



## **Bibliography**

### **Natural Resource Governance, Inequality and Human Rights**

This bibliography has been prepared by the Rapoport Center for Human Rights and Justice at the University of Texas School of Law as part of a larger project on the relationship between natural resource governance, inequality and human rights.

It aims to identify resources of value for scholars and legal practitioners thinking about the relationship between inequality and human rights in the context of natural resource extraction and governance. As such it includes primary and secondary texts that relate to the intersection between inequality, natural resource governance, and human rights. This bibliography also includes texts relevant to the different sites in which the governance of natural resources is addressed not only in human rights law but in various other international and transnational legal regimes. Therefore, this document provides resources that go beyond a human rights focus that solely examines whether minimal rights standards have been met, but rather looks at how governance at these sites affects the relative distribution of power, entitlement, benefits, costs, and risks in natural resource extraction and the impact of that distribution on human rights.

Please be advised that this bibliography is subject to revision, and will be updated periodically to reflect the Rapoport Center's continuing work on the intersection between natural resource governance, inequality and human rights. If you are an author with a piece of scholarship that would be appropriate for inclusion in this bibliography, please email the work, along with an abstract, to Kate Taylor ([ktaylor@law.utexas.edu](mailto:ktaylor@law.utexas.edu)) for editorial consideration.

#### **Acknowledgements:**

This bibliography was prepared by Julia Dehm (Postdoctoral Fellow) and Kate Taylor (Postgraduate Fellow) at the Rapoport Center for Human Rights and Justice. Many thanks to Karen H. Lee, Scott Squires and Reina Wehbi for the invaluable research assistance.

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# NATURAL RESOURCE GOVERNANCE

## Primary Materials

*Natural Resource Charter 2<sup>nd</sup> edition*, Natural Resource Governance Initiative, June 12, 2014.

- Summary: The Natural Resource Charter is a set of principles for governments and societies on how to best harness the opportunities created by extractive resources for development. It is not a recipe or blueprint for the policies and institutions countries must build, but instead provides the ingredients successful countries have used.

## Scholarly Texts

Auty, Richard. *Sustaining Development in Mineral Economies: The Resource Curse Thesis*. London: Routledge, 2006.

- Summary: It is widely believed that natural mineral resources are desirable. However there is growing evidence that this may not always be the case. Indeed, it seems that natural assets can distort the economy to such a degree that the benefit actually becomes a curse. In *Sustaining Development in Mineral Economies*, Richard Auty highlights these drawbacks and the devastating effect they can have on developing economies. With reference to six ore-exporters (viz. Peru, Bolivia, Chile, Jamaica, Zambia and Papua New Guinea) he outlines how things can go badly wrong. He particularly stresses the need to avoid 'Dutch Disease' whereby competitiveness is drained out of the agriculture and manufacturing sectors so that in the long term growth falters.

Blanco, Elena and Jona Razzaque. *Globalization and Natural Resources Law: Challenges, Key Issues and Perspectives*. Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2011.

- Summary: This chapter looks at the main globalization discourses and highlights the key issues in the relationship between globalization and natural resources which are later developed throughout the book.

Collier, Paul. *The Plundered Planet: How to Reconcile Prosperity with Nature*. London: Penguin, 2011.

- Summary: How can we help poorer countries become richer without harming the planet? Is there a way of reconciling prosperity with nature? World-renowned economist Paul Collier offers smart, surprising and above all realistic answers to this dilemma. Steering a path between the desires of unchecked profiteering and the romantic views of environmentalists, he explores creative ways to deal with poverty, overpopulation and climate change - showing that the solutions needn't cost the earth.

Conca, Ken. *Green Planet Blues: Critical Perspectives on Global Environmental Politics*. New York: Basic Books, 2014.

- Summary: This unique anthology examines global environmental politics from a range of perspectives and reflects the voices of different actors involved in the politics. Paradigms of sustainability, environmental security, and ecological justice illustrate the many ways environmental challenges and their solutions are framed in contemporary international debates about climates, water, forests, toxics.”

Doughman, Richard Clayton. "Might to Keys to Peace Open the Doors to Extractivism? Reflections on Colombia's Post-Conflict Extractive Economy" in Fredy Cant and Hartmut Quehi (eds) *Handbook of Research on Transitional Justice and Peace Building in Turbulent Regions*. IGI Global, 2016.

- Abstract: The present paper explores what the ongoing peace talks between the Colombian government and the Fuerzas Armadas Revolucionarias de Colombia – Ejército Popular (FARC-EP) may mean to Colombia's growing extractive economy. Militarization during the decades-long conflict and the spike in rural, state and paramilitary violence under former President Alvaro Uribe Vélez's (2000-2008) have left an unequal land structure favorable to resource extraction by foreign multinational corporations. Concessions for mining and oil exploration now cover a large percentage of Colombian territory, and the policy environment has become ever more welcoming to foreign capital. While armed conflict has opened new territories for resource exploitation, the instability it has created could deter long-term foreign investment. This paper hypothesizes that current President Juan Manuel Santos's pursuit of peace with the FARC-EP aims to enhance conditions for intensified resource extraction in Colombia in consonance with the regional trend toward a recolonization of Latin America's natural commons

Ebrahim-Zadeh, Christine. "Back to Basics: Dutch Disease. Too Much Wealth Managed Unwisely." *Finance and Development* 40(1) (2003): 50–51.

- Summary from the Natural Resource Governance Institute: "This short "Back to Basics" article from the International Monetary Fund's Finance and Development magazine provides a jargon-free explanation of "Dutch disease" for a non-academic audience. In addition to explaining the mechanisms through which Dutch disease occurs, the article summarizes recent debate among economists regarding its significance, and offers general advice for policymakers."

Gylfason, Thorvaldur, "Natural Resources, Education, and Economic Development." *Europe Economic Review* 45(4–6) (2001): 847–59.

- Abstract: Economic growth since 1965 has varied inversely with the share of natural capital in national wealth across countries. Four main channels of transmission from abundant natural resources to stunted economic development are discussed: (a) the Dutch disease, (b) rent seeking, (c) overconfidence, and (d) neglect of education. Public expenditure on education relative to national income, expected years of schooling for girls, and gross secondary-school enrolment are all shown to be inversely related to the share of natural capital in national wealth across countries. Natural capital appears to crowd out human capital, thereby slowing down the pace of economic development.

Humphreys, Macartan, Jeffrey D Sachs, Joseph E Stiglitz "Introduction: What is the Problem with Natural Resource Wealth" in Macartan Humphreys, Jeffrey D Sachs, Joseph E Stiglitz (eds) *Escaping the Resource Curse*. Columbia University Press, 2007.

- Summary: This introduction provides a general overview of the issues surrounding natural resource wealth. It sets up the rest of the book, which elaborates on the many

adverse effects of oil and gas wealth and then explores the different solutions.

Meyersfeld, Bonita. "Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?" *Business and Human Rights Journal*, 2(1) (2017), 31-53.

- Abstract: Mining operations in the Global South often worsen conditions for affected communities after the conclusion of the operations as compared to pre-mining conditions. This is regression, not progress, which is contrary to the narrative surrounding mining's promise of economic growth. While mining certainly brings profit, this profit does not result in social and economic development of affected communities and people living in poverty. This is the 'myth of mining' and the objective of this article is to expose this myth, identify its failings and propose a notion of 'equitable mining' that could ensure a pro-poor mining industry.

Merino-Blanco, Elena, and Jona Razzaque. *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations*. Leiden: Martinus Nijhoff Publishers, 2012.

- From the back cover: "Considering that natural resource or green capital are the drivers of globalization, this book focuses on the link between investment, trade and natural resource management in the context of the growing economic inequalities between states. It argues that there is a need to pay attention to the environmental and social conflicts arising out of the economic globalization and the response of regulatory and institutional mechanisms of the challenges of rapid resource depletion. The book will provide readers with a better understanding of the overlapping legal regimes, disagreement and diversities of legal processes, and the benefits and risks associated with sustainable management of the natural resource sector."

Michieka, Nyakundi M., and Dustin Blankenship, "Avoiding the Resource Curse: Applying the Guiding Principles in Kenya" in Jena Martin and Karen E. Bravo (eds) *The Business and Human Rights Landscape: Moving Forward, Looking Back*. Cambridge University Press, 2015.

- Summary: Many believe that the recent discovery of oil could see billions of dollars flowing into Kenya, freeing the country from the shackles of poverty. Sadly, history dictates that resource-rich countries are plagued by a phenomenon called the "resource curse," and experts have expressed fears that this could occur in Kenya. There is no easy solution to this problem. However, a system of good political and economic institutions working together to create an accountable and transparent oil industry based on principles found in the BHR framework could prevent this. This chapter begins by defining human rights and the context in which they will be evaluated then continues by describing past and current exploratory activities in Kenya before outlining the transmission channels through which the resource curse can occur. The chapter then addresses the effect of resource abundance on human rights and concludes by providing suggestions of how the resource curse can be avoided as outlined in the literature.

Sachs, Jeffrey D. and A. M. Warner, “The Curse of Natural Resources.” *European Economic Review* 45(4–6) (2001): 827–38.

- Summary: This paper summarizes and extends previous research that has shown evidence of a “curse of natural resources” – countries with great natural resource wealth tend nevertheless to grow more slowly than resource-poor countries. This result is not easily explained by other variables, or by alternative ways to measure resource abundance. This paper shows that there is little direct evidence that omitted geographical or climate variables explain the curse, or that there is bias resulting from some other unobserved growth deterrent. Resource-abundant countries tended to be high-price economies and, perhaps as a consequence, these countries tended to miss-out on export-led growth.

Schrijver, Nico, *Development without Destruction: The UN and Global Resource Management*. Indiana University Press, 2010.

- Summary: Since 1945, the UN has been actively engaged in conceptualizing strategies for both economic development and a sustainable environment. From a broad historical perspective, *Development without Destruction* sketches the role played by organizations and individuals in the UN system in developing and consolidating principles of international law and international governance with respect to natural resource management. Nico Schrijver highlights the UN's efforts to generate and implement strategies to resolve tensions between economic development and environmental protection, conservation and exploitation, sovereignty and internationalism, and armed conflict and peaceful access to natural resources. Schrijver's thorough analysis is an indispensable guide to management of the critical environmental issues on today's global agenda.

## Reports

Bhorat, Haroon, Grieve Chelwa, Karmen Naidoo & Benjamin Stanwix. “Resource Dependence and Inequality in Africa: Impact, Consequence and Potential Solutions,” paper presented at the *African Economic Conference*, Kinshasa, Democratic Republic of Congo, November 2015.

- Abstract: Over the last decade an increasing number of the world’s fastest-growing countries have been in Africa. This recent progress is creating widespread optimism as economic development prospects across many parts of the continent rapidly improve. Accompanying this optimism, however, are concerns regarding the sustainability of the current growth path, as well as the inclusivity of the growth being generated in many African economies. In this paper, we examine the recent progress in Africa with a specific focus on extractive industries and inequality. Extractive industries have become a major growth driver for many countries in Africa. However, alongside the rapidly increasing wealth they offer, an over-reliance on natural resources may create attendant challenges captured under the well-known banner of the ‘resource curse’. This includes the challenge that prosperity is often concentrated in the hands of a few, which risks exacerbating existing inequalities. Resource dependence also places critical onus on governments, often with poor track records, to optimally manage the process of extraction and accumulation. Drawing on recent data, we begin in Section 1 by reviewing the post-2000 growth record and examining the relationship between growth, inequality,

and poverty within the context of resource dependent economies. Section II goes on to explore some of the drivers of inequality in resource-dependent countries, while Section III details the ways in which illicit financial flows are linked to extractive industries and drain wealth from the continent. Section IV then suggests policy avenues that provide possible solutions to the challenges that extractive industries in Africa present.

“The Natural Resource Paradox: Resource Wealth Amid Human Poverty” in *Africa Progress Report 2013 - Equity in Extractives: Stewarding Africa’s Natural Resources for All*. Africa Progress Panel, 2013.

- Summary: Africa’s economic fortunes have changed dramatically in the past decade. Economic growth – especially in countries rich in natural resources – has been driving up average incomes, and most countries have recovered from the past years’ global recession. Some resource-rich countries have made impressive strides in improving the lives of their people. But overall progress has been uneven – and in some areas it has fallen short of expectations. After a decade of strong growth, several of Africa’s resource-rich countries remain at the bottom of the international league-table for human development. Others register some of the world’s largest inequalities in wealth and in wellbeing, as captured by indicators such as life expectancy and education. Chapter One of the report reviews the record of the past decade and the potential for resource wealth to accelerate human development. Chapter two looks at the gap between wealth and wellbeing in resource-rich countries, and explores the complex and varied interaction between economic growth, inequality and poverty reduction. Chapter three documents the environmental threats posed by extractive industries, their failure to provide a long-term boost to local economies and job markets, and the risks and opportunities presented by artisanal mining.

Curtis, Mark. *The New Colonialism: Britain’s Scramble for Africa’s Energy and Mineral Resources*. London: War on Want, 2016. PDF e-book.

- From the publisher: The report reveals the degree to which British companies now control Africa’s key mineral resources. It documents how 101 companies listed on the London Stock Exchange (LSE)- most of them British- have mining operations in 37 sub-Saharan African countries. The report exposes the long term British involvement of the British government through its trade and investment policies to control British companies access to raw materials and the way trade is conducted with Africa. The report also highlights British mining companies being at the forefront of environmental degradation in Africa. It also shows mining operations of British companies being associated with killings in or near mine areas, unfair and often forced resettlement programmes, labor rights and abuses.

“The Dutch Disease” *The Economist*, November 26, (1977): 82–83.

- Summary: Original article in *The Economist* that coined the term “Dutch disease,” which is the apparent causal relationship between the increase in the economic development of a specific sector (for example natural resources) and a decline in other sectors (like the manufacturing sector or agriculture).

# NATURAL RESOURCE GOVERNANCE AND HUMAN RIGHTS

The following section is organized into key thematic areas that are most relevant to considerations of human rights and natural resource governance. This includes those rights that are expressly recognized in the corpus of international human rights law, as well as broader areas of concern in natural resource governance that impliedly affect individuals' enjoyment of their rights or raise rights-based concerns.

## Extractive Industries and Human Rights

### Primary Materials

*The Voluntary Principles on Security and Human Rights*. Secretariat for the Voluntary Principles on Security and Human Rights, 2000.

- Summary: These voluntary principles guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The Principles are the only human rights guidelines designed specifically for extractive sector companies. Participants in the Voluntary Principles Initiative — including governments, companies, and NGOs — agree to proactively implement or assist in the implementation of the Voluntary Principles.

### Scholarly Texts

Francioni, Francesco “Natural Resources and Human Rights” in *Research Handbook on Human Rights and the Environment*. Northampton, MA: Edward Elgar Publishing, 2015.

- Summary: “The following analysis will focus on a selected group of human rights that, independently of their characterization as civil and political—or economic, social, and culture—entailed for the duty bearer, notably the State on whose territory the resources are located, the *substantive* obligation to respect, protect, and fulfill those rights. The last part of this chapter will focus on the *procedural* aspects of human rights related to natural resources, especially the rights of information and public participation in decisions concerning the use of natural resources. This distinction is useful for reasons of analytical clarity and systematic order, even if, in practice, the dividing line between substance and procedure in this field may often vanish.”

Rodríguez- Garavito, César. *Human Rights in Minefields: Extractive Economies, Environmental Conflicts, and Social Justice in the Global South*. Bogotá, D.C: Dejusticia, 2015.

- Excerpt from Introduction: “Following the opening chapter, which defines action research and its practice in the “minefields” of extractive economies, the core section of the book features studies on the consequences of these economies on human rights around the globe—from the rights of rural communities in countries like Brazil, India, Mexico, Peru, South Africa, and Uganda to the rights of indigenous peoples in places like Chile, Colombia, and Paraguay.”



Simons, Penelope and Audrey Macklin. *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*. Routledge, 2014.

- Summary: “This book explores the persistence of the governance gap with respect to the human rights-impacting conduct of transnational extractive corporations operating in zones of weak governance. The authors launch their account with a fascinating case study of Talisman Energy’s experience in Sudan, informed by their own experience as members of the 1999 Canadian Assessment Mission to Sudan (Harker Mission). Drawing on new governance, reflexive law and responsive law theories, the authors assess legal and other non-binding governance mechanisms that have emerged since that time, including the UN Guiding Principles on Business and Human Rights. They conclude that such mechanisms are incapable of systematically preventing human rights violating behaviour by transnational corporations, or of assuring accountability of these actors or recompense for victims of such violations. The authors contend that home state regulation, while not a silver bullet, has a crucial role to play in regulating such conduct. They pick up where UN Special Representative John Ruggie’s Guiding Principles on Business and Human Rights left off, and propose an innovative, robust and adaptable template for strengthening the regulatory framework of home states. Their model draws insights from the theoretical literature, leverages existing public, private, transnational, national, ‘soft’ and hard regulatory tools, and harnesses the specific strengths of state-based governance.”

Valencia, Areli. *Human Rights Trade-Offs in Times of Economic Growth The Long-Term Capability Impacts of Extractive-Led Development*. New York: Palgrave Macmillan US, 2016.

- Summary: This book uncovers a historical dependency on smelting activities that has trapped inhabitants of La Oroya, Peru, in a context of systemic lack of freedom. La Oroya has been named one of the most polluted places on the planet by the US Blacksmith Institute. Residents face the dilemma of whether to defend their health or to preserve job stability at the local smelter, the main source of toxic pollution in town. Valencia unpacks this paradoxical human rights trade-off. This context, shaped by social, historical, political, and economic factors, increases people's vulnerabilities and decreases their ability to choose, resulting in residents' trading off their right to health in order to work. This book shows the deep connection of this local dilemma to the country's national paradox, arising out of Peru's vision of natural resource extraction as the main path to secure economic growth for the entire country at the expense of some groups.

## Reports

Spohr, Maximilian, *Human Rights Risks in Mining: A Baseline Study*. Max Planck Foundation, 2016.

- From the author: The current study contributes to the discussion on human rights and in the mining sector. It attempts to close a gap in the related discussion by proving an impartial analysis that adequately considers the technical and legal correlation. In order to avoid an excessively broad analysis, the present study focuses on the minerals, metals and coal sector, leaving aside oil and gas which would require a stand-alone study. The scope of the study must further be limited to the most important general human rights risk areas. The vast field of particularly affected groups, such as women or children, can only

be covered with regard to particular aspects, such as child labor, and certainly requires further attention.

*The Cost of Gold: Environmental, Health and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand.* Harvard Law School International Human Rights Clinic, October 2016.

- Summary: This report provides a fresh look at the problems posed by gold mining in the West and Central Rand because it examines them through a human rights lens. It is based on three field trips to South Africa and about 200 interviews conducted by the International Human Rights Clinic (IHRC) at Harvard Law School. The report documents the effects of mining on local residents and assesses efforts to deal with them. While recognizing that industry and community involvement is essential to addressing the situation, the report focuses on the actions of the government, which has a legal obligation to guarantee human rights. The report directs most of its recommendations to the government as a whole because South Africa is better situated to assign tasks to specific agencies.

*They Destroyed Everything: Mining and Human Rights in Malawi.* Human Rights Watch, 2016.

- Summary: Based on more than 150 interviews with community members, government officials, civil society groups, and company representatives, this report examines the human rights impacts of Malawi's nascent mining industry on communities living in and around the country's mining areas and assesses the nature and extent of the information about mining to which local residents have access. Using Karonga district in northern Malawi as a case study, the report documents how Malawi currently lacks adequate legal standards and safeguards to ensure the necessary balance between developing the mining industry and protecting the rights of local communities. It examines how weak government oversight and lack of information leave local communities unprotected and uninformed about the risks and opportunities associated with mining.

Konte, Byen and Mal Kalkile. *Human Rights and Environmental Risks of Gold Mining in Haiti.* New York University School of Law Global Justice Clinic & Haiti Justice Initiative, 2016.

- Summary: Haiti stands at a crossroads: The prospect of gold mining glitters on the horizon, while the reality of political turmoil, weak institutions, and widespread impoverishment glares in the foreground. Minerals can be exploited only once. This moment, before mining has begun, presents a unique opportunity for Haiti to hold a robust public debate about the risks and benefits of mining for the Haitian people, and to implement preventive measures to avoid future human rights abuses and environmental harms. Such a debate requires transparency, information sharing, and active engagement of Haitian communities. Until now, most discussions about mining have occurred among government officials, company stakeholders, and international financial institutions behind closed doors. There is a dearth of information in the public domain about what gold mining entails, what challenges it poses, what opportunities it presents, and what it may mean for communities and the country as a whole. The purpose of this report is to help fill that gap.

## Right to a Clean and Healthy Environment

### Primary Materials

*Stockholm Declaration*, General Assembly, A/Conf.48/14/Rev. 1(1973); 11 ILM 1416, June 1972.

- Summary: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being of, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

*Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, 19<sup>th</sup> plenary meeting, A/CONF.151/26 (Vol. I), 12 August 1992.

- Summary: The Rio Declaration on Environment and Development consists of 27 principles intended to guide countries in future sustainable development. Some notable principles are: Principle 1) Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. Principle 4) In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Principle 17) Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

*African [Banjul] Charter on Human and Peoples' Rights*, African Commission on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted 27 June 1981, entered into force 21 October 1986.

- Environmental Provision(s): Article 24. All peoples shall have the right to a general satisfactory environment favorable to their development.

*San Salvador Protocol to the American Convention on Human Rights*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," (O.A.S. Treaty Series No. 69 (1988), OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), entered into force November 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System.

- Environmental Provision(s): Article 11. Right to a Healthy Environment 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

*Arab Charter on Human Rights*, League of Arab States, Arab Charter on Human Rights, (May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008.

- Environmental Provision(s): Article 38. Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment.

The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

*ASEAN Declaration on Human Rights*, 21<sup>st</sup> ASEAN Intergovernmental Commission on Human Rights, adopted November 2012.

- Environmental Provision(s): Principle 28f. Every person has the right to an adequate standard of living for himself or herself and his or her family including: the right to a safe, clean, and sustainable environment. Principle 35. The right to development is an unalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural, and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

*Human Rights and the Environment*, UN Human Rights Council, 16<sup>th</sup> session, item 3 of the agenda, Resolution 16/11 A/HRC/RES/16/11, April 12 2011.

- Summary: This resolution urges States to take human rights into consideration when developing their environmental policies, 1. Requests the Office of the United Nations High Commissioner for Human Rights, in consultation with and taking into account the views of States Members of the United Nations, relevant international organizations and intergovernmental bodies, including the United Nations Environment Programme and relevant multilateral environmental agreements, special procedures, treaty bodies and other stakeholders, to conduct, within existing resources, a detailed analytical study on the relationship between human rights and the environment, to be submitted to the Human Rights Council prior to its nineteenth session.

*Analytical Study on the Relationship between Human Rights and the Environment*, UN Human Rights Council, 19<sup>th</sup> session, item 2 and 3 of the agenda, Report of the United Nations Higher Commissioner for Human Rights A/HRC/19/34, December 16, 2011.

- Summary: The present report is submitted in accordance with resolution 16/11 of the Human Rights Council. This analytical study examines the key components of the relationship between human rights and the environment, with emphasis on the following themes: the conceptual relationship between human rights and the environment; environmental threats to human rights; mutual reinforcement of environmental and human rights protection; and extraterritorial dimensions of human rights and the environment.

### **Special Rapporteur Reports:**

Knox, John H., *Preliminary Report, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, Twenty Second Session, Agenda Item 3, A/HRC/22/43, December, 24 2012.

- The first report of the Independent Expert is intended to place the mandate in a historical context, present some of the outstanding issues relevant to the relationship between human rights and the environment and describe the current and planned program of

activities. The Independent Expert notes that the relationship between human rights and the environment has been the subject of serious, sustained attention in many different forums. Although some fundamental aspects of the relationship are now firmly established, the Independent Expert explains that many issues related to the obligations that human rights law imposes regarding environmental protection need greater study and clarification. Therefore, the first priority of his mandate is to provide greater conceptual clarity to the application of human rights obligations related to the environment. He intends to take an evidence-based approach to determining the nature, scope and content of these obligations. To inform his work, the Independent Expert will actively consult and seek input from a wide spectrum of relevant stakeholders.

Knox, John H., *Mapping Report, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, Twenty Fifth Session, Agenda Item 3, A/HRC/25/53, December 30, 2013.

