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Environmental Racism: How Governments Are Systematically Poisoning Indigenous Communities & the U.N.'s Role

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ENVIRONMENTAL RACISM: HOW GOVERNMENTS ARE
SYSTEMATICALLY POISONING INDIGENOUS COMMUNITIES & THE
U.N.'S ROLE

By: Maia Dombey*

Abstract

This note examines the practice of toxic waste dumping on indigenous lands and how it fits within the broader concept of environmental racism. It further evaluates the international human rights framework and how the United Nations and other international bodies interact with this concept and provide means for protection against this illicit practice. Further, it examines the role of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes and how he, in his role as Special Rapporteur, can provide relief to indigenous communities suffering the effects of this governmental practice. It delves into such occurrences in specific countries, as well as evaluates the universal human rights of the Right to Information and the Right to Life.

| | |
|--|-----|
| INTRODUCTION | 132 |
| TOXIC WASTE DUMPING AND ITS EFFECTS ON INDIGENOUS PEOPLES | 133 |
| A. <i>Indigenous Land and its Spiritual Connections</i> | 133 |
| COUNTRY STUDIES | 137 |
| A. <i>United States</i> | 137 |
| B. <i>Canada</i> | 138 |
| C. <i>Australia</i> | 140 |
| THE UNITED NATIONS AND THE ENVIRONMENT | 142 |

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| | |
|--|-----|
| THE RIGHT TO INFORMATION | 147 |
| A. <i>Report of the Special Rapporteur on Toxins on the Right to Information</i> | 147 |
| B. <i>What is the Right to Information?</i> | 150 |
| C. <i>How it applies to environmental practices and indigenous communities</i> | 151 |
| THE RIGHT TO LIFE | 152 |
| THE SPECIAL RAPPOORTEURS' ROLE..... | 152 |

INTRODUCTION

The lands of marginalized populations are disproportionately and deliberately targeted by the industrial toxic waste disposal systems. Indigenous populations in countries like the United States and Canada, among others, are particularly vulnerable targets to these industries, as they are typically assumed to be the path of least resistance for nuclear and other toxic waste management strategies. These practices pose a serious threat to the lives and wellbeing of these indigenous peoples, groups which have a significant spiritual relationship to their land and place great reliance on it for the furtherance of their societies. Of particular issue is the blatant disregard for the notion of consent while dumping toxic wastes on indigenous lands, which often happens without warning or informing its inhabitants of either the occurrence of such a dump or the inevitable consequences it will have on the land and the people's health. This note will argue that the United Nations should play an active role through its Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on Human Rights and the Environment by enacting policies and enforcement mechanisms to prevent this illicit waste dumping in accordance with their overarching mantra of protecting human rights and valuing human integrity. Part I of this note will analyze Indigenous populations' relationships to their land – both in a spiritual capacity and as their main resource point and will delve into the practice of toxic waste dumping and how it affects marginalized communities. Part II will delve into specific instances of toxic waste dumping on indigenous lands in various countries and what effects they had on the population. Part III will analyze how the United Nations and its human rights mechanisms address such a practice, including the mandate and reports of the

aforementioned UN Special Rapporteur. Part IV will analyze how unethical toxic waste dumping on Indigenous lands interferes with Indigenous peoples' human rights to information. Part V deals with how the same practices are interfering with and sabotaging indigenous peoples' right to life. Last, Part VI calls each Special Rapporteur to action on this topic.

TOXIC WASTE DUMPING AND ITS EFFECTS ON INDIGENOUS PEOPLES

A. Indigenous Land and its Spiritual Connections

Indigenous peoples in the United States and abroad substantially rely on their land for their basic resources, but, beyond this, they also have a spiritual and cultural connection to the land – the land is their “food, [] culture, [] spirit and identity.”¹ This particularly strong relationship to the land is due to the belief that Indigenous peoples' ancestors continue to live in the land, the water, and the sky where these communities live for countless generations. The spiritual connection Indigenous people have to their land derives from “cultural sites” being seen as “living museums” of their ancestors. Such sites include “dreaming sites, archaeological sites, water holes, [and] burial grounds.”² Such a spiritual connection to the land is true of all Indigenous peoples, not only those in the United States. Each First Nation of Canada, for example, has different but substantial spiritual and cultural connections to its land. In Canada, this relationship to land is “constitutionally recognized and legally protected.”³ By 2014, approximately 100 indigenous comprehensive land claims were being negotiated between First Nations and the Canadian government, recognizing their relationship to their land and furthering indigenous self-government in relation to these lands.⁴ Similarly, Australian Indigenous populations value their spiritual

¹ Jens Korff, “Aboriginal Spirituality and Beliefs” CREATIVE SPIRITS (Aug. 23, 2017), <https://www.creativespirits.info/aboriginalculture/spirituality/>.

