

The Responsibility to Preserve: A Road Map for Saving Ecuador's Yasuni Rain Forest

Joshua M. Alter*

Ecuador's Yasuni National Park is known for its extraordinary biodiversity, its state of conservation, and its natural heritage.¹ Yasuni is home to one of the world's highest concentrations of biodiversity,² the Yasuni-ITT Initiative,³ which is one of the largest environmental conservations projects this century,⁴ and indigenous tribes and uncontacted peoples living in voluntary isolation.⁵ Yet beneath this modern Garden of Eden lies billions of dollars worth of oil that may soon be extracted unless the international community reaches an agreement to preserve Yasuni.⁶

This article analyzes Ecuador's domestic and international legal obligations to its indigenous peoples, its environment, and its natural heritage. It suggests that Ecuador, along with the international community, adopt a "Responsibility to Preserve" approach to complement the Yasuni-ITT Initiative. It concludes by demonstrating that a Responsibility to Preserve approach would benefit all Ecuadorian citizens, the environment, and the Ecuadorian government. It would also save the Yasuni rain forest.

-
1. See United Nations Framework on Climate Change, Submission from Ecuador, *The Yasuni-ITT Initiative: Enhancing Cost-Effectiveness of, and Promoting, Mitigation Actions*, U.N. Doc. FCCC/AWGLCA/2011/Misc.4/Add.1 (Apr. 7, 2011).
 2. See Elie Chachoua, *Turning Externalities Into Opportunities: The Case of Ecuador's Yasuni ITT Trust Fund*, in GETTING IT RIGHT: LESSONS FROM THE SOUTH IN MANAGING HYDROCARBON ECONOMIES 193 (U.N. Development Programme, 2011); see also Bryan Walsh, *Ransoming Paradise: Should the World Bribe Ecuador to Protect That Country's Rain Forests?*, CHI. TRIB. (Feb. 5, 2012), http://articles.chicagotribune.com/2012-02-05/news/ct-edit-ecuador-0205-20120205_1_yasuni-national-park-rain-forests-ecuador.
 3. See Esme McAvoy, *Oil or Life? Ecuador's Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (noting that the Yasuni-ITT Initiative is named for the oil wells that make up the block at the center of the controversy: Ishpingo, Tambococha, Tiputini).
 4. See U.N. GAOR, 65th Sess., 19th plen. mtg. at 2, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) ("The Yasuni Initiative . . . is not just symbolic. It is the most important initiative for our country and the entire planet."); see also *Ecuador's Initiative to Protect Rainforest Demonstrates Sustainable Development, Possible with Leadership, Creativity, Commitment, Says Secretary-General*, U.N. Doc. SG/SM/13843/ENV/DEV/1231 (Sept. 23, 2011) ("The Yasuni-ITT Initiative is a remarkable idea. . . . It is not often that a Government chooses sustainable development over easy money.").
 5. See Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, 4th Sess., Mar. 15, 2006, ¶ 37, U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006) (noting the history of the tribes living in voluntary isolation); see also PAMELA L. MARTIN, *OIL IN THE SOIL: THE POLITICS OF PAYING TO PRESERVE YASUNI* 9 (2011); see also Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguida v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 431 (2006).
 6. See Pamela L. Martin, *Global Governance from the Amazon: Leaving Oil Underground in Yasuni National Park, Ecuador*, 11 GLOBAL ENVTL. POL. 22, 22–23 (2011).

* Managing Editor, NEW YORK INTERNATIONAL LAW REVIEW; J.D. Candidate, 2013, St. John's University School of Law; B.A., 2009, University of Maryland—College Park.

I. Welcome to Paradise

Yasuni National Park is located in northeastern Ecuador.⁷ It became a national park in 1979 and was designated as a Biosphere Reserve in 1989.⁸ Yasuni is close to 10,000 square kilometers in size and sits at the intersection of the Andes, the Amazon, and the Equator.⁹ The area has a high rainfall, a steady climate, and is one of the most biodiverse places on Earth.¹⁰ Although Yasuni makes up only a fraction of a percentage of the Amazon basin, it contains the same number of insect species as the entire continent of North America.¹¹

In addition to the thousands of species that call Yasuni home, the park is also home to the Huaorani tribe, a “relatively recently contacted Amazonian indigenous group with a long—and violent—history of protecting their territory from unwanted intruders.”¹² Relatives of this tribe, known as the Taromenane and Tagaeri, are the last known uncontacted tribes inside Yasuni and live in voluntary isolation deep within the rain forest.¹³

The discovery of billions of dollars worth of oil now threatens the tribes and the species that call Yasuni home.¹⁴ In 2006, the Ecuadorian-owned oil company Petroecuador¹⁵ found massive oil fields containing nearly a billion barrels of oil in what is designated as Block 31 of Yasuni National Park.¹⁶ However, these oil fields and the exploration block are on the territory

-
7. See United Nations Framework on Climate Change, Submission from Ecuador, *supra* note 1; see also Matt Finer et al., *Ecuador's Yasuni Biosphere Reserve: A Brief Modern History and Conservation Challenges*, 4 ENVTL. RES. LETTERS 1, 7 (2009).
 8. See Biosphere Reserve Information, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, <http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=ECU+02&mode=all> (last visited Oct. 22, 2012); see also McAvoy, *supra* note 3 (noting that Yasuni was declared a World Biosphere Reserve by UNESCO in 1989).
 9. See Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011; see also Walsh, *supra* note 2.
 10. See United Nations Framework on Climate Change, Submission from Ecuador, *The Yasuni-ITT Initiative: Enhancing Cost-Effectiveness of, and Promoting, Mitigation Actions*, U.N. Doc. FCCC/AWGLCA/2011/Misc.4/Add.1 (Apr. 7, 2011) (noting that Yasuni is home to 593 recorded bird species, 80 bat species, 150 amphibian species, and 121 reptile species); see also McAvoy, *supra* note 3.
 11. See Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 21, 2005, available at <http://www.cnn.com/2012/03/05/world/americas/rainforest-life/index.html>.
 12. Finer et al., *supra* note 7, at 1–2.
 13. See Kimerling, *supra* note 5.
 14. See Jonathan Watts, *World's Conservation Hopes Rest on Ecuador's Revolutionary Model*, THE GUARDIAN, Sept. 2, 2012 (“Yasuni . . . has moved to the frontline of a global battle between living systems and fossil fuels.”).
 15. See Gonzalo Escribano, *Ecuador's Energy Policy Mix: Development, Conservation and Nationalism with Chinese Loans—Analysis*, EURASIAREVIEW (Apr. 18, 2012), <http://www.eurasiareview.com/18042012-ecuadors-energy-policy-mix-development-conservation-and-nationalism-with-chinese-loans-analysis/> (explaining that Petroecuador and Petroamazonas are Ecuador's two national gas and oil companies); see also Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 447 (2006) (noting that Petroecuador arose as a state oil company shortly after oil was discovered in the 1960s).
 16. See Pamela L. Martin, *Global Governance from the Amazon: Leaving Oil Underground in Yasuni National Park, Ecuador*, 11 GLOBAL ENVTL. POL. 22, 24 (2011); see also John Vidal, *Ecuador: Four Months to Save the World's Last Great Wilderness From “Oil Curse,”* THE OBSERVER, Aug. 13, 2011, <http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park>.

of the Huaorani peoples.¹⁷ Ecuadorian President Rafael Correa stated that Ecuador would be willing to forgo drilling and leave Yasuni as it currently stands if the international community pays \$3.6 billion over 13 years.¹⁸ The oil in these unexplored fields is valued at over \$7 billion.¹⁹ Ecuador, at least in theory, is willing to forgo half the value of that oil in order to protect Yasuni and keep its pristine features intact.²⁰ This project is known as the Yasuni-ITT Initiative.²¹