- Summary: The report maps human rights obligations relating to the environment, on the basis of an extensive review of global and regional sources. The Independent Expert describes procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies for environmental harm. He describes States' substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors. Finally, he outlines obligations relating to the protection of members of groups in vulnerable situations, including women, children and indigenous peoples.

Knox, John H., *Compilation of Good Practices, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, Twenty Eighth Session, Agenda Item 3, A/HRC/28/61, February 3, 2015.

- Summary: This report of the Independent Expert is submitted to the Human Rights Council in accordance with Council resolution 19/10. The report describes good practices of Governments, international organizations, civil society organizations, corporations and others in the use of human rights obligations relating to the environment, including (a) procedural obligations to make environmental information public, to facilitate public participation in environmental decision-making, to protect rights of expression and association, and to provide access to legal remedies; (b) substantive obligations, including obligations relating to non-State actors; (c) obligations relating to transboundary harm; and (d) obligations relating to those in vulnerable situations.

Knox, John H., *Biodiversity Report Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, Thirty-Forth Session, Agenda Item 3, A/HRC/34/49, January 19, 2017)

- Summary: This report examines the issue of human rights obligation relating to the conservation and sustainable use of biological diversity. In his report, he describes the

importance of ecosystem services and biodiversity for the full enjoyment of human rights and outlines the application of human rights obligations to biodiversity-related actions.

## Scholarly Texts

There is an extensive literature on the right to a clean and healthy environment, and this list does not purport to provide a complete overview. It seeks only to provide a list of key texts and representative sample of recent scholarship. For a more comprehensive overview please see:

- International Human Rights and the Environment: Bibliography of Secondary Sources (Updated August 2015), prepared for John Knox, <http://srenvironment.org/academic-research/>
- The online bibliography of resources prepared by the Global Network on Human Rights and the Environment (GNHRE), <http://gnhre.org/>

Anton, Donald K. and Dinah L. Shelton. *Environmental Protection and Human Rights*. New York: Cambridge University Press, 2011.

- General Summary of Book: With unique scholarly analysis and practical discussion, this book provides a comprehensive introduction to the relationship between environmental protection and human rights being formalized into law in many legal systems. By illuminating human rights theory and the institutions that can be employed to meet environmental goals, this book instructs on environmental techniques and procedures that assist in the protection of human rights. The text provides cogent guidance on a growing international jurisprudence on the promotion and protection of human rights in relation to the environment that has been developed by international and regional human rights bodies and tribunals. It explores a rich body of case law that continues to develop within states on the environmental dimension of the rights to life, to health, and to public participation and access to information. Five compelling contemporary case studies are included that implicate human rights and the environment, ranging from large dam projects, to the creation of a new human rights, to a clean environment.

Bratspies, Rebecca, "Claimed Not Granted: Finding a Human Right to a Healthy Environment" *Transnational Law and Contemporary Problems* 26 (2017).

- Abstract: Scholars, activists, and decision-makers of all stripes increasingly invoke human rights in the face of the looming climate catastrophe. This article explores how advocates might use human rights to reframe existing legal regulatory regimes, thereby avoiding the tendency to trade environmental protection for short-term economic advantage.

Grear, Anna and Louis J. Kotze (eds), *Research Handbook on Human Rights and the Environment*. Northampton, MA: Edward Elgar Publishing, 2015.

- Summary from Publishers: Bringing together leading international scholars in the field, this Research Handbook interrogates, from various angles and positions, the fractious relationship between human rights and the environment and between human rights and environmental law. The Handbook provides researchers and students with a fertile source of reflection and engagement with this most important of contemporary legal

relationships. Law's complex role in the mediation of the relationship between humanity and the living order is richly reflected in this timely and authoritative collection.

Rodriguez-Garavito, Cesar, "A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations" in John H. Knox & Ramin Pejan, eds. *The Human Right to a Healthy Environment*, Cambridge University Press, Forthcoming.

- Summary: This chapter aims to analytically and empirically unpack the question of whether there should be a human right to a healthy environment. The author draws on moral and legal theory in order to examine the premises of the question, reframe it, and offer an answer to it. Building on socio-legal studies of rights, the text explores the potential benefits and costs of using "rights talk" in environmental debates in general, and of adopting the right to a healthy environment in an international legal instrument in particular. The chapter is divided into three sections, each related to one of the main three arguments, followed by a conclusion. In the first section, the text discusses Amartya Sen's objection to "legally parasitic" theories of rights in order to substantiate the author's claim that, understood as a moral right, a RHE already exists. In the second section, the chapter reviews the legal evidence and arguments in favor of the existence of such a right in customary international law. In the third section, the text examines the trade-offs involved in the potential recognition of the RHE in an international legal instrument, whether a global treaty or an instrument of soft law.

## **Right to Access to Information and to Participate in Decision Making Processes**

### **Primary Materials**

*Rio Declaration on Environment and Development*, General Assembly 19<sup>th</sup> plenary meeting, A/CONF.151/26 (Vol. I), 14 June 1992.

- Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. European Commission adopted on 25 June 1998; entered in force 30 October 2001.

- Summary: "The Aarhus Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level will contribute to these rights to become effective. The

Convention provides for: (1) the right of everyone to receive environmental information that is held by public authorities (“access to environmental information”). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession; (2) the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organizations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it (“public participation in environmental decision-making”); (3) the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general (“access to justice”).”

*Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, United Nations Environment Programme, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010.

- Summary: Improving access to environment information, public participation in decision-making and access to justice on environmental matters was specifically recognized in Principle 10 of the Rio Declaration of 1992. In order to catalyze and to accelerate action in terms of implementing Principle 10, governments adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters at the 11th Special Session of UNEP Governing Council/Global Ministerial Environmental Forum in Bali, Indonesia. These Guidelines though voluntary, demonstrate a willingness by Governments to more thoroughly engage the public at all levels to protect and manage the environment and related resources.

## Scholarly Texts

Anton, Donald K., and Dinah L. Shelton. “Procedural Human Rights and the Environment.” in *Environmental Protection and Human Rights*, 356–435. New York: Cambridge University Press, 2011.

- Chapter Summary: The chapter focuses on three procedural human rights namely access to environmental information, public participation in decision making and access to justice and remedies in the event of environmental harm.

Bishop, Cheryl, *Access to Information as a Human Right*. El Paso: LFB Scholarly Publishing, 2012.

- From the publisher: “Conceptualizing access to government information as a human right is a new development in the global trend promoting institutional transparency. Bishop provides a comprehensive examination of international human rights law and explains



four conceptualizations of access to information as a human right. Rights to information have been linked to the right to free expression, the right to privacy, and the right to a healthy environment, and the right to the truth about human rights abuses. She concludes that a human right to access information is evolving in disparate ways. The current evolution of access rights creates a patchwork system of guarantees; nonetheless, the freedom-of-expression conceptualization holds the most promise for proving a broad right of access.”

Fabiana, Li, “Documenting Accountability: Environmental Impact Assessment in a Peruvian Mining Project” *Political and Legal Anthropology Review* 32(2) (2009): 218–236.

- Abstract: Over the past two decades, practices of accountability have acquired a new presence in neoliberal governance and resource extraction in Peru. In the context of mining activity, accountability generally refers to public mechanisms of evaluation and record-keeping through which citizens can make corporations and governments answerable to them. However, I argue that these practices often prioritize mining interests by enabling corporations to define and ultimately enforce standards of performance. This article focuses on a key process in the making of social and environmental accountability in mining projects: Environmental Impact Assessment (EIA). I show that the form of the documents produced for the EIA (i.e., their required components, as established in legal frameworks) and the process of making them public (participatory meetings and public forums) can take precedence over their content. I examine two aspects of the EIA that make this possible. First, the risks that are identified in the EIA are those that a company deems to be technically manageable based on the solutions and interventions that it has to offer. Second, the participatory process of the EIA creates collaborative relationships among state agents, corporations, NGOs, and communities that strengthen the EIA's claims of accountability while circumscribing the spaces for opposition to a proposed project.

Hartley N, Wood C, “Public Participation in Environmental Impact Assessment—Implementing the Aarhus Convention” *Environmental Impact Assess Review* 25(4) (2005): 319–340.

- Summary: This article explores the nature of public participation in the environmental impact assessment (EIA) process in the context of the potential integration of the Aarhus Convention principles into the UK EIA system. Although the Convention advocates ‘early’ and ‘effective’ participation, these terms remain undefined and questions persist about exactly how to implement the Aarhus principles. Ten practice evaluation criteria derived from the Aarhus Convention are used to analyse the public participation procedures used in four UK waste disposal EIA case studies. The paper reports the extent to which the practice evaluation criteria were fulfilled, explores the types and effectiveness of the participation methods used in the EIAs, and highlights some of the key barriers that appear to impede the execution of ‘early’ and ‘effective’ participation programmes. It concludes that the Aarhus Convention will undoubtedly lead to a strengthening of participation procedures but that the level of improvement secured will depend upon how its ideals are interpreted and incorporated into legislation and practice.

Morgan, Richard K. "Environmental Impact Assessment: The State of the Art," *Impact Assessment and Project Appraisal*, 30, (1) (2011): 5-14.

- Summary: This paper reviews progress in environmental impact assessment (EIA) over the last 40 years, with particular emphasis on the last 15–20 years, and poses the question: is EIA ready to meet future challenges? The first part of the paper briefly examines the spread of EIA around the world, recent trends in the uptake of EIA, and the continuing emergence of variants of impact assessment. The second part of the paper concentrates on current issues in EIA, under three broad headings: theory and EIA, practice issues and EIA effectiveness. An important thread running through the second part of the paper is how discussions about EIA theory, a feature of the last 15 years, are affecting the different areas of EIA practice and evaluation.

Richardson, T. "Environmental Assessment and Planning Theory: Four Short Stories about Power, Multiple Rationality, and Ethics." *Environmental Impact Assessment Review*, 25(4) (2005): 341–365.

- Summary: This paper engages with recent debates in the environmental assessment (EA) literature about the lessons that can be learned from planning theory. It argues that the current communicative turn in EA, echoing a similar shift in planning thought in the 1990s, has failed to benefit from this earlier experience. Instead of following this trend, the paper examines EA from a perspective which is more closely aligned with some of the critics of the communicative approach, and which combines concepts of power, rationality, value and ethics in a different way. First, the paper briefly sets out how planning theory has engaged with these concepts. It then argues that EA needs to engage with competing multiple rationalities, and the inescapable presence of value conflicts within EA. It then turns to recent debates in EA to show how the question of value has become a very difficult issue for EA theorists. These issues are then explored by looking at four cases where environmental impact assessment (EIA) and strategic environmental assessment (SEA) become dramatic sites of struggle, in very different ways: where the boundaries between facts, boundaries, and opinions are defined through power struggles; where SEA is used as a process of brokerage between a fragile coalition of interests; where power defines rationality in the construction of an SEA instrument; and where EIA is challenged from the outside by civil society. The paper closes by discussing how EA practitioners can operate reflexively and ethically in a world of contested rationality.

Peters, Birgit. "Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention" *Journal of Environmental Law* 1 (2018) forthcoming.

- Summary: Procedural environmental rights have been found to be an effective way of securing environmental protection, but they are often discussed as a single, uniform standard and are associated with similar effects on environmental decision-making. This view needs reconsideration. Comparing the procedural environmental rights guaranteed in Europe by the European Convention on Human Rights (ECHR) and the Aarhus Convention (AC), this article argues that these rights differ considerably in objective, content and scope. Taking note of these differences helps to concretize the doctrine of procedural environmental rights and supports more realistic conclusions about the

contribution of procedural environmental rights to environmental governance.

Wiklund, H, “Why High Participatory Ideals Fail in Practice: a Bottom-Up Approach to Public Non-participation in EIA” *Journal of Environmental Assessment Policy and Management*, 13(2) (2011): 159–178.

- Summary: This paper explores the uninvestigated phenomenon of citizens' reasons for nonparticipation in EIA. By adopting a bottom-up approach, based on the assumption that citizens are rational actors who are able to provide reasons for their choice to participate or not to participate, it complements traditional public participation research focusing on structural barriers to and socio-economic predictors of participation. The reasons citizens provide for nonparticipation are described and it is discussed how the design and management of public participation schemes can be improved to better meet the high participatory ideals of EIA expressed by professionals and academics in standards of good practice.

## Reports

*Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters.* United Nations Environment Program, 2015.

- Summary: “In February 2010 a milestone was achieved in the field of environmental law and sustainable development when the Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in Bali, Indonesia, unanimously adopted the ‘Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ (The “Bali Guidelines”). The Bali Guidelines seek to assist countries in filling possible gaps in their respective relevant national legislation, and where relevant and appropriate in sub-national legal norms and regulations at the state or district levels, etc., ensuring consistency at all levels to facilitate broad access to information, public participation and access to justice in environmental matters.”

“Statement by United Nations Experts on the ECLAC’s Negotiation of a Regional Instrument on Environmental Democracy.” United Nations Human Rights Office of the High Commissioner, October 22, 2015.

- Summary: Expressed strong support for the efforts by governments in Latin America and the Caribbean to agree on a regional instrument on rights of access to information, participation, and justice in environmental matters.

## Extractive Industries and Indigenous Peoples' Rights

The conceptual and practical distinction between indigenous rights and human rights warrants a separate section specifically dedicated to the rights of indigenous people in the context of natural resource governance. Indigenous rights reflect a notion of cultural particularism, and stem from the collective struggles of indigenous peoples and claims for self-determination. These indigenous rights claims are particularly important as they relate to the governance and extraction of natural resources, land and territory that are traditionally owned and used by indigenous peoples.

### Primary Materials

International Labor Organization, *Indigenous and Tribal Peoples Convention* No 169, 1989.

- Summary: C169 acted as a normative repeal of C107 on Indigenous and Tribal Populations, and is important for recognizing the right to free, prior and informed consent (Article 6), the right to natural resources (Article 15), protection from forced relocation (Article 16), conditions of employment (Article 20). C169 provides that “the rights of the peoples concerned to the natural resource pertaining to their lands shall be specifically safeguarded . . . including] the right . . . to participate in the use, management and conservation of these resources” (Article 15).

*Proposed American Declaration on the Rights of Indigenous Peoples*. American Commission on Human Rights, approved on February 26, 1997, at its 1333rd session, 95th Regular Session, OEA/Ser/L/V/II.95 Doc.6.

- The member states of the OAS (hereafter the states) declare, no forced assimilation (Article 5), right to cultural integrity (Article 7), right to philosophy, outlook, and language (Article 8), and rights to land, territories, and resources (Article 18).

*United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly 107<sup>th</sup> Plenary Meeting Resolution 61/295, September 13, 2007.

- Summary: The resolution provides that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” as well as the right to “own, use, develop and control the lands, territories and resources that they possess” (Article 26). Obligations of States (Articles 8, 17, 22), right not to be relocated without compensation (Article 10), right to development (Article 23, 32), right to land and resources (Article 26, 29), right to redress (Article 28).

*The World Bank Environmental and Social Framework: Setting Environmental and Social Standards*. The International Bank of Reconstruction and Development and the World Bank, 2016.

- Summary: “This new framework will replace the current Safeguard Policies (during 2018), boosting protections for people and the environment, and driving sustainable development through capacity- and institution-building and country ownership. Standard 7 attempts to ensure that the development process fosters full respect for the human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local

Communities. It is also meant to avoid adverse impacts of projects on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities, or when avoidance is not possible, to minimize, mitigate and/or compensate for such impacts.

International Finance Corporation, *IFC Environmental and Social Performance Standards: Standard 7 Indigenous People and Guidance Note 7*, 2012.

Summary: IFC's Environmental and Social Performance Standards define IFC clients' responsibilities for managing their environmental and social risks. The 2012 edition of IFC's Sustainability Framework, which includes the Performance Standards, applies to all investment and advisory clients whose projects go through IFC's initial credit review process after January 1, 2012. Performance Standard 7 recognizes that indigenous peoples (IPs) may be particularly vulnerable to the adverse impacts associated with project development, including risk of impoverishment and loss of identity, culture, and natural resource-based livelihoods. PS7 seeks to ensure that business activities minimize negative impacts, foster respect for human rights, dignity and culture of indigenous populations, and promote development benefits in culturally appropriate ways. Informed consultation and participation with IPs throughout the project process is a core requirement and may include Free, Prior and Informed Consent under certain circumstances. Guidance Note 7 corresponds with, and accompanies Performance Standard 7.

## Cases

*African Commission on Human and Peoples' Right v. Republic of Kenya* (Application 006/2012) Judgment of the Court 26 May 2017, African Court on Human and Peoples' Rights.

- Summary: In the judgement it delivered on Friday 26 May 2017, the African Court found the actions of the Respondent state to be in violation of the various rights of the Ogiek community. This judgement vindicates the rights of the Ogiek community who have been impeded from securing ownership and use of their ancestral land on which they depend for their social, economic and cultural existence, after being demanded by the Government of Kenya to move out of the Mau Forest Complex. Setting an important precedent in terms of the protection of the rights of vulnerable ethnic communities facing similar challenges and violations of their rights, the judgment entails that whatever conservation or development policies and actions states seek to pursue should not come at the expense of the rights and very existence of minority groups or indigenous populations/communities like the Ogiek.

*The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)

- Summary: "The Mayagna Awas (Sumo) Tingni Community lives in the Atlantic coast of Nicaragua and is made up of approximately 142 families. Jaime Castillo Felipe, a leader of the community, lodged a petition before the Inter-American Commission on Human Rights (IACHR) denouncing the State of Nicaragua for failing to demarcate the Awas Tingni Community's communal land and to take the necessary measures to protect the Community's property rights over its ancestral lands and natural resources. Furthermore,

the petitioner denounced the State for failing to guarantee access to an effective remedy for the Community's claims regarding the then imminent concession of 62,000 hectares of tropical forest to be commercially developed by a company in communal lands. The IACHR submitted the case to the Inter-American Court of Human Rights, who concluded that Nicaragua had violated the right to judicial protection and to property. The Court noted that the right to property acknowledged by the American Convention of Human Rights protected the indigenous people's property rights originated in indigenous tradition and, therefore, the State had no right to grant concessions to third parties in their land. Consequently, the Court decided that the State had to adopt the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law, values, customs and mores. The Court also decided that, until such mechanism was created, the State had to refrain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the indigenous community live and carry out their activities.”

*Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, ¶¶ 143, 152, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004).

Summary: “1. This report concerns a petition presented to the Inter-American Commission of Human Rights (the "Commission") against the State of Belize (the "State" or “Belize”) on August 7, 1998 by the Indian Law Resource Center and the Toledo Maya Cultural Council (the “Petitioners”). The petition claims that the State is responsible for violating rights under the American Declaration of the Rights and Duties of Man (the “American Declaration”) that the Mopan and Ke’kchi Maya People of the Toledo District of Southern Belize (the “Maya people of the Toledo District” or the “Maya people”) are alleged to have over certain lands and natural resources.”

*Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 172, Judgment of November 28, 2007.

- Summary: “This case addresses indigenous peoples’ rights to their land and their struggle against encroachment by mining and logging companies carrying out activities on their territory on the basis of concessions granted by the State without consultation with the indigenous people. The Court found State committed violations of the American Convention against the members of the Saramaka people, a tribal community living in the Upper Suriname River region, by failing to adopt effective measures to recognize the Saramaka people's right to the use and enjoyment of the territory they traditionally occupied and used. The State also failed to provide the Saramaka people with the right to effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions. Lastly, the State failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramaka people.”

## Special Rapporteur and other Reports

Nicolaisen, Ida and Wilton Littlechild, *Study on the structures, procedures and mechanisms that presently exist and that might be established to effectively address the human rights situation of indigenous peoples and to arrange for indigenous representation and inclusion in such structures, procedures and mechanisms*, Forum on Indigenous Issues, United Nations Economic and Social Council, Seventh Session, Item .5. of the Provisional Agenda E/C.19/2008/2, December 19, 2007.

- From the summary: “The present study has found that, with the adoption of the UN Declaration on the Rights of Indigenous Peoples (UN-DECRIPS) by the UN General Assembly, the international community has significant new opportunities by which to motivate states to comply with human rights standards, including those set forth in the Declaration. The study calls on the Human Rights Council and the Permanent Forum on Indigenous Issues to seize this historic opportunity and establish mechanisms that can strengthen the protection of indigenous peoples’ rights and focus on their attainment.”

*Guidelines on Indigenous Peoples’ Issues*, United Nations Development Group (UNDG), HR/P/PT/16, 2009.

- From the summary: “These Guidelines contain three sections. Section I provides an overview of the situation of indigenous peoples and the existing international norms and standards adopted to ensure the realization of their rights and resolve some of the crucial issues that they face. Section II presents a practical table and checklist of key issues and related rights. Section III discusses special programmatic implications for UNCTs for addressing and mainstreaming indigenous peoples’ issues”.

Anaya, James, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, General Assembly, sixty-fourth session, agenda item 68 A/64/338, September 4, 2009.

- Summary: “The present report is the first submitted to the General Assembly by the current Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, pursuant to General Assembly resolution 63/161. The Special Rapporteur discusses the implementation of his mandate pursuant to Human Rights Council resolution 6/12, in which he was directed to work cooperatively with States, indigenous peoples, the United Nations, regional bodies and non-governmental organizations and to pay particular attention to both the obstacles preventing full enjoyment of the human rights and fundamental freedoms of indigenous peoples and to best practices in overcoming these obstacles, including through the promotion of the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples. The rights set forth in the United Nations Declaration serve as a platform for the cooperative manner in which the Special Rapporteur carries out his work, inform his collaboration with the United Nations mechanisms with which he engages and form the core of his concerted involvement with States, indigenous peoples’ organizations and civil society partners.”

Anaya, James, *Report of the Special Rapporteur on the Situation of human rights and fundamental freedoms of indigenous people*, General Assembly, sixty-fifth session, agenda item 66, A/65/264, August 9, 2010.

- Summary: “The present report is submitted pursuant to Human Rights Council resolution 12/13. The report provides an overview of the activities carried out by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people between July 2009 and July 2010. In particular, it describes the Special Rapporteur’s coordination with United Nations and regional human rights mechanisms and outlines initiatives undertaken within four interrelated spheres of activity: promoting good practices, thematic studies, country reports and cases of alleged human rights violations. The report provides a brief discussion of three key issues that the Special Rapporteur has addressed during the past year, namely the right of indigenous peoples to development with culture and identity, the right of indigenous peoples to participation and the obligation of States to implement the United Nations Declaration on the Rights of Indigenous Peoples. These observations are intended as a complement to the work undertaken by the Permanent Forum and the Expert Mechanism on these important issues. The report also offers a number of conclusions and recommendations on the basis of the Special Rapporteur’s examination of the substantive issues discussed in the report.”

Anaya, James, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, Human Rights Council, eighteenth session, agenda item 3, A/HRC/18/35, July 11, 2011.

- Summary: In his 2011 report, the Special Rapporteur presented a synthesis of the responses he received to a Questionnaire about extractive industries that operate within or near indigenous territories. Responses received from indigenous organizations, NGOs, companies, and governments led to the identification of the following issues related to extractive industries
  - Environmental impacts
  - Social and cultural effects
  - Lack of consultation and participation
  - Lack of clear regulatory frameworks and other institutional weakness
  - The question of tangible benefits

Anaya, James, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, General Assembly, sixty-sixth session, agenda item 66, A/66/288, August 10, 2011.

- Summary: “The present report provides an overview of the activities carried out by the Special Rapporteur on the rights of indigenous peoples, James Anaya, during the first three-year term of his mandate, which began in May 2008. In particular, the report describes the Special Rapporteur’s efforts to coordinate with global and regional mechanisms concerned with indigenous issues and outlines the work undertaken within four interrelated spheres of activity: promoting good practices, country reports, cases of alleged human rights violations and thematic studies. The report includes summaries of the thematic studies that the Special Rapporteur has included in the annual reports he has submitted to date to the Human Rights Council. These includes studies on the United Nations Declaration on the Rights of Indigenous Peoples; the duty of States to consult



with and obtain the consent of indigenous peoples before adopting measures that affect them; the responsibility of corporations to respect the rights of indigenous peoples; and, building on these themes, issues related to extractive industries operating in or near indigenous peoples' traditional territories.”

Anaya, James, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, General Assembly, sixty-seventh session, agenda item 67, A/67/301, August 13, 2012.

