4. The role of fair and equitable benefit-sharing in environmental peacebuilding

Elisa Morgera

1. INTRODUCTION

This chapter will explore the extent to which international legal obligations on fair and equitable benefit-sharing, apply to the integration of natural resource management and environmental protection in conflict resolution and recovery strategies. These obligations have emerged at the crossroads of international biodiversity law and international human rights law.[1] They will be analysed in the context of efforts to prevent conflict relapse and to lay the foundations for sustainable peace and development in the sectors of extractives, infrastructure and agricultural development, fisheries, as well as conservation. These obligations apply to states (both the state undergoing a peacebuilding process and other states involved in this process via bilateral development cooperation or foreign investment). These obligations also apply to international organizations and are relevant to understand business responsibility to respect human rights in peacebuilding processes.

Attention will focus on how fair and equitable benefit-sharing can contribute to sustainable and inclusive approaches to the conservation and sustainable use of natural resources by supporting consideration of the human rights of indigenous peoples, the rights to culture and food of local communities, and the human rights of rural women, as part of peacebuilding processes. This chapter will therefore not address the equally important questions of reducing the environmental footprint of peacekeeping operations[2] or the evaluation and redress of environmental damage caused during the conflict. Ultimately, the chapter seeks to clarify the scope of existing obligations in international human rights law and international biodiversity law against the background of the International Law Commission's draft principles on the protection of the environment in relation to armed conflict. Specifically, this chapter will relate to the draft principles on environmental impact assessments, indigenous peoples, and corporate due diligence in post-conflict situations.[3]

The chapter will first introduce fair and equitable benefit-sharing and its status and normative content in international law. It will then assess to what extent benefit-sharing has been addressed in the context of environmental peacebuilding scholarship, and identify its potential to prevent a country from relapsing into armed conflict due to unresolved issues in natural

[1] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit-sharing' (2016) 27(2) *European Journal of International Law* 353–83.

[2] E.g., UN, *Environmental Policy for UN Field Missions* (2017).

[3] International Law Commission (ILC), Report of the Seventy-third session: 'Protection of the environment in relation to armed conflicts' (18 April–3 June and 4 July–5 August 2022), UN Doc A/77/10:, Principles 5.2, 10 and 24 (hereinafter, ILC draft principles on the protection of the environment in relation to armed conflict).

resources tenure and governance.[4] In that connection, the chapter will advance an understanding of benefit-sharing that can support the respect of the human rights of indigenous peoples, local communities, and rural women. The chapter will then focus on how fair and equitable benefit-sharing can support environmental peacebuilding vis-à-vis indigenous peoples in particular, which is the most developed area of international practice.[5] It will proceed to discuss relevant implications for business responsibility to respect the human rights of indigenous peoples. The chapter will conclude with a reflection on the impact of benefit-sharing on the rights and obligations of various actors involved in environmental peacebuilding, as well as recommendations about its more systematic operationalization.

2. THE EMERGENCE OF FAIR AND EQUITABLE BENEFIT-SHARING IN INTERNATIONAL LAW

The first appearance of benefit-sharing in international law dates back to the 1948 Universal Declaration of Human Rights, which referred to everyone's right to share in the benefits of scientific advancement[6] and the 1986 UN Declaration on the Right to Development, which referred to states' duty to ensure the 'active, free and meaningful participation in …the *fair distribution of the benefits* resulting' from national development for their entire population and all individuals.[7] Benefit-sharing is also embedded in the 1989 ILO Indigenous and Tribal Peoples Convention No 169,[8] which provides that indigenous and tribal peoples 'shall, wherever possible participate in the benefits' arising from the exploration and exploitation of natural resources pertaining to their lands. Notwithstanding its vagueness[9] and the limited membership of the ILO Convention, this provision has become increasingly prominent in the interpretation of other international instruments (the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the UN Declaration on the Rights of Indigenous Peoples)[10] in connection with the territories and natural resources of indigenous peoples.[11] In a nutshell, fair and equitable benefit-sharing has emerged as a key safeguard,

---

[4] Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (CUP, 2015) at 3–4.

[5] Elisa Morgera, 'Fair and Equitable Benefit-sharing' in Emanuela Orlando and Ludwig Krämer (eds), *Encyclopedia of Environmental Law: Principles of Environmental Law* (Edward Elgar 2018) 323–37.

[6] Universal Declaration on Human Rights (adopted on 10 December 1948) UN Doc. A/810 (UDHR) Art 27(1) (emphasis added), which is reiterated in slightly different wording in the International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966) 16 December 1966, 993 UNTS 3 (ICESCR) Art 15.

[7] UN Declaration on the Right to Development (adopted on 4 December 1986) UN Doc GA Res 41/128, Art 2(3) (emphasis added).

[8] International Labour Organization (ILO), 'Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries' (adopted on 7 June 1989) 28 ILM 1382.

[9] Lee Swepston, 'New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 *Oklahoma City University Law Review* 677, 703–706.

[10] American Convention on Human Rights (adopted on 22 November 1969) 1144 UNTS 123; UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (adopted on 13 September 2007) UNGA Res. 61/295.

[11] E.g., IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007 and subsequent case law cited below.

together with environmental and socio-cultural impact assessments and free, prior informed consent (FPIC), under all relevant international human rights treaties that contribute to the protection of the rights of indigenous peoples, such as the Convention on the Elimination of All Forms of Racial Discrimination.[12] Based on the rights to property, culture, development and self-determination, benefit-sharing has been increasingly recognized[13] as an implicit component of indigenous peoples' rights to their territories, lands, waters and natural resources.[14] It is mainly seen to *protect* communities against third parties' natural resource development (mining and logging) or conservation measures that can negatively affect communities' way of life.[15]

In parallel, substantial developments on fair and equitable benefit-sharing have occurred in the context of international biodiversity law. The 1992 Convention of Biological Diversity (CBD)[16] includes benefit-sharing obligations, which have been spelt out in a series of consensus-based, soft-law decisions adopted by 196 Parties[17] and in the legally binding Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing (Nagoya Protocol).[18] Most attention has focused on fair and equitable benefit-sharing in relation to bioprospecting, i.e., transnational bio-based research and development (R&D). But benefit-sharing has also emerged under the CBD as a component of the ecosystem approach,[19] in conjunction with the benefit-sharing obligations arising from the use of indigenous peoples' and local communities' traditional knowledge.[20] This is in recognition of the relationship between the stewardship of traditionally occupied or used territories and natural resources and the production and dissem-

---

[12] Elisa Morgera 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities Connected to Natural Resources' (2019) 23 *International Journal of Human Rights* 1098–139.

[13] African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya), and Minority Rights Group International, *Endorois Welfare Council v. Kenya*, Communication no. 276/2003, 25 November 2009; IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment (Merits, Reparations and Costs), 25 November 2015.

[14] Namely, UNDRIP Arts 25–26: see Report of the James Anaya, 'UN Special Rapporteur on Indigenous Peoples Rights' (19 July 2010) UN Doc. A/HRC/15/37, paras 76–77.

[15] Morgera (n 12).

[16] Convention on Biological Diversity (CBD) (adopted on 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[17] As opposed to the limited membership of the ILO Convention (24 countries).

[18] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization 2014, CBD Decision X/1 (2010) Annex I; see Elisa Morgera et al, *Unraveling the Nagoya Protocol: Commentary on the Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Martinus Nijhoff 2014).

[19] Principles of the Ecosystem Approach, CBD Decision V/6 (2000), para 9; Elisa Morgera, 'Ecosystem and Precautionary Approaches', in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar 2017).

[20] Bonn Guidelines on Access and Benefit-sharing, CBD Decision VI/24 (2002) Annex, para 48; and Tkarihwaié:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD Decision X/42 (2010), annex, para 14; Principles of the Ecosystem Approach (n 19), Principle 8; Refinement and elaboration of the ecosystem approach (n 22), rationale to Principle 4. For a discussion, Morgera (n 1).

ination of traditional knowledge,[21] which embodies *traditional lifestyles*[22] based on the link between communities' shared cultural identity, the biological resources that they use,[23] and their customary rules about traditional knowledge and natural resource management.[24] In this connection, benefit-sharing serves as *recognition* and *reward* for the use of traditional knowledge, and customary sustainable management and conservation of natural resources.[25]

These developments at the crossroads of international biodiversity and human rights law also explain the emergence of benefit-sharing in a variety of international legal developments in the areas of water,[26] fisheries,[27] climate change,[28] land and food,[29] and corporate accountability.[30] The proliferation of references to benefit-sharing in different international legal materials, however, has been accompanied by a remarkable lack of conceptual clarity and terminological inconsistencies.[31] As argued elsewhere,[32] it is nevertheless possible to identify a common normative core to fair and equitable benefit-sharing across different areas of international law. 'Sharing' conveys agency, rather than the passive enjoyment of bene-

---

[21] Johanna Gibson , 'Community Rights to Culture: The UN Declaration on the Rights of Indigenous Peoples', in Stephan Allen and Alexandra Xanthanki (eds), *Reflections on the UN Declaration of the Rights of Indigenous Peoples* (Bloomsbury, 2011) 434, at 434–35.