Under the Yasuni-ITT Initiative, money from the international community goes into a capital fund administered by the U.N. Development Programme (UNDP) and earmarked for investment in renewable energy products and social development for indigenous communities.²² The fund is governed and overseen by an eight-person Steering Committee, including representatives from the Ecuadorian government, contributing states' governments, Ecuadorian civil society, and UNDP members.²³

II. The Legal Arguments to Save Yasuni

Under domestic and international law, Ecuador is required to protect Yasuni National Park and the indigenous peoples who live there. The 2008 Ecuadorian Constitution contains many provisions to protect the environment and indigenous peoples. Additionally, executive decrees have granted further protections to Yasuni. Finally, Ecuadorian courts have demonstrated that they are willing to play a part in protecting nature. Ecuador has also signed onto

-
17. See *Campaign: Yasuni Depends on You, Arguments in Support of the Proposal*, http://www.sosyasuni.org/en/index.php?option=com_content&view=article&id=34:arguments-in-support-of-the-proposal&catid=15:campaign&Itemid=27 (last visited Oct. 22, 2012).
 18. See Erin Sefloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-N.W. J. ENV. L. & POL'Y 379, 388–89 (2012) (clarifying that President Correa sought \$600 to \$700 million a year for 10 years to leave the oil underground); see also Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.
 19. See Esme McAvoy, *Oil or Life? Ecuador's Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (estimating the amount at over \$7 billion).
 20. See U.N. GAOR, 65th Sess., 19th plen. mtg. at 2, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) ("Ecuador . . . is making major efforts to achieve development. But, as an act of generosity . . . decided not to receive 50 percent of the income that the oil would generate."). Whether or not Ecuador would, or even be able to, stop drilling in its entirety is an important question. The Yasuni-ITT Fund's website claims that if for any reason drilling does occur in the future, any donations greater than \$100,000 would be returned. See generally Patrick Wieland, *From Kyoto to Quito: Reassessing Oil Moratorium as an Effective Climate Change Policy from a Property-Based Approach*, 4 KY. J. EQUINE, AGRIC. & NATURAL RES. L. 93, 94 (2012) (arguing that "forgoing a country's oil reserves through a moratorium will prove to be ineffective climate change policy in the long-run because it represents a nonenforceable, unilateral promise, which is subject to the political pendulum").
 21. See Ecuador Yasuni-ITT Trust Fund, <http://mptf.undp.org/yasuni> (last visited Oct. 22, 2012).
 22. See Walsh, *supra* note 18 (Dec. 19, 2011).
 23. See Yasuni-ITT FAQs, <http://www.mdtf.undp.org/document/download/7500> (last visited Oct. 22, 2012); see also Elie Chachoua, *Turning Externalities into Opportunities: The Case of Ecuador's Yasuni-ITT Trust Fund*, in GETTING IT RIGHT: LESSONS FROM THE SOUTH IN MANAGING HYDROCARBON ECONOMIES 205 (U.N. Development Programme, 2011).

multiple multilateral treaties on topics ranging from indigenous peoples' rights, international environmental law, and protecting biodiversity. Thus, Yasuni may be saved under a combination of domestic and international obligations.

A. Domestic Legal Arguments

Ecuador's 2008 Constitution affords indigenous peoples and nature many important rights.²⁴ According to a 2011 Report by the United Nations Secretary-General, Ecuador's Constitution "states that the rights of nature should be taken into account in all planning activities, including: the right to have its existence respected in an integral manner, including the maintenance and regeneration of its cycles, functions and evolutionary processes; and the right to restoration."²⁵ Ecuador is in a unique position to enforce the rights of Yasuni, as well as its indigenous tribes. Executive, legislative, and judicial responses demonstrate the state's willingness to provide for the rights of its indigenous peoples and environment.

1. Constitutional Protections

Ecuador's Constitution provides important protections for indigenous peoples.²⁶ In Chapter Four, titled "Rights of Communities, Peoples and Nations," the Constitution lays out 21 collective rights.²⁷ In addition to these enumerated rights, Article 57 provides that:

The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The States shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. *The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law.*²⁸

Aside from the 21 enumerated rights for all indigenous peoples, tribes choosing to live in isolation are afforded even greater protections.

Ecuador's 2008 Constitution also contains important protections for nature, and it affords Ecuadorian citizens the ability to defend these rights.²⁹ The 2008 Constitution declared that

24. See Escribano, *supra* note 15.

25. See U.N. GAOR, 66th Sess., ¶75, U.N. Doc. A/66/302 (Aug. 15, 2011) (noting progressive protections for nature in Latin America).

26. See Gonzalo Escribano, *Ecuador's Energy Policy Mix: Development, Conservation and Nationalism with Chinese Loans—Analysis*, EURASIAREVIEW (Apr. 18, 2012), <http://www.eurasiareview.com/18042012-ecuadors-energy-policy-mix-development-conservation-and-nationalism-with-chinese-loans-analysis/>.

27. See CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 57, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

28. *Id.* (emphasis added); see also Francesco Francioni, Symposium, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1212 (2004) (noting that the possibility of adding wording on "cultural genocide" to the Universal Declaration of Human Rights was ultimately rejected).

29. See Michelle P. Bassi, Note, *La Naturaleza O Pacha Mama de Ecuador: What Doctrine Should Grant Trees Standing?*, 11 OR. REV. INT'L L. 461, 461–62 (2009).

nature is considered a legal person.³⁰ In Articles 71–74, entitled “Rights of Nature,” the Constitution provides protection against severe or permanent environmental impact,³¹ extinction of species,³² and harmful actions against persons, communities, peoples and nations.³³ Thus, Ecuadorians may vindicate their rights based on their own Constitution. Article 71 of Ecuador’s Constitution further provides that “[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”³⁴

2. Political Branches Protections

Ecuador’s Executive Branch is also able to play a role in saving Yasuni. Presidential Decree 1572 indefinitely extended a prior decision to refrain from extracting oil, even though Ecuador had not received the funds required in order to refrain from drilling.³⁵ Ecuadorian law protects Yasuni and other lands endowed with important natural heritage. In 1999, an Executive Decree declared an “intangible zone” of 700,000 hectares of land within the national park’s area.³⁶ However, it was not until 2007 that the boundaries were formally defined in a subsequent Executive Decree.³⁷ Nonetheless, Ecuador has laws and practices that demonstrate the importance of the Yasuni land.³⁸

2. Judicial Protections

Ecuadorian courts have been involved in curbing the destruction within Yasuni and the entire Ecuadorian Amazon basin.³⁹ Recently, an Ecuadorian court found that Texaco polluted the Ecuadorian rain forest for 30 years by not properly disposing of toxic wastes and by causing

30. See DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 124 (2011) (discussing multiple provisions of the 2008 Constitution that protect nature).

31. See Constitution of the Republic of Ecuador, Oct. 20, 2008, art. 72.

32. See *id.* at art. 73.

33. See *id.* at art. 74.

34. See *id.* at art. 71.

35. See Esperanza Martinez, *Yasuni: The Last Chance or the First Step?*, AmazonWatch (Mar. 5, 2009), <http://amazon-watch.org/news/2009/0305-yasun-and-iacute-the-last-chance-or-the-first-step>.

36. See Constitutional President of the Republic, Decreto Ejecutivo No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (Ecuador); see also Esme McAvoy, *Oil or Life? Ecuador’s Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (describing how leaving Yasuni untapped is vital for the survival of the indigenous tribes).

37. See Constitutional President of the Republic, Decreto Ejecutivo No. 2187 [Executive Decree No. 2187] (Jan. 3, 2007) (Ecuador).

38. See Constitutional President of the Republic, Decreto Ejecutivo No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (Ecuador).

