



Kala Gabler, Student

Kala Gabler describes herself as "a descendant of Dutch, German, French and Irish settlers who have occupied various unceded lands throughout the so-called United States of America for over 150 years." She is currently a third-year law student at the Chapman University Fowler School of Law. During law school, she has spent her time critiquing foundational concepts of the U.S. legal system such as private property, criminalization, and the doctrine of discovery. In the future, she hopes to influence other European settlers and their descendants like herself to understand their position as such, to be critical of the law, and to take an active role in rectifying the harm done to others that they've benefited from.

International Law's Shortcoming in Addressing Environmental Destruction: The Exclusion of the World's Indigenous Nations

I. Introduction

Today, indigenous nations, peoples, and perspectives have very little status or power in the international legal system, and as a result, that system is fundamentally incapable of addressing and solving Earth's environmental issues. Instead, the nations that are given status and power in the international legal system are those that either rose to power via centuries of colonial land, labor, and resource extraction or those born from the ashes of former colonies. In either case, these nations almost universally act to reinforce the neo-colonialism and hegemony of the West, which values such concepts and systems as individualism, private property rights, and a capitalist economy. These concepts are in sharp contrast to indigenous value systems worldwide, which emphasize collectivism, communally shared property and resources, and an economy in balance with the environment. The colonial period essentially operated to convert vast numbers of indigenous populations to Westernism, and via neo-colonialism today, even former colonies that have gained so-called independence are heavily coerced into modeling their governments and economic systems after their former colonizers. This has resulted in establishing capitalist economies worldwide, which extract cheap labor and resources from certain regions in order to satisfy the hyper-consumerism other regions. This world order is exactly why we face the environmental crises of today and can only be solved by giving power and status to make decisions to indigenous nations worldwide.

At the foundation of the current international legal system, Indigenous nations and the international law they practiced with one another for centuries were explicitly dismissed and rejected.¹ The dominant narrative throughout the centuries of colonial expansion, and the narrative many still believe today, was that due to Europe's "superiority", it was justified in invading the territories of the "other", who were characterized as inferior, incapable of organized society and wasteful of their resources.² However, the true motivation was Europe's desire to extract labor and resources as cheaply as possible from other's lands in order to expand its

own power and wealth.³ The myths painting Europeans as civilized and everyone else as uncivilized were born to justify these exploits, and tremendous efforts were made to ensure these myths persisted throughout the centuries of colonial expansion.⁴

Despite the power of these myths and the systems they supported, indigenous people have and still do regularly attempt to gain recognition in the international legal arena, resulting in the establishment of working groups, conventions, and documents declaring the rights of indigenous persons. Further, Indigenous people regularly attempt to use the current legal structure to gain protection and redress for harm done to the environment.⁵ Indigenous tribes have also attempted to sue corporations, local, state and national governments, and have appealed to bodies such as the United Nations to intervene when litigation has failed.⁶ The fourth part of this paper exhibits four examples of these attempts at redress. Through these examples, this paper will argue that the international legal system is yet to shift in the fundamental ways required to amend the evils of colonialism and protect indigenous peoples and the environment.



The most powerful nations in the world and the capitalist/consumerist economies they rely on are directly responsible for the environmental crises we face today.⁷ Prior to colonization, and more recently industrialization, the world's ecosystems were carefully protected and maintained via indigenous practices.⁸ Only in the last 200 years have we begun to use Earth's resources at such an extreme pace and volume as to cause drastic changes in climate and ecosystem health.⁹ However, even with the near omnipresence of capitalism and consumerism worldwide, indigenous nations and groups who have maintained their autonomy and traditional ways are the ones protecting the rest of us from destruction.¹⁰ But these groups are being challenged and threatened every day by corporations and the nations that enable them. Thus, it is crucial to adjust the current structure of international law to allow indigenous nations to have truly equal status and power, giving them the ability to guide us back to a healthy way of living.