[22] On the basis of the wording of CBD Art 8(j).

[23] In the light of the placement of CBD Art 8(j) in the context of *in situ conservation* (CBD Art 8).

[24] *See* generally Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge 2014).

[25] Morgera (n 12).

[26] Ramsar Convention on Wetlands of International Importance, Resolution X.19: Wetlands and River Basin Management: Consolidated Scientific and Technical Guidance (2008), Annex, para. 25; Patricia Wouters and Ruby Moynihan, 'Benefit-sharing in International Water Law', in Flavia Loures and Alistair Rieu-Clarke (eds), *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Earthscan 2013) 321.

[27] Food and Agricultural Organization (FAO), Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication (2013), para. 5.1.

[28] E.g., UN Reducing Emissions from Deforestation and Forest Degradation (REDD), Programme Social and Environmental Principles and Criteria, Criterion 12 (2012); Adaptation Fund Board, Adaptation Fund Environmental and Social Policy (2013), para. 13. For a discussion, see Kim Bouwer, 'Possibilities for Justice and Equity in Human Rights and Climate Law; Benefit-sharing in Climate Finance' (2021) 11 *Climate Law* 1; and Annalisa Savaresi and Kim Bouwer, 'Equity and Justice in Climate Change Law and Policy: a Role for Benefit-sharing' in Tahseen Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2019).

[29] FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), UN Doc. CL 144/9 (C 2013/20) (2012), Appendix D, Art 8.6; O. De Schutter, 'UN Rapporteur on the Right to Food, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge' (28 December 2009), UN Doc. A/HRC/13/33/Add.2, para. 33; Elsa Tsioumani, *Fair and Equitable Benefit-sharing in Agriculture: Reinventing Agrarian Justice* (Routledge 2020).

[30] E.g., Expert Mechanism on the Rights of Indigenous Peoples, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making (25 August 2010) UN Doc A/HRC/15/35. See discussion in Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn, OUP 2020) 202–10.

[31] Bram de Jonge, 'What Is Fair and Equitable Benefit-Sharing?' (2011) 24 *Journal of Agricultural and Environmental Ethics* 127; Doris Schroeder, 'Benefit-Sharing: It's Time for a Definition' (2007) 33 *Journal of Medical Ethics* 205, at 208.

[32] Morgera (n 1).

fits.[33] To that end, benefit-sharing is not about unidirectional (likely, top-down) or one-off flows of benefits. Rather it needs to be interpreted as a concerted, iterative dialogue aimed at finding common understanding in identifying and apportioning benefits to lay the foundation for a *partnership* among different actors in the context of power asymmetries.[34] Similarly, international developments on business responsibility to respect human rights[35] have clarified that benefit-sharing, as part of the due diligence of companies operating projects in or near indigenous lands, entails good-faith consultations with communities with a view to agreeing on benefit-sharing modalities that make communities genuine partners in the project.[36]

While terminology varies, the rationale for the emergence of benefit-sharing obligations in international law is largely seen as the operationalization of fairness and equity,[37] which is also a key concern in peacebuilding approaches.[38] Benefit-sharing can be seen as a tool to balance competing rights and interests[39] with a view to integrating ideas of justice into a relationship regulated by international law.[40] In theory, the recourse to the twin expression 'fair and equitable' serves to make explicit both procedural dimensions of justice (fairness) that determine the legitimacy of certain courses of action as well as substantive dimensions of justice (equity).[41] Rather, inequalities in the substantive outcome are only justifiable if they provide advantages to all participants,[42] as part of the state's exercise of national sovereignty as a 'guarantee for the progressive realization of human rights', to the maximum of available resources.[43]

In terms of 'benefits', international human rights law guidance has emphasized that the determination of benefits is inherently contextual. It has also tended to emphasize monetary

---

[33] Mikel Mancisidor, 'Is There Such a Thing as a Human Right to Science in International Law?' (*ESIL Reflections* 7 April 2015).

[34] On the intra-state dimension of benefit sharing, see, e.g., James Anaya, 'Rapporteur on Indigenous Peoples' Rights, Study on extractive industries and indigenous peoples' (1 July 2013) A/HRC/24/41, paras 75–77, 92; Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/AC.4/2001/2 (2001), para. 19. On the inter-state dimension, see, e.g., Report of the High-Level Task Force on the Implementation of the Right to Development on Its Second Meeting, UN Doc. E/CN.4/2005/WG.18/TF/3 (2005), para. 82.

[35] UN Human Rights Commission (UNHRC), Protect, Respect and Remedy, a Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (2008), endorsed by HRC Resolution 8/7 (2008); UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011), endorsed by HRC Resolution 17/4 (2011).

[36] Rapporteur on Indigenous Peoples' Rights, Study on extractive industries and indigenous peoples (2013) UN Doc A/HRC/24/41, para. 75.

[37] Committee on the Elimination of Racial Discrimination, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2 (2003), para. 16; UNPFII, Report of the International Workshop on Methodologies Regarding Free, Prior Informed Consent and Indigenous Peoples, UN Doc. E/C.19/2005/3 (2005), para. 46(i)(e); *Saramaka* (n 11), para. 140 ('reasonable equitable'); *Endorois* (n 13), paras 269, 297.

[38] See the contribution of Barral, Chapter 3 in this volume.

[39] Ciarán Burke, *An Equitable Framework for Humanitarian Intervention* (Hart 2014), at 197–98 and 250–51.

[40] Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP 2013), at 130.

[41] Ibid., at 141.

[42] Ibid., at 145.

[43] ICESCR Art 1(2).

benefits,[44] although empirical evidence suggests that non-monetary benefits may exceed the importance of monetary benefits for communities' well-being.[45] CBD Parties, in turn, have identified benefits that support indigenous peoples' own economic activities, such as: fostering local enterprises, participating in others' enterprises and projects, offering direct investment opportunities, facilitating access to markets, and supporting the diversification of income-generating (economic) opportunities for small- and medium-sized businesses.[46] Further types of benefits have been identified to *improve and consolidate* the conditions under which ecosystem stewards and traditional knowledge holders develop and maintain their knowledge and practices: information sharing, capacity building, scientific cooperation, or assistance in diversifying management capacities,[47] as well as the legal recognition for community-based natural resource management and conservation,[48] the incorporation of traditional knowledge in environmental and socio-cultural impact assessments[49] and in natural resource management planning.[50] This also includes payments for ecosystem services.[51] The rationale of the CBD benefit-sharing obligation can thus also be understood as *recognition* for past and present contributions of indigenous peoples and local communities to global environmental objectives with a view to ensuring that their traditional practices continue in the future.[52] What seems to emerge from these varying approaches as a common thread, is that benefit-sharing obligations are linked to a *menu* of benefits, the nature of which can be economic and non-economic. This arguably aims at taking into account, through the concerted, dialogic process of sharing, the

---

[44] Eg ILO, Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of ILO Convention No. 169, Doc. GB.282/14/4 (2001), para. 44(3); Report of the Committee set up to Examine the Representation alleging non-observance by Ecuador of ILO Convention No. 169, ILO Doc. GB.282/14/4, para. 44(3) (2001).

[45] Rachel Wynberg and Maria Hauck, 'People, Power and the Coast: Towards an Integrated, Just and Holistic Approach' in Rachel Wynberg and Maria Hauck (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (UCT Press 2014) 143, 158.

[46] CBD, Guidelines on Biodiversity and Tourism, Decision V/25 (2000), paras 22–23, 43.

[47] Principles of the Ecosystem Approach, para. 9; CBD expanded work programme on forest biodiversity, Decision VI/22 (2002), at goal 5, objective 1, activities; CBD work programme on mountain biodiversity, CBD decision VII/27 (2004), Annex, para. 1.3.7; Akwé: Kon Guidelines, paras. 40 and 46; Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, CBD Decision VII/12 (2004), Annex, rationale to Principle 4; CBD, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization, CBD Decision VI/24 (2002) Annex, para. 50.

[48] Eg CBD Decision VI/22, para. 31 and programme element 1, Goal 4, objective 3; CBD work programme on mountain biodiversity, CBD decision VII/27 (2004), Annex, paras 2.2.1–2.2.5.

[49] Akwé: Kon Guidelines, para. 56.

[50] Addis Ababa Guidelines, operational guidelines to Principle 4; and CBD work programme on forest biodiversity, Decision VI/22 (2002), para. 34. See also Agenda 21 (1992) UN Doc A/CONF.151/26/Rev.1 vol 1, Annex II, para. 15(4)(g) and Johannesburg Plan of Implementation (2002) UN Doc A/CONF.199/20, Resolution 2, para. 44(j).

[51] Akwé: Kon Guidelines, para. 46. See Mary Menton and Aoife Bennett, 'PES: Payments for Ecosystem Services and Poverty Alleviation?' and Ina Porras and Nigel Asquith, 'Scaling-up Conditional Transfers for Environmental Protection and Poverty Alleviation' in Kate Schreckenberg et al (eds), Ecosystem Services and Poverty Alleviation: Trade-offs and Governance (Routledge 2018) 189 and 204 respectively.