² *Id.*

³ “First Nation Relationship to the Land,” INDIGENOUS CORPORATE TRAINING INC. (May 7, 2015), <https://www.ictinc.ca/blog/first-nation-relationship-to-the-land>

⁴ John Leonard Taylor, “Indigenous Peoples and Government Policy in Canada,” THE CANADIAN ENCYCLOPEDIA, Feb. 7, 2006, available at <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-people-government-policy>.

connection to their land. Land is “the core of all spirituality”⁵ for Australian Indigenous peoples, and they consider the land their “mother, the giver of life who provides them with everything they need.”⁶ These Indigenous people fight for their right to “country,” which refers to their origin and ancestral relationship to specific parts of the land of Australia.⁷ They consider the land their source of strength, and a place that “holds the stories of human survival across generations.”⁸

B. Land as Used for Survival and Economic Growth

Beyond their spiritual and ancestral relationship to land, preservation of Indigenous land can be imperative to the survival and prosperity of Indigenous individuals and entire tribes. Many Native and Indigenous communities who used to survive solely on hunting and gathering practices have expanded into the practice of trade and selling of produce and game, in addition to other economic activities, in order to advance their economic gain. Indigenous populations often base significant portions of their economy around natural resources available in their land. “In Asia, most indigenous peoples are primarily small-scale agriculturists, fishing, hunting and gathering from nearby forests,” and in most of these communities, “access to land and resources is central to [their] livelihoods.”⁹ In these communities, food is produced from the land primarily to feed indigenous families and then additionally sold in local markets. While many of these societies have modernized and integrated modern economic ventures, like

⁵ “Indigenous Australians: Australia’s First Peoples Exhibition 1996-2015,” AUSTRALIAN MUSEUM (Jun. 12, 2018), <https://australianmuseum.net.au/about/history/exhibitions/indigenous-australians/>.

⁶ “The Land,” WORKING WITH INDIGENOUS AUSTRALIANS (Feb. 19, 2017), http://www.workingwithindigenoustralian.info/content/Culture_3_The_Land.html.

⁷ Res005, “Relationship to Country: Aboriginal People and Torres Strait Islander People,” Queensland Curriculum & Assessment Authority (Mar. 2008), https://www.qcaa.qld.edu.au/downloads/approach2/indigenous_res005_0803.pdf.

⁸ Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* 27 (2002).

⁹ Jannie Lasimbang, *Indigenous Peoples and Local Economic Development*, Pro 169 (2008), <http://pro169.org/res/materials/en/development/IPs%20and%20Local%20Economic%20Development.pdf>

casinos and other commercial forms of economic production,¹⁰ retaining agricultural and environmental resources as an integral part of their economy and subsistence puts these communities at a grave disadvantage and threatens their existence when there is negative environmental impact on their resources due to pollution.

C. *What is Environmental Racism?*

And yet beside their sacred and pronounced connection to their land and their reliance on it for subsistence, indigenous peoples suffer greatly at the hands of public governments and private actors illicitly dumping toxins on the lands on which these and other communities live. The practice of toxic waste dumping on lands of underprivileged populations is neither new nor exclusive to Indigenous populations. Governments around the world continue to participate in what many have coined “environmental racism.” Environmental racism, though a contested term, is the deliberate and systemic pattern of:

“racial discrimination in environmental policy making, in the enforcement of regulation of laws, in the deliberate targeting of communities of color for toxic waste disposal and the siting of polluting industries, in the official sanctioning of the life-threatening presence of poisons and pollutants in communities of color, in the history of excluding people from the mainstream environmental groups, decision-making boards, commissions, and regulatory bodies.”¹¹

In the United States, toxic contamination of basic resources continue to occur in places like Flint, Michigan, or Butte, Montana, places now called “superfunds” – places in the United States which the Environmental Protection Agency has designated as

¹⁰ *Id.*

¹¹ Beverly Jacobs, *Environmental Racism on Indigenous Lands and Territories*, (May 20, 2010), (citing Lori A. Colomeda and Eberhard R. Wenzel, *Medicine Keepers: Issues in Indigenous Health* CRITICAL PUB. HEALTH, Vol. 10, No. 2, 243-256. <http://www.ldb.org/indheal.htm>; see also, Robert D. Bullard (ed.) *Confronting Environmental Racism: Voices from the Grassroots*, (South End Press 1993).

particularly hazardous to the environment and to human health.¹² “The biggest polluters in the U.S. – factories, warehouse and other facilities using toxic substances – are overwhelmingly located in poor, non-white neighborhoods,”¹³ and studies have theorized that these poorer communities are “sacrifice zones”¹⁴ in which these large polluters will receive less pushback and focus than if they were placed in whiter, more affluent communities. “In fact, places that are *already* disproportionately populated by minorities, *and where their numbers are growing*, have the best chances of being selected”¹⁵ in the United States, placing these communities at a further disadvantage.

Indigenous people in the United States specifically are at the highest disadvantage of all underprivileged minority communities, with “devastating chronic unemployment [and] pervasive poverty”¹⁶ that makes them a significant target for these large polluters looking for communities of which to take advantage. Additionally, Indigenous communities are particularly vulnerable to the effects of unsafe toxic waste dumping and environmental racism because “these disadvantages are multiplied by dependence on food supplies closely tied to the land in which toxic materials have been shown to accumulate.”¹⁷ The toxics industry has “exploited the vulnerability of economically and politically disenfranchised communities”¹⁸ and thus continuously interferes with indigenous peoples means of life and their cultural identity. For Indigenous peoples, “land is not just physical and biological environment. The land is the ashes of their ancestors on whose should [they] stand in this generation”¹⁹ and plays a significant role

¹² Kacy Burdette, *See Aerial Photos of the Worst Hazardous Waste Sites in the U.S.*, FORTUNE (Oct. 30, 2018), <http://fortune.com/2018/10/30/aerial-photos-superfund-sites-usa/>.

