

**Renouncing the “Doctrine of Discovery”
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 intent 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)

The Amendment To Be Moved at the WCC

The Members will move to substitute their original motion for the one put forth by Council, and then invite a debate and vote on that motion. In the alternative, the Members will move to amend the motion to (a) succinctly state that the doctrine of discovery is antithetical to nature conservation and is discredited as contrary to human rights for the reasons set forth in the memo below), and that (b) therefore IUCN renounces the doctrine of discovery.

Background: The Discredited Doctrine of Discovery

Implicit in the adoption of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**, by the UN General Assembly (13 September 2007), is the renunciation of the so-called “Doctrine of Discovery” (DoD). IUCN has endorsed UNDRIP. Article 8 Section 1 provides that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.” Importantly, UNDRIP clearly advocates for state action for “the prevention of, and redress” for “any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.”

Further, UNDRIP recognizes the unique nationality and autonomy of each indigenous nation, and reaffirms that “indigenous peoples have the right to maintain and strengthen their

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

A “Just” “Unjust” Doctrine

¹ The sponsors presented this motion to expressly renounce the Doctrine of Discovery” from the perspectives of human rights, indigenous rights, 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 renounce 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 choose, 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 um 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)

² This note was prepared during June 2020 – August 2021 by Nicholas A. Robinson, Makayla Loeb, Christopher Sudol, Madison Roberts, and Gina Hervey of the Global Center for Environmental Legal Studies (GCELS) at the Elisabeth Haub School of Law at Pace University.

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 canon 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.

Supported by the spiritual authority of the Church, the Portuguese and the Spanish extended the DoD to include the secular management of non-Christian lands.⁹ As the Spanish and Portuguese Empires expanded their interests in Africa and the Americas, the DoD grew into an international doctrine. The DoD dictated the relevant rights of sovereignty and management

³ Robert Miller, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* 9 (Oxford Univ. Press 2012).

⁴ *Id.*

⁵ *Id.* Here, Robert Miller defines *dominium* as governmental sovereignty and property.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 10. See also Steven T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Chicago Rev. Press 2008).

⁹ *Id.* at 11.

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 climate change.

Governments have yet to renounce the The Papal Bulls and Royal Charters that launched the DoD. Queen Elizabeth II, as head of the Church of England, the Archbishop of Canterbury, and Her Majesty's government still refuse to renounce the 1496 Charter granted to John Cabot and his sons, to go forth and claim possession of all the lands in the "New World" not yet claimed by Spain and Portugal. As head of the English Church, royal decrees thereafter continued the colonization of many different countries.

The Pope previously sanctified the conquest of lands beyond Europe with Papal Bulls granted to the kingdoms in Portugal and Spain, through three Papal Bulls: *Romanus pontifex*, 1455, *Dum diversas*, 1452, and *Inter Caetera*, 1493. These gave the Kings their authority to "invade, search out, capture, vanquish, [] subdue" all "enemies of Christ," and "reduce their persons to perpetual slavery."¹⁷ These papal bulls and decrees added a level of brutality to colonialism that was supported by the Catholic Church, and had the effect of sanctioning near-genocides of indigenous populations and abolishing the rights of those who were left.¹⁸

"Discovery" was a hollow practice, where Europeans stole indigenous land through distorted symbolism and ceremonies of possession. The claim of ownership that "Discovery" granted Europeans was known to be false as a matter of fact, and is therefore a legal fiction.¹⁹ The Vatican and Church of England have not renounced these decrees, and their authority appear "on the books" today, as does the legal fiction in many nations.

Present Implementation of the Doctrine of Discovery

The DoD survived the colonial era and its use by government and non-government institutions perpetuate its wrongs. In the United States, the judiciary continues to cite the DoD. The DoD underpins American treatment of indigenous peoples today, continuing its destructive legacy from the 1823 U.S. Supreme Court ruling in *Johnson v. McIntosh* which stripped Native people of their fee simple title to their lands.²⁰ Federal courts have also declined to enforce treaty rights of indigenous nations. In the case *Shirrell v. Oneida*, the United States Supreme Court refused to take up the issues of justice, which the Court deemed to be a "political question" best left for Congress to decide. In 2020, however, the Supreme court may have signaled a change in its approach to treaty rights with indigenous sovereign nations in *McGirt v. Oklahoma*.²¹

Example of Doctrine of Discovery's Impact on Nature

¹⁷ Bogan, Wyatt, *The Doctrine of Christian Discovery: A Framework for Global Dominance*, 2017, pg. 4.

