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MISERABLE COMFORTS OR CONCRETE PROTECTIONS: HUMAN RIGHTS CONVENTIONS, TREATIES, DECLARATIONS, AND THE RIGHTS OF INDIGENOUS/OTHERED COMMUNITIES—QUO VADIS?

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MISERABLE COMFORTS OR CONCRETE PROTECTIONS: HUMAN RIGHTS CONVENTIONS, TREATIES, DECLARATIONS, AND THE RIGHTS OF INDIGENOUS/OTHERED COMMUNITIES—QUO VADIS?

By Cosmas Emeziem *

Abstract

It has become an annual ritual for the world—especially through the United Nations (UN)—to organize events and activities celebrating Indigenous Peoples.¹ Further to this disposition, the UN

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¹ In this article, the descriptive, “indigenous peoples” and “indigenous communities” are sometimes used interchangeably as is the case in the literature in the field. I have also used *othered communities* to describe indigenous communities because it is hard to see an indigenous community that is not also *othered* both in the domestic polity, and in international law and policy. This is notwithstanding that there are other communities that have also been peripheralized and the use of the words *othered*, *otherness*, and *others* also apply to them in some specific contexts. The *United Nations General Assembly resolution 49/214 of December 23, 1994*, proclaims August 9 every year as the International day for the World’s Indigenous Peoples. Amongst other things, the resolution also recognized the value of diversity of cultures, the need to improve the economic, social, and cultural conditions of indigenous people, with full respect to their distinctiveness and their own initiatives. [S]ee also Joseph Biden, *Executive Order: A Proclamation on Indigenous Peoples Day, 2021*, October 08, 2021. The Executive order noted that,

The Federal Government has a solemn obligation to lift up and invest in the future of Indigenous people and empower Tribal Nations to govern their own communities and make their own decision. We must never forget the centuries-long campaign of violence, displacement, assimilation, and terror wrought upon Native communities and Tribal Nations throughout our country. Today, we acknowledge the significant sacrifices made by native peoples to this country—and recognize their many ongoing contributions to our nation.

has adopted a Declaration on the Rights of Indigenous Peoples.² Equally, it is now fashionable, to include the needs, and questions, affecting indigenous peoples in our development programs and climate action activities—albeit sometimes as an addendum to the mainstream policies.³ The Sustainable Development Goals (SDGs), and the current prominence of Diversity, Equity, and Inclusion (DEI), and decolonialization language in international policy briefs, give further credence to this apparent commitment to the rights of indigenous and othered communities. The recently concluded UN Climate Action Conference in Scotland (COP26)⁴ also voiced out some of the concerns of indigenous communities.⁵ Beyond these Conventions, Treaties, Declarations, and

Melina Delkic, *Indigenous Peoples' Day, Explained*, New York Times, (October 11, 2021). Many other countries have also instituted national days and sometimes months to acknowledge the contributions of indigenous peoples and their rights to exist as coequals and co-owners of the earth and the fullness thereof. I use the ownership here in a very liberal sense because many traditions including that of many indigenous communities do not construe ownership as it is considered in western legal traditions. Many communities privilege collective ownership along tribal, ethnic, and such other community lines. [S]ee Proclamation No. 10283, 86 Fed. Reg. 57,307 (Oct. 08, 2021); Melina Delkic, *Indigenous Peoples' Day, Explained*, N.Y. TIMES, (Oct. 11, 2021); See also Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 414-57 (1998) (giving some general insight on the crystallization of Indigenous people's movement in international law); Rashwet Shrinkhal, *Evolution of Indigenous Rights Under International law: Analysis from TWAIL Perspective*, 19 THE ORIENTAL ANTHROPOLOGIST 7, 7-24 (2019); Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 177-210 (2008).

² G.A. Res. 61/295 (Sept. 13, 2007) (the declaration culminated decades long efforts by many organizations and civil society groups including the International Labor Organization (ILO) to see to the global recognition of the specific needs and rights of indigenous peoples); Alexandra Xanthaki, *Indigenous Rights in International Law over the Last 10 Years and Future Developments*, 10 MELB. J. INT'L L. 27, 27-28 (2009); Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 348-99 (2004).

³ G.A. Res. 70/1 (Oct. 21, 2015); See also Sumudu Atapattu, *From "Our Common Future" To Sustainable Development Goals: Evolution of Sustainable Development Under International Law*, 36 WIS. INT'L L.J. 215, 215-46 (2019) for a general view about the development of the idea of sustainable development.

⁴ The United Nations Climate Conference 2021; Victoria Tauli-Corpuz, *Indigenous peoples had a clear vision for Cop26, but it has not been delivered*, THE GUARDIAN (Nov. 15, 2021); Nina Lakhani, 'A continuation of colonialism': indigenous activists say their voices are missing at Cop26, THE GUARDIAN (Nov. 3, 2021); Grace Barrett, *COP26: Indigenous peoples, protests, and a call to end the war on nature*, UN NEWS (Nov. 6, 2021).

⁵ Because Indigenous Communities are on the frontlines of climate change disasters, though they are often the minor contributors to the factors that exacerbate rapid climatic changes, such as greenhouse emissions. See Susan K Serrano, Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crises*, 110 CALIF. 1281-1313(2022). The particular experience of those living in the U.S. unincorporated territories clearly show the intersection between indigenous communities and continuities of colonialism. The perpetual state of being in-between becoming full sovereigns and otherwise has devastating impact on the inhabitants of these territories as they are continually navigating policy uncertainties and inchoate legal status. See also Julian Aguon, *On Loving the Maps our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International law*, 16 UCLA ASIAN PAC. AM. L.J. 47 (2010). Current policy and legal suggestions for adaptation to the radical change in climate situations is bringing up anxieties about genocide since many of these adaptation strategies are privileging

good faith statements, about the rights of indigenous/othered communities, it is imperative to articulate a set of principles, that can ensure that these apparent commitments do not become miserable comforts to indigenous and othered communities. Such principles can be implemented as best practices, and therefore sharpen the blunt edges of liberal international human rights. More so, such will enhance the pedagogies regarding the rights of indigenous peoples using Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) because indigenous people are often the racialized other, and also part of the “third world.” Thus, this essay highlights the possibilities that CRT and TWAIL can bring to the paradigms and proposes a ten-principle approach through which we can (re)invigorate these conventions, treaties, and declarations; thereby enhancing the human rights of indigenous/othered communities.

removals of indigenous peoples from their traditional homelands. [S]ee Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1625 (2007).

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INTRODUCTION

The human species has come a long way—tracking existential timelines across epochs and civilizations.⁶ Different traditions have many views about the origins and evolutions of human societies. Many of these views are founded on intangible realities, such as belief systems, and other notions of existence. Others justify human social evolution by natural law principles, and theories of individual rationality. Yet many others are founded on fables and mythologies such as those of Greek and Roman Mythologies—major canons of the Western Tradition.⁷ Indigenous and othered communities all around the world also have their respective conceptions of the human society, and its evolution over time.⁸ These traditions have remained resilient despite the complex historical junctures they have crossed. Clearly, one cornerstone of many of these theories is an attempt to make sense of the world, and the social relationships that inhere in it. In any case, it is almost trite that human societal existence reveals in many ways consistent efforts to humanize and make societies less fractious and violent. Articulating these efforts is still a favorite preoccupation of social and political theorists. Some of the efforts come through deliberate social and political movements, such as the Slavery Abolition Movements of the 19th century, the Feminist Rights Movements, the Civil Rights Movements and indeed, the Anti-colonization Movements.⁹

⁶ See generally THE OXFORD HANDBOOK OF INDIGENOUS SOCIOLOGY (Maggie Walter et al. eds., 2021) (responding to the general need to fill the gap in sociological literature wherein indigenous writing have often not been given primacy).

⁷ For instance, in Homer's *Iliad*, we see a society that is deeply fragmented and the role of powerful individuals in the making of social order. See generally HOMER, THE ILLIAD (Michael Heumann trans.) (2020); such depictions can also be seen generally in *Odyssey*, *Antigone* and other classical literatures of the Western Tradition. Remarkably, the belief (justified or otherwise) that supernatural forces (*gods*) can influence the trajectory of human encounters be it victory in wars, successful voyage at sea, and pestilence or peaceful reign and success of a kingdom is an eloquent theme in these mythologies. Hence, we find social epistemic commitments to seek clarification from the gods and, at times make sacrifices to appease them. All these point to the search for coherence, cohesion and values for flourishing in societies. See generally SOPHOCLES, *ANTIGONE* (Thomas Francklin trans.) (1899); See generally HOMER, *ODYSSEY* (George Herbert Palmer trans.) (1891).

⁸ For instance, many indigenous traditions see society and the people that inhabit it as a spectrum, as opposed to absolute units. Thus, the social encounter is largely relational. This has been described as holism. However, it is also noteworthy that there are many indigenous communities with differently nuanced perception of this holism. See generally on the idea of holism, Farah Shroff, *CHAPTER THREE: We Are All One: Holistic Thought-Forms within Indigenous Societies Indigeneity and Holism*, 379 COUNTERPOINTS, INDIGENOUS PHIL. AND CRITICAL EDUC. 53–67 (2011); <http://www.jstor.org/stable/42980884>. There are also mythologies which explore indigenous views of existence. See generally GABRIEL GARCIA MARQUEZ, *100 YEARS OF SOLITUDE* (1967).

⁹ For instance, Jenny Martinez in a recent work explores the anti-slavery movement and its general contribution to international human rights. See JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2011); Jenny S. Martinez, *Human Rights and History: Responding to Philip Alston, Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 221-240 (2012); Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043-2081(2013); DONALD G., NIEMAN, *PROMISES TO KEEP: AFRICAN AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* 153-199 (Oxford Univ. Press 2d ed. 2020) (highlighting the role of civil rights movements in the advancement of human rights in America while also depicting the limitations, and challenges for human rights). For indigenous peoples their struggle for self-determination

Many other changes—towards a more humane encounter between peoples and communities—have also been contingent and indeterminate. Thus, many approaches, contingent issues, and factors have contributed to the continuous humanization of the encounter between communities and peoples’ overtime. This is not progressivism as is seen in international law, sometimes represented as civilization, and at other times as development. It is an acknowledgement of some of the gains made without meaning to avoid the many losses and the intergenerational commitments in lives and limbs made by indigenous populations to our current ways of living. Thus, there is still significant work left to be done. Indeed, in the recent years, the theorization about human rights has increasingly encountered difficulties—especially as it relates to economic, social and cultural rights. One of such problem is the bifurcation of social economic and cultural rights from civil and political rights. The second limb of the problem is to elevate civil and political rights as justiciable, while categorizing socioeconomic rights as ‘desirable norms’ that are generally not justiciable—although there is the doctrine of the interdependence of all human rights. Thus, market approaches—efficiency, profit maximization, and incentivization—to public policy continues to whittle down the capacity of the public to aim at a humanized public order, that emphasizes human dignity and capabilities, as opposed to law and order, without a commensurate effort at social justice.¹⁰

In all of that movement, from the first primal warbling to the current state of humanity, has been a difficult history in the efforts to increasingly humanize the encounter between peoples. Law has been one of the tools of human social organizing—both locally and internationally. One of the

and against forces of colonial conquest, and sometimes extermination is an ongoing one. See Marie de la Luz Inclan & Paul Almeida, *Indigenous Peoples’ and revolutionary Movements in Meso-America*, in THE OXFORD HANDBOOK OF INDIGENOUS PEOPLES POLITICS (Jose Antonio Lucero, Dale Turner, and Donna Lee VanCott eds., 2013); Maria Sapignoli, *Indigenous Mobilization and Activism*, in THE ROUTLEDGE HANDBOOK OF INDIGENOUS PEOPLE’S RIGHTS (Corinne Lennox, and Damien Short eds., 2016); Peter Johansson, *Indigenous Self-determination in the Nordic Countries: The Sami, and the Inuit of Greenland*, in THE ROUTLEDGE HANDBOOK OF INDIGENOUS PEOPLES’ RIGHTS (Corinne Lennox, and Damien Short eds., 2016); Karen Knop, *Indigenous women and self-determination*, in DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 358–372 (Cambridge Univ. Press ed., 2002); Megan Black, *Indigenous Sovereignities and Social Movements*, in THE CAMBRIDGE HISTORY OF AMERICA AND THE WORLD 452–474 (Brooke L. Blower & Andrew Preston eds., 2022) (highlighting how judicial review can further open up indigenous sovereignty to exploitation and more intrusive excise of Congressional plenary powers); Siegfried Wiessner, *Indigenous self-determination, culture, and land: A reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, in INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 31–63 (Elvira Pulitano ed., 2012). Darwin Horning & Beth Baumbrough, *Contributions to urban Indigenous self-determination: the story of Neeginan and Kaupapa Māori*, 50 THE AUSTL. J. OF INDIGENOUS EDUC. 393–401 (2021) (showing how indigenous communities through self-help push their interests onto the foreground of politics—especially in those settler states where their rights have been systemically suppressed over time).

¹⁰ See generally MALCOM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Cambridge Univ. Press ed., 2009); MORAL AND POLITICAL CONCEPTIONS OF HUMAN RIGHTS: IMPLICATIONS FOR THEORY AND PRACTICE (R. Maliks & J. K. Schaffer eds., Cambridge Univ. Press 2017); THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (K. G. Young ed., Cambridge University Press 2019).

core efforts through law and principles associated with lawfulness, legality, ethics, and propriety generally, I would argue, has been to ensure that encounters between different communities and civilizations do not lead to violence and consequent human rights violations. Even now, the contest of civilizations, and the efforts to calibrate the tenuous balance of powers—East/West, North/South and otherwise—is a primary preoccupation of statesmen and diplomats around the world. Although globalization has blunted some of the sharp edges of confrontation, they are still existing in the great competition of nation states.¹¹ Still, the more difficult reality of globalization is the exacerbation of human suffering for marginalized groups and communities. Accordingly, even in the face of globalization, indigenous communities have continued to face uncommon challenges that require critical commitment.

In any case, the humanizing effort and the need for peaceful encounter is a worthy effort and must necessarily be so; else humanity will be subjected to the consistent violence of one against another.¹² The pathway to that peace must not be a mutually assured destruction as sometimes pursued by frontline states, but the enhancement of human dignity across social, economic, class, sex, and other identities and boundaries. A direct dividend of this disposition of ensuring that human interactions do not default to violence against one another is the creation of norms of wholesome encounters—both for the common good and individual progress. These norms include immemorial diplomatic principles, as captured in customary international law and the Vienna Conventions on Diplomatic and Consular Relations.¹³ *Id est*, humanity exerts efforts

¹¹ Perhaps, globalization gives some credence to Kant's vision about the possibility of perpetual peace through interlinked social, economic, and political relationships whose perfection will be a world citizenship. Although Kant's Utopia is yet to be realized, it is notable that the current dispensation has moved away from that which existed in his time. It is also interesting to note that as far back as 1795 Kant had spoken out against the injustice of the [c]ivilized against indigenous and othered communities. Kant states that: "the human race can gradually be brought closer and closer to a constitution establishing world citizenship. But to this perfection compare the inhospitable actions of the civilized and especially of the commercial states of our part of the world. The injustice which they show to lands and peoples they visit (which is equivalent to conquering them) is carried by them to terrifying lengths. America, the Lands inhabited by the [Blacks] the Spice Islands, the Cape, etc., were at the time of their discovery considered by these [c]ivilized intruders as lands without owners, for they counted the inhabitants as nothing. In East India (Hindustan), under the pretense of establishing economic undertakings they brought in soldiers and used them to oppress the natives, excited widespread wars among the various states, spread famine, rebellion, perfidy and the whole litany of evils which afflict mankind." *See generally* IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795).

¹² Thomas Hobbes has argued about human's state of nature where the means of survival was the war of one against another. He noted however how that is counterproductive because it led to a society where life is short, nasty and brutish. Thus, the evolution of human society can be viewed as a continued ascendancy from this brutish nature to a state of societal equilibrium, rule of law, and common good. *See generally* THOMAS HOBBS, THE LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL (1904).

¹³ The Vienna Conventions on Diplomatic and Consular Relations 1963 recalled that, Consular relations have been established among peoples since ancient times... (and expressed a belief that) an international convention on consular relations, privileges and immunities would also contribute to the development of [f]riendly relations among nations, irrespective of their differing constitutional and social systems... *See* The Preamble to the Vienna Conventions on Consular and Diplomatic Relations, Mar. 19, 1967, 1963 U.N.T.S. 596. In the same vein the United Nations Declaration on the Principles of International Law

towards creating norms and spaces of human flourishing and human rights protection—both for the strong and the ostensibly weak, the young and the old; the mighty and the seemingly lowly.

Our effort to humanize the encounter between systems, peoples, communities, individuals, traditions, and civilizations is also punctuated at several junctures by the deliberate *othering* of certain groups, persons, systems, and communities. The idea of the *other*, *otherness*, or *othering* has been reckoned with in literature in philosophy, social sciences, and the humanities generally. However, there is a more circumscribed use of other/otherness/othering in law. Hence in this essay, it is used to mean those communities that have historically been excluded politically, socially, or otherwise because they are considered different from the rest of the community. Their categorization as different leads to a devaluation of their personhood or notions of humanity—individually, and as collectives. The *other could be the racialized other, it could also be the “third world other”* or such other othered category of groups, and communities around the world. In any case, any category of *othering* that is chosen always involves the indigenous communities. In a sense indigenous communities are quintessentially othered communities and groups in the structures, systems and mechanisms we operate in our societies. This otherness or othering of indigenous communities has ramifications for healthcare access, education, access to justice, labor rights, property rights, and the general human dignity of indigenous peoples.

Often, the fate of the individual devalued by othering, is also tied to the devaluation of the othered group, to which she belongs. In that regard, an individual indigenous woman is othered, and readily subject to violence, because she belongs to a group or community that is also devalued. There is a reinforcement of devaluation horizontally and vertically. Vertically, the individual is devalued in terms of her intrinsic worth and dignity. Horizontality, she is also devalued because in relationship to other communities, her community is not guaranteed equal measure of recognition and human dignity. This determination as different and consequent exclusion can be based on racial difference, religious difference, cultural difference, and such other foundations. The differences need not be real in terms of human constitution, rather they can be developed to serve the purpose of the dominant foundations in society. The othered are therefore the excluded or, in

Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations also expresses the necessity of peaceable relations amongst states. Hence its articulation of the point that:

the peoples of the United Nations are determined to practice tolerance and live together in peace with one another as good neighbors bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic, and social systems or the levels of their development.

See generally the Preamble to the United Nations Declarations on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations. U.N. Res 2625, art. XXV, A/8147 (Nov. 12, 1970).

the minimum, they are downgraded. *Otherring* is therefore a categorical antithesis of equal humanity.¹⁴

In these regards, many communities have historically been subjects of *othering* and this has served the purpose of the structurally dominant systems. Its manifestations have been seen in the dehumanization and exploitation of these communities over time. However, indigenous communities appear to be one constant in the othering structures that we have seen overtime. Hence, this Essay sees indigenous communities as a significant subset of othered communities around the world. Downgraded, excluded, and exoticized, indigenous communities face stiff human rights challenges in many of our communities today. Thus, this Essay's focus on shaping the principles for improving our encounter with indigenous communities is aimed at energizing the rights of indigenous communities. By doing so, the indigenous rights recognized, and proclaimed in our declarations, conventions, and treaties will not continue to be cold comfort to these communities. It is also important because, although many of these communities have been fighting to restore their rights for centuries and generations, their rights are often still treated as exotic. The contempt towards indigenous peoples is ever present—even in judicial reviews.¹⁵ Hence, indigenous and othered communities remain on the frontiers of the quest for human rights for all. It is even more imperative considering the devastating impact of climate change, and the intractable issues of environmental justice which are entangled with the struggles of these communities. Our current dilemmas about historical injustice questions, healing, and peace will remain intractable until we are able to bring the balm of deliberate policy and legal engagement to the full realization of the rights of indigenous peoples.

