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## HARDIN'S 'TRAGEDY OF THE COMMONS': INDIGENOUS PEOPLES' RIGHTS AND ENVIRONMENTAL PROTECTION: MOVING TOWARDS AN EMERGING NORM OF INDIGENOUS RIGHTS PROTECTION?

SASCHA DOV BACHMANN\* & IKECHUKWU P. UGWU\*\*

### *Abstract*

*Most of the world's natural resources can be found on the territories of indigenous peoples. This puts indigenous peoples in a position where they are not only subjected to environmental hazards, as a result of the mining and exploitation of these resources, but are also denied the use and control of these resources. In addition, the proximity to such commodities makes indigenous peoples the subject of widespread human rights violations. This article discusses the indigenous peoples' situation in light of Garret Hardin's theoretical "Tragedy of the Commons" concept of the correlation between shared resources and their depletion before the reality of the major role Multinational Corporations (MNCs) play in the abuse of indigenous peoples' rights. At the international level, we find a progressive*

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*consensus in recognizing the rights of indigenous peoples with regard to the management of their lands and natural resources. We argue that the absence of an international and permanent mechanism for holding MNCs accountable for environmental pollution and human rights abuses remains one of the biggest threats to indigenous peoples' rights. Resorting to transnational and international litigation to close this accountability gap seems to be the last resort for indigenous peoples. This article explores examples in national jurisdictions which establish enforceable environmental rights such as environmental personhood, the recognition of the fundamental rights of Mother Earth, the harmonious construction of the right to clean environment and right to life, and the right to be consulted and accommodated, all of which are relevant to indigenous peoples. This article links the relationship between human rights and environmental protection and, to establishes that resource ownership and communal management of shared resources, rather than state's control, are necessary for both the protection of the environment and, by extension, of indigenous peoples as socially and culturally distinct groups.*

**KEY WORDS: Indigenous Peoples; Environment; Human Rights; MNCs; Oil Pollution; Corporate Eco Terrorism; Transnational Human Rights Litigation; Aarhus Convention; Governance; Environmental Justice; Earth Rights; Globalization**

### *Introduction*

Mining and the excessive extraction of natural resources has not only depleted such resources<sup>1</sup> but has also negatively impacted the environment, often leading to the extinction, or at least endangerment, of both fauna and wildlife.<sup>2</sup> Those who live in proximity to these natural resources are often the first victims of such natural resource extraction in terms of their health and quality of life; this can be seen as a violation of their rights to be

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1. Erin A Clancy, 'The Tragedy of the Global Commons', (1998) 5 *Indiana Journal of Global Legal Studies* 601, 602; David Chang, 'Diminishing Footprints: Exploring the Local and Global Challenges to Place based Environmental Education', (2017) 23 *Environmental Education Research*, 722, 724.

2. Jean-Louis Martina, Virginie Marisa, and Daniel S Simberloff, 'The Need to Respect Nature and its Limits Challenges Society and Conservation Science' (2016) 113 *PNAS* 6105–6112; Kevin J Gaston and Richard A Fuller 'Biodiversity and Extinction: Losing the Common and the Widespread' (2007) 31 *Progress in Physical Geography* 213; Allister Slingenberg and others, 'Final Report: Study on Understanding the Causes of Biodiversity Loss and the Policy Assessment Framework' (*European Commission Directorate General for Environment*, October 2009) 67.

protected from such environmental pollution.<sup>3</sup> In the context of extraction of natural resources and its impact on the environment, Garret Hardin's *Tragedy of the Commons*<sup>4</sup> comes to mind. The Tragedy of the Commons highlights the fate of mankind as a 'destination of ruin'<sup>5</sup> if conscious efforts are not put in place to correct what Hardin calls the 'remorseless working of things'<sup>6</sup> – a continuous depletion of the environment without an attempt at replenishing the resources.

Indigenous peoples all over the world require a pollution-free environment, not only as an essential requirement for their survival as a distinct people,<sup>7</sup> but also for the right of ownership of resources found in proximity to their communities.<sup>8</sup> The prerogative that a people who owns land has the greatest interest in the protection of that land<sup>9</sup> serves as a reminder to call for the participation of indigenous peoples in the decision making affecting their land and resources.<sup>10</sup> But in reality, such demands are often not met because the states where indigenous people live benefit

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3. Sang-Yong Eom and others, 'Health Effects of Environmental Pollution in Population Living near Industrial Complex areas in Korea' (2018) 33 *Environmental Health and Toxicology* 1 – 8.

4. Garrett Hardin, 'Tragedy of the Commons' (1968) 162 *Science* 1243.

5. *Id.* at 1244.

6. *Id.*

7. Monica Gratani and others, 'Indigenous Environmental Values as Human Values' (2016) 2 *Cogent Social Sciences* 2 – 17; Mark Dowie, 'Clash of Cultures: The Conflict between Conservation and Indigenous People in Wild Landscapes' (*The Guardian* 3 June 2009) <<https://www.theguardian.com/environment/2009/jun/03/yosemite-conservation-indigenous-people>> accessed 4 June 2019.

8. Geir Ulfstein, 'Indigenous Peoples' Right to Land' in A von Bogdandy and R Wolfrum (eds) *Max Planck Yearbook on United Nations Laws* (vol 8 Kominklije Brill NV 2004) 2; Birgitte Feiring, 'Indigenous Peoples' Rights to Lands, Territories, and Resources' (International Land Coalition 2003) 17.

9. Henry E Smith, 'Property and Property Rules' (2004) 79 *New York University Law Review* 1719, 1729; Gleb Raygorodetskyun, 'Indigenous Peoples Defend Earth's Biodiversity—but they're in Danger' (*National Geographic* 16 November 2018) <<https://www.nationalgeographic.com/environment/2018/11/can-indigenous-land-stewardship-protect-biodiversity/>> accessed 4 June 2019; Guido Bilbao, 'Panamanian Indigenous People Act to Protect the Forest from Invading Loggers' (*Mongabay* 2 April 2019) <<https://news.mongabay.com/2019/04/panamanian-indigenous-people-act-to-protect-the-forest-from-invading-loggers/>> accessed 4 June 2019; United Nations Environment Programme, 'Indigenous People: Protecting our Planet' (*UN Environment* 8 August 2017) <<https://www.unenvironment.org/news-and-stories/story/indigenous-people-protecting-our-planet>> accessed 4 June 2019.

10. Margherita Paola Poto, 'Participatory Engagement and the Empowerment of the Arctic Indigenous Peoples' (2017) 19 *Environmental Law Review* 30, 31.

directly from the commercial exploitation of these resources.<sup>11</sup> Further, in cases where the environment has already been damaged through such exploitation, the costs necessary for cleaning up would be a major burden to the public purse<sup>12</sup> and are often prohibitive. In the developing world, powerful Multinational Corporations (MNCs), aided and abetted by government security organs, have committed acts of environmental pollution, forced displacement of persons and people, and other breaches of human rights.<sup>13</sup> As we argue in this article, the absence of a workable system for holding MNCs liable and the enforcement of the right to a clean environment have led indigenous people to turn to foreign jurisdictions to seek remedies from MNCs for such acts.

On June 22, 2019, an explosion occurred at an abandoned oil pipeline at Obigbo, a neighbouring town to Ogoni, Nigeria on June 22, 2019, and it is believed that the indigenous people of the Ogoni were among the casualties.<sup>14</sup> Similarly, intentionally ignited fires in the Amazon in Brazil left members of the Mura indigenous peoples displaced, with Mura tribal

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11. Barisere Rachel Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47 *Cornell International Law Journal* 181, 182.

12. Camillus Eboh and Felix Onuah, 'UN Slams Shell as Nigeria Needs Biggest ever Oil Clean-up' (*The Reuters* 4 August 2011) <<https://www.reuters.com/article/us-nigeria-ogoniland/u-n-slams-shell-as-nigeria-needs-biggest-ever-oil-clean-up-idUSTRE7734MQ20110804>> accessed 6 June 2019; BBC, 'Nigeria Ogoniland oil clean-up 'could take 30 years'' (*BBC* 4 August 2011) <<https://www.bbc.co.uk/news/world-africa-14398659>> accessed 6 June 2019.

13. Sascha-Dominik Bachmann, *Civil Responsibility for Gross Human Rights Violations: The Need for a Global Instrument* (Pretoria University 2007); Sascha Bachmann, 'Terrorism Litigation as Deterrence under International Law -From Protecting Human Rights to Countering Hybrid Threats' (2011) 87 *Amicus Curiae* 22; Sascha-Dominik Bachmann, 'Colonialism, Justice and the Rule of Law: A Southern African and Australian Narrative' (2012) *De-Jure* 306; Theresa (Maxi) Adamski, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' *International Relations* (2011) 34 *Fordham International Law Journal* 1501; Amanda Perry-Kessaris, 'Corporate Liability for Environmental Harm' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds) *Research Handbook on International Environmental Law* (Edward Elgar 2010) 361.

14. Sahara Reporters, '10 Die In Rivers Pipeline Explosion' (*Sahara Reporters: New York* 22 June 2019) <<http://saharareporters.com/2019/06/22/10-die-rivers-pipeline-explosion>> accessed 9 July 2019; Channels Television, 'Several Feared Dead in Rivers Pipeline Explosion' (*Channels Television: Lagos* 22 June 2019) <<https://www.channelstv.com/2019/06/22/several-feared-dead-in-rivers-pipeline-explosion/>> accessed 9 July 2019.

land totally destroyed and its people now left with only scorched land and forests.<sup>15</sup>

This article examines the various international and national laws on the protection of the rights of the indigenous peoples and the environment with the aim of identifying the problems of environmental rights protection and enforcement in general and the difficulty indigenous peoples face in their attempt to safeguard their environment. The analysis of these legal instruments with provisions for the protection of the rights of indigenous peoples *vis a vis* their natural resources and environment, will be discussed in terms of their suitability and success for making recommendations for the international community towards the end goal of tying the protection of indigenous peoples' rights to their natural resources to the protection of the environment. One aim of this article is to discuss how the recognition of the rights of the indigenous peoples can lead to adequate environmental protection. Linked to this is the role of MNCs regarding environmental pollution and how they could be held accountable under international law. There seems to be evidence of an emerging consensus on an international right and duty for the international protection of the rights of the indigenous peoples and the environment. In addition, transnational human rights litigation in the form of civil cases brought under the US Alien Tort Statute have highlighted the role MNCs play in regard to environmental wrongs and human rights violations committed against indigenous peoples.

### *I. Indigenous People, the Need for Environmental Protection, and the Role of Multinational Corporations*

From the 1960s, international environmental law has evolved as a unique body of law that is distinct from both international human rights and international trade law.<sup>16</sup> However, there is an overlap among the three areas and other disciplines.<sup>17</sup> This development was driven by what is

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15. Bryan Harris and Andres Schipani, 'Bolsanero seeks to open indigenous land to mining', (*Financial Times* 7 February 2020) <https://www.ft.com/content/0d3055b4-48d9-11ea-aeb3-955839e06441> accessed 5 January 2021

16. Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford Press 2009) 1; Malcom N Shaw, *International Law* (8th edn, Cambridge Press 2017) 640.