¹⁸ Frincher, Tonya Gonnella, *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights, A Preliminary Study*, (2010) p. 10.

¹⁹ Robert J. Miller, *Oregon, Indigenous Nations, Manifest Destiny and the Doctrine of Discovery*, <https://www.anglican.ca/primate/tfc/drj/doctrineofdiscovery/>.

²⁰ Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, 95-116 (Oxford Univ. Press 2005).

²¹ *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.

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 renouncing the Doctrine of Discovery looks like. This exemption allows Aboriginals a right to practice, respect, and live in partnership with the land in a way largely distinct from the settler-colonial concept while furthering environmental conservation goals of the state.²⁴ Most recently,

²² National Park Service, *The Trail of Tears and the Forced Relocation of the Cherokee Nation (Teaching with Historic Places)*, <https://www.nps.gov/articles/the-trail-of-tears-and-the-forced-relocation-of-the-choerokee-nation-teaching-with-historic-places.htm> (last visited Aug. 29, 2021).

²³ See the Assembly of First Nations, "Dismantling the Doctrine of Discovery," (January 2018) at <https://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Docctrine-of-Discovery-EN.pdf>.

²⁴ Legal Services Society, *A Guide to Aboriginal Harvesting Rights* <https://pubsdb.lss.bc.ca/resources/pdfs/pubs/A-Guide-to-Aboriginal-Harvesting-Rights-eng.pdf>, and Saskatchewan, "Treaty and Aboriginal Hunting and Fishing Rights," <https://www.saskatchewan.ca/residents/parks-culture-heritage-and-sport/hunting-trapping-and-angling/treaty-and-aboriginal-rights-for-hunting-and-fishing>.

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 This ruling was based on section 35 (1) of the Canadian Constitution Act.

There is a growing understanding of how impactful it is to understand, reflect, and act upon the concepts of Indigenous laws and morals in Canada. In *Van der Peet* the Supreme Court of Canada explicitly discussed the need to have intercultural legal dialogue. In 2004 hunting natural resource co-management between the crown and the Metis was first codified. Overtime, the Metis approach to hunting has been growing in legal systems across Canada. When considering the impact of a hunt, all impacted parties including the animal, landowner, crops and greater community are considered. The individuals will discuss the consequences of their actions and focus on appropriate reparations as needed. Most recently, the country is looking at co-management for moose and fish.²⁶

Australia

Australia also adopted the DoD into their legal system. However, Australia has made progress towards addressing the ongoing injustices of the DoD by judicial renouncements of the legal fiction of discovery. As a matter of historic reality, the Aborigines were clearly there first, as recognized in *Mabo v. Queensland*, decided by the High Court of Australia in 1992. The High Court of Australia held that Aboriginal peoples "have rights to land - rights that existed before the British arrived and can still exist today."²⁷

Additionally, in Australia, national parks are co-manages between the State government and Aboriginal groups. Specifically, it is a union between the government of South Australia's Department of the Environment and Water, and a variety of Aboriginal associations and tribes.²⁸ A very intentional program, the state recognized the value and importance of managing the national parks in a way that combines traditional knowledge with contemporary park management. The park system was amended in 2004 to include co-management boards and advisory committees and was further extended in 2013 to include wilderness protected areas.

Through a co-management system, the traditional Aboriginal relationship with land can be more respected and preserved. Using a hybrid system in which the land is either maintained and protected by an Aboriginal group and board, the Crown and a board, or the Crowns with an advisory committee, Aboriginal traditional owners are key voices and decision makers regarding how the land is maintained and respected so as to preserve its spiritual, environmental, cultural,

²⁵R. v. Desautel, 2021 SCC 17 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do>. And The Canadian Press, "Supreme Court Affirms American Indigenous Man's Right to Hunt in Canada," CTVnews (last viewed Aug. 29, 2021) <https://www.ctvnews.ca/canada/supreme-court-affirms-american-indigenous-man-s-right-to-hunt-in-canada-1.5399547>.