Be that as it may, it suffices to note that *othering* in law has served two strong purposes—especially in the hands of the more powerful partners in the encounter of human species across the ages. First, *othering* is a useful tool for reifying difference and consequent indifference. By this, I mean that those that instigate *othering* utilize it to show that the *othered* are different and therefore excluded either from the fulfilling activities in the public sphere, or even to be part of the said community. Often, it may seem that othering is natural—organically developed issue in our communities. This may well be so in some cases, but it is interesting to consider how law enshrines othering as a state policy. For instance, until the *apartheid* laws were enacted in South Africa, differences and exclusion were not very hopeless. However, with the enactment of apartheid laws, these differences were given the imprimatur of the state. They also became acute and gave law

¹⁴ One of the functions of legal language is to invent things—such as legal personality and legal concepts. Such legal concepts can mean a lot in terms of who gets access to the resources available in the community. GUNNAR FOLKE SCHUPPERT, A GLOBAL HISTORY OF IDEAS IN THE LANGUAGE OF LAW 85-94 (Thomas Duve & Stefan Vogenauer eds., 2021). (identifying five basic functions of the language of Law: (A) the language of law as the language of discourses on the legitimacy of political authority; (B) the language of Law as the language of political change; (C) the language of law as the language of rights; (D) the language of law as the language of justice; (E) the language of law as the language of the new global order.

¹⁵ *Re Southern Rhodesia Case AC* (1919); *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 543 (1823); Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF L. REV. 637 (1978); Kent McNeil, *The Vulnerability of Indigenous Land Rights in Australia and Canada*, 42 OSGOODE HALL L.J. 2, 271-301 (2004); *Wilson v. Anderson*, 190 A.L.R. 313 (2002); David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159-181 (1994).

enforcement the cover to do violence to Black communities. Having been so set aside by law, it becomes easy to target the *othered* community for violence—either through warfare, forced removal and expropriation, vagrancy laws, starvation, or (in extreme cases) extermination.¹⁶

Even when the *othered* communities are not directly targeted, they may have been unwittingly put into perilous conditions which will ultimately diminish or extinguish their capacity for dignified human existence or flourishing. For instance, the Nazi ideology/policy of extermination of people of Jewish origins and backgrounds depended a lot on the ‘othering’ of the community and subsequent indifference to what fate befell them. The colonial visualization of colonized peoples as less, meant that they could starve to death while their resources and food produced through their exploited labor was exported to sustain wealth and society elsewhere. Colonial policies such basic issues as food, education, and health, often were indifferent to the best interest of the colonized.¹⁷ In the same manner, the enslavement of people of African origins and backgrounds, drew a lot of inspiration from the idea that there is something perceived to be inherently different and therefore inferior between Blacks and other peoples—especially peoples of European origins. Thus, epistemically, the violence began from the moment of conception of that idea of difference and inferiority. Such epistemologies are worthy of deep scholarly interrogation. Having been so construed, categorized, and othered, it became easy to move to the next level which is concentration camps as in the case of Jewish peoples and enslavement as in Blacks. It could also be policy induced famine as in the Indian colonial experience. Those who could not be enslaved have to be colonized. *Othering* therefore has the capacity of sealing off the human conscience and allow for the vilest violations of human rights in any encounter between peoples from different parts of the world. At the individual level, it robs those othered the sense of belonging in community with others. It also encourages violence against the *othered* because they have been devalued or rendered worthless by the othering structures in society. Hence, the violations can happen for decades and even centuries as in the case of the extermination of indigenous peoples, slavery, and colonialism. Temporally, othering can also produce large scale violence within a short space of time as in the case of the Holocaust and the genocides we have seen in Namibia, Rwanda, and in the Balkans.¹⁸ It can also produce displacements which makes the existence of the targeted group seem to have only began yesterday. The erasure this produces in like a ground zero for many of these communities. Thus, they are displaced from history, identity, and times. The legacies of these violations are still with us and are significant to the current anxieties we face in our search for global peace, security, sustainable development, and inclusive prosperity.

¹⁶ Using property as the standpoint of interrogation, Cheryl I. Harris, has explored “the relationships between [legalized] concepts of race and property and [reflected] on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present.” [*S*]ee Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707-1719, at 1714 (1993).

¹⁷ D. M. Braa, *The Great Potato Famine and the Transformation of Irish Peasant Society*, 61 *Science & Society*, (2), 193–215 (1997) (highlighting how colonial policy contributed to the Irish famine and subsequent devastating impact on the society).

¹⁸ Rachel Anderson, *Redressing Colonial Genocide Under International Law: The Herero’s Cause of Action Against Germany*, 93 Cal. L. Review 1155 (2005).

Second, ‘othering’ provides legal and moral legitimacy to violent actions against communities and peoples so othered. The categorization of indigenous communities as different and subject to civilization, means also that they are legally or legitimately excluded from enjoying the same rights as every other person or community in this whole advancement of humanity. Thus, othering insulates the state and public apparatus by marking the othered group a legitimate target. Hence, those who target them are now “merely following the law and the rules.” It is legal. It is justified. It brings no liability—neither in civil nor criminal law. For instance, othering Blacks made it justified to classify them as property. Having been so classified, it became legitimate to sell, resell, convey, mortgage, put a lien on them and generally advertise them as chattels as would any other property under the law. In the same vein *othering* indigenous communities made them easy prey to evictions and forced expropriations. In a sense, othering these communities made it legitimate to deny them of any proprietary rights worthy of recognition by the law. Often the law in question was the law as conceived and applied by colonizing authorities. Othering therefore withdraws the cloak of rights, that we are all imbued with as human beings. It peels off the veil of humanity from the othered. Essentially, othering lays communities so othered bare and vulnerable since the shield of humanity over them has been ripped free from their bodies. So, while the journey of human advancement has not been all linear or even circular, there has always been some shift from the primal principles and foundations, as humanity searches for dignity and intrinsic worth for all human beings and societies. The effort as I see it has been to make our human encounter at different levels and communities less violent and more humane. Yet, in that movement—as we can see depicted in many historical texts—it is clear that many cataclysms have occurred and sometimes whipped away communities and sections of humanity. The cataclysms are even more gory and dehumanizing when it is wrought by one human community against another. Sometimes these violations have been justified on grounds of supremacy of one and inferiority of another. At other times, they have been hinged on the responsibility to civilize. Hence, the evident efforts in our time to restore human dignity and provide protections against human rights cataclysms such as the ones we saw in the World War II—including the Holocaust and the use of Nuclear Weapons in Hiroshima and Nagasaki.

Before the post-World II era, conventions and treaties of international law were little less than miserable comforts to indigenous communities and other ‘othered’ communities around the world. For these communities, no agreement entered into between them, and othered peoples meant anything in terms of real protections from violations and sometimes a scorched earth annihilation. In other words, they were consistently exposed to violations without any human rights protections on any grounds. Treaties signed with indigenous communities were grossly unequal and did not stop the dominant powers from exercising plenary powers over the rights of these indigenous communities. In essence, the dominant powers can select and deselect what treaties to accord full faith and credit depending on the exigencies of the time and shifting interests. Congress can recognize and derecognize tribal groups at will. Congress can pronounce on the rights of Indian communities and judicial review will defer to that pronouncement.¹⁹

¹⁹ See Hillary M. Hoffman, *Congressional Plenary Power and Indigenous Environmental Federalism*, 97 OR. L. REV. 353-396 at 354 (2019) (Hillary highlights how the Congressional Plenary Powers Doctrine has been bolstered overtime by deferential judicial review and how that has in turn been used by the state. “Congress has used the Plenary Powers to override Supreme Court decision, abrogate treaties negotiated by the executive branch, terminate federal recognition of previously recognized tribes, divest tribes of vast

Thus, they were either colonized, enslaved, or ghettoized in segregated spaces around the world. Their civilizations meant nothing, and their flourishing was neither encouraged nor prioritized. The end of the World War II did not settle all the problems, but it provided an opportunity for the development of a new set of norms and values that could enhance the equal recognition and respect of the rights of all peoples—indigenous, othered or otherwise. It is worthy of thoughtful deliberation as to whether we have to always rely on the contingency of wars and vast human rights violations to improve our human rights protection instrumentalities. Be that as it may, the disposition towards ensuring that human rights catastrophes do not become a common occurrence in society has yielded an array of treaties, covenants, declarations, conventions and norms on human rights accruing to all human beings notwithstanding their loci or state of physical development in the world—including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights. Yet, the violations of the rights of indigenous and othered communities has remained the last to be properly reckoned with in our drive for development and other policy interventions that make a 21st century international society. This neglect is equally evident in our national and state policies and legal ordering. Hence, the motivation in this Essay is to inspire a wholistic review of our approaches to the rights of indigenous communities so that our human rights instruments do not remain miserable comforts but are translated into concrete protections for the rights of indigenous/othered communities. Thus, in this Essay, I intervene on how we can enliven these proclamations/commitments—through declarations, conventions, and development goals—to the best interest of indigenous peoples. I propose a ten-point approach that we can utilize as principles applicable to different situations, all aimed at overcoming the institutional and legal inertia towards the protection, promotion, and respect for the rights of indigenous communities. While the list may not be exhaustive, it contributes to the effort towards finding sustainable pathways for supporting and promoting the rights of indigenous communities. It is time to do this in light of the current global challenges, and the need to do the best possible good by all peoples of the world.

The Essay has five parts. Part I, the introduction, has set out the background and foundational issues for the entire discourse. It highlights the re-emergence of the rights of indigenous peoples both in the normative, historical, and functional evolution of international law. Beyond the older tradition of condescension, downgrading, and civilizational imperatives of international law, the new shift in the history of international law and the human rights of indigenous people, in particular, seeks to reassert and restore the inalienable rights and agency of indigenous peoples. Perhaps, one way of putting it is to say that it is a reclamation of the agency of these communities in the overall interest of humankind. It is imperative to ensure that the re-recognition of the rights of indigenous and othered communities does provide concrete protections. Else, international human rights will become another superficial canopy for these communities since, they cannot effectively find shelter under it in real situations of human rights violations.

holdings in violations of treaty agreements, and involuntarily incorporate numerous indigenous nation-states, such as the kingdom of Hawaii, into the United States”).

In Part II, the Essay emphasizes some of the treaties, covenants, conventions, and declarations that have significance for the recognition, respect, protection, and promotion of the rights of indigenous communities. The aim is to show that there is rather a large set of instruments through which we can provide shelter for the rights of indigenous, and historically othered societies.

Part III will further show the limits of liberal approaches to rights and the need to complicate that approach. One limitation of the liberal approach to human rights is the over individualization of rights and the bifurcation of civil and political rights. Thus, individualization limits the possibilities of robust policy interventions to concretize the rights of indigenous communities. For instance, it looks at individual injuries, individual responsibilities, and individual claims. These can be reductive when we consider that many indigenous communities enjoy many of their rights in common. They also define their world views in being with others. The bifurcation emphasizes such rights as freedom of expression, freedom of conscience and religion and right to participate in election processes. However, other rights such as right to healthy living environment, right to food, right to shelter—generally categorized as socioeconomic rights—are treated with ambivalence which does not elevate the dignity of indigenous peoples nor give them the enabling opportunities to explore their capabilities. It suggests that CRT and TWAIL frameworks are useful in analyzing how best we can enhance the humanity of indigenous peoples by changing the paradigms that have been used to subordinate them over time.

Part IV looks at the suggested ten principles for the protection and promotion of the rights of indigenous peoples in ways that are beneficial for international law and human rights.²⁰ This modest proposal is critical to our current search for meaningful ways of pursuing inclusive development. It renews the values and commitments which has been made in national, regional, and international instruments to guarantee the fundamental rights by all human persons. It draws generously from the literature on international human rights, environmental resilience, climate change adaptation, disaster management, and international legal theory to make a case for the adoption of these principles as the irreducible minimum for human rights policy in our communities. In particular, it seeks to center indigenous communities in the dialogue of human rights and inclusive development in the 21st century.

Thus, it contributes to the effort at unpacking the paradigms of law and policy which have often decentered the rights, needs, and personhood of indigenous peoples. It draws attention to the fact that policy approaches have far-reaching consequences for the human rights of indigenous peoples. Hence, human rights proclamations without due policy commitments are ‘miserable comforts’ to indigenous communities.²¹ This is why it is imperative to articulate this modest

²⁰ For general readings on the rights of indigenous peoples, *see* JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* (Sarah Pritchard ed., 1998); *INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS—1993 AND AFTER* (Eyassu Gayim & Kristian Myntti eds., 1995); *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* (Joshua Castellino & Niamh Walsh eds., 2005); *DAVID MAYBURY-LEWIS, INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE* (2d ed. 2002); ANNA MEIJKNECHT, *TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2001); CYNTHIA PRICE COHEN, *THE HUMAN RIGHTS OF INDIGENOUS PEOPLES* (1998).

²¹ “I have heard of many such things; miserable comforters are you all,” *Job* 16:2 (New King James).

proposal about how we can weave the recognition, respect, and promotion of the rights of indigenous communities into the fabric of our daily policy priorities. This is important because it is in the execution of policies that we see some of the concrete implications of law in society. While the law grants powers and delineates authorities, policies realize the goals of law or in some cases frustrate these goals. For instance, equality before the law means nothing if there is no real capacity—socially and economically—to take advantage of the normative equality. In such a situation, equality before the law becomes a convenient utopia, while human indignity and inequality thrives. So, we must step-down the human rights claims from the remote heights of normativity, into the common arena of our daily activity and encounter as human societies. Therefore, the human rights protection of minorities such as indigenous peoples should not be left to the efforts of these communities. This argument is reinforced by the fact that these minority communities may lack the tools, including the capital, and public voice, to bring about transformative human rights regimes.

Part V concludes the discourse. It is hoped that this adds to the rich and ongoing works of experts and policy makers in the field to retool our instruments and institutions in ways that are responsive to the rights of indigenous and othered communities, because they too, are co-owners of the Earth.

I. THE SHELTER OF HUMAN RIGHTS CONVENTIONS AND TREATIES

Any human advancement that is not rooted in the recognition of the inherent humanity of all peoples is an inherently violent approach and idea of progress. Having realized that the recognition and respect for the humanity and intrinsic worth of all peoples is indispensable to global peace, security, and development, efforts have been made over time to create common and specific shelters of human rights. These serve as irreducible standards of the human encounter and advancement. They are the vocabulary of human engagement, and they are the vehicles for transmitting these rights across spaces and times. Yet the duty to make these shelters concrete bulwarks against human rights violations is still an unfinished business—particularly with respect to our indigenous/othered communities. This segment highlights many of the human rights instruments and argues that these instruments are ultimately aimed at providing real refuge against human rights violations—particularly for indigenous and historically *othered* communities. These communities have often made efforts to pursue their human rights with mixed results.

First, the Universal Declaration of Human Rights (UDHR) recognizes the inherent worth of every human person and other fundamental freedoms.²² These rights are deemed accruable to

²² See the Universal Declaration of Human Rights [hereinafter UDHR] *G.A. Res. 217A, UNGA Doc A/810* (Dec. 12, 1948). Article 1, of the UDHR recognizes that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.” For an overview of the UDHR see generally, Ş. İlgü Özler, *The Universal Declaration of Human Rights at Seventy: Progress and Challenges*, 32 *ETHICS & INT’L AFF.* 395–406 (2018); Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it still Right for the United States*, 41 *CORNELL INT’L L.J.* 2, 251-305 (2008); Mary Ann Glendon, *The Rule of Law in The Universal Declaration of Human Rights*, 2 *Nw. U. J. INT’L HUM. RTS.* 5, 35 (2004); Mary Ann Glendon, *Knowing the Universal*

all human persons, without distinction regarding race, religion, region, ethnicity, or other backgrounds.²³ The UDHR in a sense, articulates the expressed hopes and aspirations of the international community, as captured in the United Nations (UN) Charter.²⁴ The UDHR is also an expression of humanity's faith in a new legal order, rising from the ruins of World War II. The new rule based international order aimed to ensure the non-repetition of the human rights catastrophes which had 'affronted the human conscience' before 1945.²⁵ In a way, the UDHR adjusted the lens of the global community towards viewing human beings everywhere, as human, with equal and inalienable rights and dignity.²⁶ No people are to be considered less in this new

Declaration of Human Rights, 73 NOTRE DAME L. REV. 1153 (1998) (the author provides an overview of the UDHR while describing it as "the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today"); ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (Cambridge Univ. Press ed., 2016).

²³ UDHR supra note 20, art. 6.

²⁴ See U.N. Charter Preamble, ¶ 1, the preamble to the UN Charter which provides that the determination for the establishment of the United Nations is founded on the need:

to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human right, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom";

See U.N. Charter art. 1, ¶ 1. More precisely Article 1 of the UN Charter provides that the purposes of the UN amongst other things includes:

to maintain international peace and security, and to that end; to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to the breach of peace; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

²⁵ The New World Legal Order after 1945 was seen by many scholars as a legal order that guarantees peace and freedoms. One of the primary reasons for this disposition was the belief that such a system will protect human rights and secure global peace and security. Hence, the consideration that the rapid expansion of international human rights is a prominent accomplishment of the post-world war II era. See generally, Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH AND HUM. RTS. 144-158 (1998); John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527-541 (1976).

²⁶ The inalienability of Human Rights of all peoples in international law has today become universally acknowledged. *Article 1 (2)* of the UN Charter acknowledges the "principle of equal rights and self-determination of [all peoples]." See U.N. Charter art. 1, ¶ 1-2. *Article 1(3)* of the Charter expresses the need for cooperation of members states in solving international problems in all aspects of public life including

scheme, hence the prohibition of force as a primary means of resolving disputes in international law.²⁷ The post-1945 order, while recognizing the potential difficulties that could arise from

economic, social, cultural, and humanitarian spheres without distinction as to race, sex, language or religion. *See* U.N. Charter art. 1, ¶ 3. Although the literature of equality has also expanded over the years, the existence of colonies, colonized peoples and non-self-governing territories at the time of the UDHR in 1948, illustrated an unequal world and peoples. However, the idea of human rights as applicable to all peoples precedes the UDHR. *See generally*, A. Cançado Trindade, “*International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part I*”, 316 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE (2005) (Exploring the legal origins of humanity’s law, jus cogens, and how it relates to international human rights); Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 3, 491- 508(2008) < doi: 10.1093/ejil/chn026 > (expressing the view that there is almost an intrinsic relationship between peremptory norms and human rights); B. Simma, P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUST. Y.B. INT’L L. 82 (1988-1989);

The idea that it belongs to the noble obligation of conquering powers to treat indigenous peoples of conquered territories and to promote their well-being has existed for many hundred years, at least since the era of Vitoria. But we had to wait for the Treaty of Peace with Germany, signed at Versailles in 1919, and the creation of the League of Nations for this idea to take the concrete form of an international institution, namely the mandates system, and to be realized by a large and complicated machinery of implementation. After the dissolution of the league, the same idea and principles have been continued in the “International Trusteeship System” in the Charter of the United Nations.

See South West Africa Case (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6 (July 1966) (dissenting opinion by Judge Tanaka). Though the idea of rights of the indigenous peoples was founded on what is referred as the sacred trust civilization, it is clear that the idea of indigenous peoples having rights arising from universal humanity, worthy of protection even by conquering powers, has a longer and deeper provenance than the Universal Declaration of Human Rights 1948. *See generally*, G. C. Marks, *Indigenous Peoples in International Law: The Significance of the Francisco De Vitoria and Bartolome De Las Casas*, 2 AUST. Y.B. INT’L L. 1-52 (1992); Nancy C. Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, 17 DENV. J. INT’L L. & POL’Y 373 (1989). Many a time, the rights of indigenous peoples in international law are justified as arising from natural law and general ethical foundations. This is because, the sovereignty/Westphalian foundations of relations amongst states have often focused on positive sources of law such as treaties, agreements, and parchments. Thus, these rights arise from foundations that transcend legal positivism. More so, Kennedy argues that there is also a conception of law by “primitives” which is integral as opposed to the classic conception of law as municipal and international. Thus, he argues that “the primitive text envisions a single law which binds sovereigns and citizens alike” unlike the canon in traditional international law scholarship which tends to “distinguish sharply” between two areas of legal competence—municipal and international. *See* David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1, 1-99 (1986).