17. Alan Boyle, 'Relationship Between International Environmental Law and Other Branches of International Law' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford Press 2008) 125 – 145, here, the author discusses the fact that international environmental law is not self-contained; Harro Van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at

known as ‘environmental ethics’ and the ‘ecological movement’, seeking an extension of protection not only to humans but also to non-humans by the mere acknowledgment that they co-exist.<sup>18</sup> The works of Hardin<sup>19</sup> and Lynn White<sup>20</sup> significantly impacted this movement. While Hardin ruminates what will become of humanity if the environment is not protected by state governments making a conscientious effort in protecting the environment,<sup>21</sup> White scrutinises some religious beliefs and teachings that he attributes as the roots of ecological crisis, especially what he describes as the ‘greatest psychic revolution’<sup>22</sup> of the Christian faith. To him, this is because Christianity teaches that the environment exists only to serve man<sup>23</sup> and that man has been given the power and domination over earth by the ‘right’ to multiply and to subdue nature.<sup>24</sup>

Hardin argues that where shared common resources are continuously consumed without a corresponding thought to limitation and efforts at replenishing the resources,<sup>25</sup> a time will come when there will be overuse and depletion ‘of the very thing upon which the interest relies – the commons.’<sup>26</sup> Agreeing with Thomas Malthus’s exponential principles of

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the Intersection of the Climate and Biodiversity Regimes (2012) 44 *International Law and Politics* 1205 – 1278, where the author discusses the overlap between climate change, biodiversity and other international law; Oran R Young, ‘Effectiveness of International Environmental Regimes: Existing Knowledge, Cutting-edge Themes, and Research Strategies’ (2011) 108 *PNAS* 19853 – 19860, for the author, the effectiveness of environmental law depends on its interplay with other areas of law.

18. Michael N Mautner, ‘Life-Centred Ethics, and the Human Future in Space’ (2009) 23 *Bioethics* 433.

19. Hardin (n 4) 1243 – 1248.

20. Lynn White Jr, ‘The Historical Roots of Our Ecologic Crisis’ (1967) 155 *Science* 1203 – 1207.

21. Hardin (n 4) 1245.

22. White (n 20) 1205.

23. *Id.* at 1207.

24. The New American Bible - Revised Catholic Edition, Genesis 1: 28. The argument by White, though plausible, is not entirely true. This is because the Church, through the works of Pope Francis, especially in his *Laudato si*, now calls on all stakeholders to be more responsible in the use of the resources of our ‘sister’, the Mother Earth. Pope Francis also condemns what he calls ‘modern anthropocentrism’ and to him, our dominion of the earth is a call for ‘responsible stewardship’. See the Encyclical Letter, ‘Laudato Si’ of the Holy Father Francis on Care for our Common Home, *Given in Rome at Saint Peter’s on 24 May 2015*.

25. Hardin (n 4) 1244.

26. Nicholas D Welly, ‘Enlightened State Interest: A Legal Framework for Protecting “the Commons Interest of all Mankind” from Hardinian Tragedy’ (2010) 36 *Journal of Space Law* 273, 284.

population,<sup>27</sup> Hardin is of the view that the overuse of the shared commons will get worse as population increases.<sup>28</sup> Hardin's position has been a source of inspiration to many writers who insist on the need for the protection of the environment.<sup>29</sup> This notion has also been extended to include indigenous peoples' position concerning their quest to protect their environment<sup>30</sup> and it is believed that indigenous peoples' natural resource governance and management reinforces the effective protection of the environment.<sup>31</sup>

The necessity to protect the environment cannot be overemphasized. Apart from the ethical, aesthetic or symbolic reasons for protecting some facets of the environment,<sup>32</sup> there are also health and economic considerations.<sup>33</sup> Protecting the environment will lead to a reduction of air pollution, protection of human life and health, protection of animals and plants, maintenance of humans' daily life and recreation, the prevention of a possible 'end' of the world, aesthetic reasons, prevention of bushfire and wildfire crises,<sup>34</sup> and so forth. Altruistically, people may opt to protect the

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27. Thomas is of the view that while population increases in geometric progression of 2, 4, 8, 16, 32, etc, food production grows in arithmetic progression of 2, 4, 6, 8, 10, etc, and he thereby prophesies doom for the human race as there will be a time when there will be nothing left for man to feed on. See Thomas Malthus, *An Essay on the Principle of Population* (1st published in 1798, republished OUP 2008).

28. Hardin (n 4) 1243.

29. Raymond De Young and Stephen Kaplan, 'On Averting the Tragedy of the Commons' (1988) 12 *Environmental Management* 273 – 283; David Feeny and others, 'The Tragedy of the Commons: Twenty two Years Later' (1990) 18 *Human Ecology* 1 – 19; Masaru Ito, Tatsuyoshi Saijo, and Masashi Une, 'The Tragedy of the Commons Revisited: Identifying Behavioural Principles' (1995) 28 *Journal of Economic Behaviour and Organisation* 311 – 335; Julia Schindler, 'Rethinking the Tragedy of the Commons: The Integration of Socio-Psychological Dispositions' (2012) 15 *Journal of Artificial Societies and Social Simulation* 4; Stephen Battersby, 'News Feature: Can Humankind Escape the Tragedy of the Commons?' (2017) 114 *PNAS* 7 – 10.

30. Gary D Libecap, 'The Tragedy of the Commons: Property Rights and Markets as Solutions to Resource and Environmental Problems' (2009) 53 *The Australian Journal of Agricultural and Resource Economics* 129 – 144.

31. Nigel Crawhall and Allison Silverman, 'Access to Justice and the Right to Sustain Nature' (2016) *International Union for Conservation of Nature and Commission on Environmental, Economic and Social Policy's Working Paper* 1 – 31, 6.

32. Birnie, Boyle and Redgwell (n 16) 7.

33. Drew Shindell, 'Protecting the Environment can Boost the Economy' (2009) 459 *Nature* 321.

34. Dovilė Šorytė and Vilmantė Pakalniškienė, 'Why it is Important to Protect the Environment: Reasons given by Children' (2019) *International Research in Geographical*

environment when such protection contributes to their personal benefit rather than to the benefit of environment as an abstract common good;<sup>35</sup> this conforms with the views that environmental international laws are primarily anthropocentric<sup>36</sup> – ‘human chauvinism’<sup>37</sup> that places man at the centre of everything.<sup>38</sup> This article’s argument is based on the premise that the ecosystem generally should be protected because ‘the environment is intrinsically valuable’<sup>39</sup> and that man is only but a part of this ecosystem.<sup>40</sup> To achieve this, there is a need for cooperation by different actors.<sup>41</sup>

Like earlier submitted, persons, affected most by the diminution, loss or destruction of a commodity will always be more interested in its protection,<sup>42</sup> and indigenous peoples fall under this category when issues affecting the environment are raised.<sup>43</sup> The terms indigenous peoples and aboriginal are used interchangeably by scholars<sup>44</sup> and are also referred to as Native people, Local people, and First Nations.<sup>45</sup> Often their unique cultures, as identified by Pereira, have been deplorably deemed by some

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and Environmental Education< <https://www.tandfonline.com/doi/full/10.1080/10382046.2019.1582771>> accessed 12 June 2019.

35. Stefano De Dominicis, Wesley Schultz P and Marino Bonaiuto, ‘Protecting the Environment for Self interested Reasons: Altruism Is Not the Only Pathway to Sustainability’ (2017) 8 *Frontiers in Psychology* 1.

36. Birnie, Boyle and Redgwell (n 16) 7; Alexander Gillespie, *International Environmental Law, Policy and Ethics* (2nd edn, Oxford Press 2014) 11.

37. Gillespie (n 36) 4.

38. Mary Midgley, ‘The End of Anthropocentrism?’ (1994) 36 *Royal Institute of Philosophy Supplement* 103, 107.

39. Samuel Cocks and Steven Simpson, ‘Anthropocentric and Ecocentric: An Application of Environmental Philosophy to Outdoor Recreation and Environmental Education’ (2015) 38 *Journal of Experiential Education* 216, 218.

40. Id.

41. United Nations Environment Programmes, ‘World Environment Day - How the World came Together to #BeatAirPollution’ (*UNEP website* 7 June 2019) <<https://www.unenvironment.org/news-and-stories/story/world-environment-day-how-world-came-together-beatairpollution>> accessed 12 June 2019.

42. Smith (n 9) 1729; UNEP (n 9).

43. UNEP (n 9).

44. Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing 2011) 402 – 405. Here the authors while discussing the rights of indigenous peoples also discussed the Canadian Royal Commission on Aboriginal Peoples (RCAP). See also Barsh Lawrence Russell, ‘Indigenous Peoples’ in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford 2007) 838.

45. Poto (n 10) 41.

governments as 'anachronistic stage of human development'.<sup>46</sup> Indigenous peoples are progenies of distinctive populations and living examples of human and *environmental* relationships,<sup>47</sup> having maintained social, cultural, economic, and political features that are different from those of the modern majority cultures they reside in.<sup>48</sup> Generally, indigenous peoples are among the poorest in terms of their socio-economic status wherever they live<sup>49</sup> despite their resources often being used to sustain the economies of the various states they live in.<sup>50</sup>

As identified by Barsh,<sup>51</sup> the indigenous peoples' rights can be grouped into three distinctive categories of rights: (1) distinctive political rights, like self-determination and right to participation,<sup>52</sup> (2) distinctive substantive rights,<sup>53</sup> like rights to land and the environment,<sup>54</sup> and (3) intellectual and cultural property rights.<sup>55</sup> While this article is limited in scope to the rights to land and the environment, references to the rights to self-determination

46. Ricardo Pereira, 'Government-Sponsored Population Policies and Indigenous Peoples: Challenges for International Human Rights Law' (2015) 33/4 *Netherlands Quarterly of Human Rights* 437, 438.

47. United Nations Department for Economic and Social Affairs, 'Indigenous Peoples at the UN' (*UN DESA*) <<https://www.un.org/development/desa/indigenouspeoples/about-us.html>> accessed 12 June 2019.

48. *Id.*

49. Shelton H Davis, 'Indigenous Peoples, Poverty and Participatory Development: The Experience of the World Bank in Latin America' in Rachel Sieder (ed) *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 227. See Brittany Bingham and others, 'Indigenous and non-Indigenous People Experiencing Homelessness and Mental Illness in two Canadian Cities: A Retrospective Analysis and Implications for Culturally Informed Action' (2019) 9 *BMJ Open* 1 – 10, where the authors conducted a research that shows that as between indigenous people and non-indigenous people, the latter are most likely to get better access to health facilities than the former.

50. Ben Naanen, 'Oil- Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People' (1995) 33 *The Journal of Commonwealth and Comparative Politics* 46–78; Fidelis AE Paki and Kimiebi Imomotimi Ebienfa, 'Militant Oil Agitations in Nigeria's Niger Delta and the Economy' (2011) 1 *International Journal of Humanities and Social Science* 140 – 145; Mark Kernan, 'The Economics of Exploitation: Indigenous Peoples and the Impact of Resource Extraction, (*Counter Punch* 20 August 2015) <<https://www.counterpunch.org/2015/08/20/the-economics-of-exploitation-indigenous-peoples-and-the-impact-of-resource-extraction/>> accessed 13 June 2019.

51. Barsh (n 44) 841.

52. *Id.* at 842.

53. *Id.* at 845.

54. *Id.* at 845.

55. *Id.* at 847.

and political rights, and intellectual and cultural property rights, when we discuss the Convention on Biodiversity, and how the right to self-determination leads to the realisation of the right to land and environment.

Over the years, indigenous people all over the world have demanded rights which can be summed up as ‘environmental justice,’<sup>56</sup> which entails firstly, the right to have regulatory rights for control over their lands and environment<sup>57</sup> and secondly, the right for indigenous peoples in any decision making process which will affect their resources or environment, to be recognised as right holders.<sup>58</sup> The indigenous right to environmental self-determination evokes a human rights-based set of norms<sup>59</sup> that necessitates international efforts rather than domestic changes to protect indigenous peoples’ right over their environment.<sup>60</sup>

On the other hand, the activities of MNCs affect both the environment and the rights of the indigenous peoples. The increase in business operations around the world by MNCs saw also an increase in reports of human rights abuses,<sup>61</sup> not only in the form of physical abuses<sup>62</sup> but also as the result of environmental (law) violations.<sup>63</sup> MNCs’ appetite for resources

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56. See Kristen Marttila Gast, ‘Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis’ (2004) 14 *Transnational Law and Contemporary Problems* 253 – 279; David Schlosberg and David Carruthers, ‘Indigenous Struggles, Environmental Justice, and Community Capabilities’ (2010) 10 *Global Environmental Politics* 12 – 35; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Taylor and Francis 2008).