Before continuing, I want to address who I am and why I wanted to write on this topic. I am a third-generation Dutch settler on my mother's side, and I believe a fifth generation German on my father's side. I grew up on the lands of the Yuhaaviatam/Maarenga'yam and have spent most of my adulthood on the lands of the Acjachemen and Tongva peoples. Nothing in my lived experience gives me the certain natural authority to write on this subject. Still, as a settler, I feel I have a duty to disrupt the spaces my racial, class, and ability privileges give me access to. I did not grow up with any critical lens of the West; on the contrary, I was a strong believer in Western exceptionalism. Thankfully, I was given opportunities to alter the window I saw the world through, thanks to many Black, Asian, and Indigenous writers, thinkers, and friends with more truthful understandings of reality that challenged my thinking. This article is born out of that personal journey and my

current frustrations with going to a law school that does not acknowledge settler colonialism, the genocide and forced removal of the Acjachemen and Tongva peoples of this area, nor the harms that we, as law students may cause to others in this profession.

I choose to critique International Environmental Law because the most pressing problems we face today are environmental issues, and the current structures in place are inadequate to bring about change. This article is my attempt to speak to my classmates, professors, and others in legal and academic spaces who insist on upholding a system born from and still fueled by stolen lands, stolen labor, and stolen lives. My hope is that at least some will see, like I now do, the errors in the institutions we rely on and that they are harming us all, despite any benefit we think we gain personally. Finally, I want to specifically acknowledge the harm white writers, so-called historians, and experts have done in creating and popularizing disgusting lies and characterizations of indigenous persons to justify colonialism. It is my goal to highlight that the environmental crises we face today find their origins in the Christianized, individualized European model of society and that indigenous persons throughout Earth hold beliefs and have practices that, if uninterrupted by European invasion, would have left us all in much safer and fulfilling world today.

II. International Law's Consideration of Indigenous Nations.

International law does not consider the thousands of indigenous nations across the world as nations. International law, as it is viewed today, is incredibly recent compared to human history. Organizations considered fundamental to international law, such as the League of Nations (the League) and the United Nations (the UN), were not formed until the 1900s. However, the phenomena of different peoples meeting together, formulating treaties, agreements, and governmental bodies to coordinate and cooperate on various issues affecting them is not so recent nor is it something that was historically confined to one region of the globe. Despite this, international law, though it presents itself as universal, has been incredibly selective in its foundations.

In 1923, Georgetown Professor Baron Korff delivered a lecture titled “An Introduction to the History of International Law” to the Academy of International Law at the Hague (the Academy).¹¹ In the lecture, Professor Korff describes how the writers of international law that preceded him had falsely believed that the ancient world had no systems of international law.¹² He stated that these previous writings on international law demonstrated a sense that it was “one of the best fruits of [European] civilization” and “a system which distinguished us from the ancient barbarians.”¹³ Professor Korff then sets out to show how that old conceptualization has now been discarded, as historical investigations have unearthed treaties from ancient Egypt in 1280 B.C. and ancient Sumer in the 3000s B.C. However, these attempts to enrich international law with a more comprehensive historical consideration of international relations still fall short. In his lecture, Professor Korff fails to mention even one word about the civilizations of the Western Hemisphere. Additionally, though he mentions Egypt and Sumer, there is no mention of the true breadth of kingdoms, empires, and civilizations that

spanned Africa, Asia, and the Pacific Islands. This is a very telling omission, as Europe in 1923 was engaged in hundreds of colonial conquests worldwide and thus was well aware of these regions' histories.¹⁴

Korff's lecture to the Academy tells us that those developing the current version of international law in the 1900s knew that they needed to address the Eurocentrism of the 18th and 19th-century international legal writers. But they also knew that they could not legitimize the sovereignty of the very people they were currently colonizing and exploiting. This resulted in a contradiction that still haunts international law today, though most refuse to acknowledge it. It is a contradiction that is blatantly obvious to anyone engaging in an honest analysis of history--even in 1923. At the same time that the League declared its purpose was to "promote international cooperation and to achieve international peace and security,"¹⁵ members of the League were waging colonial campaigns worldwide, doing the exact opposite of promoting international cooperation and peace.¹⁶

Despite the myth created to justify this contradiction: that the "uncivilized" people under colonial rule were benefiting from the gift of European civilization.¹⁷ Indigenous peoples of the world are not uncivilized, nor were their pre-colonial societies underdeveloped--and Europeans knew this. For example, before the arrival of Europeans on Turtle Island (so-called "North America"), indigenous nations had "well-established diplomatic processes in effect [and] their own continental treaty order."¹⁸ These treaties were made "for purposes of trade, peace, neutrality, alliance, the use of territories and resources, and protection."¹⁹ Similarly, throughout Africa, there were various established kingdoms, empires, federations, and tribal nomadic groups, some of whom minted their own currencies, established trade routes, entered into treaties, and practiced diplomacy with one another.²⁰ The same existed in Asia, from the Chinese dynasties to the Majapahit Empire of Southeast Asia.²¹



