Towards a Critical Green Southern Criminology: An Analysis of Criminal Selectivity, Indigenous Peoples and Green Harms in Argentina

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Abstract

This paper offers critical analytical tools to progress the development of a critical green southern criminology. Using Argentina as a case study, the article develops the notion of criminal selectivity to expose the biased functioning of the criminal justice system. The article explores how crime control is used to the detriment of Indigenous peoples, despite the fact that their protests do not produce significant social harm and are framed within constitutional rights. Conversely, the study exposes how the criminal justice system is not used to prosecute green harms perpetrated by corporations or the unlawful use of force against native peoples by law enforcement agencies, despite the harm of those behaviours on the environment and communities. The article exposes how the Argentinean criminal justice system targets the most vulnerable peoples while failing to provide environmental protections, and is an indicator of the bias within criminal justice systems in the Global South.

Keywords

Argentinean Indigenous peoples; criminal selectivity; green harms; over-criminalisation; social protest; under-criminalisation.

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Introduction

The exploitation of natural resources has exponentially increased in Argentina over the last 20 years. Many of these environmentally contaminating endeavours are located in Indigenous lands and have been conducted by corporations without prior consultation with the affected communities. However, the criminal justice system does not focus on the harm produced by the corporations—acting with the support or the indifference of local and national governments—but on the Indigenous peoples claiming to protect their land and natural resources.

This analysis will rely on a 'critical green southern criminology' perspective. The southern criminology perspective understands that a truly transnational green criminology must ensure that the environmental crimes and harms affecting the lands of the peoples of the Global South are brought to the forefront' (Goyes et al. 2017: 2). In particular, a green southern criminology might be understood as 'the science that is attentive to the dynamics and contexts of the global south and that is formed from the epistemological power of the marginalised, impoverished and oppressed' (Goyes 2018: 17; see also Goyes 2016, 2017, 2018, 2019; Brisman, South and Walters 2018) or as 'the production of green criminological knowledge attuned to the differential world (material, symbolic and epistemological) existent in the global south, thus preventing the universalization of Western theories' (Goyes 2018: 55–56).

By combining green southern criminology and critical criminology, this study highlights the need to connect environmental harm, criminal agencies' bias and the socio-economic context in which these phenomena occur, considering the specific characteristics and resources of the Global South. Particularly, this approach suggests that it might be enriching to delve into green southern criminology topics through the notion of criminal selectivity, which helps expose the biased functioning of the criminal justice system. Criminal selectivity runs through two mechanisms: over-criminalisation and under-criminalisation. When focusing specifically on green crimes, criminal selectivity exposes that crime control is intensively used to the detriment of Indigenous peoples, despite the fact that their protests do not produce significant social harm and are framed within constitutional rights (*over-criminalisation*). Conversely, the criminal justice system is not used to prosecute green harms or the unlawful use of force against native peoples by law enforcement agencies, despite of the severe harm of those behaviours on the environment and the lives and physical integrity of communities (*under-criminalisation*).

Overall, this article proposes using critical green southern criminology as a framework to analyse green harms and the biased functioning of the criminal justice systems in terms of class, race, ethnicity, gender and age when approaching green offences. It considers the specific socio-economic features and knowledge of the Global South and, particularly, the effects of colonisation and neo-colonisation. More specifically, a critical green southern criminology perspective may expose how criminal selectivity has functioned in relation to environmental harms in the Global South since colonial times. Criminal selectivity can be perceived through the systematic over-criminalisation of the acts perpetrated by disadvantaged groups (considered in terms of class, race, ethnicity, gender and age) even when these groups defend nature. Further, it can be perceived through the under-criminalisation of acts committed by privileged subsets of the population (also considered in terms of class, race, ethnicity, gender and age), even when these groups produce severe environmental harm.

Within this perspective, this study seeks to encourage further research on green crimes experienced by Indigenous peoples:

> who are also among the most socially and economically marginalized people globally, but whose victimization has not been exposed, analyzed, understood and addressed to the extent that it should, especially within criminology (Lynch 2018: 319).

The methodological approach is based on qualitative analysis, which is used often to study large and complex situations (Rothe and Kauzlarich 2016: 34). In turn, critical discourse analysis (Fairclough 1989) is used to unearth the power relations underlying media and governmental authorities' discourses to confront opposed narratives. The article relies on the main Argentinean newspapers (*Clarin*, *Perfil*, *Pagina/12*, *Infobae* and *La Nacion*), international media (e.g., BBC *Mundo, Hispantv Resumen Latinoamericano, Telesur*) and reports from national governmental authorities and international and local non-government organisations (NGOs) such as Amnesty International, Impunity Watch and CELS.