57. Rebecca A Tsosie, ‘Indigenous People and Environmental Justice: The Impact of Climate Change’ (2007) 78 *University of Colorado Law Review* 1625, 1627.

58. *Id.* at 1627 – 1628.

59. *Id.* at 1628.

60. *Id.*

61. Sascha-Dominik Bachmann, ‘Bankrupting Terrorism: The Role of US Anti-terrorism Litigation in the Prevention of Terrorism and Other Hybrid Threats: A Legal Assessment and Outlook’ (2012) 33 *Liverpool Law Rev* 91, 96; Oluwatosin Busayo Igbayiloye, Hameenat Bukola Ojibara, and Anthonia Omosefe Ugowe, “Legal Response to Human Rights Challenges of Multinational Corporations in Nigeria” (2015) 6 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 106, 106.

62. OECD, ‘Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses’ (2002) 1 *OECD Working Papers on International Investment* 1 – 36, where the OECD investigated and found out that an MNC in conjunction with Myanmar’s military, engaged in human rights abuses such as ‘summary execution, ethnic cleansing, torture, forced relocations and forced labour’. See page 4.

63. Birnie, Boyle, and Redgwell (n 16) 326 – 329, Beyerlin and Marauhn (n 44) 393 – 402.

is limitless and even eyes the prospect of mining the 'orbital commons'.<sup>64</sup> Business related activities by MNCs, especially in regards to resources belonging to a particular group of people or indigenous peoples, can even be labelled 'corporate terrorism'<sup>65</sup> underscoring its severity and impact on populations affected. Indigenous peoples who own these resources suffer the most due to their proximity and relationship to the land and, by extension to the environment.<sup>66</sup> There have been various efforts to hold MNCs accountable for human rights abuses<sup>67</sup> and these efforts have all failed.<sup>68</sup> Indigenous peoples and their advocate groups have also tried to use

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64. Alexandra R Taylor and Christopher J Newman, 'Law, Ethics, and Space: Space Exploration and Environmental Values' (2018) 56 *ETYKA* 51, 58; William R Kramer, 'In Dreams Begin Responsibilities – Environmental Impact Assessment and Outer Space Development' (2017) 19 *Environmental Practice* 128; William R Kramer, 'Extra-Terrestrial Environmental Impact Assessments: A Foreseeable Prerequisite for Wise Decision Regarding Outer Space Exploration' (2014) 30 *Space Policy* 215 – 222.

65. Vandana Shiva, 'Solidarity Against All Forms of Terrorism, (*Global Issues* 18 September 2001) <<http://www.globalissues.org/article/255/solidarity-against-all-forms-of-terrorism>> accessed 14 June 2019, here the writer decries the attitude of MNCs in their quest to mine minerals in Jhodia district of Kashipur in India. See also Basudev Mahapatra, 'India's Systematic Hunting of a Tribe to Promote Corporate Mining' (*HotnHit News* 5 July 2016) <[https://www.academia.edu/26753820/Indias\\_systematic\\_hunting\\_of\\_a\\_tribe\\_to\\_promote\\_corporate\\_mining](https://www.academia.edu/26753820/Indias_systematic_hunting_of_a_tribe_to_promote_corporate_mining)> accessed 14 June 2019.

66. Barsh (n 44) 830.

67. Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN-ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN-Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003); UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011); Inter-Governmental Working Group, *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* (October 2018) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF>>accessed 15 June 2019.

68. Kamil Omoteso and Hakeem Yusuf, 'Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism', (2017) 13 *Critical Perspectives on International Business* 54 – 71; Susan Aaronson and Ian Higham, 'Re-Righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms', (2013) 35 *Human Rights Quarterly* 333, 335; Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem' (2012) 17 *Deakin Law Review* 24.

the legal redress available under US federal law with its potential for human rights litigation to protect their rights.<sup>69</sup>

## *II. International Law, Indigenous Peoples And Environmental Protection*

The notion of rights for indigenous peoples to their land and the extent to which they can protect their living environment are the result of international law evolving in respect to inclusion of, and the application respectively on indigenous peoples. Encouragingly, at the national level, states are implementing and enforcing international laws granting such rights. This section focuses on the relevant international and national rules recognizing the rights of indigenous peoples and the obligation to protect the environment. In addition, examples of jurisprudence which recognize the proactive role indigenous peoples can play in protecting the environment will be discussed.

### *A. International Legal Instruments on Indigenous Peoples' Right to Their Environment*

The rights of indigenous peoples, such as rights to lands, territories, and resources, are not special rights, but articulations of universal human rights that are contextualised to the situation of indigenous peoples<sup>70</sup> We find evidence of collective elements such rights in the international legal instruments we discuss below, albeit often not explicit yet in a contextual and often of a *conditio sine qua non* (of a necessary nature) nature.

#### *1. The Universal Declaration of Human Rights (UDHR)*

In 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR)<sup>71</sup> in order to 'guarantee the right of every individual everywhere'.<sup>72</sup> Adopted as a non-binding declaration by the UN General Assembly of only a declaratory nature and originally not binding *per se* on states,<sup>73</sup> the UDHR has become binding as *jus cogens*<sup>74</sup> by virtue of

69. Discussed below at 34.

70. Feiring (n 8) 23.

71. United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

72. United Nations, "History of the Document" (*United Nations Website*) <<https://www.un.org/en/sections/universal-declaration/history-document/index.html>> accessed 1 July 2019.

73. Lorie M Graham and Nicole Friederichs, 'Indigenous Peoples, Human Rights, and the Environment' (2012) (12-01) Suffolk University Law School: Legal Studies Research Paper Series 2 <<http://ssrn.com/abstract=1979745>> (last visited July 1, 2019); Hobbins AJ,

consistent state practice.<sup>75</sup> The UDHR can be divided into six subjects,<sup>76</sup> namely dignity and justice,<sup>77</sup> development, environment, culture, gender<sup>78</sup> and participation.<sup>79</sup> Even though there is no express provision on ‘the environment,’ it can be argued that once the environment is heavily polluted and toxic other rights are threatened such as the right to life,<sup>80</sup> right not to be deprived of property,<sup>81</sup> and right to participate in the cultural life of the community, are all affected with a clean environment constituting a necessary condition.<sup>82</sup>

## 2. *The Three ‘Is’ of Indigenous Peoples’ Protection*

Three covenants are important for the protection of rights of indigenous peoples (1) The International Covenant on Civil and Political Rights (ICCPR) of 1976,<sup>83</sup> (2) the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) of 1976<sup>84</sup> and (3) the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) of 1969.<sup>85</sup> Article I of the ICCPR provides for the right to self-determination.

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‘Rene Cassin and the Daughter of Time: The First Draft of the Universal Declaration of Human Rights’ (1989) II Fontanus 7.

74. Jacob Abiodun Dada, ‘Human Rights under the Nigerian Constitution: Issues and Problems’ (2012) 2 *International Journal of Humanities and Social Sciences* 33.

75. See Report of the Commission on Human Rights, UN Doc E/3616/Rev 1, para 105, 18th session, Economic and Social Council, 19 March- 14 April 1962, United Nations, New York; Hurst Hannum, “The UDHR in National and International Law” (1998) 3 *Health and Human Rights* 144, 145.

76. Office of the High Commissioner, United Nations Human Rights, “Universal Declaration of Human Rights - In Six Cross-cutting Themes” (*United Nations*) <<https://www.ohchr.org/EN/UDHR/Pages/CrossCuttingThemes.aspx>> (last accessed July 1, 2019).

77. UDHR (n 71) art 1.

78. *Id.* at arts 2 and 30.

79. *Id.* at arts 21.

80. *Id.* at art 3.

81. *Id.* at art 17 (2).

82. Office of the High Commissioner, United Nations Human Rights (n 75).

83. United Nations General Assembly, *International Covenant on Civil and Political Rights (ICCPR)* res 2200A (XXI) of 16 December 1966, (entered into force on 23 March 1976) 999 UNTS 171.

84. United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, res 2200A (XXI) of 16 December 1966, (entered into force on 3 January 1976) 993 UNTS 3.

85. United Nations General Assembly, *International Convention on the Elimination of all Forms of Racial Discrimination*, res 2106 (XX) of 21 December 1965 (entered into force on 4 January 1969) 660 UNTS 195.

Although this provision has been equated with decolonisation and not right of indigenous peoples as a minority within an already established and independent state,<sup>86</sup> it nonetheless remains an aspiration for most indigenous peoples.<sup>87</sup> Article 27 of the ICCPR grants indigenous peoples the right to enjoy and live their distinctiveness. This right has been interpreted to extend to the right to ‘use resources’ by indigenous peoples<sup>88</sup> and serves as a valid ground in an argument for resource control by indigenous peoples.<sup>89</sup> In *Ominayak v Canada*,<sup>90</sup> the United Nations Human Rights Committee (HRC) held that Canada was in breach of Article 27 of ICCPR since Canada did not prevent the regional government of Alberta to grant a commercial lease over the Lubicon Lake Band for oil exploration and timber felling, which automatically denied to the indigenous peoples of the region the material benefits arising from their territory.<sup>91</sup> The right to reside in a tribal reserve and the denial of this right was found to fall under Article 27 of ICCPR in the case of *Lovelace v Canada*<sup>92</sup> where a Canadian Maliseet indigenous person was denied the right to access the tribal reserve despite the fact that no other person from that group lived outside the reserve.<sup>93</sup>

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86. See Barsh (n 44) 831 – 832; Erica-Irene Daes, Working Paper on the Fifty-Ninth Session of the Sub Commission on the Prevention of Discrimination and Protection of Minorities: Indigenous Peoples and Their Relationship to Land’ (1997) 2 Australian Indigenous Law Report 564.

87. Gillian Triggs, The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective’ in Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford Press 2002) 127.

88. United Nations Human Rights Committee (HRC), *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5 [para 3.2]; *Ivan Kitok v Sweden* (Merits), Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985, IHRL 2484 (UNHRC 1988), 27th July 1988, United Nations [UN]; Human Rights Committee [CCPR].

89. Feiring (n 8) 24.

90. *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) at 1 (1990).

91. *Id.* at 135.

92. *Lovelace v Canada*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No 24/1977, UN Do A/36/40, Annex 18 (1977).

93. *Id.* See also *Hopu v France* United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev 1 (1997).

The ICESCR protects the full enjoyment of good health of mind and body.<sup>94</sup> In order to achieve this, states have a duty to improve environmental and industrial hygiene.<sup>95</sup> It further calls on states to ensure the 'conservation of culture'<sup>96</sup> of indigenous peoples. This involves the rights of indigenous peoples to the lands, territories, and resources customarily owned by them.<sup>97</sup> The ICESCR is the most encompassing international agreement on the protection of economic, cultural, and social rights.<sup>98</sup> However, the provisions of the ICESCR are only 'hortatory' and have not been widely implemented at the national level.<sup>99</sup>

Next, the ICERD guarantees freedom from discrimination and the right to own property.<sup>100</sup> In a recommendation from 2003,<sup>101</sup> the Committee on the Elimination of Racial Discrimination (CERD) stated that these rights also extend to indigenous peoples and that states should make conscientious efforts towards the protection of indigenous peoples' rights to own, control and use their 'communal lands, territories and resources,'<sup>102</sup> and to fully consult them in any decision making process that will affect them.<sup>103</sup> The ICERD provisions are non-derogable, that is, they are *jus cogens* and have the status of a peremptory norm of international law.<sup>104</sup>

It is worthy to note that while some states like Nigeria have acceded to the ICCPR, ICESCR and the ICERD, they have not yet incorporated and implemented them as part of their *corpus juris*. This is a direct consequence of the dualism theory of the relationship between international law and local law, which some states follow. The dualism theory requires that

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94. ICESCR (n 84) art 12 (1).