39. See generally Steven Donziger, Laura Garr & Aaron Marr Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron’s Abusive Litigation in Ecuador’s Amazon*, 17 HUM. RTS. BR. 8 (2010) (documenting the history of the litigation over Texaco’s actions in the Amazon basin from the damage done forty years ago until the present day); see Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44, 44–45 (2011) (noting a recent Ecuadorian decision in favor of the Ecuadorian plaintiffs).

widespread harm to the environment and to the humans in the area.⁴⁰ The court cited the Ecuadorian Constitution and the American Convention on Human Rights,⁴¹ ratified by Ecuador in 1977 to provide a judicial opportunity for the plaintiffs, and ultimately held that Chevron was liable for \$8.6 billion.⁴²

B. International Legal Arguments

Those seeking to save Yasuni and its indigenous peoples may rely on three separate legal arguments to make a claim against the oil exploration that would ravish the national park and destroy its indigenous peoples: first, that greater protections are afforded to indigenous people; second, that indigenous peoples have a right to culture; third, that there is an obligation to preserve Yasuni. There is strong international and domestic political support behind the Yasuni-ITT Trust Fund. The United Nations Secretary-General supported the fund.⁴³ Ecuadorian politicians have offered to support the fund,⁴⁴ and internationally, other states have pledged, and continue to pledge, monies to the fund.⁴⁵

1. Indigenous Peoples Protections

Yasuni National Park is home to the Tagaeri and Taromenane, two indigenous tribes that live in voluntary isolation.⁴⁶ As Ecuador determines whether or not oil drilling may start in the rain forest, it must be cognizant that its decision will have severe ramifications for the native tribes. The focal point for the rights of the indigenous peoples inside Yasuni is the United Nations Declaration on the Rights of Indigenous People.⁴⁷

-
40. See Lynd, *supra* note 39 (discussing the Court's finding in the *Chevron* matter); see also Simon Romero & Clifford Krauss, *Chevron Is Ordered to Pay \$9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 15, 2011, at A4.
41. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.
42. See Lynd, *supra* note 39 at 45 (stating that "the decision can be seen as a step towards holding transnational companies accountable for the harms they cause").
43. See *Ecuador's Initiative to Protect Rainforest Demonstrates Sustainable Development, Possible with Leadership, Creativity, Commitment, Says Secretary-General*, U.N. Doc. SG/SM/13843 ENV/DEV/1231 (Sept. 23, 2011) ("It is not often that a Government chooses sustainable development over easy money.").
44. See *Ecuador: Statement Against Proposed Oil Exploration in Armadillo Block and Demands for Protecting of Indigenous People in Voluntary Isolation*, INDIGENOUS PEOPLES ISSUES & RESOURCES (2011), http://indigenous-peoplesissues.com/index.php?option=com_content&view=article&id=11414:ecuador-statement-against-proposed-oil-exploration-in-armadillo-block-and-demands-for-protecting-of-indigenous-people-in-voluntary-isolation&catid=23&Itemid=56 (original version and unofficial English translation).
45. See, e.g., *Chile the First Country to Contribute to the Yasuni-ITT Initiative*, UNITED NATIONS DEVELOPMENT FUND NEWSROOM, (2010), <http://content.undp.org/go/newsroom/2010/september/chile-the-first-country-to-contribute-to-the-yasuni-itt-initiative.en> (noting Chile's initial contribution of US\$100,000 to the Fund); *Spain to Contribute to Ecuador's Yasuni Initiative*, LATIN AMERICAN HERALD TRIBUNE, <http://www.laht.com/article.asp?ArticleId=376994&CategoryId=14089> (commenting upon Spain's proposed USD \$1,000,000 contribution to the Fund).
46. See *Yasuni ITT FAQs*, UNITED NATIONS DEVELOPMENT GROUP, 1, mdtf.undp.org/document/download/7500 (describing the indigenous groups living in seclusion within Ecuador).
47. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (United Nations Declaration on the Rights of Indigenous People).

Ecuador has recently played a major role in protecting the rights of indigenous peoples. Ecuador is a party to the 1989 International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.⁴⁸ Ecuador also co-sponsored the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007.⁴⁹ Furthermore, Ecuador has played an important role in the Organization of American States' working group responsible for the Draft Inter-American Convention on the Rights of Indigenous Peoples.⁵⁰ The Draft Inter-American Convention, for instance, provides protection for indigenous peoples and the environment by providing that "states shall not undertake, support or favor any policy of artificial or forced assimilation of indigenous peoples, destruction of a culture or possibly of the extermination of an indigenous people."⁵¹

According to the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, indigenous peoples "shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community."⁵² Additionally, third parties "shall be prevented from taking advantage of [indigenous peoples'] customs or lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them."⁵³

According to the United Nations Declaration on the Rights of Indigenous Peoples, these native tribes are afforded certain enhanced protections. One such protection is found in Article 8, which states, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."⁵⁴ Although the Declaration is not legally binding, it should be treated as the Universal Declaration of Human Rights was in the 1950s, ideals we should strive toward.⁵⁵ The Universal Declaration of Human Rights led to the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic Social and Cultural Rights (ICESCR).⁵⁶ Similarly, the Declaration on the Rights

48. See International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (ILO Convention 169) (Sept. 5, 1991), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

49. See Human Rights Council, National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Ecuador, 1st Sess., Apr. 7, 2008, at ¶ 141, U.N. Doc. A/HRC/WG.6/1/ECU/1 (2008).

50. See *Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples*, DIPUBLICO.COM, <http://www.dipublico.com.ar/english/draft-inter-american-commission-declaration-on-the-rights-of-indigenous-peoples>; see also Human Rights Council, *supra* note 49.

51. See *Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples*, DIPUBLICO.COM, at art. 5(2), <http://www.dipublico.com.ar/english/draft-inter-american-commission-declaration-on-the-rights-of-indigenous-peoples>.

52. See ILO Convention 169, *supra* note 48, at art. 17(2).

53. See *id.* at art. 17(3).

54. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 47.

55. See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4th Sess., Feb. 19, 2007, ¶ 38, U.N. Doc. A/HRC/4/35 (2007) (tracking the history of the Universal Declaration of Human Rights).

56. See *id.* at ¶ 36, U.N. Doc. A/HRC/4/35 (2007) (tracing the ICCPR and ICESCR's origins to the Universal Declaration of Human Rights).

of Indigenous Peoples should lead to the formation of a binding treaty protecting indigenous peoples' human rights.

The Declaration recommends that states provide effective mechanisms for prevention of and redress for:

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;⁵⁷

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;⁵⁸

The Declaration is not concerned with motives or intent; rather, it regards all actions that have these effects equally. Although there is a chance the exploration or drilling would not deprive the indigenous peoples of the land they inhabit, this may very well be the reality.⁵⁹ Exploration and drilling would force those tribes to transfer locations, as those tribes that voluntarily choose to avoid the modern world would have to migrate.⁶⁰ Thus, Ecuador must carefully explore and drill for oil.

The indigenous peoples are fighting back, and their efforts are directed at the Ecuadorian government and transnational corporations.⁶¹ Recently, the communities affected by the drilling and exploration sought redress for human rights abuses that have decimated indigenous groups. These groups have also addressed the broader, related questions of accountability and impunity.⁶²

Their efforts may be starting to pay off as foreign courts start to become more open to the enforcement of such suits. In *Chevron Corp. v. Donziger*,⁶³ the Ecuadorian Lago Agrio court

57. See United Nations Declaration on the Rights of Indigenous Peoples, at art. 8(2)(b).

58. See United Nations Declaration on the Rights of Indigenous Peoples, at art. 8(2)(c).

59. See Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-national Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rain Forest in Ecuador*, 31 AM. INDIAN L. REV. 445, 449 (2006) (noting that the loss of indigenous peoples' ancestral lands has threatened their very survival).

60. See Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 860 (2011) (discussing what constitutes cultural genocide and noting that forced population transfers qualify as an example).