Part 1 outlines the situation of Indigenous populations in Argentina and the historical process of land expropriation, extermination, stigmatisation and criminalisation of their acts of resistance. Section 1a exposes how colonisers and the independent Argentinean nation-state sought the occupation of Indigenous territory via the peoples' direct extermination and, more recently, via stigmatisation and invisibilisation. Section 1b presents the Indigenous struggle against multinational corporations—supported by the State—to recover ancestral lands and protect natural resources. Section 1c examines the current use of terrorist accusations against native peoples by the government and mainstream media to legitimise their increasing criminalisation and the defence of corporations. This section discusses the expansion of the functions of the militarised police to confront Indigenous peoples. Part 2 develops the related notion of criminal selectivity to analyse how the criminal justice system systematically works towards the *over-criminalisation* of Indigenous peoples and the *under-criminalisation* of corporations and law enforcement.

Indigenous populations in Argentina: The occupation of their land and natural resources via extermination, stigmatisation and criminalisation

The occupation of Indigenous territory via their direct extermination and stigmatisation

Reluctant to surrender to the capitalist discipline and give up their lands and natural resources, Indigenous groups in Argentina have suffered extermination, displacement, stigmatisation and criminalisation since the fifteenth century.

The initial European colonisation of Ibero-América was catastrophic for the native peoples of the 'new world'. Indeed, during the first 50 years of conquest alone, the continental native population was reduced to 25 per cent of its pre-conquest size (Colombres 1989: 14–15). In the specific territory that is now Argentina, censuses did not consider the Indigenous population thoroughly until 2001. Conforming the national statistics institute (INDEC, 2015), the first national census in 1869 estimated the number of Indigenous peoples on the basis of information provided by military officers and placed them within the category of non-Argentineans. The second and third national censuses of 1895 and 1914 did not count the Indigenous populations; it only estimated it. By 1914, these estimations stated that, of 7,903,662 Argentinean peoples, 18,425 were Indigenous (approximately 0.23 per cent). The following census did not reference Indigenous populations. By 1966–1968, the national census included Indigenous peoples again, estimating 165,381 of a total population of 22.8 million people (approximately 0.73 per cent). It was only in 2001 that a national census included a more thorough measure of Indigenous populations, on the basis of self-identification. This census discovered that 281,959 homes had one or more persons who identified as Indigenous. In 2004 and 2005, a specific census targeting Indigenous populations established that 600,329 Argentineans self-identified as native peoples. Considering that by 2015, the total Argentinean population was 43 million (Population Pyramid 2015), self-identified Indigenous comprised approximately 1.4 per cent of the population. Finally, the last national census in 2010 stated that the total Indigenous population was 955,032, representing 2.38 per cent of the national population. These people represented 31 different Indigenous groups (Atacama, Ava Guaraní, Aymara, Chané, Charrúa, Chorote, Chulupi, Comechingón, Diaguita-Calchaquí, Guaraní, Huarpe, Kolla, Lule, Maimará, Mapuche, Mbyá Guaraní, Mocoví,

Omaguaca, Ona, Pampa, Pilagá, Quechua, Rankulche, Sanavirón, Tapiete, Tehuelche, Toba [Qom], Tonocote, Tupí Guaraní, Vilela and Wichí, among others) (INDEC 2015: 8).

Encounters between Indigenous and European worlds also exposed opposite views about the perception of nature. The latter perceived the elements of nature as 'resources', disconnected from each other and measured in terms of efficiency and productivity. While natives catalogued soils according to their productivity, Spaniards differentiated them by their mercantile value. Similarly, colonisers distinguished animals and plants into 'useful' and 'unusable' or 'dangerous'. Conversely, Indigenous peoples, especially the Andean ones, focused on productive tasks that were in balance with the environment, and not calculated to destroy or deplete it (Gudynas 2003: 27).

Argentinean independence from Spanish colonisers in 1810 did not change the stigmatisation and elimination of Indigenous peoples, who were perceived as obstacles to progress. The independent government sought to exterminate them and populate their territories with European immigrants who would bring 'civilisation' to the new land. The Argentinean army, led by Colonel Julio A Roca, led military campaigns financed by 50 British corporations, including the Argentine Southern Land Co., in exchange for huge parcels of property (Minieri 2006). The notion of civilisation also included a particular conception of land management and an attempt to reproduce European landscapes, totally different from the Latin-American environments (Gudynas 2003: 20). During the twentieth and twenty-first centuries, the Argentinean governments did not carry out direct military campaigns aimed at Indigenous extermination. Rather, they engaged strategies of assimilation and exclusion. Even today, the dominant historiography of the country states that the Argentinean population descends from European immigrants and neglects the country's Indigenous background (Moyano 2013).

As a result of killings, expropriations and invisibilisation in the name of 'civilisation', the land currently contested with Indigenous land rights claims is owned or exploited by foreign corporations. A report from the National Register of Rural Lands (2015) states that from 16 million hectares of rural land, foreign investors own six per cent, double the percentage demanded by Indigenous populations (Amnesty International 2017a). The Benetton Company is one of the biggest landowners, with 900,000 hectares across four different provinces (Moyano 2013). The UN Special Rapporteur on the Rights of Indigenous Peoples identified a significant gap between the normative framework on Indigenous rights and its real implementation, as most Indigenous peoples do not have a legal document supporting their ownership of lands. The Special Rapporteur on the rights of indigenous peoples, James Anaya, attributes this to "the fact that historically they have been dispossessed of large tracts of their land by ranchers and by the operations of farming, oil and mining companies" (UN 2012, párr. 21).