Despite European knowledge of and even participation in treaty-making with indigenous nations during the colonial period, international law did not consider all the nations of the world and their relative systems, nor those systems' values as they developed. Anthony Anghie, Professor of Law at the S.J. Quinney College of Law, sums up the hypocrisy of imperial nations forming treaties with indigenous nations and then refusing to honor those nations' sovereignty:

The ability of natives to enter into such treaties was paradoxical, given that they were characterized as entirely lacking in legal status. What is clear from an examination of the treaties, however, is that international lawyers granted the natives such status, quasi-sovereignty, for the purposes of enabling them to transfer rights, property, and sovereignty.²²

In the US alone, there were something close to 370 treaties signed between the US government and indigenous tribes.²³ In the US, treaties are on equal status as federal law--the supreme law of the land--and can only be signed between two or more sovereign nations.²⁴ To date, many of these treaties have been broken.²⁵

Indigenous treaties were broken by the US because the US economic system required and demanded the ceaseless exploitation of land and resources to maximize profits. Honoring treaties would mean limiting growth, something that the western world was and still is unwilling to do.

Further, it is not that Indigenous persons have not tried to gain recognition in international legal spheres. In the 1920s, Chief Deskaheh of the Haudenosaunee (Iroquois) Confederacy traveled to the League to seek a resolution to a dispute with the Canadian Government regarding their sovereignty. The League dismissed the dispute as a domestic matter.²⁶ In 1924, two Māori leaders brought to the League concerns that the Treaty of Waitangi had been violated.²⁷ Their request to meet with the secretary general was rejected because the request was not “transmitted by the government of a member state.”²⁸ Similarly, in 1938, on behalf of Aboriginals from so-called Australia, an activist requested the League hear their protests against the oppressive treatment by the Australian government.^[29] The League did nothing, and the official who handled the request dismissively noted on the file that “I don’t think any action is possible or desirable.”³⁰ In the 1970s, Grand Chief George Manuel from the National Indian Brotherhood in Canada accompanied the Canadian Delegation to the UN Conference on the Human Environment in Stockholm, Sweden.³¹ Although this marked the beginning of Indigenous participation in Western international environmental negotiations, the resulting Stockholm Declaration and Action Plan did not acknowledge Indigenous Peoples.³² More recently, indigenous Hawaiians and Inuit have appealed to the UN for recognition of their sovereignty independent of the US and to declare that they have been illegally occupied by the US in violation of the Charter of the United Nations and that the US “instituted puppet governments that do not function as legitimate representatives.”³³ This is just a small sample of the various attempts by indigenous nations to gain recognition under international law.

After the creation of the UN, there has been much commentary on the issues of colonialism and decolonization, driven by attempts to reckon with many of the issues discussed here. However, these efforts continue to fall short of legally declaring the sovereignty of these formerly colonized people and requiring prior colonial and neo-colonial states to make amends. For example, in 1960, the UN General Assembly adopted the Declaration on Decolonization “solemnly proclaim[ing] the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations,” thus declaring that all people had a right to self-determination.³⁴ The declaration supposedly applies to “Non-Self Governing Territories”, which are defined as “territories whose people have not yet attained a full measure of self-government.”³⁵ According to the UN website, “When the United Nations was established in 1945, 750 million people - almost a third of the world's population then - lived in territories that were non-self-governing, dependent on colonial powers.” The UN claims that today, only 17 non-self governing territories remain, representing less than 2 million people.³⁶