²⁷ The prohibition of the use of force as a primary means of dispute resolution in international law is central to the UN’s policy. *See* U.N. Charter art. 2, ¶ 4, “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” *See generally*, IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7-38

unregulated (zero-sum) competition amongst states and peoples, therefore sets out a full measure of peaceful methods for dispute resolution amongst states in Chapter VI of the Charter of the United Nations.²⁸ It equally provided for collective security under the Charter.²⁹ Chapter VII of the UN Charter was also put in place to ensure that the coercive powers of the United Nations is judiciously utilized because its misuse can upend the rights of members of the international community from enjoying the freedoms articulated in the UN Charter, and the UDHR. Beyond the UDHR, other international law instruments—especially human rights instruments—have also emerged since 1949, intending to consolidate the human rights gains and goals in the post-World War II era. Prominent amongst these instruments are the International Covenant on Civil and Political Rights (ICCPR),³⁰ the International Covenant on Economic, Social and Cultural Rights

(2003). Mr. Greenwood argued in favor of preemptive use of force by states, though he acknowledged the provisions of article 2(4) of the UN Charter. In his view:

the following conclusions seem warranted: (1) All States have the right of self-defense against an armed attack, actual or imminent; (2) There is, however, no right to take military action in self-defense against a threat that is not imminent; (3) In determining whether an attack is imminent, the gravity of the threat and the means by which it would materialize in violence are relevant considerations and mean that the concept of imminence will vary from case to case; (4) The Security Council can authorize States to use pre-emptive military force against a threat to the peace in circumstances where an attack is not yet imminent; (5) The scope for pre-emptive action under the collective security regime is therefore more extensive than under the right of self-defense; (6) Neither the right of self-defense nor the collective security regime is confined to threats emanating from States.

In recent years, Professor Greenwood has been criticized for his opinion and advice to the British Government on the use of force in the days before the Iraqi invasion in 2003. *See* Owen Bowcott, *No British judge on world court for first time in its 71-year history*, THE GUARDIAN, (Nov. 20, 2017); For general views on the use of force in international law exploring the prohibition of use of force as a primary recourse for settlement of international disputes vis-à-vis the right to self-defense under article 51 of the UN Charter. *See* Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473-492 (1997); MARC WELLER ET AL, THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (2015); Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, AM. SOC'Y INT'L L. 1-21 (2002).

²⁸ On the UN and the peaceful settlement of disputes in international law, see generally, DONALD R ROTHWELL ET AL., THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES, IN INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES 759–816 (2018); Ian Brownlie, *The Peaceful Settlement of International Disputes in Practice*, 7 PACE INT'L L. REV. 257-279 (1995); Steven R. Ratner, *Image and Reality in the UN's Peaceful Settlement of Disputes*, 6 EUR J. INT'L L. 426-444 (1995).

²⁹ Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783–796 (1948); Stephen M. De Luca, *The Gulf Crisis and Collective Security under the United Nations Charter*, 3 PACE Y.B. INT'L L. 267 (1991).

³⁰ G.A. Res. 2200A (XXI) The International Covenant on Civil and Political Rights 171 (Dec. 16, 1996); The International Covenant on Civil and Political Rights 407 (process-verbal of rectification of the authentic Spanish text); entry into force 23 March 1976, No 14668 (opened for signature at New York on 19 December 1966); *See generally*, Kristen D. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger*, 26 N.C. J. INT'L L. 1 (2000); David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95 (2013); Matthew Lippman, *Human Rights*

Revisited: The protection of human rights under the international Covenant on Civil and Political Rights, 26 NETH. INT'L L. REV., 221–277 (1979); Geping Rao, *The Application of the International Covenant on Civil and Political Rights to Hong Kong*, 2 PAC. RIM L. & POL'Y J. 9 (1993). <https://digitalcommons.law.uw.edu/wilj/vol2/iss1/4>; SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* (OUP 2013); Beth Simmons, *Civil rights in international law: Compliance with aspects of the “International Bill of Rights”* 16 IND. J. OF GLOB. LEGAL STUD. 2, 437-481(2009).

(ICESCR),³¹ the International Convention Against all forms of Racial Discrimination (ICARD),³² the Genocide Convention,³³ and the Convention Against Torture (CAT),³⁴ the Geneva

³¹ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 1, 190-247 (2012); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC); MALCOLM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Cambridge Univ. Press ed., 2008); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Princeton Univ. Press ed., 2008); Frank I. Michelman & Robert Walmsley, *Socioeconomic rights in constitutional law: Explaining America away*, 6 INT'L J. CONST. L. 663-686 (2008); Matthew C.R. Craven, *The Domestic Application of the International Covenant on Economic, Social and Cultural Rights*, 40 NETH. INT'L L. REV. 367-404 (1993).

³² G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (4 Jan. 1969); Gay McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Audio Visual Library, https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf (the author argues that: "The prohibition against racial discrimination is fundamental and deeply entrenched in international law. It has been recognized as having the exceptional character of *jus cogens* which creates obligations *erga omnes*, an obligation from which no derogation is acceptable. The [ICERD] is the centerpiece of the international regime for the protection and enforcement of the right against racial discrimination"). See generally, Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in nationality Laws: A Doctrinal Blind Spot of International Law*, 11 COLUM. J. RACE & L., 1, 83-146 (2021) (highlighting the gap in the scholarship of racial discrimination especially as it relates to article 1(3) of the ICERD); David Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20 HUMAN RIGHTS L. REV. at 236 (2020); Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford Univ. Press, 2016; Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. OF INT'L L., 2, 283-318 (1985); Bruno V. Bitker, *The International Treaty Against Racial Discrimination*, 53 MARQ. L. REV. 68 (1970). For judicial deliberations on ICERD especially as it relates to 'nationality' see generally, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Preliminary Opinions, Judgment, I.C.J. Reports 2021 (Feb. 4). The subject of nationality can impact indigenous communities significantly especially for those indigenous communities whose daily living entails traversing established sovereign boundaries. These boundaries that are often the outcome of colonial policies, often did not consider the tribal affiliation of groups living in those territories prior to colonial parcellation of territories, and delimitation of boundaries. For instance, the Maasai in East Africa are today found in parts of Kenya and Tanzania due to the existing colonial borders. See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (Achiume pursues a thesis about decolonizing migration. The thesis interrogates the prevailing notions of sovereignty based often on colonial boundaries, because it excludes and discriminates against strangers. This is especially so for economic migrants who are sometimes subjected to xenophobia, and this includes indigenous communities).

³³ *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 78 U.N.T.S. 277 (defining genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily harm or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group"). Too many times, indigenous communities have been subjected to genocidal violence. For more on genocide, indigenous rights and measures towards combatting genocide, see Norimitsu Onishi & Melissa Eddy, *A Forgotten Genocide: What Germany Did in Namibia, and What It's Saying Now*, N.Y. TIMES (May 29,

2021); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE 4, 387-409(2006) <DOI: 10.1080/14623520601056240> (arguing that elimination is part of the logic of settler colonialism, although genocide has also been seen in other non-colonial situations); Bonnie St. Charles, *You're on native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings*, 21 CHI. J. INT'L L. 1, 229-262(2020); David Lisson, *Defining "National Group" in the Genocide Convention: A Case Study of Timor Leste*, 60 STAN. L. REV. 1459-1496 (2008); Benjamin Madley, *Patterns of Frontier Genocide 1803-1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia*, 6 J. GENOCIDE RSCH. 2, 167-192 (2004); David Alonzo-Maizlish, *In Whole or in Part: Group Rights, the Intent Element of genocide, and the "Quantitative Criterion."* 77 N.Y.U. L. REV. 5; 1370-1403 (2002); Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L COMP. L. 415, 423-424 (1998); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (Highlighting the role of rape as an instrumentality of genocide. Though the Akayesu doctrine on rape as an instrument/aspect of genocide is established in a post-war situation in Rwanda, the lessons are useful when understanding the impact of rape of indigenous women on their wellbeing and potential capacity to bear children and thus sustain the existence of the tribal group); Myres S. McDougal and Richard Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683-710 (1950).

³⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Reg. No. 24841, 1465 U.N.T.S 85; Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275 (1994). In a recent effort to facilitate national healing Australia made a public apology to indigenous peoples for: "the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country...for the pain, suffering and hurt of these stolen generation, their descendants and for their families left behind, we say sorry." See Tim Johnston, *Australia Says 'Sorry' to Aborigines for Mistreatment*, N. Y. TIMES (Feb. 13, 2008), <https://www.nytimes.com/2008/02/13/world/asia/13aborigine.html>; Hans Danelius, *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UN AUDIOVISUAL LIB. OF INT'L L. (2008); THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY (Manfred Nowak et al. eds., 2nd ed. 2019). Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U. L. REV. 837 (2007). Particularly significant in the field is the exposure of minorities such as refugees, indigenous groups, and immigrants to torture. This has been found to be a significant issue in the outsourcing of immigration detention to third states at the instance of powerful states and regional groups such as Australia, and the European Union. Immigrant detentions affect a lot of indigenous peoples and their children.

Conventions on Laws of Warfare.³⁵ Others are the protocols to the Geneva Conventions on Laws of Warfare,³⁶ the Convention on the Rights of the Child (CRC),³⁷ the Convention on Elimination

³⁵ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316. One area that implicates the rights of indigenous populations in times of war is usually the disruption of means of livelihood, environmental pollutions, and sometimes displacement/disappearance of populations. This can work a lot of hardship or indeed lead to devastation of indigenous populations. Historically indigenous communities have sometimes been forced from their homesteads into situations of starvation and death. With the Namibian case, the indigenous populations were pushed into the arid regions of the country, and this is known to have caused deaths in genocidal proportions. In recent years Germany has been making efforts to offer some remediation for this crime. *See generally* Rachel Anderson, *Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany*, 93 CAL. L. REV. 1155 (2005); Lynn Berat, *Genocide: The Namibian Case against Germany*, 5 PACE INT'L L. REV. 165 (1993).

³⁶ The reformation of the laws of warfare through the additional protocols to the Geneva Conventions, and conventions banning the use of chemical weapons and anti-personnel landmines, have added to the effort to mitigate the impact of war on civilian populations. This also affects indigenous communities many of whom depend on fishing, farming, and hunting grounds for their daily supply of food and livelihoods in general. *See generally*, Protocols I and II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Alicia H. Petracca, *An Impetus of Human Wreckage?: The 1996 Landmine Protocol*, 27 CAL. W. INT'L L.J. 1, 205-239 (1996) (highlighting how landmines are frequently used by insurgents and this negatively affects indigenous peoples or peacekeepers); *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction*, of 18 September 1997; Rachel Good, *Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty*, 9 Nw. J. Int'l Hum. Rts. 209 (2011); Andrew C.S. Efav, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87, 89 (1999); M. Patrick Cottrell, *The Emergence of the Mine Ban Treaty: The Politics of Reconstruction*, in *The Evolution and Legitimacy of International Security Institutions* (2016); Michael Bothe, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On their Destruction*, United Nations Audiovisual Library of Int'l Law (2011); R. Trapp, *The Chemical Weapons Convention a decade after its entry into force: challenges and opportunities*, 52 JAPANESE Y.B. INT'L L. 127 (2009). It is worth noting that a compelling factor for the ban of these weapons is that they do not discriminate between combatants and civilians and have capacities to create enduring impact on human communities, animals, and the environment.

³⁷ U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 3 (entered into force on Sept. 2, 1990) [hereinafter CRC] (Children's rights have in the recent decades received strong institutional support. Despite cultural differences, the basic understanding that the best interest of the child, shall be the paramount consideration when taking steps and decisions that will affect the child enjoys significant global endorsement. However, it is important to recognize peculiar experience of indigenous children. Today 140 countries have either signed, ratified or acceded to the convention). For specific comments on the rights of indigenous children, *see generally* CRC, General Comment No. 11, CRC/C/11 (Feb. 12, 2009); CRC, art. 30 "in those states in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language." This aligns further with article 29 of CRC which emphasized education of the child in the spirit of understanding and tolerance and friendship among all peoples, ethnic, national and religious groups and persons. *See also* T. Libesman, *Can International Law Imagine the World of Indigenous Children?* 15 INT'L J. CHILD. RTS. 15(2), 283-309 (2007) <https://doi.org/10.1163/092755607X206524>; Maria Antonia Tigre, Victoria Lichet, *The CRC Decision in*

of all Forms of Discrimination Against Women (CEDAW).³⁸ There is also the 1970 United Nations Declaration of Friendly Relations, which articulates the rights of all peoples to self-determination.³⁹ The ILO Convention Concerning the Indigenous and Tribal Peoples in Independent Countries is also of a similar tenor with the recognition of the rights of indigenous peoples.⁴⁰ All these make affirmative commitments to protecting human rights—of all peoples—

Saachi v. Argentina, 25 AM. SOC'Y INT'L L. Insights 26, 1-7 (2021) (exploring the climate rights of indigenous children. The petition had asked for declaratory findings regarding the failure of Argentina, Brazil, France, Germany and Turkey to sufficiently address climate change as this affected the health of children. This was discountenanced on the grounds that there has not been an exhaustion of local remedies). Despite this failure some scholars believe it offers a new vista for strategic litigations on climate issues affecting children's rights. See Bridget Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, NORDIC J. HUM. RTS. 39:2, 180-203 (2021) , DOI: 10.1080/18918131.2021.1996002; Bridget Lewis, *The Potential of International Rights-Based Climate Litigation to Advance Human Rights Law and Climate Justice*, 9 GRIFFITH J.L. & HUM. DIGNITY 1-27 (2021); In recent times the experience of indigenous children with colonialism has come to the fore of deliberations and public dialogues for reconciliation, reparation, and just reckoning with historical injustices. See generally David B. MacDonald, *Canada's history wars; indigenous genocide and public memory in the United States, Australia and Canada*, 17 J. GENOCIDE RSCH 4, 411-431 (2015); Marcia A. Yablon-Zug, ICWA International: The Benefits and Dangers of Enacting ICWA Type Legislation in Non-U.S. Jurisdictions, 97 DENV. L. REV. 206-259 (2019).

³⁸ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (entered into force Dec. 3, 1981) [hereinafter CEDAW]; Rauna Kuokkanen, *Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights*, 34 HUM. RTS. Q., 225-250 (2012) (showing the intersection between gender and the right to self-determination of indigenous communities. The author argues that “most studies present the project of indigenous self-determination as a phenomenon outside of gendered political structures and relations of power or processes of gendering in society in general); see also generally, Grazia Redolfi, Nikoletta Pikramenou, Rosario Grimá Algora, *Raising Indigenous Women's Voices for Equal Rights and Self-Determination*, 31 NEW ENG. J. OF PUB. POL'Y 2 , 1-16 (2019); Christine Chinkin, Keina Yoshida, *40 Years of the Convention on the Elimination of All Forms of Discrimination Against Women*, LSE Ctr. for Women Peace and Sec. (2020) <http://eprints.lse.ac.uk/110306/1/Chinkin_40_years_of_the_convention_published.pdf>; John Borrows, *Aboriginal and Treaty Rights and Violence against Women*, 50 OSGOODE HALL L.J. 699-736 (2013); Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada*, AMNESTY INT'L (2009).

³⁹ G.A. Res. 2525 (XXV) The UN Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

⁴⁰ See generally I.L.O. Convention No. 169, Indigenous and Tribal Peoples Convention (Jun. 27, 1989); I.L.O. Convention No. 107, Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 328 U.N.T.S. 247 (1957) (the ILO 107 was path breaking in the contemporary era in that it sought to protect indigenous communities from exploitation. Article 2 of the Convention noted that: “(1) Governments shall have the primary responsibility for developing coordinated and systemic action for the protection of the populations concerned and their progressive integration into the life of their respective countries. Article 2(2) Such actions shall include measures for (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population; (b) promoting the social, economic and cultural development of these populations and raising their standard of living; (c) creating possibilities of national

even in times of war.⁴¹In the same vein, regional, subregional, and national instruments committed to ensuring equal humanity, respect, protection, and promotion of human rights have been enacted.⁴² Some of them are the Inter-American Convention on Human Rights,⁴³ the European Convention on Human Rights,⁴⁴the African Charter on Human and Peoples' Rights,⁴⁵ and the ASEAN Declaration on Human Rights.⁴⁶

The United Nations has also moved forward from these commitments, through its organs and specialized agencies,⁴⁷ by establishing platforms for the continued recognition, respect,

integration to the exclusion of measures tending towards the artificial assimilation of these populations. 2(3) The Primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative. 2(4) Recourse to force or coercion as a means of promoting integration of these populations into the national community shall be excluded.”)

⁴¹ War does not end human rights obligations. Rather in war human rights needs and the duty of belligerents to respect the human rights of both combatants and non-combatants becomes amplified. Although this is studied more in the subfield of humanitarian law, it is argued that human rights and humanitarian law are all entangled in conflict situations. This is especially so when interpreting and applying the broad rules in Art. 3 of the Geneva Conventions (1949). *See generally* HUMANIZING THE LAWS OF WAR: THE RED CROSS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (Robin Geiß, Andreas Zimmermann, & Stefanie Haumer eds., 2017). Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT'L L., 1, 109–138 (2015); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 4, 741–767 (2005) <https://doi.org/10.1093/ejil/chi139>.

⁴² The inclusion of a bill of rights in the constitution is arguably one of the most enduring innovations in modern constitutional making. *See generally* William J. Brennan, *Why Have a Bill of Rights?* 26 VALPARAISO U. L. REV. 1, 1-19 (1991) (Justice William Brennan argued that the stipulation of a bill of rights in a constitution is one of the greatest guarantors to the respect for human rights and the preservation of public order. Accordingly, “the point of having a bill of rights supported by judicial review is not just to make lawmakers and citizens think. Its salient purpose is to remove certain rights from the daily joust of politic, to protect minorities—and we may well be in the minority at times—from the passions or fears of political majorities”).

⁴³ American Convention on Human Rights, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; G.A. Res. 2888 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples (June 15, 2016).

⁴⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5.

⁴⁵ Association of Southeast Asian Nations [ASEAN], *ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration* (Nov. 18, 2012), https://asean.org/wp-content/uploads/2021/01/6_AHRD_Booklet.pdf; *See generally* Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 HUM. RTS. L. REV. 557, 557-79 (2013), <https://doi.org/10.1093/hrlr/ngt016>.

⁴⁶ Organization of African Unity [OAU], *African (Banjul) Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981). The African Charter on Human and Peoples Rights, recognizes group rights side by side with individual rights. Thus, the definition of indigeneity is complex in Africa due to its complicated history of encounter, conquest, settlement and colonization. However, the African Charter and the rights expressed in it are not in conflict with the spirit of the UN Declaration on the Rights of Indigenous Peoples.

⁴⁷ Thomas Buergenthal, *International Human Rights and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1 (1988).

protection, and promotion of human rights. The United Nations Human Rights Commission⁴⁸ plays a crucial role in harnessing expertise, institutional platforms/networks, and resources for enunciating, advocating, and fostering the advancement of human rights. The periodic reports of country efforts in these respects are a significant way of ensuring accountability for human rights violations.⁴⁹ At the minimum, these periodic reports provide for a peer review of the activities of state parties to their obligations, to respect, protect, and promote human rights within their territories and other spheres of influence. Though there is often the need to do more to ensure state's compliance with international human rights standards, it is interesting to note that when states deny the violation of human rights in their reports, they are inherently affirming the human rights norms. The denial is a form of recognition, otherwise there would be no need to deny. For instance, if torture is a positive thing no state will deny using torture in law enforcement. Thus, lack of proof or the existence of non-compliant state behavior does not mean the non-existence of the human rights standards. The UN also engages experts to study, articulate, propose, and advocate for different human rights problems.

Therefore, whether the subject matter is human trafficking, disappearances, violence against women/gender-based violence, racial discrimination, or the responsibility of businesses for human rights violations, there is an array of activities and experts in the field working with the UN to fulfill its human rights protections and promotion. Through Special Rapporteurs⁵⁰—who are usually experts and publicists on different aspects of international human rights law—the UN and the UNHRC articulates positions and sets the agenda for global human rights pursuit.⁵¹

⁴⁸ INGRID NIFOSI, *THE U.N. SPECIAL PROCEDURES IN THE FIELD OF HUMAN RIGHTS* (Intersentia ed., 2005).

⁴⁹ In recent times, the United Nations Human Rights system has been criticized because of the limited accountability capacities it has brought to human rights violations—especially in the light of the crisis affecting the Rohingyas, and the Uighurs. Other criticisms have also been about the constitution of the Commission by countries with known difficult records of human rights protection. See generally Michelle Nichols, 'Systemic failure' of U.N. Ahead of Myanmar Military Crackdown: Review, ALJAZEERA (June 17, 2019); Hannah Ellis-Peterson and Emmanuel Stoakes, UN Report Condemns its Conduct in Myanmar as Systemic Failure, THE GUARDIAN (June 17, 2019, 1:22 PM), <https://www.theguardian.com/world/2019/jun/17/un-report-myanmar-rohingya-systemic-failure>.