95. *Id.* at art 12 (2)(b).

96. *Id.* at art 15(2).

97. United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 21, Right of Everyone to take Part in Cultural Life (art 15, para 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C12/GC/21 [para 36].

98. Manisuli Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259, 260.

99. Triggs (n 87) 129.

100. ICERD (n 85) art 5.

101. Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of Indigenous Peoples* (Fifty-first session, 1997), UN Doc A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 6 at 212 (2003)

102. *Id.* at para 5.

103. *Id.* at para 4(d).

104. Triggs (n 87) 130.

international agreements have to be implemented through domestic legislation post signing and ratification.<sup>105</sup>

### *3. The International Labour Organisation Conventions and Indigenous Peoples' Rights*

In 1957 the International Labour Organisation (ILO) adopted the Convention Concerning the Protection and Integration of Indigenous Populations and other Tribal and Semi Populations in the Independent Countries (Convention No 107).<sup>106</sup> It protected the right of indigenous peoples to own, collectively or individually, the lands they traditionally occupied.<sup>107</sup> Thirty years later in 1989, Convention No 107 was revised and is presently known as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No 169).<sup>108</sup> It uses 'self-identification' as a criterion for determining an indigenous peoples' group.<sup>109</sup> Indigenous peoples are guaranteed the right to decide how to live their lives, especially in exercising control over economic and cultural development.<sup>110</sup> These rights extend to management of every aspect of the ecosystem they have been traditionally used, except minerals.<sup>111</sup> For mineral resources and sub-surface resources, governments are mandated to develop a mechanism of consulting indigenous peoples before allowing any form of exploration and mining of resources on lands traditionally occupied by these people.<sup>112</sup> The word 'land' as used in this Convention has been

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105. (Munir) AFM Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12 *European Journal of International Law* 309, 319; Sachin Sachdeva, 'Interaction Between the Monist and the Dualist Tax Systems: A Cause (of Double Taxation) Less Obvious' (2013) 41 *Intertax* 313–318; Jordan J Paust, 'Basic Forms of International Law and Monist, Dualist, and Realist Perspectives' in Marko Novakovic (ed) *Basic Concepts of Public International Law – Monism and Dualism* (Belgrade 2013) 246; Takele Soboka Bulto, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law* 132, 135

106. International Labour Organization (ILO), *Convention Concerning the Protection and Integration of Indigenous Populations and other Tribal and Semi-Populations in the Independent Countries* (Convention No 107), C107, 26 June 1957, C107.

107. *Id.* art 11.

108. International Labour Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (Convention No 169), C169, 27 June 1989, C169.

109. *Id.* at art 1(2).

110. *Id.* at art 7(1).

111. *Id.* at art 15(1).

112. *Id.* at art 15 (2).

argued to extend to 'living resources' such as fish and wildlife, whether the indigenous peoples live permanently on the land or not.<sup>113</sup>

In a general observation, *Observation Concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Brazil*,<sup>114</sup> the ILO's Committee of Experts resolved the issue whether article 1 of Convention No 169 also extends to tribal people who are not indigenous. The ILO committee held that once a group meets the 'self-identification' criterion, they are protected whether they are indigenous or not.<sup>115</sup> The Chilean indigenous peoples communities of *Chusmiza* and *Usmagana* utilised the provisions of Convention No 169 to challenge a corporation that produced bottled water from a water spring that served as the only source of water to these indigenous peoples groups.<sup>116</sup> The Supreme Court of Chile held in the case of *Agua Mineral Chusmiza SAIC con Comunidad Indigena Aymara de Chusmiza y Usmagana*<sup>117</sup> that by the 'ancient use' of the water by these groups, they are the owners of the water and that a subsequent grant issued to the corporation violated this right.<sup>118</sup>

As of July 2019, only 23 countries have ratified Convention No. 169. Luxembourg is the most recent country to ratify Convention No. 169 in 2018.<sup>119</sup> Unfortunately the reluctance of countries to ratify it or to apply the Convention in its domestic jurisprudence means that it does not yet constitute 'customary law for non-parties',<sup>120</sup> despite its 'benchmark' provisions.<sup>121</sup>

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113. Barsh (n 44) 845; Beyerlin and Marauhn (n 44) 404.

114. *Observation Concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Brazil* (International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations (CEACR)) adopted 2008, published 98th ILC session (2009).

115. *Id.*

116. See Rodrigo Cespedes, 'Indigenous Peoples' Human Right to a Clean Environment, Environmental Impact Assessment and ILO-Convention 169', (2013) 3 *Warwick Student Law Review* 71 – 79.

117. *Agua Mineral Chusmiza SAIC con Comunidad Indigena Aymara de Chusmiza y Usmagana*, Rol 2840- 2008, Corte Suprema, casacin forma y fondo. It can be found in Oxford Reports on International Law in Domestic Courts, Action to annul, Rol 2/840-2008; ILDC 1881 (CL 2009), 25 November 2009.

118. *Id.*

119. International Labour Organisation, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (*ILO website*) <[https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:31231\\_4](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:31231_4)> accessed 1 July 2019.

120. Triggs (n 87) 132.

121. *Id.* at 133.

#### 4. *The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

The United Declaration on the Rights of Indigenous Peoples (UNDRIP) safeguards minimum standards for indigenous peoples' "survival, dignity and well-being".<sup>122</sup>

The UNDRIP<sup>123</sup> has chequered history of its drafting: spanning from the time a petition was written to the League of Nations (the predecessor to the United Nations) in 1922 and 1925 calling for self-determination of the US Native American indigenous peoples, the Haudenosaunee,<sup>124</sup> to 1993 when an earlier version of the later text of the UNDRIP was made part of the Vienna Declaration and Programme of Action.<sup>125</sup> In 1994, a Draft UNDRIP was adopted<sup>126</sup> and was reworked in 1995 by the UN Working Group on Indigenous Populations.<sup>127</sup> It was finally adopted on 13 September 2007.<sup>128</sup> A total of 143 states voted in favour of it while Nigeria abstained from voting.<sup>129</sup> Although UNDRIP is non-binding and does not create legally-binding international law obligations, it provides a reference point for political activism and an authoritative declaration on evolving indigenous

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122. First Nations & Indigenous Studies – The University of British Columbia, 'UN Declaration on the Rights of Indigenous Peoples – What is the UNDRIP' <[https://indigenousfoundations.arts.ubc.ca/un\\_declaration\\_on\\_the\\_rights\\_of\\_indigenous\\_peoples/](https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/)> accessed 9 January 2021

123. United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295.

124. Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous Rights Discourse' (2008) 33 *Alternatives* 105.

125. United Nations General Assembly, *Vienna Declaration and Programme of Action* res 48/121, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. See para 19.

126. Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN ESCOR, 46th Session, UN Doc E/CN4/Sub2/1994/45 (1994).

127. Beyerlin and Maruhn (n 44) 404; James S Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 *Arizona Journal of International and Comparative Law* 13, 24.

128. Anaya (n 127) 24.

129. United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples' (*United Nations Department of Economic and Social Affairs*) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 2 July 2019.

law positions.<sup>130</sup> Its importance lies in its potential to crystallise into customary international law.<sup>131</sup>

The UNDRIP recognises that indigenous peoples, as a group or individually, have the right to enjoy all the rights provided in the UDHR and other international laws.<sup>132</sup> It removes any form of discrimination “in the exercise of their rights, in particular that [are] based on their indigenous origin or identity”<sup>133</sup> and grants them the right to self-determination.<sup>134</sup> The right to self-determination provides the right to be autonomous and to determine the form of self-government in “matters relating to their internal and local affairs”.<sup>135</sup> The UNDRIP also ensures their right to maintain their culture, and not be dispossessed of their land, territories, and resources.<sup>136</sup> Indigenous peoples can only be removed from their lands and territory after their ‘prior and informed consent’ has been sought and obtained.<sup>137</sup> An important provision of the UNDRIP is the protection of Indigenous peoples’ intellectual property rights. Once such rights have been infringed upon, states must put in place effective redress mechanisms for the restitution of such rights.<sup>138</sup>

With regards to decision-making, Indigenous peoples not only have the right to maintain their own decision-making processes, but also have the right to participate in any decision-making that will affect them, through their representatives.<sup>139</sup> Before any legislation or government policy is made that affects any indigenous peoples, they must be consulted and their ‘prior and informed consent’ must be obtained.<sup>140</sup> This is because indigenous peoples have right over the land, territories, and resources which they have traditionally maintained<sup>141</sup> and the right to use their land, etc.<sup>142</sup> There should be established, an impartial judicial system to address

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130. Odette Mazel, ‘Indigenous Health and Human Rights: A Reflection on Law and Culture’ (2018) 15 *International Journal of Environmental Research and Public Health* 1, 23.

131. *Id.* at 6.

132. UNDRIP (129) art 1.

133. *Id.* at art 2.

134. *Id.* at art 3.

135. *Id.* at art 4.

136. *Id.* at art 8.

137. *Id.* at art 10.

138. *Id.* at art 11(2).

139. *Id.* at art 18.

140. *Id.* at art 19.

141. *Id.* at art 26 (1).

142. *Id.* at art 26 (2).

grievances of indigenous peoples concerning their rights;<sup>143</sup> where the judicial body can either order for restitution. If restitution is not possible, indigenous peoples should receive fair and equitable compensation.<sup>144</sup>

Indigenous peoples also have the right to protect their environment from hazards. States are mandated to ensure that no hazardous substances are deposited on their land, etc.<sup>145</sup> Where indigenous peoples are already affected by such pollution, states must put measures in place to restore the health of affected persons.<sup>146</sup> If not justified by public interest, military activities should not take place within the territory of indigenous peoples.<sup>147</sup> While imploring all relevant bodies, including the UN, and states to make sure that its provisions are complied with,<sup>148</sup> it is worthy to note that the UNDRIP is a minimum standard of protective rights for indigenous peoples.<sup>149</sup> States must adhere to it with the option of states increasing these rights.

#### 5. *The Convention on Biodiversity (CBD)*

Scholars claim that the UN Convention on Biodiversity (CBD)<sup>150</sup> resembles the first international agreement to address all aspects of biodiversity in detail,<sup>151</sup> as well as the recognition and safeguard for the protection of traditional knowledge at the international level.<sup>152</sup> The three objectives of the CBD are (1) ‘the conservation of biodiversity’, (2) ‘the sustainable use of components of biodiversity’ and (3) ‘the fair sharing of

143. *Id.* at art 27.

144. *Id.* at art 28 (1).

145. *Id.* at art 29 (1-2).

146. *Id.* at art 29 (3).

147. *Id.* at art 30(1).

148. *Id.* at arts 41-42.

149. *Id.* at art 43.

150. United Nations General Assembly, *The Convention on Biological Diversity* of 5 June 1992 (entered into force on 29 December 1993) 1760 UNTS 79.

151. Catherine Redgwell, ‘The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity’ in Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford Press 2002) 207.

152. Marcia Langton, Lisa Palmer and Zane Ma Rhea, ‘Community-Oriented Protected Areas for Indigenous Peoples and Local Communities: Indigenous Protected Areas in Australia’ in Stan Stevens (ed) *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture, and Rights* (University of Arizona Press 2014) 87.

benefits from the use of biodiversity.<sup>153</sup> State parties have a duty to preserve and maintain traditional knowledge, practices, and innovations of indigenous peoples relevant to the conservation of biodiversity and to ensure equitable sharing of benefits from their utilisation.<sup>154</sup> States must also disclose the origin of genetic resources, traditional knowledge, and innovations of indigenous peoples.<sup>155</sup> The CBD, therefore, tends to prevent the use, without authorisation and compensation, of traditional knowledge and indigenous innovations, or its patenting,<sup>156</sup> generally referred to as 'biopiracy'.<sup>157</sup> Indigenous peoples in Africa, Asia, and Latin America have been often the victims of biopiracy.<sup>158</sup>

#### 6. *The African Charter on Human and Peoples Rights*

The African Charter on Human and Peoples Rights (ACHPR)<sup>159</sup> is a regional law regime by the African Union that provides for the rights and duties of both citizens and the state. The ACHPR guarantees to indigenous peoples as 'all people' the 'right to a general satisfactory environment favourable to their development',<sup>160</sup> the right of a people to pursue their political and economic status in the form of self-determination<sup>161</sup> and the right of a people to dispose of their natural resources.<sup>162</sup> In the Principles and Guidelines of the ACHPR,<sup>163</sup> it is stated that the right to self-

153. CBD (n 150) art 1.

154. *Id.* at art 8 (j).