¹³ Erik Sherman, *If You're a Minority and Poor, You're More Likely to Live Near a Toxic Waste Site*, FORTUNE (Feb. 4, 2016), <http://fortune.com/2016/02/04/environmental-race-poverty-flint/>.

¹⁴ *Id.*

¹⁵ Zoë Schlanger, *Race is the Biggest Indicator in the US of Whether you Live Near Toxic Waste*, QUARTZ (Mar. 22, 2017), <https://qz.com/939612/race-is-the-biggest-indicator-in-the-us-of-whether-you-live-near-toxic-waste/>.

¹⁶ Daniel Brook, *Environmental Genocide: Native Americans and Toxic Waste*, 57 AM. J. OF ECON. & SOC., 105, 106 (1998).

¹⁷ *Id.* at 105 (quotations omitted) (citing *By Our Own Lives: Moving the Foundation Stone of Racism* Ron Glass).

¹⁸ *Id.*

¹⁹ Jacobs, *supra* note 11.

in their rituals, as well as their way of life. Indigenous communities' livelihood often depends on the state of their land, including the condition of their water, soil, and livestock – all of which are in peril at the hands of corporations recklessly dumping toxins on their land.

COUNTRY STUDIES

A. *United States*

As previously mentioned in this note, the United States government and its major companies engage in environmental racism and extensive practices of illegal toxic waste dumping on marginalized communities, including predominantly Black communities and land on which Native American tribes live. In recent history, the government of the United States began an effort to install the Dakota Access Pipeline (“DAPL”) on the Standing Rock Indian Reservation in North Dakota. This effort erupted a nationally renowned movement titled #NoDAPL. The Standing Rock Reservation filed suit against the United States Army Corps of Engineers and the Dakota Access corporation, alleging that the DAPL, among other things, will discharge oil and chemicals into the waters at multiple locations on Standing Rock land – disrupting their water source as well as their historical and cultural connections to the land.²⁰ The DAPL will also cross “waters of utmost cultural, spiritual, ecological and economic significance to the Tribe and its members.”²¹

The Keystone XL Pipeline was approved by President Trump to cross into the United States in 2017 after the previous government denied its construction twice upon evaluating environmental impact studies. This pipeline is owned by TransCanada, and it was built to cross from Alberta, Canada, all the way down to Nebraska. In its path, it crosses the Fort Belknap Indian Reservation, running “directly through sacred sites, historic sites, and ancestral lands of the Gros Ventre and Assiniboine Tribes

²⁰ Compl. for Declaratory and Injunctive Relief at ¶¶ 3, 8, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F.Supp.3d 50 (No. 1:16-cv-01534), 2016 WL 4033936 (D.D.C.).

²¹ *Id.* at ¶ 9.

of Fort Belknap.”²² It also crosses through the South Dakota Great Sioux Reservation and through Rosebud’s historic reservation, disrupting Indigenous lands further.²³ The Keystone XL Pipeline ruptured in North Dakota in 2011, spilling roughly 16,800 gallons of tar sands, and again in South Dakota spilling another 16,800 gallons of tar sands in 2016. In November of 2017 and spilled roughly 407,000 gallons of tar sands along its path.²⁴ These spills wreak havoc on indigenous lands and interferes with the tribal members’ ability to hunt and fish for subsistence and disrupts their economy by disrupting the availability of fish sold by tribal members.²⁵ It interferes with their right to life not only in that it removes a source of food for these Indigenous people but it also removes a source of income which helps them live. Further, the XL Pipeline interferes with the Rosebud reservation’s water supply, crossing both the Rosebud Water System and the Mni Wiconi Project – the latter of which provides one sixth of all water in South Dakota.²⁶ It would also cross the Tripp Country District’s pipelines over 20 times, and these pipelines are the water source for several surrounding Tribal Communities.²⁷

B. Canada

Canadian First Nations in Manitoba were severely affected by illicit toxic waste dumping, with seventy out of seventy-seven “high priority” contaminated sites in Manitoba belonging to First Nation communities.²⁸ These seventy-seven sites include only those sites for which the Canadian government has a cause of contamination – thus it is not even an inclusive list of all the

²² Compl. for Declaratory and Injunctive Relief at ¶ 32, *Rosebud Sioux Tribe & Fort Belknap Indian Cmty. v. U.S. Dep’t of State*, No. 4:18-cv-00118-BMM, 2019 WL 2373054.

²³ *Id.* at ¶ 36.

²⁴ *Id.* at ¶ 39.

²⁵ *Id.* at ¶ 61.

²⁶ *Id.* at ¶ 63-65.

²⁷ The Tribal communities of Winner, Ideal, Dixon, Bull Creek, Milk’s Camp, and Wood are all served by the Tripp County Water Users District. Rosebud provided half a million dollars to the Tripp County District to upgrade its water system and provide safe drinking water to these communities.