61. See Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, 4th Sess., Mar. 15, 2006, ¶ 38, U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006) (noting the resistance of indigenous tribes to forced relocation).

62. See Steven Donziger, et al., *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8 (2010).

63. 768 F. Supp. 2d 581, 600 (S.D.N.Y. 2011), *rev'd and remanded by Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (discussing the history of the Lago Agrio case). A certified translation of the Lago Agrio court's February 14, 2011 decision is available at <http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf>.

imposed \$8.646 billion in damages for reparation measures.⁶⁴ “Some of the most vulnerable indigenous groups and rain forest communities are moving ever closer to having their human rights claims resolved after years of struggle against one of the world’s largest and most influential corporations.”⁶⁵

2. Cultural Rights Protections

There are also important rights to culture and cultural heritage that are implicated by the proposed oil drillings in Yasuni. Article 27(1) of the Universal Declaration of Human Rights affirms that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁶⁶ The Universal Declaration on Human Rights was codified into treaties, and its ideals remain the goal for human rights advocates.⁶⁷ The United Nations General Assembly’s Declaration illustrates that they believed that the cultural life of the community was an important right.⁶⁸

The International Covenant on Civil and Political Rights also notes that where “ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁶⁹ In conjunction with the Declaration on the Rights of Indigenous People, discussed above, minorities are given the right to enjoy their own culture.⁷⁰

The International Covenant on Economic, Social and Cultural Rights states that member parties recognize the right of their inhabitants to take part in cultural life.⁷¹ It also states that

64. See Letter from Randy Mastro to Honorable Lewis A. Kaplan, dated Feb. 24, 2011. (Categories include: \$600 million for groundwater remediation; \$5.396 billion for soil remediation; \$200 million to restore native flora, fauna, and aquatic life; \$150 million to implement a potable water system in the allegedly affected areas; \$1.4 billion to establish a health-care system to serve the general population of the allegedly affected communities; \$800 million for a plan of health, including potential cancer treatments; and \$100 million to rebuild ethnic communities and indigenous culture) (on file with author).

65. See Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44 (2011) (noting the recent \$8.6 billion award in Ecuador for the plaintiffs and against Chevron); see also Micaela L. Neal, Comment, *The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343, 370 (2011) (noting the recent Ecuadorian decision in the context of an emerging trend toward transnational oil corporations being held accountable for their activities).

66. See Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 27(1), U.N. Doc A/810 (1948).

67. See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4th Sess., Feb. 19, 2007, ¶ 36, U.N. Doc. A/HRC/4/35 (2007) (tracking the history of the Universal Declaration of Human Rights).

68. But see Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 303–04 (2000) (pointing out that stronger language to protect indigenous peoples was ultimately rejected).

69. See International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

70. See *id.*

71. See International Covenant on Economic, Social, and Cultural Rights, art. 15(1)(a), Jan. 3, 1976, 993 U.N.T.S. 3.

the member parties will take steps “to achieve the full realization of this right [including] those necessary for the conservation, the development and the diffusion of science and culture.”⁷²

The traditional view of intentional destruction of cultural heritage is informed by instances of destruction that occurred during hostilities.⁷³ One example is the Taliban’s destruction of the Buddhas at Bamiyan in Afghanistan.⁷⁴ In that case, the Taliban destroyed the Bamiyan Buddhas because they were considered an affront to Islam.⁷⁵ Intentional destruction of cultural heritage took place during war in the former Yugoslavia.⁷⁶ The International Criminal Tribunal for the Former Yugoslavia⁷⁷ was established in response to ethnic and cultural genocide that occurred in the Balkans, and included crimes against cultural heritage in its statute.⁷⁸

Yet intentional destruction of cultural heritage occurs in another important context. The intentional destruction of cultural heritage for profit is no different from the intentional destruction of cultural heritage for political reasons. In 2007, the Human Rights Council published a draft resolution stating that “[s]tates bear responsibility for intentional destruction or intentional failure to take appropriate means to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity.”⁷⁹

Intentional destruction of cultural heritage during armed conflict is governed by different rules than intentional destruction of cultural heritage during peacetime.⁸⁰ The former allows for a military necessity exception to the obligation to safeguard cultural property⁸¹ while the

72. See *id.* at art. 15(2) (emphasis added).

73. See generally The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, Series III, Vol. 3, General Orders no. 100 (Apr. 24, 1863).

74. See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 247 (2006); see also Corinne Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas’ Destruction*, 29 SUFFOLK TRANSNAT’L L. REV. 237 (2006).

75. See Brenner, *supra*, note 74, at 252–53.

76. See Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

77. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704 (1993).

78. See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(d), G.A. Res. 827 (25 May 1993), amended by GA Res. 1166 (13 May 1998), 1329 (30 Nov. 2000), 1411 (17 May 2002), 1431 (14 Aug. 2002), and 1481 (19 May 2005) (allowing prosecutions for “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”); see also Francesco Francioni, Symposium, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1212 (2004) at 1219 (noting that ICTY jurisprudence also acknowledges “that deliberate destruction of cultural heritage of a given ethnic group may constitute evidence of the element of mens rea required for the commission of the crime of genocide”).

79. See Human Rights Council Res. 6/L.33, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 6th Sess., U.N. Doc. A/HRC/6/L.33, (Sept. 26, 2007).

80. Compare Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1954 Hague Convention), with Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.N.T.S. 37 (World Heritage Convention).

81. See 1954 Hague Convention, *supra* note 80, at art. 4(2) (waiving obligations only in cases where military necessity imperatively requires such a waiver).

latter does not. Peacetime destruction is generally condemned, and the World Heritage Convention,⁸² which applies during peacetime, states:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.⁸³

Ecuador has a duty under the World Heritage Convention to preserve Yasuni for future generations. Article 4 envisions the Yasuni problem and its solution, which is international assistance and co-operation in the form of financial assistance.⁸⁴ The Yasuni-ITT Trust Fund is exactly the type of international cooperation the World Heritage Convention contemplates.

Yasuni was designated as a Biosphere Reserve in 1989 and, as such, qualifies as “cultural or natural heritage” under international law. Under the World Heritage Convention, natural heritage includes “geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation.”⁸⁵ Additionally, Article 2 of the World Heritage Convention also states that “natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty” qualify as natural heritage.⁸⁶ One potential solution would be adding Yasuni to the World Heritage List in order to afford it even greater protections.⁸⁷

3. Biological Diversity

Ecuador is also a party to the Convention on Biological Diversity.⁸⁸ The Convention on Biological Diversity’s objectives include the “conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. . . .”⁸⁹ “Biological diversity” is defined as the “variability among living organisms from all sources. . . . [T]his includes diversity within species, between species and

82. Ecuador acceded to the World Heritage Convention on June 16, 1975. See States Parties: Ratification Status, UNESCO, <http://whc.unesco.org/en/statesparties> (listing all state parties to the World Heritage Convention).

83. See World Heritage Convention, *supra* note 80, at art. 4.

84. See *id.*

85. See *id.* at art. 2.

86. See *id.*

87. See R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCI. AM. (Mar. 17, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/> (noting that Ecuador has recently added the Galapagos Islands to the World Heritage List by Ecuador).

88. See Convention on Biological Diversity, 31 I.L.M 818 (June 5, 1992).

89. See *id.* at art. 1.

of ecosystems.⁹⁰ Although states have the sovereign right to exploit their own natural resources, they also have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.⁹¹ The Biological Diversity Convention obligates states to take effective national action to halt the destruction of species, habitats and ecosystems.⁹²

Finally, international law also recognizes important rights relating to access to justice.⁹³ In the American Declaration of the Rights and Duties of Man, for example, people “may resort to the courts to ensure respect for his legal rights.”⁹⁴ Should Yasuni be placed on the World Heritage List, one important question to consider is whether the approved oil exploration would constitute intentional destruction of cultural heritage under international law.