155. Secretariat of the Convention on Biological Diversity (2002), *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity* [UNEP/CBD/COP/6/20] (2002), para 16 (d)(ii).

156. Graham Dutfield, 'Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation' (2003) 4 *International Trade and Sustainable Development Series* 1, 26.

157. Peter Drahos, 'Indigenous knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?' (2000) 6 *European Intellectual Property Review* 245-250. Some authors have doubted if biopiracy or more subtly, bioprospecting exists. See James Ming Chen, 'There's No Such Thing as Biopiracy . . . And it's a Good Thing Too' (2006) 37 *McGeorge Law Review* 1 – 32.

158. Graham (n 156) 26.

159. African Union (AU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

160. *Id.* at art 24.

161. *Id.* at art 20.

162. *Id.* at art 21(1).

163. African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on*

determination under the ACHPR can only be ‘exercised within the inviolable national borders of a state party,’<sup>164</sup> thereby limiting the possibility of an indigenous peoples’ group to seek self-determination outside an already existing state; a reasonable limitation given the colonial arbitrariness of how state borders were drawn without consideration of the territorial reality of the people affected. The ACHPR established the African Commission on Human and Peoples’ Rights (African Commission) in 1987 with the mandate to interpret the provisions of the Charter<sup>165</sup> and to protect human and peoples’ rights.<sup>166</sup> In addition the African Court on Human and Peoples’ Rights was established as the judicial organ of the African Union was established in 2004 to apply the ACHPR.<sup>167</sup>

The displacement of an indigenous community for the purposes of establishing a game reserve likely violates indigenous peoples’ rights under the ACHPR. This was the decision of the African Commission in the case of *Centre for Minority Rights Endorois Welfare Council v Kenya*<sup>168</sup> involving the forced expulsion and removal from their traditional lands of a native community to make way for a game reserve in Kenya. The community asked that their ancestral lands be given back to them.<sup>169</sup> The Commission found for the community holding that the government deprived them of the right to free disposition of natural resources, right to property<sup>170</sup> and culture.<sup>171</sup>

In May 2002, the African Commission made an important decision regarding indigenous’ rights which was ‘highly praised’<sup>172</sup> among human rights defenders globally: the *Ogoni case*.<sup>173</sup> The Ogoni indigenous peoples

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*Human and Peoples’ Right* <[https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC\\_E.pdf](https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf)> accessed 18 May 2021.

164. *Id.* at para 41.

165. ACHPR (n 159) art 45 (3).

166. *Id.* at art 45 (1).

167. For more on the court, see *African Court on Human and Peoples’ Rights Basic Information*, <<https://www.african-court.org/wpafc/basic-information/>> accessed 10 January 2021

168. *Centre for Minority Rights Endorois Welfare Council v Kenya* (African Commission on Human and Peoples’ Rights) Communication No 276/2003 (4 February 2010).

169. *Id.*

170. *Id.* at para 209.

171. *Id.* at para 173.

172. Beyerlin and Maruhn (n 44) 395.

173. *SERAC and the Centre for Economic and Social Rights v Nigeria* (the Ogoni case) (Decision of 27 May 2002, Communication No 155/96).

in Nigeria, having exhausted all legal remedies,<sup>174</sup> brought an 'other communication' action under Article 55 of the ACHPR before the African Commission. The action alleged that the Nigerian government did nothing to stop environmental contamination from numerous oil spills caused by the Shell Petroleum Development Company of Nigeria (SPDC). The African Commission determined that the Nigerian government violated the Ogoni peoples' right to a generally satisfactory environment<sup>175</sup> and failed to protect the Ogoni people from damages caused by private persons.<sup>176</sup> Additionally, the Commission held that the government always has a duty to undertake 'appropriate environmental and social impact assessments'<sup>177</sup> whenever oil exploration occurs. As significant for the protection of rights of indigenous peoples this decision might be, it is noteworthy that African Commission decisions under Art 55 refer to communications, human rights complaints respectively, by individuals and organizations which are not legally binding.<sup>178</sup> Today, only decisions of the African Court of Human and Peoples rights are binding. Decisions by the African Commission can however be referred to the African Court which could then make those decisions binding and enforceable. However, the Ogoni decision was made before the African Court came into existence.

### 7. Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)<sup>179</sup> 'is the most ambitious venture in the area of environmental democracy.'<sup>180</sup> It is underpinned by three pillars.<sup>181</sup> First,

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174. The ACHPR requires that for a matter to be brought before the African Commission, local remedies must have been exhausted. See art 56.

175. ACHPR (n 159) art 21.

176. *Id.* at art 21(1).

177. *Ogoni case* (n 173) para 14.

178. See ACHPR (n 159) arts 52 and 53.

179. United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* of 28 June 1998 (entered into force 30 October 2001) 2161 UNTS 447.

180. Kofi Annan, *Foreword to Economic Commission for Europe, the Aarhus Convention: An Implementation Guide* (2000) <<https://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>> accessed 2 July 2019.

181. See Peter Davies, 'Public Participation, the Aarhus Convention, and the European Community' in Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds) *Human*

‘access to information’, where environmental authorities are to make available to the public, and environmental information once requested.<sup>182</sup> The information may be denied if it is in the public interest to do so.<sup>183</sup> Second, ‘Public participation in decision-making on specific activities’,<sup>184</sup> like in the energy sector, production, and processing of metal, mineral, chemical industries, etc.<sup>185</sup> Also, where the project does not fall within the scope of Annex 1 of the Convention, but will have a ‘significant effect on the environment’,<sup>186</sup> the public must be allowed to participate in decision making. And finally, ‘Access to justice’<sup>187</sup>: where state members ensure that those who claim their rights under the Aarhus Convention have not been met get justice before a court of law or an impartial body.<sup>188</sup> The Aarhus Convention has improved the relationship between environmental protection and human rights.<sup>189</sup> Additionally, indigenous peoples’ rights could well be subsumed under the three pillars of the Aarhus Convention to protect their rights to the environment.<sup>190</sup> Potential rights are subject to the relevant signatory state’s compliance with the Convention, and indirectly through implementing legislation and jurisprudence recognizing the Convention rights. This is already the case in the European Union, which is one of its 46 member states having acceded in 2005.<sup>191</sup>

#### 8. *The American Convention on Human Rights (American Convention)*

The American Declaration of the Rights and Duties of Man (ADRDM)<sup>192</sup> and the American Convention on Human Rights<sup>193</sup> guarantee the right to

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*Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford Press 2002) 155 – 185.

182. Aarhus Convention (n 179) art 4(1).

183. *Id.* at art 4(3)(c).

184. *Id.* at art 6.

185. *Id.* at Annex 1.

186. *Id.* at art 6 (1)(b).

187. *Id.* at art 8.

188. *Id.* at art 8(1).

189. Margherita Paola Poto, ‘Participatory Engagement and the Empowerment of the Arctic Indigenous Peoples’ (2017) 1 *Environmental Law Review* 30, 44.

190. Darell Posey, ‘Upsetting the Sacred Balance: Can the Study of Indigenous Knowledge Reflect Cosmic Connectedness?’ in Paul Sillitoe, Alan Bicker and Johan Pottier (eds) *Participating in Development: Approaches to Indigenous Knowledge* (Routledge 2002) 35.

191. European Commission, ‘The EU and Aarhus’, <https://ec.europa.eu/environment/aarhus/legislation.htm> last accessed 12 January 2021.

192. Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man (ADRDM)*, 2 May 1948 OAS Res XXX, reprinted in Basic

life,<sup>194</sup> the right to property<sup>195</sup> that can only be deprived for public utility after payment of just compensation,<sup>196</sup> and the right to participate in decision-making.<sup>197</sup> The American Convention recognises the Inter-American Commission and the Inter-American Court of Human Rights,<sup>198</sup> and tasks them with the judicial function of promoting and defending human rights.<sup>199</sup> The Commission has expanded the rights of indigenous peoples in *Brazil, Comunidad Yanomami*.<sup>200</sup> There, the Commission held that Brazil infringe on the rights of indigenous peoples of Yanomami by granting mining rights to a corporation and the construction of trans-Amazonian highway, BR-210, on native lands.<sup>201</sup> The Inter-American Court held in *Saramaka People v Suriname*<sup>202</sup> that tribal people share the same status with indigenous peoples provided they have traditionally occupied the land,<sup>203</sup> and would always have the right to use any natural resources found on the land.<sup>204</sup> Such jurisprudence feeds directly into the emergence of new law as either customary international law or as dicta in terms of Article 38 ICJ Statute paragraph 1 lit d.<sup>205</sup>

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Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser L/V/II Rev 9 (2003); 43 AJIL Supp 133 (1949).

193. Organisation of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969 OAS Treaty Series No 36; 1144 UNTS 123.

194. *Id.* at art 4; ADRDM (503) art I.

195. *Id.* at art 21(1); ADRDM (503) art XXIII.

196. *Id.* at art 21 (2).

197. *Id.* at art 23; ADRDM (503) art XX.

198. *Id.* at art 33(a).

199. *Id.* at art 41.

200. *Brazil, Comunidad Yanomami* Inter-American Commission on Human Rights; Case No 7615, Report No 12/85 (5 March 1985).

201. *Id.* at para 2.

202. *Suriname, Case of the Saramaka People v Suriname* Inter-American Court of Human Rights, Series C No 172 (28 November 2007)

203. *Id.* at paras 91 and 96.

204. *Id.* at para 118.

205. ICJ Statute, Article 38 (1) lit d stipulates that "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

### 9. *The UN Sustainable Development Goals*

The 2030 UN Agenda for Sustainable Development (2030 Agenda) is a “blueprint to achieve a better and more sustainable future for all”<sup>206</sup> and it is geared towards the elimination of the ‘tyranny of poverty’.<sup>207</sup> It makes six explicit mentions of indigenous people in the areas of empowerment,<sup>208</sup> education and learning,<sup>209</sup> engagement,<sup>210</sup> promotion of sustainable agriculture, and participation in follow-up and review.<sup>211</sup> The 2030 Agenda as it relates to the indigenous people, although it has been hailed for recognizing the human rights of indigenous people and vulnerable people,<sup>212</sup> is not comprehensive of the indigenous people’s yearnings as it does not mention the right to self-determination.<sup>213</sup>

#### *B. A Selective Comparative Analysis of National Laws for the Protection of Indigenous Peoples’ Environmental Rights*

States with indigenous populations either implemented the above discussed legal treatise or developed their own domestic, country-specific legal protections of indigenous peoples’ environmental rights. We will now look at a selection of examples for such a domestic approach with a reflection on selected protective rights.

##### *1. Duty to Consult – Canada and Ecuador*

In Canada, some 4.9% of the national population are indigenous of either Inuit, Métis or First Nations people.<sup>214</sup> In Ecuador, there are 14 indigenous peoples numbering 1.1 million.<sup>215</sup> In Canada, relating to mining and use of

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206. UN General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

207. *Id.* Preamble para 2.

208. *Id.* at para 23.

209. *Id.* at para 25 and target 4.5.

210. *Id.* at para 52 and target 2.3.