²⁸ Martha Troian, *The Toxic Contamination of Manitoba First Nations Communities*, BRIARPATCH (Sep. 2, 2015), <https://briarpatchmagazine.com/articles/view/the-toxic-contamination-of-manitoba-first-nations-communities>.

contamination of Canadian First Nation land.²⁹ In Shamattawa First Nation lands, there are over 11,000 tons of petroleum hydrocarbons in the groundwater soil.³⁰ In these lands, “there are approximately 138 people living within a one-kilometer radius of the contaminated sites in Shamattawa First Nation, with 1,094 people living within a five-kilometer radius, and 1,205 people living within 10-50 kilometers.”³¹ In Sayisi Dene First Nation lands there are two sites contaminated with 3,205 to 5,310 tons of petroleum hydrocarbons and another site polluted with polycyclic aromatic hydrocarbons—another toxic substance.³² In these lands, the contamination was caused by faulty diesel pipes causing major spills on two different sites.³³ On these lands, “as many as 184 people live within a one-kilometer radius of the two contaminated sites in Sayisi Dene First Nation, and a further 319 people within 5-50 kilometers.”³⁴ These sites have experienced several cancer-caused deaths, which the people believe were a direct result of the contaminants in their land that have yet to be excavated properly. As mentioned above, Canada has yet to ratify UNDRIP, which would bind the Canadian government to seek consent from First Nations before conducting these activities on their land and presumably prevent significant loss of life and of land.

According to the Canadian federal government, there are 355 First Nations on whose land there is severe pollution of the water and soil—over half of all First Nations in Canada. This database, however, does not count incidents of arsenic poisoning in N’dilo First Nation soil or unsafe mercury dumping on Grassy Narrows First Nation land as they are outside of federal jurisdiction and are thus not counted within the federal database.³⁵ The contamination in N’Dilo occurred after industrialization of

²⁹ *Id.*

³⁰ *Id.* “Petroleum hydrocarbons are chemical compounds that are found in oil, gas, diesel, and other petroleum-based fuels. Some of these compounds are believed to be carcinogenic or to affect the central nervous system in humans. PHCs are among the most common soil contaminants in Canada and are often caused by fuel spills.”

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Hillary Beaumont, *The Monster Underground*, VICE NEWS, (Sep. 6, 2017), https://news.vice.com/en_ca/article/3kpi9k/more-than-half-of-first-nations-communities-in-canada-are-affected-by-industrial-pollution.

reservation lands occurred without First Nation Elders' consultation.³⁶ Miners used arsenic trioxide, a known carcinogen, which contaminated the water and air supply and is even more toxic than other forms of arsenic.³⁷ Members of N'Dilo since reported heightened numbers of cancer-related deaths—which they attribute directly to this mining practice.³⁸ In Ontario, a river poisoned over 300 members of the Grassy narrows and White Dog First Nations after a pulp and paper mill was allowed to dump mercury into it, contaminating the river sediment at least 250 kilometers and the wildlife within the river.³⁹ It took 50 years for the government of Ontario to even provide the funds to begin a cleanup, allowing members of these First Nations to continually suffer the “birth defects, learning disabilities, numbness in the feet and hands, and anxiety and depression” that are often caused by such high concentrations of mercury.⁴⁰ The Canadian government is also known to have destroyed the sulphuric acid plant on the Serpent River reservation that was intended to serve nearby uranium mines, which are thought to be the cause of 1,246 lung cancer-related deaths in the area.⁴¹

C. Australia

In Australia, the government engaged in a years-long debate with various Aboriginal peoples over imposing a national nuclear waste dump on their lands in South Australia from 1998-2004.⁴² From 2006-2014, the government again fought with Australian Aboriginal people to establish another nuclear dump site on Muckaty land.⁴³ In 2015, the South Australian government enacted a plan to “import 13,8000 tonnes of spent nuclear fuel and 390,000 cubic metres of intermediate level waste for storage and

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Hillary Beaumont, *Ontario is Finally Cleaning up a River that has Poisoned First Nations for Decades*, VICE NEWS, (Jun. 28, 2017), https://news.vice.com/en_ca/article/mb9km3/ontario-is-finally-cleaning-up-a-river-that-has-poisoned-first-nations-for-decades.

⁴⁰ *Id.*

⁴¹ Beaumont, *supra* note 35.

⁴² Jim Green, *Radioactive Waste and the Nuclear War on Australia's Aboriginal People*, FRIENDS OF EARTH AUSTRALIA, <https://www.foe.org.au/radioactive-waste-and-nuclear-war-australias-aboriginal-people>

⁴³ *Id.*

disposal as a commercial venture” on Aboriginal land.⁴⁴ The people of that land called the process of site selection “disgusting and a form of *cultural genocide*.”⁴⁵ In opposition, the Aboriginal Congress of South Australia proposed the following statement:

“We, as native title representatives of lands and waters of South Australia, stand firmly in opposition to nuclear developments on our country, including all plans to expand uranium mining, and implement nuclear reactors and nuclear waste dumps on our land . . . many of us suffer to this day the devastating effects of the nuclear industry and continue to be subject to it through extensive uranium mining on our lands and country that has been contaminated. We view any further expansion of industry as an imposition on our country, our people, our environment, our culture and our history. We also view it as a blatant disregard for our rights under various legislative instruments, including the founding principles of this state.”⁴⁶

At the time the site was announced, the government had yet to commission any study or report on the effects of the site on the indigenous populations nearby.⁴⁷ The leaders of these Aboriginal groups say their land in question “is not only significant culturally and spiritually but priceless—heritage sites full of archaeological treasures including burial mounds, fossilized bone and countless stone tools.”⁴⁸

⁴⁴ *Id.*

⁴⁵ Alex Mann, *Indigenous Owners Appeal to Minister’s “Human Side” to Shelve Proposed Nuclear Waste Site*, ABC AUSTRALIA (May 26, 2016), <https://www.abc.net.au/7.30/indigenous-owners-appeal-to-ministers-human/7450192> (emphasis added).

