such as Australia, where a substantial Constitutional voice for First Nations continues to be absent, courts have been compelled to develop norms of recognition and justice from a clean slate. Admittedly, a constitutional provision has symbolic merit in protecting and advancing the interests of Indigenous peoples. Evidence from Canada and Brazil provides a contrast to the Australian experience.[29] Yet, express constitutional protection and treaties (Brazil and Canada respectively) or absent constitutionalism (Australia) have no effect on the past and present wrongs of settler colonialism. The absence of effect results unless the current legal apparatus acknowledges the pervasive nature of settler structures and the continuing harm endured by the Indigenous peoples without powers of self-determination. In the next part, I analyze three cases from the three jurisdictions - Australia, Brazil, and Canada - to examine the nature of the judicial treatment of the idea of Indigenous environmental justice (explicit or implicit), the extent to which courts have pushed the boundaries of discretion or creative engagement to achieve a contemporaneous understanding of Indigenous peoples' rights, and their implications for theoretical articulations of Indigenous environmental justice.

Australia

Aboriginal Areas Protection Authority v OM (Manganese) Ltd[30], popularly known as the Bootu Creek case, was decided in

[27] Eloise Scotford (2017). Environmental Principles and the Evolution of Environmental Law.Hart Publishing; Phillip Paiement (2020). "Urgent agenda: how climate litigation builds transnational narratives", Transnational Legal Theory, 11(1-2).
[28] Jeremy Horder (2016). Principles of Criminal Law. 8th Edition, OUP.
[29] S.35 of the Canadian Constitution Act states that the "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.". Similarly, Chapter VIII (Articles 231 and 232) of the Constitution of Federative Republic of Brazil deals with the rights of Indians, including the preservation of environmental resources necessary for their well-being and physical and cultural reproduction.

2013 by a summary magistrate court in the Northern Territory. It has acquired significant interdisciplinary attention compared to other cases that witnessed the destruction of Indigenous heritage. Anthropologists Elizabeth Povinelli and Benedict Scambary have studied the Bootu Creek litigation, throwing light on the legal and anthropological ramifications it bore for the protection of sacred sites.[31] It is Northern Territory has relatively strong state heritage protection laws, such as the Aboriginal Sacred Sites Act 1989 and Heritage Conservation Act 1991, that made prosecution in a court of law possible. It is also important to note that historically, there has been a steady opposition to uranium mining in the region.

The OM (Manganese) Ltd operating the Bootu Creek manganese mine was fined $120,000 and $30,000 for offenses under Northern Territory Aboriginal Sacred Sites Act, 1989 (Sacred Sites Act). The defendant mining company had contested the charges of desecration under the Sacred Sites Act but had pleaded guilty to contravening the condition of an authority certificate by damaging the same sacred site. That it was a sacred site remained uncontested. The court reiterated the testimony of one of the traditional owners of the area, Gina Smith, who stated that the defendant knew about the significance of songlines and dreaming.[32] The traditional owners had also informed the mining company of the existence of the sacred sites. The sacred site's story is that of two women, the bandicoot, and the rat, who are the female Dreamtime ancestors. While the Dreamtime or the sacred site is not contested, the court delved on the significance of the story, affirming the evidence of the consulting anthropologist. The court recognized that it is likely that inconsistencies in the story are a result of older informants having passed away, altering the contemporary relevance of the site.[33] It also observed that the land's cultural significance had been eroding since the 1950s due to extractive activities.[34]

There are two critical parts to the decision, and it has significant consequences for how judicial treatment of Aboriginal heritage issue can be carefully devised to achieve the best outcome. In the first part, Magistrate Sue Oliver addresses the question of exceeding the authority certificate. The initial mining plan allowed the defendants to mine at an angle of 36 degrees. Instead, they chose to extract the site at a steeper angle, at 55 degrees, to maximize the amount of ore extracted.[35] The sacred site was adjoining the Masai pit, where the mining was to take place and was already at risk. There was no authorization, explicit or implicit, by the local custodians of the land for altering the angle of mining. Instead of an authorization, the defendants invited

[30] 2013 NTMC 01.
[31] Povinelli E (2016) Geontologies: A Requiem to Late Liberalism. Duke University Press; Scambary B (2013) My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia, CAEPR Research Monograph, No.33.Australian National University.
[32] Bootu Creek n (28), Para 4.
[33] Bootu Creek n (28), Para 5-7.
[34] Bootu Creek n (28), Para 6.
[35] Bootu Creek n (28), Para 18.