The Indigenous struggle against multinational corporations

The particularity of the Indigenous struggle over the last two decades is associated with increasing forestry and extractive investments, particularly mining and oil-related. Mining initiatives alone have expanded from 40 to 800 since 2000 (Amnesty International 2017b). Moreover, these investments occur without prior consultation and informed consent of the affected communities (UN 2011).

As a result, different Indigenous peoples have actively defended their ancestral lands and resisted endeavours that will likely pollute and destroy natural resources. As native peoples exist in a closely bound relationship with nature, its destruction is depicted as a process that destroys the basis of Indigenous existence itself (Lynch 2018: 324). Native Argentinean Jeremías Chauque claimed 'We, indigenous peoples, do not accept extractivism. And we will die fighting against the mining, oil and transgenic corporations. That is why they consider us as a threat' (Aranda 2017).

Under this framework, struggles between Indigenous groups and corporations—supported by local and national governmental authorities—have spread throughout Argentinean territory (Escolar 2017a; CELS 2017). Amnesty International (2017) reported 225 land conflicts and highlighted that all cases featured mining or oil corporations. Most conflicts occur in the provinces of Salta and Jujuy, where the largest reserves of lithium—whose exploitation is now increasing—are located. Another clear example of the relationship between environmental harm and Indigenous claims is in the province of Neuquén, where hydrocarbon source Loma de la Lata—comprising five main gas pipelines—is located in Mapuche territory, occupied by the Paynemil and Kaxipayiñ communities. German consultancy Umweltschutz, a specialist in environmental issues, affirmed that 'toxic elements', including aluminum, manganese, lead, cadmium, arsenic, nickel and thallium, have been detected in the bodies of community members (Seguel 2004). A court found the local government responsible for water pollution and, in 2002, the communities sought help at the Inter-American Commission on Human Rights of the Organization of American States to ensure government compliance with the sentence (Scandizzo 2003). In 2011, following a complaint from local Indigenous communities in Loncopué in the same Neuquén province, a local court nullified a contract between the government and a Chinese mining company. To deter any future mining exploitation, Indigenous peoples held a referendum; in June 2012, over 80 per cent of the population voted against mining and Loncopué was declared free of mega-mining (Colectivo Editorial Mapuexpress 2016; Weinstock 2017).

Despite these isolated positive outcomes, Verónica Huilipán, an Indigenous representative, clarified:

> the fundamental problem for the communities is that the government refuses to let them exercise their rights to control and administer their own territory, their resources, and the existing biodiversity … The Argentinean government has not properly assumed its responsibility, as the conflict has been classified as a problem between individuals, preventing a real and effective understanding of the fact that serious harms suffered by pollution is a consequence of the public policies applied by the Neuquén government, which has allowed corporations to come and extract. (quoted in Scandizzo 2003).

In this context, a wide range of Indigenous communities signed a document calling 'Benetton, Lewis, Van Ditmar, and all the Winkas [whites] usurpers, oligarchs, and imperialists [to] get out of Chacaywa Ruca mines, [and to] take out the nuclear power plants' (La Vaca 2017). The document also rejected the actions of multinational corporations that destroy:

> the natural resources that we have protected and cared for both for the present and future generations … we will not allow mining, oil, hydroelectric, forestry interventions in our territory carried out by landowners such as Benetton, Lewis, Los Amigos, Ginóbili, Yanozzi. Ted Turner, etc., who were endorsed by the different governments' policies. (La Vaca 2017).

Indigenous as terrorists as the last argument to support criminalisation

Trying to confront and delegitimise Indigenous claims, the government and mainstream media engaged in the stigmatisation of Indigenous peoples and reinforced their characterisation as outsiders. Indigenous are described as 'criminals' (La Nación 2017), 'anarchists' (Di Natale 2017) or 'violent people that do not respect the law, the homeland or the flag, and permanently assault everybody' (Spinetta 2017). Minister of Chubut province Pablo Durán affirmed that the Mapuches, one of the most active Indigenous groups, do not fight for their ancestral rights, but are simply criminals (Rio Negro 2017). Mainstream narratives even state that some Indigenous groups 'are not originally from our country, but from the Araucania (Chile)' (La Nación 2017a),

even though native communities preceded the creation of national borders and occupied the current territories of Chile and Argentina.