⁵⁰ The UN Special rapporteurs and the advancement of the human rights policies of the UN is well noted in the literature. See Surya P. Subedi, et al., *The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms*, 15 INT'L J. HUM. RTS. 155, 155-161 (2011); Philip Alston, *Hobbling the Monitors: Should the UN Human Rights Monitors Be Accountable*, 52 HARVARD INT'L L.J. 563, 563-649 (2011) (overviewing the UN Special procedure for monitoring human rights mandates and some of the efforts by states to hobble the monitors).

⁵¹ The role of Special Rapporteurs in the quest for human rights protection is also part of the special procedures of the United Nation Human Rights system. See G.A. Res. 60/251 (Apr. 3, 2006); *Manual of Operations of the Special Procedures of the Human Rights Council* (Aug. 112008); Ted Piccone, *The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms*, 15 INT'L J. HUM. RTS. 2, 206-231(2011) DOI: 10.1080/13642987.2011.537467; Joanna Naples-Mitchell, *Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights*, 15 INT'L J. HUM. RTS. 2, 232-248 (2011) DOI: 10.1080/13642987.2011.537468.

In addition, the International Law Commission (ILC), also constituted of jurists/jurisconsults with expertise on different aspects of international law and representing different legal traditions, equally conducts studies and aims to enhance the codification of different aspects of international law—including international human rights.⁵² This complimentary institutional work of the ILC ultimately broadens the knowledge, appreciation, advocacy, and approaches to implementing human rights obligations. The ILC has in recent years made efforts to codify the responsibility of states, which has great significance in the field—especially on questions of human rights violations.⁵³ Sometimes, the Secretary-General acting on the recommendations of the UN General Assembly (UNGA) or the UN Security Council (UNSC) also sets up working groups to articulate and provide guidelines for implementing some human rights policies and obligations. Some of these policy documents have been critical to the renewed commitment of the global community to different problems touching on human rights, including peacekeeping and peace-building measures, transitional justice, the liability of UN personnel for violation of human rights of local populations, and more.⁵⁴ All these are significant when we also consider the efforts put into the adoption of conventions, charters, treaties, and declarations, on such diverse issues as climate change and the rights of indigenous peoples.⁵⁵

More so, the global commitment to the prevention of human rights violations of all peoples—especially those occurring in internal conflicts/civil wars—has led to the international expression of strong commitment(s) towards ending impunity. That commitment also prohibits aggression. “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.⁵⁶ One significant outcome of this strong commitment is the

⁵² See Yejoon Rim, *Reflections on the Role of the International Law Commission in Consideration of the Final Form of Its Work*, 10 ASIAN J. INT'L L. 23–37 (2020).

⁵³ The Work of the ILC on the responsibility of states to protect human rights and other subjects that have significant impact on human rights such as climate. This includes codification of international security and global peace, environment, criminal law, consular relations, and law of treaties in general. For more on the draft articles of the ILC see, James Crawford, *The ILC Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 4, 874-890 (2002); Rep. of Int'l Law Comm'n, *Draft Articles on the Law of Transboundary Aquifers, with Commentaries*, U.N. Doc. A/63/10 (2008); G.A. Res. Rep. of Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal*, U.N. Doc. A/1316 (1950). See also *Vienna Convention on Consular Relations*, 596 U.N.T.S. 261 (Apr. 24, 1963); *United Nations on the Law of the Sea*, 1833 U.N.T.S. 3 (Nov. 16, 1994).

⁵⁴ The Millennium Development Goals were aimed at enhancing the human condition by reducing global poverty. This has significance for all communities especially indigenous communities since they are sometimes at the last mile of social and economic policy interventions. See generally G.A. Res. A/55/L.2 (Sept. 18, 2000).

⁵⁵ For a general overview of the rights of indigenous peoples in international law, see S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward The Multicultural State*, 21 ARIZ. J. INT'L. COMPAR. L. 4-7 (2009); Helen Quane, *The Rights of Indigenous Peoples and the Development Process*, 27 HUM. RTS. Q. 652-82 (2005); Symposium, James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 191 HARV. INDIAN L. SYMP. 193-97 (1989).

⁵⁶ G.A. Res. 3314 (XXIX) (Dec. 14, 1974) (international law generally views any resort to force which violates the UN Charter as an aggression). See generally Mary Ellen O'Connell, Mirakmal Niyazmatov,

establishment of the International Criminal Court (ICC) under the Rome Statute.⁵⁷ The goal of the ICC is to prevent impunity under any guise. It responds to the cavity in international law regarding accountability for egregious violations of human rights, including genocide, crimes against humanity, and war crimes.⁵⁸ The ICC statute (the Rome Statute) recognizes that common bonds unite all peoples and that their cultures are pieced together in a shared heritage. The Rome statute equally expressed a concern that this delicate mosaic may be shattered at any time.⁵⁹ The ICC has an international legal personality⁶⁰ and is clothed with the jurisdiction to entertain such cases as

What is Aggression? Comparing Jus ad Bellum and the ICC Statute, 10 J. INT'L. CRIM. JUST. 189 (2012); Dapo Akande, Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, in THE CRIME OF AGGRESSION: A COMMENTARY 214–232 (Cambridge Univ. Press ed., 2016); Meagan S. Wong, *Aggression and State Responsibility at the International Criminal Court*, 70 INT'L COMP. L. Q. 961–990 (2021).

⁵⁷ Before the Rome Statute the international community had often relied on *ad hoc* tribunals such as those of Nuremberg, and Tokyo at the end of World War II; and Arusha, Sierra Leone, and Kosovo, in the 1990's as accountability mechanisms for egregious human rights violation during conflicts. Thus, international criminal law and accountability has grown consistently since the end of World War II despite the obstacles arising from political will, geopolitics, and the general reticence of some members of the security Council towards accountability. For more on the *ad hoc* tribunals and the expansion of international criminal law and jurisprudence, see MICHAEL P. SCHARF & MILENA STERIO, THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW: ASSESSING THE ICTY'S AND THE ICTR'S MOST SIGNIFICANT LEGAL ACCOMPLISHMENTS 1–8 (Milena Sterio & Michael Scharf eds., 2019); Winston P. Nagan, *International Law and the ad hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMPAR. INT'L. L. 127-65 (1995).

⁵⁸ Rosaria Vigorito, *The Evolution and Establishment of the International Criminal Court (ICC): A Selected Annotated Bibliography of Secondary Sources*, 30 INT'L J. LEGAL INFO., 92–162 (2002); Cherif M. Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 3, 443-469 (1999).

⁵⁹ Rome Statute of the International Criminal Court [hereinafter Rome Statute], Preamble, July 17, 1998, 2187 U.N.T.S. 3, ¶ 1. The Rome Statute of the ICC has 128 Articles dealing on different subjects aimed at ensuring accountability for the any violation of the human rights of all peoples—including indigenous communities. Such matters cognizable under the Rome statute are establishment, jurisdiction, general principles of law, composition of the court, investigation, and prosecution. Other are questions of procedure including trial, penalties, and sentencing, appeal processes, international cooperation, and judicial assistance, enforcement and membership of the court, financing and final clauses; The events in Ukraine in the last couple of days poignantly illustrates the delicate nature of these things. They also show how there is no winner if we chose the path of war. This is still unfolding but it shows in bold relief the extreme nature of abuse of power and the challenge it poses to humanity even now. *See generally Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures*, I.C.J. Press Release No.2022/4 (Feb. 27, 2022) (in its application, Ukraine contends, inter alia, that “the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’, and then declared and implemented a ‘special military operation’ against Ukraine”. Ukraine “emphatically denies” that such genocide has occurred and states that it submitted the Application “to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide”); Editorial, *The Guardian view on Putin’s War in Ukraine: Moscow’s on the losing side*, THE GUARDIAN, Mar. 7, 2022.

⁶⁰ Rome Statute, *supra* note 59, at art. 4.

genocide,⁶¹ crimes against humanity,⁶² and war crimes.⁶³ The statute also provides for the crime of aggression which is defined as:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.⁶⁴

⁶¹ Rome Statute, *supra* note 59, at art. 6 (defining genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group). For further readings on genocide as a crime in international law, *see generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 43 (26 Feb. 2007) (examines the nature of genocide); Prosecutor v Akayesu, Case No ICTR-96-4-T, Judgment (Sept. 2, 1998 (discusses rape in war as genocidal); WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (Cambridge Univ. Press, 2d ed., 2009). Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT’L L., 145–151 (1947); *See generally* Ines Gillich, *Between Light and Shadow: The International Law Against Genocide in the International Court of Justice’s Judgement in Croatia v. Serbia*, 28 PACE INT’L L. REV. 117 (2016).

⁶² Rome Statute, *supra* note 59, at art. 7 (defining crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health). For more insight on crimes against humanity in international law, *see generally*, Charles Chernor Jalloh, *What Makes A Crime Against Humanity A Crime Against Humanity*, 28 AM. UNIV. INT’L L. REV. 382-441 (2013).

⁶³ Rome Statute, *supra* note 59, at art. 8 (providing that “ for the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages. There are other enumerated crimes under article 7 of the Rome Statute. These are all aimed at providing accountability for violation of the rights of all peoples whether arising out of international conflicts or conflicts within nation states.)

⁶⁴ The provision further expands on what it means by Acts of Aggression to include such acts as act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political

Thus, both private individuals, and state functionaries are subject to the accountability measures put in place through the Rome statute. Equally, there is an effort to allow states to use their local measures to respond to these human rights questions; else the ICC may begin processes into such situations either *suo motu*⁶⁵ or through referrals by states or in some special cases by the United Nations through any of its organs such as the UNSC. This is often expressed as the doctrine of complementarity under *Article 17* of the Rome Statute of the ICC.

Besides these UN-backed frameworks, regional and national frameworks of human rights recognition, protection, and promotion have also emerged to facilitate the realization of these rights. For instance, the European Convention on Human Rights 1950⁶⁶ is the regional instrument governing the protection and enforcement of human rights within the member states of the Council of Europe. Since it took effect in 1953, it has helped redefine, clarify, and advocate human rights

independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with G.A. Res. 3314 (XXIX) (Dec. 14, 1974), qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

For further readings on Aggression and Acts of Aggression under the Rome Statute of the I.C.C. *see generally*, CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Cambridge Univ. Press ed., 2d ed., 2021); Mary Ellen O'Connell & Mirakmal Niyazmatov *supra* note 56; Alexander H. McCabe, *Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention*, 83 *FORDHAM L. REV.* 991 (2014); Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 *WASH. U. GLOB. STUD. L. REV.* 551 (2007). *See also* the general discussions in Nicaragua case Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 1986).

⁶⁵ On its own initiative.

⁶⁶ A. A. Luini del Russo, *The European Bill of Rights: The First Decade of International Protection of Human Rights*, 4 *Santa Clara Lawyer* 8, 8-29 (1963).

and associated paradigms within and outside the region. The Charter of Human Rights of the European Union is also an articulation of a regional bill of rights that is accruable to all EU citizens within the framework of the European Union.⁶⁷ These rights are cognizable within any member state of the EU, and they are available to all persons—including othered communities within the region. The European Union Human Rights Charter, which became effective in 2009, has further consolidated the steady gains of human right treaties and conventions made since the 1950's.

The impact of these regional instruments in Europe is also felt in law reforms, constitutional making, and policy prescriptions for all member states of the Council of Europe in general, and the EU in particular.⁶⁸ One important impact of the human rights policy in the region is the rapid elimination of the death penalty—especially within the EU.⁶⁹ Indeed, new members of the EU must, as a prerequisite, commit to upholding the EU Human Rights Charter. These are also fundamental documents and norms when advocating for the protection of the rights of indigenous peoples before regional courts such as the European Court of Human Rights (ECHR).⁷⁰

As a region, America is not left out in the overarching adoption of regional instruments to respect, protect, and promote human rights. In that regard, the American Convention on Human Rights articulates the aspirations of the peoples of the region to ensure the attainment of equal human rights for all.⁷¹ These are binding on member states of the Organization of American States (OAS). Over the years, the jurisprudence of human rights in the region has been further enunciated by the Inter-American Court of Human Rights. The significant contribution of the court to the expansion of ideas about the protection of the rights of minorities, refugees/migrants, and women

⁶⁷ The Charter of the Fundamental Rights of the European Union recognizes amongst other rights the right to human dignity, equality, solidarity, and justice. It also provides for a framework governing the interpretation and application of the Charter. The decisions of the European Court of Justice (ECJ) have also helped to catalyze the development of human rights within the region and also enhanced the jurisprudence of international human rights in general. See Generally Elizabeth F. Dedeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 Fordham Int'l L.J. 1104 (2007).

⁶⁸ Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, 11 Human Rights Law Review 645-682 (2011); GRÁINNE DE BÚRCA, *The Domestic Impact of the EU Charter of Fundamental Rights* 49 Irish Jurist (1966) 49-64. (2013).

⁶⁹ See *Protocol No 6 of the European Convention on Human Rights 1982*. This protocol abolished the death penalty and has been signed by 46 European countries. Russia is the only member of the Council of Europe who is not a party to this protocol. The protocol prohibits any form of derogation from the obligations arising from it.

⁷⁰ Notably the ECHR has been criticized for its narrow jurisprudence when considering litigations on the rights of indigenous communities. See Péter Kovács, *Indigenous Issues Under the European Convention of Human Rights, Reflected in An Inter-American Mirror*, 48 The Geo. Wash. Int'l L. Rev. 781 (2016). The author argued that for some complex historical and social reasons, the complaints of indigenous communities are frequently marginalized, and these communities have had limited success in obtaining *in merito* judgments when appearing before the organs of the European Convention on Human Rights.

⁷¹ Article 24 of the American Convention on Human Rights provides for equal protection under the law. See also Thomas Buergenthal, *The American Convention on Human Rights: Illusions and Hopes*, 21 Buff. L. Rev. 121 (1971); Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 Wash. U. Global Stud. L. Rev. 639 (2010), (exploring the workings of the Inter-American Court system and the updates needed to enhance the human rights capacity of the court).

is well acclaimed in international human rights scholarship.⁷² Equally, it has been crucial to the evolution of the rights of indigenous peoples, considering the history and temporal dynamics affecting indigenous rights in Latin America and other parts of the region.⁷³

Further to this is the American Declaration of the Rights of Indigenous Peoples 2016⁷⁴ which acknowledges that “*the rights of indigenous peoples are both essential and of historical significance to the present and future of the Americas.*”⁷⁵ The American Declaration equally underscores the immense contributions of indigenous peoples to the development, plurality, and cultural diversity of the Americas. Above all it recognizes,

that indigenous peoples have suffered from historical injustices as a result inter alia, their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular their right to development in accordance with their own needs.⁷⁶

Amongst other things, *Article II* of the American Declaration of the Rights of the Indigenous Peoples acknowledges the multicultural and multilingual character of indigenous peoples and the need for states to respect these rights. Equally *Article III* notes the inherent right of self-determination of indigenous peoples. By virtue of this right, they have a right to freely determine their political status and freely pursue their economic, social, and cultural

⁷² The Inter-American Court of Human Rights has been a significant contributor to the development of international human rights jurisprudence. Today such subjects as disappearance, violence against women and minorities, environmental justice, water rights and rights of refugees and migrants cannot be meaningfully discussed without due examination of the interventions of the of the Inter-American human rights system. *See generally* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 German Law Journal 1203–1230 (2011); Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future* 83 Indiana Law Journal 4, 5 (2008); Antonio Augusto Cancado Trindade, *The Developing Case Law of the Inter-American Court of Human Rights*, 3 Human Rights Law Review 1, 1-25 (2003); *Exceptions to the Exhaustion of Domestic Remedies* IACHR Series A 11(1990); 12 HRLJ 20 (1991). The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, IACtHR Series A 16; 7 IHRR 766 (2000). The jurisprudence of the Inter-American Court has also been endorsed by the ICJ in a number of cases on Consular rights of citizens as provided in Article 36 of the Vienna Convention on Consular Relations 1963. *See generally* Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 12 (2004); LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 466 (2001).

⁷³ Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012); Indigenous Communities of The Lhaka Honhat Association v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), (Feb. 6, 2020).

⁷⁴ A.G. Res. 2888, ¶ 1, XLVI-O/16 (Jun. 15, 2016).

⁷⁵ *Id.*

⁷⁶ *Id.* *See also* Article 1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law).

development.⁷⁷ In the same vein, the African Charter on Human and Peoples Rights forms the backbone of the human rights regime in the continent. The Charter goes beyond civil and political rights, which are the mainframe of human rights instruments in most states, encompassing economic, social, and cultural rights (ESCR).⁷⁸ These ESCRs are not limited to individuals. Rather it also acknowledges collective rights, such as the right to a healthy living environment.⁷⁹ These collective rights have very high significance for indigenous communities because of their collective ownership of lands, groves, and water resources.⁸⁰ Overall, almost every region of the world has one form of regional human rights instrument or another.⁸¹

⁷⁷ Interestingly too, the American Declaration of the Rights of Indigenous Peoples has an omnibus provision in Article V that “Indigenous peoples and individuals have the right to the full enjoyment of all human rights and fundamental freedoms, as recognized in the Charter of the United Nations, the Charter of the Organization of American States, and international human rights law.” This incorporation by reference widens the scope of the Declaration and hinges it on recognized principles and norms of international law. For some African regional judicial discussion of the rights of indigenous communities. *See generally* Elizabeth Ashamu, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission*, 55 J. of Afr. L., 300–13 (2011) (exploring the rights of indigenous people to development). *Center for Minority Rights Development (Kenya) v. Kenya*, Commission No. 276/03, Afr. Com. Hum. and Peoples Rts. (Feb. 10, 2010).

⁷⁸ Manisuli Ssenyonjo, *Analyzing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter*, 29 NETH. Q. OF HUM. RTS. 358-397 (2011).

⁷⁹ Org. of African Unity [OAU] Charter art. 24; Morne Van Der Linde & Lirette Louw, *Considering the Interpretation and Implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication*, 3 AFR. HUM. RTS. L.J. 161, 168 (2003) (Article 24 of the African Charter on Human and Peoples' Rights provides for the need for a satisfactory and healthy environment).

⁸⁰ Judith Murphy, *Extending Indigenous Rights by Way of the African Charter*, 24 PACE INT'L L. REV. 158 (2012) (exploring generally how the African system provided for collective rights) available at: <https://digitalcommons.pace.edu/pilr/vol24/iss1/5> (the paper generally explores how the African system has provided for collective rights). *See Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 70. Org. of Am. States Gen. Assembly, the American Declaration on the rights of Indigenous Peoples, art. VI. (June 15, 2016) (“Indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples. In that regard, States recognize and respect the right of indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources.” States are therefore enjoined to promote these rights with the full and effective participation of indigenous peoples.)

⁸¹ It must be noted that although Asia was considered an outlier in the general movement towards the adoption of regional human rights instruments since the 1950's, in 2012 the Association of Southeast Asian Nations (ASEAN), adopted a Human Rights Declaration. This has been viewed with mixed feeling in scholarly and policy circles. While some see it as a vista of hope for a future flourishing of a regional human rights instrument, others are skeptical. The sceptics argue that the declaration fails to secure enforceable rights for citizens in that region. In any case, it is yet to be seen, if the declaration will invigorate the evolution of regional protection of human rights within the region in the near future. Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 HUM. RTS. L. REV. 557, 557-79 (2013). Matthew Davies, *An Agreement to Disagree: the ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia*, 3 J. OF CURRENT SE. ASIAN AFF. 107, 108-109 (2014) (expressing the view that despite the critical comments made by scholars and policy institutions following the adoption of

This wealth of laws, conventions, and treaties on human rights have further given rise to the establishment of regional courts, subregional tribunals, and commissions on human rights. Thus, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human Rights, the ECOWAS⁸² Court of Justice, and the European Court of Justice, all form significant platforms for the clarification, advocacy, and transmission of human rights ideals for all persons including indigenous peoples. Indigenous peoples have equally been using these regional courts to pursue their interests.⁸³ However, the gap in the international law architecture for the respect, promotion, and protection of the rights of indigenous peoples has remained acute over time.⁸⁴ For a long time, international law was itself vested in the idea of civilization, assimilation, and the harmonization of norms and practices.⁸⁵

Basically, the empire states were the civilized states, and that meant the assimilation of many indigenous traditions in the evolution of international law norms and principles. Thus, principles and notions of law and practices from the civilized traditions were deployed to marginalize and justify the othering of indigenous peoples.⁸⁶ Notions of civilization also justified conquest and colonial domination.⁸⁷ Thus, from land policies to trade, intellectual property rights, self-governance/sovereignty, and sustainable utilization of the environment, water, and other

the declaration in 2012, it is a positive development and worth studying for the insights it gives about ASEAN values, and how the respective state parties who do not necessarily agree on human rights norms were able to accede to a declaration on human rights).