The problem with the claim that only 2 million people are now living under colonial rule is that it disregards neo-colonialism. When the UN declares that a “non-self-governing territory” has gained independence, we must inquire deeper into the following two questions: (a) who gained independence? and (2)

what did they gain independence from? Up until the Declaration of Decolonization, it was no secret that international law had served the interests of the most powerful Western states.³⁷ These Western states maintained explicit “classic” colonial control over much of the planet; they created the so-called “first/third” world binary by stealing resources, labor, and land all over the planet to enrich themselves. Since international law has yet to fully reckon with the scope of classic colonialism and its influence, power and coercion, these so-called decolonization efforts could never fully achieve what they proposed they would. Thus, enter neo-colonialism, a system by which the old Western colonial powers still exert their influence over territories supposedly sovereign and independent in order to continue resource exploitation and economic dominance across the globe.³⁸ This takes place through institutions like the International Monetary Fund, where nations with bigger economies hold more voting power to decide who receives loans and under what conditions.³⁹

The failure of the UN’s decolonial movement is illustrated by the understanding that the states that resulted from the efforts look nothing like they did pre-colonialism. What the UN did was require former colonies to look, sound, and act like Western “democracies” in order to be considered “independent.” True decolonization would require full economic and political autonomy to the persons native to the region; it would require returning power over land, resources, and the decision of whether or not to even have borders--which very few societies thought were necessary before colonization. The UN cites that there are over 5,000 distinct indigenous groups worldwide.⁴⁰ But there are only about 200 nations. Indigenous groups far outnumber what the world considers formalized states. Restoring indigenous sovereignty and autonomy to its true precolonial forms requires the reinstatement of tribal structures, historic alliances, and traditional understandings of land and resource use.

There are numerous other declarations, forums, committees, and working groups throughout the international community claiming to address the issues facing indigenous peoples but which do not carry any binding legal obligations on states.⁴¹ One example, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), is often cited and applauded as evidence of the international progress in addressing indigenous rights. While it’s true that the document states such things as “the right not to be subjected to forced assimilation or destruction of their culture,” “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions,” and “the right to self-determination,” without a legally binding nature, it is unclear what there is to celebrate. Further, it took twenty years of formal debate to finalize the UNDRIP, and during these debates, material changes were forced by powerful nations to enshrine their ability to interpret the language in their favor.⁴²



International law, throughout its history and still today, is an institution that upholds Eurocentric ideals and structures of society at the expense of the vastly diverse societal values and structures found across the world prior to colonization. In contrast to what many say and believe about the current period being post-colonial, it has yet to truly reach such a milestone. What now exists is a structure that denies indigenous nations enforcement of the very rights the UNDRIP says they have, all while upholding those same rights for the countries who are responsible for the loss of autonomy and sovereignty of indigenous peoples around the globe.

III. International Law's Continued Rejection of Indigenous Sovereignty is Directly Related to the Environmental Crises We Face Today.

It is commonly said that humans cause climate change; that if we look at a timeline of the universe, scaled down to one year, humans arrive and almost immediately begin destroying Earth. However, this is blurring the problem because *all* humans do not cause climate change. The humans endorsing and participating in a system of perpetual exploitation of people and Earth's resources are causing climate change. Today, that system is the capitalist economic system. But it's not just capitalism in and of itself; it's what capitalism does to the way we view ourselves and Earth. Capitalism incentivizes us—particularly those of us with social and financial status—to see every interaction—with humans, with land, with the seas, with space—as an opportunity to exploit for profit.⁴³ This is the key problem we face today in protecting the planet, and why it is vital that we place indigenous nations and values in the driver's seat.⁴⁴

Contrary to the views of capitalism, indigenous communities, which we all come from, consider humans a part of nature, not in a position of domination over it. Harold Johnson, a Cree, explains the mindset of the Cree when they entered into treaties with Europeans:

[W]hen your family arrived here, Kiciwamanawak, we expected that you would join the families already here, and in time, learn to live like us. No one thought you would try to take everything for yourselves, and that we would have to beg for leftovers. We thought we would live as before, and that you would share your technology with us. We thought that maybe, if you watched how we lived, you might learn how to live in balance in this territory. The treaties that gave your family the right to occupy this territory were also an opportunity for you to learn how to live in this territory.⁴⁵