The stigmatisation campaign has also entailed the use of terrorist accusations. National authorities have alleged that the Mapuches belong to a terrorist organisation funded from abroad that operates under the name Mapuche Ancestral Resistance (RAM), which seeks to 'impose an autonomous and Mapuche republic in the middle of Argentina' (Perfil 2017a), even though this has been confirmed as inaccurate (Spinetta 2017; CELS 2018b: 7–8). Similarly, a National Ministry of Security report (2016) stated that the Mapuches 'are willing to impose their ideas through force' and that they commit 'usurpation, fires, property destruction, threats', which constitute federal offences. Accusations also link Indigenous peoples with the Colombian FARC, extremist Kurdish groups in Turkey and Spanish terrorist organisation ETA (Di Natale 2017). A Joint Report by the National Ministry of Security and the Provincial Governments of Rio Negro, Neuquén and Chubut states that the RAM:

> is an ethnic nationalist violent movement that has been operating in the Argentinean territory for eight years … The activists of the RAM commit crimes against property, against public safety, against public order, and against people. The different crimes committed by the RAM share the same political goal that promotes an insurrectional struggle against the Argentinean state and private property. The RAM considers that the Argentinean state and its laws are illegitimate. (2017: 5).

Further, mainstream press stated that 'the ancestral resistance advocated [by Mapuches] is not rhetorical or discursive, but violent [and the] RAM feels empowered to exercise force to achieve its objectives' (La Nación 2017a). Alfredo Astiz, one of the most notorious henchmen of the last civil-military dictatorship that committed crimes against humanity under the guise of fighting terrorists, accused the Mapuches of being the new terrorists and applauded the role of the Gendarmerie in confronting them (Página/12 2017).

The characterisation of native groups as terrorists and criminals has helped legitimise their increasing criminalisation (UN 2016). The aforementioned Joint Report used the euphemism 'revalorization of the criminal law' to categorise territorial claims as threats against national security. It also acknowledged that the government gathers intelligence within native Argentineans' organisations (Amnesty 2017a: 20).

Interventions of quasi-militarised police agencies—the Coast Guard and the Gendarmerie—against Indigenous demonstrations have increased. The post-dictatorship commitment to prevent military forces from intervening in ordinary policing has been abandoned. The declaration by Indigenous groups throughout the country affirmed:

> We made this claim … with the presence of Gendarmerie in our territories, with dozens of criminalized Mapuche authorities, with pending evictions, with oil and mining corporations being protected by the extractive policy of the state [and devoted to the] unreasonable exploitation and disrespect for the natural resources. (La Vaca 2017).

Notably, the Gendarmerie was created within the Ministry of War in 1939 to police the borders and intervene in internal affairs only in political emergencies (Andersen 2002: 129). In violation of this traditional division of tasks, the Gendarmerie extended its jurisdiction to internal affairs and received an increasing budget during the last Argentinean civil-military dictatorship (Hathazy 2016: 79). The first democratic government after the civil-military regime abandoned the dictatorship's National Security Doctrine and passed laws[1] to reimpose strict distinctions between the military and police forces; this was the main concern of the democratic transition

(Muzzopappa 2017; Sain 2000; Andersen 2002: 80). However, since the 1990s, the Gendarmerie was called on to provide security to Jewish establishments (Hathazy 2013: 36; Nieves and Bonavena 2014), participate in forensic examinations (Escolar 2017a), support the police in ordinary crime prevention (Nieves and Bonavena 2014) and suppress social protests (Escolar 2017a: 47).

Overall, the most striking Gendarmerie interventions in relation to repression of Indigenous groups occurred on 1 August 2017. CELS (2017: 5–6) acknowledged that on 1 August, the Gendarmerie began the eviction of route 40, which was occupied by members of the Mapuche community 'Pu Lof'. The group was protesting the arrest of its leader and prominent Indigenous activist Facundo Jones Huala. The Mapuches fled and the route was cleared. However, the gendarmes entered the community without a court order, with the justification of pursuing the 'flagrancy' of those throwing stones. Fifty-two troops entered the community territory and remained there for five hours, shooting rubber bullets. Santiago Maldonado was a craftsman supporting the struggle of the Mapuches. When the violent operation ended, he was missing. CELS requested the UN Committee Against Forced Disappearances urge the State to find Maldonado. On 7 August, the Committee granted the urgent action and asked the Argentinean State to adopt a comprehensive search strategy and ensure the exclusion of the Gendarmerie from the investigation, among other measures. Instead of protecting the victim's family and community, the State mistreated them (CELS 2017: 2–3). Therefore, the UN Committee also asked the State to adopt precautionary measures to protect the life and integrity of the family, its lawyers and the Mapuche community, and ensure that they were not subjected to violence or harassment. Later, the Inter-American Commission on Human Rights (2017) required the Argentinean State to adopt all the necessary measures to resolve the situation and find Maldonado, with the aim of protecting his right to life and personal integrity. Maldonado remained missing for about three months. On October 2017, three days before the national election, he was found dead in a river, in the area where the Gendarmerie pursued protesters (CELS 2017: 9).

