EXTRACTIVE INDUSTRIES AND INEQUALITY: Intersections of Environmental Law, Human Rights, and Environmental Justice

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INTRODUCTION

From Shell Oil in Ogoniland, Nigeria to Chevron in Ecuador, and from Bhopal, India to Freeport-McMoRan in Indonesia, the world is replete with examples of corporate excesses and impunity. Time and time again we hear of gross human rights violations and severe environmental degradation associated with multinational corporations operating in developing countries. Extractive industries are just one category of businesses guilty of these excesses.

International law has long sought to control the activities of these multinational companies with little success. Several attempts at adopting hard law by the United Nations (UN) were vetoed by developed countries. International law does not technically govern the activities of these companies—they are not states. However, they operate at the international level (more accurately in the grey zone between international law and national law) and are often more influential and powerful than many developing states. This power asymmetry has resulted in human rights violations, environmental degradation, and often impunity for their actions. At the same time, several movements have emerged as a response to these violations, resulting in many corporations themselves voluntarily accepting codes of conduct and other standards of behavior. These include corporate social responsibility,[1] the Equator Principles,[2] and the UN Guiding Principles

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1. *See Corporate Social Responsibility*, INVESTOPEDIA, http://www.investopedia.com/terms/c/corp-social-responsibility.asp (last visited Feb. 8, 2018).

2. EQUATOR PRINCIPLES, http://www.equator-principles.com/ (last visited Feb. 8, 2018).

on Business and Human Rights[3] (often referred to as "Ruggie Principles"). Sustainable development, environmental rights, and environmental justice are some of the other developments that have a bearing on this issue. Given the extensive and excessive nature of these incidents, the African Commission on Human and Peoples' Rights established a Working Group on Extractive Industries, Environment and Human Rights Violations in 2009. Despite these developments, no significant change can be seen on the ground, and the power asymmetry between multinational companies and developing countries continues.

This article discusses extractive industries and their impact on human rights and the environment, the convergence between the human rights movement and the environmental protection movement, and whether environmental justice is a useful framework to discuss the impact of extractive industries on human rights and the environment. Given the scope of the article and space constraints, it will not discuss corporate social responsibility,[4] Extractive Industries Transparency Initiative (EITI),[5] or Principles for Responsible Investment (PRI).[6] The article proceeds in three parts. Section I will discuss three examples—the Ogoniland case, the Chevron in Ecuador case, and La Oroya mining in Peru. All three cases have been subject to litigation. Section II will discuss the convergence of the human rights movement with the environmental protection movement. Section III will discuss environmental justice as a framework, and Section IV will discuss intersectionality and conclude with some observations and suggestions.

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3. Office of the U.N. High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (2011) [hereinafter Guiding Principles].

4. *See* David Wheeler, Heike Fabig & Richard Boele, *Paradoxes and Dilemmas for Stakeholder Responsive Firms in the Extractive Sector: Lessons from the Case of Shell and the Ogoni*, 39 J. BUS. ETHICS 297, 298–300 (2002).

5. *See generally* EITI, https://eiti.org/ (last visited Feb. 8, 2018).

6. *See generally* PRINCIPLES FOR RESPONSIBLE INVESTMENT, https://www.unpri.org/ (last visited Feb. 8, 2018).

I. A TALE OF THREE TRAGEDIES

A. Ogoniland Case in Nigeria

In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*,[7] before the African Commission on Human and Peoples' Rights, the petitioners alleged that:

> [T]he military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.[8]

The Communication further alleged that:

> [T]he oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.[9]

The Communication further alleged that no monitoring of activities was done,[10] the companies were not required to prepare a health and environmental impact assessment or consult with communities,[11] and that the government security forces have attacked, burned, and destroyed Ogoni people's villages and houses and engaged in other human rights violations.

This case is a sad, but familiar, story involving severe environmental degradation, serious human rights violations, multinational companies, extractive activities, indigenous groups, and collusion by government forces. The African Charter on Human and Peoples' Rights[12] is the only human rights

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7. Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 1 (Oct. 27, 2001), http://hrlibrary.umn.edu/africa/comcases/155-96.html.
8. *Id.*
9. *Id.* ¶ 2.
10. *Id.* ¶ 4.
11. *Id.* ¶ 6.
12. *Id.* ¶ 52.

treaty with a justiciable right to a healthy environment. The African Commission after holding that the Communication was admissible, noted:

> Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velàsquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens . . . .
>
> The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.[13]

The Commission held that the Government of Nigeria had violated Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter[14] and called upon the Government to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

> Stopping all attacks on Ogoni communities and leaders by the security forces; Conducting an investigation into the human rights violations and prosecuting those involved in human rights violations; Providing adequate compensation to victims, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and ensuring oversight by an independent body; and Providing information on health and environmental risks and

13. *Id.* ¶ 57–58 (citations omitted).
14. *Id.* ¶ 69.

> meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[15]

This case is noteworthy for its discussion on the content of the right to environment (elaborated in Section II), obligations of government with regard to activities of private entities—notably oil companies, and the need to consult communities before these entities embark on activities that could have an impact on the lives of the peoples. Notably absent from this decision, however, is a reference to indigenous rights and the need to obtain the free, prior and informed consent (FPIC) of the Ogoni people particularly if eviction or relocation from their traditional lands is envisaged. This principle is now codified in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[16] adopted by the UN General Assembly (UN GA) in 2007.

In a related case—a class action suit filed by a law firm in London (Leigh Day & Co) in relation to two oil spills that devastated the Nigerian community of 69,000 people in Bodo in Ogoniland—Shell accepted full liability.[17] The oil spills occurred within months of each other in 2008, and no attempt was made to clean up the oil which had seeped deep into the water table and farmland. According to the communities, the company earlier offered only about $5,000 to the community together with fifty bags of rice, beans, a few cartons of sugar, tomatoes, and groundnut oil, which the community chief considered to be insulting. Considering that the wealth of Shell is in the range of $200 billion,[18] this offer is indeed insulting.