[52] Elisa Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity' (2015) 25 *Italian Yearbook of International Law* 113.

beneficiaries' needs, values, and priorities through a contextual selection of the combination of benefits that may best serve to lay the foundation for partnership.

In practice, no criteria or mechanism is provided at the international level to determine whether contextual benefit-sharing agreements are actually fair and equitable.[53] International treaties, however, leave the specific determination of what is fair and equitable to successive multilateral negotiations or to contractual negotiations.[54] Much remains to be ascertained as to when and why benefit-sharing achieves its stated fairness and equity purposes. Situations in which it does not, and rather contributes to consolidating power and information asymmetries, are well-documented.[55] Risks attached to different benefits (and the costs and losses that may be associated with certain benefits[56]) have not been fully or systematically analysed. The interaction between benefit-sharing and procedural rights (access to information, decision-making, and justice)[57] and legal empowerment approaches[58] is also understudied, which is very concerning in light of the documented misuse of benefit-sharing to 'renegotiate' communities' human rights or put a price tag on them.[59] That said, there have been increasing efforts internationally to interpret benefit-sharing from a human rights perspective, which contributed to address these equity concerns.[60] Similarly to other equitable principles, fair and equitable benefit-sharing is open-textured and evolutionary,[61] and may arguably be filled with content by establishing a linkage with different international legal sub-systems.[62] A comparison is possible with the evolution of the similarly worded notion of fair and equitable treatment in international investment law,[63] which was fleshed out by relying on international human rights standards such as procedural fairness, non-discrimination, and proportionality.[64] In effect,

---

[53] With the exception of the WHO PIP Framework (Art 6(1)), which makes reference to public health risk and needs, as principles for fair and equitable benefit-sharing.

[54] Francesco Francioni, 'Equity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010, online ed).

[55] Adrian Martin *et al*., 'Just Conservation? On the Fairness of Sharing Benefits', in Thomas Sikor (ed.), *The Justices and Injustices of Ecosystem Services* (Routledge 2014) 69, at 84–88.

[56] Wynberg and Hauck (n 45), at 158.

[57] Rio Declaration on Environment and Development 1992 (adopted on 14 June 1992) 31 ILM 874, Principle 10. Note that Sand considered Rio Principle 27 on a global partnership as the substantive basis for the exercise of the procedural rights enshrined in Principle 10. Peter Sand, 'Cooperation in a Spirit of Global Partnership' in Jorge Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 617, at 630–631.

[58] This is particularly the case of the 'community protocols' for which an international obligation to support has been included in the Nagoya Protocol, Art. 12(3)(a).

[59] Marcos Orellana, 'Saramaka People v Suriname Judgment' (2008) 102 *American Journal of International Law* 841, at 847.

[60] Morgera (n 12).

[61] WTO Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products – Report of the Appellate Body*, (12 October 1998) WT/DS58/AB/R, para. 130.

[62] *North Sea Continental Shelf Cases*, (Germany/Denmark) (Judgment) [20 February 1969] ICJ Rep 3, para. 88; Wolfrum (n 54), para. 63; Hugh Thirlway, *The Sources of International Law* (OUP, 2014), at 106; Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the WTO-and-Competing-Regimes Debate?' (2010) 21 *European Journal of International Law* 649.

[63] Francesco Francioni, 'International Law for Biotechnology: Basic Principles', in Francesco Francioni and Tullio Scovazzi (eds), *Biotechnology and International Law* (Hart 2006) 3, at 24.

[64] Pierre M Dupuy and Jorge Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress', in Marc Bungenberg *et al.* (eds), *International Investment Law: A Handbook* (Beck/Hart/Nomos 2015).

human rights standards have helped determine minimum (albeit general) parameters of fairness, that tend to remain unspecified in international biodiversity law, in relation to the human rights of indigenous peoples in the context of extractives and conservation initiatives.[65] These will be discussed below.

With regard to its beneficiaries, in addition to indigenous peoples, 'local communities', small-scale/traditional 'farmers',[66] small-scale fishing communities[67] and 'tenure right holders' (i.e., those having a formal or informal right to access land and other natural resources for the realization of their human right to an adequate standard of living and well-being)[68] have been identified as beneficiaries. As former UN Special Rapporteur Knox explained, these communities may be comparable in terms of vulnerability to indigenous peoples in that they have a similarly close relationship with territories and 'depend directly on nature for their material needs and cultural life' without self-identifying as indigenous peoples.[69] These groups would benefit from the protection of human rights of general application (such as those related to property, subsistence, and culture),[70] which may be negatively affected by interferences with their customary relations with land and biological resources.[71] Accordingly, 'additional measures [are needed] to protect those who are most vulnerable to, or at particular risk from', biodiversity loss, as well as:

> effective measures against the underlying conditions that cause or help to perpetuate discrimination, such as those measures that have disproportionately severe effects on communities that rely on the ecosystems (such as mining and logging concessions) or historical or persistent prejudice against groups of individuals that can be reinforced by environmental harm.[72]

An additional group of beneficiaries can be identified in relation to rural women's human rights in the ownership, acquisition, management, administration, enjoyment and disposition of land, non-discrimination in rural areas, as well as participation in rural development[73] (which is understood to comprise agricultural and water policies, forestry, livestock, fisheries

---

[65] Morgera (n 12).

[66] International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) (adopted in 2001, entered into force 29 June 2004), 2400 UNTS 303, Art. 9.2 and UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN General Assembly Resolution 73/165 (adopted on 28 September 2018 entered into force 8 October 2018) UN Doc A/HRC/RES/39/12 see Tsioumani (n 29).

[67] FAO, Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication (2013), para. 5.1.

[68] VGGT, Art. 8.6.

[69] John H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights and the Environment: Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59, (UN Framework Principles) (2018) para. 48.

[70] Adriana Bessa, 'Traditional Local Communities in International Law' (PhD dissertation, European University Institute 2013); inconclusive CBD, Decision XI/14 (2012).

[71] Olivier De Schutter, 'The Emerging Human Right to Land' (2010)12 *International Community Law Review* 303, at 324–25, 319.

[72] UN Framework Principles, para. 9.

[73] United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Arts 16(1)(h) and 14(2).

and aquaculture).[74] In particular, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) recommended ensuring that rural development projects are implemented only after conducting participatory gender and environmental impact assessments with full participation of rural women, obtaining rural women's FPIC and ensuring benefit-sharing (for instance, in revenues generated by large-scale development projects).[75] As these safeguards are remarkably similar to those identified for the protection of indigenous peoples' rights to natural resources, more clarity on the obligations on EIAs, FPIC and benefit-sharing for rural women could be derived by analogy from the CBD guidance that has focused on the impacts of extractives and conservation initiatives on indigenous peoples and local communities.

With regard to its status, benefit-sharing is employed in international law as a treaty objective,[76] an international obligation,[77] a right,[78] a safeguard,[79] or a mechanism.[80] Limited and qualified treaty bases[81] have been increasingly complemented by authoritative interpretations put forward by international human rights bodies of adjudicatory and advisory nature, including by relying on international soft-law guidance adopted by consensus by CBD Parties. It seems more apt to understand it as an inherent component of human rights connected to natural resources.[82] As such, benefit-sharing obligations can be construed as part and parcel of the prohibition of discrimination against indigenous peoples on racial grounds,[83] and to that extent benefit-sharing could partake in the customary and *ius cogens* nature of non-discrimination. In all other cases, benefit-sharing obligations can be conceived as part and parcel of the general principle of international law[84] of effective consultation.[85] This seems relevant for the ILC draft article on 'effective consultations and cooperation with indigenous peoples', although it also points to a broader range of relevant human rights holders (non-indigenous local communities,

---

[74] Naomi Kenney and Mika Schroder, 'Gender Equality and Benefit Sharing: Exploring the Linkages in Relation to Land and Genetic Resources' (Benelexblog, 2016) ; and Victoria Jenkins, 'Gender and the Convention on Biological Diversity', in Morgera and Razzaque (n 19).

[75] Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), *General recommendation No. 34 on the rights of rural women*, 2016.

[76] CBD, Art. 1; ITPGRFA, Art. 1; Nagoya Protocol, Art. 1.

[77] CBD, Arts 15(7), 8(j); Nagoya Protocol, Art. 5.

[78] International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 7 June 1989) 28 ILM 1382, Art. 15(2); ITPGRFA, Art. 9.

[79] *Saramaka* (n 11), para. 129; *Endorois* (n 13), para. 227; Special Rapporteur Anaya (n 34) para. 52.

[80] United Nations Convention on the Law of the Sea (adopted on 10 December1982,entered into force on 16 November 1994) 21 ILM 1261 (UNCLOS) Art. 140; ITPGRFA, Art. 10; Nagoya Protocol, Art. 10.

[81] CBD treaty provisions contains significantly qualified language and their legal weight has been contested: Suart Harrop and Diana Pritchard, 'A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory' (2011) 21 *Global Environmental Change* 474.

[82] But not as a self-standing right in and of itself. This proposition was quickly abandoned by former UN Special Rapporteur James Anaya (n 14) paras 67 and 76–78.