The day before the repression that ended with Maldonado's disappearance and death, the Chief Cabinet of the National Ministry of Security met with the Ministries of Security of Chubut and Rio Negro Provinces and police chiefs to 'coordinate defense actions' against possible RAM attacks. They were authorised to act under the 'flagrant' procedures condition, which does not require a court order. In this framework, the Chief Cabinet affirmed that the Mapuches wanted to 'generate chaos and disorder and to threaten the population' and that they might have relations with extremist Kurdish groups (CELS 2017). The provincial executive power and judicial branch followed this statement with an assertion that the Cushamen Mapuche community belonged to the RAM and that their members were 'terrorists'. During Maldonado's disappearance, a leaked message from the government uncovered an order to refer to 'the RAM' rather than to the 'Mapuches' when making declarations to the press (Escolar 2017a: 13). Meanwhile, the senator of the Rio Negro province publicly warned of the risk of insurrection and called for military intervention (Escolar 2017: 13).

Human rights organisations argued that 'this exaggerated characterization of the conflict [as terrorism-related] was aimed at justifying repressive state responses and illegal intelligence actions' (Escolar 2017). Argentinean Indigenous rights expert Silvina Ramírez observed 'a deployment of force, of around 300 troops, against 10 or 15 Mapuches' can only be justified by referring to the Mapuches 'as if they were a militarized army operating in the mountains' when 'they are a community that ran out when facing the onslaught of the security forces'. Thus, the RAM 'seems a name that justifies any use of violence … putting a mantle of suspicion on all the Mapuche communities' (Cooperativa La 770 2017). In addition, CELS, the leading human rights organisation in Argentina, stated that all unfounded accusations that characterise Indigenous peoples as terrorists favour 'the [State] violent approach to social conflicts [as] it is argued that the complaining groups are dangerous' (2018b: 8). Addressing social problems such as land conflicts as if they were security issues is even more worrying when the State associates certain

groups with crimes regarded as threats to national security and locates them, explicitly or implicitly, as enemies (CELS 2017b: 93–94).

Despite the massive impact of the case (Hispantv 2017), Maldonado was not the last person to die because of the repression of Indigenous peoples by militarised police forces. On 25 November 2017, in Bariloche, a Coast Guard Special Group entered the lands of a Mapuche community. They shot at least 114 times with firearms, and killed a young Mapuche, Rafael Nahuel, shooting him in the back (Soriano 2018). Mainstream media (Perfil 2017b), the Governor of Rio Negro Province (Clarín 2017), a senator of that province (La izquierda Diario 2017) and Vice-President Gabriela Michetti (La Nación 2017b) falsely alleged Nahuel was a RAM member. Although evidence showed that the young man was unarmed, the Vice-President stated:

> what we have to say here, and we have to be very serious, is that the benefit of the doubt always has to benefit the security force exercising the monopoly of state violence. (La Nación 2017b).

The media referred to the situation as an *enfrentamiento* (Andrade 2018), which not only suggests that the two sides were equally armed, but is also a notion with strong political connotations, as it was used by the media and military during the last dictatorship to justify killings and disappearances.

The expansion of militarised police did not stop despite the proved excessive use of force during Gendarmerie interventions. On 23 July, the Argentinean government issued a new executive order (no. 683/2018)[2] broadening the scope of military interventions to collaborate with global security strategies:

> The Military will frame the planning and employment of the following operations: operation in defense of the vital interest of the nation; operations decided by United Nations or other international organizations; operations in support of the national and international community.

The national government specified that, among the new responsibilities, the military was in charge of providing security for 'strategic objects defined by the Executive such as a dam or a pipeline' (Clarín 2018b). These types of strategic objects are usually located in lands involving natural resources, such as lakes and mines, claimed by the Indigenous populations.

Criminal selectivity: *Over-criminalisation* of Indigenous peoples and *under-criminalisation* of militarised police

Borrowing from the labelling approach (e.g., Becker 1966) and critical criminology (e.g., Taylor, Walton and Young 1973; Baratta 1986: 133–134), the notions of criminal selectivity, primary criminalisation and secondary criminalisation have been extensively used in Latin-American scholarship (e.g., Zaffaroni, Slokar and Alagia 2000: 8). However, comprehensive definitions, clarifications about the links among these notions, their historical dimension and how they concretely operate are still neglected. Thus, in previous works (2017 and 2017b), I proposed a historical evolvement of criminal selectivity since the fifteenth century to today and suggested that it functions in two instances: 'primary criminalisation' (*unequal legal treatment*) and 'secondary criminalisation' (*law enforcement profiling*, *courts' discretion* and *differential penalisation*). *Law enforcement profiling* is the key aspect of the criminalisation process, as most cases involve police intervention but they do not make it into court or are dismissed in that instance.

Primary criminalisation refers to the primary filtering process through which certain behaviours are more or less emphatically legislated as crimes because of the socio-economic, gender, ethnic,

racial and religious status of the individuals that usually commit them, rather than because of the social harm they produce. Therefore, this filter exposes how only certain types of actions are legislated and qualified as criminal acts in the existing statutes or criminal codes. While most laws appear to be formally neutral, they disproportionately target behaviours associated with lower classes and racial minorities. This phenomenon is clearly exemplified by the 100-to-1 United States law, which punishes crimes related to crack cocaine (broadly consumed by African Americans) 100 times harsher than those related to cocaine (more generally consumed by the white population), even though there is no difference in the harmfulness of these offences (Tonry 2012: 53). Overall, the outcome of the process of primary criminalisation is the unequal legislative and common law treatment of different negative social behaviours, which can be termed *inequality under the law.*

Within 'secondary criminalisation', we confront the fact that it would be materially impossible for police, judges, correctional officers and parole boards to enforce the law every time a crime is committed; therefore, they act on a discretionary basis, under a biased process that particularly responds to the class and race features of the offender. Thus, secondary criminalisation consists of a secondary filtering process that is responsible for selecting which of the already-limited number of behaviours established as criminal are likely to be *effectively* criminalised.