In its environmental assessment of Ogoniland, the United Nations Environment Program (UNEP) found that "oil contamination in Ogoniland is widespread and severely impacting many components of the environment."[19] Oil spills continue to occur with alarming regularity and Ogoni people live with this pollution every day. In addition to the environmental contamination, which is extensive, the impact on public health was even more alarming. The UNEP report notes that of most immediate concern are the drinking water wells that are contaminated with benzene, a well-known carcinogen, at a level over 900 times above the WHO guidelines, warranting immediate action.[20] Moreover, Benzene was detected in all air samples at levels higher than the

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15. *Id.*

16. G.A. Res. 61/295 art. 11 (Sept. 13, 2007).

17. John Vidal, *Shell Accepts Liability for Two Oil Spills in Nigeria*, GUARDIAN (Aug. 3, 2011), https://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria.

18. *The World's Biggest Companies*, FORBES, https://www.forbes.com/companies/royal-dutch-shell/ (last visited May 7, 2018).

19. U.N. ENV'T PROGRAM, ENVIRONMENT ASSESSMENT OF OGONILAND 9 (2011), http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf.

20. *Id.* at 11.

WHO standards.[21] In human rights terms, this can be considered a serious violation of several rights—right to health, right to a healthy environment, right to an adequate standard of living, right to water, right to privacy, and the right to family life.

B. Chevron in Ecuador

The Chevron in Ecuador litigations span over three decades, but the environmental damage and human rights violations go back even further (almost fifty years). It is a textbook account of what not to do on every aspect. Again, the story is familiar. Texaco (before it was acquired by Chevron) began oil exploration in Ecuador in 1964.[22] People, including indigenous people, had no idea of these activities until helicopters started roaming around, people started clearing forests, and sleeks of oil started appearing in their waterways.[23] This is a very poor community.[24] When people who drank water and bathed in the river became ill and some children even died, the community started to wonder what was happening.[25] The timeline of Chevron's involvement in Ecuador spans over five decades.[26] The documentary *Crude* sheds light on the severity of the problem.[27] The finger-pointing continues to date, and the people continue to suffer with no relief in sight (not even fifty bags of rice).[28] In the meantime, Chevron fought tooth and nail to bankrupt the plaintiff's attorneys and filed actions in various fora against the attorneys, including litigation against the Ecuadorian government under an investment treaty in the Permanent Court of Arbitration.[29] In February 2011 the international arbitration panel issued an Interim Measures Order in favor of Chevron; in August 2011, the tribunal awarded Chevron $96 million; and in July 2016, Ecuador paid Chevron $112 million (award

21. *Id.*

22. *Endgame in Ecuador: The $18 Billion Case Against Chevron*, E&E NEWS (Sept. 21, 2011), https://www.eenews.net/special_reports/ecuador/timeline.

23. *See* Alexander Zaitchik, *Meet the Amazon Tribespeople Who Beat Chevron in Court*, TAKEPART (Oct. 30, 2014), http://www.takepart.com/feature/2014/10/30/amazon-tribes-chevron-lawsuit-ecuador-oil-pollution.

24. *Id.*

25. *Id.*

26. *Endgame in Ecuador*, *supra* note 22.

27. CRUDE (First Run Features 2009).

28. Zaitchik, *supra* note 23.

29. *See* Chevron Corp. v. Ecuador, Case No. 34877, Final Award (Perm. Ct. Arb. 2011), https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf.

plus interest).[30] In an effort to enforce the judgment against Chevron, Ecuadorian villagers filed an action in Canada, which was dismissed on the grounds that Chevron Canada is a separate entity, but that the ground case against Chevron Corporation can proceed. The Court, while expressing sympathy for the plight of the indigenous petitioners, held that the Canadian subsidiary could not be held liable for the US $9.5 award in Ecuador ordered against the parent company.[31] In addition, in 2014, Ecuadorian communities filed a complaint in the International Criminal Court (ICC) against the CEO of Chevron, John Watson alleging that their actions in Ecuador amounted to crimes against humanity.[32] The ICC declared that the crimes listed there did not amount to crimes that are within the Court's jurisdiction.[33] Although ICC recently decided to expand its jurisdiction to cover environmental abuses, the court can only hear cases that occurred after July 1, 2002.[34]

This case highlighted, yet again, the power asymmetry between one of the largest multinational companies in the world, a developing country, and a poor community who continues to suffer the injustice inflicted on its peoples. Is this the price they have to pay for foreign investment and "economic development?" To add insult to injury, the Government of Ecuador had to pay over $100 million for violating the investment treaty between Ecuador and United States,[35] reinforcing the power asymmetry between the two parties—a company worth over $200 billion and a developing country whose GDP per capita is around $5,800 (as compared to that of the United States at $57,000).[36] What is the justice in this?

C. La Oroya Mine in Peru

Since 1922, adults and children in La Oroya, Peru—a mining town in the Peruvian Andes and the site of a polymetallic smelter—have been exposed to

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30. *Texaco/Chevron Lawsuits (Re Ecuador)*, BUS. & HUMAN RIGHTS RES. CTR., https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador (last visited June 2, 2018).

31. *Id.*

32. *See* Lachlan Markay, *ICC Won't Prosecute Chevron*, WASH. FREE BEACON (Apr. 2, 2015), http://freebeacon.com/issues/icc-wont-prosecute-chevron/.

33. *Id.*

34. John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, GUARDIAN (Sept. 15, 2016), https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases.

35. *Chevron Corp.*, Case No. 34877, Final Award, at 141–42.