²⁶ Mark Walters, "Exploring Indigenous Justice Systems in Canada and Around the World," Canada Department of Justice (last viewed Aug. 29, 2021, <https://www.justice.gc.ca/eng/rp-pr/aj-ja/eijs-esja/p3.html>).

²⁷ "Five things you should know about the Mabo decision," The University of Sydney, (2017), <https://www.sydney.edu.au/news-opinion/news/2017/06/02/five-things-you-should-know-about-the-mabo-decision.html#:~:text=On%203%20June%201992%2C%20the,and%20can%20still%20exist%20today.>

²⁸ "National Park Co-Management Boards and committees," Government of South Australia, (last viewed Aug. 29, 2021) <https://www.environment.sa.gov.au/about-us/boards-and-committees/park-co-management>.

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 Homelands, Empower Tribal Governments to Better Manage Indian Lands,” *U.S. Department of the Interior* (last visited Aug. 29, 2021) <https://www.doi.gov/pressreleases/interior-department-takes-steps-restore-tribal-homelands-empower-tribal-governments>.

³⁴ Cathrin Schaer, “For Maori, New Zealand’s Waitangi Tribunal has Aided Reconciliation,” *CCH News* (last visited Aug. 21, 2021) <https://cchdailynews.com/for-maori-new-zealands-waitangi-tribunal-has-aided-reconciliation.html>.

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 in 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 Waitangi 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 as 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>.

Other nations have not yet examined the on-going, perverse legal force of the DoD in their legal regimes. The United Nations Permanent Forum on Indigenous Issues has called upon states to do so.⁴¹

The IUCN's Covenant with Indigenous Peoples

The International Union on the Conservation of Nature (IUCN), founded over 70 years ago, was the first global union to focus on safeguarding nature and the environment. The IUCN is a hybrid intergovernmental organization, composed of governments as state members, of ministries, and of non-governmental organizations. It is the first international organization to admit indigenous peoples to full membership. The IUCN's mission is to foster, encourage and assist in the conservation of nature, to ensure the equitable ecological use of natural resources and to promote sustainable development. IUCN's program "Caring for the Earth" first defined what is now known as "sustainable development." IUCN, with ICEL, inspired the United Nations to adopt the World Charter for Nature in 1982.

The IUCN is committed to strengthening the "rights, participation, voice and role"⁴² of indigenous people in the IUCN. The Director-General, Secretariat and Council of IUCN have demonstrated this through their participation in the Permanent Forum on Indigenous Issues, facilitated by IUCN's Permanent Observer Mission to the UN in New York. The Members of IUCN have done so by adopting the United Nations Declaration of the Rights of Indigenous People (UNDRIP⁴³) in 2008⁴⁴ and by admitting Indigenous Peoples' Organizations to full membership in the IUCN through amending IUCN's Statutes and Regulations at the 2016 World Conservation Congress.⁴⁵ By ensuring collaborative and inclusive decision-making, IUCN can "play an important convening and facilitating role for indigenous participation in environmental decision making."⁴⁶

Through indigenous participation in the United Nations Permanent Forum on Indigenous Issues (UNPFII), the IUCN Council and Secretariat has developed a seven point strategy to identify joint priorities for advancing indigenous rights and issues.⁴⁷ The strategy includes initiatives like increasing indigenous participation in IUCN governance, promoting the recognition of indigenous peoples' rights, and promoting the rights and participation of indigenous women.⁴⁸ Though the strategy benefited from IUCN's participation in the UNPFII,

⁴¹ "Forum Speakers say 'Doctrine of Discovery' Shameful Root of Today's Indigenous Oppression, Remnants Still Evident in Many Constitutions Must be Removed," *UN Economic and Social Council* 9 May 2012, (last viewed Aug. 29, 2021)

<https://www.un.org/press/en/2012/hr5089.doc.htm#:~:text=Bolivian%20judges%20were%20elected%20by%20the%20people.&text=%E2%80%9CThe%20real%20concept%20of%20the,peoples%20themselves%2C%E2%80%9D%20he%20said.>

⁴² "Indigenous Peoples" *IUCN* (last viewed Aug. 29, 2021) <https://www.iucn.org/theme/governance-and-rights/our-work/indigenous-peoples>