Secondary criminalisation operates at three different levels. The first level is policing; it involves the discretionary activity of federal, state and local police and special groups belonging to the security forces (including border patrol and special teams or agents conducting policing activities). This level has most commonly been conceptualised as racial profiling, even though this notion excludes other features that might underline the biased performance, it excludes other security agents besides police, and there is no common agreement as to its definition (e.g., Ramírez 2000; Sollund 2006: 265; Walker, Spohn and DeLone 2012: 156). Thus, this level of secondary criminalisation may be better referred to as *law enforcement profiling*, as it describes how the work of police officers, patrol boards, special units and other policing agencies (mainly investigating crimes and apprehending offenders) is particularly plagued by explicit and implicit selective orientation.

The second stage of secondary criminalisation involves the activity of the judicial system, including prosecutors, judges, juries and defence attorneys. Thus, even if this stage is commonly described as 'prosecutorial discretion' (e.g., Walker et al. 2012: 218; Davis 2007), 'prosecutorial overreach' (US Chamber Institute for Legal Reform 2016) or 'discriminatory prosecution' (Ziegler 1976), these notions fall short, as they do not highlight the comprehensive number of actors contributing to bias at the court level. Therefore, it might be preferable to refer to this second stage as *courts' discretion*. This notion describes how the work of prosecutors, judges, juries and even defence attorneys is also plagued by explicit and implicit selectivity, particularly based on the class, gender, ethnicity and race of the defendant and how they operate throughout the judicial stage (from pre-trial and plea barging to sentencing, and pertinence and length of prison time).

The third level of secondary criminalisation rests on the inequality in the administration of punishment. This aspect has been called 'racial prejudice' (Anwar and Fang 2015), 'racial discrimination in parole release' (Dalhousie 2011) and 'racial disparities among prisoners' (Schlanger 2013) among other similar notions that refer to bias in the administration of punishment, but only in terms of racial selectivity and only in relation to parole or prison in isolation. Therefore, it might be more comprehensive to refer to this last stage of secondary criminalisation as *differential penalisation*. This notion relates to how parole boards (and their decisions), prison managers and correctional officers (and their influence on prison conditions), and bureaucratic agents (in charge of welfare programs and criminal records' administration), engage in unequal practices, conditioning an explicit and implicit biased administration of punishment.

Notably, primary and secondary criminalisation are traversed by two other categories that explain *how* selectivity pragmatically operates in each of those instances (i.e., which cases are selected to be criminalised and which are not). *Over-criminalisation* refers to the overly punitive treatment, at the primary and secondary criminalisation levels, of acts perpetrated by individuals in a *vulnerable* position due to their class, gender, culture, race, ethnicity or religion. *Under-criminalisation* refers to the absence or minimisation of the punitive treatment, at the primary and secondary levels, of acts perpetrated by individuals in a socially advantageous position in relation to their class, gender, racial, cultural, ethnic or religious membership. In both cases, the socio-economic position of the victim can also be key in the selective process.

Relying on this framework and on the level of secondary criminalisation, it is possible to identify that the harmful green crimes and the biased, violent and often unlawful actions of the gendarmes against Indigenous peoples have been largely a matter of *secondary under-criminalisation*. Meanwhile, the Indigenous have been extensively *secondary over-criminalised* when exercising their constitutional right to protest the occupation of their ancestral lands. This means that severe and harmful actions committed by members of corporations and the Gendarmerie—including murder and irreversible pollution—did not result in criminal prosecution. Conversely, native peoples have been extensively criminalised, even though their actions did not involve serious harm to property, physical integrity or life.

Secondary over-criminalisation of Indigenous peoples

When analysing secondary over-criminalisation of Indigenous peoples, it is relevant to shed light on the relevance of policing and how crime control is largely exercised at the level of *law enforcement profiling*. Indeed, in all identified cases, the Indigenous were criminalised at the policing level (*law enforcement profiling*) but the cases were later dismissed in court, even after large periods of pre-trial detention, because of insufficient evidence. Then, it is not necessary to secure a conviction at the court level (*court discretion*) to enforce crime control and ensure the *secondary over-criminalisation* of conflicting groups.