36. *GDP Per Capita (Current US$)*, WORLD BANK (1960–2016), https://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited Mar. 26, 2018).

the toxic emissions and wastes from the plant.[37] Peru's Clean Air Act cites La Oroya in a list of Peruvian towns suffering from critical levels of air pollution,[38] but no action has been taken to clean up and curtail this pollution. Currently owned by the United States-based Doe Run Corporation, the plant has been largely responsible for the dangerously high lead levels found in children's blood.[39]

Dubbed the most polluted place on earth, La Oroya mine in Peru has put the health of 35,000 people living near the lead smelter at serious risk.[40] After being cited for several environmental violations, the company closed the smelter in 2009.[41] The parent company Renco Group, based in the United States, filed a lawsuit against Peru, claiming its actions violated the United States-Peru Free Trade Agreement and that the cleanup order to protect the health of the people was excessive.[42] In a welcome departure from the trend where corporations are the winners in most investment disputes, Peru won the case in this instance. Children in La Oroya have tested positive for lead in their blood at much higher levels than the standards imposed by the United States Center for Disease Control.[43] The Manager of Oxfam America's Right to Know, Right to Decide campaign said: "Renco Group has money, power and influence on Capitol Hill. The people of La Oroya don't. But they have an equal right to make their voices heard."[44]

Ninety-nine percent of children living in and around La Oroya have blood lead levels that exceed acceptable limits, according to studies carried out by the Director General of Environmental Health in Peru in 1999.[45] A survey conducted by the Peruvian Ministry of Health in 1999 revealed blood lead levels among local children to be dangerously high.[46] Neurologists at local hospitals state that even newborn children have high blood lead levels, inherited while still in the womb. Sulfur dioxide concentrations also exceed

37. *La Oroya Lead Pollution*, PURE EARTH, http://www.pureearth.org/project/la-oroya-lead-pollution/ (last visited Mar. 8, 2018).

38. *Id.*

39. *Id.*

40. Anna Kramer, *La Oroya, Peru: Poisoned Town*, OXFAM AM. (Nov. 30, 2011), https://www.oxfamamerica.org/explore/stories/la-oroya-peru-poisoned-town/.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *La Oroya Lead Pollution*, *supra* note 37.

the World Health Organization guidelines.[47] Soil contamination is now being studied, and a plan for clean-up is in progress.[48]

In 2009, in response to a petition filed by three NGOs on behalf of a group of affected people in La Oroya, the Inter-American Commission on Human Rights held that the case was admissible with regard to several rights enshrined in the American Convention of Human Rights.[49] Although the right to a healthy environment is included in the Additional Protocol to the American Convention, it is not justiciable and this case will set an important precedent.[50] The Commission also held a public hearing on the issue.

Again, the story is familiar: a multinational company, mining in a developing country, a poor community, severe environmental pollution, health impacts, no relief to people, no environmental clean-up, no compensation offered and to add insult to injury, the corporation brings an action again the government for violating a Free Trade Agreement. Is this "free" trade? What is the cost to people and the environment? La Oroya is considered the most polluted place on earth for a reason.

There are unfortunately similar examples from all over the world. Most of these cases involve human rights violations, serious environmental degradation, and justice issues, as most often the affected communities are poor, marginalized, and live in remote places leading a very simple way of life (some are indigenous communities). So what can be done to address the situation? In the next two sections, I will discuss two frameworks that have been used by victims and activists to seek relief: (a) emerging right to a healthy environment/environmental rights framework and (b) the environmental justice framework.

II. EMERGENCE OF ENVIRONMENTAL RIGHTS AND THE RIGHT TO A HEALTHY ENVIRONMENT[51]

Environmental degradation has a direct impact on people and the enjoyment of their rights. The case studies discussed above highlighted the

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47. *Id.*

48. *Id.*

49. Community of La Oroya v. Peru, Petition 1473-06, Inter-Am. Comm'n H.R., Report No. 76/09, OEA/Ser.L/V/II., doc. 51 (2009).

50. *See* Paula Spieler, *The La Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations*, HUM. RTS. BRIEF, Fall 2010, at 19, 19, http://www.corteidh.or.cr/tablas/r25885.pdf.

51. This topic has attracted a significant amount of scholarly literature. *See generally* DONALD K. ANTON & DINAH SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011); Sumudu Atapattu, *The Role of Human Rights Law in Protecting Environmental Rights*,

link between environmental degradation and the impact on people. Because the human rights framework has a sophisticated redress mechanism, many victims of environmental abuse started resorting to the human rights framework to seek redress.[52] Since its emergence in the early 1990s, the environmental rights movement has grown phenomenally and human rights institutions—particularly at the regional level—have developed a robust jurisprudence on the subject.

One of the earliest decisions that reflects this convergence is *Lopez Ostra v. Spain*[53] that was filed before the European Court of Human Rights under Article 8 of the European Convention of Human Rights. Mrs. Ostra and family lived in a town in Spain that had a heavy concentration of leather industries.[54] Due to fumes and smells emanating from tanneries, many people developed health problems, including Mrs. Ostra's family.[55] Expert evidence submitted in court showed that the symptoms displayed by Mrs. Ostra's daughter were consistent with living in a highly polluted area.[56] The daughter's pediatrician recommended that she be moved from the area.[57] The Court found a violation of Article 8 of the European Convention on Human Rights on right to private and family life.[58] Since then, a long line of cases has affirmed that environmental pollution and degradation can lead to a violation of protected rights.[59] In addition, the Inter-American

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in SOUTH ASIA IN CLOSING THE RIGHTS GAP 105 (LaDawn Haglund & Robin Stryker eds., 2015) [hereinafter Atapattu, *Role of Human Rights Law*]; ALAN BOYLE & MICHAEL ANDERSON, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1998); COUNCIL ON EUR. PUBL'G, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2d ed. 2012), http://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf; SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT (2008); Sumudu Atapattu, *Right to a Healthy Environment or the Right to Die Polluted? The Emergence of a Right to a Healthy Environment Under International Law*, 16 TUL. L. REV. 65 (2002); Alan Boyle, *Human Rights and the Environment*, 23 EUR. J. INT'L L., 613 (2012); Michael Burger, *Bipolar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUM. J. ENVTL. L. 371 (2003); Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights*, 21 GEO. INT'L ENVTL. L. REV., 73 (2008); Dinah Shelton, *Human Rights, Environmental Rights, and Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

52. *See* Shelton, *supra* note 51, at 104–05; Dinah Shelton, *Whiplash and Backlash—Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT'L L. 11, 12–13 (2015).