⁴³ UNDRIP is a pivotal piece of international policy for ensuring the rights of indigenous peoples. The Declaration ensures religious freedoms, rights to health, rights to land and rights to self-determination.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

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 rights as it relates to their environment, lands, territories, and natural resources.⁵⁰

WCC Motion 48: IUCN for *Pache Mama*

Motion number 48 was submitted with the title "Rediscovering care for Mother Earth through renouncing the 'Doctrine of Discovery.'" In preparing the motion to be submitted to the members, the Council of IUCN's Resolution Working Group changed the name was to "Rediscovering the care for Mother Earth from the vision of indigenous people," without the consultation or approval of sponsors.⁵¹ In the original motion, the WCC expressly renounces the DoD, which is stronger and clearer than the IUCN Council's Motions Committee restated phrase "Renouces paradigms of inequality." The Motions Committee clearly did not understand – or chose to avoid understanding – the notorious character of the DoD, which is still in the laws of many nations. ICEL respectfully observes that it is not the mandate of the Council's Motions Committee to water down and distort Members' motions. ICEL suggests that IUCN Members move to amend the draft motion so that IUCN can expressly and explicitly "Renouce the DoD." ICEL also recommends that, when adopting the Motion, the WCC insist that the original title be clear, so that the renunciation of the DoD is manifest. The full motion, as pending, is appended to this NOTE.⁵² Its provisions may be briefly summarized here, reflecting further amendments that should be accepted by the WCC:

Preamble:

The preamble sets forth the rationale for adopting the motion with the following points:

⁴⁹ "Indigenous Peoples and Environmental Law," *IUCN* (last viewed Aug. 29, 2021)

<https://www.iucn.org/commissions/world-commission-environmental-law/our-work/indigenous-peoples-and-environmental-law#:~:text=The%20IUCN%20CEESP%2FWCEL%20Indigenous,%2C%20lands%2C%20territories%2C%20and%20natural>

⁵⁰ *Id.*

⁵¹ In 2008, when a similar motion to renounce the DoD was submitted to the IUCN World Conservation Congress held in Barcelona, the IUCN Council's Resolutions Working Group refused to have the motion admitted for debate, contenting its topic was irrelevant to IUCN's Mission.

⁵² It is online at: Motion No. 48 *Rediscovering the care of Mother Earth from the vision of indigenous peoples*, 2020 <https://www.iucncongress2020.org/motion/048>

- Grateful for the full participation of Indigenous Peoples Organizations in IUCN,
- Seeking to advance IUCN's 2008 endorsement of UNDRIP and IUCN's continued participation in the United Nations Permanent Forum on Indigenous Issues.
- Conscious of the many past, present and future contributions made by indigenous peoples in restoring and sustaining nature,
- Troubled by the denial of human rights to indigenous nations and communities, as these are fundamentally unjust and impede attaining IUCN's goals,
- Tracing these denials of indigenous rights to the papal bulls and royal charters granted in the 15th and 16th centuries to legitimize the DoD and seizure and occupation of indigenous peoples' lands,
- Recognizing new trends by which governments seek to establish just and equitable relationships with indigenous peoples, such as in the Arctic Council, which has embraced the Permanent Representatives of Indigenous Peoples,
- Troubled that the DoD is still formally recognized in many legal systems, and the Papal Bulls and Charters of the Head of the Church of England have not been annulled,
- Acknowledging the on-going need for truth and reconciliation to bring about social justice and peaceful relations among all peoples, and with the Earth.

Decisions:

Based upon acceptance of these preambular declarations, the WCC resolves to take two actions internal to IUCN and recommends two actions for others to take:

- Resolved: The IUCN renounces the Doctrine of Discovery, in all of its manifestations.
- Resolved: The IUCN establishes a Truth and Reconciliation Working Group, similar to such councils assembled in South Africa after Apartheid or active today in Canada and elsewhere, which will educate us all about the DoD and its consequences, will explore how to advance indigenous rights, and identify best practices for involving indigenous peoples in the co-stewardship of Earth's natural areas and further the conservation of nature and sustainable practices.
- Recommended: IUCN calls upon all legal systems that still formally recognize the DoD, to repeal it from their laws; and proceed to establish truth and reconciliation commissions which will teach the history of the DoD in their countries and facilitate discovery of pathways to justice.
- Recommended: IUCN calls upon the Pope of the Catholic Church and the Head of the Church to repeal and renounce their Bulls and Charters and the DOD, and urges all leaders of religious movements to promote new conservation methods where the experience and knowledge of indigenous peoples are included.⁵³

Adoption of these Decisions helps restore IUCN's just relations with Indigenous Peoples

⁵³ Such as the Anglican Church of Canada.