211. *Id.* at para 79.

212. John H Knox, ‘Human Rights, Environmental Protection, and the Sustainable Development Goals’ (2015) 24 *Washington International Law Journal* 517, 528.

213. United Nations Human Rights Council, *Update on Indigenous Peoples and the 2030 Agenda*, 8 February 2017, E/C.19/2017/5, para 26.

214. Statistics of Canada, ‘Aboriginal peoples in Canada: Key Results from the 2016 Census’ (*The Daily* 25 October 2017) <<https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>> accessed 3 July 2019.

215. International Work Group for Indigenous Affairs (IWGIA), ‘Indigenous Peoples in Ecuador’ (*IWGIA*) <<https://www.iwgia.org/en/ecuador>> accessed 3 July 2019.

natural resources,<sup>216</sup> the Canadian Government has a legal duty to consult the relevant indigenous peoples<sup>217</sup> and make the necessary effort to meet these expectations by adjusting already existing rules.<sup>218</sup> This responsibility stems from both, statutory law<sup>219</sup> and jurisprudence,<sup>220</sup> and applies where there is a positive knowledge of a right,<sup>221</sup> a consideration of government action over natural resources or lands belonging to indigenous peoples,<sup>222</sup> and where government action is most likely to have a negative impact on the indigenous peoples' rights.<sup>223</sup> The 2008 Constitution of Ecuador<sup>224</sup> recognizes a wide range of indigenous peoples' rights, including the rights to own their traditional lands without seizure,<sup>225</sup> to participate in the conservation of renewable resources on their land,<sup>226</sup> and the right to be consulted on "the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them".<sup>227</sup> Consultation must be prompt and mandatory.<sup>228</sup> Failure to comply may lead to damage and compensation claims.<sup>229</sup>

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216. Chris Wsanderson, Keith B Bergner and Michelle S Jones, 'The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty' (2012) 49 *Alberta Law Review* 821.

217. Brendan Boyd and Sophie Lorefice, 'Understanding Consultation and Engagement of Indigenous Peoples in Resource Development: A Policy Framing Approach' (2018) 62 *Canadian Public Administration* 572–595.

218. Stephen Wilmot, 'Cultural Rights and First Nations Health Care in Canada' (2018) 20 *Health and Human Rights Journal* 283, 284.

219. See art 45 of Canadian Constitution Act, 1982.

220. *Rio Tinto Alcan v Carrier Sekani Tribal Council* 2010 SCC 43, [2010] 2 SCR 650; *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53, [2010] 3 SCR 103; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388.

221. *Beckman* (n 220) para 119.

222. *Id.*

223. *Id.*

224. Republic of Ecuador Constitution of 2008 <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> accessed 3 July 2019.

225. *Id.* at art 57(4).

226. *Id.* at art 57(6).

227. *Id.* at art 57 (7),

228. *Id.*

229. *Jota v Texaco [Chevron] Inc* 29 ELR 20181 (10/05/1998).

## 2. Doctrine of 'Harmonious Construction' in India

Indigenous peoples in India are collectively called 'Adivasi' and amount to 104 million people, making up roughly 8.6% of the Indian population.<sup>230</sup> Just like in Nigeria, the right to a clean environment is provided for in the Indian Constitution<sup>231</sup> as part of the Directive Principles,<sup>232</sup> and as such, are not judicially enforceable.<sup>233</sup> In other words, while the right to life is a fundamental right and enforceable, the right to a healthy environment is not. This created inconsistencies in the application of the Indian Constitution. The Indian Supreme Court developed the doctrine of harmonious construction to resolve such inconsistencies in the provisions of the same piece of legislation.<sup>234</sup> In cases where inconsistencies cannot be resolved, the court will as far as possible, give effect to the two inconsistent provisions of the same law.<sup>235</sup> In *Subhash Kumar v State of Bihar*,<sup>236</sup> India's Apex Court expanded the meaning of the right to life under Article 21 of the Indian Constitution by including the right to a healthy environment, free from pollution.<sup>237</sup> It is difficult to draw a distinction between human rights and environmental cases in India,<sup>238</sup> not just because of the harmonious principle but also because of the development of the 'Public Interest Litigation jurisdiction' of the court where objections to matters based on justiciability are not allowed.<sup>239</sup> In other words, the courts in India will not allow objections on the ground that the right to a clean environment is not

230. DNA, 'CPI(M) Demands Reservation for SCs, STs in Private Sector' (*DNA: India* 16 April 2015) <<https://www.dnaindia.com/india/report-cpi-m-demands-reservation-for-scs-sts-in-private-sector-2078034>> accessed 3 July 2019.

231. Constitution of India as updated on 31st July 2018 <[http://legislative.gov.in/sites/default/files/COI\\_updated-as-31072018.pdf](http://legislative.gov.in/sites/default/files/COI_updated-as-31072018.pdf)> accessed 3 July 2019.

232. *Id.* at art 48 (A); art 51 (A)(g).

233. See LexPress, 'Right to Clean and Healthy Environment' as a Fundamental Right in India' (*LexPress* 11 July 2018) <<http://www.lexpress.in/environment/right-clean-healthy-environment-fundamental-right-india>> accessed 3 July 2019.

234. Rhuks Ako, Ngozi Stewart, and Eghosa O Ekhaton, 'Overcoming the (Non) Justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria' in Alice Diver and Jacinta Miller (eds) *Justiciability of Human Rights Law in Domestic Jurisdictions* (Spring International Publishing 2016) 135.

235. *Venkataramana Devaru v State of Mysore* 1958 SCR 895.

236. *Subhash Kumar v State of Bihar* 1991 1 SCC 598.

237. The same reasoning was reached with approval in *TN Godavarman Thirumulpad v Union of India* 3344- 45 In Wp No 202 1995, *Rural Litigation and Entitlement Kendra Dehradun and others v State of UP and others* 8209 and 8821 of 1983 D. 12-3-1985.

238. Ako, Stewart and, Ekhaton (n 234) 137.

239. *Id.*

judicially enforceable since the right to a healthy environment is linked with the right to life, which is judicially enforceable. Nigeria came close to adopting this principle in the *Gbemre case*, where the Federal High Court held that the right to a clean environment is linked to the right to life.

### 3. Bolivian Concepts of *Madre Tierra* and *Vivir Bien*

The Bolivian Constitution<sup>240</sup> is one of the most revolutionary and progressive constitutions in the world when it comes to human rights and the recognition of indigenous rights.<sup>241</sup> It explicitly recognises the thirty-six indigenous peoples of Bolivia.<sup>242</sup> Indigenous peoples are given the right of control over their ancestral territories, the right to autonomy and self-government,<sup>243</sup> the right to ownership of their lands,<sup>244</sup> the right to live in a healthy environment with good management of the ecosystem,<sup>245</sup> the right to benefit from the exploitation of the natural resources,<sup>246</sup> and the right to exclusive management of renewable resources.<sup>247</sup> It is the duty of the government to 'preserve the environment.'<sup>248</sup> As part of the moral principles guiding Bolivia, the state adopted a principle called *Vivir Bien*, that is, to 'live well'<sup>249</sup> by living in 'harmony with the Mother Earth and in equilibrium with all forms of life'.<sup>250</sup> *Vivir Bien* opposes 'the neoliberal consumerist, growth-without-limit paradigm' that led to overexploitation of the environment and the indigenous peoples in Bolivia.<sup>251</sup> There is also recognition of the rights of Mother Earth, that is, *Madre Tierra*.<sup>252</sup> Mother Earth has numerous rights under the so called Law of the Rights of Mother

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240. Constitution of the Plurinational State of Bolivia 2009 <[https://www.constituteproject.org/constitution/Bolivia\\_2009?lang=en](https://www.constituteproject.org/constitution/Bolivia_2009?lang=en)> accessed 4 July 2019.

241. Richard Lalander, 'Ethnic Rights and the Dilemma of Extractive Development in Plurinational Bolivia' (2017) 21 *The International Journal of Human Rights* 464, 464.

242. *Id.* at art 1; Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 *Transnational Environmental Law* 397, 401.

243. Constitution of Bolivia (n 240) arts 2 and 30 (II)(1).

244. *Id.* at art 30 (II)(6).

245. *Id.* at art 30 (II)(10).

246. *Id.* at art 30 (II)(16).

247. *Id.* at art 30 (II)(17).

248. *Id.* at art 10 (6).

249. *Id.* at art 8 (I).

250. Calzadilla and Kotzé (n 242) 403.

251. *Id.*

252. Bolivia: Law of the Rights of Mother Earth/*Ley de Derechos de la Madre Tierra* (No 071) [December 7, 2010] <<http://peoplesagreement.org/?p=1651>> accessed 4 July 2019.

Earth, including the right to life,<sup>253</sup> the right to clean air,<sup>254</sup> the right to be restored after human activities,<sup>255</sup> etc. Article 8 of the Law of the Rights of Mother Earth focuses on what the government should do to protect the environment, including developing policies favourable to Mother Earth, preventing overexploitation of the environment, and controlling other human activities that may lead to the extinction of populations.<sup>256</sup> If the government fails to uphold their required obligations, any individual or group of indigenous peoples may take up legal action in defense of the environment.<sup>257</sup>

#### *4. Environmental Protection and Restorative Justice in New Zealand*

In dealing with indigenous peoples' rights to environmental protection, New Zealand relies on restorative justice. Concepts such as damage reparation, social recovery, social harmony, and complex problem-solving build the basis of restorative justice.<sup>258</sup> In this sense, restorative justice is used to address offenses like pollution and tree destruction. The environment is seen as the victim and payment of costs and afforestation are appropriate punishments for these environmental harms.<sup>259</sup> But the traditional notion that natural entities like rivers and forests did not have legal rights limited the application of restorative justice,<sup>260</sup> but it is now settled that natural entities 'must rely upon humans to bring actions to protect them'.<sup>261</sup> In adopting the 'environmental personhood' doctrine where components of the environment are recognized as persons,<sup>262</sup> New

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253. *Id.* at art 7 (1).

254. *Id.* at art 7 (4).

255. *Id.* at art 7(6).

256. *Id.* at art 8 (1 – 7).

257. Constitution of Bolivia (n 240) art 34.

258. Rob White, 'Indigenous Communities, Environmental Protection and Restorative Justice' (2014/2015) 18 *Australian Indigenous Law Review* 43.

259. Mark Hamilton, 'Restorative Justice Intervention in an Environmental Law Context: *Garrett v Williams*, Prosecutions Under the Resource Management Act 1991 (NZ), and Beyond' (2008) 25 *Environmental and Planning Law Journal* 263, 269.

260. White (n 258) 44.

261. *Id.*

262. James DK Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water' (2010) 14 *Australian Indigenous Law Review* 49 – 62; Catherine J Iorns Magallanes, 'From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers' in Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *Responsibility: Law and Governance for Living Well with the Earth* (Routledge 2019) 216 (Routledge 2019); Gwendolyn Gordon, 'Environmental Personhood', (2018) 43 *Columbia Journal of Environmental Law* 49.

Zealand gave legal personality to the Whanganui River after Maori indigenous peoples demanded that the river be respected as their ancestor. Harm to the person of the river is harm to the indigenous peoples who are taken as 'surrogate victims',<sup>263</sup> and guardians and legal representatives of the Whanganui River.<sup>264</sup> A brave step in the right direction by the government of New Zealand and something the Australian government should consider building upon in respect to the indigenous peoples of Australia. Similar to their outlawing of climbing Uluru (Ayers Rock) in 2019 in response to requests made by the local Anangu indigenous peoples. New Zealand has used restorative justice extensively, and from 2001 to 2013, more than 33 prosecutions were carried out<sup>265</sup> under the Resource Management Act.<sup>266</sup>

*C. Environmental Protection: Erga Omnes Obligation and Universal Jurisdiction?*

From the increased recognition of the right to a healthy environment and the willingness of states to enforce this right, it would not be too optimistic to say that there is an *erga omnes* obligation emerging towards protecting the earth.<sup>267</sup> Obligations *erga omnes* exist for those rights which all states have an interest to protect. With the existence of such obligations stemming from the understanding that such obligations are owed towards all humankind.<sup>268</sup> Obligations *erga omnes* historically arose from the responsibility to prevent genocide, piracy, the act of aggression, protection

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263. White (n 258) 44.

