**At**
**The IUCN World Conservation Congress**
**Marseille, 3-11 September 2021**

***Center for Environmental Legal Studies***
(Elisabeth Haub School of Law at Pace University)

*These Members of IUCN will move to amend pending motion 048, the motion submitted by the out-going IUCN Council's Motions working group to the Congress, so as to restore their initial intend and express proposed decision, which was to renounce the colonial doctrine of discovery, and lay a foundation for all communities to engage with indigenous people to build just relationships that value and conserve nature:*

Center for Environmental Legal Studies (Elisabeth Haub School of Law at Pace University) (USA)
Centre International de Droit Comparé de l'Environnement (France)
Centre Mexicano de Derecho Ambiental (CEMDA) (Mexico)
Instituto Direito por un Planeta Verde (Brazil)
Ecological Society of the Philippines (Philippines)
Environmental Law Program, William S. Richardson Law School, University of Hawai'i at Mānoa (USA)
International Council of Environmental Law (Int'l NGO, Spain)

distinct political, legal, economic, social and cultural institutions." It is time to make explicit what is implied: the Doctrine of Discovery (DoD) destroys the collective and individual rights of indigenous peoples world-wide. Laws, policies, and practices effectuating the DoD are unjust and incompatible to UNDRIP.

The International Union for the Conservation of Nature (IUCN) will decide at its upcoming next World Conservation Congress (WCC) in September, 2021, whether or not to renounce the DoD. The International Council of Environmental Law (ICEL), with others,[1] moved that the WCC take the decision to renounce the DoD, by adopting a resolution (Motion 48). ICEL has been a member of IUCN since 1970, helped to draft the **UN World Charter for Nature** (UNGA Res. 37/3, 1982) and supported the WCC adoption of the **Declaration on the Rights of Indigenous Peoples** and subsequent decision to admit indigenous peoples organizations as full members of IUCN, with the all the rights under IUCN Statutes that are enjoyed by states, ministries, and international and national non-governmental organizations.

ICEL has prepared this NOTE to advise the Members of IUCN about the background and rationale for Motion 48, in advance of the deliberations of the WCC.[2]

After the WCC's postponement because of COVID-19, the Congress is now scheduled for 3-11 September 2021, in Marseille, France. This will be the first time IUCN's Assembly of its members includes indigenous peoples organizations (IPOs). ICEL is pleased to present this NOTE. This ICEL NOTE provides background context for the draft resolution and explains why the motion should be adopted.

## Doctrine of Discovery History

[1] The sponsors presented this motion to expressly renounce the Doctrine of Discovery" from the perspectives of human rights, indigenous righs, and justice. The IUCN Council's Motions' Committee changed the title of the motion unilaterally, and altered the substance of the motion. To be clear, the motion's sponsor are specialists in law, and call on IUCN's Members to renouce the Doctrine as unjust and inhumane, and contrary to law. This motion repairs harm done and being done by governments and others. The motion is about righting a heinous wrong, healing an open wound that harms *all* peoples today, and not about "rediscovering the care of Mother Earth from the vision of Indigenous Peoples." The motion's sponsors did not chose, or intend to have, the title that Motion 48 now carries. Here is the original list of sponsors:

Center for Environmental Legal Studies (Elisabeth Haub School of Law at Pace University) (USA)
Centre International de Droit Comparé de l'Environnement (France)
Centre Mexicano de Derecho Ambiental (CEMDA) (Mexico)
Instituto Direito por un Planeta Verde (Brazil)
Ecological Society of the Philippines (Philippines)

While not always known as such, the Doctrine of Discovery ("DoD"), is an international legal principle that historians date to the 5th century AD.[3] In the 5th century AD, the Roman Empire, having newly converted to Christianity, experienced internal and external threats that contributed toward its slow decline. The Empire experienced increased interactions between Christian and non-Christian peoples on the fringes of the empire, notably on the Iberian Peninsula. As a result, Christian philosophers and legal writers began to critique Christian values in a theory of "just war," the divine authority and justification of Christians' violent engagements against non-Christian peoples.[4]