It is clear that domination over Earth is leading to its destruction. The values under capitalism, or any system that does not value the protection of Earth's resources, are incompatible with a healthy environment. Indigenous persons have been saying this since the beginning of such destructive systems. But recently, even more people are recognizing this, and calls for true decolonization, a return to our pre-colonial ways, living in balance with nature, are growing. However, at the same time, capitalism sees a new opportunity to exploit, and is constantly selling us new "solutions" to the problems it creates--which history is showing us just causes more problems. The latest in this cycle is the calls for a green, clean economy, which, contrary to the name, is not the solution to environmental harm.⁴⁶ The green economy isn't pushing us towards de-growth, towards more

balance with nature, it's simply proposing a new way to exploit nature for profit. Instead of clearing the forests for fossil fuel mining and drilling, we'll be clearing them for the mining of minerals to make electric batteries for cars, wind turbines, and other electric "solutions," few of which are recyclable.⁴⁷ Indigenous persons are already at the UN urging member nations to act.⁴⁸ Again, this is why indigenous sovereignty matters. This is why there is no hope in international law without indigenous nations having equal participation and voting power in these institutions.

Finally, indigenous people are presently those protecting the rest of us from destroying Earth and ourselves. Indigenous people are currently stewarding the lands where 80% of Earth's remaining biodiversity is located.⁴⁹ Indigenous traditional knowledge centers on the responsible and sustainable use of resources.⁵⁰ Many indigenous cultures have a mandate to act in ways that preserve resources for future generations.⁵¹ Founding the institutions of our societies on such principles would ensure we can allow the world to recover from the last century and a half of exploitation and preserve its future for the generations to come. Thus, it is imperative that we understand how and why we got here and who really is responsible. Then, moving forward, we can resist the next "solution" capitalism tries to sell us, we can eliminate the insufficient institutions and mechanisms of today and rest knowing we've had the answer all along in our ancestors.



IV. Case Examples.

Despite knowing how flawed and limited the systems in domestic and international law are to solve indigenous and environmental issues, there is no shortage of attempts by indigenous persons and groups to use these systems to find redress. Unfortunately, but unsurprisingly, these cases further demonstrate that international law is ill-equipped to resolve such issues.

a. The Inuit Circumpolar Council sues the United States.

In 2005, the Inuit Circumpolar Conference (ICC) submitted a legal petition⁵² to the Inter-American Commission on Human Rights (IACHR) against the United States (US) government, alleging that US climate change policies are violating the human rights of the Inuit.⁵³ The petition was specifically filed against the US because worldwide, the US is the "largest emitter of greenhouse gasses (GHG)" and, further, because the US refuses to participate seriously in efforts to reduce emissions, including its refusal to sign and ratify the Kyoto protocol.⁵⁴ The petition cited violations by the US against the Inuit of the 1948 American Declaration of the Rights and Duties of Man (ADRDM), including: the right to life (Article I), the rights to use and enjoy lands (Article XXIII), which includes the right to use and enjoy personal, intangible and intellectual property; the right

to the preservation of health and well-being (Article XI); the right to benefits of culture (Article XIII); the rights to residence and movement (Article VIII); and the rights to their own means of subsistence, as implied by the rights to lands, life, health and culture.⁵⁵ The ADRDM, a resolution that was non-binding at its adoption in 1948, is said to have gained force more recently with the 1970 revision of the Charter of the Organization of American States (OAS), to which the US is a party.⁵⁶

Unfortunately, submitting this petition was nothing more than a symbolic gesture. The IACHR actually has no authority to force the US to reduce emissions or compensate for its harm.⁵⁷ The petitioners knew this, but because no other means to obtain relief for the Inuit exists, they submitted it anyway, hoping at least for more international awareness and pressure on the US to act.⁵⁸ Even if the petition was accepted, the best the petitioners could ask for was (1) that the IACHR encourage the parties to negotiate, (2) that it conduct its own investigation and issue its own report on the connection between US emissions and Inuit human rights violations, and (3) if their report found evidence of human rights violations, to issue recommendations to the US and request the US report back on measures they adopt to comply with the recommendations.⁵⁹ Again, the recommendations would be purely voluntary.