⁸² The Economic Community of West African States is the subregional body established in 1976 to inter alia harness the economic capacity of the 15 member states in west Africa. It has a regional court of justice which sits in Abuja Nigeria. *See generally* Revised Treaty of the Economic Community of West African States, ECOWAS Parliament, July 24, 1993.

⁸³ Núria REGUART-SEGARRA, *Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights*, 4 BUSINESS AND HUMAN RIGHTS JOURNAL 109–130 (2019).

⁸⁴ *See case cited supra* note 74.

⁸⁵ Georg Schwarzenberger, *The Standard of Civilisation in International Law*, 8 CURRENT LEGAL PROBLEMS 212 (1955); Statute of the International Court of Justice, art. 38, ¶ 1, Oct. 24, 1945, 33 U.N.T.S. 993; WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., 2000); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (Cambridge Univ. Press ed. 2002); David P. Fidler, *A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Globalized Civilization*, 35 TEX. INT'L L.J. 387 (2002).

⁸⁶ *See* U.N.T.S. *supra* note 81, at 27; *See also* M.C. Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT'L L. 768 (1990).

⁸⁷ *See generally*, NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 1–43 (Larissa van den Herik & Jean d'Aspremont eds., 2020); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 4 (1999).

natural resources,⁸⁸ the rights of indigenous communities have often suffered.⁸⁹ Where these rights are not totally suppressed, or extinguished, they are downgraded both in law and policy decisions. This relegation affects not only physical rights, such as the right to life and ownership of property, but it also extends to their cultural heritage, values, and ideas about existence. Their attempts to communicate these concerns were either drowned out by the prevailing voices on the international space or frustrated by the existing asymmetry of information and power that underpins international law and international relations.⁹⁰ Even in this era the efforts of indigenous communities and peoples in general to assert their rights requires a lot of effort and often depends on public interest litigations before regional and international courts. Thus, the politics of international law and the overbearing nature of sovereign powers makes the voices and concerns of indigenous communities very marginal in the policy spaces of international law.

Hence, treaties, agreements, and other arrangements made with first nations and indigenous communities are often disregarded in planning and policy implementation. However, the recent upsurge in climate change-induced hazards has once more put the rights of indigenous communities on the front burner of global and local approaches to sustainability. The UNs Sustainable Development Goals (SDGs) also confronts society with the need to have sustainable approaches to development because they enhance the livelihoods or lived experiences of all peoples, including indigenous communities, who themselves face extraordinary difficulties arising from our unsustainable use of the environment. Even before the United Nations Sustainable Development policy, the International Court of Justice had recognized the importance of the

⁸⁸ See generally, ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN ENGLISH COLONIES* (2016); PHILIP J. STERN, *THE COMPANY STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN EUROPEAN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* (2011); Petra Gumplová, *Sovereignty Over Natural Resources—A Normative Reinterpretation*, 9 GLOBAL CONSTITUTIONALISM 1, 7-37 (2020) (The author while exploring alternative normative paradigms for justifying the permanent sovereign rights of peoples over their natural resources, highlights some of the issues of proprietary exploitation against the rights of indigenous peoples by European states during the colonialism. It was done through direct exercise of powers of conquests, and lopsided treaties or by proxy through corporation-states such as the British East India Company).

⁸⁹ See generally Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous People's Rights, Identity and Resources*, 15 TEX. WESLEYAN L. REV. 207-256 (2000) (The paper explores the possibilities of a new paradigms of intellectual property rights so as to enhance the rights of indigenous peoples. Thus “when this article promotes its theme of indigenizing intellectual property law, it means to apply legal pluralism to justify employment of Indigenous law as a primary source of law to begin the development of a sui generis legal system to bring to the fore essential protections for Indigenous knowledge, tangible and intangible cultural materials and artifacts, secret and sacred information and know-how, cultural expressions, and the biogenetic resources justly owned and possessed by Indigenous Peoples”).

⁹⁰ Vermette D'Arcy, *Colonialism and the Suppression of Aboriginal Voice*, 40-2 *Ottawa Law Review* 225, (2009), <https://canlii.ca/t/28fp>; Hiroshi FUKURAI, *Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law*, 5 *ASIAN JOURNAL OF LAW AND SOCIETY* 221–231 (2018) (highlighting the struggle of indigenous peoples and their efforts to regain active voice as people who have been victimized by predatory policies of the state system and international law).

sustainable utilization of environmental resources. In the case of *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* the Court stated thus:

Throughout the ages, mankind has for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun on the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.⁹¹

II. HUMAN RIGHTS FOUNDATIONS AND THE NEED TO COMPLICATE THE PARADIGMS

International human rights have thrived in so many ways. But at its core is the commitment to human wellbeing: But even that core is very limited in many respects. These limitations are quite noticeable when we seek to operationalize human rights in society. Thus, it is easy to see that the protection, respect, and promotion, of the human rights of all does not just depend on human rights agreements alone. It is also entwined with other aspects of the socioeconomic and political international order. These include labor, migration, global governance, financial regulation, and trade. Others are intellectual property regimes, ocean navigation, farming and economic laws generally. The globalized nature of these activities also means that that their impact is both local and global. In particular, these activities affect the rights of indigenous communities including their rights to move in search of their daily sustenance, their right to a healthy living environment and protection of their cultural intellectual property.

The privileging of liberal approaches to trade, market and human rights has ramification for the scope of gains that can be made through the human rights order—especially for indigenous and other marginalized communities since they may lack the political structures to bring real transformation. This is because liberalism as a set of beliefs and organizing ideas amongst other things commits to the individualization of rights and privileges. At the core of this individualization is personal liberty which may not be attenuated unless it is legitimate and justified. The second limb of the liberal conception of human rights is that there is a bifurcation between negative and positive rights.⁹² This bifurcation has three potentially limiting implications. First, it unwittingly reduces the potentially transformative nature of social and economic rights. That is to say, such right as housing, food, and healthy access to water and sanitation are

⁹¹See *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 1.C.J. Rep. 7, 78 (Sep. 25); *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992-2012* (Marie-Claire Cordonier Segger & H.E. Judge C.G. Weeramantry eds., 2017).

⁹²The idea of negative and positive rights has been explored by Isaiah Berlin. See generally, Isaiah Berlin, *The Two Concepts of Liberty* (1969).

peripheralized as if they are not real rights but socially desirable goods. The second problem with this is that of market approach to socioeconomic and cultural rights. In that regard, the work of taking care of the needy in society becomes outsourced to third parties—usually charities. It also means that instead of human beings, businesses are prioritized with the hope that their success will trickle down to the mass majority of the populace who are in need. The third difficulty which I have also highlighted above is the justiciability of these rights and the individualization of remedies even when it is accepted that harm has been done. For societies with a broader perspective of rights, this can be a problem to the exercise of their collective agency in search of their rights or in seeking restoration, reparations, and restitution for violations. In this segment I illustrate with a few foundations how individualization, bifurcation, and commitment to market approaches limits the promise of international human rights for indigenous and othered communities.

A. The Limits of Liberal Individualism

The liberal order of international human rights which commits to individual wrongs and how those wrongs can be remedied has identifiable limits which I categorize into four groups; (1) they are inadequate when seeking remediation for historically significant violations of human rights; (2) It rarely has any remedy for group rights and group violations (3) It gravitates to the human species as the primary reason of existence—the anthropocentric commitment limits its capacity to understand and respond to issues of the environment; and (4) it privileges the status quo. I shall highlight these seriatim. Liberal individualism cannot easily comprehend and remedy historically significant violation of human rights such as the Armenian genocide, the suppression of the natives, the elimination of the Herreros because, it is often difficult to pin culpability on individuals or find direct victims of these violations.⁹³ Thus, questions of reparations, restitution, and affirmative actions linked to these are often not easily assimilable to the liberal polity that we currently privilege. Historical injustice such as enslavement and abuse of indigenous children more or less deemed unfortunate accidents of history that are temporally distant. Efforts to revisit these and encourage intergroup dialogues, truth, reconciliation, and healing often come in conflict with the liberal approaches to human rights. In the end, the society is not in harmony but in a perpetual quest for power and domination. The transmitted generational trauma often bubbles to the surface at the slightest provocation.

Thus, if we are truly interested in global peace, and respect for human rights, then it is time to explore more robust approaches to the rights of indigenous communities in ways that transforms the limited paradigms of liberal conceptions of human rights. Second, a direct corollary to the limited capacity to deal with historical injustices is that group rights are not also easily cognizable under the approach. This is so because claims of violations must be that of individuals acting for themselves or as representing other persons who form part of the larger group. It must also adopt the processes and proceedings noted in the law, else, the claims will fail. In that regard, environmental pollution situations will often rely on tort and other forms of personal injury. In rare

⁹³ Some of this individuation of rights has unfolded in the debates about reparations in America. Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic* June 2014; A. J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 *Journal of Law & Politics*, (3), 183-229(2006); Richard A. Epstein, *The Case against Black Reparations*, 84 *Boston University Law Review* 1177 (2004). There is a lot of literature in the field that is beyond the scope of this essay.

cases these matters of environmental pollution are actionable *per se* otherwise parties would have to show significant evidence of personal injury to succeed. For indigenous communities this can be disabling considering their experience with colonial instruments for the remediation of their collective rights. It therefore means that more socioeconomic and policy sensitive interventions are required to pursue the rights of indigenous communities in these regards. Thirdly, liberalism gravitates towards the human species as the paragon of existence. To this effect everything has to be explored and exploited to serve the unchecked interest of the human species. The downside to this, is that such realities as the environments for which indigenous communities have remarkable respect and care for, are treated without much thought and commitment. This is a direct contributor to the climate change issues we have now seen. Thus, liberalism's best effort at environmental change adaptation is only a deeper commitment to market fundamentals—for example, carbon emission tariff.⁹⁴

A forward-looking paradigm will have to incorporate environmental justice and group rights arising from it. Because of the overarching nature of environmental justice, and how it affects the human rights of indigenous communities, it also requires committed policy and social intervention by the state to mitigate human suffering arising from these disruptions. We cannot litigate our way out of the climatic change difficulties and consequent environmental justice quagmire. The huddles in litigation are too often beyond individual capacities. We equally cannot wave our individual liberties on the face of a raging storm or hurricane—the frequency of which has increased as a result of climate change and say—ho! Be still.

Finally, the liberal fundamental commitments to human rights which is a narrow paradigm protects the status quo and unwittingly discourages any attempt at transformation for the common good. In that regard, it limits our ability to see the success and respect of the rights of indigenous communities as a contribution to the common good of humanity. To produce transformation our human rights paradigms, need to be complex and engage these multiple sites of domination and dehumanization. Some scholarly effort to illustrate the difficulties inherent in the liberal order and how it does not commit to structural transformation for inclusive prosperity has been through the canon of Critical Race Theory (CRT) and the Third World Approaches to International law (TWAIL).⁹⁵ These two cannons can help uplift the slumbering face of liberal international human rights to see and focus more on the rights of indigenous communities: And how these can be further recognized, respected, protected, and promoted. To this I turn in the next segment highlighting areas of intersection and suggesting pathways of usage in the effort to advance the rights of indigenous communities.

⁹⁴ DEVELOPMENTS IN THE LAW OF CLIMATE CHANGE, 135 HARVARD LAW REVIEW, 1640–1663 (2022).

⁹⁵ There is also a burgeoning literature on Fourth World Approaches to International Law. I have not engaged with that literature in this paper. For general reading on fourth world approaches to international law see—Hiroshi FUKURAI, *Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law*, 5 Asian Journal of Law and Society 221–231 (2018) (emphasizing FWAIL as an attempt to give voice to indigenous people, (2) provide a framework for seeking self-determination, (3) and provide an alternative vision to preserve biodiversity and the natural environment). GEORGE MANUEL, *THE FOURTH WORLD: AN INDIAN REALITY* (1974)

B. Critical Race Theory and Third World Approaches to International Law

Critical Race Theory (CRT) as a system of legal thought, and a method of analysis of the legal architecture in society was developed in the legal academia in America.⁹⁶ It has since become germane in the global scheme of understanding how race, racialization, and othering is baked into the architecture of global economy, international law and international relations. The recent Covid-19 pandemic has indeed further illustrated the unique contributions of CRT to our current dilemmas about racial othering in the international sphere. In developing the tenets of the theory, the pioneers were responding to a gaping scholarly absence of race and racialized groups in the laws as in America. Accordingly, there was a frustration with the extant legal theories for failing to interrogate the materiality of racism and its entanglements with every aspect of society—especially with law and its institutions. The strong commitments of legal theory—especially in the western canon—to abstractions, scientific analysis of text, and other transcendental interlocutions using hypothetical inventions had no answer for the Black community whose churches were being bombed or whose pastors were being shot in churches. Such theories could not also sufficiently answer for the hierarchical nature of society based on primordial accidents such as skin color and place of birth. Therefore it became, the intention of the CRT pioneering scholars such as Derrick Bell, Kimberle Williams Crenshaw, Richard Delgado, Mari Matsuda and others to highlight this deficiency in the law and legal system—not as an aberration, but as an organic self-reproducing germ of the legal system.⁹⁷ It took some time for international law and international human rights to catch up with the value of CRT theorization, but the events of the recent past—especially the gruesome murder of George Floyd and Covid-19 pandemics has revived the interest in analyzing international law with the sharp tools of CRT.⁹⁸

Amongst other things, there are central tenets which are the contributions of CRT to the way we think about law and how it implicates human beings in society. First, racism is *ordinary* in society and in law—not *aberrative*. Racism is ordinary in the conceptual, design, and implementation of legal frameworks in society. That is to say, it is not an anomaly rather a part of the design of the system of law and social organizing to create and sustain hierarchies.

⁹⁶ See generally, Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking back to Move Forward*, 43 CONN. L. REV. 1253, 1253 (2011); Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 17 (2009); Neil Gotanda, *A Critique of Our Constitution is Color- Blind*, 44 STAN. L. REV. 1 (1991); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019); Devon W. Carbado, *Critical What What?* 43 CONN. L. REV. 1593 (2011); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. (2000); DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

⁹⁷ Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995(4) UNIV. ILL. L. REV. 893, 893 (1995).

⁹⁸ See generally *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 1659 (2013) (The United Nations adoption of the Convention on the Elimination of all Forms of Racial Discrimination 1965 has not transformed the architecture of economic exploitation of racialized groups in international law. It has also not stopped the use of international law as a fig leaf to cover the atrocities of multinational corporations against indigenous peoples. Increasingly, the doors of justice are narrowed for claims against companies. For instance, in the United States, the alien torts law which hitherto held out hopes for accountability efforts against multinational corporations has been stymied by the Supreme Court of the United States).

Consequently, some members of the society sit at the bottom of the well of hierarchies.⁹⁹ Therefore, racism is normal and should be so construed in analyzing the law and what it does. The choice of any given analytical framework has real material and living experience implication for members of the society. The law can maintain racialized hierarchy by focusing on the text of law and not the social factors animating legislation, policy formulation and judicial review. Thus, facial neutrality may conceal, the more enduring but latent functions of law. Second, adjustments and reforms based on liberal commitments in law and society may well happen when there is a *convergence of interest* between the dominant racial hierarchy and others.¹⁰⁰ For instance, desegregation had important interest convergence motivations such as the overall outlook of America's foreign policy vis-à-vis the Russian propaganda in the immediate post-World War II era.¹⁰¹ Some of the *interest convergence* motivation has also been used to analyze the efforts and social movements behind decriminalization of same sex marriage, interracial marriage, and the efforts to tackle the opioid epidemic.¹⁰² The third pillar of CRT is *intersectionality*: The overlap of identities in the community can significantly affect the lived experiences of racialized groups and persons in that community. It is therefore not a monochromatic view of the racialized experience but rather a complex, spectrum which can produce remarkable differences in experience and outcomes in any encounter with the law. For instance, Black, African American, and Ivy league educated, single mother, LGBTQ+ are different identities that can intersect and therefore make for different experience with law and society. It is a multidimensional—as opposed to a single dimensional—analysis of the experiences of Black women.

The proposal and teasing out of this limb of the CRT genre, has gained a lot from the scholarship of Kimberle Williams Crenshaw. Crenshaw explores a multidimensional experience of Black women and suggested that this be considered in the conceptualization and analysis of their racialized experience. The multidimensional paradigm also means a multidimensional burden for the Black woman within the system.¹⁰³ Fourth, CRT does not subscribe to *color blindness* in

⁹⁹ DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

¹⁰⁰ Derrick A. Bell, Comment, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518-33 (1980).

¹⁰¹ These adjustments may also provoke resistance and CRT as a theory has not escaped resistance within and outside the legal academia. See Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE GENDER & SOC. JUST. 61, 61 (2021).

¹⁰² Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1019-36 (2019) (Mary suggests that Bell's interest convergence has evolved in the literature in that scholars are currently trying to use it for policy making cultivation across interest groups. Some scholarships have outrightly called for the use of interest convergence as a transactional tool of policy making); See also Patience A. Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693 (2014); Amy Christian McCormick & Robert A. McCormick, *Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL'Y 17 (2012).

¹⁰³ See Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 1, art. 8, 139-67 (1989) (The author argues that the single axis analysis of the experiences of Black women erases Black women in the conceptualization, identification, and remediation of race and sex discrimination by limiting the inquiry to the experiences of otherwise-privileged members of the group).

the law.¹⁰⁴ The law as it operates is not neutral to race and often its ramifications are seen in the lived experiences of racialized groups in the community.¹⁰⁵ The fifth foundational claim of CRT is that it also does not *subscribe to the post-racial legal language* because, the few wins made through the rigorous process of social movements and public interest lawyering have not uprooted the foundations of racism.¹⁰⁶ Excavating the foundations of the racial order will require a keen eye and not a post-racial disposition. Sixth, CRT recognizes *the uniqueness of the voice of color*. In a sense, this speaks to agency and the voice of the marginalized as central to any meaningful effort to make for racial justice and expansion of the promises of human rights. Communication and interlocution are essential for democracy and equal humanity. In that regard, *speaking for the other*, could unwittingly become, *silencing the other*.

On its part Third World Approaches to International law (TWAIL) also recognizes the inherent otherness in the history and evolution of international law.¹⁰⁷ Therefore, is it not just a liberal critique of the failures of international law but a praxis for challenging the continued use of international law by empire states to dominate the rest of the world often categorized as third world. TWAIL is also *antihierarchical* as it resists the subordination of the other—racialized groups, indigenous communities, and the subaltern.¹⁰⁸ It therefore seeks to understand, interrogate, unpack, and deconstruct the many ways through which international law is used to create and sustain racialized norms and institutions for the purpose of domination of non-Europeans by Europeans. Overall, TWAIL makes effort to imagine, construct, and present an alternative normative architecture for global governance and enhance development in the third world.¹⁰⁹ Thus, TWAIL does not subscribe to merely critiquing international law but commits to proffering alternatives that will change the human wellbeing of third world communities. It aims at bringing change in the system of international law.¹¹⁰

These foundational tenets of TWAIL are amenable to the pursuit of the rights of indigenous communities because many of them inhabit the geographical third world or live in conditions akin to third world developmental situations even when they live outside the geographical third world. We can use the case of the Insular Territories in the US as typical of third world experience in the

¹⁰⁴ Kimberle Williams Crenshaw, *Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 52-84 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz eds., 2019) <https://doi.org/10.1525/9780520972148-004>.

¹⁰⁵ Dwanna L. McKay, *Masking Legitimized Racism: Indigeneity, Color Blindness and the Sociology of Race*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES, (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz eds., 2019).

¹⁰⁶ Kimberle W. Crenshaw et al., *How Colorblindness Flourished in the Age of Obama*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 128 (Kimberle W. Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, & George Lipsitz eds., 2019).