⁴⁶ Green, *supra* note 42.

⁴⁷ See Timothy Large, *Indigenous Australians Fight Nuclear Dump Plan on “Sacred Land,”* REUTERS, (Aug. 17, 2016), <https://www.reuters.com/article/us-australia-landrights-indigenous/indigenous-australians-fight-nuclear-dump-plan-on-sacred-land-idUSKCN10S1PD>.

⁴⁸ *Id.*

THE UNITED NATIONS AND THE ENVIRONMENT

The United Nations, through the Office of the High Commissioner, established a system of Special Rapporteurs— independent human rights experts who conduct investigations and publish reports on thematic human rights issues or country-specific crises.⁴⁹ These Special Rapporteurs cover “all human rights: civil, cultural, economic, political, and social”⁵⁰ in an effort to advance international human rights on behalf of the United Nations. These Special Rapporteurs visit specific countries and investigate, “act on individual cases and concerns...by sending communications to States and others in which they bring alleged violations or abuses to their attention,” and produce annual reports to the UN Human Rights Council, and often to the UN General Assembly as well.⁵¹ These reports not only examine particular nation crises or the general human rights situations in specific countries, but also provide detailed and explicit recommendations on how such crises can be mended. Such recommendations are usually directed to the government and outline specific actions they should take. Examples include, but are not limited to, the following: reforming state mechanisms for addressing crime,⁵² conducting investigations into human rights violations and making the findings of those investigations publicly accessible, erecting monuments and museums to commemorate the victims of the crises and remind the nation and promote a lack of recurrence.⁵³ While it is at each government’s discretion whether or not to implement these recommendations, as the Special Rapporteurs do not have any binding power on neither the UN nor individual national governments, these country reports often serve as a driving force of publicity and public pressure, which is ultimately necessary to influence governments to address human rights issues in order to

⁴⁹ Special Procedures of the Human Rights Council, <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> (last visited Dec. 29, 2019).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See González et al. (“Cotton Field”) v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 506 (2009).

⁵³ See *id.*

avoid international scrutiny or political retribution.⁵⁴ The reports garner international notice and focus on the human rights violations or crises occurring in specific nations, which can have a significant effect on international relations and potentially on trade between countries.

The United Nations Special Rapporteurs have and continue to cover a myriad of situations, nations, and peoples. Indigenous peoples are a group that has obtained the attention of the UN, through the establishment of a Special Rapporteur and through various resolutions and studies. The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), introduced into the General Assembly in 2007, outlines specific rights afforded to all indigenous peoples in the world—a focus which is significant in bringing attention to the rights of a persistently marginalized group. UNDRIP specifically recognized Indigenous people’s relationship to their environment, outlining particular rights they have to protect their land, and is often the document upon which other international bodies and individual actors rely in order to evaluate the rights of indigenous peoples in various contexts. Article 29 of UNDRIP says “[i]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources,” and outlines states’ duties in maintaining this right, including taking “effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent,” and providing programs to restore the health of

⁵⁴ For example, the crisis in Ciudad Juarez, Mexico where women were being murdered at inordinately high rates garnered the attention of several Special Rapporteurs, including the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on Women’s Rights of the Inter-American Commission on Human Rights. These independent actors all produced writings on the crisis expressing concern, which ultimately led to an investigation by the CEDAW committee. The investigation then progressed into a case before the Inter-American Court of Human Rights where the court found the Mexican government culpable and provided specific recommendations—many of which the government implemented in an effort to repair the crisis. See Jacqui Hunt & Shanta Bhavnani, *Using the Inquiry Procedure to Ensure Gender Equality*, OPTIONAL PROTOCOL TO CEDAW (Aug. 19, 2012) <https://opcedaw.wordpress.com/tag/ciudad-juarez-inquiry/>.

indigenous people adversely affected by improper dumping of toxic waste materials.⁵⁵

The UN's interest in indigenous land issues is evident beyond UNDRIP's delineation of a right. In fact, the UN has maintained attention to indigenous right to land since the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities conducted a Study on the Problem of Discrimination against Indigenous Populations in 1981.⁵⁶ This study recognized indigenous peoples' determination to:

"preserve, develop and transmit to future generations their ancestral territories," and called attention to the illicit practice of atomic testing on indigenous lands, which was carried out "over protest and complaints of indigenous peoples, who feel that . . . they have nowhere to go and that they must stay where they are, on their lands, and who demand respect for ecological balance and healthy environment."⁵⁷

After this study, the UN established a Working Group on Indigenous Populations, the International Year of the World's Indigenous People (1993), the International Decade of the World's Indigenous Peoples (1995-2004), and the Permanent Forum on Indigenous Peoples. The Permanent Forum, established in 2000, was formed to "provide expert advice and recommendations on indigenous issues" to the Economic and Social Council, "raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system," and "prepare and disseminate information on indigenous issues."⁵⁸ The UN ultimately established a Special Rapporteur on the Rights of Indigenous Peoples. This Special Rapporteur promotes good relationships between indigenous people and state governments, reports on human rights situations in indigenous communities of

⁵⁵ G.A. Res. 61/295 (Oct. 2, 2007).