53. Ostra v. Spain, 20 Eur. Ct. H.R. 277, 277 (1994).

54. *Id.* at 280.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 293.

59. *See* ANTON & SHELTON, *supra* note 51, at 519–20, 532–42; DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1350 (5th ed. 2015).

Commission/Court has affirmed indigenous rights[60] and the African Commission on Human Rights has elaborated on the content of the right to a satisfactory environment included in the African Charter on Human and Peoples' Rights.[61] Despite the mounting jurisprudence, international human rights law has yet to recognize a substantive right to a healthy environment.[62]

In the international context, the ICJ too has referred to the link between human rights and the environment. In the *Case Concerning the Gabcikovo Nagymaros Project*,[63] in his separate opinion Judge Weeramantry succinctly summarized the close link between the two fields:

> The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, *as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments*.[64]

It is ironic that two developments *at the national level* contributed to the convergence of these two fields at the international level. The first development is the environmental impact assessment process at the national level which is subject to public scrutiny and public participation in many countries.[65] These documents are often considered public documents and legislation in many countries provide for public participation through comments, public hearings, etc.[66] This process has incorporated the procedural rights that are recognized under international human rights law—access to information, public participation, and access to remedies.[67] Referred

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60. *See* ANTON & SHELTON, *supra* note 51, at 567–77; HUNTER ET AL., *supra* note 59, at 1352; KRAVCHENKO & BONINE, *supra* note 51, at 174–80.

61. African Charter on Human and Peoples' Rights art. 24, *adopted* June 27, 1981, 21 I.L.M. 58, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

62. *See, e.g.*, Sam Kalen, *An Essay: An Aspirational Right to a Healthy Environment?*, 34 UCLA J. ENVTL. L. & POL'Y 156, 157–60 (2016); Anastasia Telesetsky, *Fulfilling the Human Right to Food and a Healthy Environment*, 40 VT. L. REV. 791, 800–01 (2016).

63. Gabcikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 4, 91–92 (Sept. 25) (separate opinion by Weeramantry, J.).

64. *Id.* (emphasis added).

65. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 190–91 (1997).

66. *See id.* at 191 nn.103–108.

67. *See* PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 648 (3d ed. 2012) (noting that access to environmental information is now firmly entrenched in international law and is closely connected to participatory rights in environmental impact assessment procedures and with the development of procedural rights in

to as environmental democracy or access rights,[68] these three pillars have been incorporated in international environmental law[69] and are now embodied in an environmental treaty as discussed below.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1988[70] is the first environmental treaty to specifically incorporate the procedural rights of access to information, public participation, and access to remedies in the context of environmental issues which were hitherto confined to human rights treaties. The Convention makes a clear link between procedural rights and a substantive right to a healthy environment:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.[71]

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human rights law); s*ee also* ANTON & SHELTON, *supra* note 51, at 357–407; HUNTER ET AL., *supra* note 59, at 1357.

68. *See* Peter H. Sand, *The Right to Know: Freedom of Environmental Information in Comparative and International Law*, *in* THE HISTORY AND ORIGIN OF INTERNATIONAL ENVIRONMENTAL LAW 889, 890 (Peter H. Sand ed., 2015) (noting that the "participatory revolution" is one of the features of the post-modern environmental era); Jeremy Wates, *The Aarhus Convention: A New Instrument Promoting Environmental Democracy*, *in* SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 393, 393 (Marie-Claire Cordonier Segger & C.G. Weeramantry eds., 2005); *The Access Initiative*, WORLD RES. INST., http://www.wri.org/our-work/project/access-initiative-tai (last visited Feb. 23, 2018).

69. *See* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26 (Vol. 1), annex I (Aug. 12, 1992), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (recognizing access to information, public participation, and access to remedies as the procedural components of sustainable development in Principle 10 for the first time in the context of sustainable development); SUMUDU A. ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 135 (2006); SANDS & PEEL, *supra* note 67, at 649.

70. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, U.N. Doc ECE/CEP/43 (June 25, 1998), http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. *See* Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 309, 335 (2012). *See also Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, ECON. COMMISSION FOR LATIN AM. AND CARIBBEAN, https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice.

71. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, *supra* note 70, at 3.

The second development is the environmental justice movement which originated in the United States as a direct response to the practice of locating polluting and hazardous activities in areas of low income and minority communities.[72] These polluting activities had a huge impact on the lives of people and impinged on their rights. This situation ultimately led to the issuance of an Executive Order on Environmental Justice by President Clinton in 1994.[73] It called on each federal agency to make "achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States."[74] It also established an Interagency Working Group on Environmental Justice to, *inter alia*, provide guidance to federal agencies on criteria for identifying disproportionately high adverse effects on minority and low-income populations, examine data and studies on environmental justice, develop interagency model projects, and hold public hearings.[75] In *Mossville Environmental Action Now v. United States*,[76] currently pending before the Inter-American Commission on Human Rights, the petitioners alleged that the Mossville residents, who are predominately African American, are subject to a disproportionate pollution burden, what they refer to as environmental racism, in breach of the American Declaration of the Rights and Duties of Man.[77] They further alleged that the State is responsible for the violation of Mossville residents' rights to life, health, and private life guaranteed under the American Declaration.[78] This is the first case that has been brought against the United States on the basis of environmental justice and, in particular, environmental racism before an international forum.