¹⁰⁷ James Thuo Gathii, *TWAIL: A Brief History of Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 26-48 (2011).

¹⁰⁸ See generally Obiora C. Okafor, *Critical Third World Approaches to International Law (TWAIL) Theory, Methodology or Both?*, 10 INT'L CMTY. L. REV. 371, 371-378 (2008).

¹⁰⁹ B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT. CMTY. L. REV. 3, 3-27 (2006).

¹¹⁰ See Antony Anghie, *What is TWAIL*, 94 PROCEEDINGS OF THE ANNUAL MEETING (THE AMERICAN SOC'Y OF INT'L L.) 31-40 (2000).

global north despite the association of these territories with the United States. Third world developmental situation is therefore diverse and hybridized across loci and time stamps.¹¹¹ Their subaltern status is seared into the legal, policy and judicial architecture of the US. Makau Matua explores these themes and surmises that TWAIL is antihegemonic, suspicious of universal neutral principles and is a coalition movement.¹¹² Having briefly highlighted the principal tenets of CRT and TWAIL, I proceed in the next segment to show the possible synthesis of these tenets and their potential use in advancing the rights of indigenous peoples.

C. Towards a Synthesis of the CRT and TWAIL Genres for Indigenous Rights

Why CRT and TWAIL for indigenous peoples' human rights? First, Indigenous peoples' human rights are human rights, and their extensions transcend the liberal foundations of international law and human rights. Second, despite the profuse proclamations made in the conventions and treaties, indigenous people and communities remain on the frontlines of racially informed frameworks of international law and human rights. Our best liberal pretensions therefore have no substantive answers to the living realities of these communities. Hence, TWAIL and CRT genres are useful in our current search for modalities that will respond to the yearning need to make the promises of international human rights real and not miserable comforts for indigenous communities. I identify six crucial sites of synthesis and synergy between CRT, TWAIL and Indigenous Rights conceptualization, mobilization and advocacy. First, the three foundations/genres are interested in *challenging and changing the architecture of international law*—including international human rights—often racialized and used to subordinate the othered. This entails excavating the foundations of international law and human rights so as to unpack and deconstruct its dominating and subordinating foundations. This is the surest way of making any meaningful change because racialization is equally ordinary in the general architecture of international law.

Second, the canons recognize *the multidimensional nature of domination, and sites of subordination*—economic, legal, environmental, political/power, and strategy—which have deep ramifications for indigenous peoples.¹¹³ There should therefore be a multi-dimensional approach to all efforts to combat the recognition, respect, promotion and protection of the rights of indigenous communities. CRT and TWAIL therefore enhances the capacity of this multidimensional challenge of the structures of domination whether in economic law,

¹¹¹ Ama Ruth Francis, *Global Southerners in the North*, 93 TEMP. L. REV. 690, 690-711 (2021) (highlighting the hybrid positionality of marginalized groups and why this understanding should influence the methods for achieving change or overcoming intransigent issues across the north-south paradigm).

¹¹² Makau Mutua & Antony Anghie, *What is TWAIL*, 94 PROCEEDINGS OF THE ANNUAL MEETING (THE AM. SOC'Y OF INT'L L.) 31-40 (2000).

¹¹³ SERGIO PUIG, AT THE MARGINS OF GLOBALIZATION: INDIGENOUS PEOPLES AND INTERNATIONAL ECONOMIC LAW (2021) (highlighting how international economic law continues to create marginality for indigenous peoples); Mohsen AL ATTAR, *Must International Legal Pedagogy Remain Eurocentric?*, 11 ASIAN JOURNAL OF INTERNATIONAL LAW 176-206 (2021) (highlighting the epistemic domination of international law by European ideas. This means a decentering of the ideas of law by indigenous peoples and others outside Europe and of European origins. This means a constant struggle to bring to make the indigenous voice matter in the theorization of international law).

environmental justice or power relations arising from unequal legal architectures of law forged on the furnace of colonialism. In all that effort, there is a need to build coalition across groups and fields. This brings us to the third point of interest convergence. The materiality of *interest convergence* for the mobilization of the social movement that can bend the arc of justice and shift the often-recondite subordinating norms of international law cannot be overemphasized. Thus, CRT and TWAIL has a lot of converging interest with indigenous communities, and this should be increasingly explored to support the search for best possible outcomes for indigenous communities.

Fourth, coalition building is essential to the efforts to enhance the rights of indigenous communities and the centrality of *the unique voice of indigenes* in that effort. Historically the law has masked, muffled, or outrightly silenced the voices of the native.¹¹⁴ Current efforts must change the paradigm by centralizing the voice of the native in its affairs. This will help restore the agency of the indigenous. TWAIL and CRT should be working to collaborate and amplify these voices of indigenous communities since this also serves the larger interest of dismantling racial structures and enhancing the wellbeing of third world societies. Fifth, *ubi jus ibi remedium*¹¹⁵ is a classic statement of the law of right and its jural correlation of remedy. However, we often do not have reliable remedies for the violation of indigenous rights. Thus, remediation that goes *beyond the liberal minimalism, marketization, and cooptation of local elites* are necessary in thinking about remedial measures for indigenous rights violations. This means that ideas of restorative justice, racial just reckoning, reparations, and social justice are key to any meaningful effort to enhance the rights of indigenous communities. Finally, there is a need to continually reimagine the paradigms of international law and human rights using the CRT, TWAIL and other critical approaches. This will assist in presenting alternatives that could make the promise of international rights real for indigenous communities. With this overview and mindset, the next section proposes a set of principles which should animate our search for viable, sustainable and fulfilling ways of recognizing, respecting, promoting and protecting the rights of indigenous communities.

III. A TEN PRINCIPLE APPROACH

Whereas we have an array of conventions, treaties, declarations, commitments, and proclamations covering every aspect of human rights, indigenous communities are yet to feel the impact of these proclamations fully. Their issues and concerns are still matters that are left to the policy whim of many states. From the remediation of historical injustices to climate change adaptation, these communities yearn for the real impact of the promises of international law and human rights. In this era, that concern has shifted more to sustainability since indigenous peoples face grave dangers arising from the impact of industrial pollution, unsustainable development, and

¹¹⁴ L. Townsend, and D. L. Townsend, *Consultation, Consent, and the Silencing of Indigenous Communities*, 37 Journal of Applied Philosophy 781-798 at 781 (2020) (highlighting how since the beginning of colonial times, Indigenous peoples have been given little say in decision-making processes that directly affect their land and livelihoods. This includes, “*decisions about natural resource extraction or industrial development on their traditional territory. Historically, this silencing of Indigenous voices and viewpoints has taken the form of exclusion. Indigenous communities were never given a seat at the table, never asked to contribute to the relevant discussions—they were given no say in the sense that their input was never sought and never permitted.*”

¹¹⁵ Latin—wherever there is a right, there is a remedy.

agricultural practices. This is made even more difficult by an overarching policy indifference by regulatory and administrative authorities. This is the basis of this modest proposal—a ten-principle approach towards respecting and promoting the rights of indigenous communities.

These are: (1) indigenous peoples are co-equals of the earth; respect their equal rights to exist and flourish; (2) the proprietary rights of indigenous peoples should be recognized and accorded equal protection in law and policy; (3) access to clean water includes the obligation not to pollute the waters, and environmental resources that sustain the livelihoods of indigenous communities; and, (4) indigenous civilizations are real and deserve protection—not erasure through forced assimilation of indigenous peoples and their children. Others are, (5) laws, regulations, and policies affecting indigenous communities should not be made without adequate, informed contribution and consent from them; (6) full faith and credit—enforce all agreements, treaties, parchments, made with indigenous communities or renegotiate them with respect, candor, and recognition of their interests; (7) protect indigenous women against violence—their disappearance is an element in genocide; (8) respect indigenous sacred groves and support the restoration of some of that heritage where possible; (9) encourage and enact reconciliation, nondiscrimination, reparations, restitution and avoid the repetition of past abuses of indigenous peoples' rights; and, (10) sustain all these precepts with available instruments and resources. In the following segments, I shall articulate my views on these outlined modest principles *seriatim*.

A. Indigenous Peoples and Othered Communities as Co-Equals of the Earth.

Respect the equal rights of indigenous peoples to exist and flourish. The first and fundamental principle for the respect, protection and promotion of the rights of indigenous communities is to accord indigenous peoples the same type of recognition that we give to other communities around the world. They are in every measure human and are therefore entitled to the widest panoply of rights and privileges which we accord to other human beings. This principle is hinged on two foundations—equal humanity, and equal human dignity. No human community is inferior to the other, hence the need to ensure equality under the laws and policies we enact in our increasingly diverse communities. The declarations of equal humanity run through many of the preambles and substantive provisions of the international instruments for the protection of human rights.¹¹⁶ Regional instrumentalities also have the same tenor, and this resonates in the constitutional provisions of many states. Thus, we believe in these ideals, but for them to have meaning, there is a need to see them manifest daily in the policies, programs, and activities that we implement about the rights of indigenous and other marginalized communities.

Thus, the humanity of indigenous people must be accorded as much regard as that of any other member or group in the society. This is a very modest principle in that it does not demand more than what is already accorded to the other members of the community. To accord them an equal treatment without discrimination is a standard that we can afford. Such equal treatment can radically change the way we conceive programs and projects that may affect the rights of these

¹¹⁶ Universal Declaration of Human Rights, *supra* note 20, at art. 1. The UN Charter affirms the fundamental rights and equal rights of all men and women, and of nations large and small. *See* U.N. Charter Preamble, ¶ 1.

indigenous communities in society. It also aligns with the express provisions of *Article 2* of the United Nations Declaration on the Rights of Indigenous Peoples which is to the effect that these communities are,

free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin and identity.¹¹⁷

The difficulty is that, over time, many societies have gotten used to treating indigenous communities and other peoples differently from us. The indigenous communities are therefore othered, marginalized, and sometimes exterminated. The origins of the many genocidal efforts against indigenous peoples, which we have seen in the contemporary histories of countries around the globe, are traceable to this mindset of difference. ‘These people’ are not like ‘us’ and so do not have equal humanity just as everyone else. This same mindset justifies other forms of violence and vices in society against indigenous peoples, such as xenophobic attacks, forced disappearances,¹¹⁸ and forced evictions.¹¹⁹ The noticeable gap and discrimination against indigenous peoples and communities on issues of adequate housing has since become a source of concern for the UN and

¹¹⁷ Article 1 of the U.N. Declaration of the Rights of Indigenous Peoples is also instructive when it provided that “*Indigenous peoples have the right to the full enjoyment, as a collective or as individual, of all human rights and fundamental freedoms as recognized in the charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*” This incorporates the provisions on equality and nondiscrimination as is recognized in international human rights law. See G.A. Res. 61/295. United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007).

¹¹⁸ Nichole Chavez, *Deb Haaland Creates unit to investigate killings and disappearances of Indigenous People*, CNN (Apr. 6, 2021); U.S. Dep’t of the Interior, *Missing and Murdered Indigenous Peoples*, <https://www.doi.gov/priorities/missing-and-murdered-indigenous-peoples> (last visited Nov. 14, 2022). U.S. Dep’t of the Interior, *Secretary Haaland Continues Pursuit of Justice in Indian Country, Begins Implementation of ‘Not Invisible Act’* (Apr. 22, 2021) (The press release noted that “a lack of urgency, transparency, and coordination has hampered our country’s efforts to combat violence against American Indians and Alaska Natives”); Chris Arsenault, *Native Women Disappear in Canada*, ALJAZEERA (Sept. 19, 2010); *Enforced Disappearances rife across the world—UN Chief*, UN NEWS (Aug. 30, 2020), <https://news.un.org/en/story/2020/08/1071282> (noting that the crime of disappearance is rife across the world and this includes the disappearance of defenders of the environment who are often indigenous peoples). President Joseph R. Biden Jr., *A Proclamation on Missing and Murdered Indigenous Persons Awareness Day, 2021*, THE WHITE HOUSE (May 4, 2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/04/a-proclamation-on-missing-and-murdered-indigenous-persons-awareness-day-2021/> (expressing concern that “today thousands of unsolved cases of missing and murdered Native Americans continue to cry out for justice and healing. On Missing and Murdered Indigenous Persons Awareness Day, we remember the indigenous people who we have lost to murder and those who remain missing and commit to working with Tribal Nations to ensure any instance of a missing murdered person is met with swift and effective action”).

¹¹⁹ *Nepal: Authorities Must Stop ruthless evictions of Indigenous Peoples*, AMNESTY INTERNATIONAL (July 21, 2020); *Kenya: Indigenous peoples targeted as forced evictions continue despite government promises*, AMNESTY INTERNATIONAL (Aug. 9, 2018). *Submission to the Study on Indigenous Peoples by the Special Rapporteur on Adequate Housing*, AMNESTY INTERNATIONAL (June 14, 2019). Press Release, UN Hum. Rts. Off. of the High Comm’r, UNUSA: Evictions of Indigenous Nooksack Must Stop—UN Experts (Feb. 3, 2022).

experts in the field. Thus, indigenous persons and communities are known to face significant barriers to their enjoyment of adequate housing compared with other non-indigenous peoples. Equally, they are more likely to be exposed to the negative health outcomes of homelessness. They are also highly vulnerable to forced eviction. They face violence including murder when they seek to defend their rights. In the light of these, the UN Special Rapporteur on Right to Adequate Housing has called for the interpretation of the right to housing of indigenous peoples in ways that emphasize interdependence and the indivisibility of human rights.¹²⁰

To retrace our steps and begin a process that will guarantee the best possible outcome for the rights of the indigenous communities and also enhance the values of human rights of others, we need to adopt this principle in all measures and mechanisms of government in our societies. This is imperative because in accepting the humanity of others, we deepen our own humanity. In accepting, protecting, and promoting the humanity of indigenous communities, we deepen the humanity of all within our societies and live true to the proclamations we have in our respective constitutions and in the UDHR.¹²¹ The next limb of equality is equal human dignity.¹²² The dignity of all is an essential attribute of all human lives. All peoples are sacred (inviolable). Human dignity also flows inexorably from this inviolability and personhood. This inviolability of human person is also attributable to indigenous peoples. However, this has not been the reality of many indigenous peoples. From enslavement, forced labor, quarantine in camps, forced removals, forced expropriations, pacification, and colonization, indigenous communities have always borne the burden of our collective indifference to their humanity.

It is often the case that we do not accord them the dignity which they are entitled to as a matter of course. This is because the direct corollary of not recognizing the equal humanity of any group of people is to set them up for all forms of indignities. However, if we recognize the inherent humanity of all peoples, including indigenous communities, then it becomes imperative to accord them the minimum debt of due respect, protection, and promotion of their human dignity. This is very crucial because dignity is the cloak of life and to remove it is to lay bare the life of the individual in ways that are manifestly violent. Dignity is also central to the interdependence doctrine in international human rights. That is to say to ensure the protection of the dignity of indigenous communities' other human rights such as freedoms of religion and conscience, access

¹²⁰ See generally, Leilani Farha (Special Rapporteur), Adequate Housing as a component of the Right to Adequate Standard of Living and on the Right to Non-discrimination in this Context, U.N. Doc. A/74/183 (July 17, 2019) <https://www.undocs.org/A/74/183>.

¹²¹ For instance, the American Declaration of Independence professes the equality of human beings as a canonical foundation of the Republic. The declaration of independence has been described as words fitly spoken and the frame of the constitution. See generally Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107 (1998); The Constitution of the Republic of South Africa 1996, Section 9(1) (also making for equal protection of all persons under the law). See also Pius Nkondo Langa, *Equality Provisions of the South African Constitution*, 54 SMU L. REV. 2101, 2101-2106 (2001).

¹²² See generally MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (Harvard Univ. Press ed., 2018); JEREMY WALDRON, *ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY* (Harvard Univ. Press ed., 2017); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

to clean water and food, adequate housing are all inclusive factors for the enhancement of human dignity.¹²³ We therefore have a duty to make our policies, laws, regulations and instrumentalities responsive to these other factors which give verve to human dignity.¹²⁴ Homelessness, forced eviction, and the destruction of the habitation of indigenous communities does not enhance their human dignity. It also does not accord them recognition as humans—of equal standing and co-owners/custodians of the earth and the fullness thereof.

B. Equal Protection of the Proprietary Rights of Indigenous and Othered Communities

Property and incidents of property are crucial factors in the economic, social, and political wellbeing of any people or society.¹²⁵ Every legal tradition is dependent on the exigencies of property for the larger questions of the organization of the polity. While ownership is the widest amplitude of rights that can arise in a property, there are other proprietary rights and privileges.

¹²³ See Org. of American States [OAS], The American Declaration of the Rights of Indigenous Peoples art. XLI OEA/Ser.P AG/RES.2888 (XLVI-O/16) (June 15, 2016) ("The rights recognized in the Declaration and the United Nations Declaration of the Rights of Indigenous Peoples Constitute the minimum standards for the survival, dignity and well-being of indigenous peoples in the Americas").

¹²⁴ Human Dignity has been central to the development of moral and human rights principles. It can be found in many traditions. See generally Pope Leo XIII, *Rerum Novarum* (Papal Encyclical on Capital and Labor), CATHOLIC CHURCH (May 15, 1891); Antonio Autiero, *Human Dignity in an Ethical Sense: Basic Considerations*, 6 INTERDISC. J. FOR RELIGION AND TRANSFORMATION CONTEMP. SOC'Y 9 (2020); JENS BRAARVIG ET AL., THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES (Dietmar Mieth, Jens Braarvig, Marcus Düwell, & Roger Brownsword eds., 2014). Marcus Düwell, *Human Dignity: Concepts, Discussions, Philosophical Perspectives*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 23–50 (2014); Lars Kirkhusmo Pharo, *The Concepts of Human Dignity in Moral Philosophies of Indigenous Peoples of the Americas*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 147–54 (2014); Thaddeus Metz *Dignity in the Ubuntu Tradition*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 310–18 (2014).

¹²⁵ Incidentally as there are legal and social traditions, so are their also conceptual positions about property and all its incidents. Because of the different historical shifts that have happened in the modern era the proprietary conceptions that are traceable to western thoughts and legal traditions are currently prevalent in the literature of international economic law, and comparative law in general. The significance of this for indigenous communities is revolutionary. See generally GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (Cambridge Univ. Press ed., 2012); Julian Brave NoiseCat, *The Western Idea of Private Property is Flawed. Indigenous Peoples Have It Right*, THE GUARDIAN (Mar. 27, 2017), <https://www.theguardian.com/commentisfree/2017/mar/27/western-idea-private-property-flawed-indigenous-peoples-have-it-right> (noting that ". . .while indigenous values, beliefs and practices are as diverse as indigenous people themselves, they find common roots in a relationship to land and water radically different from the notion of property. For indigenous people, land and water are regarded as sacred living relatives, ancestors, places of origin or any combination of the above [I]ndigenous epistemologies were all but eliminated by colonization."); John Borrows, *Aboriginal Title and Private Property*, 71 SUP. CT. L. REV. 91 (2015); UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION (Greenwood Publ'g Grp. ed., 2000); MICHELE GRAZIADEI & LIONEL SMITH, COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES (Lionel D. Smith & Michele Graziadei eds., 2017); JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (Stanford Univ. Press ed., 2007).

They include leases, tenancies, profits, and easements.¹²⁶ Some rights are also intangible in that they are not physical though the law recognizes and accords them due protection.

Thus, aspects of intellectual and creative property readily come to mind.¹²⁷ These proprietary rights could range from traditional knowledge about medicinal plants to musical sounds and couture.¹²⁸ These proprietary rights have been central to the relationship and encounter between indigenous communities and other peoples. That encounter and relationship have sometimes produced difficult outcomes and challenged the human conscience. They have led to abuse and long trauma. The story of that relationship also resonates with many of the current dilemmas in society regarding historical (in)justice in particular, and social justice in general. Hence, we have seen expropriation, forced and uncompensated removals, and the appropriation of creative and intellectual property.¹²⁹ In some cases, the concept of property has also been applied

¹²⁶ For general readings on the incidents of property as articulated in the common and civil law traditions, see A. E. S. Tay, *The Concept of Possession in the Common Law: Foundations for New Approaches*, 4 MELB. U. L. REV. 476 (1964); David J. Seipp, *The Concept of Property in the Early Common Law*, 12 L. AND HIST. REV. 29 (1994); J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); Sarah E. Hamill, *Common Law Property Theory and Jurisprudence in Canada*, 40 QUEEN'S L.J. 679 (2015). It is interesting to see how these concepts were transplanted into all colonial territories and their consequent impact on the indigenous peoples.

