

# Oil Extraction, Indigenous Peoples Living in Voluntary Isolation, and Genocide: The Case of the Tagaeri and Taromenane Peoples

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## ABSTRACT

*This Article utilizes the crime of genocide's requisite elements to analyze the massacres of the Tagaeri and Taromenane Peoples (Tagaeri-Taromenane). The Tagaeri-Taromenane are Indigenous peoples living in voluntary isolation in the Ecuadorian Amazon who are endangered by the oil and timber industries and the expansion of peasant settlements in their territory. This Article first provides a brief history of the Tagaeri-Taromenane massacres and then discusses the “intent to destroy a group” element of the crime of genocide as enumerated in international human rights jurisprudence. In concluding, the authors propose that the oil industry's public and private actors' direct control over the events that led to the massacres could establish criminal liability for those actors.*

## INTRODUCTION

In the book “Eichmann in Jerusalem,” Hannah Arendt presents her theory on the banality of evil. According to Arendt, portraying genocide as the work of evil people acting out of hatred is to ignore the true motives of responsible persons.<sup>1</sup> Genocide is a complex crime performed by many peo-

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1. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* (Penguin Classics 2006) (1964).

ple whose motives are often calculated to achieve their political or economic aims. The Tagaeri-Taromenane are Indigenous peoples living in voluntary isolation (IPLVI) in the Ecuadorian Amazon. Their territory is resource rich, housing an oil reserve and trees that are highly prized by logging companies. Ecuadorian law forbids activities like logging and oil drilling in areas where the Tagaeri-Taromenane are present. But after three massacres, there is reason to worry about the adequacy of Ecuador's protection measures and the Tagaeri-Taromenane's potential extermination. This Article will demonstrate how a lack of respect for the Tagaeri-Taromenane's human dignity and a desire for profit have combined to endanger the lives of the Tagaeri-Taromenane and cast doubt on assurances of their continued existence.

This Article proceeds as follows. Part I starts with a general background on IPLVI in Ecuador that will inform the rest of the Article. Part II analyzes the specific circumstances of Ecuador's last remaining IPLVI, the Tagaeri-Taromenane, their present situation, the massacres that they suffered, and the precautionary measures adopted by the Inter-American Commission on Human Rights in response to the attacks. Part III argues that the crime of genocide, as established under international law, could be applicable to the case of the Tagaeri-Taromenane massacres. Finally, Part IV briefly proposes means to establish criminal responsibility for those massacres. In doing so, this Article concludes that Ecuadorian public officials and private actors engaged in oil extraction activities within Tagaeri-Taromenane territory could be criminally responsible for genocide due to knowledge of their acts' consequences and the control that they exercised over such acts.

## I. INDIGENOUS PEOPLES LIVING IN VOLUNTARY ISOLATION AND INITIAL CONTACT IN ECUADOR

Accounts of Indigenous peoples refusing contact with the Western world appear throughout the Amazon basin; a consequence of colonization's violent and predatory practices.<sup>2</sup> States, influenced by the economic interests of mainstream culture, have tried to assimilate these peoples, often through violent and arbitrary contact, or by changing the way in which these people

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2. See PUEBLOS INDÍGENAS EN AISLAMIENTO VOLUNTARIO Y CONTACTO INICIAL EN LA AMAZONÍA Y EL GRAN CHACO [INDIGENOUS PEOPLES IN VOLUNTARY ISOLATION AND INITIAL CONTACT IN THE AMAZON AND THE GRAN CHACO] (Alejandro Parellada ed., 2006) (describing the current situation and threats to indigenous peoples living in voluntary isolation in Peru, Ecuador, Colombia, Venezuela, Brazil, Paraguay, and Bolivia). The IACHR recognizes the presence of isolated peoples in Peru, Ecuador, Colombia, Venezuela, Brazil, Paraguay, Guyana, Suriname and Bolivia; in its 2013 report, the IACHR stated that there are about 200 groups of isolated peoples, collectively totaling 10,000 members. See Inter-Am. Comm'n H.R., *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights*, OEA/Ser.L/V/II Doc. 47/13 (Dec. 30, 2013) [hereinafter *Inter-American Commission Recommendations*].

use their territory and resources.<sup>3</sup> Through these practices, States, informed by a different conception of development and wellbeing, deprive these peoples of the opportunity to live by their own culture and practices.<sup>4</sup> The Indigenous peoples living in voluntary isolation, through the fierce defense of their territories and their decision to remain isolated from surrounding cultures, are the last groups in the Americas to keep their traditional ways of life and cosmovision almost intact.<sup>5</sup>

There are difficulties in describing and defining these peoples, especially when attempting to determine their representation or even prove their almost-mythical existence.<sup>6</sup> Some authors call them “uncontacted” Indigenous peoples.<sup>7</sup> But, in fact, saying that they have refused contact is more accurate, so it is better to call them “Indigenous Peoples Living in Voluntary Isolation” (IPLVI).<sup>8</sup> It is also difficult to establish the names of these

3. In El Chaco (Paraguay) the state policy was to intern indigenous peoples in *reducciones* or small pieces of land where indigenous peoples received religious education and where their hunting and gathering traditional activities were highly limited. See Benno Glaiser, *Su presencia protege el corazón del Chaco seco*, in PUEBLOS INDÍGENAS EN AISLAMIENTO VOLUNTARIO Y CONTACTO INICIAL EN LA AMAZONÍA Y EL GRAN CHACO [The Presence that Protects the Heart of the Dry Chaco, in INDIGENOUS PEOPLES IN VOLUNTARY ISOLATION AND INITIAL CONTACT IN THE AMAZON AND THE GRAN CHACO] 212, 217 (Alejandro Parellada ed., 2006). In Peru, although there are some legal protections for isolated indigenous peoples, some indigenous peoples have been violently contacted with the support of the state. See Beatriz Huertas Castillo, *Auto determinación y protección*, in PUEBLOS INDÍGENAS EN AISLAMIENTO VOLUNTARIO Y CONTACTO INICIAL EN LA AMAZONÍA Y EL GRAN CHACO [Self Determination and Protection, in INDIGENOUS PEOPLES IN VOLUNTARY ISOLATION AND INITIAL CONTACT IN THE AMAZON AND THE GRAN CHACO] 34, 37 (Alejandro Parellada ed., 2006).

4. For centuries, the indigenous peoples suffered from violence and a lack of recognition of their fundamental rights. See Natividad Gutiérrez Chong, *Tipos de violencia contra las poblaciones indígenas*, in ETNICIDAD Y CONFLICTO EN LAS AMÉRICAS [Types of Violence Against Indigenous Peoples, in ETHNICITY AND CONFLICT IN THE AMERICAS] 17, 19–42 (Natividad Gutiérrez Chong ed., 2013). In colonial times, indigenous persons were under the guardianship of the Spanish settlers in the *encomienda* system. See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 23–26 (2000). Countries like Ecuador denied civil and political rights to people with no large land ownership when they split from Spain, and that covered most of the indigenous peoples. See ENRIQUE AYALA MORA, EVOLUCIÓN CONSTITUCIONAL DEL ECUADOR [CONSTITUTIONAL EVOLUTION OF ECUADOR] 25–26 (2018). The United States did not recognize all Native Americans as citizens until 1924. See 8 U.S.C.A. § 1401(b) (1924) (granting citizenship to Native Americans); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 25 (6th ed. 2015).

5. See Sydney Possuelo and Vincent Brackelaire, *Insumos para una estrategia regional para la protección de los pueblos indígenas aislados y en contacto inicial*, in PUEBLOS INDÍGENAS EN AISLAMIENTO VOLUNTARIO Y CONTACTO INICIAL EN LA AMAZONÍA Y EL GRAN CHACO [Inputs for a Regional Strategy for the Protection of Indigenous Peoples in Isolation and Initial Contact, in INDIGENOUS PEOPLES IN VOLUNTARY ISOLATION AND INITIAL CONTACT IN THE AMAZON AND THE GRAN CHACO] 192, 194–95 (Alejandro Parellada ed., 2006).

6. MINISTERIO COORDINADOR DE PATRIMONIO & FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES SEDE ECUADOR (FLACSO ECUADOR) [COORDINATING MINISTRY OF HERITAGE & THE LATIN AMERICAN FACULTY OF SOCIAL SCIENCES SEATED IN ECUADOR (FLACSO ECUADOR)], *Situación del Grupo Armadillo-Cononaco-Chico-Vía Tigüino*, in OBSERVATORIO CONTRA LA DISCRIMINACIÓN Y EL RACISMO [Situation of the Armadillo-Cononaco-Chico-Vía Tigüino Group, in OBSERVATORY AGAINST DISCRIMINATION AND RACISM] 12 (2012) [Hereinafter *Situación del Grupo Armadillo-Cononaco-Chico-Vía Tigüino*].

7. For example, Miguel Angel Cabodevilla uses the terms uncontacted and hidden peoples in his books. MIGUEL ANGEL CABODEVILLA, EL EXTERMINIO DE LOS PUEBLOS OCULTOS [THE EXTERMINATION OF THE HIDDEN PEOPLES] 55 (2004) [hereinafter EL EXTERMINIO DE LOS PUEBLOS OCULTOS].

8. See *Inter-American Commission Recommendations*, *supra* note 2.

groups, whether they identify themselves as a part of a larger group, and how they live. Despite this, anthropologists have identified two groups of IPLVI in Ecuador, the Tagaeri and the Taromenane peoples.<sup>9</sup>

The names “Tagaeri” and “Taromenane” come from the Waorani people, who act as researchers’ primary source on the Tagaeri-Taromenane.<sup>10</sup> The term “Waorani” is used to describe a group of clans or families that share the same language (*wao terero*) and cultural practices. The Waorani are deemed “Indigenous Peoples in Initial Contact” by virtue of having maintained contact and relations with Western society since the mid-20th century, while still retaining aspects of their pre-contact way of life.<sup>11</sup> The Tagaeri-Taromenane, meanwhile, are clans or families of indigenous peoples living in voluntary isolation in the Ecuadorian Amazon forest. The Tagaeri-Taromenane’s lack of contact with the Western world designates them as their own unique ethnic group,<sup>12</sup> though as we will elaborate, these peoples share some cultural similarities with the Waorani.

Although the Waorani’s exact relation to the Tagaeri-Taromenane is an issue of debate, there is no doubt about the groups’ similarities and close, if not always pacific, relationship. Testimony obtained from elderly Waorani families and records of religious groups working in the area indicate that the Tagaeri were once members of a Waorani family who, after experiencing the fear and rejection caused by mid-20th century contact, chose to re-isolate themselves and live by their traditional practices.<sup>13</sup> The leader of the Waorani who re-entered isolation was named *Taga* and is the reason why

9. See JOSÉ PROAÑO & PAOLA COLLEONI, *TAROMENANE WARANI NANI* 12 (2008).

10. See LAURA RIVAL, *TRANSFORMACIONES HUAORANIS: FRONTERA, CULTURA Y TENSIÓN* [WAORANI TRANSFORMATIONS: THE BORDER, CULTURE AND TENSION] (2015) [hereinafter *TRANSFORMACIONES HUAORANIS*]; MIGUEL ANGEL CABODEVILLA ET AL., *TIEMPOS DE GUERRA* [TIMES OF WAR] 35 (2004) [hereinafter *TIEMPOS DE GUERRA*].

11. In 1890, Catholic missionaries identified a group of 36 “auca” families (now called Waorani) living near the source of the Curarai River. Missionaries subsequently visited the location, annually or biannually, for three decades. In 1927, a mission settled in the bank of the Villano River near indigenous persons from the Zapara, Kichwa, and Waorani cultures. In 1947, Dayuma (a Waorani girl) was captured by missionaries. Through Dayuma, another missionary group, the Summer Language Institute (ILV) learned the Waorani’s language and started an aggressive plan to contact the Waorani that included settling a village to teach the Waorani Spanish and religion. See MIGUEL ANGEL CABODEVILLA, *LOS HUAORANI EN LA HISTORIA DE LOS PUEBLOS DEL ORIENTE* [THE WAORANI IN THE HISTORY OF WESTERN PEOPLES] 350 (3d ed. 1995) [hereinafter *LOS HUAORANI EN LA HISTORIA DE LOS PUEBLOS DEL ORIENTE*].