The "just war" philosophy did not stop at contemplating and justifying the interactions between fellow humans, but also applied to human values of, land, resources, and property. Legal professor Robert J. Miller notes that Pope Innocent IV's writings in 1240 questioned the just invasion and acquisition of "infidel" *dominium*.[5] Pope Innocent's writings established that the papacy's "divine mandate" superseded any non-Christian's natural right claim to governmental sovereignty and property.[6] Non-Christian property ownership and stewardship, therefore, was unilaterally declared void upon Christian conquest. The doctrine imposed on the world, the Roman Catholic Church's goal of establishing a "universal Christian commonwealth."[7]

## Christian and Secular Codification of the DoD

While philosophers debated the moral basis of the confiscation of non-Christian lands and domination of non-Christian peoples, the Church codified its unjust and inhumane policies in papal bulls which embodied cannon law. In the 15th century, the Portuguese and Spanish Empires expanded the application of the DoD as they applied it in their transatlantic religious and secular pursuits and as they confiscated indigenous lands and enslaved indigenous peoples.[8]

Not all Christians supported the implementation of the DoD. Most notably, Spanish friar, Protector of Indians, Bartolomé de las Casas openly objected the unjust implementation of the DoD by conquistadors in the Americas in his book *Brevísima relación de la destrucción de las Indias* (*A Short Account of the Destruction of the Indies, 1551*). This work was preceded by Las Casas' delivery of *Memorial de Remedios para las Indias* to the regents of Madrid, which advocated for a moratorium on the exploitation and enslavement of indigenous peoples.

of "discovered" lands between respective European Empires and the non-European Christians they encountered.[10]

Then, like the Portuguese and Spanish, in the 12th century the English relied on the Church's authority through papal bulls to justify their dominion over Ireland.[11] By the 16th century, however, the English Crown, no longer tied to the Catholic Church, transformed the Christian DoD into a more secularized tool of conquest.[12] The English used the DoD as an international doctrine to circumvent the Church's authority to claim rights to non-European lands.[13]

In the American English colonies, the superior right to colonize and settle land not occupied by Christians became imbedded in legal charters of individuals such as John Cabot and Sir Walter Raleigh, and private settlement companies such as the First Charter for the Virginia Company. As English populations rose, so did the laws that embedded the unjust principals of the DoD. The Treaty of Paris in 1763 that ended the Seven Years' War and the Royal Proclamation of 1763 reasserted European superiority of property rights of indigenous lands. Later, after the United States gained independence, in 1823, the United States Supreme Court infamously confirmed that the United States maintained sovereignty over the land by adopting the discovery rights of England.

Similar to the United States, the English colonies of Canada asserted discovery rights over indigenous peoples through the 1670 Royal Charter of the Hudson's Bay Company and the Royal Proclamation of 1763. Furthermore, through the Canadian treaty and reservation creation processes, Miller notes, "the Doctrine of Discovery ideology related to the presumption of sovereign authority (ie the power to determine the location of Indians) ran parallel to the notion of lawful possession by Indians."[14]

Likewise, in Australia, the framers of the constitution in 1900 rejected equal protection and due process clause that "enable[d] legislation that discriminated on the basis of race . . . to ensure that the regulation of the lives of Aboriginal people could continue."[15] The early reinforcement of the DoD in Australia came with policies such as the Northern Territory Aboriginals Act 1910 which controlled Aboriginal people in the Northern Territory.[16]

## The Doctrine of Discovery Today

The DoD continues its harmful impact upon indigenous communities around the globe. The DoD is embedded in the laws of many countries. It legitimizes the continuing suppression of indigenous communities and culture. Furthermore, it makes the co-stewardship of nature and natural resources by indigenous peoples impossible during a time when unsustainable

[10] Id. at 13
[11] Id. at 15.
[12] Id. at 16-17.
[13] Id. at 17.
[14] Id. at 114.
[15] Id. at 188.
[16] Id.

development, supported by DoD principles, is diminishing biodiversity and contributing to

In the United States, the Doctrine of Discovery had devastating impacts on nature. For one example, in 1828, American's discovery of gold in Georgia legitimized the 1830 Indian Removal Act and the assertion of American control over Cherokee land. The inhumane and deadly removal policy resulted in forced indigenous displacement of about 100,000 indigenous peoples, countless deaths, and the loss of ownership and stewardship of Eastern indigenous land.[22] Indigenous peoples were replaced by exploitative American settlers who mined for gold, only a foreshadow of the further destructions in the 1848 California Gold Rush and beyond. American removal policies led to the broader use of the reservation system that restricted indigenous peoples on and off small parcels of land. Indigenous peoples were prevented from exercising their stewardship of the land and maintain their cultural practices and its legacy continues to provide the basis for unequal and unjust land use practices today.