[83] IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (24 August 2010), Sect. 3.1 and n. 37; see Alessandro Fodella, 'Indigenous Peoples, the Environment and International Jurisprudence', in Nerina Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer, 2013) 349, at 358.

[84] IACtHR, *Comunidad Garífuna de Punta Piedra y sus miembros v. Honduras* (Preliminary Exceptions, Merits, Reparations and Costs), 8 October 2015, para. 222.

[85] Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *EJIL* 165, 176.

rural women). The CEDAW Committee, for instance, has recommended that states parties in post-conflict situations should ensure rural women's participation as decision-makers in peacebuilding efforts and processes.[86]

Ultimately, as has been argued elsewhere, benefit-sharing can be understood as a general principle of international law that has affected in different ways different areas of international law.[87] The meaning of fair and equitable benefit-sharing appears to go beyond a particular treaty regime in which it can be found, and its common normative core is 'recognized by international law itself'.[88] As a general principle, fair and equitable benefit-sharing may affect the exercise of states' discretionary powers in relation to the development, interpretation, and application of international law in the absence of an applicable treaty basis.[89] As such, it can also apply to international organizations.[90] It exerts influence by providing 'parameters' (an objective to be taken into account and appropriate processes for doing so[91]) affecting the way governments, courts or international organizations make decisions.[92] It provides a 'yardstick' contributing to 'the evolution of a new balance of rights and duties in many fields of international law' in the context of 'legal relationships of all kinds' and 'in a world deeply divided by conflicting ideologies as well as conflicting interests'.[93] As states may disagree, however, as to the status of benefit-sharing as a general principle, the least contentious legal basis for its applicability to peacebuilding operations is provided by near-universal treaties, such as the Convention on Biological Diversity and the Convention on the Elimination of Racial Discrimination.

Overall, fair and equitable benefit-sharing contributes to, but goes beyond, the need for good governance of natural resources and inclusiveness in decision-making on development with a view to ensuring that a state's population (as a whole, as well as with regard to specific groups) benefits from development outcomes of the peacebuilding process.[94] On top of that, it requires peacebuilding actors to avoid consolidating power and information asymmetries and discrimination, and rather invest in legal empowerment and other skills that can support human rights holders in negotiations with unequal parties over benefits arising from the conservation and use of natural resources. Benefit-sharing, therefore, relates to obligations concerning the human dignity[95] of indigenous peoples, rural women and local communities: their agency and autonomy in determining the course of one's life; their subsistence (material dignity as the minimum conditions for physical and cultural existence); their protection from

---

86 CEDAW Committee General Recommendation 34 (para. 54(f).

87 Morgera (n 5).

88 Rüdiger Wolfrum, 'General International Law (Principles, Rules and Standards)', in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010; online edition) http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1408 accessed 14 March 2023, paras 28 and 33–36. See also Patricia Birnie et al, *International Law and the Environment* (OUP 2009), at 26–29; Burke (n 39), at 3–4, 95, 115, 123 and 253.

89 Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), at 222–25.

90 Olivier De Schutter, *International Human Rights Law* (CUP, 2010), at 55.

91 Birnie et al. (n 88), at 127.

92 In accordance with Art. 31(3) VCLT: ibid., at 28.

93 Wolfgang Friedmann, 'The Use of "General Principles" in the Development of International Law' (1963) 57 *American Journal of International Law* 279 at 287 and 289–90.

94 Dam-de Jong (n 4), at 23 and 150–51 and 427.

95 Inter-American Court, *Kaliña and Lokono* (n 13), paras 181 and 193 referring to the 'right to a dignified life … connected with natural resources on … traditional territories'.

discrimination (the right to be acknowledged as equals against the background of historically entrenched and pervasive discrimination); and their political participation (the opportunity for rights holders to preserve their identity and culture as part of broader society).[96]

3. FAIR AND EQUITABLE BENEFIT-SHARING AND INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION

With specific regard to indigenous peoples, fair and equitable benefit-sharing is seen as a means to build a 'partnership' to accommodate state sovereignty over natural resources and indigenous peoples' self-determination.[97] The need to establish a genuine *partnership,* whereby actors treat each other as equal[98] notwithstanding different power relations, points to the absence of overriding presumptions in favour of the state.[99] In the context of peacebuilding, benefit-sharing goes beyond the obligation to use proceeds from natural resource development to enhance the standards of living of populations, which can be per se a factor for relapse into armed conflict.[100]

Former UN Special Rapporteur on Indigenous Peoples' Rights James Anaya, in his study on extractives and indigenous peoples' rights, emphasized that 'benefit sharing must go beyond restrictive approaches based solely on financial payments which, depending on the specific circumstances, may not be adequate for the communities receiving them'. He referred to documented experience showing that monetary benefits to indigenous peoples may have negative (including divisive) effects on communities, and lead to the exercise of undue influence and even bribery. Accordingly, he recommended giving consideration to 'the development of benefit-sharing mechanisms which genuinely strengthen the capacity of indigenous peoples to establish and follow up *their development priorities* and which help to make their own decision-making mechanisms and institutions more effective'.[101] To that end, Anaya prioritized as the preferred model for natural resource development one which 'indigenous peoples themselves initiate and engage in'.[102] Extractive projects are to be carried out by outside companies or the state only if indigenous peoples are not able to do so themselves and in that case an agreement is needed to fully protect their rights and make indigenous peoples genuine partners in natural resource development projects (for instance, through a minority ownership

---

[96] This is preliminary explored in Morgera (n 12).

[97] Malgosia Fitzmaurice, 'The Question of Indigenous Peoples' Rights: A Time for Reappraisal?' in Duncan French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 349, at 375; Report of the UN Special Rapporteur on Indigenous Peoples Rights, UN Doc A/HRC/12/34 (2009), para. 53.

[98] E.g., *see* Special Rapporteur Anaya, (2009) UN Doc A/HRC/12/34, paras 51 and 53; and Report of the High-level Task Force on the Implementation of the Right to Development on its Second Meeting, UN Doc. E/CN.4/2005/WG.18/TF/3, para. 82 (2005); UNDRIP prembular para. 25.

[99] Burke (n 45), at 250.

[100] Dam-de Jong (n 4), 7. Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, (2019) UN Doc A/CN.4/728, para. 25, cited in Francesco Francioni, 'Natural Resources and Human Rights", in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016) 66–85, at 71.

[101] Special Rapporteur Anaya (n 14), para. 80 (emphasis added).

[102] Rapporteur Anaya (n 34) para. 88.

interest in the extractive operations), to participate in project decision-making *and* share in profits.[103] This points to the usefulness of benefit-sharing arrangements that at the same time provide enhanced participation opportunities and income generation for indigenous peoples when they see the need for state intervention or private-sector involvement in the management of their territories.[104]

Anaya thus encouraged indigenous peoples to use consultations with governments and other stakeholders as mechanisms to reach 'agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights'.[105] Other international human rights processes have been significant in clarifying that it must be consistent with indigenous peoples' and traditional communities' own priorities.[106] Moreover, the absence of explicit mechanisms that guarantee benefit-sharing from conservation measures constitutes a violation of political rights.[107]

In addition, the African Commission, in the *Endorois* decision,[108] clarified the substantive core of benefit-sharing as a matter of *choice* and increased *capabilities*,[109] resulting in indigenous and tribal peoples' improved well-being[110] and empowerment.[111] Although the African Commission limited itself to make reference to profit-sharing through trust funds and job creation for communities, [112] its reference to choice and capabilities finds resonance in a broader range of monetary and non-monetary benefits that have been identified in a plethora of CBD decisions. Choice can be realized through those benefits that provide or enhance 'resource control' – the realization of communities' worldview of their resources.[113] *Control*-benefits can thus take the form of community-based management of natural resources, joint ventures

---

[103] Ibid., para. 75

[104] Morgera (n 12).

[105] Anaya (n 98), para. 59.

[106] UN Framework Principles, paras 53 and 47–49.

[107] IACHR, 2018.

[108] *Endorois* (n 13), paras 294–298. The right to development is explicitly protected under the African Charter (Art. 22), and is understood as an expression of the right to self-determination of indigenous and tribal peoples comprising a distinctive bundle of rights to participation, culture and natural resources: see Pentassuglia (n 85), 157, and generally Cathal Doyle and Jérémie Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' (2008/9) 7 *Eur. Y.B. Minority Issues* 219.

[109] *Endorois* (n 13), para. 279. Cynthia Morel, 'From Theory to Practice: Holistic Strategies for Effective Advocacy' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge, 2016) (n 146) 355, 359. Sarah Coulthard et al, 'Multiple Dimensions of Wellbeing in Practice' in Schreckenberg et al (n 51) 243.

[110] Joshua Castellino, 'Indigenous Rights and the Right to Development: Emerging Synergies or Collusion?' *in* Allen and Xanthaki (n 21) 367, 369 fn 8. On well-being as the substantive aim of benefit-sharing, see also Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and Its Applications, UN Doc. A/HRC/20/26, para. 22 (2012); and ILO Conference 87th Session 1999, Report III (Part 1a), 434.