12. The Ecuadorian government and the Inter-American Commission on Human Rights consider Tagaeri-Taromenane to be a distinct ethnic group. See REPÚBLICA DEL ECUADOR, *CONSTITUCIONES DE 2008* [REPUBLIC OF ECUADOR CONSTITUTION OF 2008], art. 57, Oct. 20, 2008 Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> [hereinafter *CONST. OF ECUADOR*]. Inter-Am. Comm’n H.R., *Report No. 96/14, Petition 422-06, Report on Admissibility Tagaeri and Taromenani Indigenous Peoples in Isolation Ecuador*, ¶ 37 n.6, OEA/Ser.L/V/II.153 Doc. 12 (Nov. 12, 2014); *Inter-American Commission Recommendations*, *supra* note 2, at ¶ 78.

13. The Tagaeri’s re-entry into isolation entailed a complete lack of interaction with “cowories,” a Waorani term which literally means “non-humans,” but refers to anyone who is not Waorani. *TRANSFORMACIONES HUAORANIS*, *supra* note 10, at 66.

the Waorani now call them the Tagaeri—“the people of Taga.”<sup>14</sup> On the other hand, the Taromenane apparently come from entirely different families. The Waorani’s oral traditions describe them as racially different: Taromenane are tall, lighter-skinned, and speak with a different accent.<sup>15</sup> Some suggest the Taromenane are peoples originating from the Colombian Amazon who migrated into Ecuador at the beginning of the 20th century to escape rubber exploitation.<sup>16</sup>

Some experts, and the authors of this Article, claim that the Tagaeri-Taromenane are now one group, arguing that due to their small number, the Tagaeri-Taromenane should have set up alliances of necessity.<sup>17</sup> Due to this fact, the authors refer to them as the Tagaeri-Taromenane people, unless we need to differentiate them for explanatory purposes. For the Waorani, however, the Taromenane remain “other people”—a feature of the Waorani’s notoriously insular worldview and understanding of all non-Waorani as “coworie,” a word meaning “non-human” in the Waorani language. Indeed, despite the Taromenane’s purported merger with the Tagaeri, the Waorani still see the Taromenane as intruders living in their territory.<sup>18</sup> Unfortunately, the Waorani’s conception of the Taromenane as “other” and various territorial pressures continue to play a role in ongoing interethnic conflict between the Waorani and Tagaeri-Taromenane.<sup>19</sup>

Despite these differences, the Waorani’s recent contact with Western society and relationship with the Tagaeri-Taromenane allows researchers to use the Waorani’s testimony and way of life as a means of understanding how the Tagaeri-Taromenane currently live.<sup>20</sup> Following in this tradition, this Article’s purpose in discussing the Waorani lifestyle is to create not only a better understanding of the Waorani, but also the Tagaeri-Taromenane.

Though not a nation in the Western sense, because they do not have a central power and their decisions are not vertically approved, the Waorani are a group of families who share a common language, culture, and worldview.<sup>21</sup> The Waorani live in common houses of up to thirty people.<sup>22</sup>

14. LAURA RIVAL, *HIJOS DEL SOL, PADRES DEL JAGUAR: LOS HUAORANI DE AYER Y HOY* [SONS OF THE SUN, FATHERS OF THE JAGUAR: THE HUAORANI OF YESTERDAY AND TODAY] 78 (1996) [hereinafter *HIJOS DEL SOL, PADRES DEL JAGUAR*].

15. See TIEMPOS DE GUERRA, *supra* note 10, at 37.

16. See PROAÑO & COLLEONI, *supra* note 9, at 85.

17. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 155; PROAÑO & COLLEONI, *supra* note 9, at 86.

18. See PROAÑO & COLLEONI, *supra* note 9, at 86.

19. See Roberto Esteban Narváez Collaguazo, *Territorialidad de los Grupos Familiares de Pueblos Indígenas en Aislamiento (PIA) en la Región del Yasuní, Amazonía Ecuatoriana* [The Territoriality of Family Groups of Indigenous Peoples Living in Voluntary Isolation in the Yasuni Region of the Ecuadorian Amazon], 16 *TIPITÍ: J. SOC'Y ANTHROPOLOGY LOWLAND SOUTH AM.* 103 (2018).

20. Ecuadorian anthropologist Roberto Naraváez’s work is an example of how researchers use Waorani ethnographic studies to understand the Tagaeri-Taromenane’s culture. See *id.*

21. MIGUEL ANGEL CABODEVILLA & MILAGROS AGUIRRE, *UNA TRAGEDIA OCULTADA* [A HIDDEN TRAGEDY] 76 (2013).

They are hunter-gatherers who practice shifting agriculture<sup>23</sup> and depend entirely on the resources within their territory.<sup>24</sup> The Waorani try to maintain small family sizes, based on kinship and marital relations, which enables them to be self-sufficient and autonomous within their own territory.<sup>25</sup> Each family has a leader whose status comes from his or her abilities as a warrior and peacemaker, and each family member must contribute to the family's subsistence work.<sup>26</sup> Each family takes its name from an old man or old woman who is a common ancestor of the family.<sup>27</sup>

The Waorani are nomadic people whose movement aids to maintain a delicate balance between their hunter-gatherer way of life and the natural resources of the jungle. They move systematically at the end of each generation, and then return to the place of past generations, looking for their ancestors' marks.<sup>28</sup> These families maintain constant relations of friendship, exchange, or war. For them, war obeys a traditional custom that does not tend to the conquest of other's spaces, territories, resources, or the extermination of the other group, but to maintain independence and keep the social value of being a warrior.<sup>29</sup>

An important feature of the Waorani is that they are exogamous.<sup>30</sup> For the Waorani, the kidnapping of women from other Indigenous families is a common practice and one of the main reasons for relationships between different families.<sup>31</sup> These inter-family relationships include relationships with Tagaeri-Taromenane families.<sup>32</sup>

Each Waorani family needs a territory for its activities, so external activities, such as oil exploitation and illegal logging, which reduce the available territory for the Waorani and Tagaeri-Taromenane, have the potential to create conflicts among clans. Despite having been recently contacted, some Waorani families have already changed, to some extent, their livelihoods. Comparatively, the Tagaeri-Taromenane, who remain in isolation, continue to live by their traditional ways, which require sufficient territory to hunt, fish, and gather goods. The increasing amount of external pressure, in the

22. JOSÉ PROAÑO ET AL., *TRAS LAS HUELLAS DEL SILENCIO [BEHIND THE FOOTPRINTS OF SILENCE]* 45 (2018) [hereinafter *TRAS LAS HUELLAS DEL SILENCIO*].

23. Shifting agriculture is a "[s]ystem of cultivation that preserves soil fertility by plot (field) rotation, as distinct from crop rotation. In shifting agriculture a plot of land is cleared and cultivated for a short period of time; then it is abandoned and allowed to revert to its natural vegetation while the cultivator moves on to another plot." *Shifting Agriculture*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/shifting-agriculture>.

24. See LOS HUAORANI EN LA HISTORIA DE LOS PUEBLOS DEL ORIENTE, *supra* note 11, at 77–83.

25. See PROAÑO & COLLEONI, *supra* note 9, at 33.

26. See CABODEVILLA & AGUIRRE, *supra* note 21, at 76.

27. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 50.

28. See TIEMPOS DE GUERRA, *supra* note 10, at 48.

29. HIJOS DEL SOL, PADRES DEL JAGUAR, *supra* note 14.

30. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 87.

31. See *id.* at 312.

32. See Miguel Angel Cabodevilla, *Pueblos ocultos e innecesarios: El caso de Ecuador*, in *PUEBLOS INDÍGENAS Y POLÍTICA EN AMÉRICA LATINA [Hidden and Unnecessary Peoples: The Case of Ecuador]*, in *INDIGENOUS PEOPLES AND POLITICS IN LATIN AMERICA* 499–520 (Salvador Martí I Puig ed., 2007).

form of oil and logging activities, on Waorani territory has provoked violent competition for natural resources among clans. The Waorani culture makes this competition all too foreseeable.

The scholarship on this topic shows that war among clans happens in times of scarcity, when different clans are forced to compete for resources.<sup>33</sup> Traditionally, hostilities are settled through spear warfare that ends when both parties to the warfare arrive at an agreement. Where an agreement is reached, parties tend to experience a sense of injustice and seek moments to avenge dead warriors through continued warfare.<sup>34</sup>

Before contact, the Waorani were known for violently refusing contact through the 1950s and were referred to as “auca”—a Kichwa word for “savages”—in international news in 1956 when they speared to death five Christian missionaries who entered their territory.<sup>35</sup> Even today, the Waorani are considered abnormally violent, with some scholars asserting the Waorani “may have the highest rate of homicide of any society known to anthropology.”<sup>36</sup> One study, which evaluated 551 Waorani individuals through five generations found that 42% of all Waorani population losses were caused by Waorani killing other Waorani and that 64% of all Waorani population losses were “attributable to warfare and other threats of violence.”<sup>37</sup> Although violence among clans is a common occurrence in Waorani culture, the Waorani’s access to modern firearms means that continued clashes with the Tagaeri-Taromenane have taken an unsustainable turn. Ultimately, Western society’s necessities have pushed these groups into an escalating series of deadly confrontations.<sup>38</sup>

## II. THE PRESENT SITUATION, ATTACKS, AND LEGAL RESPONSE

### A. *The Attack of 2003*

The most significant attack against the IPLVI occurred in May of 2003 when nine Waorani men assaulted a house belonging to a Tagaeri and Taromenane group.<sup>39</sup> With spears and shotguns, the Waorani killed twelve people, most of them women and children.<sup>40</sup> Leading up to the attack, Babe, the elder leader of a Waorani community that perpetuated the attack, invited Waorani from different communities to a meeting in Tiguino town,

33. See Narváez, *supra* note 19, at 109.

34. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 23.

35. See LOS HUAORANI EN LA HISTORIA DE LOS PUEBLOS DEL ORIENTE, *supra* note 11, at 439.

36. Stephen Beckerman et al., *Life Histories, Blood Revenge, and Reproductive Success Among the Waorani of Ecuador*, 106 PNAS 1834, 1834 (2009).

37. *Id.*

38. See PROAÑO & COLLEONI, *supra* note 9.

39. See MILAGROS AGUIRRE, ¡A QUIÉN LE IMPORTAN ESAS VIDAS! [WHO CARES ABOUT THESE LIVES!] 25 (2001) [hereinafter ¡A QUIÉN LE IMPORTAN ESAS VIDAS!].

40. See *id.*

with the aim of planning the massacre.<sup>41</sup> During the meeting, the son of a Waorani man, killed by IPLVI a decade prior, asked the assembled Waorani for justice; in response, the elder Babe provided boats, provisions, and fuel for the punitive expedition.<sup>42</sup> After the meeting, the Waorani who perpetrated the attack immediately entered the Tagaeri-Taromenane's territory.<sup>43</sup> Upon their return from the massacre, they displayed the head of one of the killed Tagaeri-Taromenane in the streets of the closest town.<sup>44</sup>

The express motive for the attack was revenge for the killing of the Waorani man that occurred ten years before.<sup>45</sup> However, the Waorani that committed the 2003 attack were in the timber business, and timber companies saw the presence of IPLVI as an obstacle to business after several lumberjacks died from Tagaeri-Taromenane spear attacks.<sup>46</sup> Indeed, an important group of Waorani believe that the influence of timber and oil companies is responsible for the massacre.<sup>47</sup> The oil frontier's expansion displaces the Tagaeri-Taromenane from their territory and results in clashes with the Waorani and the region's settlers.<sup>48</sup> When displaced, the IPLVI will attack in order to defend their territory, and given the risk of IPLVI retaliation, some settlers and lumberjacks may look to establish contact with the Tagaeri-Taromenane with the intent of pleading "self-defense" as an excuse to kill Tagaeri-Taromenane.