## Actions Toward Renouncing the Doctrine of Discovery

### Canada

The DoD provided legal and moral justification for colonial dispossession of sovereign indigenous lands in what is now Canada, and the Doctrine remains in its legal system. In January 2018, Canada's Assembly of First Nations called upon governments there to renounce the DoD. In "Dismantling the Doctrine of Discovery," the Assembly notes that "The Truth and Reconciliation Commission of Canada (TRC) called on all faith bodies to repudiate the concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*, and the reformation of policies within their institutions that continue to rely on such concepts. Many faith-based groups are responding to this Call to Action by examining discovery and issuing formal statements repudiating. The World Council of Churches has also done so."[23]

Canada is also implementing joint enforcement systems to respect the seasons and sustainability of wildlife. In Canada, there is a constitutionally protected right for aboriginals who exercise treaties to harvest fish and wildlife for food. This is based on section 35 (1) of the Constitution Act of 1982. This protection exempts Aboriginals and Metis from some hunting and fishing laws and instead follows the specific conservation principles in congruence with their sacred relationship with the natural environment. In a way of protecting the fish and game in Canada without an overarching law that imposes the possession/domination relationship onto Aboriginals, this exemption is another example of a government/Native approach to what

the Supreme Court of Canada upheld the constitutional rights of an American indigenous member of the Lakes Tribe of Washington state to hunt in the Tribe's traditional lands in British Columbia based.[25]

and natural resources. Currently, there are 12 co-managed agreements in over 35 of South Australia's parks and reserves covering 64% of all eligible land.[29]

**United States**

In 2020, the United States Supreme Court has made progress in recognizing Native American rights to land in the case of *McGirt v. Oklahoma*.[30] In the case, the U.S. Supreme Court found that a significant amount of land in eastern Oklahoma is an American Indian Reservation and belongs to the Muscogee (Creek) peoples.[31] As a result, the court relied on treaties to protect Muscogee rights to land and "the unrestricted right of self-government."[32]

Further, in April of 2021, the U.S. Department of Interior moved to reverse a Trump-era order, and make it easier for indigenous Nations to reclaim lands in trust. Order 3400 changes the review process of applications for land trusts, reducing the complexities and speeding up the process. Ultimately, Interior Secretary Deb Haaland stated, ""Our actions today will help us meet that obligation and will help empower Tribes to determine how their lands are used — from conservation to economic development projects."[33]

**New Zealand**

The Waitangi Tribunal was established as a permanent commission of inquiry in 1975 to make recommendations on claims brought by the Maori related to actives by the New Zealand Crown that may breach the promises made in the Waitangi Act. The Treaty of Waitangi was signed in 1840, but the English and te reo language versions had discrepancies. However, the treaty remains one of the longest surviving reconciliation projects in the world. The Tribunal spans topics including indigenous language preservation, environmental stewardship, copyright infringements, and cultural artifacts. While historically overlooked, it has grown significantly in its prominence in the last twenty years as a way to effectively address and approach the inequities between the Maori and non-Maori in New Zealand. Given more national leadership they have been able to begin addressing the structural racism within their legal system, slowly dismantling the harmful legacy left by the Doctrine of Discovery.[34]

In the 1970's the Tribunal was set in place as a permanent commission of inquiry to better clarify and install Maori rights in the legal system as growing discrimination and social marginalization grew. As of 2020 a national poll showed that 27% of New Zealanders though the treaty should play an even larger role in national law. Recognizing the positive effects it has had

---

[29] *Strong People, Strong Country: Co-Management in South Australia* (May 19, 2016) (accessed using YouTube) https://www.youtube.com/watch?v=_14WwT6veZM&feature=youtu.be.