[111] *Endorois* (n 13), para. 283, as well as paras 127–129 and 135. *See*, however, words of caution again understanding of well-being in economic and spatial terms, rather than cultural terms, by Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002), 298.

[112] *Endorois* (n 13), para. 297.

[113] For their own primary benefit, including in terms of environmental sustainability, albeit without excluding opportunities for benefits to others according to views within broader society: see generally Yinka Omorogbe, 'Resource Control and Benefit-sharing in Nigeria' in Lila Barrera-Hernandez et al (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

when the skills or technology of external actors may be needed, but also the incorporation of traditional knowledge in environmental and socio-cultural impact assessments and in natural resource management planning, and, under certain conditions, the allocation of employment opportunities in the natural resource sector to communities. Capabilities as the distribution of opportunities for individuals and groups to freely pursue their chosen way of life and well-being,[114] find specific reflection in *support*-benefits identified under the CBD. These include support for the economic activities of indigenous peoples, through direct investment opportunities, access to markets, and diversification of income-generating (economic) opportunities, or capacity building and technical support.[115]

4. FAIR AND EQUITABLE BENEFIT-SHARING AND PEACEBUILDING

Peacebuilding scholars have already underscored the role of benefit-sharing in relation to 'using natural resources (and particularly high-value natural resources) to jump-start the economy… including through natural resource trust funds'.[116] But benefit-sharing could also be connected to other environmental dimensions of peacebuilding,[117] such as 'regaining control of illicit and illegal exploitation of natural resources', and 'supporting livelihoods and food security, especially through agriculture….by ensuring recognition of land held under customary tenure…and addressing challenges associated with large-scale land acquisitions'.[118] This chimes with the argument made above on the international biodiversity and human rights obligations and guidance on protecting indigenous peoples' and local communities' human rights through impact assessments, FPIC and benefit-sharing. Both benefit-sharing obligations and peacebuilding processes can cover a variety of sectors, such as agriculture, fishing and construction, as well as the support industries, services and trade networks related to these two sectors, which are generally the most opportune for post-war economic recovery.[119] While post-conflict land issues may be similar to those in peacetime, however, there are more institutions involved, including external organizations, such as UN relief, development, and peacekeeping agencies; bilateral agencies; and non-governmental organizations (NGOs). All these actors should be alerted to the pitfalls of environmental assessments, FPIC and benefit-sharing, with a view to focusing on ways to use these safeguards to build partnerships.

Peacebuilding scholars have also underscored the role of benefit-sharing in relation to gender equality in natural resource development. The UN Environment Programme (UNEP)

---

[114] E.g., generally Martha Nussbaum and Amartya Sen, *The Quality of Life* (Clarendon Press 1993).

[115] CBD, Guidelines on Biodiversity and Tourism, Decision V/25 (2000), paras 22–23, 43; Akwé: Kon Guidelines, para. 46.

[116] Carl Bruch, 'Considerations in Framing the Environmental Dimensions of Jus Post Bellum' in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds), *Environmental Protection and Tranistion from Conflict to Peace: Clarifying Norms, Principles and Practices* (OUP 2017) 25–27.

[117] Ibid.

[118] UN Rapporteur on the Right to Food, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, UN Doc. A/HRC/13/33/Add.2 (2010), para. 33.

[119] Carl Bruch et al, 'Post-Conflict Peace Building and Natural Resources' (2008) 19 *Yearbook of International Environmental Law* 58–96, at 71.

indicated that inequality in access and benefit-sharing from natural resources is a major driver of conflict.[120] UNEP underlined that addressing issues of inequality related to resource access, participation in decision-making and benefit-sharing early on in the peacebuilding process is therefore a critical condition for lasting peace and development.[121] And it also clarified that while the link is most evident with regard to land tenure, it extends to access and usage rights for renewable resources, such as water, and extractive activities.[122] According to UNEP, women are:

> primary managers and users of natural resources in many conflict-affected contexts, [and] have a key role to play in building peace. However, they remain largely excluded from owning land, benefiting from resource wealth or participating in decision-making about resource management. … peace and development will only be achieved when both men and women in conflict-affected and fragile societies access and *benefit* from natural resources in an equitable and sustainable way.[123]

In this connection, UNEP has underscored that 'the peacebuilding phase can provide an important window of opportunity in which natural resource management can be used as an entry point to increase women's political participation',[124] to build partnerships that enhance their agency and open up opportunities for their leadership. This chimes with the argument made above on the international biodiversity and human rights obligations and guidance on protecting rural women's human rights through impact assessments, FPIC and benefit-sharing. State obligations would then concern both the inclusion of benefit-sharing provisions when concluding peace settlement agreements, and their consideration in the entire 'peace process', including 'ad hoc, decentralized or informal natural resource allocation and management'.[125]

While there is currently no exhaustive research on the inclusion of benefit-sharing in peacebuilding agreements, it has been observed that peace settlement agreements often explicitly grant certain parties access to, or control over, natural resources as immediate incentives for peace.[126] Peace settlement agreements also present opportunities to address long-standing grievances over natural resources, such as through land reform programmes. In addition, peace agreements can mandate or encourage the collaborative management of natural resources, with a view to building confidence between former combatants.[127] That said, UNEP has emphasized that environmental and human rights considerations may not be sufficiently addressed in that context: negotiators may avoid addressing these issues in order to more quickly stop the violence, but this may in itself create a risk of high recurrence rates of conflicts linked with natural resources.[128] The specific needs of women are often ignored in peace agreement provi-

---

[120] UNEP et al, Women and Natural Resources: Unlocking the Peacebuilding Potential (UN, 2013) at 5.

[121] Ibid., at 10.

[122] Ibid., at 14.

[123] Ibid., at 5 (emphasis added; note that the interchangeable use of benefit-sharing and benefitting is common in international human rights, but is problematic from a legal perspective – as discussed in Elisa Morgera, 'Fair and Equitable Benefit-sharing at the Crossroads of the Human Right to Science and International Biodiversity Law' (2015) 4 *Laws* 803–31).

[124] UNEP et al (n 120), at 32.

[125] ILC, Principle 23, commentary para. 2 and Principle 24, para. 17

[126] Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law* (CUP 2015) at 372.

[127] Bruch et al (n 119), at 63–64.

[128] UNEP et al (n 120).

sions that address natural resource access and benefit-sharing.[129] So peacebuilding agreements should include requirements for the three safeguards (EIAs, FPIC and benefit-shairng) for indigenous peoples, local communities and women, as well as environmental strategic assessments, with a view to supporting their agency and partnership-building.

With respect to the whole peace process, international benefit-sharing obligations require efforts to support the meaningful participation of indigenous peoples, local communities and rural women in legal reform, capacity building, decision-making and monitoring of natural resource allocation and development. For instance, indigenous peoples, local communities and rural women should participate directly in commissions established for benefit-sharing at national and sub-national levels and be consulted in the formulation of community development plans.[130] They should be further supported in obtaining access to credit, technical support and other benefits from natural resource exploitation for their own empowerment.[131] This means a focus on non-discrimination and agency, as opposed to top-down and one-off approaches.

A key difference in the context of environmental peacebuilding, however, is the urgent need to provide for humanitarian needs (including settling and resettling internationally displaced peoples and refugees), which creates pressure to act quickly even though land reform (which usually provides the basis for other natural resource management) often takes many years to implement.[132] At the same time, however, by separating the temporal scales of peacebuilding and environmental action, countries can become locked into 'unsustainable trajectories of recovery that may undermine long-term peace and stability'.[133] So the key argument explored here is that in applying the general human rights and biodiversity obligations on impact assessments, FPIC and benefit-sharing in a peacebuilding process is how to balance the need for urgency with an understanding of benefit-sharing as an iterative process, rather than a one-off exercise, of good-faith engagement.[134] In international human rights and biodiversity guidance, it has in effect been underlined that an iterative process provides 'elements of confidence-building conducive to consensus',[135] to develop a shared development vision to accommodate state sovereignty over natural resources and indigenous peoples' self-determination.[136] Such an iterative process responds to the need to understand communities' worldviews of the environment and development, their own priorities in order to support their FPIC[137] and to factor in their evolving understanding of benefits over time.[138] As intergovernmentally agreed upon under the CBD, respectful and enduring partnership-building 'means a continual process of building mutually beneficial, ongoing arrangements ... in order to build trust, good

---

[129] These suggestions were made specifically with women in mind, but have been supported in other sources in relation to other beneficiaries of international benefit-sharing obligations: ibid., at 33.

[130] Ibid., 50 and 33.

[131] Ibid., at 49.

[132] Bruch et al (n 119), at 77.

[133] Ibid., at 126.

[134] Morgera (n 12), 363–64.

[135] Special Rapporteur Anaya (n 98) para. 53; and Special Rapporteur Anaya (n 34) para. 88.

[136] Fitzmaurice (n 97) at 375; Special Rapporteur Anaya (n 98) para. 53.

[137] UN Framework Principles, Principle 15.