Following the attack, the Pastaza prosecutor's office in Ecuador inspected the scene of the massacre, performed autopsies on the corpses, and initiated a criminal investigation that ended with no conclusive findings.<sup>49</sup> In response to the opening of the criminal investigation, the president of one of the main Waorani organizations (Organización de la Nacionalidad Waorani del Ecuador, or ONAWE) publicly requested that the State amnesty the perpetrators on the condition that the perpetrators refrain from conducting another attack.<sup>50</sup>

Although from a Western perspective, a criminal investigation into the Waorani perpetrators' actions may appear to be an appropriate means of ensuring punishment for the perpetrators, a culturally-sensitive analysis would ask whether external actors took advantage of the Waorani's internal dynamics.<sup>51</sup> As previously addressed, the scarcity of resources in competing territory is a cause of conflict among Waorani and Tagaeri-Taromene clans.

41. See TIEMPOS DE GUERRA, *supra* note 10, at 50.

42. See *id.*

43. See *id.* A picture of the head was on the front page of national newspaper "El Extra." See TIEMPOS DE GUERRA, *supra* note 10, at 18.

44. See *id.*

45. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7.

46. See ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 73.

47. See *id.*

48. See PROAÑO & COLLEONI, *supra* note 9, at 51.

49. ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 45.

50. See *id.* at 76.

51. See *id.* at 23.



The leaders of the confessed perpetrators were Waorani members involved in the timber business whose revenues were affected by the attacks of the Tagaeri-Taromenane to the lumberjacks. The cedar trees, mahogany trees, and handroanthus chrysanthus trees are rapidly disappearing from the Waorani territory, so lumberjacks travel to Tagaeri-Taromenane territory to obtain these highly valued species.<sup>52</sup> It is still unclear how firearms were distributed amongst the Waorani.<sup>53</sup> Also unclear is the extent to which the oil and timber industries, who view IPLVI as interfering with business and to whom many Waorani owe their livelihood, played a role in influencing the attack.<sup>54</sup> In conducting its investigation, the Pastaza prosecutor's office failed to consider the influence of external actors in the conflict.<sup>55</sup>

A culturally appropriate reopening of the investigation is necessary to establish a precedent for these kinds of crimes. A new investigation should inquire into the source of weapons and money to perpetrate the attack and the businesses profiting from the illegal logging activities of the perpetrators. Acknowledging the Waorani culture means to take into consideration their territorial and gathering dynamics, and how third parties could take advantage of those things in order to spur conflict among the different ethnic groups. The Tagaeri-Taromenane are in permanent danger due to the heavy casualties suffered in the 2003 attack. Meanwhile, the Waorani nation are now stigmatized because of the acts of a few members,<sup>56</sup> when according to their leaders, most of the Waorani families trying to live by their traditional practices suffer similar aggressions to those suffered by IPLVI families.<sup>57</sup>

### B. Other Attacks After 2003

The 2003 incident attracted the whole of Ecuador's attention. Since then, similar episodes involving IPLVI have been reported. In 2006, three illegal lumberjacks were attacked by spear-wielding IPLVI when they entered Tagaeri-Taromenane territory, resulting in one lumberjack's death.<sup>58</sup> Even

52. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 16-21.

53. The sole presence of indigenous peoples in voluntary isolation near an oil camp demands the implementation of special safeguards and protocols that could result in the suspension or permanent termination of an oil camp's operations. See *id.* at 189. Additionally, several lumberjacks have died or been injured by Tagaeri-Taromenane spear attacks. See *id.*

54. See *id.*

55. See Mikel Barraondo López, *Pueblos Indígenas no Contactados ante los Derechos Humanos*, in PUEBLOS NO CONTACTADOS ANTE EL RETO DE LOS DERECHOS HUMANOS: UN CAMINO DE ESPERANZA PARA LOS TAGAERI Y TAROMENANI [*Uncontacted Indigenous Peoples Before Human Rights*, in UNCONTACTED PEOPLES BEFORE THE CHALLENGE OF HUMAN RIGHTS: A PATH OF HOPE FOR THE TAGAERI AND TAROMENANI], 59-104 (2005).

56. See ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 189.

57. Comisión Interamericana de Derechos Humanos, Ecuador: Caso Tagaeri y Taromenani, YOUTUBE (Oct. 19, 2015), <https://www.youtube.com/watch?v=LEduoxc0Sg&t=6963s> (Testimony of Alicia Cawiya (Vice President of the ONAWE), Merits Hearing on the Tagaeri and Taromene Case, IACHR, Washington DC, 156 period of sessions).

58. See ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 20.

though the lumberjacks illegally entered the Tagaeri-Taromenane's territory, their illegal entrance was not investigated.<sup>59</sup> Subsequently, some Waorani reported similar expeditions of armed personnel to the authorities.<sup>60</sup> Apparently, the purpose of these expeditions was not only to extract timber, but sometimes to decrease the number of IPLVI.<sup>61</sup>

Another incident, the Duche family killing, occurred in 2009 when a group of IPLVI killed the Duche family in the peasant village of Los Reyes, which is located near the Armadillo Oil Camp Zone ("Armadillo Camp").<sup>62</sup> In August of 2009, the killings occurred when a group of Tagaeri-Taromenane crossed paths in a secondary road with a woman and her three children. The group killed the woman, her 11-year-old daughter, and her 18-year-old son.<sup>63</sup> Both independent and official information has revealed the existence of IPLVI in the Armadillo Camp.<sup>64</sup> Indeed, maps created by Ecuador's Environmental Ministry acknowledge that the "Armadillo Camp Clan" lives in the area, and Ministry personnel have found several signs of IPLVI presence there.<sup>65</sup> In the Armadillo Camp, it is possible to clearly identify the factors affecting the Tagaeri-Taromenane's chances of survival. The Armadillo Camp: (i) is the easiest point of access to the Tagaeri-Taromenane's territory by land; (ii) is the part of the Tagaeri-Taromenane's territory that adjoins to peasant villages (such as Canelos, Nueva Esperanza and Los Reyes); and (iii) contains two oil camps (Armadillo and Hormiguero Sur) that contaminate the jungle with chemical and noise pollution.<sup>66</sup> The noise pollution is particularly problematic, as it scares away animals normally hunted by the IPLVI, thus reducing their means of obtaining sustenance within their own territory.<sup>67</sup> In its investigation, the Orellana prosecutor's office acknowledged this problem and identified noise pollution as one of the factors prompting the IPLVI to move from their

59. See *id.* at 97.

60. See *id.* at 102–04.

61. A clash between the Tagaeri-Taromenane and lumberjacks on April 26, 2006 has not yet been confirmed. However, rumors of a lumberjack revenge killing 30 Tagaeri-Taromenane came from multiple sources and were widely broadcast by the Ecuadorian media. See *id.* at 17.

62. See CABODEVILLA & AGUIRRE, *supra* note 21, at 43.

63. See *Matanza en Oriente sería por petroleras* [Killings in the East could be caused because the oil companies], *El Universo* (August 16, 2009), <https://www.eluniverso.com/2009/08/16/1/1447/matanza-oriente-seria-petroleras.html>.

64. See Official letter MAE-D-2009-0383 from Marcela Aguiñaga, Ministra del Ambiente [Secretary of the Environment], to Luis Arauz, Gerente de operaciones de Petrotesting Colombia [Director of Operations for Petrotesting Colombia] (Jul. 30, 2009) [on file].

65. See Memorandum from Susana Ullauri, Directora Nacional de Prevención de la Contaminación Ambiental [National Director for the Prevention of Environmental Contamination], to Lorena Tapia, Coordinadora General del Ministerio de Ambiente [General Coordinator of the Environmental Ministry] (Jan. 25, 2010) [on file].

66. See PROAÑO & COLLEONI, *supra* note 9, at 72.

67. See CABODEVILLA & AGUIRRE, *supra* note 21, at 44, n.13 (interviewing Alicia Cawiya, Vice President of the ONAWE, on the living conditions of the Waorani and Tagaeri-Taromenane).

territory to nearby villages.<sup>68</sup> The IPLVI's forced proximity to these villages increases resource competition between IPLVI and village settlers, resulting in inter-ethnic conflict like that observed in the Duche family killing.<sup>69</sup>

The 2009 killing of the Duche family in Los Reyes is a sign of the external pressures the Tagaeri-Taromenane feel within their territory.<sup>70</sup> Furthermore, the Tagaeri-Taromenane's presence near Los Reyes evokes fear in the village's settlers, even if the settlers understand that the IPLVI are not responsible for their acts. Consequently, the settlers of Los Reyes remain armed and ready to defend themselves from any new IPLVI attack.<sup>71</sup>

In response to the Duche family killings, Ecuador's Environmental Ministry initiated an investigation and presented a report establishing the Armadillo Camp as an area of highest vulnerability for the IPLVI.<sup>72</sup> In the report, the Ministry identified oil extraction activities as the cause of the killings and asked the Ministry of Nonrenewable Natural Resources to take actions to stop all oil activity in the Armadillo Camp-Los Reyes area.<sup>73</sup> In doing so, the Environmental Ministry discussed the Ministry of Nonrenewable Natural Resources' responsibilities under the criminal code (genocide and ethnocide)<sup>74</sup> for which public authorities shall be liable if they do not take actions to stop a genocide.<sup>75</sup> Soon after the report's publication, the author of the report was dismissed from his post and the documents and competences on IPLVI protections were passed from the Environmental Ministry to the Justice Ministry.<sup>76</sup> A few months afterward, the new office

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68. Investigation of the Prosecutor of Orellana, Investigation on the Murder of the Duche Family (Aug. 10, 2009), (Investigation No. F1-643-2009).

69. See CABODEVILLA & AGUIRRE, *supra* note 21, at 44, n.13.

70. See *Informe Ejecutivo sobre Ataque con Lanzas en Comunidad Colona de Los Reyes* [Executive Report on the Spear Attack in the Settlers' Community of Los Reyes], Ministerio del Ambiente (MA) (Environmental Ministry) 3 (Aug. 19, 2009) (Ecuador) [on file].

71. See *id.* at 16.

72. See *id.*

73. See *id.* at 43.

74. Ecuador's Criminal Code includes the crime of ethnocide to prosecute people that attempt to contact the Indigenous People Living in Voluntary Isolation. Article 80, titled "Ethnocide," states that "[t]he person who, purposely, generally or systematically, destroys totally or partially the cultural identity of indigenous peoples living in voluntary isolation, will be punished with imprisonment of 16 to 19 years in jail." *Código Orgánico Integral Penal (Integral Criminal Code)* (Feb. 10, 2014), Supplement of the Official Registry No. 180 (Ecuador). The Constitution of Ecuador also states that a violation of the isolation of these groups amounts to a crime of ethnocide. Article 57 states that "[t]he territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation, and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law." REPÚBLICA DEL ECUADOR, CONSTITUCIONES DE 2008 [REPUBLIC OF ECUADOR CONSTITUTION OF 2008], Oct. 20, 2008 Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> [Hereinafter CONST. OF ECUADOR].