As predicted, the petition was denied. The IACHR simply stated that the information provided did not enable them “to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”⁶⁰ Critics of the petition stated that one major problem was simply that the Inuit who authorized the complaint on their behalf were mostly in Canada.⁶¹ Thus, the critics felt that by filing it against the US, the petition requested the IACHR to approve a “major extra-territorial extension of the scope of application” which is not supported by international human rights law.⁶² Another criticism was regarding the issue of causation: “it is too simplistic to say that a State that contributes twenty-five percent of the world's [GHG] emissions bears twenty-five percent of the blame” because international law does not recognize contributory responsibility.⁶³ Finally, the petition was criticized for citing treaties and agreements that the US has not consented to be bound by, such as the American Convention on Human Rights.⁶⁴

The above critiques illustrate many of the problems faced in holding governments and private parties accountable for harms due to climate change. These mechanisms are insufficient. First, the international bodies where the petitions are filed often have no enforcement power and/or cannot enforce agreements on countries that refuse to be bound by them. They have no enforcement power because those in power do not want them to have enforcement power. This is done intentionally to ensure that corporations are not inhibited in their pursuit of unlimited economic profits or that countries are not limited in their ability to exploit the environment. Further, it's logically problematic to allow countries the option to consent or not when the countries themselves asserted legitimacy and jurisdiction over people and places that did not consent to their dominance over them.

Relatedly, western conceptualizations of jurisdiction specifically harm indigenous people and prevent effective resolution to climate issues. The Inuit are native to areas now colonized by Canada and the US. The

Inuit did not consent to this jurisdiction, but because international law legitimizes neo-colonial nations while delegitimizing Indigenous nations, people such as the Inuit are forcibly either under US jurisdiction or Canadian. Further, the critique that comparative responsibility is not supported by international law is just another example of why international law is ineffective at solving these problems. Western conceptualizations of law are very selective about who can be punished and for what conduct. Individuals are easily held accountable, whereas large corporations and governments are not, even when their conduct causes very similar or even more serious harm.⁶⁵ Under these systems, we will never address climate change, because addressing climate change is not profitable, whereas pretending to address it or simply denying it's a problem is.

b. Kivalina v. ExxonMobil Corporation.

In February of 2008, Kivalina, a Native Alaskan village of approximately 390 Inupiat residents, filed a federal lawsuit in California aimed at oil, coal, and power companies.⁶⁶ The village has historically been protected from winter storms and coastal erosion by sea ice.⁶⁷ However, due to global warming, the ice is melting, and the village may soon be completely lost due to the resulting coastal erosion.⁶⁸ The lawsuit alleges that the companies' contribution to global warming through GHG emissions interferes with the village's rights under the public nuisance doctrine to use and enjoy public and private property in Kivalina.⁶⁹ The village sought a remedy of \$400 million to assist with the inevitable relocation of the village.⁷⁰ Kivalina also alleged that certain companies conspired to limit public awareness of the link between GHG emissions and global warming, thereby further contributing to the community's injuries.⁷¹



No court ever even heard the merits of Kivalina's claim. Several of the companies being sued--Chevron, ConocoPhillips, ExxonMobil, Peabody Energy, and Shell--filed motions to dismiss, which were granted by the US District Court and later affirmed by the 9th Circuit Appeals Court and the US Supreme Court (denied certiorari).⁷² In granting the motions to dismiss, the District Court held that federal common law nuisance was no longer a viable claim, as it had been displaced by the Clean Air Act (CAA).⁷³ This means that Kivalina would have to now go through the CAA to seek relief. However, there is no remedy for such harm under the CAA. So, in practice, Kivalina must request the Environmental Protection Agency (EPA) create remedies specific to address their claim.

Further, the holding stated that the villagers lacked standing to bring the case because of the issue of causation. The court stated that since the EPA has released no standards regarding GHG emissions, the court doesn't know how to evaluate whether or not any

of the companies' conduct harmed Kivalina.⁷⁴

Today, Kivalina continues to erode due to the loss of sea ice caused by global warming.⁷⁵ Attempts by the EPA to regulate GHG emissions were also recently limited by the US Supreme Court in *West Virginia v. EPA*.⁷⁶ That decision held that Congress, not the EPA, would need to set state-level caps on carbon emissions.⁷⁷

The argument of causation justifying dismissal in both the ICC petition and the Kivalina lawsuit requires further analysis as it is constantly cited as justification for refusing to act. One point these courts emphasize is that they cannot hold companies accountable because they can't or shouldn't be the ones to decide who bears the cost of climate change. The issue with this argument is that it ignores the fact that someone is already bearing the cost of climate change--poor, working class, and indigenous people. By not acting, the court is endorsing such a reality. The courts are saying, yes, we know you are harmed by climate change, and yes, we know climate change is caused by GHG emissions, and yes, we know these companies are responsible for these emissions, yet we're going to conclude that you haven't proved causation.

c. Smith v. Attorney-General of New Zealand.