- Summary: “The present report is submitted to the General Assembly by the Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 18/8. In his report, the Special Rapporteur provides a summary of his activities since his previous report to the General Assembly (A/66/288). He also provides comments on the need to harmonize the myriad activities within the United Nations system which affect indigenous peoples. Specific United Nations processes and programmes reviewed include those relating to the United Nations Educational, Scientific and Cultural Organization; the Food and Agriculture Organization of the United Nations; the World Intellectual Property Organization; the Convention on Biological Diversity; the United Nations Framework Convention on Climate Change; the United Nations Conference on Sustainable Development; the World Bank Group; and programmes aimed at reducing emissions from deforestation and forest degradation. The Special Rapporteur notes that the United Nations system has done important work to promote the rights of indigenous peoples. However, greater efforts are needed to maximize action throughout the United Nations system to promote the rights of indigenous peoples and to ensure that all actions within the system which affect indigenous peoples are in harmony with their rights, particularly their rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples. The Special Rapporteur makes a series of recommendations to this end.”

*Follow Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, Human Rights Council, twenty-first session, agenda item 5, A/HRC/21/55, August 16, 2012.

- Summary: In the present follow-up report, the Expert Mechanism on the Rights of Indigenous Peoples examines the issue of indigenous peoples and the right to participate in decision-making, with a focus on extractive industries. It examines, inter alia, the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council, relevant provisions of the Declaration on the Rights of Indigenous peoples, and policy considerations. Advice No. 4 provides guidance for States, extractive industries and indigenous peoples in relation to indigenous peoples' participation in decision-making.

*Right of Indigenous Peoples: Final Report*. International Law Association, 2012.

- Summary: Outlines the conclusions and recommendations of the committee on the rights of indigenous peoples at the 75<sup>th</sup> Conference of the International Law Association in Sofia, Bulgaria.

Anaya, James, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, Human Rights Council, twenty-fourth session, agenda item 3, A/HRC/24/41, July 1, 2013.

- Summary: This is the final thematic report of James Anaya, the Special Rapporteur on the rights of indigenous peoples, to the Human Rights Council. Building upon previous reports, it addresses the human rights concerns of indigenous peoples relating to extractive industries. The Special Rapporteur seeks to further advance understanding of the content and implications of international human rights standards that are relevant to these concerns, identifying and building upon points of consensus that he has found in relation to these standards. He provides a series of observations and recommendations that draw from the experiences he has studied, and that point to new models for resource extraction that are or would be consistent with international standards and conducive to the fulfilment of indigenous peoples' rights. The report does not address the issues and human rights standards that are particular to indigenous peoples in voluntary isolation.

*Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. Report. Inter-American Commission on Human Rights. OEA/Ser.L/V/II. Doc. 47/15, December 31, 2015.

- From the executive summary: The Inter-American Commission addresses in this report State obligations with regard to extraction, exploitation, and development activities concerning natural resources. The report also offers the opportunity to address an important issue in the region relating to the prevalence of foreign companies in Member States with headquarters in another Member State and which are often accused of committing human rights violations in the host countries with impunity. This report outlines the evolving jurisprudential arguments on the issue and the context which necessitates jurisprudential intervention.

Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil*, Human Rights Council, Thirty-third session, Agenda item 3, A/HRC/33/42/Add.1. August 11, 2016.

This report expressed “ a disturbing absence of progress in the implementation of his recommendations and the resolution of long-standing issues of key concern to indigenous peoples”, as well as “ a worrying regression in the protection of indigenous peoples’ rights”. She also offers a number of recommendations.

### **Scholarly Materials:**

Burger, Julian, *Indigenous Peoples, Extractive Industries, and Human Rights*. Human Rights Centre: University of Essex, United Kingdom, 2014.

- From Abstract: The present study examines the human rights impacts of the extractive industries on indigenous peoples worldwide. It finds that there continues to be significant human rights risk associated with mining, oil, and gas extraction falling disproportionately on indigenous peoples. It argues that the growing demand for non-renewable resources and the need to explore and exploit resources in ever more invasive ways suggests that such activities are likely to impinge even more on the lands of indigenous communities living in countries with important resource revenues. The paper

acknowledges the major efforts being made by industry associations to address these issues through voluntary guidelines but finds that, notwithstanding, conflicts and violence persist and that further measures are required to protect the rights and interests of indigenous peoples. The universal acceptance of the 2007 Declaration on the Rights of Indigenous Peoples provides impetus to renewed efforts to ensure implementation of the provisions in practice. The paper concludes by recommending, among other things, that the European Union as one of the regions championing the Declaration at the United Nations take the initiative to develop a region-wide framework for extractive industries that sanction companies and provide legal redress in cases where the human rights of indigenous peoples are violated.

Newman, Dwight, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?": pages 267-86 in Andrew Byrnes, Mika Hayashi & Christopher Michaelson (eds) *International Law in the New Age of Globalization*, Brill, 2013.

- Summary: As with the traditional formation of customary international law more generally, one might frame a case for norms of consultation with Indigenous peoples in terms of state practice and *opinio juris*, and some have done so in at least partial ways. This chapter focuses, rather, on what has arguably become the most significant post-DRIP comment on consultation, that issued by Special Rapporteur James Anaya in his second report to the United Nations Human Rights Council as Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. As Part II of the chapter will show in the context of a larger description of the report, the Special Rapporteur's Report actually tends to eschew reference to the traditional customary international law arguments. Part III will consider the claim that the Report manifests a significant fracturing around the legitimate formation of customary international law, with the possibility of something other than state practice and *opinio juris* more appropriately grounding customary international law formation in some contexts. Part IV argues that the norm formation in this instance paradoxically reflects both an interesting transformation in the role of non-state actors in law formation within the global legal order and reinforcement of more traditional state-centered law formation.

Rodríguez-Garavito, César. "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" *Indiana Journal of Global Legal Studies* 18:1 (2011).

- Summary: This article explores law's protagonism and effects in contemporary conflicts over development, natural resource extraction, and indigenous peoples' rights. It focuses on the socio-legal site where these conflicts have been most visible and acute: consultations with indigenous peoples prior to the undertaking of economic projects that affect them. I argue that legal disputes over prior consultation are part of a broader process of juridification of ethnic claims, which I call "ethnicity.gov." I examine the plurality of public and private regulations involved in this process and trace their affinity with the procedural logic of neoliberal global governance. I further argue that ethnicity.gov is a highly contested field, as shown by the legal strategies and regulatory frameworks on consultation, which the global indigenous rights -movement has advanced

in opposition to neoliberalism. Drawing on empirical research in Colombia and other Latin American countries, I study consultation in action and document its ambiguous effects on indigenous peoples' rights.

Sawyer, Suzana, and Edmund Terence Gomez. *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State*. Basingstoke: Palgrave Macmillan, 2014.

- From the back cover: International institutions, including the United Nations and World Bank, and numerous multinational companies (MNCs) have voiced concern over the adverse impact of resource extraction activities on the livelihood of indigenous communities. Yet scale and scope of problems confronting indigenous peoples caused by mineral extraction projects endorsed by governments, international agencies and MNCs is monumental. This raises a paradox: Despite the burgeoning number of international charters and national laws asserting the rights of indigenous peoples, they find themselves subjected to discrimination, dispossession and racism. The authors explore this paradox by examining mega resource extraction projects in Australia, Bolivia, Canada, Chad and Cameroon, India, Nigeria, Peru and the Philippines.

## Reports

*Guidelines on Free, Prior and Informed Consent*, UN-REDD Programme, January 2013.

- Document Objective: The aim of this document is to outline a normative, policy and operational framework for UN-REDD Programme partner countries to seek FPIC. (While these Guidelines often refer to “seeking” consent, this is to be interpreted beyond what should be the general aspiration and goal of every good faith consultation, and to also include the requirement to actually “secure” that consent where the circumstances so warrant.

Buxton, A and Wilson, E. *FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects*. UK: International Institute for Environment and Development, 2013.

- From the executive summary: The paper seeks to articulate the relevance of FPIC to company policy and practice, while also providing a balanced consideration of the relative responsibilities of government and civil society. It explores what we term the “spirit of FPIC”, the key elements of which are deliberation and considering all options equally and fairly.

Doyle, Cathal and Jill Carino, “Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector” Indigenous Peoples Links, Middlesex University School of Law, and The Ecumenical Council for Corporate Responsibility, May 2013.

- Summary: “The paper draws on a range of case studies to illustrate positive and negative experiences from which lessons can be derived. Company-specific case studies examine the challenges faced, and progress made, by corporations in engaging with FPIC in certain contexts. A second set of case studies focuses on the experiences of indigenous peoples with self-developed FPIC protocols, policies and guidelines. It points to the central role that these indigenous peoples’ defined instruments can play in the operationalization of the FPIC principle.

*The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador and Peru*, Due Process of Law Foundation and Oxfam Washington, 2011.

- Summary: "Part One of the report summarizes the main international regulations derived from the relevant instruments and identifies the international bodies with jurisdiction to take up and rule on [FPIC] issues. That these same rules come out of several different legal systems only reinforces their national and international validity. Part Two offers a normative and factual analysis of the right to prior consultation in four Andean countries, describing progress made at the constitutional, legislative and judicial levels, as well as the barriers or setbacks observed. The discussion is illustrated with cases chosen for their domestic and international relevance. Part Three sets forth a series of specific recommendations for each of the stakeholders: States, corporations, indigenous peoples, civil society and international organizations and donors."

*Community Consent Index 2015: Oil, Gas, and Mining Company Public Positions on Free, Prior, and Informed Consent*, Oxfam, 2015.

- Summary: "As large-scale oil, gas, and mining projects move to increasingly remote areas, they threaten to generate adverse impacts for the local communities and indigenous peoples who inhabit these areas. For many project-affected communities, Free, Prior, and Informed Consent (FPIC) represents a critical tool for ensuring that they have a say in whether and how extractive industry projects move forward. This policy brief examines publicly available corporate commitments regarding community rights and community engagement. The results suggest increasing commitments to FPIC in the mining sector but disappointing trends in relation to the oil and gas sector and women's participation in decision making"

## **Human Rights of Environmental Defenders**

### **Primary Materials**

*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, United Nation Office of the High Commissioner, adopted by General Assembly resolution 53/144 of December 9, 1998.

- Summary The Declaration on Defenders is the first international instrument "formally to define the 'defense' of human rights as a right in itself". In this regard, it recognizes that "[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

*Ensuring Protection - European Union Guidelines on Human Rights Defenders*, European Union, 10056/1/04, June 14, 2004.

- Summary: Support for human rights defenders is already a long-established element of the European Union's human rights external relations policy. The purpose of these Guidelines is to provide practical suggestions for enhancing EU action in relation to this issue. The Guidelines can be used in contacts with third countries at all levels as well as

in multilateral human rights fora, in order to support and strengthen ongoing efforts by the Union to promote and encourage respect for the right to defend human rights. The Guidelines also provide for interventions by the Union for human rights defenders at risk and suggest practical means of supporting and assisting human rights defenders. An important element of the Guidelines is support for the Special Procedures of the UN Human Rights Council, including the UN Special Rapporteur on Human Rights Defenders and appropriate regional mechanisms to protect human rights defenders. The Guidelines will assist EU Missions (Embassies and Consulates of EU Member States and European Commission Delegations) in their approach to human rights defenders. While the primary purpose of the Guidelines is to address specific concerns regarding human rights defenders, they also contribute to reinforcing the EU's human rights policy in general.

*Declaration of the Committee of Ministers on Council of Europe Action to Improve the Protection of Human Rights Defenders and Promote their Activities.* Comm. of Ministers of the Council of Europe, February 6, 2008.

Summary: The declaration condemned all attacks and violations of the rights of human rights defenders and called on member states to comply with a number of stipulations that would improve the protection of human rights defenders and promote their activities.

*Resolution on the Protection of Human Rights Defenders in Africa,* African Commission on Human and Peoples' Rights [ACHPR], ACIPR/Res. 69 (XXXV), June 4, 2004.

- Summary: This resolution recognized the crucial work of human rights defenders and the persistent violations of their human rights. The resolution nominated a Special Rapporteur on human rights defenders in Africa. It also called upon member states to promote and give full effect to the UN Declaration of on Human Rights Defenders.

*Human Rights Defenders in the Americas, Support for the Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas,* General Assembly of the Organization of American States [OAS], AG/RES. 1671 (XXIX-O/99), June 7, 1999.

- Summary: This resolution was passed by the General Assembly of the Organization of American States to recognize and support the work carried out by Human Rights Defenders and their valuable contribution to the promotion, observance, and protection of fundamental rights and freedoms in the Americas. It also urged member states to persist in their efforts to provide Human Rights Defenders with the necessary guarantees and facilities to continue freely carrying out their work of promoting and protecting human rights, at the national and regional levels, in accordance with internationally recognized principles and agreements. The resolution also encouraged the Inter-American Commission on Human Rights to continue promoting and protecting the fundamental rights of Human Rights Defenders.

## Special Rapporteur Reports

Kiai, Maina. *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Maina Kiai*, Human Rights Council, Twenty third session, Agenda item 3, A/HRC/23/39, April 24, 2013.

- From the conclusion: The Special Rapporteur considers the two issues discussed in the present report, namely funding of associations and holding of peaceful assemblies, to be critical for the enjoyment of the rights to freedom of peaceful assembly and of association. He expresses serious concern that undue barriers to funding are put in place, especially in a climate of harassment and exclusion of civil society actors on one hand, and in the context of a global financial crisis on the other. It is crucial that civil society not bear any more restrictions and obligations than private corporate bodies, for instance, in these areas.

Forst, Michel, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, Human Rights Council, Thirty-first session, Agenda item 3, A/HRC/31/55. February 1, 2016.

- Note by the Secretariat: In the present report, the Special Rapporteur on the situation of human rights defenders, Michel Forst, conceptualizes good practices in the protection of human rights defenders at the local, national, regional and international levels. He outlines protection initiatives in three interrelated areas: practices that strengthen the resources and capacities of defenders; measures that foster an enabling environment for the defence of their rights; and regional and international initiatives that support their protection at the local and national levels. He concludes the report with seven principles underpinning good practices in the protection of defenders, and makes recommendations on further ways to strengthen, replicate and disseminate them.

Forst, Michel, *They Spoke Truth to Power and Were Murdered in Cold Blood: Analysis on the Situation of Human Rights Defenders and Concrete Recommendations to Better Protect Them*, *Special Rapporteur on the Situation of Human Rights Defenders*, Human Rights Council, A/71/281, August 3, 2016.

- Summary: The present report highlights the situation of environmental human rights defenders. In his report, the Special Rapporteur raises alarm about the increasing and intensifying violence against them. He makes recommendations to various stakeholders in order to reverse this worrying trend and to empower and protect those defenders, for the sake of our common environment and sustainable development.

*Promotion and Protection of Human Rights Defenders*, Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders in accordance with Commission resolution 2000/61. E/CN.4/2001/94, January 26, 2001.

- Summary: “Identifies the main areas of progress and the remaining challenges that need to be addressed in relation to the implementation of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; contains a compilation of developments relating to the situation of human rights defenders and implementation of the Declaration in 118 countries over the past 6 years.”

Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights Defenders in the Americas, 2011.

- Summary: The Second Report on the Situation of Human Rights Defenders in the Americas highlights of the role the extractive sector played in the increasing abuse towards human rights defenders and activists. Along with noting many troubling trends regarding extractive industries and human rights abuses, the Commission laid out certain state responsibilities in relation to the issue.

## Scholarly Texts

Carvalho, Sandra and de Souza, Alice de Marchi Pereira and Dias, Rafael Mendonça, "Protection Policies for Human Rights Defenders" *Sur-International Journal on Human Rights* 13(23) (2016).

- From a civil society perspective, this article examines experiences with policies for the protection of human rights defenders currently in place in three Latin American countries: Brazil, Colombia and Mexico.<sup>1</sup> It identifies the main issues of concern for the organisations monitoring these policies and indicates the challenges and the importance of regional coordination on the issue. Based on the experience of the Brazilian Committee of Human Rights Defenders, a platform that brings together non-governmental organisations and social movements, the article also analyses the process of implementing the National Programme for the Protection of Human Rights Defenders (Programa Nacional de Proteção aos Defensores de Direitos Humanos or PPDDH) in Brazil and its political institutions.

Gleason, Jennifer and Elizabeth Mitchell, "Will the Confluence Between Human Rights and the Environment Continue to Flow? Threats to the Rights of Environmental Defenders to Collaborate and Speak Out" *Oregon Review of International Law* 267 (11)(2009).

- Summary: Lawyers and citizen advocates who defend the rights of communities to a healthy environment stand between the people they seek to protect and powerful interests that aim to gain from destroying or polluting natural resources. Environmental defenders are frequently subjected to threats, harassment, and physical violence. Many national governments refuse to investigate or prosecute crimes committed against environmental advocates. But one of the most ubiquitous challenges environmental defenders face is government infringement on their rights to free speech and association. Although international declarations support the rights of environmental advocates to associate freely and to speak out against environmental abuses, domestic laws often undermine these protections. Part I of this Article describes the defining characteristics of an environmental defender. Part II reviews the United Nations Declaration on Human Rights Defenders and related regional declarations. Part III examines examples of domestic laws that directly contradict the free speech and association rights of environmental advocates. Part IV briefly discusses the formal and informal mechanisms that defenders use to overcome these obstacles.



Tanner, Lauri R, “Kawas v. Honduras – Protecting Environmental Defenders” *Journal of Human Rights Practice*, 3 (3) 2011: 309-326.

- Summary: This policy note examines the reasoning and implications of the judgment of the Inter-American Court of Human Rights in the milestone case of *Kawas v. Honduras*. In its first-ever ruling on environmental defenders, the Court found a positive obligation on the part of member states in the Hemisphere to protect environmentalists who are in serious jeopardy from human rights violations. The *Kawas* case is a paradigmatic example of the constant threats these activists encounter, both in the Americas and internationally, and states in the region are now on notice to ensure special protection to those most in danger of harm. The Court arrived at the remarkable juncture of ‘making visible and potentially punishable what heretofore has been invisible and unpunished’. An Epilogue addresses the subsequent ruling in the ‘Mexican Ecologists’ case, and offers recommendations to human rights and environmental defenders and practitioners both regionally and internationally.

## Reports

*The Human Cost of Defending the Planet: Human Rights Violations against Environmental Defenders in the Americas* Report 2002–2003, Center for Human Rights and Environment (CEDHA), 2003.

- Summary: “In April 2002 CEDHA (Center for Human Rights and Environment), together with CIEL (Center for International Environmental Law), presented the first report “The human cost of defending the planet”<sup>1</sup> to the Functional Unit of Human Rights Defenders of the InterAmerican Commission on Human Rights (CIDH). This was a compilation of cases, by country, of human rights violations against environmental activists and was an approximation of the diverse violations that environmental activists have been suffering in the region for their denunciation of the uncontrolled degradation of natural resources. CEDHA presented this initial report to the Human Resources Unit of CIDH in a renewed effort to promote a better and more effective protection of environmentalists in Latin America. This following report intends to continue that initiative, showing that the situation of environmental defenders has not improved.”

*Deadly Environment: The Dramatic Rise in Killings of Environmental And Land Defenders*. Global Witness, 2014

- From the executive summary: This report shines a light on the sharp end of the rapidly worsening and poorly understood problem of violation against environmental defenders. The issue is notoriously under-reported, but between 2002 and 2013, we have been able to verify that 908 citizens were killed protecting rights to their land and environment. Three times as many people were killed in 2012 than 10 years previously, with the death rate rising in the past four years to an average of two activists a week. There were almost certainly more cases, but the nature of the problem makes information hard to find, and even harder to verify. However, even the known level of killings is on a par with the more high-profile incidences of 913 journalists killed while carrying out their work in the same period.<sup>3</sup> The death rate also points to a much greater level of non-lethal violence and intimidation, which are not documented in this report.

*How Many More? 2014's Deadly Environment: The Killing and Intimidation of Environmental and Land Activists, with a Spotlight on Honduras.* Global Witness, 2015.

- From the conclusion: This report asks how many more people will die before the world takes notice? The need to protect environmental and land defenders must be pushed high up on the agendas of national governments and international bodies. States should call for a UN Human Rights Council resolution to address the increase in these threats. But also, importantly, structural problems at the root of the violence need to be challenged. Laws that guarantee free, prior and informed consent for indigenous peoples must be properly implemented. Government must end secret resource deals that benefit business and political elites to the detriment of local communities. Companies behind these projects should also be held accountable for any violence or intimidation carried out on their behalf.

*On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide.* Global Witness, 2016.

- From the executive summary: This report sheds light on the acute vulnerability of indigenous people, whose weak land rights and geographic isolation make them particularly exposed to land grabbing for natural resource exploitation. In 2015, almost 40% of victims were indigenous. For example, the father and grandfather of Filipino activist Michelle Campos were publicly executed for defending their ancestral land against mining in an attack which drove 3,000 indigenous Lumad people from their homes. Rich in natural resources, their region of Mindanao is one of the most dangerous in the world for land and environmental defenders, with 25 deaths in 2015 alone. Although the Lumad killers were identified by the many witnesses, they have never been brought to justice.

Hernandez, Alejandra, et al, *Emerging Practices of States Regarding the Protection of Environmental Defenders in Latin America and the Caribbean*, Centro Mexicano de Derecho Ambiental, November 2016.

- This report is an attempt to describe emerging practices that are relevant to the prevention of harm, and protection of environmental defenders in countries across the region in the alarming context of violence and aggression. These case studies are the result of the work of various civil society organizations and researchers from Latin America and the Caribbean, created with the input, of environmental human rights defenders from the region. Specifically, this publication seeks to identify emerging practices that address not only protection of the physical integrity of the defender, but also promote a preventive approach to avoid social and environmental conflicts, through mechanisms of access to information, participation and justice.

*Annual Report on Human Rights Defenders at Risk in 2016*, Frontline Defenders, 2016.

- The report honors the activists killed in 2016, of which there are 282 from 25 countries. About half of those killed were defending land, indigenous and environmental rights. Most of these cases were preceded with reported warnings, death threats and intimidation that police ignored. The violence and killing of human rights defenders is also shown to affect the community and social movements, leading to increased self-censorship, breakdown of activist networks, and many human rights defenders leaving the country. Furthermore, criminalization of human rights defenders was involved in over half of the cases in the report. Arbitrary detention, used as a tactic to silence activists and dissuade others, was widespread. The 2016 report also finds that Western Europe is not immune to human rights setbacks as organizations and activists assisting refugees saw increased harassment and were subject to smear campaigns. Countries who experienced terrorist attacks responded by restricting civil liberties and banned human rights defenders from assembling or demonstrating.

*Defenders of the Earth: global killings of land and environmental defenders in 2016*, Global Witness, 2017.

- Summary: “This Global Witness report documents the murder of 200 land and environmental defenders in 2016, drawing upon data, analysis and human stories to create an annual picture of this global phenomenon. The report finds that this tide of violence is driven by an intensifying fight for land and natural resources, as mining, logging, hydro-electric and agricultural companies trample on people and the environment in their pursuit of profit. It highlights the courage of their communities as they stand up to the might of multinationals, paramilitaries and even their own governments in the most dangerous countries on Earth to be a defender. The report highlights regions and countries where threats facing land and environmental defenders are the most pernicious - including Brazil, Honduras, Nicaragua, Philippines, Colombia, India and the Democratic Republic of Congo.”

## **Climate Change, Fossil Fuel Extraction and Human Rights**

There is an extensive literature on climate change and human rights. In particular, see the bibliography prepared by John Knox, Special Rapporteur on Human Rights and the Environment. Citation included below. However, we are concerned primarily with material that focuses on the human rights impacts of fossil fuel extraction.

Knox, John H., “Human Rights Principles and Climate Change” in Cinnamon Carlarne, Kevin R. Gray, and Richard Tarasofsky (eds) *Oxford Handbook of International Climate Change Law*, 2015. Wake Forest Univ. Legal Studies Paper No. 2523599. Available at SSRN: <https://ssrn.com/abstract=2523599>

## Primary Materials

*Paris Agreement on Climate Change*, United Nations Framework Convention on Climate Change, opened for signature on 22 April 2016, entered into force 4 November 2016.

- Preamble: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”

*Petition to the Commission on Human Rights in the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, submitted by Greenpeace Southeast Asia and Philippines Rural Reconstruction Movement. September 22, 2015.