[138] Patrick Keenan, 'Business, Human Rights, and Communities: The Problem of Community Contest in Development', Illinois Public Law Research Paper No. 14-18 (2013), http:// ssrn .com/ abstract = 2353493 accessed 14 March 2023.

relations, mutual understanding, intercultural spaces, knowledge exchanges, and to create new knowledge and reconciliation'.[139] Prioritization and pragmatic limitation have been considered essential features of environmental peacebuilding, due to the need to overcome food insecurity in agriculture and freshwater management, reconstruct infrastructure, and provide environmental and health monitoring to ensure acceptable living conditions.[140] These aspects appear, once again, to confirm the importance of understanding benefit-sharing as an iterative approach to ensure that needs and development priorities of human rights holders that cannot be prioritized at a certain point in time are not left behind in successive stages. Attention to non-discrimination and the human right to subsistence is called for here.

Against this background, the rest of the chapter will assess to what extent fair and equitable benefit-sharing obligations can be applied in an iterative manner to environmental peacebuilding processes,[141] in accordance with the need identified by international environmental law scholars to ensure 'proper consideration' of prevention, environmental impact assessment, the rights of indigenous peoples, and public participation' in peacebuilding efforts.[142] The following sections will focus on the application of fair and equitable benefit-sharing in the context of impact assessment and consultations with indigenous peoples as part of peacebuilding efforts. This will be followed by a reflection on the implications for business responsibility to respect human rights in environmental peacebuilding. The final section will address the relevance of fair and equitable benefit-sharing for other forms of international cooperation around environmental peacebuilding.

4.1 Environmental Impact Assessments

Much attention has been paid to environmental impact assessments, which are seen as key for peacebuilding.[143] This offers perhaps the best starting point to assess the extent to which the application of fair and equitable benefit-sharing can make a difference in current peacebuilding efforts that may have impacts on the rights of indigenous peoples and strengthen their participation in decision-making, implementation and monitoring concerning natural resources in or near indigenous peoples' lands and territories.[144] The application of benefit-sharing obligations to environmental impact assessments can contribute to making space for different

[139] CBD Mo'otz Kuxtal Guidelines (CBD, Dec. XIII/18, 2016), paras 23(a) and 8.

[140] Dieter Fleck, 'Legal Protection of the Environment: The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding' in Stahn et al (n 116) 203, at 216.

[141] Although the Rio Declaration did not take a human rights-based approach to peace, environmental and development, this is how the relationship has evolved: Alyssa Bellal and Gilles Giacca, 'Principle 29. Peace, Development and Environmental Protection' in Viñuales (n 57), 585, at 587 and 593.

[142] Dupuy and Viñuales (n 126) at 373.

[143] Dam-de Jong (n 3), at 148.

[144] Francioni (n 100), 66, in light of International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3, Arts 1(2) and 2(1). Virginie Barral, 'National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development', in Morgera and Kulovesi (n 100) 3; Mattias Århén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016), at 55; and Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 *Texas International Law Journal* 155.

worldviews of nature and development[145] embodied in communities' distinctive ways of life,[146] thereby supporting indigenous peoples' agency in peacebuilding processes.

These considerations are also relevant for the use of strategic environmental assessments (SEAs) of proposed policies in peacebuilding processes,[147] which generally include more consideration of broader territorial and historical context than EIAs at project-level[148] and are likely to address long-term implications of resource development on community interests.[149] It is interesting to note that a recent UNEP guidance on 'post-crisis integrated SEAs' has emphasized data integration and multi-stakeholder coordination in order to facilitate rapid resettlement and redevelopment and build resilience to disaster, climate, and conflict risks,[150] does not make any specific reference to benefit-sharing.

In turn, the International Law Commission has further distinguished 'post-conflict environmental assessments' as a composite tool to 'mainstream environmental considerations in the development plans in the post-conflict phase' with a view to identifying 'major environmental risks to health, livelihoods and security' including ecosystem services.[151] This could therefore be the first opportunity for integrating an iterative approach to fair and equitable benefit-sharing as part of the assessment, that could be followed up and expanded upon in ensuing SEAs and EIAs.

EIAs are generally understood as geared towards *damage prevention* or *damage control*, including as a way to provide information necessary for indigenous peoples to decide whether to provide FPIC or not.[152] The Inter-American Court has consistently indicated that these assessments should aim at ensuring that permitted levels of impact do not negate the survival of the members of indigenous peoples, and that indigenous peoples are aware of possible risks, including environmental and health ones, so that they can weigh up whether to accept proposed developments voluntarily and with full knowledge.[153] In that connection, the CEDAW Committee emphasized the damage prevention purpose, by making reference to the need for effective measures to mitigate possible adverse environmental and gender impacts.[154] But EIAs also need to take into account potential positive impacts on relevant human rights holders, such as indigenous peoples, local communities and rural women. The CEDAW

---

[145] Alonso Barros, 'The Fetish Mechanism: A Post-Dogmatic Case Study of the Atacama Desert Peoples and the Extractive Industries' in Lennox and Short (n 109) 223, 231–32.

[146] Pentassuglia (n 85), 176; Deborah McGregor, 'Living Well with the Earth: Indigenous Rights and the Environment' in Lennox and Short (n 109) 167, 175; and Francioni (n 100).

[147] UNEP, *Integrated Strategic Environmnetal Assessements in Post-Crisis Countries* (2018).

[148] Saskia Vermeylen, 'Benefit-sharing, Justice and the Global South' (BENELEX blog post 2016).

[149] *See* generally Neil Craik, Holly Gardner and Daniel McCarthy, 'Indigenous – Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements' (2017) 52 *Resources Policy* 379.

[150] UNEP (n 147).

[151] ILC, Principle 24, Commentary paras 3–4.

[152] Neil Craik, 'Biodiversity-inclusive Impact Assessment' in Morgera and Razzaque (n 19) 431, argues that consideration of biodiversity concerns more generally expands the range of issues and values to be included in environmental assessments. *See* also Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015), 94.

[153] *Saramaka* (n 12), para. 133; I-AmCtHR, *Kichwa Indigenous Communitiy of Sarayaku v. Ecuador* (Merits and reparations, Judgment of 27 June 2012), para. 205; *Kaliña and Lokono* (n 13*)*, para. 214.

[154] CEDAW Committee General Recommendation 34 para. 54(e).

Committee, for instance, has recommended that rural development projects are implemented only after participatory gender and environmental impact assessments have been conducted with full participation of rural women, and after obtaining their FPIC, so that their results are considered as fundamental criteria for taking any decision regarding the implementation of these projects.

The argument put forward here is that post-conflict assessments could rely, in a gradual and iterative manner, on the CBD Akwé: Kon Guidelines on Environmental and Socio-Cultural Impact Assessments, which have been referred to repeatedly by international human rights bodies.[155] These guidelines specifically clarify that impact assessments should identify, in an integrated fashion environmental, economic and socio-cultural benefits,[156] in addition to potential damage to ways of life, livelihoods, well-being, and traditional knowledge of indigenous peoples and local communities.[157]

It should be clarified at the outset that CBD Akwé: Kon Guidelines are contained in a decision adopted by consensus by the Conference of the 196 Parties to the CBD, so they are formally a non-legally binding document. CBD Parties often emphasize the voluntary nature of CBD guidelines, but decisions can be considered the expression of subsequent agreement or subsequent practice related to the interpretation of underlying CBD obligations – in other words, their legal value as interpretative tools is derived from the obligatory nature of CBD provisions that they clarify.[158] Or CBD guidelines could be considered as 'best practices' that serve to 'facilitate the implementation' of existing international obligations and should be 'adopt[ed] as expeditiously as possible'.[159] This is because it becomes increasingly difficult for a state to defend any sub-standard approach, particularly when the state has joined the consensus in accepting these guidelines after its participation in intergovernmental negotiations. In other words, consensus adoption by 196 Parties to the CBD had in practical terms a 'powerful law-making effect' with its 'securing widespread support for a text that legitimises and promotes consistent state practice'.[160] An additional argument about the legal value of the CBD Akwé: Kon Guidelines is derived from international human rights law: to the extent that their interpretative value is also recognized from an international human rights perspective, their legal nature can also be derived from the legally binding human rights obligations to the interpretation of which they are considered relevant.[161]

In terms of content, the Akwé: Kon Guidelines provide a step-by-step approach to the inclusion of inter-linked socio-cultural and biodiversity concerns in environmental impact assessments, calling for specific attention to: beliefs systems, languages and customs, traditional systems of natural resource use, maintenance of genetic diversity through indigenous customary management, exercise of customary laws regarding land tenure, as well as distribution of resources and benefits from transgenerational aspects, including opportunities for elders to pass on their knowledge to youths. The Akwé: Kon Guidelines clarify that processes should

---

[155] Special Rapporteur Anaya, (n 14), para. 73, and by the Expert Mechanism, Progress report on the study on indigenous peoples and the right to participate in decision-making, (2010) UN Doc. A/HRC/15/35, para. 37.

[156] CBD Akwé: Kon Guidelines, para. 23.

[157] Ibid., para. 36.

[158] Morgera (n 1).

[159] This applies by analogy the reasoning in UN Framework Principles.

[160] Boyle and Chinkin (n 89), 2007.