A more recent case, *Smith v. The Attorney General of New Zealand* (NZ), demonstrates another example of the limitations that indigenous persons face even when they seek relief from environmental harm caused by emissions within their domestic legal system.⁷⁸ The plaintiff in the case was a Māori elder, landowner, and tribal climate spokesperson of Ngāti Kahu descent who argued that the NZ government was not adequately addressing the harms caused by climate change to the country as a whole, and more particularly to the Māori.⁷⁹ He specifically advanced three claims: (1) the government of NZ breached a common law duty of care owed to all NZ citizens to "take all necessary steps to reduce [NZ] emissions and to actively protect the plaintiff and his descendants from the adverse effects of climate change;" (2) that the government of [NZ] had breached the rights guaranteed under sections 8 and 20 of the New Zealand Bill of Rights Act 1990 (NZBORA), namely the rights to life and the rights of minorities to enjoy and practice their culture; and (3) that the New Zealand government had failed to act in accordance with its obligations under Te Tiriti o Waitangi | the Treaty of Waitangi (Te Tiriti), New Zealand's founding document.⁸⁰ The Plaintiff also included descriptions of how climate change has harmed and will further bring harm to the Māori unless the NZ government takes action.⁸¹ All three causes of action were further premised on the fact that the Crown of NZ has been aware of the seriousness of the climate issue since 1992.⁸²

The case concluded with the High Court determining that all three claims were untenable. On the first claim, the court attacked the duty of care concept as both unrealistic under NZ law,⁸³ harmful to the NZ government and their companies' economic exploits,⁸⁴ and unsuitable for the judiciary to handle.⁸⁵ The court stated that such a general duty, as requested by the plaintiff would give all NZ citizens the right to sue the government for harm caused by Crown companies that cause climate change.⁸⁶ This would then require the Crown to interfere with the structure and functioning of these companies, which normally make decisions via

their board and directors.⁸⁷ Further, the court made the excuse that climate change is too complex for the courts and that the solutions to such problems are better handled by the legislature.⁸⁸

On the second claim, that the NZ government breached two provisions of the NZBORA: S 8 (deprivation of life) and S 20 (denial of the right to practice culture), the court rejected the plaintiff's argument that he and other Māori are deprived of the right to life by the government's failure to act. The court stated that the right to life is very narrow and that the risks to life cited were not urgent or "real" enough to trigger the protection of the right.⁸⁹ On the issue of the right to practice culture, the court rejected the plaintiff's argument that S 20 imposed a positive duty on the state to protect Māori culture from the harms of climate change and that the government has sufficiently considered Māori interests.⁹⁰

Finally, the third claim was turned down because the court stated that claims could not be brought to the court under Te Tiriti unless coupled with other tenable claims, of which there were none here.⁹¹

Again, we see more of the same problems as from the ICC Inuit case and the Kivalina case. The government of NZ is saying to its citizens that they are not owed a duty of protection against climate change because such a duty would disrupt the government and its corporations. This is after the Court acknowledged the general agreement about the causes and effects of climate change and after it cited all the agreements it participated in that promised to take action on climate change. So, we have a government here that acknowledges climate change and purportedly agrees that they have obligations to act under international agreements they are a party to, but they still will not grant the relief and make the changes that indigenous people are asking for because it would interfere with economic exploits.

d. Billy et al. v. Australia.

A group of eight Zenadth Kes (Torres Strait) Islanders, on behalf of themselves and their children, all Australian citizens, submitted a petition to the United Nations Human Rights Committee (HCHR) alleging that the government of Australia has violated their rights under the International Covenant on Civil and Political Rights (ICCPR) due to the government's failure to address climate change.⁹² Specifically, the islanders alleged violations of Articles 6 (right to life), 17 (right to freedom from arbitrary interference with life), 24 (the rights of children to protection), and 27 (right to enjoy culture).⁹³ As evidence of the harms, the islanders cited erosion and rising seas as causing the washing away of human remains of ancestors from burial sites, interfering with an important part of their culture.⁹⁴ In addition, the islanders explained that important



ceremonies in their culture must take place on their native lands to retain the full significance of the practices.⁹⁵ The islanders also argued that heavy rainfall and storms caused by climate change have degraded the land, consequently reducing the amount of food available from traditional fishing and farming.⁹⁶