III. The Responsibility to Preserve

In addition to the indigenous peoples’ rights and the right to culture and natural heritage, Ecuador should take this opportunity to implement a “Responsibility to Preserve.” The Yasuni-ITT Initiative raises questions of international law. Foremost is whether the international community has a financial responsibility to help developing nations preserve nature.⁹⁵ Similar to the Responsibility to Protect⁹⁶ (R2P) during internal hostilities, this emerging trend would obligate the industrialized world to help developing nations preserve nature.

Developing countries should not bear the financial burden of protecting the Earth’s most biodiverse forests.⁹⁷ Since the developed world benefits from the existence of Yasuni, they should support it.⁹⁸ In this context, Yasuni’s biodiversity will lead to new medicines and scientific advancements for the *entire* world – but only if this treasured land survives the oncoming

90. See *id.* at art. 2.

91. See *id.* at art. 3.

92. See DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 98 (2011) (describing features of the Biological Diversity Convention).

93. See Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc A/810 (1948); International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; American Declaration of Human Rights and Duties of Man, art. 18, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

94. See American Declaration of Human Rights and Duties of Man, art. 18, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

95. See Rigoberta Menchú, *The Amazon or Oil?*, PROJECT SYNDICATE (Oct. 6, 2011), <http://www.project-syndicate.org/commentary/the-amazon-or-oil->. (noting that Ecuador and the UNDP hope “to promote a spirit of global responsibility for Yasuni’s preservation”); see also Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

96. See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99 (2007) (detailing the history of the Responsibility to Protect).

97. See Carlos Zorrilla, *The Role of the World Bank in Promoting Sustainable Development in Latin America*, 14 MICH. ST. J. INT’L L. 541, 547 (2006) (arguing that prior World Bank measures in Ecuador have greatly increased the “social, environmental, and economic risks as well as the burden for developing countries”).

98. See Alister Doyle, *Ecuador Says Companies Join Novel Amazon Protection Fund*, REUTERS (Oct. 19, 2012) (noting that keeping oil below ground slows global warming).

oil rush.⁹⁹ Under Responsibility to Preserve, the international community must “recognize that Yasuni does not belong just to Ecuador, but to all of us, and that it is our responsibility to protect it for all time.”¹⁰⁰

One risk of allowing oil extractions is the loss of scientific and medical knowledge.¹⁰¹ In one example, an anti-cancer fungus has recently been found to naturally eat away plastic waste.¹⁰² From a scientific standpoint, this fungus will help eat away at a major source of pollution.¹⁰³ From a medical standpoint, this fungus contains taxol, the same enzyme used in conventional medicine to treat cancer patients.¹⁰⁴

A benefit is that protection from oil extraction will help in the fight against deforestation.¹⁰⁵ Scientific studies have demonstrated that deforestation is occurring inside the National Park, especially where roads have been built.¹⁰⁶ Adding further infrastructure required to extract oil would harm the efforts to prevent deforestation even more.¹⁰⁷

Yasuni's demise would have far-reaching consequences for the entire international community. It would lead to species loss and environmental degradation. It would also destroy natural heritage that is currently protected by UNESCO as a World Biosphere. Therefore, the international community should adopt a Responsibility to Preserve approach to save Yasuni. Similar to the responsibility to protect civilians during a humanitarian crisis,¹⁰⁸ states should be required to protect an ecosystem during an international environmental crisis. The first step would be for Yasuni to be designated a UNESCO World Heritage Site.¹⁰⁹ Under Article 11(3)

99. See Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012, (noting the hidden benefits of rain forests include medicines and chemicals used by the rest of the world); see also Menchú, *supra* note 95.

100. See Menchú, *supra* note 95.

101. See Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012 (noting that forest plants are a source of chemicals and medicines).

102. See Jonathan Benson, *Anti-Cancer Fungus Found to Naturally Eat Away Plastic Waste*, NATURALNEWS (Feb. 28, 2012), http://www.naturalnews.com/035077_fungus_plastic_bioremediation.html.

103. See *id.*

104. See *id.*

105. See generally Jonathan Asher Greenberg et al., *Survival Analysis of a Neotropical Rainforest Using Multitemporal Satellite Imagery*, 96 REMOTE SENSING ENV'T 202 (2005), available at <http://www.sciencedirect.com/science/article/pii/S0034425705000891>; see also Doyle, *supra* note 98 (noting that keeping oil underground will avoid emitting 1.2 billion metric tons of carbon dioxide into the atmosphere).

106. See Greenberg, *supra* note 105, at 209.

107. See John Vidal, *Ecuador: Four Months to Save the World's Last Great Wilderness From "Oil Curse,"* THE OBSERVER, Aug. 13, 2011, <http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park> (noting that drilling would make total destruction of Yasuni inevitable).

108. See Stahn, *supra* note 96, at 99 (detailing the history of the Responsibility to Protect).

109. See <http://whc.unesco.org/en/list> (indicating which cultural heritage sites are part of the UNESCO World Heritage List).

of the World Heritage Convention, Ecuador may request its addition.¹¹⁰ Once Yasuni is added to the World Heritage List, it would enjoy the protections of being a Biosphere Reserve and a World Heritage List site. Ecuador, having taken the first step, should be able to rely on the international community and a corresponding responsibility to preserve.¹¹¹ Ecuador's actions would signal its intent to be bound to conservation, thus alleviating the international community's fears that Ecuador may take the money and use it to drill.¹¹²

A Responsibility to Preserve approach would be a coalition between states, transnational corporations, and indigenous peoples. It would allow for safe drilling that does not have drastic effects on the environment. It would bring much needed financial assistance to developing states. It would maintain the integrity of the indigenous peoples in a manner consistent with the United Nations Declaration on the Rights of Indigenous Peoples. In addition, it would ensure that the funds received and the benefits conferred would go toward the Ecuadorian people.

For Responsibility to Preserve to achieve its goal, states and transnational corporations must make certain strategic choices. Both groups should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies. These standards that are required of states under international environmental law are readily applicable to transnational corporations.¹¹³

First, states and transnational corporations should support a precautionary approach to environmental challenges.¹¹⁴ The precautionary principle's purpose is "to anticipate and avoid environmental damage before it occurs. This preventive measure, which is novel in many ways, would ultimately serve to lower mitigation costs of resultant environmental damage."¹¹⁵ As dis-

110. See Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 11(3), Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 ("The inclusion of a property in the World Heritage List requires the consent of the State concerned.").

111. See Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Protection of Cultural Heritage as an Important Component of the Promotion and Protection of Cultural Rights*, ¶ 5, U.N. Doc. A/HRC/6/L.33 (Sept. 26, 2007) ("States bear responsibility for intentional destruction or intentional failure to take appropriate measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, to the extent provided for by international law.").

112. In response, the Yasuni-ITT Initiative has a provision whereby monies over a certain amount are automatically refunded in the event that the target is not met or if Ecuador one day decides to drill for oil. See *Yasuni ITT FAQs*, <http://mdtf.undp.org/document/download/7500> (referring to Yasuni Guaranty Certificates which allow for contributions above \$50,000 to be refunded).

113. See generally UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org> (last visited Oct. 21, 2012).

114. See UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle7.html> (last visited Oct. 21, 2012).

115. See Mary Stevens, *The Precautionary Principle in the International Arena*, 2 SUSTAINABLE DEV. L. & POL'Y 13, 13 (2002).

cussed above, Yasuni is home to countless flora and fauna that have yet to be classified. Were Yasuni to be destroyed today, the international community would miss the opportunity to analyze these unknown plants and animals because of its short-term obsession over oil. It would be in the pharmaceutical companies' best interests to push for more time to fully understand the scientific advantages we would gain by preserving Yasuni.