75. See *supra* note 70, at 6–8.

76. See MILAGROS AGUIRRE, LA SELVA DE PAPEL. ITT, POLÍTICAS, LEYES Y DECRETOS EN FAVOR DE LOS AISLADOS [THE PAPER JUNGLE. ITT, POLICIES, LAWS, AND EXECUTIVE DECISIONS IN FAVOR OF ISOLATED PEOPLES] 44 (CICAME, 2010) [Hereinafter, LA SELVA DE PAPEL].

in charge of the case denied the existence of the Tagaeri-Taromenane people in the area of Armadillo Camp-Los Reyes.<sup>77</sup>

### C. *The IACHR's Precautionary Measures (MC-91-06)*

In 2006, before the Duche killings, a group of people concerned about the IPLVI's situation presented a request for precautionary measures to the Inter-American Commission on Human Rights (IACHR).<sup>78</sup> The measures were granted on May 10, 2006.<sup>79</sup> Subsequently, Ecuador created the National Plan of Precautionary Measures with the goal of abiding by and implementing the IACHR measures.<sup>80</sup> Ecuador hired researchers and experts on IPLVI to design a plan for reducing the danger third parties posed to IPLVI, and the Environmental Ministry controlled the plan's implementation.<sup>81</sup>

Under the first iteration of the plan, a system was created to control illegal timber activities.<sup>82</sup> The Environmental Ministry also tried locating the IPLVI in order to develop the best measures for their protection.<sup>83</sup> The Environmental Ministry's research showed that there was a family of IPLVI living close to an oil camp (the Armadillo Camp), which was a surprise; at the time, it was generally accepted that the IPLVI were located deeper in the jungle.<sup>84</sup> Upon this discovery, the Environmental Ministry sent a request to the Mining and Oil Ministry for the immediate end to all oil activities occurring in the Armadillo Camp.<sup>85</sup>

In addition to these precautionary measures, the government continued using "Intangible Zones" (ZITT), which demarcate the Tagaeri-Taromenane's territory and establish an area where no resource extraction can occur.<sup>86</sup> Around this time, Ecuador also launched the "Yasuni-ITT Ini-

77. See Official Letter from Luis Arauz, CEO of Petrotesting Colombia, to Germánico Pinto, Ministro de Recursos Naturales No Renovables [Secretary of Non-Renewable Natural Resources] (Apr. 6, 2010) [on file].

78. See *Tagaeri and Taromenane Indigenous Peoples v. Ecuador*, Decision on Precautionary Measures, MC-91-06, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.127, doc. 4 (2006).

79. See *id.*

80. See *Acuerdo Interministerial No. 033 [Inter-Secretary Agreement] signed by Anita Albán Mora Ministra del Ambiente [Secretary of Environment], Juan Martínez Yáñez, Ministro Coordinador de Patrimonio Natural y Cultural [Secretary of Coordination on Natural and Cultural Heritage], and Galo Chiriboga Zambrano, Ministro de Minas y Petróleos [Secretary of Mining and Oil]*, (Oct. 19, 2017) Supplement of the Public Registry No. 194 (Ecuador).

81. See *id.*

82. See AGUIRRE, *supra* note 39, at 106.

83. See *id.* at 108.

84. See PROAÑO & COLLEONI, *supra* note 9, at 70.

85. See Official Letter from Marcela Aguiñaga, Ministra del Ambiente [Secretary of the Environment], to Derlis Palacio, Ministro de Minas y Petróleos [Secretary of Mining and Oil] (Dec. 30, 2008) [on file].

86. The ZITT was created by an executive order in 1999 by President Jamil Mahuad. See *Executive Order No. 552*, Presidente de la República del Ecuador (PRE) [President of the Republic of Ecuador] (Feb. 2, 1999), Supplement of the Official Registry No. 121. Article 1 establishes that the ZITT is a zone where all extractive activity is forbidden. *Id.*

tiative,”<sup>87</sup> an international fund-raising plan to keep Yasuni National Park and the IPLVI intact.<sup>88</sup>

After reports of the State’s responsibility in the *Los Reyes* attack, the office for IPLVI protection was moved to the Justice Ministry where the program’s vision changed.<sup>89</sup> The office’s new official position was that (1) there were no IPLVI near the Armadillo Camp, and (2) even if there were IPLVI in the area, the camp was outside the “Intangible Zone” for Tagaeri-Taromenane (ZITT),<sup>90</sup> meaning the Tagaeri-Taromenane had “left” their territory and were no longer subject to the same protections as they would have been had they “remained” in the ZITT.<sup>91</sup>

In early 2012, Rafael Correa, then-President of Ecuador, started a media conflict with the IACHR because of its decision to grant precautionary measures to a private Ecuadorian newspaper.<sup>92</sup> The conflict arose out of IACHR’s recommendation to Ecuador not to enforce a judgment against the owners and the director of *El Universo* diary to protect the freedom of expression. The sentence included three years in prison and 40 million dollars in damages resulting from an op-ed accusing Correa of having ordered the use of lethal force to rescue him in a kidnapping in 2010.<sup>93</sup> After that event, Correa’s Foreign Service department engaged in a campaign against the IACHR, accusing the institution of being under the influence of the United States and of illegally ordering precautionary measures.<sup>94</sup> This international relations policy affected the implementation of all the precautionary measures, including the ones granted to the Tagaeri-Taromenane.<sup>95</sup> After 2012, the budget of the government’s program to protect the IPLVI

87. See GóberZamora, *El Sueño Ecuatoriano* [The Ecuadorian Dream], YouTube (Nov. 15, 2012), <https://youtu.be/whxwMSa6Uwc>.

88. See *La Iniciativa Yasuni- ITT prepara nueva estrategia* [The Yasuni- ITT Prepares New Strategy], SECRETARÍA TÉCNICA PLANIFICA ECUADOR [Secretary of Technical Planning of the Republic of Ecuador], [www.planificacion.gob.ec/la-iniciativa-yasuni-itt-prepara-nueva-estrategia/](http://www.planificacion.gob.ec/la-iniciativa-yasuni-itt-prepara-nueva-estrategia/) (last visited Aug. 14, 2019).

89. See AGUIRRE, *supra* note 76, at 44.

90. The ZITT was created by an executive order in 1999 by President Jamil Mahuad. See *Executive Order No. 552*, Presidente de la República del Ecuador (PRE) (President of the Republic of Ecuador) (Feb. 2, 1999), Supplement of the Official Registry No. 121. Article 1 establishes that the ZITT is a zone where all extractive activity is forbidden. *Id.*

91. See *Situación del Grupo Armadillo-Cononaco-Chico-Vía Tigüino*, *supra* note 6, at 18.

92. See CIDH *emitió medidas cautelares para los directivos de Diario El Universo* [The IACHR adopted precautionary measures for *El Universo* newsletter directives], EL UNIVERSO (Feb. 22, 2012), <http://www.eluniverso.com/2012/02/22/1/1355/sala-tiene-hasta-hoy-notificar-fallo-contra-diario.html>.

93. *Id.*

94. See *Rafael usa escenario de la OEA para desprestigiar a la CIDH* *emitió medidas cautelares para los directivos de Diario El Universo* [Rafael uses OAS forum to discredit the IACHR], EL UNIVERSO (June 5, 2012), <http://www.eluniverso.com/2012/06/05/1/1355/rafael-correa-usa-escenario-oea-desprestigiar-cidh.html>.

95. See *El gobierno no reconoce atribución de CIDH de dictar medidas cautelares* [The government does not recognize the IACHR’s competence to adopting precautionary measures], SECRETARÍA GENERAL DE COMUNICACIÓN DE LA PRESIDENCIA, <https://www.comunicacion.gob.ec/el-gobierno-no-reconoce-atribucion-de-cidh-de-dictar-medidas-cautelares-video/> (last visited July 29, 2019).

began to decrease and a new massacre in 2013 confirmed the inefficacy of the precautionary measures.<sup>96</sup>

#### D. *The Attack of 2013*

On March 5th, 2013, a group of spear-bearing IPLVI attacked and killed two Waorani elders, Ompure and Buganey, in the Waorani town of Yarentaro.<sup>97</sup> Ompure, Buganey's partner,<sup>98</sup> had previously communicated with members of the Tagaeri-Taromenane people before he was killed.<sup>99</sup> During those communications, the IPLVI told Ompure to stop cowories from crossing the river.<sup>100</sup> But the IPLVI's request to the old Waorani amounted to an impossible task: stopping the oil industry's expansion. According to some Waorani testimonies, the noise of the oil camps is one of the main factors disrupting IPLVI life and could explain the IPLVI's decision to attack Ompure and Buganey.<sup>101</sup> On the same day as Ompure and Buganey's death, one of their sons publicly announced his intention to take revenge.<sup>102</sup>

Soon after the attack on Ompure and Buganey, several civil society actors demanded that the State take immediate action, suggesting the State look to redress Ompure and Buganey's community and implement firearm controls in Waorani communities, among other measures.<sup>103</sup> The Catholic Church even wrote to the Secretary of State, asking for immediate provisions in order to stop a new massacre.<sup>104</sup> The State did not take any action.<sup>105</sup>

On March 30th, 2013, a heavily-armed group of Waorani attacked a Tagaeri-Taromenane house.<sup>106</sup> The attackers killed approximately 30 people—men, women and children.<sup>107</sup> Responding to news of the attack, the State's official position was to express regret for the victims of an "inter-ethnic" conflict and deny that oil industry operations played any role in inflaming tensions.<sup>108</sup> Despite the State's official position, which is to pro-

96. See CABODEVILLA & AGUIRRE, *supra* note 21, at 167.

97. See *id.* at 31.

98. Buganey was not a target of the attack, but she was with her partner at the time of the attack and died as an indirect casualty. See *id.*

99. See *id.* at 29.

100. See *id.* at 59–60.

101. See *id.* at 60.

102. See *id.* at 36.

103. See *id.* at 150.

104. See *id.* at 151.

105. See *id.*

106. See *id.* at 156.

107. See Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador], 6 agosto 2014, Sentencia 004-14-SCN-CC, p. 3 (Ecuador), available at <http://www.funcionjudicial.gob.ec/pdf/004-14-SCN-CC.pdf>.

108. See Ana María Carvajal, *Dos visiones waorani se enfrentaron en la CIDH [Two Waorani Visions Faced Off in the IACHR]*, EL COMERCIO (Oct. 20, 2015), <http://www.elcomercio.com/actualidad/waorani-cidh-tagaeri-indigenas-matanza.html>.

tect and preserve IPLVI, the State's oil extraction policy is to expand oil operations in areas where it has previously recognized the presence of IPLVI.<sup>109</sup>

#### *E. Ecuador's Decision to Expand Oil Operations in Yasuni National Park*

The 2013 attack led some to believe the Ecuadorian government would extend additional protections to IPLVI. However, on October 3, 2013, the National Assembly approved the "Declaration of National Interest on Oil Extraction in Yasuni National Park," which permitted oil extraction activities in Yasuni National Park.<sup>110</sup> Ecuador's Constitution forbids extractive activities in the Tagaeri-Taromenane's territory, so in order to arrive at this decision, the National Assembly focused on whether IPLVI existed in Yasuni National Park.<sup>111</sup> On April 22, 2013, several months before the discussion took place, the Environmental Ministry produced a map locating the Tagaeri and Taromenane in the Yasuni National Park.<sup>112</sup> The Ecuadorian government used that information to advertise a final fundraising effort for the Yasuni-ITT Initiative,<sup>113</sup> but on August 15, 2013, declared the fundraising effort a failure and terminated the Yasuni-ITT Initiative.<sup>114</sup> With the Yasuni-ITT Initiative dismantled, when it was time to decide whether to permit exploitation in the Park, the Justice and Human Rights Ministry presented a new map to the Assembly on August 21, 2013.<sup>115</sup> Unlike the previous map, the new map did not show the Tagaeri-Taromenane living in any area outside of the ZITT.<sup>116</sup>

The Figures below portray the varying conceptions of Tagaeri and Taromenane territory and its place within Yasuni National Park. Figure 1 depicts the ZITT's size within Yasuni National Park and the overlap between the ZITT and the Waorani's recognized territory. Figure 2 depicts, with circles, the Tagaeri-Taromenane's territory and movement as stated in Ecuador's Ministry of the Environment's April 22, 2013 report to the IACHR. Figure 3 depicts, with circles, the Tagaeri-Taromenane's territory and movement as stated in Ecuador's Ministry of Justice's presentation to the Ecuadorian National Assembly on August 21, 2013. Crucially, Figures

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109. See AGUIRRE, *supra* note 76, at 57.

110. *Decision on the National Interest in Oil Extraction in Zones 31 and 43 inside the Yasuni National Park*, Asamblea Nacional (AN) (National Assembly) (Oct. 22, 2013), Supplement of the Public Registry No. 106, 2 (Ecuador).