two traditional owners and a local employee of Northern Land Council (NLC) for a meeting to discuss the altered plans. The court observed that this meeting's implicit intention was to obtain permission for mining at a steeper angle even when the defendants were fully aware that the people consulted neither had expertise in mining to appreciate the risks nor the authority to grant such consent.[36]

Interestingly, the court delves into each element contributing to the site's destruction even though the defendant entered a guilty plea. At one point, Magistrate Oliver observes, *"In my view arranging a meeting with the three gentlemen to essentially obtain approval for the steeper batter angle approach was either cynical or a naïve exercise on the part of the defendant. The custodians had no individual authority to approve a mining plan that posed a risk to the integrity of the Sacred Site…"*.[37] She emphasizes that the consent process was flawed and that the decision-making authority or whose voice counts is a crucial element in protecting the sacred site. By allowing these observations and reflections in a seemingly straightforward case, Magistrate Oliver reflects on both the case's legal and moral questions. This exercise may not have any significance in terms of precedence. Nonetheless, it is a critical signifier that courts ought to think in terms of 'principles.'

Following this discussion, the court considers the next important question of 'desecration' under Section 35 of the Sacred Sites Act. Since the defendant contested the charge, the judge dealt with 'what is a desecration' elaborately. S.35 of the Act only creates an offense of desecration without providing a functional definition of 'desecration'. S.35 merely states, 'A person shall not desecrate a sacred site.' Magistrate Oliver decided to rely on the legislation's apparent intentions, that is, to preserve and protect the sacred and spiritual value of the site. Although the summary judgment does not suggest that the judge has consulted any preparatory materials that went into the making of the legislation, purposive construction dominates the decision's language.[38] The judge refuses to accept the defendant's claim that an act of desecration requires an element of contempt and is a matter of attitude and disposition.[39] The sacred site's significant feature was a horizontal rock arm extending from the rocky outcrops on the site. The feature was very recognizable and represented the two women, forming the vital part of the sacred site. Kunapa traditional owner Gina Smith's testimony on why harming the site erodes the sacredness of the place is reiterated in the decision:

First, it greatly offends our law which says that sacred sites must not be disturbed or damaged. Second, the appearance and shape of the sacred site have been significantly changed. This makes it harder for me and other aboriginal people with traditional interests in the sacred site to recognise it and the dreaming that it represents and to teach

[36] Bootu Creek n (28), Para 20.
[37] Bootu Creek n (28), Para 22.
[38] Bootu Creek n (28), Para 32.
[39] Bootu Creek n (28), Para 33-34.
[40] Bootu Creek n (28), Para 38.

our young people about this. This is likely to stop people from visiting the sacred site any longer. This damage has greatly offended the sacredness of this site and has made it much less sacred.[40]

Magistrate Oliver concluded that removing the horizontal arm of the sacred site amounted to desecration beyond a reasonable doubt. The decision highlights that the defendant's conduct throughout, including the attempts to obtain approval from the two traditional owners, suggests that they knew the site was a sacred and the horizontal arm was not a mere geological feature. Even if it is inferential, anyone whose conduct subjected the site to a substantial risk contributes to eroding it's sacredness. Moreover, the judge finds this to be a reasonable burden on any ordinary corporation to understand the intention of the Sacred Sites Act and obligations under it. Interestingly, the judge calls the defendant's actions a product of 'wilful blindness' and 'illogical' to not *"appreciate that preservation of the sacredness and spiritual significance of the Sites was central to the system of protection"*.[41]

In Bootu Creek, the court was constrained by the level of authority and lacked the freedom that a superior court may cherish in expanding the jurisprudence. However, the judgment opens up the space and meaning of desecration by reading into the legislature's intention. This in itself is a significant and radical departure from an ordinary judicial process that treats Indigenous environmental or heritage litigation within a limited matrix of issue-resolution. While the destruction of Sacred Site in cases such as these result in intergenerational and utterly disproportionate loss, a court of summary jurisdiction will be hard-pressed to provide adequate compensation. For a legal theory to flourish, the leap in judicial imagination would be radical and welcome only if it does not violate the demands of consistency and legitimacy. This particular court was ill-equipped to answer the political questions of whether Indigenous heritage is valued adequately or whether the decades of environmental and cultural opposition to uranium mining compounds this specific incident. Yet, it stands as one of the promising decisions among the recent decisions and is often recognised as a significant success in Indigenous peoples' litigation.