⁵⁶ See INDIGENOUS PEOPLES AT THE UN, <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited Dec. 29, 2019).

⁵⁷ Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.4 (1983).

⁵⁸ INDIGENOUS PEOPLES AT THE UN, *supra* note 56.

selected countries, and conducts thematic studies, among other responsibilities.⁵⁹

In 2011, the United Nations Human Rights Council appointed a Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, whose mandate includes examining the impact of improper toxic waste disposal on the rights to food, adequate housing, health, water, and life.⁶⁰ In this capacity, the Special Rapporteur conducts country visits and produces reports on toxic management practices in countries around the world and how they affect the human rights of persons within those nations. Through this work, the Special Rapporteur identified that “children in low-income, minority, *indigenous* and marginalized communities are more at risk, as exposure levels in such communities are often higher.”⁶¹ The Special Rapporteur, along with academics and researchers, called attention the question of “‘environmental racism’ and ‘environmental justice’ that undermine human dignity, equality and non-discrimination.”⁶² Environmental racism has manifested through industries “exploit[ing] the vulnerability of economically and politically disenfranchised communities” by dumping their waste on lands whose inhabitants they expect will put up the least resistance.⁶³

In 2012, after initially existing as an Independent expert, the Special Rapporteur on Human Rights and the Environment mandate was established⁶⁴ and subsequently extended to cover “human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.”⁶⁵ Like other Special Rapporteurs, the person in this position is responsible for examining the status of this issue in countries around the world. This includes “to study...human rights mechanisms, local authorities, national human rights institutions, civil society

⁵⁹ See Special Rapporteur on The Rights of Indigenous Peoples: Introduction, <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx> (last visited Dec. 29, 2019).

⁶⁰ See G.A. Res. 36/15 (Oct. 10, 2017).

⁶¹ U.N. Doc. A/HRC/30/40 (2015) (emphasis added).

⁶² *Id.*

⁶³ Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36 ENVIRONMENT: SCIENCE AND POLICY FOR SUSTAINABLE DEVELOPMENT (1994).

⁶⁴ See G.A. Res. 19/10 (Apr. 19, 2012).

⁶⁵ G.A. Res. 28/11, Human Rights and the Environment (Apr. 7, 2015).

organizations, including those representing indigenous peoples and other persons in vulnerable situations, the private sector and academic institutions, the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.”⁶⁶ John Knox, the first Special Rapporteur of this kind, submitted 16 Framework Principles on Human Rights and the environment, in which he included the third Framework Principle, which “applies a basic human rights norm to environmental issues: States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.”⁶⁷ He also asserted, most directly addressing indigenous rights, that “States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:

- (a) Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
- (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;
- (c) Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;
- (d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.”⁶⁸

⁶⁶ *Id.*

⁶⁷ UN Special Rapporteur on Human Rights and the Environment, *16 Framework Principles on Human Rights and the Environment in final report to UN Human Rights Council*, GREAT LAKES LAW (Feb. 2018),

<https://www.greatlakeslaw.org/blog/2018/02/un-special-rapporteur-on-human-rights-and-the-environment-presents-16-framework-principles.html> (quoting John Knox (@JohnHKnox), TWITTER (Feb. 3, 2018, 11:33 AM), <https://twitter.com/JohnHKnox/status/959827307560144896>).

⁶⁸ John Knox (Special Rapporteur), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/37/59, at 18 (Jan. 24, 2018).

Environmental racism, of course, is a manifestation of states' systematic disregard for such obligations to indigenous communities.

THE RIGHT TO INFORMATION

A. *Report of the Special Rapporteur on Toxins on the Right to Information*

The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes produced a report in which he emphasized and analyzed various obligations of public and private actors with regards to the right of information about hazardous substances and wastes. In the environmental context, the Special Rapporteur says, "information is crucial to preventing human rights violations resulting from exposure to hazardous substances and wastes; crucial information on hazardous substances and wastes is, however, frequently unavailable and inaccessible."⁶⁹ The Special Rapporteur believes that the availability and access of more information regarding the quality of the environment and toxic waste dumping practices may allow underserved populations the ability to fulfill their right to "the highest attainable standard of physical and mental health, the right to food, the right to safe drinking water and sanitation, and the right to a healthy environment."⁷⁰ Specifically regarding toxic waste dumping, a lack of information creates a "fundamental impediment" to a person's ability to knowingly and actively exercise their decision-making power and weigh the consequences that toxic waste dumping will have on their land.⁷¹ Significantly, the Special Rapporteur emphasized that "meaningful consent relies upon and cannot be achieved without information,"⁷² thus underscoring how the corporations and government actors dumping on lands without providing information are taking advantage of marginalized populations.

⁶⁹ *Id.*, citing UNEP-WHO, *State of the Science of Endocrine disrupting chemicals: 2012* (2013); see also European Comm'n/European Env't Agency, *Env't and Human Health*, Joint EEA-JRC report, No. 5/2013 (2013).

⁷⁰ G.A. Res. 36/15 *supra* note 60 at 23.

⁷¹ *Id.* at 24.

⁷² *Id.* at 27.