¹²⁷ Article 31 of the U.N. Declaration of the Rights of Indigenous Peoples recognizes their ". . . right to maintain control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions as well as the manifestation of their sciences, technologies and cultures, including human genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports, traditional games and visual and performing arts." See G.A. Res. 61/295. United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007).

¹²⁸ See generally Suzan Shown Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. L.J. 321-328 (1992). Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, WIPO MAGAZINE (August 2019).

¹²⁹ See Article 28(1) of the U.N. Declaration on the Rights of Indigenous Peoples provides for "the rights of indigenous peoples to have redress, through such means as restitution and compensation for their lands, territories or other resources which they have traditionally owned and which has been occupied, confiscated or damaged without their prior informed consent." See G.A. Res. 61/295. United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007). See also *Mabo and Others v. Queensland (No. 2)*, 175 CLR 1, (1992) (Austl.) (in this case some Aboriginal and Torres Islander peoples challenged the Australian legal system for its assumption that these indigenous peoples had no concept of ownership and therefore which could exclude the early British settlers who arrived in Australia in 1788. Equally, as a Crown colony, the queen had sovereignty over all lands thus extinguishing any incident of ownership such as possession, easements and tenancies which may have existed prior to the 1788. This was also supported by the doctrine of terra nullius (empty land or no man's land as it is sometimes colloquially referred to). The court nullified the doctrine thereby establishing the truth of the pre-existing rights of indigenous communities before the arrival of British ships on the shores of Australia. This has also laid bare the need for transitional justice efforts to provide restitution, and just compensation for the historical injustice). See also *In re Southern Rhodesia Case*, AC 211 (1919) (in this case the clash of English Common Law principles of property and the rights of the indigenous communities also came to the fore. In that case the Judicial Committee of the Privy Council while conceding to the prior presence of indigenous peoples in Southern Rhodesia, dismissed whatever claims of ownership they had over the lands. Three things stick out clearly from the opinion; (1)

to indigenous peoples themselves.¹³⁰This objectification and subsequent treatment of these peoples as property are some of the most difficult wounds of human history. In extreme cases, some of these proprietary conceptions and approaches have yielded egregious violations of human rights—including slavery, indentured labor, servitude, genocide, and other forms of violations against indigenous communities.¹³¹

As we progress into the second decade of the 21st century, it is time to recognize, respect, and accord equal protection to the persons and property of indigenous communities worldwide. This recognition, respect, and equal protection of indigenous proprietary rights have to consider many underpinning factors. First, there has to be an epistemic and cognitive shift in the way society views and understands the place of indigenous peoples in society and human civilizations.

That is to say, indigenous communities and peoples are human beings and co-contributors, and equal owners of human civilization(s). In particular, forceful homogenization, assimilation, or acculturation of these civilizations could produce difficult justice outcomes for indigenous peoples. Indigenous peoples are not obstacles to development policy and human civilizations. They are endowed with full faculties and with unalienable rights. These rights include the sanctity of their personhood and also the right to rely on their property interests in the sustenance of the

the litigation was in faraway London and under the English common law, (2) the natives and their conceptions of property did not matter to the Court as reliance was placed squarely on British Crown proclamations for Southern Rhodesia (3) the natives were represented by English Law firms and solicitors and it is a safe presumption that their learning and understanding of native approaches to property in Mashonaland or Matabeleland is minuscule. Of course, the language of litigation was also English. The alienating possibilities of these circumstances to the natives is self-evident). *See generally* In Re Southern Rhodesia, Appeal Cases (1919) (U.K.); Matabeleland [British] Order in Council 1894; Mashonaland [British] Order in Council (1898) and the Southern Rhodesia [British] Order in Council 1898; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). *See also* Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363-377 (2004) (for a general review of the role of transnational corporations in the process of conquest, occupation, forceful and uncompensated expropriation of indigenous property). *See generally* Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims To Actors* (2016); Lindsay G. Robertson, *Conquest By Law: How The Discovery Of America Dispossessed Indigenous Peoples Of Their Lands* (2005); Merete Falck Borch, *Conciliation—Compulsion – Conversion: British Attitudes Towards Indigenous Peoples 1763-1814* (2021) (for a general reading on the land rights of indigenous peoples under International law).

¹³⁰ *See* Gregory Ablavsky, *Making Indians White: the Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy*, 159 U. PA. L. REV. 1457-1531 (2011) (stating that indigenous people were also enslaved and treated as property during the early decades of European settlement of the Americas and it shows that Indians were also enslaved although the traditional views in the field defaults to the enslavement of Blacks).

¹³¹ *See generally* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale Law Journal, 4, 1062-1153 (2022) (highlighting the nature of property law and how it has erased the processes such as conquest and racism that created the current regime of private property rights in America. This is very evident in the way these laws are taught in our schools and articulated in our case books). LINDSAY ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); ALEXANDER LABAN HINTON, ANDREW WOOLFORD, JEFF BENVENUTO (EDS.), *COLONIAL GENOCIDE IN INDIGENOUS NORTH AMERICA*, (2014); Bonnie St. Charles, *You 're on Native Land: The Genocide Convention, Cultural Genocide and Prevention of Indigenous Land Takings*, 21 Chicago International Law Journal 1, 227 (2020).

dignity of their human person. They are therefore neither property nor just expedient farm labor hands. All forms of policies and practices that treat indigenous people with less dignity deserve our strictest scrutiny.

Second, there has to be a deliberate approach to anything that is likely to affect the proprietary right of these communities. That intentionality in approach must be receptive to learning the indigenous approaches to proprietary rights, including the timeless existence of the collective ownership of land rights in these communities. Thus, community rights that are central to indigenous ways of life need to be given due protection, just like individual rights. It is argued that for indigenous communities, individual ownership and collective ownership are not mutually exclusive.¹³² Their norms of ownership often revolve around access and usufructuary rights as opposed to allodial control as conceptualized under the Common law or dominion as in Roman law. While ownership is vested in the corporate group, usages are open to all members of the community. In that regard an individual member of the community does not have absolute control but participates in the beneficial enjoyment of the property. The subject may be water resources, hunting grounds, fishing sites and more. Often, these communities have worked out long traditions for collectivized enjoyment of the resources sustainably. Sometimes economic policies emphasize security of tenure as an incentive for individual ownership of property—especially land rights. The important point is to focus on how the members of the community can gain the most beneficial interest from such individual ownership approaches.

Thus, community ownership of property can be secured through legal instruments such as trust, incorporation and vested representation. Indeed, the imaginative capacity of the law is limitless when it comes to designing instruments for the vesting of rights in property either in individuals for themselves or as representing indigenous communities. Whatever approach to be adopted should be with the informed consent of these indigenous communities. Collective ownership is significant in the preservation and sustainable utilization of common resources such as water, spiritual spaces, groves, and hunting grounds. Thus, both individual and collective

¹³² MAYAGANA (SUMO) AWAS TINGNI COMMUNITY V. NICARAGUA, [MERITS, REPARATIONS, AND COSTS], JUDGEMENT, INTER-AMERICAN COURT OF HUMAN RIGHTS (SER. C) NO 79, ¶ 149 (2001).

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generation.

Id at ¶ 149; Winston P. Nagan & Craig Hammer, *The Conceptual and Jurisprudential Aspects of Property in the Context of The Fundamental Rights of Indigenous People: The Case of The Shuar of Ecuador*, 58 N.Y.L. Sch. L. Rev. 875 (2013).

ownership structures support and nourish each other to the extent that they are useful for the growth and wellbeing of society. One way of avoiding the inappropriate treatment of indigenous communities is not to covet/expropriate their property, including art—design, music, handicrafts—and cultural intellectual property without due compensation.

C. On Water and other Environmental Resources of Indigenous Communities

Access to clean water is a basic need for every human community because water is the fluid of life.¹³³ It inebriates our being, and it is a scarce resource.¹³⁴ Many indigenous communities and peoples are custodians of our natural drinking water resources. They have for centuries maintained some of these springs, fountains, streams, forests, and habitats sustainably. Their commitment to these resources is also seen in the values that they express and enunciate about the environment. For instance, the idea of legal personhood of the environment and trusteeship of the environment by the current generation for the next generation has gained a lot for indigenous ideas about property and human flourishing.¹³⁵

Some of these values, such as the recognition of the existence of the environment as entitled to rights, have helped in complicating our understanding of the relationship between human beings and the environment. This has raised further concepts such as the duty of care to the environment.¹³⁶ Caring for the common home of humankind is an overarching goal that has very deep resonance with the right of indigenous communities to access clean water and live their lives sustainably. Indigenous communities have for centuries understood and approached our natural resources—especially water—with an uncommon commitment to sustainability. Hence, they understand that we in the present are merely fiduciaries (trustees) who must adapt our usage of natural resources in ways that make the next generation of humankind better and not worse off.¹³⁷

¹³³ See generally, THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, (Malcolm Langford & Anna F. S. Russell eds., 2017); HELLER LÉO, THE HUMAN RIGHTS TO WATER AND SANITATION (2022); David H. Getches, *Indigenous Peoples' Rights to Water Under International Norms*, 16 Colo. J. Int'l Env'tl. L. & Pol'y 259 (2005).

¹³⁴ Elliot Curry, *Water Scarcity and the Recognition of the Human Right to Safe Freshwater*, 9 Nw. J. Int'l Hum. Rts. 103 (2010).

¹³⁵ Joseph Kowalski, *Environmentalism Isn't New: Lessons from Indigenous Law*, 26 Buff. Env'tl. L.J. 15 (2019); Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9 Transnational Environmental Law 429–453 (2020).

¹³⁶ See POPE FRANCIS, ENCYCLICAL FRATELLI TUTTI (2020); See also Erin O'Donnell et al., *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 TRANSNAT'L ENV'T L. 403–427 (2020); See also Elaine C. Hsiao, *Whanganui River Agreement: Indigenous Rights and Rights of Nature* 42 ENV'T POL'Y & L. 371, 375 (2012); [S]ee also Catherine J. Iorns Magallenes, *Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment*, 21 WIDENER L. REV. 273, 283 (2015).

¹³⁷ See generally, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); E. Barritt, *Conceptualising Stewardship in Environmental Law* 26(1) Journal of Environmental Law, 1–23 (2014); MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014); EDITH BROWN, IN FAIRNESS OF FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (UNITED NATIONS UNIVERSITY 1989); KLAUS BOSSELMANN, EARTH GOVERNANCE: TRUSTEESHIP OF THE GLOBAL COMMONS (2015). The public trust theory of environmental law and

However, this age—the Anthropocene¹³⁸—has been anything but sustainable in its approaches to our limited resources such as clean water. Our commitment to the exploitation of the environment as opposed to sustainable use has meant that our economic activities have sometimes treated environmental pollution as the cost of development and growth. Our policies also appear not fit for purpose. This attitude has continued to produce a rapid decline in the quality and quantity of water resources available for healthy human use. The impact of this is more on indigenous communities because of several factors, including our fraught policies on the environment in the decades before now.

Thus, the environmental resources that provide for the food, water, and other livelihoods for these communities are now critically threatened. In a sense, we are jeopardizing not only our environmental splendor and biodiversity but the primary sources of human sustenance and survival. This has been seen in the continued struggle regarding farming and industrial approaches in places such as Indonesia and Brazil.¹³⁹ More germane is also the problem of seeming indifference with which these concerns are treated.

Therefore, it has become imperative to review our approaches to these issues and ensure that we do not destroy access to clean water for indigenous communities or make their means of living to disappear. One way of doing this is to pursue environmental justice. Environmental justice will entail restorative, reparative, and non-repetition measures. It is restorative in that it shall seek to restore where possible the polluted environment—especially water resources.

The first step towards this restorative measure is to stop the source of pollution. Hence, if industrial effluents are being transmitted directly into these water bodies, policies and measures should be adopted to stop the pollution processes. Such policies should include a combination of measures aimed at incentivizing businesses and other stakeholders in the processes that engender pollution to retool or refocus their business policies. This can also include tax holidays and other approaches that empower these stakeholders while ensuring that they can embrace the restorative justice policies in the affected communities.

The restorative measures would also include investments in research and policy design to match the situations under consideration. It is reparative in that the communities that are negatively impacted by current water pollution realities require reparative interventions to assist in healthcare,

resources has gradually gained ground over the years in our juridical lexicon. However, many indigenous philosophies had it as core to their way of life long before now.

¹³⁸ See generally, Frank Biermann, *The Future of 'Environmental' Policy in the Anthropocene: Time for a Paradigm Shift*, 30 ENV'T POL. 61-80 (2021), <https://doi.org/10.1080/09644016.2020.1846958>; [s]ee also Rakhyun E. Kim & Klaus Bosselmann, *International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements 2* TRANSNAT'L ENV'T L., 285–309 (2013).

¹³⁹ Lily Grisafi, *Prosecuting International Environmental Crime Committed Against Indigenous Peoples in Brazil*, 5 HUM. RTS. L. REV. 29-59 (2020) (discussing some of the issues touching on Indigenous rights in Brazil and sustainability. The author views the environmental crimes as qualifying for prosecution under the Rome statute).

education, and the provision of basic amenities needed for enhanced healthy living. Thus, environmental justice in this age will include remediation of environmental damage and proactive investments in methods of economic activities that reduce the pollution of our water resources and the environment in general.

Equally, this is also important for climate justice and other aspects of our collective efforts to reduce the rapid and violent climatic conditions. These will always involve our collective public effort and individual responsibility. However, individual responsibility alone does not stand a chance of meeting the enduring concerns of environmental justice, such as continued access to clean water for all—including indigenous communities.

Indigenous communities bear a heavy burden of our failure to manage our water resources sustainably.¹⁴⁰ First, these communities are sometimes entirely dependent on these water resources for their daily living. Hence, the pollution of these resources deeply violates their right to a safe and healthy living environment. The further consequence of this is the diminution of their capabilities to self-determine the best interest of their communities: Because they would either continue to depend on the compromised water resources or move in search of less polluted environments. More so, the destruction of these resources makes these communities very vulnerable since they are often at the last mile of our distributive and social intervention systems and policies.

For example, due to the policy approaches we had adopted in the past, indigenous communities often live in difficult terrains, segregated homelands, and suburbs not easily reachable for our social policy interventions. A clear picture of this was seen in the COVID-19 pandemic and access to vaccines for many communities. Other factors include the experiences that these indigenous communities have had with the health science field prior to this time. That experience in part breeds mistrust and vaccine hesitancy.¹⁴¹ Thus owing to a combination of these factors these communities have struggled exceptionally during this time.¹⁴²

The mortality rate arising from this is also significantly higher in these communities. It also evidences some of the preexisting health conditions in these communities before the onset of the COVID-19 pandemic. The opioid epidemics we have seen in these communities have also been significantly influenced by the limited capacities and capabilities in these communities, some of which are traceable to the policies of difference and exclusion which we had adopted in the past. Equally, sometimes the policy prescriptions that we map out for indigenous communities are done without any significant input from these communities. Thus, we sometimes produce a mismatched

¹⁴⁰ Á. Fernández-Llamazares, M Garteizgoeascoa, N. Basu, E.S. Brondizio, M. Cabeza, J.M. Martínez-Alier, P McElwee, V. Reyes-García, *A State-of-the-Art Review of Indigenous Peoples and Environmental Pollution* (2020) Integrated Environmental Assessment and Management. doi: <https://doi.org/10.1002/ieam.4239>

¹⁴¹ Randi Druzin, *Canada's Troubled Healthcare Relationship with Its Indigenous: The Coronavirus pandemic has exposed the troubled history between the country's indigenous communities and the healthcare system*, USA NEWS, Apr. 13, 2021.

¹⁴² Lorena Allan, Nick Evershed & Nino Bucci, *Scramble to Lift Indigenous Vaccination Rates as Covid Spreads in Western NSW*, THE GUARDIAN, Aug. 13, 2021.

set of policies for these communities. This produces mixed outcomes, and to obviate some of these difficult outcomes, thou shall do environmental justice.

D. Indigenous Civilizations are Real and Deserve Respect and Protection

Many traditions and civilizations underpin our current realities as human species. These civilizations and traditions give us identity, agency, and a place in the universe of things. This is the case for every community, including empires and nation-states. These civilizations and traditions add to the vast story of human existence across epochs, seasons, and spaces. What we learn of each civilization helps us understand the richness, mistakes, and potential pathways for human advancement. Yet, the human encounter is often based on competition and interests, which may misalign.

This misalignment has been sometimes seen in the clash of civilizations or the clash in civilization. Hence conflict, wars, and consequent violations of human rights—despoliations, scorched earth degradation of communities, pogroms, genocides, and crimes against humanity—has punctuated and sometimes written entire epochs of human history. From empires to nation-states, the story of that despoliation has been written in blood. Often the blood of indigenous populations has fertilized the competing interest of empires and states. It has also sometimes watered the civilizing mission of these states. These civilizational dominations are sometimes based on religion or ethnic identities. But whatever metric that is adopted, indigenous communities are often at the receiving end of the violent competition of nations and empires.

Little wonder then why policies of assimilation are often deemed gateway policies to equal participation and belonging.¹⁴³ Thus, the language, citizenship, personhood, and self-determination of these communities have often been tested on the scale of their compliance or otherwise with the standards of the dominant tradition. At this point in human history, it bears remembering that indigenous civilizations are real and deserve protection—not erasure through forced assimilation of indigenous peoples and their children. The case for this cannot be overemphasized since indigenous peoples worldwide are the custodians of different traditions and civilizations. These traditions and civilizations are very significant to their identity, agency, humanity, and place in the world. To erase these civilizations is also to erase these defining attributes of their beingness. In other words, it is like declaring these indigenous communities as nothing. To this effect, thou shall not destroy the civilization of indigenous peoples or abduct and assimilate their children; that is genocide.

Within nation-states, the veil of unlimited sovereignty has also been used to silence the interests and aspirations of indigenous communities. The unwieldy and forced, but limited pulling together of several tribes, ethnicities, and communities into modern nation-states has made internal strife a significant part of the daily life of nation-states. The use of state force and power to quell any agitation for self-determination by indigenous communities is a significant factor in the violation of the rights of indigenous communities within nation-states. Perhaps, it is time enough

¹⁴³ Craig Joseph Trocino, *Civilizing the Savages: A Comparison of Assimilation Laws and Policies in the United States and Australia*, 14 GLENDALE L. REV. 33 (1995).

to reassess these policies to respect, protect, and promote indigenous communities' rights in light of the so many commitments we have made via treaties, conventions, charters, and declarations on human rights since the end of World War II.

E. Informed Consent and Contribution from Indigenous Communities for Laws, Regulations, and Policies Affecting their Rights

The life and livelihoods of indigenous communities are often affected by laws, regulations, and policies made by sovereign authorities. The exercise of these sovereign powers means that any group or nationality within the jurisdiction of a particular sovereign is usually affected by laws and regulations in that society. Indigenous peoples are often not accorded due recognition as sovereigns in international law. This means that while they may enjoy internal autonomy in those territories that are considered their homelands, they do not enjoy the rights and privileges accorded to states in international law. Thus, they have inchoate legal personalities only to the extent granted to them by their supervising sovereign. In essence, this has implications for participation in foreign policy because they do not have the recognized personality to enter into foreign relations or join international organizations, except where exceptions are made in these regards.

Therefore, they must be considered in the process if we intend to protect their best interest in the overall scheme of things. It is, therefore, often the case that indigenous communities have marginal representation in the mainstream structure of law, regulation, and policy in the public institutions. This position of limited sovereignty means that there are technical barriers to the participation of indigenous communities in the law and policymaking processes at different levels of society. Three technically important issues arise from this. They are limited access to the spaces of law and policymaking in our societies; limited representation of indigenous frameworks, methods, and norms in the conception, articulation, and execution of laws and policies in many of our societies; misalignment of interests, goals, and purpose in lawmaking and policy. First, spaces of law and policymaking are usually elite spaces in many of our societies. Therefore, these spaces are ordinarily dominated by many who are at a distance from indigenous communities and their aspirations.