Second, transnational corporations should undertake initiatives to promote greater environmental responsibility.¹¹⁶ States associated with environmental responsibility can experience higher rates of foreign direct investment and other "carrots" in the international community.¹¹⁷ Companies associated with environmental responsibility can experience an upswing in brand reputation for environmental friendliness.¹¹⁸ As seen with the precautionary principle, it is in the best interests of transnational corporations to hold off on drilling until they understand the ramifications of their actions completely. The Texaco oil spill in the 1960s¹¹⁹ is an example of the negative effects of shirking environmental responsibility; Chevron is still tied up in the litigation from actions that took place more than 50 years ago.¹²⁰

Transnational corporations should encourage the diffusion of environmentally friendly technologies.¹²¹ One of the simplest ways to do this is to continue developing technology for safer oil extraction. It is in the best interests of these corporations to cause as little collateral damage to Yasuni as possible. Aside from safer oil extraction, these corporations should determine what is absolutely needed to safely extract oil and do no more harm than necessary. One example of an environmentally friendly technology would be to use helicopters to bring teams to and from the oil extracting sites instead of building roads.¹²² Yasuni already has a few roads, and studies conducted on those roads show a loss of biodiversity as well as illegal logging and other ills.¹²³

116. See UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle8.html> (last visited Oct. 21, 2012).

117. See *id.*

118. See Alister Doyle, *Ecuador Says Companies Join Novel Amazon Protection Fund*, REUTERS (Oct. 19, 2012) (noting that a dozen corporations, including Coca-Cola, have recently donated money to the Yasuni-ITT Initiative).

119. See *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012) (providing background details for the 1964 oil spill).

120. See *Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011).

121. See UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle9.html> (last visited Oct. 21, 2012).

122. See R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCI. AM. (Mar. 17, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/> (noting that other oil corporations "use helicopters to fly workers and drilling equipment to the sites instead of cutting roads, and they lay flexible oil pipelines to circumnavigate sensitive vegetation.").

123. *But see* E. Suarez, et al., *Oil Industry, Wild Meat Trade and Roads: Indirect Effects of Oil Extraction Activities in a Protected Area in North-Eastern Ecuador*, 12 ANIMAL CONSERV. 364, 370–71 (2009) (noting the efficiencies related to hunting caused by road construction and the better access to markets).

Ultimately, “as the need for economical growth intensifies, developing countries are increasingly turning to aggressive exploitation of natural resources in order to supply their economic needs.”¹²⁴ This conflicts with conservation of protected areas, a fact demonstrated by the apparent willingness of Ecuador to allow drilling in Yasuni. At the very least, however, a responsibility to preserve would mean learning from previous mistakes.¹²⁵ Extracting oil should not bring about a mess in the rain forest and in courtrooms.¹²⁶ Ecuador should take a leading role in this Responsibility to Preserve movement in order to protect its lands. There is a recent trend in the global South toward protection of natural assets from the global North, and Ecuador has a strong interest in pushing forth with such a movement.¹²⁷

IV. Strangers in Paradise: How a Responsibility to Preserve Would Assist Ecuadorians in Realizing Their Human Rights

The people who bear the costs of oil development have neither reaped the benefits of this discovery nor have they been invited to participate in the decisions that affect this area.¹²⁸ Ecuador has announced that the ITT Fund is expected to yield significant benefits, especially to the indigenous peoples.¹²⁹ Whether or not Ecuador’s actions will be in line with their words remains to be seen.¹³⁰

Anywhere from one-third to one-half of Ecuadorians live below the poverty line.¹³¹ Whereas the beginning of this article addressed the indigenous tribes living in Yasuni, the focus now shifts to all of Ecuador’s citizens and the human rights issues faced by them when dealing

124. *See id.* at 364.

125. *See* James Rochlin, *Development, the Environment and Ecuador’s Oil Patch: The Context and Nuances of the Case Against Texaco*, 28 J. THIRD WORLD STUD. 11, 11 (2011) (discussing the history of Ecuador’s economic development).

126. *See* *Aguinda v. Texaco*, 638 F.3d 384, 387 (2d Cir. 2011) (“For nearly seventeen years, in litigation spanning two continents and numerous courtrooms, a group of Ecuadorian citizens . . . have sought relief for environmental devastation allegedly caused by . . . Texaco Petroleum Company’s . . . oil exploration and drilling operations in the Ecuadorian rainforest.”).

127. *See* Michael T. Klare, *America, the New Saudi Arabia*, SALON (Apr. 2, 2012), http://www.salon.com/2012/04/02/america_the_new_saudi_arabia/.

128. *See* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT’L L. & POL. 413, 446 (2006).

129. *See* Economic & Social Council, Permanent Forum on Indigenous Issues, *Information Received from Governments: Ecuador*, ¶ 2 U.N. Doc. E/C.19/2010/12/Add.11 (Mar. 16, 2010) (“These measures are undertaken in implementation of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples.”).

130. *See* Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 449 (2006) (“Ecuador has previously turned a blind eye to its indigenous peoples in the name of profit.”).

131. *Compare* Rigoberta Menchú, *The Amazon or Oil?*, PROJECT SYNDICATE (Oct. 6, 2011), <http://www.project-syndicate.org/commentary/the-amazon-or-oil-; with R. Douglas Fields, Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain>, SCIENTIFIC AMERICAN (Mar. 17, 2012), <http://blogs.scientific-american.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/> (noting that Health Minister Carina Vance claims 50% of Ecuadorian citizens live below the poverty line).

with Yasuni. Ecuador's \$58.9 billion GDP is among the smallest in Latin America, and although foreign corporations have been enriched by exporting raw materials, that wealth has not trickled down to the Ecuadorian citizens.¹³²

The most financially lucrative option for Ecuador is to extract the oil.¹³³ Over the past few years, President Correa has used petroleum production to advance his social welfare campaigns.¹³⁴ This was evident when Correa gave the international community a deadline to come up with at least \$100 million for Ecuador to refrain from drilling inside Yasuni.¹³⁵ An important issue is how such money (if collected) can help the Ecuadorian people achieve their human rights.

The most difficult question Yasuni faces is how to balance the rights of the indigenous peoples and the environment with the rights of Ecuador's other citizens. Since Ecuador has one of the smallest GDPs in Latin America, the value of extracting oil could push Ecuadorians out of poverty and lead to a realization of their human rights. The International Covenant on Economic, Social and Cultural Rights provides the right "to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions."¹³⁶ The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."¹³⁷ However, the question of whether Ecuador owes its other citizens the money from oil exploration arises. Ecuador must figure out how to strike an appropriate balance between these competing interests in an equitable way for both the indigenous people and the general Ecuadorian population.

Statistics in Ecuador vary, but between one-half and one-third of its citizens live below the poverty line.¹³⁸ Ecuador is not realizing obligations to its citizens at its current level. By drilling for oil beneath Yasuni, however, Ecuador can make the argument that it is fulfilling its obligations under the International Covenant on Economic Social and Cultural Rights to provide its citizens with an adequate standard of living. The money may be invested in renewable energy products, helping Ecuador reduce its dependency on oil and funding community projects.

132. See Fields, *supra* note 32.

133. See Erin Sefloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-N.W. J. ENV. L. & POL'Y 379, 388–89 (2012) (clarifying that President Correa sought \$600 to \$700 million a year for 10 years to leave the oil underground); see also Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

134. See Rochlin, *supra* note 125, at 23 ("petroleum production had bankrolled President Correa's populist platform. It has represented the golden egg from which redistributive fruits can be drawn to cultivate and maintain support from the majority poor population. . . .").

135. See Walsh, *supra* note 133.

136. See International Covenant on Economic, Social, and Cultural Rights, art. 11(1)(a), Jan. 3, 1976, 993 U.N.T.S. 3.

137. See *id.* at art. 11(1) (emphasis added).

138. Compare Menchú, *supra* note 131 with Fields, *supra* note 132 (noting that Health Minister Carina Vance claims 50% of Ecuadorian citizens live below the poverty line).