264. New Zealand Herald, 'Agreement Entitles Whanganui River to Legal Identity' (*The New Zealand Herald* 30 August 2012) <[https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10830586](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586)> accessed 5 July 2019.

265. Nicola Pain and others, 'Restorative Justice for Environmental Crime: An Antipodean Experience' (2016) *International Union for Conservation of Nature Academy of Environmental Law Colloquium* 2016 Oslo Norway 22 June 2016, p 15; Ministry for the Environment (New Zealand), 'A Study into the use of Prosecutions Under the Resource Management Act 1991: 1 July 2008- 30 September 2012' (October 2013).

266. New Zealand Resource Management Act 1991 No 69.

267. Nicholas A Robinson, 'Environmental Law: Is an Obligation Erga Omnes Emerging?' (2018) *Permanent Mission of Colombia to the United Nations Panel Discussion at the United Nations* 4 June 2018 <[https://www.iucn.org/sites/dev/files/content/documents/2018/environmental\\_law\\_is\\_an\\_obligation\\_erga\\_omnes\\_emerging\\_interamcthradvisoryopin ionjune2018.pdf](https://www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopin ionjune2018.pdf)> accessed 6 July 2019.

268. *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*; *Second Phase*, International Court of Justice (ICJ), 5 February 1970 ICJ Rep 3.

from slavery and racial discrimination,<sup>269</sup> and has now been proposed to extend to environmental protection for all.<sup>270</sup> Whenever this obligation arises, any state has the responsibility to either prosecute an offender or to extradite them, as the offence constitutes core or gross violations of customary international law.<sup>271</sup> The transboundary nature of environmental harm implies that not only the state that creates the pollution is affected, but that other states and their populations will also be harmed.<sup>272</sup> This requires those other states to take action to protect the ‘interests of humanity and... planetary welfare’.<sup>273</sup> Protecting indigenous peoples rights could, therefore, lead to an obligation *erga omnes*, especially when it comes to the issue of self-determination as recently held by the International Court of Justice in its decision in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* in February 2019.<sup>274</sup>

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269. Id. at para 33 – 34; Erika De Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights* (Oxford Press 2013) 555.

270. See *Gabcikovo -Nagymaros Project (Hungary v Slovakia)* 37 ILM 162 (1998) (Vice President Weeramantry, separate opinion).

271. Sascha Dominik Dov Bachmann and Eda Luke Nwibo, ‘Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC within the African Union: Opportunities and Challenges’ (2018) 2 Brooklyn Journal of International Law 457, 462; Shaw (n 20) 612.

272. *Trail Smelter Arbitration (United States v Canada)* 16 April 1938, 11 March 1941; 3 RIAA 1907 (1941); Shi-Ling Hsu and Austen L Parrish, ‘Litigating Canada-U.S. Transboundary Harm: International Environmental Law-making and the Threat of Extraterritorial Reciprocity’, (2007) 48 Virginia Journal of International Law 1, 4; Randall S Abate, ‘Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context’ (2006) 31 Columbia Journal of Environmental Law 87 (the writer criticises the use of national laws in tackling transboundary pollution); Joel A Gallob, ‘Birth of the North American Transboundary Environmental Plaintiff. Transboundary Pollution and the 1979 Draft Treaty for Equal Access Remedy’, (1991) 15 Harvard Environmental Law Review 85 (the author argues that using the court to solve transboundary pollution is the best approach); Rachel Kastenber, ‘Closing the Liability Gap in the International Transboundary Water Pollution Regime – Using Domestic Law to Hold Polluters Accountable: A Case Study of *Pakootas v Teck Cominco Ltd*’ (2005) 7 Oregon Review of International Law 322 (arguing that using a national law would be effective); Noah D Hall, ‘Transboundary Pollution: Harmonizing International and Domestic Law’ (2007) 40 University of Michigan Journal of Law Reform 681 – 746 (arguing for the harmonisation of accepted international environmental law with respected domestic legal regime).

273. *Hungary v Slovakia* (n 270) 216.

274. *Legal Consequences of The Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) of 25 February 2019, International Court of Justice, General List No 169 [2019], see para 180; *East Timor (Portugal v Australia)*, Judgment,

Again, obligations *erga omnes* of environmental protection would only be effective if universal jurisdiction is exercised over environmental crimes.<sup>275</sup> Therefore, the notion of universal jurisdiction is strongly related to the idea that certain international standards are *erga omnes*, as well as the notion of *jus cogens*.<sup>276</sup> It allows any national court to prosecute certain crimes, no matter the nationality of the offender or where the offence took place.<sup>277</sup> Because of the transboundary nature of environmental pollution, Berat insists that severe environmental degradation must lead to universal jurisdiction for such environmental wrongdoing.<sup>278</sup> For indigenous peoples, universal jurisdiction would allow them to seek justice outside their states' jurisdiction if their national justice systems were unwilling or unable to provide them with the opportunity to sue over environmental pollution. This, as we will explain below, explains why some indigenous peoples have relied on US jurisdiction to sue, especially MNCs, over environmental violations in US Federal Courts.

A good example of how foreign states can exercise universal jurisdiction over the breach of rights of indigenous peoples regarding environmental pollution is use of the US Alien Tort Statute (ATS).<sup>279</sup> Under this federal US law a foreigner can sue another foreigner for a tort, wrongful act or delict respectively, committed outside of the US, provided the actionable torts breached an US law or a convention to which the US is a party to<sup>280</sup> as

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International Court of Justice Reports 102 [1995] para 29; see also *Barcelona Traction case* (n 581) para 33; *Provisional Measures regarding Colombia – Matter of Pueblo Indígena de Kankuamo* Order of the Inter-American Court of Human Rights of 5 July 2004, para 11.

275. Lynn Berat, 'Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law' (1993) 11 *Boston University International Law Journal* 327, 346.

276. Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Nijhoff 1992) 252.

277. Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *The European Journal of International Law* 427, 428.

278. Berat (n 275) 346.

279. Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73,77. The ATS is also called the Alien Tort Claims Act (ATCA).

280. James G Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *Journal of International Law and Politics* 1, 3; Vivian Grosswald Curran and David J Sloss, 'Reviving Human Rights Litigation After Kiobel' (2013) 107 *American Journal of International Law* 858–863; Thomas H Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations' (2014) 84 *Notre Dame Law Review* 1645–1670; Ralph G Steinhardt, 'Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations' (2013) 28 *Maryland Journal of International Law* 1–27; Sascha Dominik

the ‘law of nations’. Private persons,<sup>281</sup> state actors,<sup>282</sup> international institutions,<sup>283</sup> MNCs,<sup>284</sup> and even states have been sued using the ATS since 1980.

The ATS allows the institution of an action by a foreign plaintiff against a defendant for breaches committed outside of the US territory provided such breach is against a US law or a treaty to which the US is a party to,<sup>285</sup> and for breach of law of nations, that is, *jus cogens* norms.<sup>286</sup> It is the primary example of a country creating universal jurisdiction, as it gives the US federal courts the power to exercise universal civil jurisdiction over torts and abuses that took place abroad.<sup>287</sup> In *Doe v Unocal*,<sup>288</sup> Myanmar’s Karen and Mon ethnic minorities brought an ATS action against Unocal, an oil corporation, for various abuses including forced labour, forceful transfer of natives from their ancestral homes, rape, etc., using the Myanmar’s army as a proxy during the construction of the Yadana gas pipeline project.<sup>289</sup> Although the case was settled out of court before the US Supreme Court could decide on the case, the *Unocal case* is historic because it established the possibility to use the ATS as a mechanism for the enforcement of rights of indigenous peoples against MNCs<sup>290</sup> in instances where the home state did not provide any judicial redress mechanism due to the complicity of its government.

In the cases of *Maria Aguinda and Others v Texaco*,<sup>291</sup> and *Jota v Texaco Inc*<sup>292</sup> different indigenous communities from both Ecuador and Peru, sued Texaco using the ATS, for polluting their rainforests and rivers. Although

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Bachmann, *Civil Responsibility for Gross Human Rights Violations: The Need for a Global Instrument* (Pretoria University 2007) 15.

281. Bachmann (n. 280) 16.

282. *Kadic v. Karadžić*, 70F 3d 232, 241 (2d Cir 1995).

283. *Jam et al v International Finance Corp* 586 US \_\_\_ (2019).

284. *Abdullahi v Pfizer, Inc* 562F 3d 163 (2d Cir 2009); *Doe v. Unocal*, 395F 3d 932 (9th Cir. 2002); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 (1989); *Alejandre v. Cuba*, 996F Supp 1239 (1997).

285. The ATS (n 279).

286. *Sosa v Alvarez Machain* 542 US 692 (2004); *Jesner v Arab Bank, PLC* 16-499 US 584 (2018).

287. Stewart (n. 280) 3.

288. *Doe I. v Unocal Corp.*, 395 F.3d 932, 942-43 (9th Cir 2002).

289. *Id.*

290. For a detailed analysis of the case, see Armin Rosencranz and David Louk, ‘Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch’ (2005) 8 *Chapman Law Review* 130 – 147.

291. *Aguinda v Texaco Inc*, 303 F.3d 470 (2d Cir. 2002).

292. *Jota v Texaco Inc*, 157 F.3d 153 (2d Cir. 1998).

the cases were dismissed on the grounds that the US was not the most convenient forum for the action, the cases led to a protracted legal battle including an unsuccessful complaint made to the International Criminal Court in The Hague, the World's Global Criminal Court, over environmental violations,<sup>293</sup> after many arbitral tribunals had tried to resolve the issues involved.<sup>294</sup> While overall unsuccessful these cases did showcase the plight of indigenous peoples in protecting their culture and environment and attracted attention from across the developed world; leading to scrutiny of the 'ugly' side of MNC and state collusion regarding pollution and environmental delicts.

An indigenous group in India also sued an international financial actor, the International Finance Corporation (IFC), in US courts. In the case of *Jam et al v International Finance Corp*,<sup>295</sup> an indigenous community in India sued IFC claiming that pollution from the plant being constructed under the supervision of IFC harmed the surrounding air, land, and water.<sup>296</sup> The US Supreme Court, in its 2019 decision, held that the International Organizations Immunities Act grants international organisations the same immunity from suit that foreign governments have under the Foreign Sovereign Immunities Act (FSIA),<sup>297</sup> including the "commercial activity" exception of the FSIA that would deny immunity for sovereign governments. The Supreme Court remanded the case to the District Court to determine whether the activity of the IFC was "based on commercial activity" with sufficient nexus to the US or "performed in" the US. Unfortunately for the Plaintiffs, the District Court has held that "the commercial activity exception does not apply here because plaintiffs have failed to establish that their suit is based upon conduct carried in the United States. Accordingly, IFC is immune from this suit."<sup>298</sup>

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293. Nadia Bernaz, *Complaint to the International Criminal Court against the CEO of Chevron* (*Right as Usual*, 4 November 2014) <http://rightsasusual.com/?p=895> accessed 18 July 2019. But the ICC prosecutor replied that the ICC only has jurisdiction to prosecute acts committed after the Rome Statute came to force in 2002. See International Criminal Court, Office of the Prosecutor, Letter dated 16 March 2015 Reference No OTP2014/036752 <[https://freebeacon.com/wp-content/uploads/2015/04/ICC\\_letter.pdf](https://freebeacon.com/wp-content/uploads/2015/04/ICC_letter.pdf)> accessed 18 July 2019.