- Excerpt from Summary: “In September 2015, Greenpeace Southeast Asia (together with 13 Filipino civil society organisations and 18 individuals) submitted a petition to the Commission on Human Rights of the Philippines (Commission), requesting an investigation of the ‘responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change’. The 47 respondents to the petition are investor-owned oil, natural gas and coal producers and cement manufacturers, referred to in the petition as the carbon majors. These companies are part of a group of 90 investor-owned, state-owned or government-run entities found to be the largest producers of greenhouse gas emitting products since the industrial revolution, according to peer-reviewed research undertaken by Richard Heede of the Climate Accountability Institute and published first in 2013 (Heede, R, ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010’ *Climatic Change*, (2014) 122: 229). The petitioners requested the Commission to prioritise the investor-owned fossil fuel producers, including Chevron, ExxonMobil, BP, Shell and ConocoPhillips in any investigation.”

*Human Rights and Climate Change Consolidated Reply*, submitted by Greenpeace Southeast Asia. February 10, 2017.

- Summary: This document includes the company responses to the above petition as well as the petitioner’s consolidated reply to the respondents.

For a list of UN documents on Human Rights and Climate Change, please see:  
<http://srenvironment.org/un-documents/>

## Scholarly Texts

Dehm, Julia “Post Paris Reflections: Fossil Fuels, Human Rights and the Need to Excavate New Ideas for Climate Justice” *Journal of Human Rights and the Environment* 8(2) (2017, forthcoming)

- Summary: This article offers some preliminary reflections on what has arguably been a blind spot in discussions both of the Paris Agreement and in the literature on climate change and human rights, namely the continual extraction of fossil fuels. The present article suggests three analytical tools—a ‘transnational law of carbon’, infrastructure, and global value chains—that may offer possibilities for rethinking the relationship between fossil fuel and international law as well as bringing questions of justice and rights into the centre frame.

Humphreys, Stephen. *Human rights and Climate Change*. Cambridge: Cambridge University Press, 2011.

- Summary: “As the effects of climate change continue to be felt, appreciation of its future transformational impact on numerous areas of public law and policy is set to grow. Among these, human rights concerns are particularly acute. They include forced mass migration, increased disease incidence and strain on healthcare systems, threatened food and water security, the disappearance and degradation of shelter, land, livelihoods and cultures, and the threat of conflict. This inquiry into the human rights dimensions of climate change looks beyond potential impacts to examine the questions raised by climate change policies: accountability for extraterritorial harms; constructing reliable enforcement mechanisms; assessing redistributive outcomes; and allocating burdens, benefits, rights and duties among perpetrators and victims, both public and private. The book examines a range of so-far unexplored theoretical and practical concerns that international law and other scholars and policy-framers will find increasingly difficult to ignore.”

Knox, John H., “Climate Change and Human Rights Law.” *Virginia Journal of International Law* 50 (1)(2009) Wake Forest Univ. Legal Studies Paper No. 1480120.

- Excerpt from Abstract: “This article seeks to provide a basis for a better understanding of how human rights law applies to climate change. Its aim is to establish some fundamental points. First, climate change already interferes with the human rights of vulnerable communities and is an enormous threat to human rights everywhere. Second, human rights law imposes duties on states to respond to climate change regardless of whether they can be held responsible for “causing” it. Third, human rights law also constrains states’ responses. Last, and most important, the jurisprudence that human rights tribunals have developed in the context of domestic environmental harm may be applied to global environmental harm, such as climate change, on the basis of the duty of international cooperation.”

Quirico, Ottavio, and Mouloud Boumghar. *Climate Change and Human Rights: an International and Comparative Law Perspective*. London: Routledge, 2016.

- Summary from Publisher: "This book sheds light on the legal relationship between climate change and human rights, based on tripartite human rights categories.

Contributors of the book explore the relationship between climate change and first, second and third generation human rights, drawing on the obligations to respect, protect, and fulfill human rights. The book is made up of three sections: the first section defines the general framework for understanding the relationship between climate change and human rights; the second section explores the relationship between climate change and specific first, second and third human rights generations; the third section analyses the human rights approach to climate change developed by the main international and regional institutional regimes. The volume gathers together chapters by international experts, in order to provide a thorough analysis of the relationship between human rights and climate change and the possibility of combating global warming through the enforcement of human rights"

## Reports

Gomez, Krizna and Regaignon, Gregory (eds), *Digging Deeper: The Human Rights Impact of Coal in the Global South*. Dejusticia and Business and Human Rights Resource Centre, 2015).

- Summary: "In this project, we look at coal in four countries -- India, Colombia, South Africa, and Egypt --through a human rights lens. We focus on the Global South, where coal use and production are increasing despite the opposite trend in much of the Global North. Dejusticia and Business & Human Rights Resource Centre release a report, a documentary and a blog series in our attempt to contribute to a greater understanding of the coal industry and how countries can better articulate their COP 21 commitments after Paris."

Knox, John H., *Climate Change Report, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, Thirty-First<sup>st</sup> Session, Agenda Item 3, A/HRC/31/52, Feb 1, 2016.

- This report of the Independent Expert is submitted to the Human Rights Council in accordance with Council resolution 19/10. The report examines the human rights obligations relating to climate change. Section II of this report reviews the actions taken in recent years by the Human Rights Council, the special procedure mandate holders and the parties to the United Nations Framework Convention on Climate Change concerning the relationship between climate change and human rights. Section III describes the effects of climate change on the enjoyment of human rights. Section IV examines the application of human rights obligations to climate change.

Mcinerney-Lankford, Siobhan, Mac Darrow, and Lavanya Rajamani. *Human Rights and Climate Change*. World Bank Study, 2011.

- Summary: "The study includes a conceptual overview of the link between climate impacts and human rights, focused on the relevant legal obligations underpinning the international law frameworks governing both human rights and climate change. As such it makes a significant contribution to the global debate on climate change and human rights by offering a comprehensive analysis of the international legal dimensions of this intersection. The study helps advance an understanding of what is meant, in legal and policy terms, by the human rights impacts of climate change through examples of specific

substantive rights. It gives a legal and theoretic perspective on the connection between human rights and climate change along three dimensions: first, human rights may affect the enjoyment of human rights. Second, measures to address human rights may impact the realization of rights and third, that human rights have potential relevance to policy and operational responses to climate change, and may promote resilience to climate change, including in developing countries in a way that may help sustainable development. This study effectively consolidates knowledge from the fields of international human rights law, international law governing climate change and international environmental law, building on the existing work of the United Nation (UN) office of the high commissioner on human rights, the UN human rights council and the international council on human rights policy. Although it maintains a legal focus, the study has benefited from the input of a host of international experts from other disciplines as well.”

## **Mining and Displacement**

### **Primary Materials**

Miloon Kothari, *Basic Principles on Development-Based Evictions and Displacement in Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Human Rights Council, 5th sess., U.N. Doc. A/HRC/4/18, Feb. 5, 2007.

- Summary: This document outlines the obligations of States to refrain from, and protect again, forced evictions from home(s) and land arises from several international legal instruments that protect the human right to adequate housing and other related human rights.

*Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing, Standard 5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*. World Bank, 2016.

- Summary: “This new framework will replace the current Safeguard Policies (during 2018), boosting protections for people and the environment, and driving sustainable development through capacity- and institution-building and country ownership. Standard 5 recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons. Project-related land acquisition or restrictions on land use<sup>1</sup> may cause physical displacement (relocation, loss of residential land or loss of shelter), economic displacement (loss of land, assets or access to assets, leading to loss of income sources or other means of livelihood), or both. The term “involuntary resettlement” refers to these impacts. Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in displacement.

*IFC Performance Standards 5 on Land Acquisition and Involuntary Resettlement and Guidance Note 5: Land Acquisition and Involuntary Resettlement*, International Finance Corporation, World Bank, January 1, 2012.

- Objectives of the Performance Standard 5: To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs; To avoid forced eviction; To anticipate and avoid, or where avoidance is not possible, minimize adverse social and economic impacts from land acquisition or restrictions on land use by: (I) providing compensation for loss of assets at replacement cost and ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected; (II) To improve, or restore, the livelihoods and standards of living of displaced persons; (III) To improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure<sup>5</sup> at resettlement sites.

## Scholarly Texts

Owen, John R., and Deanna Kemp. "Mining-induced displacement and resettlement: A critical appraisal" *Journal of Cleaner Production* 87 (15) (2015): 478-488.

- Abstract: Physical displacement, relocation and resettlement are widely acknowledged as posing enormous social risk. For over four decades, scholars, campaigners and project-affected people have sought to highlight the effects of development-induced displacement and resettlement (DIDR). Increasingly, the generic set of international standards that are used to manage cases of DIDR are being tested by the unique challenges posed by mining-induced displacement and resettlement (MIDR). In this article the authors provide a critical appraisal of current thinking and practice relating to MIDR. Findings indicate that MIDR is largely characterised by factors that occur in 'brownfield' project scenarios; even when the initial displacement commences in otherwise 'new' mining developments. The article identifies five critical and distinguishing factors associated with MIDR. These factors are explored in light of contemporary policy debates surrounding the mining industry, including 'consent', 'negotiated agreements' and overall effectiveness of existing social safeguards in regulating industry practice.

Owen, John R. and Deanna Kemp, "The Weakness of Resettlement Safeguards in Mining" *Forced Migration Review* 52 (2016).

- Summary: "Given the levels of uncertainty that surround mining activities, it is questionable whether current planning practices can safeguard against the risks associated with displacement and resettlement, and whether industry practice is consistent with the responsibility to respect human rights." This document overviews the weakness of resettlement safeguards in mining.

## Reports

*Mining, Resettlement, and Lost Livelihoods*. Oxfam and the University of Queensland, Centre for Social Responsibility in Mining, 2015.

- Summary: This study provides insight into the lives of people who have been resettled by large-scale mining in Tete province of Mozambique. In doing so, it seeks to contribute to a broader dialogue about how to improve policy and practice in relation to involuntary resettlement associated with mining projects. There is a growing body of evidence that, despite efforts by the international finance institutions (IFIs) and some national



governments to set and apply standards in this area, people who are displaced by mining and other large scale developments typically have their rights diminished and are exposed to long-term disadvantage.<sup>1</sup> This study provides insight into factors that contribute to resettlement practice falling short of accepted global standards and, importantly, identifies actions that governments and companies can and should take to ensure better outcomes from resettlement. It also acknowledges that resettlement is a complex, disruptive and dynamic process and that decisions and actions with good intent can still result in resettled peoples being worse off.

## **Labor Conditions in Extractive Industries**

### **Primary Materials**

*Working Environment (Pollution, Noise and Vibration) Convention, 1977 (No. 148)*, International Labor Organization, adopted in Geneva, 63rd ILC session 20 Jun 1977, entry into force 11 Jul 1979.

- Summary: This resolution includes provision that “as far as possible, the working environment shall be kept free from any hazards due to air pollution, noise or vibration.”

*Occupational Safety and Health Convention, 1981 (No. 155)*, International Labor Organization, adopted in Geneva, 67<sup>th</sup> ILC Session, 22 June 1981, entry into force 11 Aug 1983.

- Summary: This resolution requires parties to establish a coherent national policy on occupational safety and health in order to improve working conditions.

*Asbestos Convention, 1986 (No. 162)*, International Labor Organization, adopted in Geneva, 72<sup>nd</sup> ILC Session, 24 June 1986, entry into force 16 Jun 1989.

- Summary: This resolution obligates States parties to prescribe measures to protect workers from exposure to asbestos, including partial or total bans on future asbestos use, and thus its extraction; proper asbestos waste disposal; inspection and monitoring procedures of working conditions; and providing information on the hazards of asbestos to workers.

*Chemicals Convention, 1990 (No. 170)*, International Labor Convention, adopted in Geneva, 77<sup>th</sup> ILC session, 25 Jun 1990, entry into force 4 Nov 1993.

- This resolution compels States parties to protect workers from exposure to hazardous chemicals. Employers in States parties to the Convention are obligated to classify and identify hazardous chemicals so as to ensure that workers are not exposed to hazardous chemicals in excess of exposure limits, and to minimize risk.

*Prevention of Major Industrial Accidents Convention, 1993 (No. 174)*, International Labor Convention, adopted in Geneva, 80th ILC session, 22 Jun 1993, entry into force 3 Jan 1993.

- Summary: This resolution obligates States parties to “formulate, implement and periodically review a coherent national policy concerning the protection of workers, the public and the environment against the risk of major accidents” (art. 4) and “establish a

comprehensive siting policy arranging for the appropriate separation of proposed major hazard installations from working and residential areas and public facilities” (art. 17).

*Safety and Health in Mines Convention, 1995 (No. 176)*, International Labor Convention, adopted in Geneva, 82<sup>nd</sup> ILC session, 22 Jun 1995, entry into force 5 Jun 1998.

- Summary: This resolution establishes standards for all mining operations, excluding oil and gas extraction. Parties to the convention must consult with representatives of employers and workers to formulate a policy on safety and health in mines consistent with the minimum standards set out in the Convention.

## Scholarly Texts

Fisher, Eleanor, "Occupying the Margins, Labour Integration and Social Exclusion in Artisanal Mining in Tanzania" *Development and Change* 38(4) (2007) 735.

- Abstract: This article examines the marginal position of artisanal miners in sub-Saharan Africa, and considers how they are incorporated into mineral sector change in the context of institutional and legal integration. Taking the case of diamond and gold mining in Tanzania, the concept of social exclusion is used to explore the consequences of marginalization on people's access to mineral resources and ability to make a living from artisanal mining. Because existing inequalities and forms of discrimination are ignored by the Tanzanian state, the institutionalization of mineral titles conceals social and power relations that perpetuate highly unequal access to resources. The article highlights the complexity of these processes, and shows that while legal integration can benefit certain wealthier categories of people, who fit into the model of an 'entrepreneurial small-scale miner', for others adverse incorporation contributes to socio-economic dependence, exploitation and insecurity. For the issue of marginality to be addressed within integration processes, the existence of local forms of organization, institutions and relationships, which underpin inequalities and discrimination, need to be recognized.

Hilson, Gavin, "Child Labour in African Artisanal Mining Communities: Experiences from Northern Ghana" *Development and Change* 41(3) (2010) 445.

- Abstract: The issue of child labour in the artisanal and small-scale mining (ASM) economy is attracting significant attention worldwide. This article critically examines this 'problem' in the context of sub-Saharan Africa, where a lack of formal sector employment opportunities and/or the need to provide financial support to their impoverished families has led tens of thousands of children to take up work in this industry. The article begins by engaging with the main debates on child labour in an attempt to explain why young boys and girls elect to pursue arduous work in ASM camps across the region. The remainder of the article uses the Ghana experience to further articulate the challenges associated with eradicating child labour at ASM camps, drawing upon recent fieldwork undertaken in Talensi-Nabdam District, Upper East Region. Overall, the issue of child labour in African ASM communities has been diagnosed far too superficially, and until donor agencies and host governments fully come to grips with the underlying causes of the poverty responsible for its existence, it will continue to burgeon.

Zou, Yanhui. “On Protection of the Miner’s Right to Life and Right to Health”, *Journal of Politics and Law* 7 (2) (2014).

- Summary: “Mine accidents occurred frequently in China. The phenomenon of ignoring the miner’s right to life and right to health is widespread. On the basis of analyzing the reasons for the infringement of the miner’s right to life and right to health, to the existing problems, the article put forward specific measures to protect the miner’s right to life and right to health.”

## Reports

*Hear No Evil: Forced Labor and Corporate Responsibility in Eritrea’s Mining Sector*, Human Rights Watch, 2013.

- Summary: The 29-page report describes how mining companies working in Eritrea risk involvement with the government’s widespread exploitation of forced labor. It also documents how Nevsun – the first company to develop an operational mine in Eritrea – initially failed to take those risks seriously, and then struggled to address allegations of abuse connected to its operations.

“Fatal Extraction: Australian Mining’s Damaging Push into Africa.” *International Consortium of Investigative Journalists*, 2015.

- Key findings: Since the beginning of 2004, more than 380 people have died in mining accidents or in off-site skirmishes connected to Australian publicly-traded mining companies in 13 countries in Africa; Australian mining companies are more numerous than those from other mining giants such as Canada, the United Kingdom and China. At the end of 2014, more than 150 companies held about 1500 licenses and owned or managed dozens of mining operations across 33 countries in Africa; Multiple Australian mining companies are accused of negligence, unfair dismissal, violence and environmental law-breaking across Africa, according to legal filings and community petitions gathered from South Africa, Botswana, Tanzania, Zambia, Madagascar, Malawi, Mali, Cote d’Ivoire, Senegal and Ghana; Australian state and federal government entities, including government workers’ pension funds, have invested in controversial Australian mining companies operating in Africa.

*You’ll be Fired if You Refuse: Labor Abuses in Zambia’s Chinese State-owned Copper Mines*, Human Rights Watch, 2011.

- Summary: The past decade has seen burgeoning investment across Africa by private and state-run Chinese enterprises. This report examines the labor practices of a Chinese state-owned enterprise in four copper mining operations in Zambia. While Zambia’s copper miners welcome Chinese-run companies’ substantial investment and job creation, they also encounter abusive employment conditions that violate national and international standards and fall short of practices among the other multinationals operating in Zambia’s copper mining industry. Miners at Chinese-run companies described consistently poor health and safety standards, including inadequate ventilation that can lead to serious lung diseases, hours of work in excess of Zambian law, the failure to replace workers’ damaged protective equipment, and routine threats of being fired should they refuse to

work in unsafe places. These practices, combined with the already dangerous nature of the work, cause injuries and other health complications. Many of the labor practices in Zambia seem to be exported from China's domestic mining industry, with safety and health measures treated as irritating barriers to greater profits, rather than as good business practices, both in the Chinese domestic mining industry and in Chinese-run mines in Zambia.

## **Permanent Sovereignty over Natural Resources**

### **Primary Materials**

*International Covenant on Economic, Social, and Cultural (ICESCR)*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

- Article 1(2): 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 co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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*Integrated Economic Development and Commercial Agreements*, General Assembly Resolution 523 (VI), January 12, 1952.

- Excerpt from Resolution 523: “The General Assembly, *considering* that the underdeveloped countries have the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests, and to further the expansion of the world economy... recommends that Members of the United Nations, within the framework of their general economic policy should: 1) continue to make every possible effort to carry out the recommendations contained in paragraphs 1, 2, 3, and 4 of Economic and Social Council resolution 341 (XII), section A, of 20 March 1951...”

*Right to Exploit Freely Natural Wealth and Resources*, General Assembly resolution 626 (VII), Dec. 21, 1952.

- Excerpt from Resolution 626: “The General Assembly, *bearing in mind* the need for encouraging the underdeveloped countries in the proper use and exploitation of their natural wealth and resources... recommends that all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to the need for maintaining the flow of capital in conditions of security, mutual confidence, and economic co-operation among nations; *further recommends* all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources.

*Permanent Sovereignty over Natural Resources*, General Assembly Resolution 1803 (XVII), 1194<sup>th</sup> plenary meeting, A/RES/, December 14, 1962.

- “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.” 2) “The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.” 6) “International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.”

*Permanent Sovereignty over Natural Resources*, General Assembly resolution 2158 (XXI), November 25, 1966.

- Excerpt from Resolution 2158: 1) “The General Assembly, *recalling* its resolutions 523 (VI), 1515 (XV), and 1803 (XVII) on permanent sovereignty over natural resources, 1) reaffirms the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development... 2) *declares*, that the United Nations should undertake a maximum concerted effort to channel its activities so as to enable all countries to exercise that right fully; 4) *confirms* that the exploitation of natural resources in each country shall always be conducted in accordance with its natural laws and regulations...”

*Charter of Economic Rights and Duties of States*, General Assembly resolution 3281 (XXIX), December 12, 1974.

- Adopted the Charter of Economic Rights and Duties of States. The Charter consists of a preamble, three chapters, and 34 articles. Chapter I addresses the “fundamentals of international economic relations,” chapter II lists the “economic rights and duties of states,” and chapter III considers the “common responsibilities towards the international community.”

## **Scholarly Texts**

Abi Saab, Georges, “Permanent Sovereignty Over Natural Resources And Economic Activities” in Mohammed Bedjaoui (eds), *International Law: Achievements and Prospects*. UNESCO: (1991) 591- 617.

- Summary: An overview of the principle of permanent sovereignty over natural resources and economic activities and the specific applications of the principle.

Anghie, Anthony. "Sovereignty and the Post-colonial State" in Chapter 4: 196-244 of *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press 2005.

- Summary: In this chapter Anghie analyzes the doctrine of permanent sovereignty over natural resources in the context of International Law. She examines the discrepancy between formal and real equality and argues that the continuing effect of the colonial encounter and the persistence of the structure of the civilizing mission are its root causes.

Bungenberg, Marc, & Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources*. Springer, 2015.

- Summary from Publisher: "Fifty years after the adoption of the Declaration on Permanent Sovereignty over Natural Resources by the General Assembly of the United Nations in December 1962, this volume assesses the evolution of the principle of permanent sovereignty over natural resources into a principle of customary international law as well as related developments. International environmental and human rights law leave unresolved questions regarding the limitations of this principle, e.g. extraterritorial and international influences such as the applicable criminal and tort law, as well as the extraterritorial and international promotion of good governance, including transparency obligations."

Hyde, James N, "Permanent Sovereignty over Natural Wealth and Resources" *American Journal of International Law* 50 (1956): 854-867.

- Summary: A discussion on permanent sovereignty over natural wealth and resources in the aftermath of the 1952 United Nations General Assembly resolution that contained the proposition that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty...."

Feichtner, Isabel, "International (Investment) Law and Distribution Conflicts over Natural Resources" in Stephan W. Schill, Christian J. Tams and Rainer Hofmann (eds) *International Investment Law and Development: Bridging the Gap*. Edward Elgar (2016): 256 – 284.

- Summary: While distribution conflicts over natural resources were central to the debates on a New International Economic Order, during the last decades the specific distribution conflicts surrounding natural resource exploitation no longer have been at the core of international law. In this paper I trace the developments in the relationship between international law and resource distribution conflicts. I first argue that the New International Economic Order favored the political resolution of distribution conflicts over natural resources and envisaged international distribution conflicts to be addressed by the political organs of international institutions within legal procedures Second, I show how the NIEO was surpassed by a different order that relied largely on the market as a distribution mechanism for raw materials and how international institutions and international law played a crucial role in the establishment of this order by promoting the privatization of natural resource exploitation and protecting foreign direct investment and trade. With reference to the copper industry in Zambia I thirdly illustrate how international investment law, and more broadly international economic law, is shaping (and affecting the resolution of) not only distribution conflicts between, but also within States. I conclude with a call for a renewed focus on an international law of resource

conflicts to allow for their political resolution given the countermoves we can observe with respect to international investment law and the persistence of (violent) conflicts over natural resource exploitation within States.

Feichtner, Isabel. "The Exploitation Bias in the Transnational Law of Natural Resource Exploitation" (work in progress).

- Summary: An examination of how trade, investment, and monetary regulation impact on natural resource extraction and governance. Feichtner highlights the important role that lawyers play in analyzing and transforming the global political economy of resource extraction to make it less exploitive of natural resources.

Pahuja, Sundhya, Chapter 4 in *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge: Cambridge University Press, 2011.

- Introduction: "The universal promise of contemporary international law has long inspired countries of the Global South to use it as an important field of contestation over global inequality. Taking three central examples, Sundhya Pahuja argues that this promise has been subsumed within a universal claim for a particular way of life by the idea of 'development'. As the horizon of the promised transformation and concomitant equality has receded ever further, international law has legitimised an ever-increasing sphere of intervention in the Third World. The post-war wave of decolonisation ended in the creation of the developmental nation state; the claim to Permanent Sovereignty over Natural Resources in the 1950s and 1960s was transformed into the protection of foreign investors; and the promotion of the rule of international law in the early 1990s has brought about the rise of the rule of law as a development strategy in the present day."

Schrijver, Nico, *Sovereignty Over Natural Resources: Balancing Rights and Duties*. Cambridge University Press, 1997.