[161] Morgera (n 12).

be established for recording communities' views, for example when they are unable to attend public meetings because of remoteness or poor health, as well as the usage of non-written forms. In addition, governments should provide sufficient human, financial, technical and legal resources to support indigenous and local expertise proportionally to the scale of any proposed development. Communities should also be involved in the financial auditing processes of development projects, so that the resources invested are used effectively.[162] Accordingly, the Akwé: Kon Guidelines require that consideration of benefit-sharing starts significantly early in the process – as early as the screening and scoping phases of assessments.[163] This may allow for shifting to collaboratively identifying and understanding opportunities for positive impacts according to indigenous peoples' and local communities' worldviews[164] to determine the scope of the assessment. The Akwé: Kon Guidelines, in effect, further call for collaborative procedures and methodologies aimed at ensuring the full involvement of indigenous peoples and local communities.[165]

Overall, the range of considerations to be integrated in otherwise technical, information-focused assessment exercises emerge as an essential pre-condition to realize the transformational potential of impact assessments to develop a shared development vision informed by communities' worldviews,[166] preventing discrimination and supporting the agency of human rights holders. As Craik has pointed out, the analysis of alternatives in environmental assessments is essential to demonstrate good faith decision of the environmental attention to interim stages, not just at the stage of the final decision of the environmental and the meaningful character of consultations in the absence of clear quantitative standards to assess the acceptability of impacts.[167] Authorities must demonstrate that mitigation measures, at a minimum, correspond to the preferred alternatives put forward by indigenous peoples or local communities, including when it is an alternative *to* the project, rather than just alternative means of carrying out the proposed project. Should a different alternative be chosen, authorities' justification also needs to take into account indigenous peoples' views.[168]

Admittedly, all these requirements for EIAs to be a tool for a shared assessment across different worldviews of negative impacts and benefits of proposed developments are quite demanding in peace contexts, and may appear incompatible with the time pressure in environmental peacebuilding processes. Expedited EIAs may be called for, including with the result that 'the temporary unsustainable exploitation of a resource may even be necessary in order to facilitate the transition to a sustainable peace'.[169] An iterative approach to partnership-building, however, could be implied by benefit-sharing (and consent, as discussed below) to devise EIAs that can be tailored to a post-conflict context without precluding further understanding across worldviews of the development opportunities and risks in different sectors.

As the process brings together different worldviews, different perceptions of environmental risks (such as negative impacts to water quality and quantity; loss of land, livelihoods, and

---

[162] CBD Dec VII/16F, 2004, paras 18, 24, 49.
[163] Ibid., Forward, and paras 3, and 13–14.
[164] Ibid., para. 37.
[165] Whether EIAs practices have been able to do so remains an open question: Nicole Schabus, 'Traditional Knowledge' in Morgera and Razzaque (n 19), 264.
[166] On such a transformational potential of impact assessment, *see* generally Craik (n 152).
[167] Craik et al (n 149) 379.
[168] Ibid.
[169] Bruch et al (n 119), at 63.

traditional way of life; eroding social cohesion) and their perceived benefits (such as economic and educational benefits; improved standard of living; and improved infrastructure) will inevitably arise as part of the assessment process. Mediation and conciliation have already been identified as possible means to support participation and priority-setting in peacebuilding efforts,[170] as well as more generally fair and equitable benefit-sharing in time of peace.[171] Mediation, for instance, can also support the understanding of the history of the communities and their territories, their distinctive ways to approach conflict resolution (influence of power, rights, and interests, availability of social capital to obtain compliance with agreements).[172] The role of mediation training was also highlighted to build capacity for dialogue, equipping communities with skills to give voice to the marginalized and bring about meaningful change through benefit-sharing negotiations. These skills were considered relevant for building trust and reciprocity within an iterative dialogue process to prevent further conflicts.[173]

An iterative application of the CBD Akwé: Kon Guidelines to the various assessments that will be undertaken in a post-conflict situation (starting from broader post-conflict environmental assessments and moving on to SEAs for specific natural resource sectors and EIAs for specific projects) could thus entail preliminary considerations of benefits and not only negative impacts on indigenous peoples, local communities and rural women, with some form of direct participation that is compatible with the urgency of the task at hand. At the very least, urgent assessments should not completely disregard the socio-cultural aspects identified in the CBD Akwé: Kon Guidelines and specifically seek to avoid discrimination. In addition, their inter-linkages with environmental impacts should not lead to decisions that would preclude their successive consideration in later assessments and decision-making processes. More in-depth consideration of socio-cultural and inter-linkages environmental impacts and benefits should then be ensured, with enhanced forms of direct participation for indigenous peoples, local communities and rural women. Finally, plans for follow-up on these assessments should be made, to guarantee the continuation of the iterative process. Accordingly, relevant resources should be made available to that end.

So in the context of the time pressure of peacebuilding processes and in consideration of the high number of partners involved, attention to pooling resources and expertise (including in history, anthropology and mediation) to carry out assessments and support communities' interactions with companies would be essential.

4.2 Consultation

Benefit-sharing has received some attention in the literature on environmental peacebuilding in a narrow sense, with reference to profit-sharing in the context of natural resource development.[174] It is notable, however, that the difference between compensation and benefit-sharing

[170] Fleck (n 140), at 216.

[171] CAO, The Power of Dialogue-Building Consensus: History and Lessons from the Mesa de Diálogo y Consenso CAO-Cajamarca, Peru (Executive Summary), (CAO, 2007), https://www.cao-ombudsman.org/resources/cao-monographs-1-building-consensus-history-and-lessons-mesa-de-dialogo-y-consenso-cao accessed 4 April 2023.

[172] Ibid, at 5.

[173] Ibid, at 7.

[174] Carl Bruch et al, 'Environmental Peacebuilding' in *Understand to Prevent: Practical Guidance on the Military Contribution to the Prevention of Violent Conflict* (Multinational Capability Development Campaign 2016) 84.

is not always clear. International guidance on fair and equitable benefit-sharing, instead, has taken a broader approach that corresponds to the inter-linkages between environmental assessments, FPIC and benefit-sharing. UN Special Rapporteur on Indigenous Peoples' Rights Anaya suggested that benefit-sharing may make up for *broader, historical inequities* that have determined the situation in which the specific material and immaterial damage has arisen than compensation.[175] These observations may support an argument whereby benefit-sharing is understood as a proactive tool for the full realization of human rights connected to natural resources in light of communities' worldviews. Benefit-sharing can thus be distinguished from compensation to make up for lost control over resources and income-generation opportunities.[176] Benefit-sharing combines instead *new* opportunities of income generation and *continued*, or possibly enhanced, control over the use of the lands and resources affected by the development,[177] in line with the above-outlined argument about support- and control-benefits.[178]

Another argument for distinguishing compensation from benefit-sharing can be derived from the Inter-American Court assertion that the creation of a community development fund as compensation for material and immaterial damage is 'additional to any other benefit present and future that communities are owed in relation to the general obligations of development of the State'.[179] The Inter-American Court contrasted the secondary obligation of compensation, deriving from and commensurate to a violation of human rights, and the state's general obligations to realize indigenous peoples' right to the protection of the environment, the productivity of their territories and natural resources,[180] and the enhancement of their quality of life.[181] Note, however, that the distinction remains to be clearly drawn between primary duties to fulfil general human rights and secondary duties to provide reparation for violations of indigenous peoples' rights connected to natural resources.[182] It could thus be argued that a similar distinction can apply to fair and equitable benefit-sharing as part of a *general and permanent obligation* to protect and realize human rights connected to natural resources, that is *independent* of any violation of these rights and related compensation.[183] Distinguishing benefit-sharing from

---

[175] Special Rapporteur Anaya (n 34) para. 76.

[176] Federico Lenzerini, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 3, 13–14. See also Dinah Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs' in Lenzerini (ibid), 47, 60–61 and 66–69.

[177] Morgera (n 19), on the basis of Rapporteur on Indigenous Peoples' Rights, Progress Report on Extractive Industries, UN Doc. A/HRC/21/47 (2012), paras 68, 74 and 76 and Special Rapportuer Anaya (n 34), para. 75.

[178] This argument is discussed in Morgera (n 12).

[179] IACtHR, *Comunidad Garífuna Triunfo de la Cruz y Sus Miembros vs Honduras* (Merits, Reparations and Costs), 8 October 2015, para. 295; *Garífuna de Punta Piedra* (n 84), 332; *Kaliña and Lokono* (n 13), para. 295.

[180] In light of UNDRIP Art. 29(1): *Garífuna de Punta Piedra* (n 84), para. 333.

[181] Such as ILO Convention 169, Art. 2.2.b: 'promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions': *Garífuna Triunfo de la Cruz* (n 178), concurrent opinion of Judge Humberto Antonio Sierra Porto, paras 30–31.

[182] Nieves Gomez, 'Indigenous Peoples and Psychosocial Reparations: The Experience with Latin American Indigenous Communities' in Federico Lenzerini (n 175), 143, 149.