111. *See id.*

112. *See id.*

113. *See supra* Section II.C.

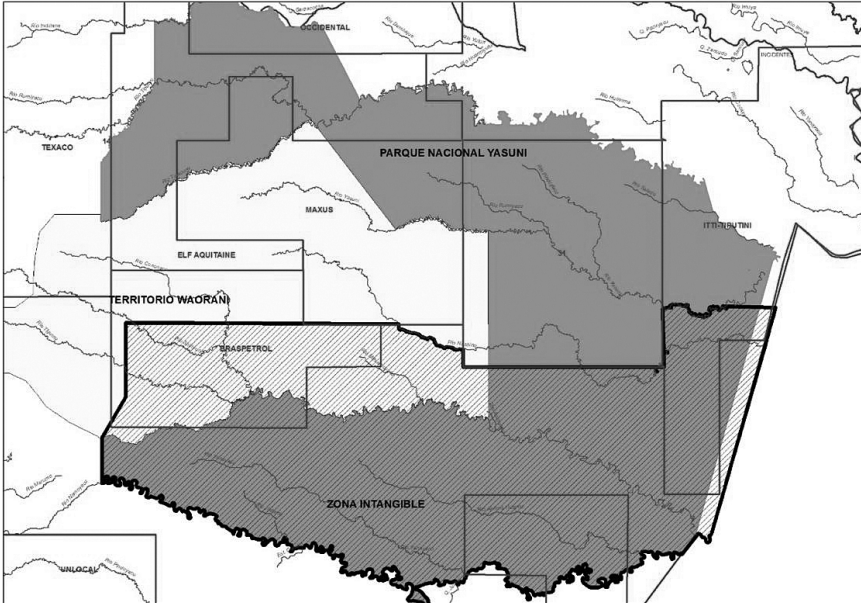
114. *See* GoberZamora, *El Sueño Ecuatoriano* [The Ecuadorian Dream], YouTube (Nov. 15, 2012), <https://youtu.be/whxwMSa6Uwc>; David Hill, *Why Ecuador's President is Misleading the World on Yasuni-ITT*, THE GUARDIAN (Oct. 15, 2013), <https://www.theguardian.com/environment/andes-to-the-amazon/2013/oct/15/ecuador-president-misleading-yasuni>.

115. *See Decision on the National Interest in Oil Extraction in Zones 31 and 43 inside the Yasuni National Park*, *supra* note 110, at 2;

116. *See id.*

2 and 3 differ on whether (1) the Tagaeri-Taromenane are located in the Armadillo Camp, and (2) whether the Tagaeri-Taromenane in the far east of YNP are located partially, as in Figure 2, or wholly, as in Figure 3, within the ZITT.

FIGURE 1: YASUNI NATIONAL PARK AND THE INTANGIBLE ZONE









the 2003 massacre, 2006 logger attack, and 2013 massacre demonstrate how several actors' actions are threatening to destroy the Tagaeri-Taromenane. This Article contends that those actors can be prosecuted for committing the crime of genocide.

Ecuador's criminalization of acts constituting genocide, being a part of Ecuadorian domestic criminal law since 2009, protects Ecuador's IPLVI from violations of their human rights to life and physical integrity.<sup>120</sup> The current Criminal Code, which entered into force in 2014, defines the crime of genocide in Article 79:

The person who, in a general and systematic way and with the intent of destroying in whole or in part a national or ethnic group, commits any of the following acts, will be punished with imprisonment for 26 to 30 years:

1. Killing the members of the group. . . .
3. Deliberately inflicting conditions of life that could bring the group physical destruction, in whole or in part<sup>121</sup>

Moreover, the official translation of the Rome Statute also uses the word "intent."<sup>122</sup> Intent, in the context of genocide, is present where "in relation to conduct, [the actor] means to engage in the conduct [and] in relation to a consequence, [the actor] means to cause that consequence or is aware that it will occur in the ordinary course of events."<sup>123</sup> Intent should not be confused with the term "purpose," which is related to the aim or motive to commit a crime.<sup>124</sup> This difference is important, as the terms "purpose" and "motive" were deliberately omitted from the Convention on Genocide.<sup>125</sup> Furthermore, the International Criminal Tribunal for Rwanda's (ICTR) appeals chamber in *Prosecutor v. Niyitegeka* stated that the words "as such" do not indicate that "motive" is an element in the crime of genocide:

The words as such, however, constitute an important element of genocide, the crime of crimes. It was deliberately included by the

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120. See *Enmiendas del Código Penal (Criminal Code Amendments)* (Apr. 27, 2009), Official Registry No. 578 (Ecuador).

121. *Código Orgánico Integral Penal (Integral Criminal Code)* (Feb. 10, 2014), Supplement of the Official Registry No. 180 (Ecuador).

122. See Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90 [Hereinafter Rome Statute], stating that: "[f]or the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Rome Statute is incorporated into Ecuador's Constitution. See *infra* note 131.

123. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 256 (2d ed. 2009) (paraphrasing Article 30(2) of the Rome Statute of the International Criminal Court).

124. See *id.* at 294–306.

125. See *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Appeals Chamber Judgement, ¶ 49 (July 9, 2004).

authors of the Genocide Convention in order to reconcile the two diverging approaches in favor of and against including a motivational component as an additional element of the crime. The term as such has the effect utile of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term as such clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting as such to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.<sup>126</sup>

Thus, when analyzing the “intent” element of genocide, it is essential to establish whether actors are conscious of the effect that their actions will produce (the destruction of a whole or a part of a group), but it is not essential to demonstrate that the actors aimed to accomplish the produced effect.

The difference between intent and motive is particularly important in the case of the Tagaeri-Taromenane peoples because they have never been the recipients of hate speech or an official discourse calling for their deliberate destruction. The actions of both public and private actors were not and are not motivated by their direct discrimination against or hatred of the IPLVI, but by their desire to access the resources in the IPLVI’s territory. Indeed, the element of intent does not require that the perpetrators of a genocide performed their acts to destroy a group, but that they acted purposefully and with the knowledge that their acts would have the effect of destroying the group in whole or in part. Thus, the construction of the *mens rea* element of the crime of genocide goes beyond the simple intention to commit the crime, but the possibility of a group’s destruction as a consequence of the perpetrators’ actions must be present. There is a broad consensus that intent should be analyzed by evaluating the results of the perpetrator’s actions and the perpetrator’s control of the events:

Special intent requires that the perpetrator has acted to achieve a certain purpose which is forbidden by law, along with the fact that the crime has been committed knowingly and willfully. Therefore, special intent arises when the perpetrator commits an act to achieve a forbidden purpose in law, and not when he has a certain purpose through committing the crime.<sup>127</sup>

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126. *Id.* at ¶ 53.

127. See, e.g., Devrim Aydin, *The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts*, 78 J. CRIM. L. 423, 432 (2014).

These questions are relevant when analyzing the case of the Tagaeri-Taromenane because the actors who are contributing to their destruction are not specifically aiming to exterminate them as a people but know that if they want to extract oil from the IPLVI's territory, the IPLVI cannot continue to exist in their current location.<sup>128</sup> Moreover, the complete destruction of a group may not be the aim of a perpetrator. Instead, it may be that the perpetrator is destroying the group because it is "in the way" and the group's destruction is the only means of guaranteeing the perpetrator's real aim:

A part of a group might be attacked to reduce any political threat the group as a whole might pose to the powers that be by virtue of its size, which appears to have been a factor in Burundi in the early 1970s; or, finally, partial destruction of a group might be sought simply because the group is "in the way." This last motive suggests that economic considerations can lie behind genocidal acts. In the work *Genocide in Paraguay . . .* the anthropologist Mark Miinzel describes the Aché Indians as a "stone-age tribe without social or political connections or aspirations that could make their existence dangerous to the Paraguayan elite"; and he suggests that the "genocidal policy directed against them can only be explained by the fact that they are in the way." In the way of what? In the way of economic development and progress.<sup>129</sup>

The 1949 ratification of the Genocide Convention introduced the law of genocide to Ecuador's legal system.<sup>130</sup> Ecuador also ratified the Rome Statute in 2002.<sup>131</sup> Ecuador's Constitution of 1998 states that international treaties shall supersede any statute.<sup>132</sup> The same stipulation is contained in

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128. Ecuador's Constitution forbids any extractive activity in the Tagaeri-Taromenane's territory, so in order to move forward with an oil drilling project the government must prove that the Tagaeri-Taromenane people are not present in the area anymore. CONST. OF ECUADOR, *supra* note 74, at art. 57, para 2. "The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law." *Id.*

129. Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 383 (1984).

130. See *Approval of the Conventions on the Prevention and Punishment of the Crime of Genocide*, Congreso Nacional del Ecuador (CNE) (Ecuadorian National Congress) (Dec. 21, 1949), Official Registry No. 393.

131. See *Decision on the Ratification of the Rome Statute*, Presidente de la República del Ecuador (PRE) (President of the Republic of Ecuador) (Jan. 31, 2002), Official Registry No. 506.

132. Article 163 of Ecuador's Constitution states that "[t]he norms of international treaties, once published in the Official Registry, will be part of the domestic legislation of the Republic and will prevail over the statutes and administrative regulations." CONST. OF ECUADOR, *supra* note 74, at art. 163.

the Constitution of 2008.<sup>133</sup> Accordingly, this Article will use the Rome Statute's definition of genocide when analyzing the case of the Tagaeri-Taromenane.

As illustrated in Part II, *supra*, creating conditions of scarcity of natural resources to Waoranis provokes nearly inevitable and new inter-ethnic conflicts against the Tagaeri-Taromenane. The IPLVI only can survive by gathering and hunting, for they do not know how the Western world's market operates. Tagaeri-Taromenane members lack any knowledge or ability to survive outside their territories. The timber business is a perfect example of an entity that created such conditions of scarcity. When Babe organized the 2003 massacre, his community did have more of the demanded species of trees and were extracting wood from the territory of the Tagaeri-Taromenane. While war is always present in the Waorani and Tagaeri-Taromenane cultures, in cases of hostilities among clans of these groups, the conflict will be unequal given the access of the Waorani to firearms.

The following Section will present two theories: (1) that by killing multiple members of a group, the killings of the Tagaeri-Taromenane people constitute the crime of genocide; and (2) that by deliberately inflicting conditions of life calculated to bring about a group's destruction in whole or in part, the actions of Ecuador's public authorities constitute the crime of genocide.

### A. *Genocide by Killing*

The Rome Statute establishes the elements for the crime of genocide as follows:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>134</sup>

These elements are present in the 2003 and 2013 massacres.

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133. Article 424 of Ecuador's Constitution states that "[t]he Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding." *Id.* at art. 424. The Constitution and international human rights treaties ratified by the state that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power. *See id.*

134. Assembly of the State Parties to the Rome Statute, ICC-ASP/1/3, Elements of Crimes, art. 6(a) (Sept. 3–10, 2002), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf?OpenElement> [Hereinafter Assembly of the State Parties to the Rome Statute].

1. *The perpetrator killed one or more persons.*

First, more than one person was killed in the attack. Twelve bodies were found in the 2003 attack, most of them women and children, and approximately thirty were killed in the 2013 attack.<sup>135</sup>

2. *Such person or persons belonged to a particular national, ethnical, racial, or religious group.*

Second, although the Tagaeri-Taromenane people share some customs and language with the Waorani, their decision to remain isolated from the Western world, and even the Waorani, makes the Tagaeri-Taromenane their own particular national, ethnical, or racial group. Indeed, the Constitution of Ecuador and the International Community recognize the Tagaeri-Taromenane, Ecuador's last remaining IPLVI, as a distinct national, ethnic, or racial group.<sup>136</sup>

3. *The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.*

Third, the magnitude of the attack helps to create the presumption that the perpetrators'<sup>137</sup> intent was to destroy the attacked family. Estimates suggest the Tagaeri-Taromenane number between 100 and 200 individuals.<sup>138</sup> Approximately 42 Tagaeri-Taromenane were killed in the 2003 and 2013 attacks.<sup>139</sup> The size of a killed group is relevant in establishing intent. Tagaeri-Taromenane society does not grow demographically in the same way as Western societies. Tagaeri-Taromenane families are purposefully small; an attempt to not exhaust their territory's natural resources. Even if the number of victims is not a constitutive element of the crime of genocide, the quantitative criterion is a useful means of inferring the perpetrator's intent.<sup>140</sup> In Rwanda's genocide, the number of Tutsi killed was an element the court used to find the special intent of the perpetrator.

Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were

135. See RIVAL, *supra* note 14; see also *supra* Sections II.A, II.D.

136. See CONST. OF ECUADOR, *supra* note 74, at art. 57; Inter-Am. Comm'n H.R., Report No. 96/14, Petition 422-06, Report on Admissibility Tagaeri and Taromenani Indigenous Peoples in Isolation Ecuador, ¶ 37 n.6, OEA/Ser.L/V/II.153, doc. 12 (2014); *Inter-American Commission Recommendations*, *supra* note 2, at ¶ 78.

137. Although a full analysis of "perpetrator" responsibility occurs in Part IV, *infra*, the authors contend that various Ecuadorian state and oil industry actors bear responsibility as perpetrators of the 2003 and 2013 massacres.

138. See Tagaeri and Taromenani Indigenous Peoples in Isolation v. Ecuador, Petition 422-06, Inter-Am. Comm'n H.R., Report No. 96/14, OEA/Ser.L/V/II.153, doc. 12 ¶ 37 (footnote 6) n.6 (2014).

139. See Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador], Aug. 6, 2014, Sentencia 004-14-SCN-CC, p. 3 (Ecuador), *available at* <http://www.funcionjudicial.gob.ec/pdf/004-14-SCN-CC.pdf>; ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 25.

140. See David Alonzo-Maizlish, *In Whole or in Part: Group Rights, the Intent Element of Genocide, and the Quantitative Criterion*, 77 N.Y.U. L. REV. 1369, 1386-96 (2002).

killed without mercy. Children were massacred before their parents' eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant. The number of the Tutsi victims is clear evidence of intent to destroy this ethnic group in whole or in part. The killers had the common intent to exterminate the ethnic group and Kayishema was instrumental in the realisation of that intent.<sup>141</sup>

The 2003 massacre was so serious that some authors theorized the actual extermination of the Tagaeri, and its complete assimilation of the survivors with the Taromemane<sup>142</sup> *Prosecutor v. Zigiranyirazo* offers additional insight:

In the absence of direct evidence, genocidal intent may be inferred from relevant facts and circumstances of a case, such as the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the exclusion of members of other groups, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, or the political doctrine that gave rise to the acts referred to.<sup>143</sup>

Regarding the Tagaeri-Taromenane massacres, the above discussed factors are essential in determining the perpetrators' intent as there has been no explicit confession or statement of intent to destroy Ecuador's IPLVI. The small number of the Tagaeri-Taromenane and the number of killings in each massacre show the relative high scale of the atrocities committed.

In addition to the severity of an attack, international law also considers the effect of killings on a group's ability to continue existing.<sup>144</sup> In the case of the Tagaeri-Taromenane, all of the victims lived in independent families.<sup>145</sup> The Tagaeri-Taromenane, generally, do not readily accept non-family members and would not have accepted the survivors of the attacked Tagaeri-Taromenane families.<sup>146</sup> The International Criminal Tribunal for the Former Yugoslavia has recognized similar actions as satisfying the intent to destroy a group "in part" element:

Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the

141. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, ¶¶ 532–33 (May 21, 1999).

142. See *EL EXTERMINIO DE LOS PUEBLOS OCULTOS*, *supra* note 7, at 159.

143. See *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement, ¶ 398 (Dec. 18, 2008); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 523 (Sept. 2, 1998).

144. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, ¶ 595 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

145. See *TRAS LAS HUELLAS DEL SILENCIO*, *supra* note 22, at 26.

146. See *EL EXTERMINIO DE LOS PUEBLOS OCULTOS*, *supra* note 7, at 155.



men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack.<sup>147</sup>

As the International Tribunal for the former Yugoslavia (ICTY)<sup>148</sup> demonstrates, courts may find the “in part” element if a killing is directed towards a specific part of a group that can be defined geographically, but the group’s internal structure is also important. Where Bosnian Serb forces killed men to destroy a group in *Prosecutor v. Krstic*, the perpetrators of the 2003 attack on the Tagaeri-Taromenane primarily killed women and children. In doing so, the perpetrators not only killed the current generation but the possibility of creating a new generation.

4. *The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.*

Finally, the frequency of attacks and Ecuador’s attitude towards the Tagaeri-Taromenane’s protection demonstrates that the 2003 attack is part of a larger pattern of similarly harmful conduct.

Researchers considered a Waorani group’s personal vendetta as the motive for the 2003 attack, but other elements, such as the timber business’ interests in the zone, suggest that the 2003 attack was part of a larger plan to destroy or at least displace the Tagaeri-Taromenane people from their territory in order to make the zone safer for illegal logging activities.<sup>149</sup> Furthermore, IPLVI presence makes oil extraction in the zone a sensitive issue. If the government can demonstrate to the National Assembly that the

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147. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, ¶ 595 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

148. For referential purposes, the complete name of the tribunal is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.

149. See ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 73.

Tagaeri-Taromenane people do not exist anymore, then oil extraction in their territory can be approved. Indeed, the Ecuadorian government “demonstrated” the Tagaeri-Taromenane’s absence in prospective oil fields in 2013.<sup>150</sup>

The 2003 attack required some preparation, including the attackers meeting in Tiguino (58 kilometers away from where the attack took place), where they gathered the provisions and weapons used in the expedition.<sup>151</sup> The possession of firearms is important because the timber industry is the Tiguino community’s only source of income, which is usually used on subsistence expenses. Therefore, it is highly improbable that Waorani could have purchased the firearms they used to attack the Tagaeri-Taromenane. A more probable explanation is that the firearms were provided by someone with an economic interest in the Tagaeri-Taromenane’s destruction.

*B. Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring About Physical Destruction*

The Rome Statute defines genocide by deliberately inflicting conditions of life calculated to bring about physical destruction as occurring where:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>152</sup>

1. *The perpetrator inflicted certain conditions of life upon one or more persons.*

For the Assembly of the State Parties to the Rome Statutes, the term “conditions of life” may include, but is not necessarily restricted to, the deliberate deprivation of resources indispensable for survival, such as food or

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150. See *Rafael Correa pone fin a la iniciativa Yasuni ITT* [Rafael Correa Ends the Yasuni ITT Initiative], EL UNIVERSO (Aug. 15, 2013), <https://www.eluniverso.com/noticias/2013/08/15/nota/1294861/rafael-correa-pone-fin-iniciativa-yasuni-itt>. The Constitution of Ecuador bans natural resources exploitation in national parks and indigenous peoples in voluntary isolation territories. *Id.* However, the National Assembly could approve an extraction project in a national park as an extraordinary measure aiming at the national interest. *Id.* In 2013, the National Assembly decided to authorize an oil extraction project in the Yasuni National Park arguing that there were no signs of the presence of Tagaeri-Taromenane in the project lands. *Id.*

151. See EL EXTERMINIO DE LOS PUEBLOS OCULTOS, *supra* note 7, at 19.

152. Assembly of the State Parties to the Rome Statute, *supra* note 134, at art. 6(e).

medical services, or the systematic expulsion of a group's members from their homes.<sup>153</sup> After the IACHR ordered Interim Measures, Ecuador conducted a study to determine whether IPLVI lived close to the Armadillo Camp, and ultimately confirmed IPLVI presence in the area.<sup>154</sup> Additionally, the State wanted to determine whether the high levels of noise emitted from the oil camp were making the Tagaeri-Taromenane move into a smaller territory.<sup>155</sup> As a result of its inquiries, the state was aware of the oil activities' negative impacts on the Tagaeri-Taromenane people.

When discussing the genocide by deliberately inflicting conditions of life calculated to bring about a group's destruction, the precedents from the international criminal courts referred to a set of positive actions. For example, when the perpetrator deprives a group of food, water, or medicine, thereby endangering their lives. However, the quoted precedents do not establish an exhaustive list of actions. For the Tagaeri-Taromenane, their opportunities to survive depend on the integrality of their territory because all their life conditions depend on the forest resources. In this particular condition, "deliberately inflicting conditions" must include the negative actions of not protecting the IPVLI and the positive actions of creating stress in the IPVLI's territory by allowing the oil drilling and decreasing Waorani's territory.

The tension caused by exploitation activities in Tagaeri-Taromenane territory strains the Tagaeri-Taromenane's internal relations and external relations with the Waorani peoples and nearby settlers. For the Tagaeri-Taromenane, as hunter-gatherers, it is especially true that they depend on their relationship with and understanding of their territory to survive as the IACHR has stressed. In its report on indigenous peoples living in voluntary isolation, the IACHR considered "that in analyzing the human rights situation of indigenous peoples in voluntary isolation and initial contact, it is fundamental to bear in mind the devastating impact for them of the destruction of a field, the pollution of a river, the deforestation of a forest, and other negative impacts on the environment in which they live and on which they depend . . . . In the case of indigenous peoples in voluntary isolation and initial contact, this notion goes even further, since for them a field or plot may represent the only source of sustenance for several families."<sup>156</sup>

In *Prosecutor v. Rutaganda*, the ICTR described how changing some aspects of a peoples' lives can, in certain circumstances, constitute genocide:

In the opinion of the Chamber, the words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, as indicated in Arti-

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153. See Assembly of the State Parties to the Rome Statute, *supra* note 134, at art. 6(c) n.4.

154. See PROAÑO & COLLEONI, *supra* note 9, at 70–73.

155. See *Informe Ejecutivo sobre Ataque con Lanzas en Comunidad Colona de Los Reyes*, *supra* note 70, at 148.

156. *Inter-American Commission Recommendations*, *supra* note 2, at ¶ 19.

cle 2(2)(c) of the Statute, are to be construed “as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group”, but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.<sup>157</sup>

The Tagaeri-Taromenane are currently subjected to conditions different from those they would experience were illegal and government-sanctioned exploitative operations not occurring in their territory. The Tagaeri-Taromenane are hunter-gatherers who depend on their knowledge of the land to survive.<sup>158</sup> The Tagaeri-Taromenane’s expulsion from lands with which they are familiar deprives them of access to fixed sources of water and food, pushing them closer to subsistence levels of living than they would otherwise experience.<sup>159</sup> This expulsion also has the potential to deprive the Tagaeri-Taromenane of access to traditional plant-based medicines, depending on the availability of certain plants. Furthermore, exploitative activities have the effect of disrupting animal migratory and behavioral patterns, thus depriving the Tagaeri-Taromenane of food sources they would otherwise expect to encounter.<sup>160</sup> With regard to the Tagaeri-Taromenane who survived the 2003 and 2013 attacks, the above circumstances are exacerbated by an inability to hunt and forage within the 30-person familial context in which their skills are based.<sup>161</sup> Thus, by the standard outlined in *Akayesu*, the Tagaeri-Taromenane’s circumstances both post-exploitation and post-attacks tend to indicate the infliction of certain conditions of life upon one or more persons.

2. *Such person or persons belonged to a particular national, ethnical, racial or religious group.*

As discussed in Section III.A.2, *supra*, the Tagaeri-Taromenane, as Ecuador’s last remaining IPLVI, with a culture, costumes, and as speakers of a native American language,<sup>162</sup> belong to a particular national, ethnical, racial or religious group.

157. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 52 (Dec. 6, 1999); see also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 505–06 (Sept. 2, 1998).

158. Narváez, *supra* note 19, at 112.

159. Roberto Narváez, *Intercambio, guerra y venganza: el lanceamiento de Ompore Omehuai y su esposa Buganei Caiga* [Exchange, War, and Revenge: The Lancing of Ompore Omehuai and his spouse Buganei Caiga] 16 ANTRPOLOGÍA CUADERNOS DE INVESTIGACIÓN 99, 99–110 (2016).