- Abstract: In modern international law, permanent sovereignty over natural resources has come to entail duties as well as rights. This study analyzes the evolution of permanent sovereignty from a political claim to a principle of international law, and examines its significance for a number of controversial issues such as people's rights, nationalization and environmental conservation. Although political discussion has long focused on the rights arising from permanent sovereignty, Dr. Schrijver argues that this has been at the expense of the consideration of the corollary obligations it also entails. His book thus identifies new directions sovereignty over natural resources has taken in an increasingly interdependent world and demonstrates its relevance to current debate on foreign-investment regulation, the environment and sustainable development.

## **Mining, Development and the Realization of Socio-Economic Rights**

### **Primary Materials**

*The Future We Want*, General Assembly, Resolution 66/228, sixty-sixth session, agenda item 19, A/RES/66/28811, para 227 & 228, September 2012.

- States: We acknowledge that minerals and metals make a major contribution to the world economy and modern societies. We note that mining industries are important to all countries with mineral resources, in particular developing countries. We also note that mining offers the opportunity to catalyse broad-based economic development, reduce poverty and assist countries in meeting internationally agreed development goals, including the Millennium Development Goals, when managed effectively and properly. We acknowledge that countries have the sovereign right to develop their mineral resources according to their national priorities and a responsibility regarding the exploitation of resources, as described in the Rio Principles. We further acknowledge that mining activities should maximize social and economic benefits, as well as effectively address negative environmental and social impacts. In this regard, we recognize that governments need strong capacities to develop, manage and regulate their mining industries, in the interest of sustainable development.

### **Scholarly Texts**

Sachs, Lisa, “Mapping mining to the Sustainable Development Goals: how can the mining sector contribute?” *Mining Law Committee Newsletter* (2016): 7.

- Summary: Sachs presents the case behind why the mining and metals sector is uniquely placed to support the realization of the Sustainable Development Goals.

Morgena, Elisa, “The Need for an International Legal Concept of Fair and Equitable Benefit Sharing” *European Journal of International Law* 27(2) (2016): 353.

- Abstract: This article proposes a concept of ‘fair and equitable benefit sharing’ deriving from international biodiversity law, international human rights law, and the law of the sea. The concept identifies normative elements that are shared among the international treaties that refer to benefit sharing, comprising the act of sharing; the nature of the benefits to be shared; the activities from which benefit sharing arise; the beneficiaries; and fairness and equity as the rationale for benefit sharing in international law. The concept is not intended to provide a holistic or exhaustive notion of fair and equitable benefit sharing but, rather, to support comparison and generalization with a view to shifting the current investigation from sectoral/technical approaches to the perspective of general international law and the contribution to research in other areas of international law. The proposed conceptualization is thus geared towards the development of a research agenda targeting a variety of international and transnational legal materials, allowing for the appreciation of differences in the context of varying logics of different areas of law.



Ozkaynak, B., and Rodriguez-Labajos, B., et al, “*Mining Conflicts Around the World: Common Grounds from an Environmental Justice Perspective*” EJOLT Report 7 (2012): 198.

- Abstract: This report aims at exploring contemporary mining conflicts in the context of the sustainable development and environmental justice movement. This is done based on 24 real case studies from 18 different countries which are described by local activists and scholars. While 17 of the reported cases focus on conflicts related to metal mining, four address uranium mining and one refers to coal mining.

## Reports

*A Rights-Base Approach to Resource Extraction in the Pursuit of Sustainable Development*, Mining Working Group at the UN.

- The brief contains: 1. Proposal for a rights-based sustainable development agenda 2. Transformation of the current model of extractive development 3. The Rights-based Litmus Test 4. Post-Extractivism: a vision for a rights- based and sustainable model of development.

*Human Development Report, Sustainability and Equity: A Better Future for All*, UNEP, 2011.

- Summary: This year’s Report focuses on the challenge of sustainable and equitable progress. A joint lens shows how environmental degradation intensifies inequality through adverse impacts on already disadvantaged people and how inequalities in human development amplify environmental degradation.

*Extractive Industries for Sustainable Development*, UNDP, 2014.

- Summary: This report contains the work that UNDP does and has done on extractive industries, their ongoing strategy, programmes and projects, and their mandate and role in the realm of extractive industries for sustainable development.

*Mapping Mining to the Sustainable Development Goals: An Atlas*, Colombia Center on Sustainable Investment, UN Sustainable Development Solutions Network, United Nations Development Programme, and the World Economic Forum, July 2016.

- Summary: This Atlas maps the relationship between mining and the SDGs by using examples of good practice in the industry and existing knowledge and resources in sustainable development that if replicated or scaled up could make useful contributions to the SDGs. It presents a broad overview of opportunities and challenges to demonstrate the actual and potential contributions of the mining sector to the achievement of the SDGs – from exploration through production and eventually mine closure. Mining companies, their staff, management and boards are the primary audience for the Atlas. It is especially relevant for existing mines, whose operations can be adjusted in line with this Atlas to contribute to the SDGs. The Atlas is also intended to advance the conversation about how mining companies, working both individually and collaboratively with governments, communities, civil society and other partners, can help to achieve the SDGs.

## Gender Justice and Extractive Industries

### Scholarly Texts

Alexander, Peter. "Women and coal mining in India and South Africa" *African Studies*, 66(2) (2007): 201-222.

- Summary: this paper is animated by the question of why it was that in South Africa, there were no women working underground in mines. Posing this absence as a problem was a way of thinking about gender, and allowed the author to compare labour practices in coal mines of South Africa with those in India, where women were employed in large numbers until after the Second World War.

Amutabi, M. and M. Lutta-Mukhebi. "Gender and Mining in Kenya: The Case of the Mukibira Mines in the Vihiga District" *Jenda: A Journal of Culture and African Women's Studies* 1(2)(2001): 1-23.

Summary: This essay examines the role of women in mining in Kenya compared to that of men. It utilizes the Mukibira mines in Vihiga district to demonstrate how women have been at the center of mining activities. As well, it reports on the various complex activities that were discovered around these mines during our field research. It interrogates these activities vis-a-vis women and evaluates their impact on their life and society around them. It also looks at the benefits or advantages that women have acquired from these mines and it discusses the dangers and problems that women face in the mines, especially the dangers to which they are exposed.

Keenan, J. C., D. L. Kemp, and R. B. Ramsay. "Company–Community Agreements, Gender and Development." *Journal of Business Ethics* 135(4)(2014): 607-15.

- Summary: This paper presents the results of the first phase of an applied research project undertaken by the Centre for Social Responsibility in Mining (CSRMI) at The University of Queensland and funded by the Minerals Council of Australia (MCA) and the Department of Foreign Affairs and Trade (DFAT). The project sought to connect with experienced practitioners who had been directly involved in mining and agreement processes to document and analyse grounded perspectives on gender dynamics and agreements, and connect those experiences with the broader literature.

Lahiri-Dutt, Kuntala. "Roles and status of women in extractive industries in India: Making a place for a gender-sensitive mining development." *Social Change* 37 (4) (2007): 37-64.

- Summary: "In tracing women's roles and analysing their low status in the extractive industries in India, particularly coal mining, this paper highlights the need of sensitizing the Indian mining establishments ranging from educational, research and training institutions to the Ministries and Bureaus as well as the industrial organizations so as to provide equal work opportunities for women. It shows that mining is not a 'non-traditional' area of work for women as is commonly thought. It also raises the importance of class, caste and locational juxtaposition in understanding institutionalized sensitivities towards gender. The author argues that the formal extractive industries continue to exclude women and remain sites of rewards of production for men because of the

entrenched social bias as traditionally those working in the collieries were largely from lower caste, poorer classes and indigenous communities.”

Lahiri-Dutt, Kuntala, and Martha Macintyre (eds.) *Women Miners in Developing Countries*. London: Routledge, 2016.

- Summary: “Contrary to their masculine portrayal, mines have always employed women in valuable and productive roles. Yet, pit life continues to be represented as a masculine world of work, legitimizing men as the only mineworkers and large, mechanized, and capitalized operations as the only form of mining. Bringing together a range of case studies of women miners from past and present in Asia, the Pacific Region, Latin America and Africa, this book makes visible the roles and contributions of women as miners. It also highlights the importance of engendering small and informal mining in the developing world as compared to the early European and American mines. The book shows that women are engaged in various kinds of mining and illustrates how gender and inequality are constructed and sustained in the mines, and also how ethnic identities intersect with those gendered identities”

Mckinnon, Katharine. “Gendering the Field: Towards Sustainable Livelihoods for Mining Communities - edited by Kuntala Lahiri-Dutt” *Geographical Research* 50(4) (2012): 444-46.

- Summary: The chapters in this book offer concrete examples from all over the world to show how community livelihoods in mineral-rich tracts can be more sustainable by fully integrating gender concerns into all aspects of the relationship between mining practices and mine affected communities. By looking at the mining industry and the mine-affected communities through a gender lens, the authors indicate a variety of practical strategies to mitigate the impacts of mining on women’s livelihoods without undermining women’s voice and status within the mine-affected communities. The term ‘field’ in the title of this volume is not restricted to the open-cut pits of large scale mining operations which are male-dominated workplaces, or with mining as a masculine, capital-intensive industry, but also connotes the wider range of mineral extractive practices which are carried out informally by women and men of artisanal communities at much smaller geographical scales throughout the mineral-rich tracts of poorer countries.

## Reports

Castillo, Gerardo and Laura Soria, *Gender Justice in Consultation Processes for Extractives Industries in Bolivia, Ecuador and Peru*, Oxfam and Societas Consultora de Analisis Social, 2011.

- Summary: “The general objective of this assessment is to explore how the processes and mechanisms for citizen consultation of extractive projects being implemented in Bolivia, Ecuador and Peru can contribute to identifying and properly addressing gender inequalities.”

*Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned.* Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, November, 2015.

- Summary: Brutal accounts of sexual and other assaults have been rife among the indigenous communities living near the Porgera Joint Venture (PJV) gold mine in Papua New Guinea (PNG). Security guards hired to patrol the mine's perimeter and to secure mine property have physically abused many local residents and landowners, and targeted women for vicious sexual assaults, including gang rapes. The assaults, which spanned many years in a context of pervasive impunity, have caused long-term and continuing harm to survivors and Porgeran communities. This report analyzes the design and implementation of a company-created mechanism established to remedy sexual violence around the mine. The report provides key lessons for corporations, civil society, survivors and affected communities, and the international community about the benefits, challenges, and limitations of company-created remedy mechanisms as a means of redressing serious human rights violations. The report is grounded in the experiences of assault survivors and the findings are based on a three-year investigation, including many interviews conducted in Porgera before and during the implementation of the remedy mechanism.

Eftimie, Adrienne, Katherine Heller, John Strongman, Jennifer Hinton, Kuntala Lahiri-Dutt, and Nellie Mutemeri, *Gender Dimensions of Artisanal and Small-Scale Mining: A Rapid Assessment Toolkit.* World Bank Group and Gender Action Plan, 2012.

- Summary: The Gender Dimensions of Artisanal and SmallScale Mining: A Rapid Assessment Toolkit is intended as an easy-to-use toolkit for understanding men's and women's differentiated access to the resources and opportunities associated with artisanal and small-scale mining (ASM) and how they are affected by ASM.

Hill, Christina. Chris Madden, and Maria Ezpeleta. *Gender and the extractive industries: putting gender on the corporate agenda.* Oxfam, May 2016.

- Summary: "Persistent and structural gender inequality within the extractive industries continues to undermine women's rights and the development potential of the sector. A failure to engage women from impacted communities means that companies lack important information and perspectives and, as a result, face various risks to their own interests. This paper presents the case for extractive industry companies to take off the gender blindfold and work towards gender equality and the realisation of women's rights. It also describes the role of a company gender policy and gender impact assessment in achieving better outcomes for the women, men, girls and boys in those communities affected by extractive projects. The paper includes some case studies that demonstrate the risks to companies of ignoring gender issues."

*Women, communities, and mining: the gender impacts of mining and the role of gender impact assessment,* Oxfam Australia, December 2009.

- Summary: "This report informs mining company staff of the potential gender impacts of mining projects and introduces some tools and approaches that they can use to conduct a gender impact assessment of these projects. These tools should be of particular interest to community relations advisors as they are designed to help incorporate gender into

community assessment and planning tools including social baseline studies, social impact assessments and risk analysis, community mapping exercises, and monitoring and evaluation plans.”

*Position Paper on Gender Justice and Extractive Industries*, Oxfam International, March 2017.

- Summary: “This paper outlines Oxfam’s position on gender justice in the context of extractive industries. It describes some of the causes and consequences of the EI sector’s gendered impacts, and it summarizes Oxfam’s recommendations 2 Gender justice is the goal of full equality and equity among women and girls and men and boys in all spheres of life. It is the result of women, jointly—and on an equal basis with men—defining and shaping the policies, structures, and decisions that affect their lives and society as a whole. Gender justice is both an outcome and a process. to mining, oil, and gas companies, to governments, and to international financial institutions for achieving better gender equality outcomes and advancing women’s rights. Tackling gender inequality within the extractive industries demands a fundamental shift in how the industry is conceptualized, organized, and governed. It requires a reshaping of the values, culture, and norms that produce and maintain gender bias within the sector. Given the positive correlation between the progressive realization of women’s rights and poverty alleviation, the imperative for a new paradigm is clear.”

*Women, Gender and Extractivism in Africa: A Collection of Papers*, African Women United Against Destructive Resource Extraction (WoMin) and IANRA Initiative.

- Summary: This resource contains the full collection of six papers on women, gender, and extractivism in Africa. The papers focus on Sub-Saharan Africa so far as the available literature allows, WoMin begins to explore some of the themes and questions that are raised by extractivism and industrial mining in particular, and its impacts upon, and ‘relationship to’ peasant and working-class women. By ‘relationship’, WoMin refers to the myriad ways – within the home, in the fields and in the workplace – in which women, in mainly invisible and unremunerated ways, participate in, shape, and contribute to the ambitions and profits of the extractivist industries.

## SITES OF NATURAL RESOURCE GOVERNANCE

This annotated bibliography seeks to extend the analysis of human rights and natural resource governance by identifying and bringing critical attention to the various ways in which the governance of natural resources is addressed not only in human rights law but in various other international and transnational legal regimes. In drawing attention to how natural resource governance is the product of a complex array and layering of legal regimes (both public and private), it seeks to identify points for useful human rights intervention. Highlighting the key governance sites reveals the crucial spaces for leverage and change, thus opening a wider discussion about potential strategies for human rights advocacy and activism to bring about more socially just outcomes.

### *International Legal Frameworks*

#### Scholarly Texts

Boer, Ben. *Environmental Law Dimensions of Human Rights*. Oxford: Oxford University Press, 2015.

- Summary: “A high quality environment is coming to be regarded as a necessary prerequisite for the enjoyment of some of the most fundamental human rights, including the rights to life and health. However, the precise recognition of a 'right to environment' has not yet been settled. The essays collected here address this and related questions from different perspectives.”

Grear, Anna and Louis J. Kotze (eds), *Research Handbook on Human Rights and the Environment*. Northampton, MA: Edward Elgar Publishing, 2015.

- Summary from Publishers: Bringing together leading international scholars in the field, this Research Handbook interrogates, from various angles and positions, the fractious relationship between human rights and the environment and between human rights and environmental law. The Handbook provides researchers and students with a fertile source of reflection and engagement with this most important of contemporary legal relationships. Law’s complex role in the mediation of the relationship between humanity and the living order is richly reflected in this timely and authoritative collection.

Jacur, Francesca Romanin, Angelica Bonfanti, and Fransesco Seatzu. *Natural Resource Grabbing: An International Law Perspective*. Noninklijke Brill NV, 2016.

- Summary from Publisher: “The growing demand for natural resources has triggered a “race” to their exploitation and possession, especially in developing countries. Most desired are water, land, forests, raw materials (oil, gas, mineral and precious stones), fisheries and genetic resources. Emerging economies, Western states, multinational corporations and international financial institutions have become the biggest “buyers” in a race that on one hand strengthens economies and creates investment opportunities and on the other threatens local communities and environmental protection.” *Natural Resources Grabbing: An International Law Perspective* aims at filling a gap in the legal

literature by addressing the adverse effects that large-scale investments in natural resources may pose to fundamental human rights and the protection of the environment.

Scholtz, Werner, and Jonathan Verschuuren, *Regional environmental law: transregional comparative lessons in pursuit of sustainable development*. Cheltenham, UK: Edward Elgar Publishing, 2015.

- Summary from Publisher: “The core focus of this timely volume is to ascertain how regional environmental law may contribute to the pursuit of global sustainable development. Leading scholars critically analyze the ways in which states may pool sovereignty to find solutions to environmental problems, presenting a comparative legal analysis of the manner in which the AU, EU, OAS and ASEAN deal with the issues of climate change, human rights and the environment.”

Zellmer, Sandra. *Comparative Environmental and Natural Resources Law*. Durham: Carolina Academic Press, 2013.

- Summary: “This coursebook provides a comparative look at environmental and natural resource laws governing water, waste, biological diversity (wildlife and habitat), and environmental assessment. It focuses on the United States, Canada, England, New Zealand, and India. The first four countries are chosen for comparative analysis because of their common cultural roots yet divergent environmental problems and strategies. The first three countries—the U.S., Canada, and England—have taken media-specific and somewhat fragmented approaches to water, waste, and wildlife issues, while New Zealand has made path-breaking efforts to adopt a more holistic, ecosystem-based approach to pollution prevention and sustainable development. The fifth nation, India, is a country deeply influenced by England but charting its own course as an emerging economic giant, whose growth poses significant implications for biological diversity, climate, and the environment.”

## ***National Constitutions***

### **Scholarly Texts**

Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, UBC Press, 2012.

- Summary from Publisher: “The right to a healthy environment has been the subject of extensive philosophical debates that revolve around a key question, Should rights to clean air, water, and soil be entrenched in law, in the constitutions of democratic states? In *The Environmental Rights Revolution*, David Boyd, one of Canada's leading environmental lawyers, answers this question by moving beyond theoretical debate to measure the practical effects of enshrining the right to a healthy environment in constitutions. His analysis of 193 constitutions and the laws and court decisions of more than 100 nations shows how the constitutional right to a healthy environment has been incorporated in legislation and is being judicially enforced in Europe, Latin America, Asia, and Africa. Nations with constitutional protections have stronger environmental laws, enhanced enforcement, greater government accountability, and better access to justice, information, and public participation in decision making than nations without

such provisions. As a result, they also have smaller ecological footprints, rank higher on comprehensive indices of environmental performance, and have reduced pollution faster. This important and timely book not only demonstrates that enshrining environmental protection into national constitutions has the power to make sustainability a priority, it tells inspiring stories about the difference the right to a healthy environment is making in people's lives.

Boyd, David R. "Constitutions, Human Rights, and the Environment: National Approaches." in *Research Handbook on Human Rights and the Environment*, 170–99. Northampton, MA: Edward Elgar Publishing, 2015.

- Chapter Summary: "The right to a healthy environment has been the subject of extensive philosophical debate for four decades. This Chapter chronicles the extent to which this human right has spread across the world in both international and national law. Even more importantly, this Chapter explores the tangible effects of constitutional recognition of this right: does the right to a healthy environment and the associated responsibilities result in stronger environmental legislation, an enhanced role for the judiciary in environmental policy-making, greater public procedural rights and on-the-ground changes in environmental quality? This Chapter summarizes a pioneering analysis of 193 constitutions and the laws and court decisions from more than 100 nations in Europe, Latin America, Asia, and Africa. It reveals a strong and consistent positive correlation between constitutional protection and stronger environmental laws, smaller ecological footprints, superior environmental performance, and improved quality of life."

May, James R. and Erin Daly, *Global Environmental Constitutionalism*. Cambridge University Press, 2014.

- Summary: "Reflecting a global trend, scores of countries have affirmed that their citizens are entitled to healthy air, water and land, and that their constitution should guarantee certain environmental rights. This book examines the increasing recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts. This phenomenon, which the authors call environmental constitutionalism, represents the confluence of constitutional law, international law, human rights and environmental law. National apex and constitutional courts are exhibiting a growing interest in environmental rights, and as courts become more aware of what their peers are doing, this momentum is likely to increase. This book explains why such provisions came into being, how they are expressed, and the extent to which they have been, and might be, enforced judicially. It is a singular resource for evaluating the content of and hope for constitutional environmental rights."

### **Additional Resources**

Gellers, Josh. *EnviroRightsMap*, <http://envirorightsmap.org/>.

- This resource provides an interactive map that documents, country by country, the existence of solidarity environmental rights, procedural environmental rights and public policy across multiple jurisdictions. Subsequent changes to environmental rights provisions and questions regarding the justiciability of these provisions are addressed in



brief comments on country pages when possible.

## **Customary and Indigenous Legal Systems**

### **Scholarly Texts**

Black, Christopher F. *The Land is the Source of the Law: a Dialogic Encounter with Indigenous Jurisprudence*. London: Routledge, 2011.

- Summary: “Brings an inter-jurisdictional dimension to the field of indigenous jurisprudence: comparing Indigenous legal regimes in New Zealand, the USA and Australia. This title offers a 'dialogical encounter with an Indigenous jurisprudence' in which individuals are characterised by their rights and responsibilities into the Land.”

Watson, Irene. *Aboriginal Peoples, Colonialism and International Law: Raw Law*. London: Routledge, 2016.

- Summary: “This work is the first to assess the legality and impact of colonisation from the viewpoint of Aboriginal law, rather than from that of the dominant Western legal tradition. It begins by outlining the Aboriginal legal system as it is embedded in Aboriginal people’s complex relationship with their ancestral lands. This is Raw Law: a natural system of obligations and benefits, flowing from an Aboriginal ontology. This book places Raw Law at the centre of an analysis of colonisation – thereby decentring the usual analytical tendency to privilege the dominant structures and concepts of Western law. From the perspective of Aboriginal law, colonisation was a violation of the code of political and social conduct embodied in Raw Law. Its effects were damaging. It forced Aboriginal peoples to violate their own principles of natural responsibility to self, community, country and future existence. But this book is not simply a work of mourning. Most profoundly, it is a celebration of the resilience of Aboriginal ways, and a call for these to be recognised as central in discussions of colonial and postcolonial legality.”

## **Financing, Mining and Human Rights**

This section is divided into two sub-sections, the first focused on mining, human rights and international financial institutions, such as development banks, while the second is focused on private financing and its relationship to rights issues and considerations in the context of mining.

### ***Mining, Human Rights and International Financial Institutions***

#### **Primary Materials**

Alston, Phillip. *Report of the Special Rapporteur on extreme poverty and human rights*, General Assembly, seventieth session, item 73(b) of the provisional agenda, A/70/274, August 4, 2015.

- Summary: “The present report begins with an analysis of the confusing approaches to human rights taken by the World Bank in its legal policy, public relations, policy analysis, operations and safeguards. The Special Rapporteur then seeks to explain why

the Bank has historically been averse to acknowledging and taking account of human rights, argues that the Bank needs a new approach and explores what differences that might make. The Special Rapporteur concludes that the existing approach taken by the Bank to human rights is incoherent, counterproductive and unsustainable. For most purposes, the World Bank is a human rights-free zone. In its operational policies, in particular, it treats human rights more like an infectious disease than universal values and obligations. The biggest single obstacle to moving towards an appropriate approach is the anachronistic and inconsistent interpretation of the “political prohibition” contained in its Articles of Agreement. As a result, the Bank is unable to engage meaningfully with the international human rights framework, or to assist its member countries in complying with their own human rights obligations. That inhibits its ability to take adequate account of the social and political economy aspects of its work within countries and contradicts and undermines the consistent recognition by the international community of the integral relationship between human rights and development. It also prevents the Bank from putting into practice much of its own policy research and analysis, which points to the to the indispensability of the human rights dimensions of many core development issues.”

## Scholarly Texts

Fergus MacKay, “Indigenous Peoples and International Financial Institutions” in D. Bradlow & D. Hunter (eds.), *International Financial Institutions and International Law*. Kluwer Law International: 2010.