[30] *United States – Muscogee (Creek) Nation Treaty — Federal Indian Law — Disestablishment of Indian Reservations — McGirt v. Oklahoma* 134 Harv. L. Rev. 600 (2020) https://harvardlawreview.org/2020/11/mcgirt-v-oklahoma/.

[31] Id.

[32] Id.

[33] "Interior Department Takes Steps to Restore Tribal Hom ˛ R- rl µ ° ξ a " t

in New Zealand society and environment, there is growing momentum toward finding common ground and correcting the harms of the past decades.[35]

In 2011, the first Maori was appointed to the New Zealand Supreme Court, Justice Joe Williams. He sees *tikanga*, the Maori cultural approach, beginning to play a larger role in New Zealand governance. He explained how integrating local governments needs with Māori culture creates "something that is better than each individually" and is ushering an a new era based in partnership.[36]

In 2017 the New Zealand Parliament passed the Te Awa Tupa (Whanganui River Claims Settlement) Bill to recognize the Whanganui River as a person in the eyes of the law. This effort came about via the Waitingi Tribunal. Giving it the same legal rights as a person reflects and legally recognizing the valued ancestral relationship the Whanganui iwi people have with the river.[37]

In the 1800's and 1920's the river was damaged from steamers and mineral extraction, degrading this cultural, spiritual, and nutritional space. This is a clear example of what a move toward renouncing the Doctrine of Discovery looks like today. As part of this compromise one representative of the state, and one of the Whanganui iwi will be appointed to act on the river's behalf and protect its interest.[38]

**India**

Five days after New Zealand granted legal personhood to the Whanganui River the Indian state court of Uttarakhand ordered that the Ganges and its main tributary the Yamuna would be given human entity status. The river Ganges is considered the holiest river in the country, and is worshiped and respected by many. With legal personhood if someone was to pollute the river, they would be charged the same as if harming a human. The court appointed three officials to act as legal custodians to protect the rivers and create a management system. While significant money had gone into cleaning up the river, it has been ineffective without a fundamental shift in how the river was governed. With personhood status it would have no longer been governed as something in the environment that needs to be "fixed" but respected and treated as a living entity with inherent rights.[39] However, four months later, the high court overturned the legal personhood of the river because it was deemed to be unsustainable in the law.[40]

---

[35] Id.
[36] Id.
[37] "Innovative Bill Protects Whanganui River with Legal Personhood," *New Zealand Parliament* (last visited Aug. 29, 2021) https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/.
[38] Id.
[39] "Ganges and Yamuna Rivers Granted Same Legal Rights ad Human Beings," *The Guardian* (last visited Aug. 29, 2021) https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings.
[40] A Vaidyanathan, "No, Ganga and Yamuna are Not Living Entities says Supreme Court," *NDTV* (last visited Aug. 29, 2021) https://www.ndtv.com/india-news/no-yamuna-and-ganga-are-not-living-entities-says-supreme-court-1721833.

the decisions at the forthcoming WCC will be the first time that Indigenous Peoples' member organizations will have an opportunity to review the IUCN strategy. The vote on IUCN Members DoD motion is important in this context.

In addition, IUCN's expert Commissions have also provided scholarly and professional leadership by engaging indigenous peoples in its work. For example. the Commission on Environmental Economic and Social Policy (CEESP) has been led by indigenous experts and furthered studies on indigenous stewardship of nature.[49] The World Commission on Protected Areas (WCPA) has ensured indigenous leaders were instrumental in the 1st World Congress on Environmental Law, and the IUCN CEESP/WCEL Indigenous Peoples and Environmental Law Joint Specialist Group focuses on deepening awareness, providing analysis, and offering recommendations for conservation that takes into account indigenous peoples' distinct human

Despite adoption of the UN Declaration on the Rights of Indigenous Peoples, the DoD is still valid law in many countries.[54] Indigenous communities are found in 30% of the Earth's natural areas. To stem the huge loss of biodiversity globally, their support is essential. It is a great moment for IUCN, therefore, to respect IUCN's adoption of the UN Declaration on the Rights of Indigenous Peoples by adopting this motion. Without renunciation of the DoD, systemic patterns of oppression and denial of rights will be allowed to persist. The motion soundly states that: "The denials of the human rights of indigenous peoples are fundamentally unjust and impede IUCN policies and programmes to restore ecologically and socially just relations among all living beings."[55]