However, not everyone is optimistic that drilling in Yasuni would have trickle-down effects for Ecuadorian citizens.¹³⁹ Many believe that this would merely enrich transnational corporations, leaving the Ecuadorian people without Yasuni and without any money. One Ecuadorian described this by saying that “the reality is that oil has not brought development. It has brought immense contamination and environmental destruction. . . . Pollution and deforestation bring problems everywhere the oil is. Oil has not solved the problems of Ecuador.”¹⁴⁰

Ecuador’s Oil Minister Wilson Pastor-Morris understands that the oil industry inevitably attracts corruption, violence, and social problems when it works in poor countries such as Ecuador.¹⁴¹ Thus, not only would drilling for oil violate the rights of the indigenous peoples and possibly violate international law, but it may also cause *greater* human rights violations in Ecuador, against people who currently enjoy comparatively better human rights. One example would be if an oil drilling station was built and an Ecuadorian citizen, who currently works on his own farm, takes a job with a transnational oil drilling company. This Ecuadorian citizen may then be subjected to human rights violations.

Even before balancing the competing interests of all Ecuadorians’ human rights versus the rights of indigenous peoples, it is imperative to decide whether Ecuadorians would even achieve an upswing in human rights based on the money received from the Yasuni drilling. If not, it would be difficult to argue that the drilling should occur. Therefore, should the Ecuadorian government use human rights rhetoric in the debate over drilling in Yasuni, then all monies that come in through the process should be transparently recorded. Contracts should be open to public bidding and leaders should be accountable. The only bigger tragedy than destroying the Yasuni ecosystem would be if the result of this tough environmental decision did not benefit the people it was intended to.

Ecuadorian President Correa stated that “the way to advance conservation is to make sure that poor countries benefit from conservation.”¹⁴² Correa should also understand that the way to advance conservation is to make sure that the poor Ecuadorians benefit from conservation. However, another issue that must be addressed is at what point do conservation and ecology become luxuries that must give way to basic necessities?¹⁴³ Ecuadorians, along with the rest of the world, would benefit immensely from keeping the oil buried deep underneath Yasuni. If the Yasuni-ITT Initiative is successful, Ecuador would prevent the emission of 407 million tons

139. See Kimerling, *supra* note 130, at 448 (“[T]he benefits of oil development have not been well distributed and the percentage of Ecuadorians living in poverty remains stubbornly high.”).

140. See John Vidal, *Ecuador: Four Months to Save the World’s Last Great Wilderness From “Oil Curse,”* THE OBSERVER, Aug. 13, 2011, <http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park>.

141. *Id.*

142. See Bryan Walsh, *Ransoming Paradise: Should the World Bribe Ecuador to Protect that Country’s Rain Forests?*, CHI. TRIB., Feb. 5, 2012, http://www.articles.chicagotribune.com/2012-02-05/news/ct-edit-ecuador-0205-201220205_1_yasuni-national-park-rain-forests-ecuador.

143. See R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCIENTIFIC AMERICAN (Mar. 17, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/> (quoting an Ecuadorian biologist arguing that these “luxuries” must give way when people need to eat).

of carbon.¹⁴⁴ Thus, Ecuador would take a leading position in the fight against climate change, and Ecuadorians would enjoy cleaner air.

V. Paradise Lost: Transnational Oil Corporations and a Responsibility to Preserve

Transnational corporations have a long history in Ecuador, and no transnational corporations are more blameworthy than oil companies like Chevron.¹⁴⁵ Texaco was accused of polluting the Amazon from the 1960s to the 1990s.¹⁴⁶ Chevron, which now owns Texaco,¹⁴⁷ continues to litigate a \$27 billion case over the damages from those allegations.¹⁴⁸ This case has taken “nearly seventeen years, in litigation spanning two continents and numerous courtrooms.”¹⁴⁹ This is one of the largest environmental cases ever to be litigated. No matter the outcome, incidents such as this have caused damage to Chevron’s reputation, both in Ecuador and abroad.¹⁵⁰ Not only are environmentalists and human rights activists upset, but Chevron

144. See U.N. GAOR, 65th Sess., 19th plen. mtg. at 1, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) (remarks of Ecuadorian Vice President, Mr. Moreno Garcés).

145. See *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012) (“The story of the conflict . . . must be among the most extensively told in the history of the American federal judiciary.”); see also Han Shan, *Chevron in Ecuador*, in THE TRUE COST OF CHEVRON: AN ALTERNATIVE ANNUAL REPORT 36 (May 2011), available at <http://truecostofchevron.com/2011-alternative-annual-report.pdf> (“There is no disputing that oil operations by Texaco—now Chevron—ravaged a sprawling, once-pristine rainforest region of Ecuador, devastating Indigenous communities, and creating a severe public health crisis for many thousands of residents.”).

146. See *Chevron Corp. v. Camacho Naranjo*, 67 F.3d 232, 235 (2d Cir. 2012); see also Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 445–46 (2006) (discussing the checkered history of Texaco in the Ecuadorian Amazon).

147. See *Ecuador v. Chevron Corp.*, 638 F.3d 384, 387 n.1 (2d Cir. 2011) (“Chevron Corporation merged with Tex-Pet’s parent company, Texaco, in 2001 to form Chevron Texaco, Inc. In 2005, ChevronTexaco changed its name back to Chevron Corporation.”).

148. See Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

149. See *Ecuador v. Chevron Corp.*, 638 F.3d 384, 387 (2d Cir. 2011); see also *Chevron v. Naranjo*, Docket Nos. 11-1150-cv(L) 11-1264-cv(CON) (2d Cir. Jan. 26, 2012) (“The story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary.”).

150. See Mitch Anderson, *Chevron’s Amazon Disaster: Ecuadorians Tour Europe, Find Investors Concerned*, S.F. CHRONICLE, Apr. 19, 2012, <http://blog.sfgate.com/manderson/2012/04/19/chevrons-amazon-disaster-ecuadorians-tour-europe-find-investors-concerned/>.

shareholders are also beginning to question decision making by Chevron's Board.¹⁵¹ The issue of corporate liability for internationally wrongful actions is one that continues to be heavily litigated.¹⁵² Chevron, the successor to Texaco in the litigation, has been accused of strong-arming the judicial process and acting in bad faith throughout the entire litigation.¹⁵³

Ecuador's human rights obligations require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights.¹⁵⁴

Transnational corporations are one such group that must abide by legislation that seeks to ensure that human rights violations do not occur.¹⁵⁵ The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights¹⁵⁶ recognize that although states are primarily responsible for human rights, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing human rights."¹⁵⁷

According to the United Nations Global Compact's three environmental principles: (i) businesses should support a precautionary approach to environmental challenges; (ii) businesses should undertake initiatives to promote greater environmental responsibility; and (iii) businesses should encourage the development and diffusion of environmentally friendly technologies.¹⁵⁸

Transnational corporations' obligations regarding cultural rights and environmental rights are spelled out in Articles 12 and 14 of the Norms on the Responsibilities of Transnational Corporations. In Article 12,

[t]ransnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and con-

151. *See id.* (noting that Chevron stockholders have written letters expressing their concern regarding Chevron's decision not to settle before the Ecuadorian judgment against the corporation for \$18 billion).

152. *Kiobel v. Royal Dutch Petroleum Co.* 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (a pertinent case on corporate liability that the Supreme Court of the United States was scheduled to decide this term, has been postponed until the October 2012 term so that the parties may brief additional issues for the court); *see generally* Lyle Denniston, *Kiobel to Be Expanded and Reargued*, SCOTUSBLOG, <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/> (detailing the circumstances that required postponing the decision until Fall 2012 term).

153. *See* Steven Donziger et. al., *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8, 9–10 (2010).