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 ongoing 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 defines indigenous peoples' relationships with nature, and with it their cultures and religions. The very existence of the DoD is in diametric opposition to everything the IUCN claims it stands for. Failing to renounce this doctrine would invalidate all of the efforts made on behalf of the IUCN for the last 70 years. *In short, IUCN cannot achieve its purpose until it makes peace with nature and with indigenous people by renouncing the Doctrine of Discovery.*

Protecting Biodiversity and Combating Unsustainable Natural Resource Extraction

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),⁵⁸ and the UN Environment Programme's sixth Global Environmental Outlook (GEO-6)⁵⁹ amply document the crisis of Earth's biodiversity in steep decline. While the rate of decline is alarming, the fact of decline is not new. It began with the ravaging of Earth launched by the DoD. The DoD allowed for unlimited extraction of resources on native lands,⁶⁰ and continued

⁵⁴ Bogan, Wyatt, *The Doctrine of Christian Discovery: A Framework for Global Dominance*, 2017, pg. 7, "The countries that still incorporate the Doctrine of Discovery include (but are not limited to), the United States of America, Canada, Australia and New Zealand."

⁵⁵ Motion No. 48 *Rediscovering the care of Mother Earth from the vision of indigenous peoples*, 2020, <https://www.iucncongress2020.org/motion/048>.

⁵⁶ "About," IUCN (last viewed Aug. 29, 2021) <https://www.iucn.org/about>.

⁵⁷ Frincher, Tonya Gonnella, *Impact on Ingenious Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights, A Preliminary Study*, (2010) p. 8. See preliminary study of the impact on indigenous peoples of the international legal construct known as the "Doctrine of Discovery" UN DOC. E/C.19/2010/13.

⁵⁸ See <https://ipbes.net/>.

⁵⁹ See <https://www.unenvironment.org/resources/global-environment-outlook-6>.

⁶⁰ Frincher, Tonya Gonnella, *Impact on Ingenious Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights, A Preliminary Study*, (2010) p. 8.

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, all humanity must muster will an "all hands on deck" approach. Climate disruptions are altering all Earth's natural systems, as indigenous peoples already know. *Not to renounce the DoD is antithetical to IUCN's goals and to our best interest of survival.*

Maintaining legal fictions is contrary to the rule of law

The manner in which lands were "discovered" and occupied was known to be false as a matter of fact, and yet the law adopted this falsehood in the DoD and continues to base many decisions on this fiction. The fiction was used as justification to oppress, dominate, enslave and murder indigenous people around the world. Its history needs to be exposed and renounced. It is hardly a heritage to celebrate. The High Court of Australia exposed this fiction in the *Mabo* decision. The court found that explorers use of the term *terra nullius*, saying the land was empty, was a lie because people were, in fact, living there.⁶² The court also found the presumption that aboriginal people had no settled law governing occupation and the use of lands to be wrongful.⁶³ The holding "[i]n acknowledging the traditional rights of the Meriam people to their land, the court also held that native title existed for all indigenous people,"⁶⁴ is applicable to all situations of unjust takings of land from indigenous people which the DoD legitimized. The *Mabo* court's reasoning should be used to begin remediating these past wrongs in countries that have not yet renounced the Doctrine.

Upholding the DoD, as a legal fiction, stands in the way of achieving the rule of law. The IUCN WCEL and UNEP have elaborated norms for the "environmental rule of law." The IUCN *World Declaration on the Environmental Rule of Law*⁶⁵ recognizes 13 principles to develop and implement solutions for ecologically sustainable development. The declaration is premised on

⁶¹ "GEO-6 key messages," *UN Environment Programme* (last viewed Aug. 29, 2021) https://wedocs.unep.org/bitstream/handle/20.500.11822/28774/GEO6_keymessages_EN.pdf?sequence=1&isAllowed=y.

⁶² "Mabo Decision," *National Museum of Australia* (last viewed Aug. 29, 2021) <https://www.nma.gov.au/defining-moments/resources/mabo-decision>.