- Summary: “This chapter focuses on whether IFI policies on indigenous peoples incorporate human rights norms, explicitly or implicitly. This question can be answered either by locating provisions in these policies that explicitly refer to or directly incorporate human rights norms, or through a comparative analysis of the various provisions in relation to human rights norms where there is no explicit reference or incorporation. Section II thus looks at the extent to which the new IFI policies explicitly acknowledge the applicability or relevance of ‘human rights’ or specific rights norms to the conduct of their activities as they relate to indigenous peoples. It concludes that although some IFI policies incorporate explicit references to human rights or specific human rights norms, the effect, with one important exception, is little more than oratory. Section III analyzes the extent to which the various policy instruments incorporate and guarantee indigenous peoples’ right to give or withhold FPIC. FPIC is important because it lies at the heart of indigenous peoples’ demands, relating as it does to the exercise and enjoyment of the right to self-determination and particularly territorial rights and freedom from involuntary resettlement.<sup>41</sup> Generally speaking, this analysis reveals that while the content of some human rights norms is reflected to varying degrees in the IFI policies, these policies nevertheless fall short in some important respects, the absence of clear affirmations of FPIC in all but one instance being a prime example. Also, deficiencies are especially apparent if rights to effective remedies for violations of the policies or harm otherwise caused in project activities are considered.”

Szablowski, David, *Transnational Law and Local Struggles: Mining, Communities, and the World Bank*. Oxford: Hart Publishing, 2007.

- Summary: The global spread of transnational mining investment, which has been taking place since the 1990s, has often led to volatile conflicts with local communities. This book examines the regulation of these conflicts through national, transnational, and local legal processes. In doing so, it examines how legal authority is being redistributed among public and private actors, as well as national and transnational actors, as a result of globalizing forces. The book presents a case study concerning the negotiation of land transfer and resettlement between a transnational mining enterprise and indigenous peasants in the Andes of Peru. The case study is used to explore the intensely local dynamics involved in negotiations between corporate and community representatives, and the role played by legal ordering in these relations. In particular, the book examines the operation of a transnational legal regime managed by the World Bank to remedy the social and environmental impacts of projects which receive World Bank assistance. The book explores the nature and character of the World Bank regime and the multiple consequences of this projection of transnational law into a local dispute.

Taylor, Kate Nancy, "Appraising the Role of the IFC and Its Independent Accountability Mechanism: Community Experiences in Haiti's Mining Sector" *Sustainable Development Law and Policy Brief* 12 (2016-2017).

- Abstract: In 2010, the International Finance Corporation (IFC) purchased an equity stake in Eurasian Minerals Inc., a junior mining company conducting gold and copper exploration activities in Northern Haiti. The investment formed part of the IFC's Early Equity portfolio, which supports private sector investment in nascent mineral markets. This article examines the governance role played by the IFC over the course of the company's exploration activities in 2010 through 2012, after which a de facto moratorium emerged over gold mining operations in Haiti. This article sets out to scrutinize the role played by the IFC during the life of its investment in Haiti, querying the extent to which it was able to enhance the environmental and social outcomes and foster greater public accountability of the project—paying particular attention to the nature of IFC investments in the earliest phases of mining operations and highlighting the importance of obligations regarding community engagement and information disclosure to project-affected communities.

## Reports

C. Daniel, K. Genovese, M. Van Huijstee & S. Singh (eds.), *Glass Half Full? The State of Accountability in Development Finance*. Amsterdam: SOMO, January 2016.

- Introductory Excerpt: "While the aim of this report is to ensure that people who have been harmed by these development projects receive adequate remedy, the ultimate goal of the 11 organisations<sup>1</sup> that have authored this report is that DFIs should pursue a development model based on human rights.<sup>2</sup> The authors would like to see less need for the IAMs because fewer people are harmed. And they would also like to make sure that complaints are handled better in the future. Until then, the accountability systems at the DFIs provide a vital but crude backstop for those people and communities that have been harmed by the current development model."

## ***Mining, Human Rights and Private Finance***

### **Primary Texts**

*Equator Principles III*, Environmental and Social Risk Management for Projects. June, 2013).

- The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. The EP apply globally, to all industry sectors and to four financial products 1) Project Finance Advisory Services 2) Project Finance 3) Project-Related Corporate Loans and 4) Bridge Loans

### **Scholarly Texts**

Feichtner, Isabel, and Manuel Wörsdörfer, "10 Year Equator Principles: A Transdisciplinary Inquiry" *Transnational Legal Theory* 5(3)(2014): 409-416.

- Summary: An introduction is presented in which the editor discusses various reports within the issue on topics including equator principles on performance standards of the International Finance Corporation, challenges to the effectiveness of the principles, and risk management related to principles.

Perks, Rachel. "How can public-private partnerships contribute to security and human rights policy and practice in the extractive industries? A case study of The Democratic Republic of Congo (DRC)." *Resources Policy* 37(2) (2012): 251-60.

- Summary: "Across sub-Saharan Africa, the presence of foreign large-scale mining companies is increasing. This is in part a result of depleting resources in countries such as Canada, United States and Australia, and in part from a more favorable national mine investment climate in several mineral-rich African countries. Their increased presence raises important questions around the potential role and function of Corporate Social Responsibility (CSR) in the sector. In post-conflict and/or fragile states, CSR has further implications for conflict and risk mitigation strategies to ensure the protection of human rights. One CSR approach increasingly being considered is the public-private partnership, whereby companies, public donors, and development agencies leverage their relationships for mutual benefit. There is merit in exploring its function in post-conflict fragile states, where socio-economic needs are high and the capacity of the state to respond to a variety of mine governance challenges is limited. Two case studies from the Democratic Republic of Congo (DRC) are presented, and their policy implications, discussed."

## Corporations, Mining and Human Rights

This section is broken into several sub-section each focused on a specific way in which the impact that corporations, especially transnational corporate, have on human rights in the context of mining. It is broken up into a general section, a section focused on business obligations to respect human rights, a section on home state regulation of transnational corporations, a section on transnational tort litigation and a section on corporate social responsibility. To provide a holistic overview of the literature, it includes references of general application related to corporations and human rights, as well as those that are specifically confined to mining contexts.

### *Business' Obligations to Respect Human Rights in Mining*

#### Primary Materials

*Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, United Nations Human Rights Office of the High Commissioner, 2011.

- Summary: "These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached."

Ruggie, John. *Rep. of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, principle 10, U.N. Doc. A/HRC/17/31, Mar. 21, 2011 and endorsed by the U.N. Human Rights Council, Res. 17/4, July 16, 2011.

- Principle 10: States, when acting as members of multilateral institutions that deal with business related issues, should: (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising; (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

*OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas third edition*. OECD, 2016.

- Summary: The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas is the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain

management of minerals from conflict-affected areas. Its objective is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices. The Guidance is also intended to cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector with a view to enabling countries to benefit from their mineral resources and preventing the extraction and trade of minerals from becoming a source of conflict, human rights abuses, and insecurity. With its Supplements on Tin, Tantalum, Tungsten and Gold, the OECD Guidance provides companies with a complete package to source minerals responsibly in order for trade in those minerals to support peace and development and not conflict.

## Scholarly Texts

De Schutter, Olivier. *The Challenges of Imposing Human Rights Norms on Corporate Actors,* ' in *Transnational Corporations and Human Rights*, Olivier De Schutter (Oxford University Press, 2006.)

- Summary: De Schutter writes an introduction to a book composed of a collection of essays that offer a broad overview of the questions raised by the impositions of human rights obligations on transnational corporation. In this first section, the author lays out the general context of the debate surrounding human rights responsibilities of companies. This chapter serves as a good primer to the topic of human rights and transnational corporations.

Deva, Surya, and David Bilchitz. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2015.

- Summary: “In recent years, the UN Human Rights Council has approved the 'Respect, Protect, and Remedy' Framework and endorsed the Guiding Principles on Business and Human Rights. These developments have been welcomed widely, but do they adequately address the challenges concerning the human rights obligations of business? This volume of essays engages critically with these important developments. The chapters revolve around four key issues: the process and methodology adopted in arriving at these documents; the source and justification of corporate human rights obligations; the nature and extent of such obligations; and the implementation and enforcement thereof. In addition to highlighting several critical deficits in these documents, the contributing authors also outline a vision for the twenty-first century in which companies have obligations to society that go beyond the responsibility to respect human rights.”

Kemp, Deanna, and John R. Owen. "Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining Industry." *Business and Human Rights Journal* 2(1) (2016): 163-69.

- Summary: “Our focus, in this piece, is to explore a series of practice-based issues and questions relating to the application of (Free Prior and Informed Consent) FPIC in the mining sector. We conclude with a cautionary note about corporate readiness. Any continued push for the advancement of FPIC must take into account both the compatibility of the host context and the ability of corporate actors to practically support the principles of FPIC.

Kemp, Deanna and John Owen , ‘Community Relations and Mining: Core to Business But Not “Core Business”’ *Resources Policy* 38(4)(2013): 523-531.

- Summary: Over the past two decades the global mining industry has witnessed the necessity and emergence of community relations and development (CRD) functions, essentially under the rubric of sustainable development and corporate social responsibility (CSR). These functions provide companies with mechanisms through which to engage and manage their relationships with key stakeholder groups, share development benefits and protect business interests. Despite widespread claims by the industry that companies have adopted CSR as a ‘core competence’, we argue that the industry has yet to incorporate the CRD function as part of ‘core business’ at the level of practice. This article characterises a CRD function and related processes within the context of a large-scale mining operation in West Africa. Findings reflect a more universal trend relating to the function and organisational positioning of CRD practice in the resources sector. The authors argue that functional equity needs to be established if the sustainable development agenda is to have a genuine future within the mining industry.

Krajewski, Markus, “Ensuring the Primacy of Human Rights in Trade and Investment Policies - Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights” CIDSE, 2017.

- Summary: The study reviews potential areas of conflict between State obligations under current trade and investment agreements on the one hand, and obligations under international human rights law on the other, illustrated by actual examples. The study then looks at the different options under consideration for instruments and mechanisms within the trade and investment regime that will avoid limitations on the capacity of states’ regulatory spaces to respect, protect, and fulfil human rights. The study explores the potential of a future treaty on business and human rights to help overcome the limitations and gaps of reforms within the trade regime and contribute to ensuring the primacy of human rights law over trade and investment law, via provisions addressing three specific areas: first, regulating the relationship between human rights and trade and investment agreements; second, human rights impact assessments; and third, human rights obligations for export credit and investment guarantee schemes.

Martin, Jena and Karen E. Bravo. *Business and human rights landscape*. Cambridge: Cambridge Univ Press, 2015.

- Summary: “The adoption of the United Nations Guiding Principles on Business and Human Rights in 2011 marked a watershed moment, establishing the first global standards for preventing human rights abuses by business. In light of this paradigm shift, *The Business and Human Rights Landscape* offers the most comprehensive analysis to date of the current legal framework. Its essential research tools include in-depth explorations of the UN Guiding Principles from both theoretical and practical standpoints, with case studies of the Rana Plaza building collapse and Kenyan resource extraction. Bookending current analyses are accounts of business and human rights from a historical perspective (discussing the colonial slave trade) and a forward-looking lens (analyzing labor's role). Bringing together scholars from across the globe, this book

represents essential reading for anyone interested in the past, present, or future of business and human rights.”

Nam, Steven S., Governance Gaps and the Legal Evolution of the Field of Business & Human Rights, *The Routledge History of Human Rights*, 2018, Forthcoming.

- Summary: This chapter sheds light on the legal developments that came to sideline U.S. courts with respect to achieving remedies for foreign business & human rights matters. It examines the reality of ever more robust cross-border protections for corporate property and shareholders’ rights versus the retention of a soft and ultimately voluntary approach to corporate responsibilities. In response, there have emerged new external channels for corporate responsibility that — untethered to national systems of corporate governance — can better address the state’s embedded protectiveness over its domestic corporations.

Oluduro, Olubayo, *Oil Exploitation and Human Rights Violations in Nigeria’s Oil Producing Communities*, Intersentia, 2014.

- Summary: With the wind of economic globalisation blowing across the globe, human rights are currently exposed to violation in great proportions by powers other than the State, including multinational corporations (MNCs). Unfortunately, a lot of States, most especially developing countries, including Nigeria, hardly regulate the activities of the MNCs for several reasons, thus creating a regulatory vacuum. Under these conditions, the existing catalogue of civil, political, social, cultural and economic rights of the people, as expressed in both domestic and international human rights law, are adversely affected by the activities of these MNCs. This book, developed from the author’s doctoral/PhD thesis at Ghent University, Belgium critically examines, among others, the various human rights violations and environmental damage associated with oil exploration activities in the oil-producing communities of Nigeria, the international codes of conduct and norms, and the roles and responsibilities of the major MNCs in respect of these violations.

Ruggie, John Gerard, The Social Construction of the UN Guiding Principles on Business & Human Rights, *Working Paper of the Corporative Responsibility Initiative, Harvard Kennedy School*, June 12, 2017.

- Summary: “Academic proponents and opponents of the UN Guiding Principles on Business & Human Rights have generated a burgeoning literature. And by now there are several years of practical experience to inform the debate. But the conceptual and theoretical understanding of global rulemaking that informed my development of the UNGPs, and to which I have contributed as a scholar, have not been fully articulated and debated. This chapter aims to close that gap, on the supposition that those ideas might have contributed to the UNGPs’ relative success where previous efforts failed, and that in some measure they may be applicable in other complex and contested global policy domains.”



Seck, Sara L., Transnational Corporations and Extractive Industries” Chapter 18 pages 380-401) in “Shawkat Alam, Sumudu Atapattu et al, *International Environmental Law and the Global South*, Cambridge University Press, 2015.

- Summary: In the context of international environmental law and the global south, chapter 18 focuses on the relationship between transnational corporation and extractive industries.

Schutter, Olivier De. *Transnational corporations and human rights*. Oxford: Hart Pub., 2006.

- Summary: This volume offers a systematic overview of the different tools through which the human rights accountability of transnational corporations may be improved. The book first examines the responsibility of States in controlling transnational corporations, emphasizing both the limits imposed by the protection of the rights of investors under investment treaties and the potential of the US Alien Tort Claims Act and other similar extra-territorial legislations. It then turns to self-regulation by transnational corporations through the use of codes of conduct or international framework agreements. The book also discusses recent attempts at the global level to improve the human rights accountability of corporations by the direct imposition on corporations of obligations under international law. Finally, it considers the use of public procurement policies or of conditions in the lending policies of multilateral lending institutions to provide incentive for transnational corporations to behave ethically. Altogether, the book offers a rigorous legal analysis of these different developments and critically appraises their potential.

Simons, Penelope “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” *Journal of Human Rights and the Environment* 3(1) (2012) 5-43.

- Summary: In May 2011, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG), Professor John G Ruggie, submitted to the Human Rights Council his ‘Guiding Principles on Business and Human Rights’ aimed at implementing his ‘Protect, Respect and Remedy’ policy framework. The Council unanimously adopted the Guiding Principles at its June 2011 session. Ruggie's work has been both welcomed and criticised and his Guiding Principles are likely to remain controversial. Apart from the SRSG's recommendation to the HRC to develop a process to clarify the legal obligations of business entities not to commit international crimes, his work on this issue did not include a recommendation that the future development of binding international obligations should be one of the goals of his policy framework and guiding principles. This article argues that Ruggie's approach to addressing corporate human rights impunity was misconceived.

## *Home State Regulation of Corporate Human Rights Obligations*

### **Primary Texts**

*Report of the Working Group on the Universal Periodic Review—Canada.* United Nations Human Rights Council. A/HRC/24/11, 28 June 2013.

- Recommendations include: “128.151. Continue efforts towards the establishment and implementation of an effective regulatory framework for holding companies registered in Canada accountable for the human rights impact of their operations (Egypt).”

*Bill C-300 of February 9, 2009,* House of Commons of Canada Second Session, Fortieth Parliament. (Not enacted). Complete text of Bill C-300 *available at*, <http://www.parl.ca/DocumentViewer/en/40-2/bill/C-300/first-reading/page-ToC>.

- Summary: An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries. Although this Bill did not become law, it is included here as an example of a potential model of home state regulation of transnational corporations.

### **Scholarly Texts**

Kamphuis, Charis, "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" *Comparative Research in Law & Political Economy*. Research Paper 10(2013).

- Summary: This article offers a critical legal account of law reform efforts undertaken by activists in Canada from 2005 to 2012 in relation to the resource extraction activities of Canadian companies operating abroad. The relevant reform proposals are reviewed in terms of three periods. In the first, federal advisors made proposals that attempt to reconcile private and public approaches to regulation. In the second, the federal government responded with a corporate social responsibility policy predicated on volunteerism. This policy is unprecedented in that its central concern is the presumed risk that civil society concerns present to Canadian companies. In the third period, Members of Parliament tabled private members' bills representing very different private and public approaches to regulation. This article analyzes each of these reform projects in terms of the regulatory vision it presents and the conception of the state, the corporation, and civil society that it advances. This allows for a preliminary step toward considering how the private or public nature of the legal forum might shape activists' legal strategies and articulations of the problem. In this regard, contractual and investment rationales were ironically dominant in the public regulation proposals advanced by Canadian activists, creating a certain disjunction between their broadly stated human rights objectives and the market-based sanction or method chosen as a means for achieving these objectives.

Seck, Sara, Home State Responsibility and Local Communities: The Case of Global Mining, *Yale Human Rights and Development Law Journal* 11(1)(2008): Article 10.

- Summary: Home states that are actively engaged in global mining have considered and rejected calls to regulate the conduct of transnational mining corporations so as to prevent and remedy human rights and environmental harms. This reluctance to regulate is often expressed as a concern that extraterritorial regulation will conflict with the sovereignty of

foreign states. This paper argues that the public international law of jurisdiction is permissive of home state regulation that can be justified under the nationality or territoriality principles, provided that there is no true conflict with an exercise of host state jurisdiction. In the human rights and environment contexts, it is more likely that home state regulation would result in concurrent but not conflicting jurisdiction, particularly where the regulation is designed to further shared international norms. Beyond permissibility, this paper argues that international sustainable mineral development law imposes an emerging obligation on all states, including home states, to ensure that the three pillars of public participation rights are respected. These rights are access to information, public participation in decision-making, and access to justice in environmental matters, and they are formulated in the global mining context as a right of indigenous and local communities to free, prior and informed consent. Support for the existence of such a home state obligation may be found in the recommendations of international human rights treaty bodies, and in the work of the International Law Commission on both state responsibility, and the prevention and allocation of loss for transboundary harm.

Seck, Sara, Home State Regulation of Environmental Human Rights Harms As Transnational Private Regulatory Governance, *German Law Journal* 13(12) (2012):1363-85.

- Summary: Home state mechanisms designed to address harms arising from overseas resource extraction have recently been considered in Canada. This paper will examine whether such mechanisms could be viewed as an example of transnational private regulatory governance, and the implications of doing so for our understanding of both public international law and transnational private regulatory governance. After first briefly unpacking the idea of transnational private regulatory governance, the paper will compare common understandings of the scope of home state jurisdiction to regulate transnational corporations under international human rights and international environmental law. Recent developments in Canadian law and policy culminating in the creation of a Corporate Social Responsibility (CSR) Counsellor for the international operations of the Canadian extractive industry will then be described.

## Reports

*The Impact of Canadian Mining in Latin America and Canada's responsibility: Executive Summary of the Report Submitted to the Inter-American Commission on Human Rights* (Working Group on Mining and Human Rights in Latin America) Due Process of Law Foundation: May 22, 2014.

- Summary: "In 2010, a group of seven non-governmental organizations decided to create the Working Group on Mining and Human Rights in Latin America (Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina),<sup>1</sup> which was to consider the effects of the actions of transnational corporations in the region and the resulting violations of the human rights of the communities in the areas where those corporations operate, and to propose common strategies. As part of its work, the group identified the majority presence of Canadian mining companies in the region, as well as the impact of their activities on the communities in whose territories they have extractive projects.<sup>2</sup>

Accordingly, the group decided to draft a report focusing on the impact of Canadian mining in Latin America and the role played by the government of Canada in the human rights violations committed. The process was supported by the development agency of the Catholic Church in Germany, Misereor.<sup>3</sup> By studying 22 mining projects developed by Canadian companies in nine countries of the region, the group was able to identify trends in terms of the impact of these activities and a pattern of human rights violations, as well as conditions in the host countries in which the mining investment occurred as well as Canadian policies that encourage human rights violations. This document presents the main findings and conclusions of the report.”

### **Additional Resources:**

- See documentary on Bill C-300, at: <http://www.youtube.com/watch?v=Nf563OSDOWs>.
- See summary of events surrounding the Bill and its ultimate defeat in Parliament: Bill C-300 a High Water Mark for Mining and Government Accountability, at: <http://www.miningwatch.ca/article/bill-c-300-high-water-mark-mining-and-government-accountability>.
- Curry, Bill (2010). Lobbying Blitz Helps Kill Mining Ethics Bill, in Globe and Mail, available at: <http://www.theglobeandmail.com/news/politics/lobbying-blitz-helps-kill-mining-ethics-bill/article1775529/>

## ***Transnational Tort Litigation***

### **Primary Materials**

Judiciary Act of 1789 § 9, 1 Stat 73, 76-77, codified as amended at 28 USC § 1350.

(We note that sometimes the Statute is referred to as ATS ("Alien Tort Statute") and other times as ACTA ("Alien Tort Claims Act").

- Summary: The Alien Tort Statute (ATS) is a single sentence in the Judiciary Act of 1789, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS has no written legislative history, although, it clearly established a federal jurisdiction for civil tort action against pirates and foreign diplomats. The ATS grants federal courts jurisdiction over three common law torts as violations of international law: acts of piracy, violations of safe conducts, and interference with the rights of ambassadors. The Supreme Court has ruled once on the scope of the ATS in *Sosa v. Alvarez-Machain* in 2004, a decision that left unclear the major issue of corporate liability for aiding and abetting violations of human rights by governments of countries in which they do business. Conflicting Circuit court rulings on aiding and abetting liability under the ATS caused the Supreme Court to hear *Kiobel v. Royal Dutch Petroleum* in 2012. The Supreme Court ruling in the *Kiobel v. Royal Dutch Petroleum* significantly limited the application of the Alien Tort Statute. Further information on this case is found below.

## Cases

### *Jesner v. Arab Bank, PLC.* (Ongoing)

- Summary: “Several alien individuals were injured, kidnapped, or killed by terrorists in attacks against Israeli citizens overseas. The surviving aliens and the families of those who perished in the attacks accused Arab Bank, PLC (Arab Bank), a bank corporation headquartered in Jordan, of financing and facilitating various terrorist organizations involved in the attacks. The survivors sued Arab Bank in New York federal court under the Alien Tort Statute (ATS), which provides for federal district court jurisdiction over civil actions brought by aliens. Arab Bank moved to dismiss the ATS claims under the U.S. Court of Appeals for the Second Circuit’s decision in *Kiobel v. Royal Dutch Petroleum Co.* In that case, the appellate court held that the ATS does not authorize claims against foreign corporations. The district court acknowledged that, because the U.S. Supreme Court affirmed *Kiobel* on other grounds and had not addressed the question of corporate liability, the court of appeals’ holding was still controlling precedent and therefore dismissed the ATS claims. On appeal, the appellate court noted that the Supreme Court’s decision did cast some doubt on the corporate liability holding in *Kiobel*. However, because the Supreme Court had not addressed the question of corporate liability, the appellate court affirmed the lower court’s dismissal.”

### *Choc v. Hudbay Minerals Inc.*, ONSC 1414 (2013) (Canada).

- Summary: The *Choc v. Hudbay Minerals Inc.* case involved lawsuits against Canadian company Hudbay Minerals Inc. over human rights abuses in Guatemala.

### *Gagarimabu v. Broken Hill Proprietary Co Ltd* [2001] VSC517 (21 December 2001) (Australia)

- Summary: “In 1994, Papua-New Guinean (PNG) landowners sued BHP in the Supreme Court of Victoria in Melbourne, Australia alleging that BHP’s operations at the Ok Tedi copper mine caused destruction of the surrounding environment and of their traditional lifestyle. The plaintiffs alleged that BHP dumped mine tailings waste into the Ok Tedi and Fly Rivers. In 1996, BHP and the plaintiffs reached an out-of-court settlement which included payment of approximately AUS\$40 million in financial compensation as well as the dredging of tailings from the rivers in an attempt to limit further damage. In 2000, the plaintiffs sued BHP in Australia again, for breaching the terms of the 1996 settlement related to environmental mitigation at the mine. This 2001 judgment of the Supreme Court of Victoria granted an injunction to enforce the 1996 settlement.