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72. *See* Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 77 (Shawkat Alam, et al. eds., 2013); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, 10,682–83 (2000).

73. Exec. Order No. 12,898, 59 C.F.R. § 7629 (1994), http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf.

74. *Id.* § 1-101.

75. *Id.* § 1-102.

76. Mossville Envtl. Action Now v. United States, Case 242-05, Inter-Am. Comm'n H.R., Report No. 43/10, OEA/Ser.LV/II.138, doc. 47 ¶ 2 (2010), http://srenvironment.org/regional-decisions/inter-american-commission/; *see also* Jeannine Cahill-Jackson, *Mossville Environmental Action Now v. United States: Is a Solution to Environmental Injustice Unfolding?*, 3 PACE INT'L L. REV. ONLINE COMPANION 173, 174 (2012).

77. American Declaration of the Rights and Duties of Man art. 2, Apr. 30, 1948, Hein's No. KAV 7225.

78. *Mossville*, Report No. 43/10 at ¶ 2.

As noted earlier, international human rights law does not recognize a stand-alone substantive right to a healthy environment. Despite attempts at recognizing such a right, so far the international community has resisted it, mainly for political reasons. Two points can be highlighted in this regard. First, there is a definite trend towards using the human rights framework to seek redress for damage caused by environmental issues at the regional level. The regional human rights institutions—especially the European Court and the Inter-American Commission—are regularly seised of cases that relate to environmental rights. This may be an argument in favor that a customary international law principle on a human right to environment is emerging, at least at the regional level.

Secondly, this convergence is most prominent at the national level. Many judiciaries have used constitutional rights and even directive principles of state policy to articulate environmental rights.[79] While newer constitutions do embody environmental rights, older constitutions do not.[80] Despite this, judiciaries across the world have interpreted existing rights expansively to encompass environmental rights.[81] This development may be an argument in favor that a general principle of international law on a human right to environment is emerging.[82]

Thus, there is an increasing move toward articulating environmental rights at the international level. In the *Ogoniland* case[83] before the African Commission of Human Rights in 2001, discussed in Section I, the

79. *See* Atapattu, *Role of Human Rights Law*, *supra* note 51, at 106.

80. *See* DAVID BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION 3 (2012) (discussing environmental rights provisions in national constitutions).

81. *See* KRAVCHENKO & BONINE, *supra* note 51, at 5–6 (explaining the expansive interpretations of the "right to life," which includes the right to clean air and water).

82. *See* HUNTER ET AL., *supra* note 59, at 336–37 (discussing sustainable development as a general principle of international law); *cf.* SANDS & PEEL, *supra* note 67, at 117 (discussing development of environmental law applying to regional groups of states).

83. Soc. & Econ. Rights Action Ctr. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R], ¶ 52 (Oct. 27, 2001), http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

Commission elaborated on the right to a satisfactory environment as embodied in the African Charter on Human and Peoples' Rights.[84]

> The right to a general satisfactory environment . . . imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[85]

Thus, there are clear obligations that flow from this right.

The ICJ too has witnessed this convergence in its cases. Although the *Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*[86] was later settled by the parties, the Memorial submitted by Ecuador deals extensively with the human rights impacts of aerial sprayings by Colombia on those who are living along the Colombia-Ecuador border.[87] It also dealt with the violation of rights of indigenous peoples in Ecuador.[88] Ecuador alleged that Colombia had violated several human rights treaties.[89] It argued that the relationship between three distinct areas of international law—human rights, environmental protection and indigenous rights—is at the heart of this case and their interrelationship has long been recognized.[90] Because the case was settled by the parties, the court did not pronounce on this important issue.

Given the disproportionate impact of these cases on minorities and impoverished communities, some scholars contend that the environmental justice framework provides a better lens to discuss the impact of severe environmental degradation on these communities.[91] We now turn to a discussion of environmental justice.

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84. African Charter on Human and Peoples' Rights art. 24, *adopted* June 27, 1981, 21 I.L.M. 58, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf ("All peoples shall have the right to a general satisfactory environment favorable to their development.").

85. *Soc. & Econ. Rights Action Ctr.*, Communication 155/96 at ¶ 52.

86. Aerial Herbicide Spraying (Ecuador v. Colom.), Order, 2013 I.C.J. 138, at 278–79 (Sept. 13), http://www.icj-cij.org/files/case-related/138/138-20130913-ORD-01-00-EN.pdf.

87. Memorial of Ecuador, Aerial Herbicide Spraying (Ecuador v. Colom.), 2009 I.C.J. Pleadings 235, at 344 (Apr. 28, 2009), http://www.icj-cij.org/files/case-related/138/17540.pdf.

88. *Id.* at 235.

89. *Id.* at 327.

90. *Id.* at 322.

91. *See, e.g.*, Kuehn, *supra* note 72, at 10,681.

III. ENVIRONMENTAL JUSTICE[92]

Scholars use various definitions of environmental justice and it seems to mean "many things to many people."[93] Dinah Shelton equates environmental justice to "Aesop's elephant," where in the fable of Aesop, several blind men who touch an elephant describe it in different ways depending on where they touch.[94] This chapter will use the four-part categorization of environmental justice proposed by Kuehn—distributive justice, procedural justice, corrective justice, and social justice.[95]

Distributive justice is closely related to equal treatment. In the environmental context, this means equal protection for all and the need to eliminate environmental hazards and the equal distribution of benefits, including access to parks, safe drinking water and sanitation, and public transportation.[96]

While equal treatment is the norm, in certain situations it becomes necessary to favor a particular group to redress past imbalances or inequities and level the playing field. Affirmative action under national law[97] and the common but differentiated responsibility principle at the international level[98] are two tools that we have developed to redress past imbalances which are based on the notion of justice and fairness.