While this may be the outcome of facially neutral laws and regulations or due to the prevailing demography of the society in question, it does not vitiate the fact that even in these societies, the access of indigenous communities to spaces of law and policymaking are usually limited. The limitations are sometimes traceable to exclusionary policies of the past, such as limited access to education and other processes of human development and empowerment, which are necessary for effective participation in the policymaking spaces in our societies. At other times the limitations may arise from the cumbersome nature of procedural provisions and congressional proceedings. Thus, there is a tendency for the dominant voices in law and policymaking to set the parameters of participation through procedures that sometimes unwittingly limit the participation capacity of indigenous communities.

Even in international law, the indigenous peoples have limited access to the arena of international lawmaking and policy. They have a right to prior and informed consent for development projects affecting them. There is also the presumption by the majority to know the concerns of everyone—including indigenous communities. It is, therefore, helpful to be deliberate

in the lawmaking process but creates spaces for all members of the society to participate in law and policymaking, especially when the policies directly impact these indigenous communities.¹⁴⁴ For instance, in deciding to grant licenses or approvals of installing pipelines or siting of refuse disposal dumps, it is useful to seek the input of these indigenous communities. This will obviate the tensions that often arise from the resistance of indigenous communities to these projects.

Equally significant is the marginalization of indigenous epistemologies in articulating frameworks, methods, and pathways that are not indigenous. This begins with the language of the law and policy. In many respects, it is often the case that indigenous languages are not centralized in the making of laws and policies. Hence, we have texts, methods, and concepts framed and shaped by foreign ideas and approaches. This has an alienating impact on indigenous communities. Thus, from our concepts of law to our legal methods and judicial deliberations, rules of recognition, and obligation, indigenous axiology is often marginalized, although these laws and policies are equally applicable to them. The endpoint of these approaches is often the misalignment of the interests and aspirations between the society at large and indigenous communities. Undoubtedly, this has implications for cost and allocation of resources for development and policy.

F. Full Faith and Credit—To All Agreements, Treaties, and Parchments made with Indigenous and Othered Communities

Accord full faith and credit to all agreements, treaties, and parchments made with indigenous communities or renegotiate them with respect, candor, and recognition of their interests.¹⁴⁵ Often there is an asymmetrical power relationship between sovereign states and indigenous peoples within their territories. One outcrop of this power dynamic is the limited recognition and enforcement of treaties, agreements, and judicial ordinances emerging from indigenous communities. In other words, we pick and choose which agreements or judgments affecting our relationship with indigenous communities that we should accord full faith and credit.

We do this often because we are aware of the power dynamics, the vulnerability of indigenous populations, and the limited capacities which they have to insist on the enforcement of the rights and privileges as recognized under these treaties, agreements, and parchments. This is with particular reference to those treaties made during the early days of settler and colonial rule. This avoidance of assumed obligations and responsibilities via treaties with indigenous communities is problematic at three critical levels. First, it minimizes the legal personhood of indigenous nations and amplifies their already marginal position in the scheme of things. This diminution of their national personality affects their overarching perception of their sense of worth

¹⁴⁴ Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. OF INT'L HUM. RTS. 54 (2011).

¹⁴⁵ Article XXIV (1) of the American Declaration of the Rights of Indigenous Peoples provides that “[i]ndigenous peoples have the right to the recognition, observance, and enforcement of treaties, agreements and other constructive arrangements concluded with states or their successors, in accordance with their true spirit and intent in good faith and to have states honor and respect same. States shall give due consideration to the understanding of the indigenous peoples as regards to treaties and constructive agreements.” G.A. Res. 61/295. United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007).

in the universe of things. It shatters their commitment to the ideals of fairness and equity, which is at the heart of a harmonious and human-centered relationship between states on the one hand: and between different constituencies within states on the other hand.

Second, it robs indigenous communities of their agency and other intangible resources, which is critical to their meaningful participation in the processes, proceedings, and legal frameworks that determine their fate in society. It gives the impression that these indigenous peoples have no interest worthy of direct self-determination since any agreement reached with them can be overridden at whim. The right of autonomy and self-determination of the wellbeing of indigenous communities is highly dependent on their agency. To think otherwise is to take away this right, and that is not in their best interest. It is important to accord full faith and credit to agreements, compacts, treaties, and parchments made with indigenous communities.

Third, it violates a classic principle of international law that agreements are meant to be obeyed—*pacta sunt servanda*.¹⁴⁶ The principle of *pacta sunt servanda* also applies in relationships between indigenous peoples and other states.¹⁴⁷ A recent work of the United Nations also articulated the complex nature of the treaties, and other instruments made between indigenous peoples and colonial powers. Many of these treaties created problematic outcomes for indigenous communities.¹⁴⁸

We can begin now to restore the dignity and agency of indigenous communities by recognizing and affording full faith and credit to existing agreements, parchments, and treaties with these indigenous communities.¹⁴⁹ Where there are critical reasons for revisiting these treaties, agreements, and obligations assumed with indigenous communities, the treaties can be renegotiated with candor, utmost good faith, and a fresh commitment. That way, society will accomplish its larger goals without violating or dehumanizing indigenous communities as we have always done in the past. This will enhance the identity and a sense of place for these indigenous communities.

For example, instead of the consistent discontents over new pipelines, railways, and other public interest infrastructure over Indian/indigenous territories without due consideration of their interests and concerns, society can negotiate with these communities and thus remove the issues that create disharmony within the community. Indeed, adopting a full faith and credit demeanor in

¹⁴⁶ Hans Wehberg, *Pacta Sunt Servanda*, 53 *American Journal of International Law* 775–786 (1959); Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 *American Journal of International Law* 180–197 (1945).

¹⁴⁷ For a general explanation of the principle of *See* I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 *AM. J. OF INT'L L.* 513 (1989).

¹⁴⁸ Miguel Alfonso Martinez (Special Rapporteur), *Study in Treaties, Agreements and other constructive arrangements between states and indigenous populations*, Final Rep. of the UN Com. on Hum. Rts., UN Doc. E/CN.4/Sub.2/1999/20 June 22, 1999.

¹⁴⁹ Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples is of the tenor that, “[i]ndigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements, and other constructive arrangements concluded with states or their successors and to have states honour and respect such treaties and agreements and other constructive arrangements.” G.A. Res. 61/295. United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007).

our dealings with indigenous communities can go a long way in avoiding the continued violation of their rights—especially those rights and privileges recognized in agreements, treaties, and conventions involving indigenous communities.

G. Violence Against Indigenous Women

The disappearance of indigenous women is an element of genocide. Violence against indigenous populations, especially their women, is a notorious human rights situation. So many factors have been noted to be creating this situation, including previous laws which limited the jurisdiction of indigenous communities to hold perpetrators accountable for violations that occur in Indian communities but with persons who are not resident in Indian reservations.¹⁵⁰ This has caused considerable harm to the development and overall wellbeing of the indigenous populations around the world. The nature and incidents of the violence range from human trafficking, sexual violence and the disappearance of indigenous women. This has led to a number of international, regional, and national instruments aimed at prohibiting the violation of the rights of native women. Indigenous women are particularly prone to sexual violence and disappearance.¹⁵¹ For instance, the United States Institute of Justice has noted that 83% of American Indian adults have experienced some form of violence in their lifetime.¹⁵²

Current efforts to tackle the epidemic of violence and generally protect the rights of indigenous communities include the appointment of the United Nations Special Rapporteur on the Rights of Indigenous Peoples. The purpose of the Rapporteur's mandate notes that;

indigenous peoples across the world experience the consequences of historical colonization and invasion of their territories. They face discrimination because of their distinct cultures, identities, and ways of life, and are disproportionately affected by poverty and marginalization.¹⁵³

It further acknowledged that the mandate was created to promote good practices, including new laws, government programs, and constructive agreements between indigenous peoples and states to implement international standards concerning the rights of indigenous peoples; make recommendations and proposals on appropriate measures to prevent and remedy violations of the

¹⁵⁰ André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey*, NAT'L INST. OF JUST. (May 2016).

¹⁵¹ Sharon Cohen, *#NotInvisible: Why Are Native American Women Vanishing?*, AP NEWS, Sept. 6, 2018; See generally Robert Maxim & Randall Akee, *What Deb Haaland's Historic Nomination as Interior Secretary Means for Indigenous Peoples*, THE BROOKINGS INSTITUTE, Dec. 18, 2020 (the appointment of Deb Haaland, an Indian woman, has raised hopes in some quarters that some of the problems relating to the treatment of Indigenous women and overall questions of access to justice concerning them will be better mainstreamed in the policy and legal processes affecting indigenous/tribal groups).

¹⁵² United States Department of Justice, *Five Things about Violence Against American Indian and Alaska Native Women and Men*, November 30, 2016.

¹⁵³ United Nations Human Rights Special Procedures, *Special Rapporteur on the Rights of Indigenous Peoples [Purpose of the Mandate]* Accessed December 17, 2022.

rights of indigenous peoples; report on the human rights situations of indigenous peoples around the world; address specific cases of alleged violations of indigenous people's rights.¹⁵⁴

In a recent piece, Megan Mallonee noted that,

the deaths and disappearances of indigenous women in America as well as the disproportionate amount of violence against them are exacerbated by a confusing jurisdictional scheme that leads to dropped charges, failed prosecutions, confusion over who has the authority to bring charges against perpetrators on tribal lands. Additionally, the absence of accurate and complete data means that there is not a clear picture of the crisis, who is affected, or how to address it. There is not yet a designated government database for these cases, and the department of justice logged only 116 of the 5,712 reported cases in 2016. Given these compounding factors, it is not surprising that evidence demonstrates the links between this epidemic and this country's story of forced assimilation and mistreatment of Native Americans as well as continued systemic bias and racism.¹⁵⁵

H. Respect Indigenous Sacred Groves and Support Restorative Measures

Indigenous communities, just as other human communities, have beliefs and aspirations that animate their whole existence. This is so because, in every community of human beings, there are deeply embedded values that sustain their perception of existence, the universe, and their place in it. It defines for these communities the mean of the here and imagination of what lies beyond the ordinary. Thus, the concept of the sacred and the holy is found in every tradition. Indigenous peoples are not exempt from this disposition of humankind. Often, however, indigenous communities are confronted with the reality of a sense of public perception of their sacred spaces as nothing. This “*disbeingness*”¹⁵⁶ which is foisted on communities is violative of the need to respect the freedom of religion, conscience, and belief as a cardinal part of international human rights.

Sacred groves may serve as places of worship or places of entombment and memorialization of ancestors; hence deserve our respect as we would accord to other forms of belief and sacred worship. This is a pathway not only to the respect of human rights but to sustainable peace, development, and human advancement. However, as already observed by some scholars, the callous destruction of the sacred groves of indigenous communities is not just a relic of the past but a subsisting violation.¹⁵⁷

¹⁵⁴ See generally, José Francisco Calí Tzay, *Indigenous women and the development, application, preservation and transmission of scientific and technical knowledge* Report A/HRC/51/28 (August 9, 2022).

¹⁵⁵ Megan Mallonee, *Selective Justice: A Crisis of Missing and Murdered Alaska Native Women*, 38 ALASKA L. REV. 93-120 (2021).

¹⁵⁶ My coinage used to describe the dismissal and general treatment of indigenous groves as meaningless and nothing worth of respect by the majority in many of our communities.

¹⁵⁷ See generally Hall Barclay & Michalyn Steele, *Rethinking Protection for Indigenous Sacred Sites*, 134 HARV. LAW REV. 1296-1358 (2021); Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v.

This position aligns with the provisions of Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples. Thus, “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used land, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” Where these resources have been compromised in any way—either through pollution, or such other activity, the state has a duty to implement restorative measures. Indeed, such restorative measures have a secondary advantage of contributing to the larger needs of sustainability and conservation within the state.

I. Reconciliation, Reparations, Restitution, Nondiscrimination, and Non-Repetition of Historical Injustices

The history and dynamics of the relationship between indigenous peoples and other peoples, including settlers, colonizers, and trading bands, is a history fraught with many contradictions. However, there has been a recent shift in transitional democracy towards the reconciliatory, restorative, and reparative approaches to justice. This has proved very relevant in those societies undergoing rapid transitions, including those emerging from authoritarian and conflict situations. On the other hand, there have also been many historically violent experiences that have endured for decades within some of the mature democracies. Thus, the histories of discrimination, violence, and egregious violations of the human rights of indigenous communities mean that there are outstanding questions requiring the balm of reconciliation, restitution, reparation, and a recommitment to non-repetition.

States must have the humility to engage with these communities and fashion out amicable ways of reviewing the challenging past and assuaging them. This will help create a more inclusive society and the progressive realization of equal humanity and human rights. Some of the reconciliatory measures that can be enacted include truth commissions, reparative programs, memorialization, national apologies, and other efforts to build peace and reconciliation within their communities. The essence of enacting these policies lies in creating a new beginning both for national healing and renewal of the possibilities of democratic societies. It is also to avoid repetition of the violations. Though the past may not be changed or adequately restored, just reckoning programs can set a new foundation for the future protection, promotion, and redress of human rights violations of all, including minorities.¹⁵⁸

Georgia, 30 U.S. I (1831); *Johnson v. M'Intosh*, *supra* note 15; [*s*]ee also David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1577 (1996); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 37-38 (1991); Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953); *The Indian Act, 1876*. S.C. 1876 c 18 (Can.) (sought to control and centralize all aspects of Indian Life from Identity and Governance to land and subsistence.)

¹⁵⁸ Colleen Murphy, *How Nations Heal*, BOSTON REVIEW, Jan. 15, 2021, <https://www.bostonreview.net/articles/colleen-murphy-transitional-justice/>.

International human rights law refers to the broad field which seeks to provide measures that could engender inclusive peace, reconciliation and healing as transitional justice.¹⁵⁹ Thus, transitional justice is a set of judicial and non-judicial measures enacted by states or communities as means of closing the wounds of injustice, violence, authoritarian repression, provide accountability, restore democratic governance and repair what has been damaged.¹⁶⁰ Depending on the situation the mechanisms to be adopted may include criminal trials, truth commissions, lustration, reparative measures and other measures aimed at mending what has been damaged. The most recognized cases of transitional justice are cases of mass atrocities arising from conflicts and authoritarian violence. However, there are other situation that could be found in situations of historical injustices such as the experiences of indigenous peoples in the Indian Residential School System, enslavement, Tuskegee experiment, and the internment of Japanese Americans.¹⁶¹

Whatever may be the situation the measure or mechanism to be adopted will depend on many factors—including the following factors which I consider indispensable to a successful transitional justice effort. They are: (1) the nature of the violations to be resolved or considered in the transitional justice process. (2) the circumstances or contexts in which the occurred and the overall prevailing environment in the community. For instance, if the violations occurred in a conflict or authoritarian situation, the circumstances and overarching contexts will be different from cases of historical violence such as slavery, colonial repression of indigenous communities, or such other violations linked to such mature democracies as Australia, France, and Belgium.¹⁶² (3) is the subject of focus. If the subject is constitutional reform the approach will be different from those situations where a criminal prosecution would be necessary such as cases of sexual violence against indigenous women or their enforced disappearance. Equally, (4) the community ownership of the transitional justice measure/process is indispensable to the success or otherwise of a transitional justice measure.

In recent decades, the truth commission mechanism has been applied in many countries around the world.¹⁶³ Some of the reasons for the adoption of the truth commission measure is that it is flexible, and the mandates could be adapted to meet the needs of different communities. It is also a mechanism which allows for reconciliation, without exaggerated blameworthiness, as opposed to such other mechanisms as criminal tribunals. This is so because, criminal tribunals are founded on a different philosophy, which is, the alleged criminal responsibility of those who are

¹⁵⁹ Frank Haldelmann, *Another King of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L.J. 675, 675-737 (2008).

¹⁶⁰ Ruti G. Teitel, *Transnational Justice*, 95 AM. POL. SCI. REV., 727 (2001).

¹⁶¹ *Day Statement: The History of Violence Against Indigenous Peoples Fully Warrants the Use of the Word "Genocide"*, CANADIAN HIST. ASS'N (June 30, 2021), <https://cha-shc.ca/news/canada-day-statement-the-history-of-violence-against-indigenous-peoples-fully-warrants-the-use-of-the-word-genocide-2021-06-30>.

¹⁶² Priya Pillai, *Truth Commissions and Colonial Atrocities: Moving the Needle Further Towards State Responsibility*, OPINION JURIS (April 27, 2019), <http://opiniojuris.org/2019/04/27/truth-commissions-and-colonial-atrocities-moving-the-needle-further-towards-state-responsibility/>; Rosemary Nagy, *Transformative justice in a settler colonial transition: implementing the UN Declaration on the Rights of Indigenous Peoples in Canada*, 26 INT'L J. HUM. RTS. 191-216 (2022).

¹⁶³ Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 25 HUM. RTS. Q. 237 (2003); Onur Bakiner, *Truth Commissions Memory, Power, and Legitimacy*, 39 PUB. HIST. 119 (2017).

arraigned before these tribunals. Equally, criminal punishment or mere indictment could make an indelible impact on the lives of those so indicted even though they may not be convicted in the end. Indeed, truth commissions are also noted for its capacity to allow for reconciliation while articulating a report which will serve as a reservoir for policy ideas and frameworks in the new society. The truth commission mechanism is useful for dealing with cases involving indigenous rights, because it will give those communities agency, voice, and allow for full participation in all the conception, design, and implementation of the reconciliatory or restitution processes.¹⁶⁴ Indeed, truth commissions mitigate the rigors of judicial proceedings inherent with criminal trials and public interest litigations on these issues.

J. Sustain All Principles with Legal and Policy Instruments

The points highlighted above are not isolated. They cohere with each other and have many remarkable intersections. They should be considered as coherent tools of engagement and recommitment of society to the equal recognition of all peoples, persons, and communities that inhabit any political space. Thus, they have to be seen as different strands of law and policy mechanisms to meet the yearning need to recognize, respect and promote the rights of indigenous peoples. To be effectual, all the parts must work in unison. Therefore, it is imperative to sustain all these precepts and parts with all available instruments and resources. In effect, instruments of state policy must deliberately put these precepts into perspective in conceiving, designing, and executing policies that will affect indigenous communities.

The importance of an inclusive and all-embracing approach that this segment pushes is that rights are intertwined. The rights are interdependent because they reinforce one another. For instance, the destruction of sacred groves and religions of indigenous communities, in a sense, affects their entire way of life and may even implicate their identity and self-purpose in the universe of things. The forceful seizure of lands without adequate compensation violates their land rights and overall economic and social wellbeing. It uproots them from their ancestral roots. This too is significantly traumatizing and could in extreme cases create genocidal conditions. Indeed, the spiritual wellbeing of these indigenous communities is often dependent on their connection to these sacred spaces, whether as places of burial, worship, communion, or just spaces of encounter with both the seen and metaphysical realities of their traditions.

CONCLUSION

Indigenous communities are co-owners and custodians of the earth and the fullness thereof. Their lived experiences in the modern era have been significantly violent encounters between them and other peoples of the world. They have often been treated quite inhumanely, subjected to genocide, displacement, and forced assimilation. These egregious human rights outcomes affront the human conscience. Though some progress has been made in recent decades, some of the foundations that engender the violation of the rights of indigenous communities are still latent in our public and private spheres. They are also significantly patent in our systems and policy

¹⁶⁴ See generally Rosemary Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, 7 INT'L J. TRANSNAT'L 52-73 (2013).

prescriptions. The policy prescriptions are sometimes justified on development grounds, although they do not align with our professed commitments to equality, dignity, and humanity of all peoples.

Thus, in our time, it has become imperative to change the wind by giving due respect to the human rights of indigenous communities, in line with the professed values found in the Universal Declaration of Human Rights, the United Nations Convention Against Racial Discrimination, the Declaration of the Rights of Indigenous Peoples and the other regional and national bills of rights. This work has been an attempt to articulate pathways to give meaning to the human rights instruments that affect indigenous peoples. In the main, it has identified ten basic canons. These canons are distillable from the existing literature and practices in the field, but they have not been ably amplified as a bundle: Hence the contribution made here. Though there is still more work to be done in developing and espousing these ideas, it is hoped that this will ignite further scholarly interest in recognizing, respecting, and protecting the rights of indigenous communities. This is imperative as these indigenous communities continue to bear an uncommon burden arising from the complex problems of our time. We would have to effectuate these ten standards, else our indigenous communities may look at our human rights conventions and declarations and say: “I have heard many things like these; you are miserable comforters, all of you!”¹⁶⁵

¹⁶⁵ *Job* 16:2 (NIV).