Brazil

Raposa Serra Do Sol (Raposa)[42] is an oft-cited case in Brazilian Indigenous rights jurisprudence. Before the Supremo Tribunal Federal (STF) the petition came in the heels of violent domestic unrest between Indigenous communities that were in favour of demarcation of Indigenous territories and pastoralists who were against it. Fundação Nacional do Índio (FUNAI) put forward the land's proposed demarcation in 2004 before the concerned minister. Simultaneously, there were many petitions and applications by the farmers who sought to remain within the Indigenous territories. The presidential ordinance accepting the demarcation was passed in 2004 and was challenged in the Superior Tribunal de Justiça (STJ). STJ's decision upholding the ordinance eventually found itself appealed in

[41] Bootu Creek n (28), Para 72.
[42] Petition 3388 / RR - Petition RORAIMA.

the STF. STF upheld the demarcation to be valid and directed the non-indigenous people from the region to be removed. Superficially, the decision appears unproblematic and may even be considered positive.

The decision is overshadowed by an anachronistic and tellingly egregious understanding of indigeneity. The social situation around Raposa litigation was marred by arguments for internal colonization and assimilation, which, in this case, was endorsed by the court.[43] While deciding the constitutionality of the presidential decree on demarcation, STF was only tasked with interpreting Indigenous peoples' rights under Article 231. Instead, STF narrowly constructed the rights embedded in Art.231 to exclude every right attached to the land except the right to stay on the demarcated territories. In recognizing the decree's validity, the court laid down nineteen qualifications to the Indigenous communities' rights. Amongst these, some of the critical conditions included:

> 1. The enjoyment of natural resources, soil, and water bodies can be extended according to the public interest by the operation of Federal or State law. The Indigenous communities will only have the usufructuary right over the resources and will not exercise the right to veto these decisions.
>
> 2. The usufructuary rights of the communities do not extend to using the mineral wealth or entering into mining agreements.
>
> 3. Indigenous interests do not outweigh national defense policy, and militarisation of Indigenous territories does not require prior consultation.
>
> 4. The Federal Government may install any public equipment, communication networks, roads, and transport routes and to the constructions necessary for the provision of public services by the Union, on Indigenous territories.[44]

On the face of it, the decision violates all principles of United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") with abandon. Brazilian Constitution goes only so far as grandstanding concerning Indigenous connection to the land. By conflating Indigenous rights over territory with the possessory or usufructuary right, the constitutional court aggravated the existing inequities. First, the court created a spurious distinction between land as political territory and Indigenous territory. The political territory in this distinction reinforces the narrow imagination of the State's political territory as the only possible category while erasing the Indigenous sovereign, political

[43] The idea of internal colonisation is defined here as used in Pinderhughes' premise: "a geographically-based pattern of subordination of a differentiated population, located within the dominant power or country.". See: Charles Pinderhughes (2011) "Toward a New Theory of Internal Colonialism," Socialism and Democracy Online 25, no. 1.
[44] Petition 3388 n (40), p.5.
[45] Petition 3388 n (40), p.3.

space. The judgment holds that the Indigenous territories are only limited to ethnic and cultural features and cannot override the political territory even if it has been long occupied by Indigenous people.[45] Second, the court mandated conditions violate Indigenous self-determination and leaves nothing for the notion of 'exclusive Indigenous enjoyment.' Even the much hailed UNDRIP has failed Indigenous peoples in this regard as it recognises Indigenous self-determination only insofar as it does not antagonise State's territorial integrity and sovereignty. While this may have been Brazil's contemporary political reality, a court reproducing it only legitimizes the violence of the law.

What is worse, the STF mulls over the question of what can be reasonably defined as 'citizens', to merit absolute control over the territory under the Constitution. It concludes that Indigenous people do not qualify under any of the social and political categories of organization.[46] The court also asserts the importance of 'assimilation' of Indigenous communities into a sense of 'Brazilian-ness' and isolate them from 'unhealthy influences of foreign non-governmental organizations.' Under the guise of positive treatment, STF subtly disenfranchises Indigenous people from making claims to their constitutional rights in a manner that expresses sovereign control. As scholars have remarked, behind the veil of a positive decision, the STF's opinion in Raposa has damaged Indigenous self-determination in an unprecedented fashion.[47]

Raposa provides a startling contrast to *Bootu Creek* decision in many ways. First, STF was a constitutional court and was within its powers to develop a constitutional, expansive, and revolutionary jurisprudence. The Superior Court was considering a principle-based question that would have implications for constructing of Indigenous rights in the future. In *Bootu Creek*, the summary court had to navigate narrow spaces of procedural limitations to create room for making a principle-based argument. Second, *Bootu Creek* revealed that what is implied and ruminated in a decision has as much heft as explicitly stated observations. The evolving nature of law corresponds with courts' evolving responsibility, especially in light of settler colonial/colonial realities. Courts ought to be conscious of not perpetuating the primeval conceptions of indigeneity, particularly when they are difficult to be dislodged from everyday social and political discourses. Brazil's STF fails where a small summary court of Northern Territory does an exceptional task.