160. See CABODEVILLA & AGUIRRE, *supra* note 21, at 44.

161. Narváez, *supra* note 19, at 112.

162. A 2018 study sponsored by the Ecuadorian government documented the cultural differences among the Tagaeri-Taromenane and the Waorani. See TRAS LAS HUELLAS DEL SILENCIO, *supra* note 22.

3. *The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.*

The Ecuadorian government's attitude towards the Tagaeri-Taromenane's preservation is demonstrative of intent. As discussed in Section III.B.5, *infra*, despite multiple attacks on IPLVI and an IACHR order demanding precautionary measures for the Tagaeri-Taromenane's protection, the Ecuadorian government effectively reduced the Tagaeri-Taromenane's protection when presented with a profit motive. Specifically, before 2013, the Ecuadorian government originally recognized IPLVI presence in the Armadillo Camp. In 2013, however, when tasked with deciding whether to permit oil exploration in the Armadillo Camp, the same administration asserted that the IPLVI are no longer in the Camp's area.<sup>163</sup> In refusing to acknowledge IPLVI presence in the Armadillo Camp, the Ecuadorian government gave the green light to petroleum exploration activities that displaced the Tagaeri-Taromenane, disrupted the Tagaeri-Taromenane's food sources, and increased the risk of inter-ethnic conflict in the region. Even if it is true that there are no IPLVI in the Armadillo Camp, the State is complicit in the Tagaeri-Taromenane's destruction by not closing the Armadillo Camp, not prosecuting the criminals from the 2003 massacre, not controlling the illegal timber activities, and not forbidding oil extraction in other parts of the Tagaeri-Taromenane's territory.

4. *The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.*

The vital standards specified by the ICTR in the *Rutaganda* case will vary from one group to another.<sup>164</sup> For the IPLVI, an intangible zone such as the ZITT is vital, as it ensures the IPLVI's existence and respects their decision to live in voluntary isolation. Tensions in the IPLVI's territory are pushing the IPLVI into zones where the existence of other groups (Waorani or settlers) puts the IPLVI in the position of having to fight against firearms with spears. In some ways, this is the same as taking IPLVI homes and pushing them to kill and to be killed. In *Sirika*, the International Criminal Tribunal for Rwanda found that a peoples' expulsion from their homes, which forced them to live in harsh subsistence conditions, was an important element in determining that certain actions constituted the crime of genocide:

Finally with regard to Article 4(2)(c)—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part—the Prosecution refers to the *Akayesu* Trial Judgement which construed this provision as refer-

163. See Official letter MJDHC-DM-2013-0880-OF from Lenin Lara, Ministro de Justicia y Derechos Humanos [Secretary of Justice and Human Rights], to Alexis Mera, Secretario de la Presidencia de la República [President's Chief of Staff] (Aug. 22, 2013) [on file].

164. See *Inter-American Commission Recommendations*, *supra* note 2.

ring to the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. The Prosecution claims that there is substantial evidence that the detainees in Keraterm had been “systematically” expelled from their homes and had been forced to endure a subsistence diet. The medical care that they received—if any—was below the minimal standards to ensure their physical well-being. In short, the living conditions were totally insufficient.<sup>165</sup>

The Tagaeri-Taromenane’s situation is akin to the situation in *Siraka* as the Ecuadorian government is not directly killing IPLVI. Instead, the State is effectively evicting the Tagaeri-Taromenane from their homes by permitting resource extraction within their territories. The State has previously recognized the Tagaeri-Taromenane in Yasuni National Park and are aware of the nearby Waorani and settler towns. The past IPLVI attacks and the Waorani’s historically violent responses put the State on notice of the risk of deadly interethnic conflict.

The ICTY tribunal also considers a group’s deliberate expulsion from their homes:

“Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” under sub-paragraph (c) does not require proof of a result. The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion. [. . .] The words calculated to bring about its physical destruction replaced the phrase aimed at causing death proposed by Belgium in the UN General Assembly’s Sixth (Legal) Committee. The Trial Chamber in *Akayesu* held that the expression should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. The element of physical destruction is inherent in the word genocide itself, which is derived from the Greek “genos” meaning race or tribe and the Latin “caedere” meaning to kill.<sup>166</sup>

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165. Prosecutor v. *Sirika*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, ¶ 42 (Int’l Crim. Trib. for Rwanda Sept. 3, 2001).

166. Prosecutor v. *Stakic*, No. IT-97-24-T, Judgement, ¶ 517 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003).

Ecuador has evidence that proves the IPLVI's existence and location.<sup>167</sup> Ecuador also has the power to control the pressures that are causing the Tagaeri-Taromenane to leave their homes, but is intentionally leaving them choosing to value profit over peoples.<sup>168</sup> In 2009, the Tagaeri-Taromenane people attacked two people in the colonist village of *Los Reyes*, and many experts contend that the event shows how timber activities, oil extraction, and Waorani attacks are forcing the IPLVI to move beyond their territory.<sup>169</sup>

5. *The conduct was conducted in a way that could itself effect such destruction.*

The Armadillo Camp's chemical and noise pollution is pushing the Tagaeri-Taromenane closer to *Los Reyes*, a nearby village. As the IPLVI move closer to *Los Reyes*, more attacks may occur, and villagers may feel the need to use lethal force to repel an attack. Additionally, as discussed above, the Waorani are notoriously violent. The Tagaeri-Taromenane's familial relationship with the Waorani means similar levels of violence may be imputed upon the Tagaeri-Taromenane. The Ecuadorian government and the exploitative industry employees in the Yasuni are aware of the Waorani's cultural violence and the resource competition that exploitative activities exacerbate within the Yasuni. In effect, the State, timber merchants, and oil companies recognize their activities are pushing all of the Armadillo Camp's inhabitants to the point of killing each other and are not seeking effective measures to avoid such an outcome.

Though intent to destroy is hard to determine for this type of genocide and particularly for this case (there is no hate speech against the IPLVI that would otherwise be indicative of intent, for example), as described above, intent can be inferred from the context of the case under the *Akaysesu* doctrine.

The State cannot plausibly contend that it was ignorant of the consequences of its actions and inactions. Ecuador received two directives from international agencies ordering it to protect the Tagaeri-Taromenane people, so the government was alerted by these institutions about the consequences of not taking action to protect the IPLVI. Indeed:

On May 10, 2006, the IACHR granted precautionary measures in favor of the Tagaeri and Taromenani Indigenous peoples who inhabit the Ecuadorian Amazon jungle in the area bordering

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167. See Official letter MJDHC-DM-2013-0880-OF from Lenin Lara, Ministro de Justicia y Derechos Humanos [Secretary of Justice and Human Rights], to Alexis Mera, Secretario de la Presidencia de la República [President's Chief of Staff] (Aug. 22, 2013) [on file]. As a consequence of the Inter-American Commission of Human Rights' precautionary measures in favor of the Tagaeri-Taromenane peoples, the Ecuadorian government created an office for their protection in the Secretary of the Environment. See *id.* This office produced a 2013-approved report on the location of the Tagaeri-Taromenane people that included the area of the Yasuni National Park and Armadillo Camp. *Id.*

168. See ¡A QUIÉN LE IMPORTAN ESAS VIDAS!, *supra* note 39, at 39.

169. See CABODEVILLA & AGUIRRE, *supra* note 21, at 56.

Peru and who are currently voluntarily isolated or “hidden”. The information available states that members of the Taromenani tribe were murdered on April 26, 2006 in the Cononaco (River Chiripuno) area during reprisals linked to illegal tree felling in the Yasun[i] Park and encroachments onto Indigenous lands. In view of this, the IACHR requested that the Ecuadorian State adopt the measures necessary to protect the territory inhabited by the beneficiaries from third parties.<sup>170</sup>

Additionally, the United Nations Rapporteur on Indigenous Peoples Rights, in his report on Ecuador, addressed the situation of the Tagaeri-Taromenane and asked the State to stop the oil activities in the Tagaeri-Taromenane’s territory:

The Special Rapporteur recommends that the Human Rights Council call on the three countries involved in protecting the peoples living in voluntary isolation (Colombia, Ecuador and Peru) and the international community to pool forces and resources in order to protect and safeguard endangered Indigenous peoples living in the Amazonian region. In the “untouchable” area and the Yasun[i] National Park, any oil activities shall be suspended and illegal logging shall be punished, in addition to any activity that disturbs the peace of peoples living in voluntary isolation. Furthermore, an integrated programme for the restructuring of the local economy in Huaorani regions shall be drawn up, and real and effective controls shall be set in place to prevent the removal of timber from these territories.<sup>171</sup>

The reports were issued in 2006 before the massacre of 2013. Both institutions found a link between extractive activities (oil and illegal logging) with the previous killings of Tagaeri-Taromenane people and the latent hazard for the survivors. In conclusion, all the elements for the crime of genocide by deliberately inflicting life conditions calculated to bring about physical destruction are present in the case of the Tagaeri-Taromenane people. However, Ecuador’s investigation is not advancing, and it most likely will not advance until a new massacre occurs.

#### IV. ESTABLISHING RESPONSIBILITIES

This raises an important question: If we accept that the Tagaeri-Taromenane massacres constitute the crime of genocide, who is responsible

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170. Tagaeri and Taromenani Indigenous Peoples v. Ecuador, Decision on Precautionary Measures, MC-91-06, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.127, doc. 4 rev. 1, Ch. III, ¶ 25 (2006).

171. Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Addendum Mission to Ecuador*, ¶¶ 94–95, A/HRC/4/32/Add.2. (Dec. 28, 2006).



for it? As described, lumberjacks, oil company employees, state officials, and Waorani members were all somehow involved in the events leading to the Tagaeri-Taromenane massacres, and their varying degrees of responsibility must be established.

In the case of the Tagaeri-Taromenane, the actions that aided, abetted, or otherwise assisted in the commission of the crime of genocide<sup>172</sup> came from multiple people within the executive, legislative, and judicial branches. Their actions include all the decisions that provoked tension in the Waorani and Tagaeri-Taromenane's territories: The National Assembly's decision to extract oil from Yasuni National Park; the Justice and Human Rights Ministry's decision to change the official maps documenting the Tagaeri-Taromenane's presence; and the decision of judges to reject all of civil society's requests for the Tagaeri-Taromenane's protection under the argument of non-legitimate representation, among others.<sup>173</sup> All these public officials' decisions illustrate the statement of Joy Gordon (referencing Hannah Arendt's work) that modern genocide needs bureaucrats to be accomplished.<sup>174</sup>

The omissions are also significant: The failure of Ecuador's Secretary of Human Rights to prevent the 2013 massacre, despite numerous warnings; the failure to engage in the serious investigation, prosecution and condemnation of the attack's perpetrators; and the failure to control illegal lumber activities, among others. These atrocities were only possible with the participation of several technicians and politicians who chose to ignore the consequences of their decisions when using formal interpretations of the law that denied the Tagaeri-Taromenane's existence and blamed the Waorani for the massacres. Formalisms, as the application of administrative law, should be used as an excuse to neglect in the assessment of the consequences of their decisions.<sup>175</sup>

In International Criminal Law there are at least five useful theories for answering the question of who is responsible for the genocide of the Tagaeri-Taromenane people: direct responsibility, complicity, control theory, joint criminal enterprise, and conspiracy.<sup>176</sup> A full analysis of responsi-

172. See Rome Statute, *supra* note 122, at art. 25.3.c.

173. Corte Constitucional de Ecuador [CCE] [Constitutional Court of Ecuador], August 20, 2015 in the accumulated cases 0648-08-RA and 0649-08-RA.

174. See Joy Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 YALE HUM. RTS. & DEV. L.J. 57, 80 (2002).

175. See *id.* at 81.

176. There are different approaches to "responsibility" in the jurisprudence of the ICC, the ICTY and the ICTR. While direct responsibility, complicity, control theory, and joint criminal enterprise are present in the jurisprudence of the three courts, conspiracy to commit genocide is a specific offense in the ICTY and ICTR's statutes. See Rome Statute, *supra* note 119, at arts. 6, 25; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, July 7, 2009, arts. 4 and 7 (entered into force on May 25, 1993), available at <https://www.icty.org/en/documents/statute-tribunal>; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Aug. 14, 2002, arts. 2 and 6

bility exceeds the scope of this work. Nevertheless, this Article briefly presents some arguments that should be discussed and developed in the future.