For more information on the case, including developments subsequent to the 2001 judgment, see the Business and Human Rights Resource Center database documenting the case, at <https://business-humanrights.org/en/bhp-lawsuit-re-papua-new-guinea>

### *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (United States).

- Summary: “The U Supreme Court held that under the Alien Tort Statute, there is a presumption against extraterritorial application of U.S. law. This presumption, derived from a traditional canon of interpretation, serves to protect against clashes between U.S.

law and the law of other nations. The Court reasoned that nothing within the text, history, or purpose of the statute indicates that it was intended to apply extraterritorially. In order to rebut this presumption, the petitioners' claim would have to touch and concern the territory of the United States with "sufficient force."

## Scholarly Texts

Buxbaum, Richard M. and David D. Caron. "The Allen Tort Statute: An Overview of the Current Issues" *Berkeley Journal of International Law* 28:2, 6(2010):511-518.

- Summary: The authors provides an overview of issues in the ATS context. They review ATS jurisprudence in three sections—a) jurisdiction and justiciability, b) immunity and other notable preliminary issues, and c) theories of liability for non-state actors.

Cleveland, SH. "After Kiobel" *Journal of International Criminal Justice* 12(3)(2014): 551-577.

- Summary: "This essay argues that the reading of the 'Kiobel presumption' and the 'touch and concern test' that best reconciles the various opinions in the case, the history and purpose of the ATS, the interests of the US government and the basic purpose of the presumption against extraterritoriality in avoiding foreign conflicts, would recognize that claims that sufficiently 'touch and concern' the United States can and should include: conduct that occurs in part on US territory, perpetrators who are US nationals or domiciled in the United States, and other claims implicating significant US national interests, including piracy and the United States' important interest in denying safe haven to heinous human rights violators. This approach is also consistent with the exercises of jurisdiction allowable under international law. Ultimately, the nature of the Kiobel presumption that the Court applied and its rebuttal by claims that 'touch and concern' the United States, should allow for a range of ATS claims to continue to be brought, including suits like *Filartiga*. Properly understood, *Kiobel* preserves a limited ability for the ATS to continue advancing *Filartiga*'s promise of a borderless regime of accountability as a matter of last resort for egregious human rights violators."

Drimmer, Jonathan. "Human rights and the extractive industries: Litigation and compliance trends" *The Journal of World Energy Law & Business* 3(2)(2010): 121-39.

- Excerpt from Introduction: "This article discusses this litigation trend, focusing on US and non-US-based human rights lawsuits filed against companies in the extractive industry. It first analyzes human rights litigation in US courts under the ATS and other theories, describing the nature of the actions and their direct and indirect results. It then briefly outlines cases filed in other domestic courts, as well as actions pursued in international tribunals. It then identifies compliance solutions to help oil, gas and other extractive companies protect themselves against hazardous and painful human rights claims. The article concludes that given the substantial potential liability and mammoth legal expenses that accompany these highly charged actions, as well as a steady and biting negative publicity that disrupts operations, harms future business and creates vast other indirect costs, it is paramount that companies take simple and direct steps to protect against potential human rights problems."

Kirsch, Stuart, *Mining Capitalism: The Relationship Between Corporations and Their Critics*. University of California Press, 2014.

- From the Publisher: Corporations are among the most powerful institutions of our time, but they are also responsible for a wide range of harmful social and environmental impacts. Consequently, political movements and nongovernmental organizations increasingly contest the risks that corporations pose to people and nature. *Mining Capitalism* examines the strategies through which corporations manage their relationships with these critics and adversaries. By focusing on the conflict over the Ok Tedi copper and gold mine in Papua New Guinea, Stuart Kirsch tells the story of a slow-moving environmental disaster and the international network of indigenous peoples, advocacy groups, and lawyers that sought to protect local rivers and rain forests. Along the way, he analyzes how corporations promote their interests by manipulating science and invoking the discourses of sustainability and social responsibility. Based on two decades of anthropological research, this book is comparative in scope, showing readers how similar dynamics operate in other industries around the world.

Joseph, Sarah *Corporations and Transnational Human Rights Litigation*. Hart Publishing, 2004.

- Since the mid-1980s, beginning with the unsuccessful Union Carbide litigation in the USA, litigants have been exploring ways of holding multinational corporations [MNCs] liable for offshore human rights abuses in the courts of the companies' home States. The highest profile cases have been the human rights claims brought against MNCs (such as Unocal, Shell, Rio Tinto, Coca Cola, and Talisman) under the Alien Tort Claims Act in the United States. Such claims also raise issues under customary international law (which may be directly applicable in US federal law) and the Racketeer Influenced and Corrupt Organizations [RICO] statute. Another legal front is found in the USA, England and Australia, where courts have become more willing to exercise jurisdiction over transnational common law tort claims against home corporations. Furthermore, a corporation's human rights practices were indirectly targeted under trade practices law in groundbreaking litigation in California against sportsgoods manufacturer Nike. This new study examines these developments and the procedural arguments (eg regarding personal jurisdiction and especially forum non conveniens) which have been used to block litigation, as well as the principles which can be gleaned from cases which have settled. The analysis is important for human rights victims in order to know the boundaries of possible available legal redress. It is also important for MNCs, which must now take human rights into account in managing the legal risks (as well as moral and reputation risks) associated with offshore projects.

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Kaeb, Caroline and David Scheffer. "The Paradox of Kiobel in Europe" *The American Journal of International Law* 107(4)(2013): 852-857.

- Summary: "Kaeb and Scheffer talk about one of the most striking features of Chief Justice John Roberts's majority opinion in the U.S. Supreme Court's judgment in *Kiobel v. Royal Dutch Petroleum Co.* is how it pays homage to foreign governments opposition to the extraterritorial application of the Alien Tort Statute (ATS), as voiced most prominently from European foreign ministries. "[F]oreign policy concerns" and the

overarching goal to avoid diplomatic tensions with foreign sovereigns are themes heavily informing the Roberts opinion.”

Stewart, David P. and Ingrid Wuerth. "Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute." *The American Journal of International Law* 107(3)(2013): 601-21.

- Summary: “The US Supreme Court has finally decided *Kiobel v. Royal Dutch Petroleum Co.* It is the Court's second modern decision applying the cryptic Alien Tort Statute (ATS), which was enacted in 1789. Since the 1980 the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the US. The statute itself and the decisions that it generates also serve as state practice that might contribute to the developing customary international law of civil universal jurisdiction, immunity for defendants in human rights cases, the duties of corporations, and the right to a remedy for violations of fundamental human rights. During the 1990s, the ATS became the focal point for academic disputes about the status of customary international law as federal common law. Here, Stewart discusses the *Kiobel v. Royal Dutch Petroleum Co.* case and analyzes its potential significance for ATS litigation. He also analyzes the *Kiobel* opinion in terms of separation of powers and the development and enforcement of customary international law.”

## Corporate Social Responsibility

A separate section has been included on corporate social responsibility (CSR), separate from the materials on business’ obligations to respect human rights (above) to distinguish the fact that CSR remains a (voluntary) private form of internal governance while business’ human rights obligations are based on an international legal framework.

### Scholarly Texts

Mares, Radu, Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy. *Transnational Legal Theory* 1(2)(2010): 221–285.

- Abstract: Corporate social responsibility (CSR) is often understood as an inherently voluntary corporate endeavour that inhabits the area stretching ‘beyond compliance’ with law. However, a growing number of writers and practitioners deem this understanding of CSR inaccurate and unproductive. In this article, the notion of CSR as ‘beyond compliance’ is questioned on logical, descriptive and normative grounds; once freed from its conceptual straitjacket, CSR research is encouraged to look more deeply into the mutual interaction between corporate voluntarism and law. When it comes to the regulation of CSR the key notion is that of discretion not voluntarism: regulating CSR is not about replacing voluntarism with hard law, but about guiding discretion through law in such a way that it neither overrides discretion nor leaves it untouched. For such purposes lawmakers employ various strategies to summon the regulatory potential of companies and their stakeholders. When it comes to CSR’s impacts on law, effects are discernible at various stages, from law-making to law-specification to law-enforcement; responsible business practices contain benchmarks of due diligence and may enhance



local capacities in host countries. Following illustrations and analysis of such interactions, CSR is characterised not merely as ‘self-regulation’ but as an emerging norm, resulting from a bottom-up process, that interacts with legal systems in both home and host countries. Furthermore this article identifies two legal baselines key to the business and human rights area: the ‘corporate baseline’, regarding the responsibility of a parent company for its affiliates’ operations where human rights abuses take place, and the ‘governance baseline’, regarding the legal protections in the host country available to rightholders. In the context discussed herein, the fact that both of these baselines have barely been sketched renders the characterisation of CSR as a matter of ‘beyond compliance’ with law problematic. Instead CSR should be analysed for its role in the legal institutionalisation of the baseline. The specific context of respecting human rights in developing countries throughout the operation of large corporate networks such as multinational enterprises (MNEs) requires an attuned concept of CSR and an informed understanding of CSR’s relation to law.

Ruggie, John Gerard, "Multinationals as global institution: Power, authority and relative autonomy" *Regulation & Governance*, 2017.

- Abstract: This article aims to inform the long-standing and unresolved debate between voluntary corporate social responsibility and initiatives to impose binding legal obligations on multinational enterprises. The two approaches share a common feature: neither can fully specify its own scope conditions, that is, how much of the people and planet agenda either can expect to deliver. The reason they share this feature is also the same: neither is based on a foundational political analysis of the multinational enterprise in the context of global governance. Such an analysis is essential for providing background to and perspective on what either approach can hope to achieve, and how. This article begins to bridge the gap by illustrating aspects of the political power, authority, and relative autonomy of the contemporary multinational enterprise. The conclusion spells out some implications for the debate itself, and for further research.

Welker, Marina, *Enacting the Corporation: An American Mining Firm in Post-Authoritarian Indonesia*. University of California Press, 2014.

- From the Publisher: What are corporations, and to whom are they responsible? Anthropologist Marina Welker draws on two years of research at Newmont Mining Corporation’s Denver headquarters and its Batu Hijau copper and gold mine in Sumbawa, Indonesia, to address these questions. Against the backdrop of an emerging Corporate Social Responsibility movement and changing state dynamics in Indonesia, she shows how people enact the mining corporation in multiple ways: as an ore producer, employer, patron, promoter of sustainable development, religious sponsor, auditable organization, foreign imperialist, and environmental threat. Rather than assuming that corporations are monolithic, profit-maximizing subjects, Welker turns to anthropological theories of personhood to develop an analytic model of the corporation as an unstable collective subject with multiple authors, boundaries, and interests. *Enacting the Corporation* demonstrates that corporations are constituted through continuous struggles over relations with—and responsibilities to—local communities, workers, activists, governments, contractors, and shareholders.

Coleman, Lara Montesinos, “Big Oil’s Ethical Violence” *Critical Legal Thinking*, 2015.

- Summary: Through examining the case against BP’s oil operations in Colombia, Montesinos discusses issues with ethical violence and oil companies.

## Examples

BP Sustainability: <http://www.bp.com/en/global/corporate/sustainability.html>

- Summary: BP and sustainability page features their reports on climate change, human rights, environmental impacts, safe operations, value to society, and responsible operation. It also includes case studies highlighting some of BP’s environmental and social initiatives from around the world.

BHP “Our Charter” <http://www.bhpbilliton.com/aboutus/ourcompany/charter>

- Excerpt from Charter: “We are BHP, a leading global resources company. Our purpose is to create long-term shareholder value through the discovery, acquisition, development and marketing of natural resources. Our strategy is to own and operate large, long-life, low-cost, expandable, upstream assets diversified by commodity, geography and market.”

## Certification Regimes

### Primary Materials

*The Standard*, Extractive Industries Transparency Initiative (EITI), February 2016.

- Summary: The EITI is the global standard for the good governance of oil, gas and mineral resources. When implemented by a country, the EITI ensures transparency and accountability about how a country's natural resources are governed. This ranges from how the rights are issued, to how the resources are monetised, to how they benefit the citizens and the economy. The Standard is composed of two parts. Part I deals with the implementation of the Standard and part II deals with the governance and management of the international EITI. Find an overview of the Standard below, including links to more information.

FSC Principles and Criteria: Defining Best Practice in Global Forest Management V5. *Forest Stewardship Council (FSC) Worldwide*, 2015.

- Summary: There are ten principles that any forest operation must adhere to before it can receive FSC forest management certification. These principles cover a broad range of issues, from environmental impact to community relations and workers’ rights, as well as monitoring and assessment. FSC also provides a number of criteria relating to each principle to provide practical ways of working out whether they are being followed. Our principles have been developed to be applicable worldwide and relevant to different kinds of forest area and ecosystem, as well as cultural, political, and legal systems. To help forest managers and owners and certification bodies interpret the latest FSC P&C (which was approved in 2015) for their region, we developed the International Generic Indicators (IGIs).

Kimberley Process Certification Scheme on Conflict Diamonds, *available at* <https://www.kimberleyprocess.com>.

- Summary: In a series of resolutions adopted from 1998 to 2005, the UN Security Council condemned the sale of conflict diamonds from Angola, Sierra Leone, Liberia, and Côte d'Ivoire and called for the creation of a voluntary regulatory body for the diamond industry, which became the Kimberley Process. The Kimberley Process functions as a certification regime, and requires the participation of state agencies, civil society and the diamond industry to reduce the flow of conflict diamonds - rough diamonds used to finance wars against governments around the world.

*Principles and Criteria for the Production of Sustainable Palm Oil*. Roundtable on Sustainable Palm Oil, 2013.

- Summary: “Sustainable palm oil production is comprised of legal, economically viable, environmentally appropriate and socially beneficial management and operations. This is delivered through the application of the following set of Principles and Criteria, and the accompanying Indicators and Guidance.” This document outlines such principles and criteria as well as the accompanying indicators and guidance.

## Scholarly Texts

Aaronson, Susan Ariel ‘Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)’ *Public Administration and Development*, 2011.

- Abstract: This article assesses the Extractive Industries Transparency Initiative (EITI), a public-private partnership designed to help resource-rich countries avoid corruption in the management of extractive industry revenues. Thirty-two nations have adopted EITI, and the numbers of implementing nations are rapidly increasing. However, the EITI partnership is not as effective as it could be for three reasons. First, the partners (governments, civil society, and business) have different visions of EITI. Second, some implementing governments have not allowed civil society to participate fully in the process or have not consistently provided civil society with the information they need to hold their governments to account. In this regard it is a limited partnership. Third, in many participating countries, the public and legislators may not be aware of EITI. Thus, although public participation is essential to the success and potential positive spillovers of EITI, the public is essentially a silent partner, limiting the ability of the EITI to succeed as a counterweight to corruption,

Auld, Graeme, and Stefan Renckens. “Rule-Making Feedbacks through Intermediation and Evaluation in Transnational Private Governance” *The ANNALS of the American Academy of Political and Social Science* 670(1)(2017): 93-111.

- Abstract: “Feedback from rule-making is an important facet of regulatory processes. By examining the operations of the Marine Stewardship Council (MSC), a transnational private certification program, we explore two types of feedback that operate within and outside R-I-T relationships and potentially influence agenda-setting and rule-reformulation. Within R-I-T relationships, intermediation feedback results from the knowledge that intermediaries acquire as they translate rules into practical forms applicable to specific regulatory targets. Intermediaries may communicate this

knowledge to the regulator to strategically inform rule-reformulation. But the regulator may also have access to this information if transparency obligations come with the responsibility of performing intermediation functions. Outside R-I-T relationships, evaluation feedback involves external evaluative audiences—actors outside the regulatory process that hold an interest in evaluating and influencing that process. Transparency about R-I-T relationships should strengthen this feedback, though lack of information will not prevent external evaluators from rendering judgments and seeking to influence rule-reformulation.”

Auld, Graeme, and Lars H. Gulbrandsen. “Learning through disclosure: The evolving importance of transparency in the practice of non-state certification” in Aarti Gupta and Michael M. Mason (eds) *Transparency in global environmental governance: Critical perspectives*, 271–96. Cambridge, MA: MIT Press, July 2014.

- Chapter Summary: “In this chapter, Graeme Auld and Lars Gulbrandsen analyze the central role of transparency in the non-state-led certification movement. Certification embodies the idea that information disclosure can be a tool for nongovernmental organizations, investors, governments, and consumers to support high sustainability performers. Auld and Gulbrandsen assess this claim by comparing the uptake and effects of transparency in the rule-making and auditing processes of the Marine Stewardship Council (MSC) and Forest Stewardship Council (FSC). The authors show that the MSC uses transparency instrumentally, whereas the FSC treats it more as an end in itself. The chapter thus identifies key differences in how transparency contributes to the (perceived) accountability and legitimacy of these two prominent certification programs. The chapter underscores as well the link between a marketization of transparency in this realm (via disclosure of auditing reports, for example) and the learning potential of the private regulatory field.”

Baumann-Pauly, Dorothée, Justine Nolan, Sarah Labowitz and Aret van Heerden, "Setting and Enforcing Industry-Specific Standards for Human Rights – The Role of Multi-Stakeholder Initiatives in Regulating Corporate Conduct" in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice*, Routledge, 2016.

- Summary: In this introductory chapter, the authors provide an overview of the typology and history of MSIs that have emerged over the past two decades. Within this typology, we focus our analysis on those MSIs that serve a governance function by setting and enforcing standards among competitors in a particular industry.

Cashore, Benjamin, “Legitimacy and the privatization of environmental governance: How non-state market-driven (NSMD) governance systems gain rule-making authority” *Governance* 15(4) (2002): 503–29.

- Abstract: “In recent years, transnational and domestic nongovernmental organizations have created non–state market–driven (NSMD) governance systems whose purpose is to develop and implement environmentally and socially responsible management practices. Eschewing traditional state authority, these systems and their supporters have turned to the market’s supply chain to create incentives and force companies to comply. This paper develops an analytical framework designed to understand better the emergence of NSMD

governance systems and the conditions under which they may gain authority to create policy. Its theoretical roots draw on pragmatic, moral, and cognitive legitimacy granting distinctions made within organizational sociology, while its empirical focus is on the case of sustainable forestry certification, arguably the most advanced case of NSMD governance globally. The paper argues that such a framework is needed to assess whether these new private governance systems might ultimately challenge existing state-centered authority and public policy-making processes, and in so doing reshape power relations within domestic and global environmental governance.”

Galland, Jean-Pierre, “Big third-party certifiers and the construction of transnational regulation” *The Annals of the American Academy of Political and Social Science* (2017).

- Summary: “International trade is increasingly regulated through standardization, certification, and accreditation. To ensure that consumers can trust that the products they buy meet regulators’ standards, third-party certifiers and accreditation bodies, which “certify the certifiers,” act as intermediaries enlisted to deliver conformity assessment certificates to producers. This article explores how a few third-party certifiers have exploited their position between multiple regulators and diverse targets to invest in a growing number of sectors, expand globally, and become preferred advisers to regulators. As regulators enlist them to standardize certification practices, big third-party certifiers (BTPCs) advise regulators to set system-based regulations that are better suited to their own organizations and networks of international subsidiaries.”

Gulbrandsen, Lars H, *Transnational environmental governance: The emergence and effects of the certification of forests and fisheries*. Cheltenham: Edward Elgar, 2010.

- Summary: “This book focuses on a relatively new type of institution for transnational environmental governance: voluntary certification schemes. The analysis is informed by questions such as: Why have these certification schemes emerged? How are they organized? And do they contribute to problem solving? To this end, Gulbrandsen engages the growing scholarly literature on the development, functioning, and competition of new types of authorities and rule setters in a less state-centric world. As states demonstrate an inability to adequately satisfy the growing demand for governance, other actors endeavor to fill this gap with different forms of regulations. In the book's empirical cases—forest certification (through the Forest Stewardship Council and the Programme for the Endorsement of Forest Certification) and fisheries certification (involving the Marine Stewardship Council)—nonstate governance actions were taken in response to perceived government failures to act. Gulbrandsen also shows that there are complex and interwoven relationships between governmental and nongovernmental initiatives.”

Haufler, Virginia. “Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World” *Global Environmental Politics* 10(3) (2010): 53-73.

- Summary: “The global promotion of transparency for the extractive sector—oil, gas and mining—has become increasingly accepted as an appropriate solution to weaknesses in governance in resource-rich developing nations. Proponents argue that if extractive firms disclose publicly their payments to governments, citizens will be able to hold

governments accountable. This will improve the management of natural resources, reduce corruption, and mitigate conflict. These beliefs are embodied in the Extractive Industries Transparency Initiative (EITI), initially a unilateral effort launched by Tony Blair that has evolved into a global program. Why has transparency become the solution of choice for managing natural resource wealth, and how has the EITI evolved? This article argues that intersecting transnational networks with complementary global norms facilitated construction of transparency as a solution for management of resource revenues. This in turn promoted the gradual expansion of the institutional architecture, membership, and scope of the EITI despite significant political barriers.”

Jerbi, Scott, "Multi-stakeholder initiatives: the Voluntary Principles on Security and Human Rights; the Extractive Industries Transparency Initiative; the Kimberley Process Certification Scheme" in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice*, Routledge, 2016.

- Summary: Companies from extractive industries have caused or contributed to tensions at local or national levels leading to conflict and human rights violations in a significant number of cases. A 2012 report sponsored by the United Nations (UN) and European Union (EU) identified a number of drivers of conflicts linked to the extractives sector including: poor engagement with communities and other stakeholders, inadequate benefit sharing, mismanagement of funds and weak institutional and legal frameworks. This chapter looks at three MSIs established to address such issues: the Voluntary Principles on Security and Human Rights (VPs); the Extractive Industries Transparency Initiative (EITI); and the Kimberley Process Certification Scheme (KPCS). The chapter briefly discusses the origins of these initiatives, all of which were created in the period 2000–03. Each section provides an overview of the approach the respective MSIs take to questions of standards and governance. Concluding reflections focus on commonly referenced criticisms facing these MSIs as well as future prospects. It should be noted that while each of the initiatives discussed is unique in its mandate and governance structure, all are of particular relevance in better understanding the appropriate human rights roles and responsibilities of the extractives sector.

Malden, Alexander, “A safer bet? Evaluating the effects of the Extractive Industries Transparency Initiative on mineral investment climate attractiveness” *The Extractive Industries and Society*, January 13, 2017.

- Summary: “The Extractives Industries Transparency Initiative (EITI) is a governmental initiative focused on improving transparency and accountability within resource-rich countries. Given EITI implementation is entirely voluntary, and time and resource intensive in nature, demonstrating the benefits of implementation for participating countries is important to the initiatives long term success. Using panel data for 167 countries from 2003 to 2014, this article analyses the impact of EITI implementation on a country’s mineral investment attractiveness, represented here by the amount of grassroots corporate mineral exploration expenditure within a country. The results suggest that EITI implementation does have a statistically significant positive impact on a country’s ability to attract mining company investment.”

## Governance through Agreement-Making

This section is divided into two sub-sections; the first is focused on governance through contractual arrangements primarily between companies and nations states and the second is focused on governance through agreements between companies and local communities.

### *Contractual Arrangements*

#### Special Rapporteur Reports

*Stabilization Clauses and Human Rights*, International Finance Corporation and United Nations Special Representative of the Secretary-General on Business and Human Rights, May 27 2009 .

- Summary: The purpose of this study was to examine whether stabilization clauses, a widely used risk management device in investment contracts, may affect a state's action to implement its international human rights obligations. Specifically, this study examined whether stabilization clauses can limit the application of new social and environmental regulations to investment activities over the life of the investment, or to obtain compensation from host states for the costs of compliance with such new laws. This study used social and environmental laws (such as nondiscrimination, health and safety, labor and employment rights, and the protection of the environment and cultural heritage) as a surrogate for human rights obligations, because social and environmental laws (labor and employment, nondiscrimination, health and safety, environment, protection of culturally significant property, and the like) are some of the more easily identifiable legislative areas that can both protect rights and impact investors

Ruggie, John. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, 14<sup>th</sup> session, agenda item 3, A/HRC/14/27 (9 April 2010).

- Summary: This is a progress report submitted in follow-up to A/HRC/8/5. Section I illustrates the Special Representative's working methods in operationalizing and promoting the "protect, respect and remedy" framework. The following three sections summarize his current thinking on the three pillars and the synergies among them, pointing towards the guiding principles that will constitute the mandate's final product.

Ruggie, John. *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*, Human Rights Council, 17<sup>th</sup> session, agenda item 3, A/HRC/17/31/Add.3 (25 May 2011).