Canada

In *Ktunaxa First Nations v British Columbia*,[48] the First Nation territory was in British Columbia in the region they had identified as Qat' muk. The Qat' muk region held the Grizzly bear spirit, which was sacred in the First Nation cosmologies.

[46] Petition 3388 n (40), p.7.
[47] Erica Yamada and Fernando Villares, "Julgamento da Terra Indígena Raposa Serra do Sol: todo dia era dia de índio", Rev. direito GV vol.6 no.1 São Paulo Jan./June 2010. Available at: https://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322010000100008 (Last accessed: 20 June 2020).
[48] 2017 SCC 54.

A year-round ski resort was proposed to be built in the area. The proponents sought government approval. The Ktunaxa First Nations expressed reservations because it would impact land and environment that was of cultural significance. Following this, the project was amended to accommodate some of the Indigenous concerns. The First Nations did not feel that their concerns were adequately addressed but were willing to engage in further consultation. After multiple consultations, the approval was granted by the relevant Minister. However, the First Nations felt that their objections were not correctly addressed. They asserted that the project would permanently drive away the Grizzly Bear spirit from the mountains and impair their right to hold and practice religious beliefs. Ktunaxa First Nations filed an application for judicial review, challenging the approval on the grounds that it violated their constitutional right to religion. Ktunaxa's submissions consisted of a Qat' muk Declaration, which involved a unilateral declaration based on pre-existing sovereignty.[49] The Qat' muk Declaration identified "refuge areas," where the building of permanent foundations or permanent human habitation was forbidden.

The court dismissed the appeal with a part concurring opinion by Moldaver J. The majority opinion held that the claim did not fall within the violation of S.2 of the Charter, i.e., freedom of religion. Since the appellants could not prove that the Minister's decision to approve the project had in any way interfered with the First Nation's ability to hold and practice their cultural and spiritual beliefs. The decision focussed more on the grounds that Ktunaxa First Nations were using judicial review 'to pronounce on the validity of their claim to a sacred site and associated spiritual practices.'[50] MacLachlin CJ et al. opined that the Minister's assessment, through consultation and accommodation, had sufficiently recognized the Ktunaxa's spiritual claims to Qat' muk. The court considered Ktunaxa's invitation to interpret S.2 widely, preserving land as integral to sustenance of religious beliefs, had to be declined as the State's duty was only to protect everyone's right to hold diverse beliefs.

Throughout the majority opinion, very little attention is paid to the significance of the site to Indigenous believes or the claim that the necessity to veto the project is an expression of Ktunaxa's self-determination. Only in one instance does the court identify the Ktunaxa claim as expressing concerns beyond something that can be offset by land reserves, economic payments, and environmental protections.[51] In explaining the reasons for dismissal, the court pays considerable attention to the scope of freedom of expression.[52] It draws instances from the European and American Convention of Human Rights in how those instruments have interpreted and defined freedom of religion but remain agnostic to how freedom of religion in Indigenous contexts is different or demand novel treatments. The majority opinions wade in

[49] Ktunaxa n (46), para 38.
[50] Ktunaxa n (46), para 71.
[51] Ktunaxa n (46), para 45.
[52] Ktunaxa n (46), para 61-67.

safe waters, never considering the relationship between Ktunaxa's beliefs and its relation to land or self-determination but taking refuge in the pedestrian rationale of Charter rights and S.35 of the constitution.

Moldaver J's partially concurring opinion contrasts the majority opinion by engaging with the submissions of Ktunaxa at length. While Moldaver J and Côté J agree that the duty to consult was fulfilled, they differ on whether the Minister's decision to approve the ski resort infringed on the freedom of religion of Ktunaxa First Nation. Moldaver J's opinion is interesting not only for the critical point on which he disagrees with the majority opinion but also on how he considers this vital breach to be balanced against other interests. He says:

> "In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her *religious* beliefs, constituting an infringement of s. 2 (a)…The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals, or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s.2 (a) breach."[53]

Moldaver J, asserts that with the loss of land, both the connection and the ability to pass on the spiritual knowledge to future generations are lost. He proceeds to contend that while it may be necessary for courts to be impartial in religious matters:

> To ensure that all religions are afforded the same level of protection under s. 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.[54]

Thus, Moldaver J's reading of S.2 in Indigenous contexts makes an interesting and innovative case against a restrictive reading of Freedom of Religion and the risk of foreclosing the said section's protection to Indigenous beliefs. The concurring opinion, in its attempt to recognise the distinctiveness of Indigenous beliefs, also opens up avenues to negate land claims. *Ktunaxa* is a fine example of deviating from the standard practice of reading duty to consult as the only framework for Indigenous contestations and moving towards understanding Indigenous claims and ontologies. Irrespective of what the outcome turned out to be *Ktunaxa* comes close to *Bootu Creek* in attempting to open up interpretative spaces for accommodating unique experiences of Indigenous communities that also define the nature of harms against them.