154. *See* HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1388 (3d ed. 2008).

155. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries. *See* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, at art. 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (Norms on the Responsibilities).

156. *See id.*

157. *See id.* at Preamble.

158. *See Environmental Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/Issues/Environment/> (last visited Oct. 23, 2012).

tribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.¹⁵⁹

Similarly, in Article 14,

[t]ransnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, and administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.¹⁶⁰

As discussed earlier, Ecuadorian law is clear on what actions taken by transnational corporations violate domestic law.¹⁶¹ Transnational corporations must abide by the provisions laid out in Ecuador's Constitution and executive decrees.¹⁶² Aside from the transnational corporations personal liability for certain actions, states are also responsible for the actions of transnational corporations. The Human Rights Committee has explained:

[T]he positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by State Parties of those rights, as a result of State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹⁶³

159. See Norms on the Responsibilities *supra* note 155.

160. See *id.*

161. See generally *Constitucion Politica de Republica del Ecuador* art. 57, 71–74 available at <http://www.pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (unofficial version); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (ratified by Ecuador in 1977).

162. See DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 577 (2011) (noting that under Ecuadorian law all surface minerals are the property of the State).

163. See Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, Art. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

Transnational corporations face greater legal hurdles when they attempt to destroy cultural heritage as opposed to when they attempt to destroy unprotected lands. The United Nations Educational Scientific and Cultural Organisation's (UNESCO) 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage requires states to identify, protect, conserve, present, and transmit to future generations the cultural and natural heritage located within their territory.¹⁶⁴ Where the state works in close proximity with transnational corporations, it may be held liable under international law for such actions. In fact, the recent Chevron litigation offers hope that this will be a step toward holding transnational corporations accountable for the harms that they cause to peoples and to environments.¹⁶⁵ Transnational corporations must be cautious of the effects that their policies have when they interact with indigenous local communities.¹⁶⁶ Steps taken in Ecuador are a step in the right direction, although not many states have been quick to adapt progressive measures against transnational corporations.¹⁶⁷

We know that left to their own devices, transnational oil companies will ignore the indigenous tribes and do as they please.¹⁶⁸ In one sad example, a subsidiary of the Italian company Eni convinced a group of Huarorani Indians to permit oil access over their lands and to sign away any right to sue in the future in exchange for a paltry amount of goods.¹⁶⁹ These tactics continue today, as PetroAmazonas "has promised villagers from the Kichwa indigenous group that they will get cash, new schools, a new eco-lodge, better healthcare and university education for their children if they accept plans for a seismic survey" that will grant exploration rights to the oil company near Yasuni.¹⁷⁰

VI. Other Yasunis

Ecuador is not the only state that faces this severe problem. Other states have an incentive to treat Yasuni with great care, as they may face this exact problem in the near future.¹⁷¹ One

164. See World Heritage Convention, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Nov. 23, 1972, 27 U.N.T.S. 37 at art. 4.

165. See Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44 (2011).

166. See E. Suarez, et al., *Oil Industry, Wild Meat Trade and Roads: Indirect Effects of Oil Extraction Activities in a Protected Area in North-Eastern Ecuador*, 12 ANIMAL CONSERV. 364, 370 (2009).

167. See Micaela L. Neal, Comment, *The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343, 370 (2011) (noting the Netherlands as another example of a progressive State regarding transnational liability).

168. See Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 450–51 (2006) (noting that although laws have been on the books in Ecuador since at least 1971 to protect the environment, oil companies have ignored those laws and the Ecuadorian Government has failed to enforce any such laws).

169. See Erin Sedloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379, 389–90 (2012) (describing that the "deal" included "medicine, food, a \$3,500 schoolhouse, plates, cups, an Ecuadorian flag, two soccer balls and a referee's whistle.").

170. See Jonathan Watts, *Shaman and British Wife Embark on Rainforest Campaign Against Oil Threat*, THE GUARDIAN (Oct. 16, 2012).

171. See Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012, (noting that Brazil and Indonesia have also recently began programs to protect their tropical rain forests from destruction).

example where there is a similar problem is in the Democratic Republic of Congo. A Ministerial Order, signed on September 1, 2011, gave South Africa Congo Oil (SOCO) a Certificate of Environmental Accessibility in order to exercise an oil exploration campaign by acquiring data in Virunga National Park.¹⁷² Virunga National Park is a UNESCO World Heritage Site, and its parallels to Yasuni are worth noting. Both cases deal with oil exploration within important natural heritage sites. Although one is in South America and the other in Africa, the lessons that have been learned from the former should be used in the latter.

Virunga National Park, located in the Democratic Republic of Congo, is Africa's oldest and most biodiverse national park.¹⁷³ Because Virunga has additional World Heritage Site protections, it seems that SOCO International, the oil company at issue, would violate international law if it began exploring for oil within the protected portions of the park. Yet SOCO has recently released details for its exploration of Block V, home of mountain gorillas and Lake Edward.¹⁷⁴ Advocates of protecting Virunga National Park would be remiss not to take lessons from Ecuador and its struggle to maintain its rain forests in the pressure of big transnational oil corporations.¹⁷⁵ Although outside the scope of this article, an important distinction is that Virunga lacks the uncontacted indigenous peoples and strong domestic legal protections that are found in the Yasuni example.

VII. Concluding Remarks

Time is slipping away in the bid to save Yasuni. Although President Correa continued the initiative for another year, he merely delayed the inevitable showdown that must take place.¹⁷⁶ Ecuador must act quickly to save its citizens and its natural resources, and should therefore adopt a Responsibility to Preserve approach that would protect its indigenous peoples and Yasuni, while at the same time helping lift Ecuadorians as a whole out of poverty.

172. See *World Heritage Centre Expresses Concern Regarding Aeromagnetic and Aerogravimetric Explorations at Virunga National Park* (DRC), UNESCO (Mar. 13, 2012), <http://whc.unesco.org/en/news/849>.

173. See *Virunga—Africa's Prized Park Needs Protection From New Oil Threat*, WORLD WILDLIFE FUND (Mar. 30, 2012), http://www.wwf.org.uk/news_feed.cfm?5868/Virunga-Africas-prized-park-needs-protection-from-new-oil-threat.

174. See Kevin Heath, *SOCO International Prepares to Survey for Oil in Gorilla Park*, WILDLIFE NEWS (Mar. 31, 2012), <http://wildlifeneews.co.uk/2012/soco-international-prepares-to-survey-for-oil-in-gorilla-park/>.

175. See *id.* ("Exploration for oil within the Virunga National Park would be very difficult to do legally as the park is protected by both national and international treaties. The park itself is a World Heritage Site and Lake Edward is a designated RAMSAR wetland.")

176. See *Ecuador: President Correa Gives Ecuador's Yasuni-ITT Initiative A Positive Evaluation*, INDIGENOUS PEOPLES ISSUES & RESOURCES (Jan. 7, 2012, 2:33 p.m.) (noting that Correa extended the Yasuni-ITT Initiative into 2013).

Ecuador should advocate the formalization of the Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples, which provides more protection than the similar U.N. declaration. Article XIII, titled “the right to environmental protection,” provides more stringent standards to protect Yasuni. The Draft Declaration would punish toxic waste dumping¹⁷⁷ and would require informed consent of indigenous peoples living within Yasuni before natural resource development began.¹⁷⁸ In addition to protecting Yasuni from oil extraction, it would also protect the Park from other natural resource extraction.¹⁷⁹

177. See Draft Inter-American Declaration on the Rights of Indigenous Peoples, at art. XIII(6).

178. See *id.* at art. XIII(7).

179. See *Ecuador Indians Protest Mining Plans*, FOX NEWS LATINO (Mar. 22, 2012), <http://latino.foxnews.com/latino/lifestyle/2012/03/22/ecuador-indians-protest-mining-plans/>.