294. *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, 134, 342 (30 March 2010); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)* (Permanent Court of Arbitration Case No 2009-23).

295. *Jam et. al. v. Int'l Fin. Corp.* 586 US \_\_\_ (2019).

296. *Id.*

297. Foreign Sovereign Immunities Act (FSIA), 28 U S C §1602.

298. *Jam v. Int'l Fin. Corp.*, Civil Action No. 2015-0612 (D.D.C. 2020).

In the 2000 case of *Wiwa v Royal Dutch Petroleum Co.*<sup>299</sup> the plaintiffs alleged that Royal Dutch Petroleum (incorporated in the Netherlands) and Shell Transport and Trading Co (incorporated in the UK) engaged in various acts of human rights abuses and environmental pollution in Ogoniland through their subsidiary in Nigeria, the Shell Petroleum Development Company (SPDC).<sup>300</sup> The lawsuit alleged that the defendants were complicit in the murder of the Ogoni human rights activist Saro-Wiwa along with the degradation of the environment.<sup>301</sup> Before the matter was concluded, SPDC opted for an out of court settlement to the sum of \$15.5 million in 2009.<sup>302</sup>

In the case of *Kiobel v Royal Dutch Petroleum Co.*,<sup>303</sup> the US Supreme Court was tasked once more to decide over a matter arising from the alleged suffering of the Ogoni people of Nigeria pending in US courts, but also on the extent of the ATS' applicability to foreign corporations as defendants. In this case, based on the same alleged facts of human rights violations as in the above *Wiwa case*, the wives of those murdered in the Ogoni region alleged that environmental pollution and murder were prohibited under international conventions.<sup>304</sup> Hence, US federal jurisdiction under the ATS applied. An appeal of prior District Court dismissals to the Supreme Court was eventually dismissed as the court held that the 'presumption against extraterritoriality' did not allow a US court to assume jurisdiction over a foreign company's tortious (wrongful act) action in another country, unless such presumption is refuted.<sup>305</sup> In this instance, the Court held that the presumption against extraterritoriality was not refuted, that laws made by the US congress are made to apply within the territory of the US<sup>306</sup> and that the case did not disclose that the claims pursued 'concern[ed] and touch[ed]' the US 'with sufficient force.'<sup>307</sup> This

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299. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

300. *Id.*

301. For a detailed analysis of the case, see Aaron Xavier Fellmeth, 'Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S Courts' (2002) 5 Yale Human Rights and Development Law Journal 241 – 254.

302. Jad Mouawad, 'Shell to Pay \$15.5 Million to Settle Nigerian Case' (*New York Times* 8 June 2009) <<https://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global>> accessed 30 June 2019.

303. *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

304. *Id.*

305. *Id.*

306. *Morrison v National Australian Bank Ltd* 561 US 247, 255 (2010); *EEOC v Arabian Am Oil Co (Aramco)*, 499 US 244, 248 (1991).

307. *Kiobel* (n 303) 1669.

decision has raised doubts about the continued efficiency of the ATS as a potential means of human rights litigations<sup>308</sup> in a transnational and extraterritorial context.

This section of the article highlights the existence of some selected international treaties and conventions that deal with the rights of indigenous peoples and the obligation to protect the environment. We also discussed the recognition of the rights of indigenous peoples under national legal regimes to varying degree and the use of US courts to pursue indigenous peoples claims. While the overall outcome of indigenous peoples' rights protection is still in balance, it is submitted that all the recognition and protection of indigenous' rights over their resources adds to the gradual recognition of an obligation *erga omnes* over the protection of the environment and indigenous peoples' rights.

### *III. Recognising the Emergence of an Erga Omnes Obligation of the Environment and Indigenous Peoples*

This section recommends how to make the emerging norm of international law more effective. First, states should amend their constitutions to allow for the automatic application of all human rights instruments signed by their government without having to go through the process of domestic implementation. This suggestion is more than just a legalistic exercise where a 'monist legal system' approach to international law is applied and makes the domestic translation of international law redundant. What we suggest is the inclusion of human rights provisions in the 'Bill of Rights' section of the Constitution. The constitutional amendment should also include the right of indigenous peoples to self-determination, or at least a right to limited autonomy. Indigenous peoples' demand for resource control is intertwined with the right to self-determination,<sup>309</sup> and self-determination will lead to the proper management of their resources.<sup>310</sup> At the international level, we argue that conventions dealing with environmental protection and the rights of indigenous peoples

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308. Ralph Steinhardt, 'Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's *Filartiga*' (2014) 89 *Notre Dame Law Review* 1695, 1696; Uta Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute' (2014) 63 *International and Comparative Law Quarterly* 665 – 697.

309. Barsh (n 44) 831.

310. Marcus Colchester, 'Self-Determination or Environmental Determinism for Indigenous Peoples in Tropical Forest Conservation' (2000) 14 *Conservation Biology* 1365, 1367.

should have ‘direct effect’. This would give citizens *jus standi* against the state in cases of a governmental refusal to implement the provisions of a binding Convention.<sup>311</sup> If this were the case, indigenous peoples all over the world would be able to sue their government for failing to implement treaties they have signed but have refused to implement.

Second, environmental impact assessment (EIA) and public participation have been recognised as relevant, especially in the context of indigenous peoples’ rights and resource exploitation. As noted by Hakeem,<sup>312</sup> EIAs and public participation is ‘low’ in developing states like Nigeria. Hakeem recommended an amendment of the laws dealing with EIA to include EIA even after the commencement of the project, as it is the case in the US.<sup>313</sup> Finally, we recommend that governments allow indigenous peoples to manage their resources.

Third, MNCs can be held accountable for breaches of indigenous peoples’ rights. The ‘Zero Draft’<sup>314</sup> and its Optional Protocol,<sup>315</sup> released by the United Nations Intergovernmental Working Group (IGWG) in 2018, aimed at “regulat[ing], in international human rights law, the activities of transnational corporations and other business enterprises”,<sup>316</sup> – are opposed by the European Union and other countries.<sup>317</sup> The use of the US ATS to hold foreign MNCs accountable for environmental pollution has suffered some setbacks, beginning with the *Kiobel case*,<sup>318</sup> *Jesner v Arab Bank*,

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311. Tilak Ginige, ‘Mining Waste: The Aznalcollar Tailings Pond Failure Part I’ (2002) 11 *European Environmental Law Review* 76, 86.

312. Hakeem Ijaiya, ‘Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems’ (2015) 13 *Nigerian Juridical Review* 83 – 102.

313. *Id.* at 102.

314. United Nations Intergovernmental Working Group, *Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises (Zero Draft)* (6 July 2018) <<https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>> accessed 6 July 2019.

315. United Nations Intergovernmental Working Group,, *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* (October 2018) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF>>accessed 6 July 2019.

316. Zero Draft (n 609) art 3.

317. CIDSE, ‘Pressure Growing for a UN Binding Treaty with or without the EU’s Support’ (CIDSE 19 October 2018) <<https://www.cidse.org/newsroom/pressure-growing-for-a-un-binding-treaty-with-or-without-the-eu-s-support.html>> accessed 6 July 2019.

318. *Kiobel* (n 303).

*PLC*,<sup>319</sup> and the more recent case of *Budha Ismail Jam et al v International Finance Corp*,<sup>320</sup> where the Supreme Court of the US (SCOTUS) held that the indigenous people of Gujarat in India cannot sue an international organisation using the ATS for offences committed in India. There is, therefore, a need for an international and permanent court to try MNCs for human rights abuses (including those arising from environmental pollution). We recommend the expansion of the jurisdiction 'ratione materiae' and 'ratione personae' of the International Criminal Court through the amendment of the Rome Statute<sup>321</sup> to include 'those directors of MNCs who are most responsible for environmental pollution and human rights abuses' as possible defendants.<sup>322</sup> Although traditionally, states are subjects of international law,<sup>323</sup> it is a fact now that MNCs have now become (non-) 'actors' of international law<sup>324</sup> and should be treated as such.

Finally, are there enough legal instruments in existence for protecting the rights of indigenous peoples' rights? As discussed earlier, there exist many legal instruments that recognise the rights of indigenous peoples to control the exploitation of their natural resources. The UNDRIP is the most comprehensive of these instruments, but unfortunately, like any UN declaration, is not legally enforceable.<sup>325</sup> The scholar Mazel expressed optimism that UNDRIP will crystallise eventually as customary international law as it has been the case with other seminal UN GA Declarations and nonbinding Resolutions (such as the Genocide Convention

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319. *Jesner v Arab Bank, PLC* 16-499 US 584 (2018).

320. *Budha Ismail Jam et al v International Finance Corp* 586 US\_\_\_ (2019).

321. United Nations General Assembly, *Rome Statute of the International Criminal Court* 17 July 1998, 2187 UNTS 90.

322. Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2016) *Leiden Journal of International Law* 16; Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909 – 918; Cristina Chiomenti, 'Corporations and the International Criminal Court' in Olivier Schutter (ed) *Transnational Corporations and Human Rights* (Hart Publishing 2006) 311 – 312.

323. Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges', (2008) 6 *Northwestern Journal of International Human Rights* 222.

324. Jose Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of International Law* 1 – 35.

325. Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879, 882.

of 1948),<sup>326</sup> but before it does, we recommend that the UN adopts a binding instrument that will immediately address the concerns of indigenous peoples especially on the issue of environmental protection. States that have not yet ratified the UNDRIP, like Nigeria, should be encouraged to do so through inclusion of such indigenous peoples' rights and the recognition of the inalienable right to a clean environment in trade and foreign direct investment agreements.

### *Conclusion*

This article examined the correlation between the rights of indigenous peoples and environmental protection and how attempts have been made to recognize this connection in light of state refusal to accept this reality. It is clear that the rights of indigenous peoples and the need to protect the environment are globally recognized.

We provided a short, synoptic, and thematic rights overview of international legal instruments recognizing the correlation between indigenous peoples' rights and environmental protection and also provided examples for domestic state protection and adjudication of breaches to the duty to protect. This growing importance at the global level is highlighted by the increased case law from several states' jurisdiction. Developed nations, like the United States, are occasionally willing to exercise universal jurisdiction where infringements of these rights and duties amount to violations of international law, and manifest gross human rights violations.

We conclude by reiterating the unfairness of the observation that the 'resource curse' phenomenon or the 'paradox of plenty' should be the fate of any indigenous peoples' group in the world, as these territories provide most of the world's natural resources. Both governments and MNCs have not done enough to protect the rights of the indigenous peoples. Garret Hardin's postulation earlier in the text aptly reflects the situation of most indigenous peoples. Ruin is the destination of mankind if we are only interested in exploiting the environment without considering its protection.

Our position, however, differs with that of Hardin in a fundamental way. While Hardin opined that state management of common resources would avert the tragedy of the commons, we are of the view that indigenous peoples' communal management (alongside or void of governmental control) of their resources and environment, would have averted the environmental pollution in the cases discussed in this article. Indeed, the

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326. Mazel (n 130) 6.

full recognition of the rights of indigenous peoples, including the right to self-determination, is a step towards environmental protection.

Due to the Covid-19 pandemic, the global recession seems to make this goal of indigenous rights protection, and environmental protection seems to be an academic utopia. The pandemic's devastating impact on the economies around the globe would most probably see an erosion of already achieved standards of protection to facilitate a post-COVID economic recovery. This article serves as a stock take of what has been achieved and a call for continuing action despite the current global pandemonium. To this end, and recognizing that the road ahead is long, we conclude with a quote by former President Obama<sup>327</sup> where we "choose hope over fear and let us shape the future for the better through concerted and collective effort" by working towards the goals of indigenous rights protection and environmental protection.

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327. Tanya Somanader 'Choosing Hope: President Obama's Address to the United Nations', 24 September 2014, <<https://obamawhitehouse.archives.gov/blog/2014/09/24/choosing-hope-president-obama-s-address-united-nations>> accessed 15 Jan 2021.