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[53] Ktunaxa n (46), para 118.
[54] Ktunaxa n (46), para 127.

Tailoring the Understandings of Indigenous Environmental Justice

While conceptualization of settler colonialism and the case law analysis of Indigenous environmental legality leaves us in an expansive theoretical field, few necessary normative elements can be gleaned out of such discussion. In ways similar to environmental justice, there is a need to recognize that the idea of Indigenous environmental justice is unique and intersectional. Environmental law at this stage must aim to integrate the new pressures in its jurisprudence—both on the environment and the people whose identities are closely interconnected with it. The Anthropocene has been exacting and creating new demands on humanity's responsibilities towards the past, the present, and the future. This is ever more pronounced in settler colonies that continue to operate with an uncritical approach to everyday realities of racism, discrimination, economic inequality, and capital-led dispossession. Courts share a greater burden of expanding and articulating meanings of justice where other avenues fail. Indigenous environmental justice not being a coherent, enforceable legal principle can hardly be mooted as an excuse for not recognizing Indigenous peoples' right to land, environment, and resources. The idea of 'substantive recognition', as opposed to mere recognition of cultural differences, must be emphasized in judicial processes. Following elements may contribute to developing a radical jurisprudence while remaining faithful to the rule of law and other principles that hold up the legal system:

• Indigenous environmental justice is an expression of sovereignty over the land. The two sovereignties that of First Nations that was never ceded and of the State may co-exist without contradictions.

• Indigenous communities must be endowed with the right to self-determination over social and economic policies that affect them. The possibilities in this realm are limitless and may range from their relationship with extractive companies to health, education, and everyday governance policies.

• Sovereignty and self-determination also imply that indigeneity must be sustained and continued to be handed down for the emerging generations. The Indigenous ways of living, knowledge systems, and cosmologies must be preserved and allowed to thrive to facilitate generational knowledge.

There are no grand gestures to achieve this within the existing juridical apparatus. Justice is a sustained practice than a single, noteworthy event. Environmental litigation has often provided an opportunity to revise and revisit the predominantly positivist assumptions that guide the legal mechanisms. Any leap in progressive jurisprudence has been episodic and left to the judges and courts' individual discretion. As interdisciplinary work in environmental and multi-species justice advance towards a better and more inclusive understanding of more-than-human world, it is imperative on courts to move towards more-than-juridical articulations of Indigenous environmental justice.