Procedural justice, on the other hand, is probably the best known. It intersects with human rights law and encompasses three related rights—access to information, participation in the decision-making process, and

92. For more information on the topic of this next section, see Sumudu Atapattu, *Justice for Small Island Nations: Intersections of Equity, Human Rights, and Environmental Justice*, *in* ENVTL. LAW INST., CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 299, 303–04 (Randall S. Abate ed., 2016).

93. Kuehn, *supra* note 72, at 10,681.

94. Dinah Shelton, *Describing the Elephant: International Justice and Environmental Law*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 55, 55 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

95. Kuehn, *supra* note 72, at 10,681; *see also* Carmen Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 78–79 (Shawkat Alam et al. eds., 2013) (explaining the four-part categorization of environmental justice originally proposed by Kuehn).

96. Kuehn, *supra* note 72, at 10,684.

97. 41 C.F.R. § 60-2 (1964–1965); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

98. For a detailed discussion of the common but differentiated responsibility principle, see Lavanya Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, 88 INT'L AFF. 605, 607–08 (2012).

access to justice.[99] These are often referred to as environmental democracy.[100] They have become most relevant in the context of environmental impact assessments.[101] In addition, procedural justice also requires the process to be "designed in a way to lead to a fair outcome."[102] While procedural justice seems rather straightforward and easy to apply, its application in practice has been rather challenging.

Corrective justice involves fairness in punishment and remedying harm inflicted on individuals and communities.[103] In the environmental context, this means punishing polluters and not allowing them to reap the benefits of disregarding the law as well as restoring the environment.[104] Many cases in the environmental field involve a combination of procedural and corrective justice.[105]

As the examples in Section I demonstrated, controlling the activities of private actors and punishing the wrongdoers has been a constant challenge. Multinational corporations operating in developing countries are responsible for many of these serious environmental and human rights abuses, sometimes in collusion with government forces. These companies have escaped liability for several reasons[106] and the power asymmetry between the investor and the host country further complicates matters.

The final aspect of environmental justice is social justice, which is the least developed and possibly the most tenuous aspect.[107] It is closely related to the social pillar of sustainable development[108] and posits that environmental

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99. *See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, *supra* note 70, art. 1; Kuehn, *supra* note 72, at 10,688.

100. ATAPATTU, *supra* note 69, at 95.

101. *See id.* at 289–90.

102. Kuehn, *supra* note 72, at 10,688.

103. *Id.* at 10,693.

104. *Id.*

105. *Id.* at 10,694; *see, e.g.*, Bates v. Dow Agrisciences LLC, 544 U.S. 431, 434, 452 (2005) (providing corrective justice in the form of recovery for toxic damage under the Federal Insecticide, Fungicide, and Rodenticide Act, and procedural justice in the form of access to courts).

106. These include lax environmental regulations in the host country, investment treaties that favor the investor, and project finance structures that shield these companies. *See* Shalanda H. Baker, *Project Finance and Sustainable Development in the Global South*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 338, 341, 354–55 (Shawkat Alam et al. eds., 2015); Shyami Puvimanasinghe, *From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra*, at 317, 317–19.

107. *See* Kuehn, *supra* note 72, at 10,698–99.

108. Sustainable development consists of three pillars: environmental, social, and economic. *See* World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, ¶ 5, U.N. Doc. A/CONF.199/20, annex (Sept. 4, 2002) [hereinafter *Johannesburg*

justice cannot be separated from struggles for other forms of justice. Thus, adopting a holistic approach to environmental justice that encompasses social justice helps to break this vicious cycle and identify underlying causes of injustice. On the other hand, the wider focus can also seem overwhelming and could overlook other factors such as the role played by the market.[109] This is reinforced by Simons' critique of the approach taken by Ruggie where she argues that the international law system itself that perpetuates these inequities is the problem.[110]

IV. INTERSECTIONALITY

The impact of extractive industries on impoverished communities and the environment in developing countries can be seen through many frameworks and lenses: environmental law, human rights, environmental rights, and environmental justice. The intersections of these frameworks as well as the intersections of injustices that compound inequities need attention, and more research needs to be done to see how these injustices intersect with one another to compound injustices.

As discussed earlier, environmental law, human rights, and environmental justice often intersect with one another and the examples we discussed earlier provide good case studies for such intersectionality. Often, however, these intersectionalities are not addressed properly, and only one aspect of the issue is addressed depending on which forum is addressing the issue. The advent of environmental rights is significant in this regard because it seeks to use the human rights framework to seek redress for damage caused by environmental pollution/degradation. An often neglected area is labor law and how labor issues intersect with other issues such as gender, indigeneity, disability, and other forms of marginalization also requires further study.

Using the environmental rights framework together with the environmental justice framework would be useful for victims of these gross violations such as those highlighted in this article. In this regard, it is necessary to bear in mind the limitations of the human rights framework. Essentially, states are the guardians of rights and victims can only bring a

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Declaration]. The Brundtland Report had only two pillars—economic and environmental—although the report did discuss social issues such as poverty eradication. *See* World Comm'n on Env't and Dev., Our Common Future, ¶ 3, U.N. Doc. A/42/427, annex (1987). The social pillar was added later at the Copenhagen Summit for Social Development in 1996, which was later endorsed by the Johannesburg Declaration on Sustainable Development.

109. *Johannesburg Declaration*, *supra* note 108, ¶¶ 11–15.

110. Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. HUM. RTS. & ENV'T 5, 9–12 (2012).

claim against the state for any infringements of their rights. In other words, international human rights law operates vertically between states (duty bearers) and citizens (rights holders), and private actors such as multinational corporations do not have direct obligations under human rights law. When human rights violations take place at the hands of private individuals or multinational corporations, states incur liability if they failed to punish the wrongdoers or failed to prevent the violations from taking place. Here states become liable for their *own failure*, not for the activities of private parties. The Ruggie principles on business and human rights sought to bring business enterprises within the realm of human rights,[111] although states remain the primary duty bearers of human rights.

The Guiding Principles are based on three pillars: the state's responsibility to protect human rights, the corporate responsibility to respect human rights, and victims' ability to access remedies.[112] The Guiding Principles are applicable to all business enterprises, including transnational corporations.[113] They are, however, careful to point out that they do not create new international law obligations. The Principles seek to implement the UN's "protect, respect and remedy" typology relating to human rights.[114] The first pillar that deals with the state's responsibility to protect human rights is rather straightforward even though the obligations are couched in soft terms and use the term "should" rather than "shall."[115] Of course, the softer term "should" is redundant since most states are bound by their existing human rights obligations.[116] The second pillar is more innovative and seeks to accord human rights obligations to business enterprises irrespective of the obligations of states to protect their obligations.[117] Thus, one of the foundational principles under the second pillar is that "business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[118] The commentary notes that the responsibility to respect human rights is a global standard of expected

111. *See* Guiding Principles, *supra* note 3, at 13–15; John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 820 (2007).

112. *Guiding Principles*, *supra* note 3, at 1.

113. *Id.*

114. *Id.* at iv.

115. *Id.* at 3–12.

116. *See, e.g.*, G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

117. Guiding Principles, *supra* note 3, at 13.

118. *Id.* at 13.

conduct for all business enterprises wherever they operate and exists independently of the obligations of states to fulfill their own obligations.[119]

Penelope Simons, however, points out that with regard to corporate impunity, it is not possible to talk about gaps in the governance structure created by globalization (as argued by Ruggie) without addressing the root causes of those gaps.[120] She argues that "corporate human rights impunity is deeply embedded in the international legal system" and "one of the most significant impediments to corporate human rights accountability is the structure of the international legal system itself."[121] In addition, structural adjustment policies of the World Bank and International Monetary Fund have exacerbated the situation where developing countries and their people have had no say in their adoption and implementation.[122]

Another framework that is applicable and is increasingly gaining traction is the rights of indigenous peoples.[123] In this context the FPIC principle is important. Over the years, we have seen many examples of development projects that have been implemented without adequate participation by the relevant stakeholders.[124] Very often people learn of projects and impending displacement only when the bulldozers arrive. By then, all the decisions have been made, and it is too late to protest. The World Bank has been guilty of these practices, especially in relation to indigenous people.[125] These communities are often seen as obstacles to development. In their letter to the incoming president of the World Bank, indigenous groups stressed that the adverse impacts on indigenous people are rarely acknowledged let alone addressed by the Bank.[126] It further noted that the current operational policy on indigenous peoples is not based on a human rights approach and is

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119. *Id.*

120. Simons, *supra* note 110, at 11.

121. *Id.* at 11–12.

122. Anup Shah, *Structural Adjustment—A Major Cause of Poverty*, GLOBAL ISSUES, http://www.globalissues.org/article/3/structural-adjustment-a-major-cause-of-poverty#PSRPsreplaceSAPsbutstillSAPthepoor (last updated Mar. 24, 2013).

123. For more information on the topic of this next section, see SUMUDU ATAPATTU, HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE 182–91 (2016).

124. *Id.* at 176, 191 (discussing examples of projects in Kenya and Uganda that were "implemented without proper consultation from indigenous groups").

125. *See, e.g.*, *World Bank: Power Project Threatens Indigenous Peoples*, HUM. RTS. WATCH (July 11, 2012), https://www.hrw.org/news/2012/07/11/world-bank-power-project-threatens-indigenous-peoples (discussing the World Bank's funding of a project that connects a transmission line from Kenya to a hydroelectric dam in Ethiopia).

126. Letter from Asia Indigenous Peoples Pact (AIPP)-Thailand et al., to Jim Yong Kim, Incoming President, World Bank Grp. (June 23, 2012), https://www.forestpeoples.org/sites/fpp/files/publication/2012/06/indigenous-peoples-letter-incoming-president-world-bank-english.pdf.

inconsistent with UNDRIP: "It is particularly a glaring fact that the World Bank is the only [multilateral development bank] that does not recognize the rights of indigenous peoples to free, prior and informed consent."[127] Likewise, in its letter to the President of the World Bank, the Human Rights Watch (HRW) stressed the need to protect the rights of indigenous peoples and the environment before it funds a power transmission line connecting Kenya to a dam in Ethiopia.[128] HRW noted that while the project's goal is to provide electricity to people in Kenya where more than eighty percent of the population has no access to electricity, the Bank has been unwilling to apply its social and environmental safeguard policies.[129] It pointed out that the rights of several thousand indigenous people will be threatened by the Gibe III dam.[130]

The Inter-American human rights system has been at the forefront of articulating indigenous rights. The case of *Saramaka People v. Suriname*[131] was the first decision to adopt the principle of FPIC. In this case, the Suriname government had granted resource concessions to private companies within the territories of Saramaka people without obtaining their consent or even consulting them.[132] The Court held that Suriname had violated the rights of Saramaka people to judicial protection and property rights and failed to have effective mechanisms to protect them from acts that violate their rights to property.[133] However, the Court noted that these property rights are not absolute and can be restricted if certain criteria are satisfied: the procedure must be previously established by law; necessary; proportionate, and with the aim of achieving a legitimate objective in a democratic society.[134] In addition, such restrictions cannot violate the right of indigenous peoples to survival.[135] In order to do so, the Court prescribed a series of safeguards: (a) states must ensure effective participation of the affected parties; (b) guarantee that the affected people will receive a reasonable benefit from the project; and (c)

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127. *Id.*

128. Letter from Arvind Ganesan, Dir., Bus. and Human Rights Div., Human Rights Watch, to Jim Yong Kim, President, World Bank Grp. (July 10, 2012), https://www.hrw.org/news/2012/07/10/letter-world-bank-president-kim-re-regional-eastern-africa-power-pool-program-apl1 [hereinafter Letter from Arvind Ganesan to Jim Yong Kim]; *see World Bank: Power Project Threatens Indigenous Peoples*, *supra* note 125.