### A. Direct Responsibility

Direct responsibility refers to the perpetrator (the principal of a crime in common law countries or the “material author” in civil law countries). Perpetrators have “the relevant *mens rea* [when they do] distinct acts which together constitute a sufficient act for the *actus reus* of an offence.”<sup>177</sup>

In the case of the Tagaeri-Taromenane, it is public knowledge that members of the Waorani nation committed the 2003 and 2013 massacres; however, that does not necessarily imply that the Waorani committed the massacres with the “special intent” of destroying the Tagaeri-Taromenane. In this sense, the Ecuadorian Constitutional Court decided that the Waorani people (as Indigenous people in initial contact) could not be judged for the crime under Western standards, so whichever tribunal eventually presides over the 2013 massacre should apply the law with an intercultural interpretation.<sup>178</sup> That interpretation should take into account the traditions, customs and law of the Waorani. At the time of this Article’s drafting, there was not a final decision of the Ecuadorian courts on this matter. Conversely, in the 2006 massacre, the attackers had the knowledge and the willingness to destroy the Tagaeri-Taromene Peoples. In that instance, loggers attacked the Tagaeri-Taromenane in an effort to permanently remove the Tagaeri-Taromenane as obstacles to logging activities. Accordingly, there was an intent (*mens rea*) to kill (*actus reus*) the Tagaeri-Taromenane in the 2006 massacre.

### B. Complicity

A person or entity can be held responsible through complicity when they are liable for the criminal act of a perpetrator by virtue of having substantially assisted in the commission of the crime (*actus reus*).<sup>179</sup> Additionally, in order to establish liability for complicity, accomplices need not share the *mens rea* of the perpetrators:

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(entered into force on Nov. 8, 1994), available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.asp-x>.

177. BETH VAN SCHACK & RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 783 (2d ed. 2010) (quoting RICHARD CARD, RUPERT CROSS & P. ASTERLEY JONES, CARD, CROSS, AND JONES CRIMINAL LAW § 23.1 (18th ed. 1992)).

178. The Prosecutor’s Office of Orellana initially brought genocide charges against seventeen Waorani. See Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador], August 6, 2014, Sentencia 004-14-SCN-CC (Ecuador), available at <http://www.funcionjudicial.gob.ec/pdf/004-14-SCN-CC.pdf>.

179. See Prosecutor v. Anto Furundjija, Case No. IT-95-17/1-T, Judgment, ¶ 234 (Int’l Crim. Trib. for Rwanda Dec. 10, 1998).

With regard to *mens rea*, the Trial Chamber must determine whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime. The case law indicates that the latter will suffice.<sup>180</sup>

Several examples of substantial assistance can be gleaned from the massacres, including the supply of weapons and fuel for the 2003 massacre, and the inactivity of the authorities responsible for the protection of the Tagaeri-Taromenane people prior to the 2013 massacre.

### C. Control Theory

Created by Claus Roxin,<sup>181</sup> if a remote agent has control over the commission of a crime, the control theory treats the remote agent in an organized criminal structure as a principal, as opposed to an accessory.<sup>182</sup> In distinguishing whether the perpetrator of a crime is a “principal” or an “accomplice,” some courts use the “control over the crime” or “control” theory.<sup>183</sup> Where, as here, there are multiple perpetrators who perform the objective elements of a crime, control is defined as “joint control over the crime by reason of the essential nature of the various contributions to the commission of a crime.”<sup>184</sup> A contribution is deemed essential if the agent who is responsible for making the contribution has “the power to frustrate the commission of the crime by not performing [his or her] tasks.”<sup>185</sup> Because an agent need only the power to “frustrate” the commission of a crime through some non-performance, the agent need not physically perpetrate any requisite element of the crime or be present at the crime scene.<sup>186</sup> Accordingly, the theory extends liability to government officials that have remote control over the direct perpetrators of a crime in a hierarchically-organized structure.<sup>187</sup>

Applied to the case of the Tagaeri-Taromenane, various Ecuadorian government agents are likely liable under the control theory; because government forces could have stopped the 2013 massacre, the government’s action to move towards a state of non-protection would have had “the power to

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180. *Id.* at ¶ 236.

181. See Rafael Leme, *Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections*, 34 AM. U. INT’L L. REV. 89 (2018).

182. See Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment (March 14, 2012) [Hereinafter *Lubanga Judgment*].

183. See, e.g., *Lubanga Judgment*; Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 330 (Jan. 29, 2007) [Hereinafter *Lubanga Confirmation Decision*]. The International Criminal Court (ICC) has (controversially) held that the control theory is supported under Article 25(3)(a)–(d) of the Rome Statute, which creates a hierarchy of the degrees of participation in a crime. See *Lubanga Judgment*.

184. *Lubanga Confirmation Decision* at ¶ 341.

185. *Id.* at ¶ 342.

186. See *Lubanga Judgment*, *supra* note 182, at ¶ 1004.

187. See Jens D. Ohlin et al., *Assessing the Control-Theory*, 26 L. J. INT’L L. 725 (2013).

frustrate” the commission of the crime were it not performed. First, Ecuadorian government agents knew of the Waorani’s plan to avenge Ompure and Baganey’s killings and, given the 2003 massacre, were fully aware of the plan’s likely outcome. Furthermore, although Ecuadorian government agents lacked direct control over the physical perpetrators of the 2003 and 2013 massacres, the government did exercise direct control over the government forces that had the means to prevent the massacres, particularly the 2013 massacre. Given that the Ecuadorian government has an affirmative baseline duty to protect the Tagaeri-Taromenane within the intangible zone, as established by the IACHR’s precautionary measures, the government’s non-compliance with its duty was a government action to move away from its baseline duty and towards a state of “non-protection.” Therefore, by not complying with the government’s duty to protect the Tagaeri-Taromenane within the intangible zone, various Ecuadorian government agents contributed an “essential” part of the 2013 massacre’s perpetration and ultimately exercised control over the crime as one of its principals.

#### D. Joint Criminal Enterprise

The joint criminal enterprise doctrine entails a plurality of persons acting to make a crime possible. The joint criminal enterprise doctrine has the following *actus reus* elements: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime; and (iii) participation of the accused in the common design. As for the *mens rea*, the intention to participate in the crime, or “responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”<sup>188</sup>

This doctrine might be applicable if a new massacre (or clash) occurred in Yasuni National Park. Public officials in different positions and hierarchies worked together to make oil extraction in the IPLVI’s territory possible, from the technicians that changed the maps to the representatives that voted for the decision. Several other actors were also needed to start the extraction. All of those persons willingly acted with the knowledge of their acts’ consequences. Moreover, continued oil exploitation will include military or private security forces. A confrontation among these armed personal and the IPLVI would be an uneven battle that could take the lives of several Tagaeri-Taromenane. Ultimately, all persons involved in extracting oil from Yasuni National Park know the risk of the Tagaeri-Taromenane peoples’ destruction.

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188. Prosecutor v. Tadić, No. IT-94-1-A, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

### E. Conspiracy

Finally, conspiracy is “an agreement between two or more persons to commit the crime of genocide.”<sup>189</sup> The *mens rea* for conspiracy is the same special intent or *dolus specialis* of the crime of genocide: the intent to destroy in whole or in part a specific group, as such.<sup>190</sup> The *actus reus* for conspiracy differs between civil law and common law countries. In civil law countries, conspiracy is “the concerted agreement to act, decided upon by two or more persons.”<sup>191</sup> Comparatively, in common law countries, conspiracy exists “when two or more persons agree to a common objective, the objective being criminal.”<sup>192</sup> The doctrine of conspiracy is useful for connecting the notion of state responsibility and individual liability, because large scale crimes such as genocide usually need the planning and participation of several high-level public officials. Authors like William A. Schabas even argue that the existence of a state policy should be a requirement for establishing whether a crime is sufficiently serious to be considered an international crime.<sup>193</sup>

The approval of oil extraction in Yasuni National Park and its consequences on the lives of the Tagaeri-Taromenane peoples was only possible with a series of concerted acts. Examples of such acts include the modification of the official maps documenting IPLVI presence and the National Assembly’s ballot on the President’s initiative to extract oil from Yasuni National Park. Moreover, it is unlikely that the President would have sent the proposal to the National Assembly without first discussing the proposal’s implications with his Cabinet. The representatives of the President’s party should have also discussed the initiative’s implications with him or his Cabinet members. If these statements are true, the highest authorities in both the executive and legislative branches jointly arranged to act with the end of approving oil extraction in Yasuni National Park, regardless of its consequences for the Tagaeri-Taromenane peoples.

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189. Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 191 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

190. Prosecutor v. Ndindiliyimana et al., No. ICTR-00-56-T, Decision in Defense Motions Pursuant to Rule 98bis, ¶ 14 (Int’l Crim. Trib. for Rwanda March 20, 2007). “Conspiracy to commit genocide is punishable under Article 2(3)(b) of the Statute. Conspiracy represents the agreement of two or more persons to pursue a common criminal objective. The *actus reus* of conspiracy to commit genocide is that an agreement has been reached that has, as its common object, the commission of genocide against a protected group; the *mens rea* is the intent to enter into such an agreement. A conspiracy to commit genocide cannot exist unless all the perpetrators share the specific intent of the crime of genocide.”

191. *Id.* at ¶ 189.

192. *Id.* at ¶ 190.

193. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 983.

## CONCLUSION

In August of 2019, ten Waorani men were convicted of manslaughter due to their participation in the 2013 massacre.<sup>194</sup> In December of 2019, the Inter-American Commission on Human Rights held the Ecuadorian government accountable for the deaths of the Tagaeri-Taromenane peoples killed in the massacres of 2003, 2006, and 2013.<sup>195</sup> However, the individual criminal responsibilities of government officials must still be established. The conditions necessary for the prosecution of genocide are present in the case of the Tagaeri-Taromenane peoples. The discussion about how the extraction of oil and other natural resources jeopardizes the existence of indigenous peoples is not isolated to Ecuador;<sup>196</sup> indigenous peoples, as a worldwide group, are especially vulnerable to the effects of territorial reduction and contamination. Domestic and international courts will eventually develop jurisprudence on this issue, especially considering the particularities in the definition of the intent of the perpetrators. However, the Tagaeri-Taromenane's case is more urgent than most—these peoples are still alive, and it is still possible to preserve their physical existence and way of life.

The Ecuadorian government is presenting the expansion of the oil activities into the Tagaeri-Taromenane's territory as something natural, a necessity for progress and the modernization of the country. However, it is now documented that the consequence of such expansion involves the destruction of the Tagaeri-Taromenane. The discussions above and ethnographic data make it impossible to credibly allege that such consequences are unintended. This Article has shown that the expansion of oil activities into the Tagaeri-Taromenane's territory should constitute the crime of genocide under international criminal law jurisprudence. The investigation and prosecution of crimes of genocide such as the massacres of 2003 and 2013 will help prevent the Tagaeri-Taromenane's total destruction in the years to come. For Ecuadorians and the international community, there is a moral obligation to act on behalf of these human beings who have no chance to defend themselves.

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194. See *Tribunal sentencia a 10 ciudadanos waorani por el asesinato de personas del pueblo taromenane* [A Criminal Tribunal found 10 waorani men guilty for the murder of individuals of the taromenane people], EL COMERCIO (Aug. 15, 2019), <https://www.elcomercio.com/actualidad/sentencia-waorani-asesinato-taromenane-amazonia.html>.

195. *Tagaeri and Taromenane Indigenous Peoples v. Ecuador*, Case 12.979, Merits Report, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.173, doc. 167 (2019).

196. See VAN SCHAACK & SLYE, *supra* note 177, at 502.