The Australian government tried to dismiss the case, making arguments similar to those seen by the US and NZ: that climate change is a global problem and causation cannot be linked to one state actor, that they have no positive duty to implement measures to combat climate change, that the harm is speculative and in the future, and that the islanders did not establish they were victims.⁹⁷

In September of 2022, the UNHRC found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated Article 27 (their rights to enjoy their culture) and Article 17 (right to be free from arbitrary interferences with their private life, family and home).⁹⁸ The Committee found that Article 6 (the right to life) was not violated because Australia could take "affirmative measures to protect and, where necessary, relocate" the islanders over the next 10-15 years in order to protect the right.⁹⁹ Further, the claim under Article 24 was not considered in light of the findings in Articles 17 and 27.¹⁰⁰

While technically, the islanders won, it is uncertain what relief--if any--they will ever receive. The UNHRC opinion states that under Article 2 (3) (a) of the ICCPR, Australia is obligated to (1) provide compensation for the harms suffered, (2) engage in meaningful consultations in order to assess what the needs are, (3) implement measures necessary to secure the islanders continued safe existence on their lands, (4) monitor the effectiveness of measures and remedy deficiencies and (5) take steps to prevent similar violations in the future. However, the UNHCR's decision is not legally binding on Australia because the ICCPR has not been ratified under Australian domestic law.¹⁰¹ So, even though Australia is "obligated" to provide the foregoing remedies, the obligation is simply one of good faith.

As of the writing of this paper, there is no evidence that the Australian government has fulfilled this good faith obligation. Further, the UNHRC had also requested the Australian Government publish, present, and disseminate information about measures taken within 180 days of the decision.¹⁰² As far as the internet can produce, there has been no information published on the topic.

Although this case was supposedly a win for indigenous peoples in the fight to protect themselves and their future generations from the harmful effects of capitalism and its destruction of the planet, it remains to be seen what benefits the "win" has produced. Further, even if Australia does provide adequate compensation, makes substantial reductions in their emissions, and takes measures to secure the islanders' safe existence on their lands—which, again, they have not done--this would be immensely insufficient. Considering this is just one case covering a small number of people, it would be too little and too late unless the decision inspired and brought about similar cases in every corner of the planet. It has taken over eighty years since scientists first connected carbon emissions and global warming for a result like this. We don't have another eighty years. But again, history shows us the likelihood of this is small when agreements only impose "good faith" obligations.

V. Conclusion: Indigenous People Should No Longer Be Denied Sovereign Recognition in International Law and How Including Them Will Benefit Us All.

The original reasons for excluding indigenous people from international law are illegitimate. Indigenous people are not uncivilized, nor are they incapable of managing resources effectively. On the contrary, European models of private property and land and resource exploitation have brought us near a point of no return regarding the health of the Earth's ecosystem. Colonialist and capitalist expansion will always require an underclass, and Europeans of all classes bought into the idea of their racial superiority to justify the exploitation of land and labor of others for their own benefit. But Europe's conquest of the globe from the 1500s until now has demonstrated to us how powerful and dangerous these systems are and how we must reject them and find our way back to living in balance with nature, just as we did for 1000s of years.

The philosophy of domination over nature must be eradicated. This is possible, as we are all descendants of indigenous ancestors somewhere; we all come from people who knew how to live with nature, not dominate it. Now that we see the destruction of Earth that these systems have caused, it is time for us to return to those ways. Economic freedom must no longer be a magic word for powerful colonial and neo-colonial states to exempt themselves from accountability for destroying the only home we have in the entire universe. There can no longer be a legitimate right to exploit the Earth for profit. Any economic justifications must be rightfully placed in a position inferior and secondary to that of Earth's wellbeing.

International Law is not universal and is not legitimate or democratic unless it fully recognizes all indigenous nations as nations and gives them full autonomy over their lands and resources. Future generations are reliant on us to act, and the time has come and gone for more debate and discussion on the value that Indigenous people bring to the table. If our governments will not listen to us, it is time for us to join together and find a way.

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