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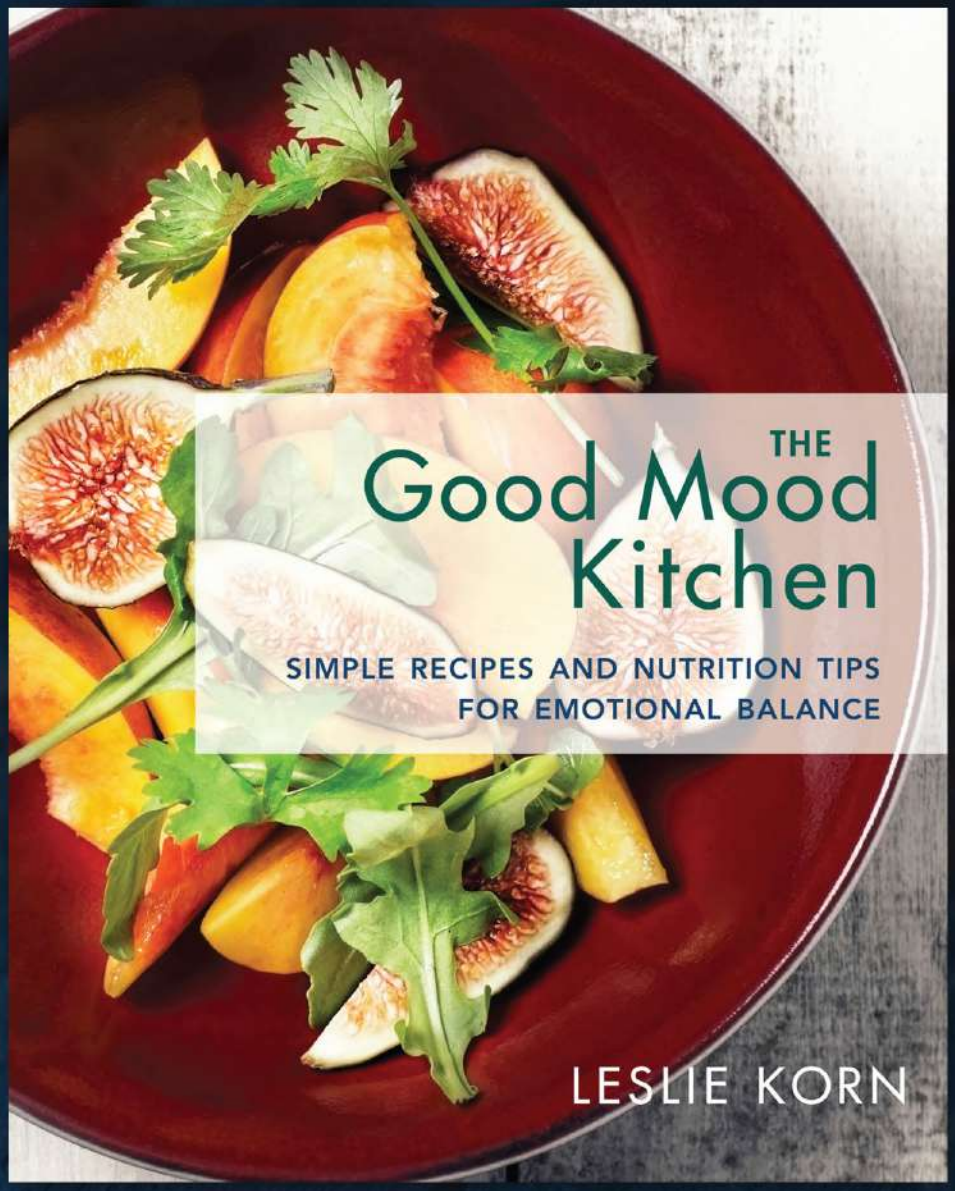

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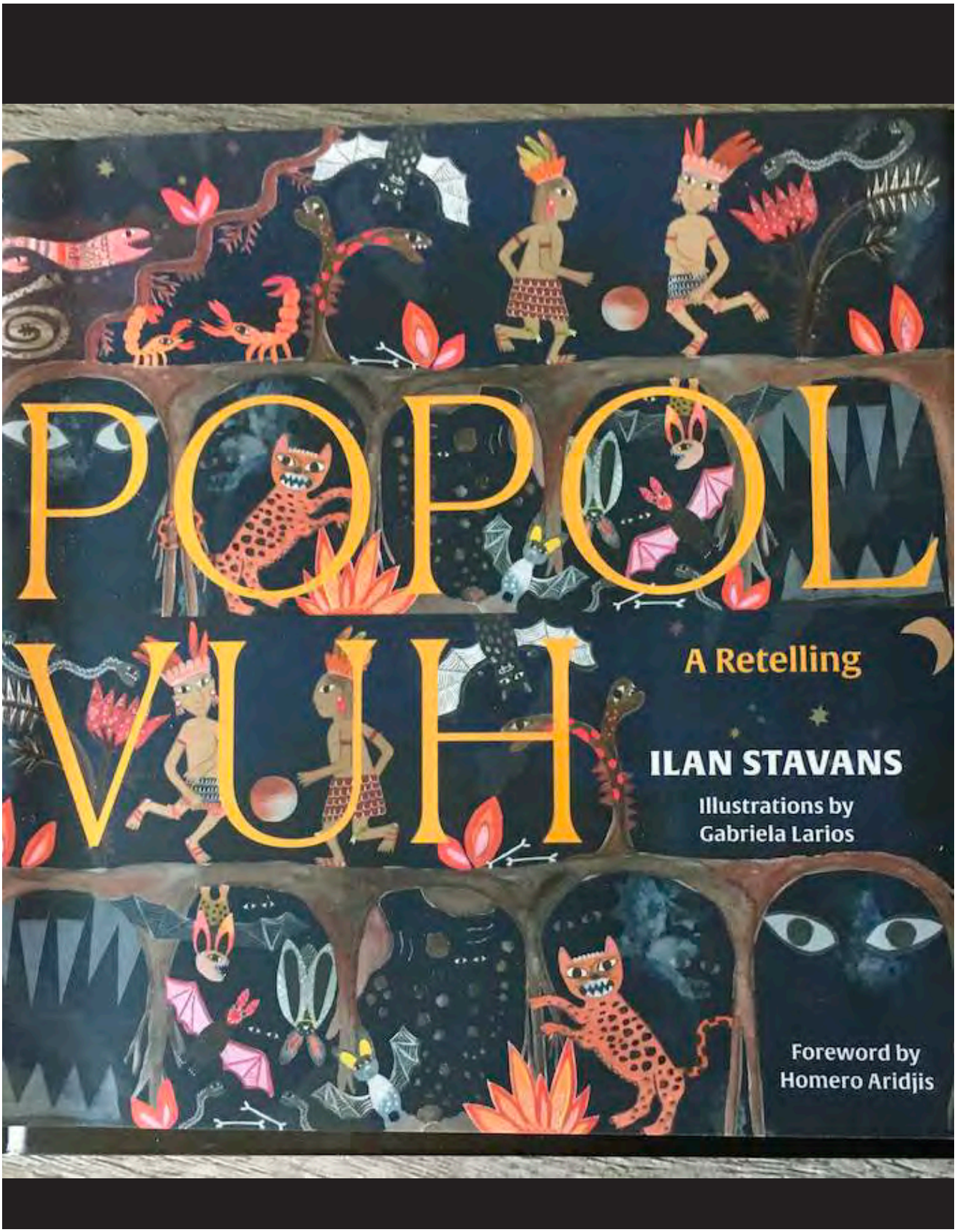
POPOL VUH
A Retelling
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BOOK REVIEW