To exemplify, one of the most prominent cases exposes how the leader of the Potae Napocna Navogoh community, Félix Díaz, and 23 other Qom faced detention and long processes for occupying lands (Amnesty International 2012: 12) even though the cases were later dismissed at the court level (2013: 44). Similarly, Mapuche representative Relmu Ñamku was accused of attempted murder under counter-terrorism laws by the oil company Apache because a police officer was hurt while community members threw stones to resist the advance of machinery passing over their houses in 2012. The community claimed that the territories were their ancestral lands and that pollution would affect unborn babies and the health of the population (Polischuk 2015). Once again, the counter-terrorism discourse was enough to foster police intervention and subject Ñamku to crime control (*law enforcement profiling*). Later, at the court level, the charges were dismissed for lack of evidence (Amya 2015). Other examples of the *secondary over-criminalisation* of Indigenous peoples at the policing level under the legitimation of the terrorist threat include the unlawful arrest of 80 members of the Nam Qom community, including elders and children, by the police of Formosa Province in 2002 (CELS 2016). Another example is the violent eviction and arrest of a member of the India Quilmes peoples in 2011 (Renace Argentina 2011). Under the same logic, a Wichí leader in Formosa Province, Agustín Santillán, received a six-month detention for protesting, even though he was finally released for lack of evidence (Página/12 2017).

Further, this use of *law enforcement profiling* seems to serve the administration when it targets individuals, even when courts are unwilling to proceed further. Thus, a Mapuche representative, Facundo Jones Huala, was in police custody for almost a year until a judge acknowledged that the arrest was in violation of his constitutional rights and that there was no evidence supporting

charges against him of violating private property and possession of firearms (Mapuexpress 2018). Moreover, the use of the terrorist threat by the administration to stigmatise Indigenous peoples continued regardless of the court decision. The governor said in a press conference that the judge should be dismissed: 'We do not want federal judges that act in connivance with criminals'. The governor also accused Mapuches communities of burning places, without providing any evidence or presenting a formal complaint. He called on 'people to react and … not allow, even if he is a judge … this type of action' (Amnistia Internacional 2017b). Amnesty International responded, asserting 'these statements violate the division of powers, harm the dignity and rights of the Native-Argentinean populations and cover up the illegal activities of policing agents' (Amnistia Internacional 2017b). Jones Huala is still in detention in relation to an extradition request from Chile granted in early March 2018. Fifteen people from the community, including a minor, were arrested during a demonstration that followed the confirmation of the extradition (Amnistia Internacional 2017b). In another example, Milagro Sala, head of social organisation Tupac Amaru—which continuously denounced corruption and racist public policies lead by the executive—was detained for the last two years, even though the UN Working Group on Arbitrary Detention (García 2016) and the Inter-American Commission on Human Rights (2017b) demanded her release.

Secondary under-criminalisation of corporations and the militarised police

Concerning green harms committed by multinational corporations and *secondary under-criminalisation*, there are isolated cases brought to court as a result of the efforts of NGOs and affected communities. From 2000–2008, there were 1,254 criminal cases for environmental crimes; only five ended with a conviction (Aranda 2008). Moreover, the lack of State support to prosecute these cases is evident in the fact that only 9.38 per cent of the environmental crime cases from 2010–2016 involved the government as a civil party pushing the investigation forward (CFCP 2016). Exposing the low engagement of the criminal justice system in the prosecution of mega-corporations, the case against mining company la Alumbrera started 16 years ago as a result of the efforts of NGO Pro-Eco. However, the CEO of la Alumbrera was the sole person prosecuted (and without pre-trial detention) for the pollution of a river with heavy metals (Lopez 2016). Moreover, this judicial measure was taken just after the corporation decided to close its businesses in Argentina because the natural resources were almost exhausted (Origlia 2016). Antonio Gustavo Gómez, the prosecutor pushing the case, stated that the auditing process was insufficient and that the local government issues administrative instructions were inadequate to deter pollution (Origlia 2016). He added that the mining industry, paper mill plants and soy industry produce pollution and that there are almost no convictions because of structural impunity (Aranda 2008). Further, Gómez explained that the criminalisation of green harms is the only possible deterrent, as corporations:

> prefer to pay fines [in civil law courts] and keep on polluting (Lynch and Stretesky 2014). In the first pollution case, the government of the province of San Juan imposed a million Argentinean pesos fine on the mining corporation Barrick Gold and they did not even appeal. (Durán 2016).

In relation to law enforcement *secondary under-criminalisation*, no gendarme was punished, despite the unlawful and harmful behaviours committed, arguably, because they act as representatives of the State. For example, there was no accountability for the illegalities of the operation that ended with the disappearance of Santiago Maldonado (i.e., entering without a warrant, throwing stones at demonstrators or burning the belongings of the community) (CELS 2017). Moreover, the only member of the Gendarmerie still under investigation was promoted by the National Minister of Security (Clarín 2018). Also, Javier Chocobar from the Diaguita people was killed by police gunshots, but no-one was held accountable (Giarracca 2009).