⁶³ "The Mabo Case," *AIATSIS* (last viewed Aug. 29, 2021) <https://aiatsis.gov.au/explore/articles/mabo-case>

⁶⁴ <https://www.nma.gov.au/defining-moments/resources/mabo-decision>.

⁶⁵ See

https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf.

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 Law⁶⁶ 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 access to health care. Indigenous communities suffer this denial of UN Sustainable Development Goals (SDGs 3 and 6), along with impoverished peoples in many nations. Indigenous communities are doubly discriminated against, further marginalized with respect to their right to health, in violation with Article 24 of UNDRIP.

The DoD severed indigenous people in the United States and elsewhere from their customary lands, in which they hold deep spiritual connections, in violation of UNDRIP Article 12, the right to spiritual and religious traditions and customs. In this respect, DoD-based practices also violate UNDRIP Articles 25-32, concerning land use. In the United States, for example, indigenous people do not hold legal title to their “reservation” lands, and must gain prior consent from the United States federal authorities for proposed actions. Moreover, federal officials in the United States and Canada disrespect tribal land when it comes to federal decisions about the placement of oil pipelines.⁶⁸

Conclusion: Will IUCN open a new chapter in IUCN’s relations with nature?

Indigenous peoples have long lived harmoniously with nature. In many lands, these relationships were torn asunder by actions legitimized under the DoD. The IUCN effectively acknowledges the need to remediate these human relationships as it sustains or restores health in ecosystems: “IUCN Resolutions and field-based work emphasize indigenous peoples’ rights to the

⁶⁶ “Environmental Rule of Law: Global Report,” *UN Environment Programme* (last viewed Aug. 29, 2021) <https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>.

⁶⁷ The Doctrine directly conflicts with articles 1-6, 7, 8, 10, 11-13, 14, 15, 18, 25-32, 33-37, and 38-42.

⁶⁸ Notably, the Dakota Access Pipeline, which gained national attention in the United States.

lands, territories, and natural resources they have traditionally owned, occupied and used, and the need to ensure effective participation of indigenous peoples in all conservation initiatives and policy developments that affect them.”⁶⁹

The adoption of this motion would reaffirm the dignity and humanity of all indigenous people, as well as help achieve IUCN’s mission for the conservation of nature. The DoD is inconsistent with IUCN’s partnership to work with *all* people to protect the environment, and is inconsistent with human and environmental rights. Failure to reject or renounce DoD would break faith with IUCN’s adoption of the UN Declaration on the Rights of Indigenous Peoples. The journey to restore just relations with indigenous peoples and the Earth, will be a long one, but it begins with a first step. Adoption of this motion is the first step of a long journey towards a just world that values and respects nature.

APPENDIX

WCC MOTION 048 - **Rediscovering the care of Mother Earth from the vision of indigenous peoples**

[Working language: English - Latest version in this language: Version as revised after first reading | Published on: 30 Jan 2020 | Compare with other versions Other languages: Français (/fr/motion/048) | Español (/es/motion/048) | Translate with Google]

GRATEFUL that IUCN has full participation of representatives of Indigenous Peoples Organizations among its Members;

SEEKING to advance further IUCN’s 2008 endorsement of the United Nations Declaration on the Rights of Indigenous Peoples and supporting the International Labour Organization’s Convention 169 and IUCN’s continuous participation in the UN Permanent Forum on Indigenous Issues;

CONSCIOUS of the many contributions indigenous peoples make to restoring and sustaining Mother Earth and the alliances all IUCN Members embrace to conserve biodiversity and natural and cultural heritage;

TROUBLED that the denials of the rights of indigenous peoples are fundamentally unjust and impede IUCN policies and programmes to restore ecologically and socially just relations among all living beings;

AWARE that respect for indigenous peoples has been denied since the beginnings of the colonial era in the 15th century, when Papal Bulls and royal edicts legitimised their enslavement and

⁶⁹ “Indigenous Peoples,” *IUCN* (last viewed Aug. 29, 2021) <https://www.iucn.org/theme/governance-and-rights/our-work/indigenous-peoples#:~:text=IUCN%20Resolutions%20and%20field%2Dbased,policy%20developments%20that%20affect%20them>.

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.