Popol Vuh, A Retelling

By Ilan Stavans

Restless Books, Inc.
ISBN 9781632062406

By Rudolph C. Rÿser

My first taste of the Popol Vuh occurred in the late 1990s when I yearned to know about the beginning of all things. This desire is not an unusual desire of one steeped in the origin stories of Pacific Northwest (US) Indian tribes and my ancestors from the Waskarini, Cree, and Oneida, the Suabians, and of course, the Orkney Islands. All had stories of their origins, and in many ways, they were similar—from the darkness of an empty sky and the waters nearby. I noticed that some of my ancestors referred to the sacred corn, beans, and squash, and I had learned earlier in life that these life-giving sources of nourishment originated in the lands of the México and the Mayan-speaking peoples. And particularly the Cree, Oneida, and Waskarini ancestors remembered origin stories when the earth had no human beings but became populated by various "peoples" such as the turtle, muskrat, bear, deer, and many others. Why I asked, were these origin stories similar?

The Popol Vuh, translated by Dennis Tedlock in the 1970s and beyond, had been published in 1996 and seemed to promise new perspectives on the origins of things that may match my ancestors' tellings. I was not disappointed. As Tedlock writes, the Quiche lords consulted their book as they met in council, and their name for that book was Popol Vuh or "Council Book." Tedlock had traveled to the lands of the Quiche in Guatemala's highlands, searching for what turned out to be a Daykeeper by the name of Andres Xiloj—a keeper of sacred knowledge. Xiloj took Tedlock as an apprentice, teaching him the "language" according to the "rhythms of the Mayan Calendar" critical to comprehending the Popol Vuh text that had been rendered into the printed word in the 16th century by four unnamed Daykeepers. Tedlock spent nine years, including his 1977-76 apprenticeship searching the meanings contained in the Popul Vuh. Though sometimes difficult to follow due to the twists and turns of the Popul Vuh's way of thinking, his translation revealed a story that showed me that the origin of humanity as the Quiche conceived of that beginning was essentially the same as the stories from far to the north. The Popul Vuh, I decided, was the grandmother origin story that was spread throughout the hemisphere over three thousand years. The origins of the Quiche and their ancestors were the origins of my ancestors.

The Popol Vuh, the Quiché Book of Creation (or more literally, Book of the People and used a Book of Council), has been translated by numerous

scholars seeking the full meaning of this Book that was first written down in about 1550 rooted until that time in the oral tradition of the Quiché. This Book of the Daykeepers served as a guide to Quiche ancestors extending 3000 years into the past. The oldest surviving written account of the Popol Vuh (c. 1701) by Dominican friar Francisco Ximénez was rendered into a manuscript transcribed in K'iche' with a side column translation in Spanish. The Popol Vuh is one of the very few books of the Quiché surviving from the Spanish deliberate burning and destruction of texts.