Similarly, none of the officers involved in the struggles in the Potae Napocna Navogoh community in 2010 were brought to justice despite the fact that various witnesses reported police violence (Amnesty International 2012: 12). Similarly, in January 2017, a provincial judge in the Province of Chubut made an order to clear a tourist path occupied by members of the Cushamen Mapuche community; the magnitude of the operation involved over 200 members of the Gendarmerie and provincial police closing all access to Indigenous lands, punching women and children, destroying houses and taking animals without judicial control, while 10 people were arrested without a court order (Amnesty 2017a: 21). The Gendarmerie used rubber and lead bullets, cars without identification and hooded personnel, resulting in several Mapuches being injured (CELS 2018a: 25). Again, nobody was punished. During the demonstration that followed the judicial decision to grant the extradition of Jones Huala in March 2018, police used sticks, gases and rubber bullets, even though there were children and elders (de Los Santos 2018). No charges were pressed against the agents (Amnistia Internacional 2017b).

Other cases include unlawful intelligence gathering about journalists and Indigenous peoples in Chubut in 2015. As the agent who conducted the intelligence activity accepted responsibility, he is facing charges (CELS 2018a: 83). However, *secondary under-criminalisation* persists, as the agent said he did so without any superior order. If true, this shows that his superiors should be accountable for lack of sufficient internal controls. Further, the judiciary should be responsible for the use of illegally gathered information without questioning the source. Likewise, in May 2016, the Gendarmerie and the Special Operation Group of Chubut Province raided the territory of the Mapuches communities with unidentified cars and hooded agents. No-one faced charges (CELS 2017), reaffirming the extended *under-criminalisation* of unlawful police conduct.

Overall, the general *secondary under-criminalisation* of harmful actions perpetrated by militarised police against Indigenous peoples is such that the Committee for the Elimination of Racial Discrimination (2017) expressed that it:

> regrets the lack of investigation and sanction of the violent acts committed by militarized police and third parties against human rights defenders and members of the indigenous populations, as well as the lack of measures to prevent these violent acts.

Importantly, the harmful actions of the Gendarmerie might have been *under-criminalised* but they have not been without an impact on the legitimacy of the force. In particular, the Maldonado case influenced public perceptions of the force. Following Maldonado's disappearance, there were massive demonstrations throughout the country against the excessive use of force. People chanted 'I knew that Santiago Maldonado was killed by the murderer Gendarmerie' (Hispantv 2017), while the Gendarmerie website was hacked with a message demanding 'A live appearance of Santiago Maldonado' (Perfil 2017c). As Escolar (2018) observed, the Maldonado case produced a break in the administration strategy of installing the Gendarmerie as the guarantor of armed governability by exposing it as a repressive force.

Short reflections

Green criminology is expanding and shedding light on behaviours that harm the environment and the most vulnerable sections of the population. Further research on the particularities of green criminology in the Global South in general and in relation to Indigenous communities is needed.

This article sought to advance this endeavour by proposing the notion of criminal selectivity to expose, at the theoretical level, the discretionary use of crime control against green crimes, Indigenous rights and social protest in Argentina. The conviction underlying this chapter is that expanding the use of radical southern green criminology to analyse the selective use of the criminal justice system might help understand the links between corporate interests on native

lands, the role of the State in protecting those interests and the constrained rights of the native population by means of a selective criminal justice system.

Theoretical clarification needs to be complemented with action on the ground led by those affected by environmental harms and their allies, with the support of the society as a whole. The relevance of the wide support of the general population and civil society to those over-criminalised has been exposed by the demonstrations prompted by the disappearance of Santiago Maldonado (Telesur 2018). To foster the expansion of those contesting the status quo, it is particularly relevant to challenge, through independent research, the distorted narratives of mainstream media and the official government discourse that stigmatises Indigenous communities and environmental activists. It is also essential to continue appealing to international organisations, acknowledging that they are not a monolithic conglomerate but offer opportunities to advance the defence of human rights. This happened with the pressure exercised by the UN and the Inter-American Commission on Human Rights to release Milagros Sala and find Santiago Maldonado. Third, dialogue channels should be opened between local police and native peoples to avoid clashes, particularly considering, as some senior members of the Gendarmerie acknowledge, 'sometimes we do not know if we should be on the other side' (Escolar 2017a: 92). This means that a key aspect of the suppression of social conflicts has to do with poor ethnic minority individuals repressing their peers. As another high-rank member clarified: '[low-rank members of the Gendarmerie and the ones to be repressed] have the same socio-economic background, come from the same places, have the same problems' (Escolar 2017a: 92).

In short, selectivity within the criminal justice sphere—enforced via the over-criminalisation of the most vulnerable sectors and with the under-criminalisation of corporations and law enforcement agencies—works as the last milestone of a selectivity process that began much earlier, at the level of wealth distribution, professional opportunities and identity recognition. Resorting to the notion of criminal selectivity to expose the fallacy of an allegedly class-, racial-, colour-, ethnic- and gender-blind criminal justice system might be a first attempt to retrace the deepest structural inequalities.

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[1] *National Defense Law* 23, 554, *Internal Safety Law* 24,059 and *National Intelligence Law* 25,520.

[2] See https://www.boletinoficial.gob.ar/#!DetalleNorma/188532/20180724

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