*Achieving IUCN's vision requires renunciation of DoD*

IUCN's purpose is to achieve a "just world that values and conserves nature."[56] The on-going existence of the DoD is both inconsistent with this vision and obstructs IUCN's ability to achieve its objective. The DoD contradicts IUCN's purpose because the DoD does not value nature. The DoD condones taking of land from indigenous peoples whose cultures and religions deeply respect and value nature, in order to own, develop, and destroy, disregarding the value of inherent worth and dignity of nature. The DoD has justified the denial of human rights of indigenous peoples around the globe.[57] We cannot live in a "just world," if indigenous peoples are killed, maligned, and denied basic human rights. The DoD destroys the community of life that

destruction of nature and indigenous communities. This unfettered extraction is not only unsustainable and detrimental to our environment, but the resulting unequal distribution of resources is also unfair to indigenous communities, who, despite being exploited, very often are living in poverty.

In order to achieve conservation and protect Earth's environment, IUCN needs to use every resource available for this fight. Indigenous peoples need to be part of the solution. "Sustainable outcomes can best be achieved by combining objectives for resource-use efficiency, with ecosystem-based management and improved human health, drawing on scientific, indigenous and local knowledge."[61] Indigenous people know and maintain biodiversity, and they have policies and practices for nature conservation with which all IUCN Members should be engaging. GEO-6 calls for cooperation with and use of indigenous peoples' ancestral knowledge to help achieve sustainability. To cope with the impacts of climate change,

respecting the importance of indigenous knowledge and cultures and their contribution to equitable sustainability. Principle 11 expressly provides that: "Indigenous and Tribal Peoples Indigenous and tribal peoples' rights over, and relationships with, their traditional and/or customary lands and territories shall be respected, with their free, prior, and informed consent to any activities on or affecting their land or resources being a key objective." This is essential to realizing the first principle: stating the obligation to protect nature. "Each State, public or private entity, and individual has the obligation to care for and promote the well-being of nature, regardless of its worth to humans, and to place limits on its use and exploitation."

UNEP's First Global Report on the Environmental Rule of Law[66] emphasized the world-wide acknowledgement of these rule of law norms. *By renouncing the DoD as an unjust legal fiction, IUCN will be strengthening the environmental rule of law.*

*IUCN cannot successfully implement UNDRIP while the DoD remains in place*

The DoD stands in the way of fulfilling the rights promised to indigenous people under the UN Declaration of the Rights of Indigenous Peoples (UNDRIP).[67] Having endorsed UNDRIP, IUCN has a duty under international law to respect and advance UNDRIP, and never to act in denigration of its aspirational norms.

The DoD still impacts indigenous communities, who are being affected worse than other communities by the current COVID19 pandemic—due to their lack of access to clean water and

seizures of their assets, and occupying the lands where they lived, through proclaiming the so-called legal ‘Doctrine of Discovery’;

MINDFUL that many governments seek to establish just and equitable relations with the indigenous peoples in the lands of which they are stewards, and that the Arctic Council has embraced the Permanent Representatives of Indigenous Peoples as full participants in the stewardship of the Arctic regions;

RECOGNISING that many post-colonial legal regimes still formally recognise the so-called ‘Doctrine of Discovery’, despite most acknowledging that indigenous peoples have long inhabited lands European powers claimed to have discovered; and

CONVINCED that acknowledgements of truth and testimonies for reconciliation are essential predicates for building social justice and peaceful relations among peoples;

The IUCN World Conservation Congress 2020, at its session in Marseille, France, 3-11 September 2021:

1. RENOUNCES the paradigms of inequality between human beings, and recognize that we can all learn from everyone, and that it is time to value indigenous wisdom and knowledge

2. REQUESTS Council, in alignment with the IUCN Programme 2021-24, to explore and explain best practices for involving indigenous peoples in co-stewardship of protected natural areas, conservation of nature, and sustainable use of species, and other appropriate activities for the care of Mother Earth;

3. URGES all states to appoint indigenous peoples as conservators of the world's natural heritage.

4. INVITES the leaders of all nations to promote new paradigms in conservation, where the ancestral knowledge of indigenous peoples is incorporated, in the struggle to conserve the nature of the planet.