Translated from the Quiché language, Father Francisco Ximénez (1666 – c.1729), a Dominican priest was known for his conservation of knowledge about the Quiché culture, prepared two versions of the Popol Vuh composed as the Manuscript of Chichicastenango. He offered himself as the "discoverer of the text" and not the author. His first translation was a verbatim, literal rendering into the Spanish language from the Quiché in which the original text had been written from the middle 1500s. His second rendering. Ximénez's transcription-translation of the Popol Vuh was retrieved from obscurity by Adrián Recinos at the Newberry Library (Chicago) in 1941.

My early reading of the Popol Vuh with Tedlock's translation was sparked anew by the publication of Ilan Stavans' 2020 translation titled, "Popol Vuh, A Retelling." I was eager to see how another researcher interpreted the Popol Vuh.

Reading the Popol Vuh in Stavans' writing informs the reader that the ancient text and the ancient animal symbols can be rendered as a poetic narrative that can be more accessible to 21st-century readers.

Stavans succeeds in retelling the Popul Vuh as a "modern story" in the language of a fantasy and not a historical or cultural narrative. Stavans writes that he had an "inescapable urge to retell the Popol Vuh for a contemporary readership." And in this goal, he succeeds. Readers familiar with Star Wars, and as Stavans notes, those who are readers of C.S. Lewis's The Chronicles of Narnia and J. K. Rowling's Harry Potter sagas will find the "retelling" of the Popol Vuh cast as a great mythic adventure that carries hints of values, ideas, and instructions. As a rendering of the Popol Vuh, an historical commentary on change, time, and space, Stavans chooses, however, to avoid. Stavans' adaptation skates over the role of dreams, omens, and rhythms of the Mayan calendar—so fundamental to the Popol Vuh. In its original form, this Book overcomes as Quiche Daykeepers will say, limitations such as nearsightedness. It's an ilbal, a "seeing instrument" or a "place to see" to know distant and future events. Daykeepers who traveled Chicago's Newbery Library to see the Popol Vuh in its original text would refer to it as "The Light That Came from Across the Sea." Since the Book tells of events that occurred before the first sunrise—a time when grandmothers and grandfathers could not be seen and when stones contained the spiritual helpers of deities in the forests all remained in the shadows.

Stavans' understanding of Popol Vuh recognizes that the Book is a story of events that take place in space and in time. Still, he assigns the story to the status of a "mythology of nature"—a story of "mythological events and ecological elements."

To the Daykeeper, the Popol Vuh gives the ability to see deep into the past and measure and comprehend future events. Stavans floats over the surface story and limits the reader's ability to see. He has transformed an instrument of power and knowledge into a mythic account that bears little resemblance to the meaning of the Book. Stavans' "retelling" transforms this ancient Book and its meaning into a television serial, as a story of "strange animals" and gods involved in a great fantasy.

If "fantasy" is what the reader seeks, Stavans has provided that in structure and style that charms and entertains. The problem is that he has stripped the text of its meaning—of its vision "before the sunrise" and the "Dawn of Life." As a Daykeeper may pray before approaching an ancient shrine:

> Make my guilt vanish,
> Heart of Sky, Heart of Earth;
> do me a favor,
> give me strength, give me courage
> in my heart, in my head,
> since you are my mountain and my plain;
> may there be no falsehood and no stain,
> and may this reading of the Popol Vuh
> come out clear as dawn,
> and may the sifting of ancient times
> be complete in my heart, in my head;
> and make my guilt vanish,
> my grandmothers, grandfathers,
> and however many souls of the dead there may be,
> you who speak with the Heart of Sky and Earth,
> may all of you together give strength
> to the reading I have undertaken.

Daykeeper Andres Xiloj, Tedlock reports, was convinced that if only one knew how to read it perfectly— "borrowing the knowledge of the day lords," the Popol Vuh would reveal truths to the four corners of the world. It is to this purpose the Book of Council has served human beings for all time. For amusement, one will read Popol Vuh, A Retelling, and not benefit from "seeing."

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Rudolph Ryser has worked in the field of Indian Affairs for more than thirty-five years as a writer, researcher and Indian rights advocate. Rudolph has taught widely on historical trauma, cultural models of addictions recovery, diabetes and culture, foods and medicine. He is the leading architect of the discipline of Fourth World Geopolitics--the study and practice of the social, economic, political and strategic relations between Fourth World nations and between Fourth World nations and States. He has developed and conducted tribal and intertribal workshops and seminars on health, community organization, self-government, law enforcement, and natural resource management. He has led these programs in the United States, Canada, Australia, Mexico and in Peru in Indian and other indigenous communities. Ryser served as Acting Executive Director of the National Congress of American Indians, and as former staff member of the American Indian Policy Review Commission. He holds a doctorate in international relations and he is the author of Indigenous Nations and Modern States, published by Rutledge in 2012.