129. *Id.*

130. *Id.*

131. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

132. *Id.* ¶ 12.

133. *Id.* ¶ 158.

134. *Id.* ¶ 127.

135. *Id.* ¶ 128.

prior to granting the concession, environmental and social impacts be carried out to mitigate any negative effects.[136]

Furthermore, participation must be in line with their customs and traditions; states have a duty to disseminate and receive information; and consultations must be in good faith, culturally appropriate, and have the intent to reach an agreement.[137] In the case of large-scale development projects that could impact the survival of indigenous people, states must obtain their free, prior, and informed consent.[138] This case endorses very important principles and sheds light on what "consultation" entails.[139] The Court limited the application of FPIC to large scale development projects that may threaten the survival of indigenous people.[140]

However, in practice, the FPIC requirement, as laudable as it is, has run into problems. Indigenous groups are not homogenous and may speak different languages or at least dialects or may have different priorities. Where there are several indigenous groups, does FPIC require the State to obtain the consent of all the groups, at least in instances where relocation is envisaged? The challenges of applying FPIC is illustrated by Baker in her case study of the Oaxaca wind project in Mexico.[141] Communal land, language issues, one sided contracts, coercion, and environmental concerns are some of the challenges facing these communities.[142]

CONCLUSION

In this article, we looked at extractive industries and their impact on the environment as well as the rights of people through the lens of three examples, all of which resulted in severe environmental degradation and led to gross human rights violations. These examples unfortunately represent only the tip of the iceberg. Corporations have continued these unsustainable practices with impunity and poor, marginalized communities in developing countries have paid the price.

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136. *Id.* ¶ 129.

137. *Id.* ¶ 133.

138. *Id.* ¶ 134. *See* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 64 (2011), who believes that this case clearly sets a precedent within the Inter-American system.

139. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 133–37.

140. *Id.* ¶ 134. The language of UNDRIP in relation to FPIC, however, is not so restrictive. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, at 10–11 (Sept. 13, 2007).

141. Baker, *supra* note 106, at 344.

142. *Id.* at 340–41. Another case that involved the violation of rights of indigenous peoples was the Ogoni case, but the African Commission did not refer to indigenous rights, possibly because it found the violation of many other rights in the African Charter.

The article also discussed the emerging right to a healthy environment and the use of the human rights framework in relation to damage caused by environmental degradation. It also examined environmental justice as a supplementary framework given that many of these cases implicate justice issues. Where rights of indigenous peoples are at stake, the indigenous rights framework operates as an additional framework. The free, prior, and informed consent principle is gaining traction although its parameters are subject to debate and its applicability on the ground is problematic.

While states remain the primary duty bearers of human rights and environmental justice, corporations are coming under increasing pressure to abide by a minimum code of conduct both in relation to environmental protection and human rights. Attempts at creating a binding framework for corporations have failed over the years and the outcome of the latest attempt by the Human Rights Council remains to be seen.[143]

Human rights law, environmental law, environmental rights, environmental justice, and indigenous rights frameworks are now developed enough to provide useful guidance to both states and corporations to ensure that the impact on people and the environment is minimized. The international community should also adopt the Framework Principles on Human Rights and the Environment proposed by the UN Special Rapporteur on Human Rights and the Environment in March 2018.[144] Thus, at a minimum, these corporations should: respect the laws of the host state; acknowledge any wrongdoings; stop externalizing environmental costs; prepare environmental and social impact assessments; provide adequate compensation in the event of any injury to people and the environment; clean up in the event of any accidents or spills; use state-of-the-art technology, not obsolete technology that has been long abandoned in their home country; consult with local communities in a language that they understand after providing them with relevant information; apologize when necessary; and work with government officials to improve the living conditions of people in the host country, rather than try and take whatever they can to increase their profit margin.

States themselves should better enforce their laws, refrain from relaxing their environmental safeguards in order to attract investment, not collude with corporations, ensure that environmental and social impact assessments are

143. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, U.N. Doc. A/HRC/26/L.22 (June 26, 2014); *see* Puvimanasinghe, *supra* note 106, at 336–37.

144. *See* U.N. HIGH COMM'R FOR HUMAN RIGHTS, FRAMEWORK PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT (2018), https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf

prepared by qualified people, ensure proper monitoring of their activities, and ensure that local communities benefit from these investments. In the event of an accident or a spill, corporations should be held accountable for clean-up operations and paying compensation to the victims. In addition, where indigenous groups are involved, states should ensure that the free, prior, and informed consent principle is applied. However, in practice, it is hard to comply with these requirements given the power asymmetry between the government and the corporations which control wealth far superior to the states that they invest in. The investor-friendly, one-sided free trade agreements need to be revisited as well. Ultimately, as Simons points out, unless we are willing to address the current economic system which has given rise to the issues discussed in this article, we will only be tinkering at the margins without achieving any real results. The frameworks discussed here become redundant in the face of corporate impunity that is being facilitated by the existing structure of international law that favors an elite few.