The International Labour Organization (“ILO”), which is focused on the rights of indigenous people to their land.⁷³ It is a UN organization that joins together “governments, employers and workers of 187 member states to set labour standards, develop policies and devise programmes promoting decent work for all women and men.”⁷⁴ The ILO was established “for the explicit purpose of promoting social justice and in so doing to preserve peace,”⁷⁵ and it remains one of the most influential international organizations. The ILO has engaged with the topic of indigenous rights and issues since the 1920s and produced the Indigenous and Tribal Peoples Convention in 1989.⁷⁶ Article 6 of this convention says, “ratifying Member States have the obligation to consult with indigenous and tribal peoples whenever consideration is being given to legislative or administrative measures which may affect them directly,” and the entire convention seeks to promote “defence of the rights of indigenous and tribal peoples worldwide.”⁷⁷ The ILO has a voice at the United Nations Human Rights Council, which its representatives attend and where it presents its objectives, including the aforementioned goal of promoting indigenous rights. It is a significant organization in the international sphere, and its published works often affect the decisions of other bodies.

As outlined by both the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization, “Indigenous peoples have the right to give their free, prior and informed consent about the exploitation of resources on their land and about the storage and disposal of hazardous

⁷³ *About the ILO*, Intl Lab. Org. available: <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>

⁷⁴ *Id.*

⁷⁵ *The Relevance of the ILO in the twenty-first century* Intl Lab. Org. https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_240832/lang--en/index.htm.

⁷⁶ The Indigenous and Tribal Peoples Convention has been ratified by Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. Notably, the United States and Canada are absent from this list.

⁷⁷ Statement by Guy Ryder, Director-General of the ILO, Human Rights Council 39th Session, (Sep. 19, 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/genericdocument/wcms_645652.pdf.

substances in their lands or territories, and other rights that require information about hazardous substances.”⁷⁸ Free, prior and informed consent is “one of the most important principles that Indigenous people believe can protect their right to participation” in their own governance.⁷⁹ Free, prior and informed consent (“FPIC”) centers around “genuine inclusion, disclosure, and respect for Indigenous peoples’ decision-making processes.”⁸⁰ The UN Expert Mechanism on the Rights of Indigenous Peoples emphasized that:

“The element of ‘free’ implies no coercion, intimidation or manipulation; ‘prior’ implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow Indigenous Peoples to undertake their own decision-making processes; ‘informed’ implies that Indigenous Peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to Indigenous Peoples; ‘consent’ implies that Indigenous Peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.”⁸¹

The current practice of illicit toxic waste dumping on indigenous lands happens, most often, without the free, prior and informed consent of the leaders and members of the indigenous

⁷⁸ *Id.* at 28, citing G.A. Res. 61/295, arts. 29, 32, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007); International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169).

⁷⁹ UN Expert Mechanism on the Rights of Indigenous Peoples, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>.

⁸⁰ Agnes Portalewska, *Free, Prior and Informed Consent: Protecting Indigenous Peoples’ Rights to Self-Determination, Participation, and Decision-Making*, CULTURAL SURVIVAL QUARTERLY MAGAZINE, (Dec. 2012)

<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>.

⁸¹ Expert Mechanism Advice No. 2 (2011): “Indigenous peoples and the right to participate in decision-making,” at 25. Available at: https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf.

populations which that own the lands targeted—even though “under current international law, governments are obligated to consult indigenous communities before any development affecting their lands and resources takes place.”⁸² National governments are operating without the FPIC of the people most affected by their actions, which interferes with an inherent right to information allotted to all humans.

B. What is the Right to Information?

The Right to Information constitutes the right to free and unfettered access to information, traditionally in the governmental context—promoting governmental transparency and accountability regarding governmental actions and abuses of power. This right is often addressed as corollary to other, existing rights in an effort to contain governmental corruption and protect citizens from ongoing illicit activities by their government. A select few governments have, however, highlighted the importance of this right and passed national acts in order to preserve it Without information, particularly in the environmental context, people can be subjected to severely harmful chemicals and substances without their knowledge or ability to act in order to protect themselves. In these contexts, the Right to Information concerns governmental transparency of records and citizens’ unfettered access to those records upon request. This right derives from the International Covenant on Civil and Political Rights, which highlights the right to freedom of expression and the right to take part in public affairs.⁸³ The right to have information and States’ duties to disseminate it are found in various human rights instruments, internationally and regionally, as well as in several national constitutions.⁸⁴

⁸² *Id.*

⁸³ International Covenant on Civil and Political Rights, 19 December 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

⁸⁴ For example, India passed the Right to Information Act in 2005, which mandates timely response to citizen request for government information, and has the objective to empower citizens, promote transparency and accountability in the working of the government...and make their democracy work for the people in real sense. Right to Information Act, No. 22 of 2005, India Code (2005). The Indian government believes that an informed citizen is better equipped to keep necessary vigil on the instruments of governance and make the government more accountable to the governed. The Australian government also passed a Freedom of Information Act in 1982, which “provides a legally enforceable right

C. *How it applies to environmental practices and indigenous communities*

80% of countries around the world do not publicly report the levels of pollution caused by companies in the country.⁸⁵ 53% of countries worldwide do not report outdoor air pollution information.⁸⁶ 54% of countries ranked by the Environmental Democracy Index do not provide annual drinking water quality data in capital cities.⁸⁷ Without this information, citizens of these countries are unaware of the toxins to which they are exposed and thus cannot effectively fight against or protect themselves from the effects of its exposure. This lack of information is particularly harmful in the indigenous context because, beyond exposure to toxins, such practices interfere with (1) their capability of survival, (2) their freedom to practice their spiritual beliefs, and (3) their ability to protect their land accordingly if they do not have prior knowledge and the ability to weigh consent before their lands are riddled with toxic waste materials and potentially destroyed or detrimentally affected. Tribal communities must be made aware of the toxins that exist and those that are set to ravage their land, as they place great economic dependence on what the land can provide them.