- Summary: This publication identifies 10 key principles to help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors. It is the product of four years (2007–2011) of research and multi-stakeholder consultations under the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie.

## Scholarly Texts

Gathii, James and Ibironke T Odumosu-Ayanu, "The Turn to Contractual Responsibility in the Global Extractive Industry" *Business and Human Rights Journal* 1(1)(2016): 69-94.

- Abstract: This article argues that there is a newer model of contracting for natural resources that expands the potential for corporate responsibility towards those adversely affected by business activities. It lays out the conceptual roadmap and justification underlying these shifts and changes in contracting for natural resources. The article calls for a renewed focus in exploring enforcement of corporate obligations for impacts to individuals and communities within a contractual framework. Examples of this type of arrangements include contracts that can be construed to allow third parties to sue on a contract; community development agreements; contracts between investors and communities; environmental contracts; human rights deeds, and investor–state–local community contracts (tripartite contracts). These contractual forms demonstrate that the law of contract has evolved from the nineteenth century idea that contracts merely protect the rights of investors without much concern for those who are directly affected by extractive industry operations. By including affected communities, indigenous communities, and others, these new contractual forms demonstrate that investors and governments are trustees and that extractive resources must be mobilized for the benefits of their publics. In so doing, we map this turn to contracts between multiple parties in the resource extraction context, and argue that it affirmatively demonstrates real potential to address or mitigate the absence of remedial and responsibility regimes for the adverse impacts of extractive industry activities on individuals and communities.

## Community Agreements

### Resources:

The Sustainable Development Strategies Group has also compiled a public library of materials related to Community Development Agreements (also known as Impact Benefit Agreements or Community Benefit Sharing Agreements). See: <http://www.sdsg.org/archives/cda-library/>

A representative sample of literature related to Community Agreements is provided below.

### Scholarly Texts:

Disney Bruckner, Kristi, "Community Development Agreements in Mining Projects" *Denver Journal of International Law and Policy* 44 (2015-2016): 413.

- Summary: this article considers Community Development Agreements (CDAs) between companies and communities that govern various aspects of the impacts and benefits of natural resource development projects. It contends that CDAs are a valuable tool for developing and maintaining positive company-community relationships through effective two-way communication and increased community participation throughout the life of a development project. Parties use mechanisms established in one or more CDAs not only for improved communications and transparency, but also to avoid or mitigate negative project impacts, address grievances, and manage the distribution of benefits in a fair and



equitable manner. CDAs are increasingly viewed as an important mechanism for preventing and managing conflict in natural resource development. Section II of this article will discuss the growing demand for minerals that is driving mineral development. Section III will describe the importance of a social license to operate and the costs of conflict to mineral developers. Section IV will discuss major international frameworks that relate to the company-community relationship. Section V will focus on trends in use, the agreement process, and content of CDAs.

O’Faircheallaigh, Ciaran, “Indigenous Peoples and Politics: Negotiations in the Indigenous World: Aboriginal peoples and the extractive industry in Australia and Canada.” Routledge 2016.

- Summary: Negotiated agreements play a critical role in setting the conditions under which resource development occurs on Indigenous land. Our understanding of what determines the outcomes of negotiations between Indigenous peoples and commercial interests is very limited. With over two decades experience with Indigenous organizations and communities, Ciaran O’Faircheallaigh's book offers the first systematic analysis of agreement outcomes and the factors that shape them, based on evaluative criteria developed especially for this study; on an analysis of 45 negotiations between Aboriginal peoples and mining companies across all of Australia’s major resource-producing regions; and on detailed case studies of four negotiations in Australia and Canada.

O’Faircheallaigh, Ciaran, “Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon” *Community Development*, 2013.

- Summary: Agreements between commercial developers and local communities are becoming more common in virtually all parts of the world, from inner city America to remote mining regions. The need for such “community development agreements” (CDAs) is especially acute in mining, where environmental and social costs are often borne by communities while project benefits accrue in national capitals and global financial centres, leading to conflict between local people and miners. This article identifies the forces behind the recent spread of CDAs in the mining industry, and provides a sense of some general trends in the nature and impact of CDAs. The article also raises some key issues regarding CDAs in mining, issues that are often equally relevant in other contexts. These include the implications of unequal bargaining relationships between communities and developers; equity in the distribution of benefits generated by CDAs; and the enforceability and implementation of agreements.

O’Neill, Lily, “The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements” *Australian Indigenous Law Review*, 2014.

- Summary: A key question in contemporary Australian Aboriginal policy is how to turn wealth derived from resource extraction on Aboriginal land into economic and social prosperity. Large amounts of mineral wealth are being extracted from or near Aboriginal communities, yet Aboriginal people continue to be less educated, live shorter lives and pass on less wealth to their children than their non-Aboriginal counterparts. One method used by Australian Aboriginal people to redress this paradox of ‘poverty in the midst of plenty’ is agreement-making through negotiation with resource companies.

This article considers the role of state government practice in two Australian Native Title Act negotiations: at James Price Point, in the Kimberley, and Curtis Island, Queensland.

Van de Biezenbos, Kristen, "Enforcing Private Environmental Governance Through Community Contracts" *George Washington Journal of Energy & Environmental Law*, Forthcoming.

- Summary: One of the greatest challenges in private environmental governance is enforceability: if we are depending upon corporations like banks and insurance companies to formulate and implement standards that curb greenhouse gas emissions and discourage environmental harm, how do we know whether these firms are living up to those commitments? And, if they are not living up to those commitments, what is the remedy? Using the Carbon Principles as an example, this essay explores whether coupling private environmental governance initiatives with community contracts could strengthen the effectiveness of and provide a level of enforcement, or at least a measure of public accountability, for both. To accomplish this, compliance with specific private environmental governance standards and principles could be expressly included in the community contract, making compliance an obligation of the corporate party. This would not completely solve the problem of enforcement in the context of private environmental governance measures, since there is still the issue of monitoring and compliance. However, it would at least make the public aware of these standards and could create "soft" enforcement by connecting the failure to comply with negative publicity and public opinion.

### **Additional Resources**

"ATNS - Agreements, Treaties and Negotiated Settlements project." ATNS - Agreements, Treaties and Negotiated Settlements project, *available at* <http://www.atns.net.au/>

- Summary: The Agreements, Treaties and Negotiated Settlements database (ATNS) is an online gateway to a wealth of information relating to agreements between indigenous people and others in Australia and overseas. The database offers a range of features including background information on each agreement; links to related agreements, organisations, signatories and events; a glossary of relevant terminology as well as direct access to published and on-line resources.

## **International Investment Law**

### **Special Rapporteur Reports**

De Zayas, Alfred Maurice, *Statement on the Promotion of a Democratic and Equitable International Order*, Human Rights Council, 30<sup>th</sup> Session (16 September 2015).

- Summary: In this report, the Special Rapporteur focuses on the challenge to the international order posed by certain activities of investors and transitional corporations that entail much more than interference in the regulatory space of States but actually constitute an attack on the very essence of sovereignty and self-determination, which are the founding principles of the United Nations.

*Report of the Special Rapporteur on the rights of indigenous peoples, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, thirty-third session, agenda item 3, A/HRC/33/42 (11 August 2016)*

- Summary: The report transmitted herewith provides an analysis of the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of indigenous peoples.

## Scholarly Texts

Cotula, Lorenzo, *Human rights, natural resource and investment law in a globalized world: shades of grey in the shadow of the law*, Abingdon, Oxon: Routledge, 2013.

- From the Publisher: The growing integration of the world economy has been accompanied by rapid and extensive developments in the national and international norms that regulate investment and its impact – including investment law, natural resource law and human rights law. These legal developments affect the ‘shadow’ that the law casts over the multiple negotiations that characterize international investment projects in the developing world. Drawing on international law, the national law of selected jurisdictions and the contracts concluded in a large investment project, *Human Rights, Natural Resource and Investment Law in a Globalized World* explores the ways in which the law protects the varied property rights that are at play in foreign investment projects in developing countries, with a focus on Africa. Through an integrated analysis of seemingly disparate fields of law, this book sheds new light on how the law mediates the competing interests that come into contact as a result of economic globalization, whilst also providing new insights on the changing nature of state sovereignty and on the relationship between law and power in a globalized world.

Cotula, Lorenzo. “The New Enclosure? Polanyi, international investment law and the global land rush” *Third World Quarterly* 34(9)(2013): 1605-1629.

- Abstract: Seven decades after its first publication, Karl Polanyi’s *The Great Transformation* remains one of the most insightful readings about the socioeconomic changes associated with the Industrial Revolution, and the ways in which law facilitated, or countered, moves towards the commodification of land at that time. As today’s global land rush brings competing land claims into contest, new transitions are occurring between more commodified and more ‘socially embedded’ conceptualizations of land. Using Polanyi’s framework, this article analyses the role of international law in these processes. International investment law construes land as a commercial asset, can facilitate access to land for foreign investors and imposes discipline on the exercise of regulatory powers in land matters. But shifts in the political economy that underpins international investment law and growing recourse to international human rights law are creating new opportunities for reflecting the non-commercial (cultural, social, political) relations within which land rights remain embedded in many societies. When contrasting conceptualisations of land collide, the relative strength of legal rights and enforcement mechanisms become particularly important. Ultimately, the legitimacy of international law to mediate between competing land claims will depend on the extent to which it can recognise the multiple values that society attaches to land.

Cotula, Lorenzo. "Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law" *International Journal of Law in Context* 11(2)(2015): 113-134.

- Summary: Long at the margins of international law, property is now among the key challenges facing international law- and decision-makers. A 'shrinking' planet and a polycentric international law regime provide the backdrop for contestation between different property concepts and claims. While presenting important commonalities in legal concepts and normative content, international investment law and international human rights law protect different and possibly competing rights, reflect different balances of commercial and non-commercial considerations, and embody different standards of legal protection. As the frontiers of natural resource extraction expand, natural resource investments can bring different property concepts and claims directly into tension. In this context, the articulation between investment law and human rights law influences the ways in which international law mediates competition for the world's natural resources, redefining the balance between public and private interests and reshaping spaces for the lawful exercise of state sovereignty

Jacur, Francesca Romanin, Angelica Bonfanti, and Francesco Seatzu. *Natural resources grabbing: an international law perspective*. Leiden: Brill Nijhoff, 2016.

- Summary: This book addresses the adverse effects that large-scale investments in natural resources may pose to fundamental human rights and the protection of the environment in the context of international law. Part four focuses specifically on the investment law context.

Miles, Kate. *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*. Cambridge University Press, 2013.

- Summary: International investment law is a complex and dynamic field. Yet, the implications of its history are under explored. Kate Miles examines the historical evolution of international investment law, assessing its origins in the commercial and political expansionism of dominant states during the seventeenth to early twentieth centuries and the continued resonance of those origins within modern foreign investment protection law. In particular, the exploration of the activities of the Dutch East India Company, Grotius' treatises, and pre-World War II international investment disputes provides insight into current controversies surrounding the interplay of public and private interests, the systemic design of investor-state arbitration, the substantive focus of principles, and the treatment of environmental issues within international investment law. In adopting such an approach, this book provides a fresh conceptual framework through which contemporary issues can be examined and creates new understandings of those controversies.

Viñuales, Jorge E. "International Investment Law and Natural Resource Governance." *E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum*, September 2015.

- Abstract: This paper analyses the implications of contemporary international investment law for the regulation of natural resources. Natural resources are unevenly distributed across different regions and countries and that makes access a very important question. In turn, access to resources located in the territory or within the jurisdiction of a country

and, more generally, any activities conducted in connection with such resources, are subject to the regulatory powers of the host State. Although such powers are above all a matter of sovereignty, understanding them through this prism alone would miss an important point, namely that the interests of a host State and a foreign investor may be aligned not only in pursuance of public welfare but also to the detriment of it. The latter phenomenon has been called the “resource curse” – i.e. a situation where a rapacious government exploits the country’s natural resources for its own benefit depriving the population of its due. Foreign investors may be involved in such phenomenon either deliberately (i.e. through a close connection with the rapacious government) or as a mere result of their activity in the host State (i.e. by making the exploitation profitable for the government irrespective of any explicit complicity). Thus, questions of ‘access’, ‘sovereignty’ and ‘distribution’ are closely interrelated in ways that require sustained analysis. The first section of the paper provides a brief overview of the basic architecture and building blocks of international investment law, from a structural and dynamic perspective. The focus then turns to the core subject matter, namely the specific implications of this body of law for the governance of natural resources, particularly as regards access, sovereignty and distribution. In conclusion, some observations and recommendations regarding possible avenues for reform are put forward for consideration and future research.

Viñuales, Jorge E. “Foreign Investment and the Environment in International Law: The Current State of Play”, Chapter 2 in Kate Miles (ed.), *Research Handbook on Environment and Investment Law*. Cheltenham: Edward Elgar, forthcoming 2016.

- Summary: This chapter provides an up-to-date view of the relationship between the international law governing foreign investment and environmental protection, covering developments until August 2015. The analysis is based among others on a dataset of 114 investment cases with environmental components compiled by the author. The chapter describes three main trends: (i) the increasing role of private investment in sustainable development instruments, particularly the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, (ii) the increasing reference to environmental considerations in IIAs, particularly FTAs, and mega-regional agreements, and (iii) the surge in investment disputes with environmental components in the last four years. It then turns to the legal analysis of several recent cases, including *Unglaube v. Costa Rica*, *Clayton and Bilcon v Canada*, *Spence v. Costa Rica*, *Mesa v. Canada* and *Perenco v. Ecuador*. The main conclusion is that environmental considerations are increasingly normalised or mainstreamed in the reasoning of investment tribunals, which in turn requires a full integration of environmental law in transactional, pre-litigation and litigation practice relating to foreign investment law.

Viñuales, Jorge E. *Foreign Investment and the Environment in International Law*. Cambridge: Cambridge University Press, 2012.

- From the Publisher: Conflicts between foreign investment law and environmental law are becoming increasingly frequent. On the one hand, the rise of environmental regulation poses significant challenges to foreign investors in several industries. On the other, the surge in investment arbitration proceedings is making States aware of the important litigation risks that may result from the adoption of environmental regulation. This study

of the relationship between these two areas of law adopts both a policy and a practical perspective. It identifies the major challenges facing States, foreign investors and their legal advisers as a result of the potential friction between investment law and environmental law and provides a detailed analysis of all the major legal issues on the basis of a comprehensive study of the jurisprudence from investment tribunals, human rights courts and bodies, the ICJ, the WTO, the ITLOS, the CJEU and other adjudication mechanisms.

Yilmaz-Vastardis, Anil and Tara Van Ho "Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection" in Jacur, Francesca Romanin, Angelica Bonfanti and Francesco Seatzu (eds) *Natural Resource Grabbing: An International Law Perspective*. Brill, 2015.

- Summary: This paper considers how states can integrate their human rights obligations into investment contracts as a means of minimizing the adverse effects of business activities related to the extractives sector on human rights.

## **International Trade Law**

### **Scholarly Texts**

Bernasconi-Osterwalder, N., Magraw, D., Oliva, M.J., Orellana, M. and Tuerk, E. *Environment and Trade: A Guide to WTO Jurisprudence*. London: Earthscan, 2006.

- Summary: "International trade rules have significant impacts on environmental law and policy, at the domestic, regional and global levels. At the World Trade Organization (WTO), dispute settlement tribunals are increasingly called to decide on environment- and health-related questions. Can governments treat products differently based on environmental considerations? Can they block the import of highly carcinogenic asbestos-containing products or genetically modified crops? Does the WTO allow governments to protect dolphins or endangered sea turtles through the use of import restrictions on certain products? How can civil society participate in WTO dispute settlement? This Guide, authored by five world leaders on international environmental and trade law at the Center for International Environmental Law (CIEL), is an accessible, comprehensive, one-of-a-kind compendium of environment and trade jurisprudence under the WTO. Providing an overview for both experts and non-experts of the major themes relevant to environment and trade, it also analyses how WTO tribunals have approached these themes in concrete disputes and provides selected excerpts of the most significant cases."

Brewer, T.L. "Trade policies and climate change policies: a rapidly expanding joint agenda." *The World Economy* 33(6)(2010): 799–809.

- Summary: Brewer examines the intersections between trade policies and climate change policies and outlines a current joint agenda that links trade and climate change on an international level.

Eckersley, R. "The big chill: the WTO and multilateral environmental agreements." *Global Environmental Politics* 4(2)(2004): 24–50.

- Abstract: "The increasing scope and disciplinary force of international trading rules have generated concern in the international environmental community concerning how far different types of trade restrictions in multilateral environmental agreements (MEAs) are compatible with the rules of the World Trade Organization (WTO). Environmental Nongovernment Organizations (ENGOS) have argued that the WTO exerts a form of disciplinary neoliberalism that has a 'chilling effect' on both the implementation and negotiation of MEAs. This paper assesses this claim, particularly in the light of the stalled deliberations of the WTO's Committee on Trade and Environment and recent WTO jurisprudence, and concludes that the WTO's trade agreements do serve to limit the scope and operation of MEAs, albeit mostly in subtle rather than direct ways. After exploring a range of options for reform it is concluded that the prospects for greening the WTO from both within and without are by no means bright."

Falkner, Robert and Nico Jaspers. "Environmental Protection, International Trade and the WTO" in Heydon, Ken and Steven Woolcock (eds) Chapter 13 in *The Ashgate Research Companion to International Trade Policy*, Ashgate, 2012.

- Summary: This chapter reviews the debate and recent scholarship surrounding environmental protection and international trade. It begins with a brief discussion of the general relationship between trade and environment and then focuses more closely on the institutional context for trade and environmental policymaking: the rules of the WTO and how they relate to environmental matters; the relationship between the WTO and multilateral environmental agreements; recent WTO jurisdiction on trade– environment conflicts; and political efforts to resolve such conflicts within the WTO's Committee on Trade and Environment (CTE) and the Doha Round

Hufbauer, G.C. and Kim, J. *The World Trade Organization and Climate Change: Challenges and Options*. Washington, DC: The Peterson Institute for International Economics, 2009.

- Abstract: Trade and environment intersect in many ways. Aside from the broad debate as to whether economic growth and trade adversely affect the environment, there are linkages between existing rules of the World Trade Organization (WTO) and rules established in various multilateral environmental agreements. Controlling greenhouse gas emissions promises to be a top priority for both national and international agendas, and special attention must be given to the relationship between the WTO and the emerging international regime on climate change. This working paper examines the nexus of the WTO and climate change and discusses challenges and options.

Gabler, M. *Norms, institutions and social learning: an explanation for weak policy integration in the WTO's Committee on Trade and Environment*. *Global Environmental Politics* 10(2)(2010): 80–117.

- Abstract: "The United Nations Conference on Environment and Development (UNCED) recognized that sustainable development can only be actualized if environmental norms are integrated into other areas of policy across levels of governance. This article examines the Committee on Trade and Environment of the World Trade Organization (WTO) to answer the question of why actors' efforts to enhance the mutual

supportiveness of trade and environmental norms have resulted in minimalist policy outcomes. I first introduce a framework for analyzing norms and their levels of compatibility and a social learning explanation for policy integration emphasizing the importance of normative and institutional conditions. Second, I show that low levels of both norm compatibility between UNCED and WTO and institutional capacity in the WTO for learning have contributed to weak integration. The approach contributes to constructivist theory development and the findings provide insights to policy-makers grappling with how to support the integration of norms and institutions in global governance.”

Gallagher, K.P. *Free Trade and the Environment: Mexico, NAFTA, and Beyond*. Palo Alto: Stanford University Press, 2004.

- Summary: “Free Trade and the Environment examines the impact economic integration has on the environment, using Mexico, which transformed itself from one of the most closed economies to one of the world's most open, as a case study. As new nations join the Free Trade Area of the Americas or the World Trade Organization, they are considering the path taken by Mexico nearly 20 years ago. The author investigates two commonly held and opposing beliefs in the policy community about the impact of free trade on the environment. While some believe that free trade will raise incomes in developing countries, thus encouraging governments to protect the environment, others argue that free trade simply provides an incentive for heavily polluting industries to move to developing countries with lax environmental regulations. The author shows that for Mexico in fact neither position is correct, and concludes with suggestions for free trade policies that couple environmental benefits with economic integration.”

Neumayer, E. Greening. *Trade and Investment: Environmental Protection Without Protectionism*. London: Earthscan, 2001.

- Summary: “A comprehensive, critical analysis of the interactions between investment, trade and the environment. It examines the consequences of existing multilateral investment and trade regimes, including the WTO and the MAI for the environment, and asks how they should be reformed to protect it. In doing so, the text shows how these regimes can be greened without erecting protectionist barriers to trade that frustrate the development aspirations of poorer countries. The solution seeks to offer a way out of one of the most difficult dilemmas in international policy: how investment and trade can protect the environment without encouraging protectionism by the industrialized world.”

Neumayer, E. *The WTO and the environment: its past record is better than critics believe, but the future outlook is bleak*. *Global Environmental Politics*, 4(3)(2004): 1–8.

- Summary: “This article argues that the WTO's past environmental record is much better than critics would have it. Its jurisprudence has become increasingly environmentally friendly and many charges against the dispute settlement process are based on misunderstandings. WTO rules have, so far at least, not deterred any multilateral environmental agreements. The lack of ambitious environmental protection measures is not the fault of the WTO, but the responsibility of policy-makers from its member states. At the same time, the WTO has done little to actually promote environmental protection and the treatment of the precautionary principle in WTO rules is highly unsatisfactory.



Unfortunately, this is unlikely to change in the future. The reason for this is that there is not enough support among member countries, particularly those from the developing world, to render the multilateral trade regime more environmentally friendly. The challenge is to green WTO rules in a way that is beneficial and therefore acceptable to developing countries.”

Partiti, Enrico and van der Velde, Steffen, "Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation" *Journal of World Trade* 51(6) (2017, Forthcoming)

- Abstract: The recent adoption of the EU Regulation laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas constitutes an important step to curb particularly heinous crimes connected to the so-called ‘conflict minerals’ supply chains. The EU measure is remarkable insofar it incorporates an international soft-law instrument, the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and makes it mandatory for EU importers. Importers are under a mandatory obligation to engage in supply chain due diligence to avoid dealing in conflict minerals, and thus to regulate upstream entities. This contribution assesses the relation between such a regulatory strategy and provisions of WTO law. It assesses whether the EU bears responsibility for possible detrimental impacts stemming from the incorporation of the OECD Guidance and from the delegation of certain regulatory tasks to economic operators. Subsequently, it evaluates the status under international law of the OECD Guidance, and discusses whether its status can justify possible detrimental impacts stemming from the EU regime.

## Reports

*Environmental requirements and market access*, OECD Trade Policy Studies. Paris: OECD, 2005.

- Summary: “Do environmental regulations block exports from developing countries? Whose responsibility is it to ensure that exports do not end up rotting in the ports of destination? Are voluntary environmental standards, like for organic foods, in fact obligatory for any developing-country exporter who wants to stay in the market? Or do such environmental requirements actually increase export opportunities while reducing environmental impacts and making products safer? Investigating over twenty cases where exports from developing countries faced new environmental requirements, this OECD report addresses these and other questions. These case studies, covering a diverse number of products and exporting countries, trace a number of environmental regulations, standards and labelling schemes, from conception through implementation. In so doing, they highlight the difference that sensitivity to potential trade effects can make when designing environmental regulations and standards. They also show that timely technical assistance has played a crucial role in helping exporters from developing countries adjust to new environmental requirements without suffering adverse trade effects.”

*Trade and Environment at the WTO.* Geneva: WTO, 2004.

- Summary: The World Trade Report 2004 on Trade and Environment reports on the intersections of trade and environment. It examines the history of the trade and environment debate, the DOHA mandate on trade and environment, market access and environmental requirements, and the effect of trade liberalization on the environment, among other topics.

*Trade in Natural Resources.* Geneva: WTO, 2010.

- Summary: “The World Trade Report 2010 focuses on trade in natural resources, such as fuels, forestry, mining and fisheries. The Report examines the characteristics of trade in natural resources, the policy choices available to governments and the role of international cooperation, particularly of the WTO, in the proper management of trade in this sector.”

*Climate and Trade Policies in a Post-2012 World.* Nairobi: UNEP, 2009.

- Summary: “This publication provides a timely collection of short forward-thinking articles by leading experts on the relationship between trade and climate change policies. They closely examine the interplay between climate and trade policies and institutions and offer recommendations for promoting a mutually supportive relationship.”