The Special Rapporteur's mention of the Right to Information is key in making it a widely recognized right, and it is the duty of the Special Rapporteur to further emphasize the important of such a right in the environmental context and the dire effects it can have on indigenous communities around the world.

The Keystone XL Pipeline, the dump sites in Canada, and those in Australia, among many others around the world, represent a systematic interference with Indigenous peoples' right to information and right to life around the world. In Keystone, for example, there was no extensive environmental impact study conducted or examined, allowing the pipeline to be built and to cross these lands without proper information distributed regarding how it will affect Indigenous lands, the people on those lands, and

of access to government documents [and] applies to Australian government ministers and most agencies." *Freedom of Information Act 1982 (Cth)* (Austl.).

⁸⁵ World Resources Institute, *Strengthening the Right to Information for People and Environment*, available at <https://www.wri.org/our-work/project/stripe>.

⁸⁶ *Id.*

⁸⁷ *Id.*

the possible impact it may have on their lives and their livelihood. The continual bursting of the pipeline and the risk of its repetition poses a grave threat to the lands directly affected by and adjacent to the environmental impact that could occur.

THE RIGHT TO LIFE

The concept of the right to life is one of the basic fundamental ideals of international human rights. All humans possess this right to "life, liberty and security of person,"⁸⁸ with which environmental pollution and toxic waste dumping interferes. The right to life is considered by some as a right to be alive, while some believe it to mean a right to a dignified, good life. The UN Conference on the Human Environment in 1972 stated, in its landmark Stockholm Declaration, that "both aspects of man's environment, the natural and the manmade, are essential to the wellbeing and to the enjoyment of basic rights even the right to life itself, and that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and wellbeing."⁸⁹ This link between the right to life and the right to a clean and livable environment has been increasingly recognized nationally and internationally. For example, the Indian Supreme Court declared that "the right to life is a fundamental right under article 21 of [its] constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life," and further emphasized that "if anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to article 32 of the constitution for removing the pollution of water or air which may be detrimental to the quality of life."⁹⁰

THE SPECIAL RAPPORTEURS' ROLE

The Special Rapporteurs are in a unique position to influence an international discourse and spread a call to action on

⁸⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights at ¶ 3 (Dec. 10, 1948).

⁸⁹ G.A. Res. A/RES/2994 (December 15, 1972).

⁹⁰ Dr. Mohd. Yousuf Bhat & Dr. Syed Damsaz Ali Andrabi, *Right to Life in Context of Clean Environment: It's Significance under Various Laws*, 22 IOSR, J. OF HUMAN AND SOC. SCIENCE, 79, 83 (2017).

what is an established, systematic practice worldwide. Environmental racism in the form of illicit toxic waste dumping on indigenous lands directly interferes with the universal rights to information and to life. As independent actors with significant influence on the international human rights arena, Special Rapporteurs possess unique opportunities to effect change and actually help marginalized communities across the world. The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste has thus far conducted several country reviews but has yet to conduct a cross-national analysis into how this issue specifically affects indigenous peoples around the world. Similarly, the Special Rapporteur on Human Rights and the Environment has conducted a handful of country reviews, yet has failed to place the necessary emphasis on how this crisis affects indigenous people specifically—not only in the aforementioned countries but around the world. Considering the United Nations' long and ongoing acknowledgement of the world-wide systematic discrimination against and abuse of Indigenous peoples and the existence of both a Special Rapporteur on the Rights of Indigenous peoples as well as the United Nations Declaration on the Rights of Indigenous Peoples, this issue should be at the forefront of the international human rights system.

The United Nations, through the Special Rapporteurs must make this issue a priority, as the health of thousands of indigenous people worldwide is continuously jeopardized by their own governments. These people, often the most disadvantaged groups in their societies, have little to no recourses in fighting such oppressive environmental tactics without support from the international human rights arena. Environmental racism is the prevailing practice in industries all over the world, sanctioned by their government, and the United Nations has the recourses to alleviate that. Although the UN's tendency to succumb to bureaucratic pressures and less than fair practice is well-known, the UN should not be tasked with conducting conduct investigations and producing recommendations on how to solve this problem. The Special Rapporteurs are most equipped to do this. In his capacity as the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, he must conduct investigations into this widespread practice both in specific countries and how it

affects the larger world landscape. The Special Rapporteur on Human Rights and the Environment is specifically mandated to address issues such as these. Neither of these offices have done enough thus far. The UN must commit the resources and support necessary for such investigation, as it is imperative to keep them in accordance with their charter and their Human Rights ideals, and because this crisis is urgent and ongoing. Once these investigations are concluded and the Special Rapporteurs produce their recommendations, the UN must be responsible in monitoring their implementation and assuring that they are met in a fair and reasonable manner. Citizens must be protected from their governments if their governments are the ones inflicting damage unto their population. Marginalized Indigenous peoples, whose lands were coopted by colonization and who suffer the effects of that to this day should be particularly aided and protected by the International arena.