[183] This interpretation appears supported by ILA (n 22, 42–43) with regard to UNDRIP Art. 32(2) and opportunities offered by indigenous lands to develop economic projects.

compensation for material and immaterial damage[184] could thus decouple the former from the need to establish a causal nexus between an ascertained human rights violation, and a damage arising from the violation.[185]

These are essential clarifications to ensure 'effective consultation and cooperation' with indigenous peoples, as recommended by the ILC.[186] The 2016 CBD Mo'otz Kuxtal Voluntary Guidelines[187] clarify that consent or approval is an iterative process, not a one-off exercise, which 'should underpin and be an integral part of developing a relationship between users and providers of traditional knowledge'.[188] They thus point to FPIC and benefit-sharing as an arguably intertwined '*continual* process of building mutually beneficial, *ongoing* arrangements between users and holders of traditional knowledge, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, and to create new knowledge and reconciliation'.[189] The Mo'otz Kuxtal Guidelines further clarify that 'benefit-sharing could include a way of recognising and strengthening the contribution of indigenous peoples and local communities to the conservation and sustainable use of biological diversity, including support for the intergenerational transmission of traditional knowledge'.[190]

So what would benefit-sharing substantively entail as part of the consultation process? It could address redress of past injustices, and benefits providing *support* (and thereby enhancing capabilities) for the exercise of effective control. Both types of benefits are essential, but they could be delivered in an iterative way. Support-benefits are extremely significant in their own right to prevent further marginalization of community voices due to the intricate nature of environmental management processes in which their views and preferences are to be integrated. For instance, communities may be legally recognized full management of an area, but not supported in complying with highly technical aspects of applicable legislation, such as plant health requirements.

That said, support-benefits should not be offered as an alternative to control-benefits: for instance, communities should not be offered employment opportunities with the understanding that they will not have a seat at the decision-making table of a forestry project or protected area.[191] But support-benefits could be offered initially with a view to building the capacities of,

---

[184] Orellana (n 59), 845 and 847.

[185] And generally 'restricts damage to provable, proximate losses to avoid excessive recovery', although it includes some flexibility in the name of proportionality and equity: Shelton (n 175) 60.

[186] ILC, Principle 5(2).

[187] CBD, Dec. XIII/18, 2016. While these guidelines focus on access to the traditional knowledge of indigenous peoples and local communities, their clarifications of FPIC and benefit-sharing obligations can also be considered relevant for other contexts (extractives or creation of protected areas, for instance), both because of the guidance's general nature and the inextricable links between indigenous peoples' lands, resources and knowledge (UN Framework Principles, para. 53).

[188] CBD, Dec. XIII/18, 2016, para. 8; Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) 54 *Wake Forest Law Review* 691–712.

[189] CBD, Dec. XIII/18, 2016, para. 8; Morgera, ibid.

[190] CBD, Dec. XIII/18, 2016, para. 13.

[191] Note the mixed picture arising in this regard from benefit-sharing as part of community-based wildlife management initiatives in Africa. Fred Nelson, 'Introduction' in Fred Nelson (ed), *Community Rights, Conservation and Contested Lands: The Politics of Natural Resource Governance in Africa* (Earthscan 2010) 3, 4 and 11.

and providing the resources to, communities to being integrated gradually in decision-making positions related to natural resource management.

This gradual process would also allow government and other actors to learn about the priorities, needs and capacities of indigenous peoples and through that process, co-develop the most appropriate forms of partnerships with them. That said, minimum guarantees should be provided from the outset of respect for environmental and socio-cultural rights of indigenous peoples and the non-preclusion of their successive consideration in later phases of negotiations and benefit-sharing arrangements.

5. FAIR AND EQUITABLE BENEFIT-SHARING AND BUSINESS DUE DILIGENCE TO RESPECT HUMAN RIGHTS IN ENVIRONMENTAL PEACEBUILDING

The importance of the role of business in post-conflict situations has already been analysed from an environmental justice and international environmental law perspective.[192] Fair and equitable benefit-sharing has also been invoked under international human rights law and international biodiversity law with respect to the relations between communities and private companies[193] that may be protected by international investment law and that, even when that is not the case, are increasingly understood in the light of business responsibility to respect human rights.[194] Thus, fair and equitable benefit-sharing as part of companies' due diligence can also be relevant to the role of private actors in peacebuilding efforts. It is argued here that benefit-sharing goes beyond what has been envisaged by the International Law Commission, which has underscored the need for 'legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment and human health' in post-armed conflict situation, including to ensure that natural resources are obtained 'in an environmentally sustainable manner'.[195]

International developments regarding the responsibility of business to respect human rights have clarified that benefit-sharing entails companies' good faith consultations with communities with a view to agreeing on benefit-sharing modalities that make communities partners in project decision making, and not merely giving them a share in the profits (for instance,

---

[192] Priscilla Schwartz, 'Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP, 2009) 429.

[193] International Finance Corporation (IFC), Performance Standard 7 (2012), paras 18–20; FAO, International Fund for Agricultural Development, UN Conference on Trade and Development and the World Bank, Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods and Resources (PRAI 2010), Principle 6; UN Global Compact Office, Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples (2013), at 76–77.

[194] UN Human Rights Commission (UNHRC), Protect, Respect and Remedy, a Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (2008), endorsed by Resolution A/HRC/RES/8/7 (2008); UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011), endorsed by Resolution A/HRC/RES/17/4 (2011).

[195] ILC, Draft Principle 10.

through a minority ownership interest).[196] Similarly to states' benefit-sharing obligations, companies should consider benefit-sharing as a tool to create genuinely equal partnerships with indigenous peoples.[197] UN Special Rapporteur Anaya therefore criticized common corporate practices envisaging benefit-sharing as compensation, as a charitable award or as a favour granted to secure social support for a project.[198] Anaya instead envisaged that, if indigenous peoples themselves do not wish or are unable to initiate resource extraction, benefit-sharing entitles them to participate in project decision-making *and* share in their profits through an agreement with outside companies (for instance, through a minority ownership interest in the extractive operations).[199] In 2017 UN Special Rapporteur Knox clarified that similar standards to those spelt out for business and other non-state actors in extractives are also relevant for private operators involved in conservation.[200] The intergovernmental consensus achieved under the CBD on indigenous and community conserved areas was considered particularly instructive in this connection,[201] entailing the need to recognize, respect and support community-based approaches to conservation and the integration of communities in governance and management arrangements.[202]

Experience with business-community benefit-sharing models, however, has been far from clearly beneficial towards indigenous peoples, as they have entangled in unfair pricing and indebtedness.[203] Several other concerns arise with regard to the use of contractual tools for incorporating benefit-sharing agreements, which generally provide the form for 'mutually agreed' benefits, as referred by both human rights bodies and CBD Parties for a contextual application of benefit-sharing.[204]

Contractual negotiations may in principle function as a dialogic partnership-building process between private companies and communities. But leaving a contextual determination of fairness and equity to contractual freedom has raised concerns in the face of the well-documented, unequal negotiating powers, as well as information and capacity asymmetries. These concerns are compounded by objective difficulties in reconciling communities' customary law within dominant legal systems,[205] including in connection with dispute resolution. States thus have obligations to ensure full respect for indigenous peoples' rights and fairness in contractual

---

[196] Special Rapporteur Anaya (n 34) paras 62 and 75–77; and UN Expert Mechanism, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, UN Doc. A/HRC/21/55 (2012), paras 8–29.

[197] Special Rapporteur Anaya, Report on the rights of indigenous peoples, (2011) UN Doc. A/HRC/66/288, para. 102 and A/HRC/21/47 (n 177), paras 68, 74 and 76.

[198] Special Rapporteur Anaya (n 14), paras 79, 89 and 91.

[199] Special Rapporteur Anaya, (n 34), para. 75.

[200] Special Rapporteur on Human Rights and the Environment John Knox, Report on biodiversity and human rights, (2017) UN Doc. A/HRC/34/49, para 72.

[201] Holly Jonas, 'Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): Evolution in International Biodiversity Law' in Morgera and Razzaque (n 19) 145.

[202] CBD Decisions X/31/B (2010) para. 31, XII/19 (2014) para 4(f) and X/33 (2010) para. 8(i) in relation to climate change (which area addressed to 'other/relevant organizations'); and XII/5 (2014) para 11 (which is addressed to 'relevant stakeholders').

[203] Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' (2013) *Yearbook on International Inestment Law & Policy 2011–2012* 281, 293.

[204] *Kaliña and Lokono* (n 13), paras 227–229 and 159.

[205] For a reflection on the challenges of legal pluralism in the context of benefit-sharing from bioprospecting, see Saskia Vermeylen, 'The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law*'* (2013) 9 *Law, Environment & Development Journal* 185.

arrangements. To that end, States are 'to oversee and evaluate the procedures and their outcomes, and to mitigate against power imbalances between the companies and the indigenous peoples with which they negotiate'.[206]

Similarly to what has already been remarked for states, private companies should engage in benefit-sharing in an iterative way, if they are planning to remain involved in natural resource development for the medium and long term. Initially business should invest in building the capacities of, and providing the resources to, communities to being integrated gradually in decision-making positions, while learning about their priorities, needs and capacities. They should then co-develop the most appropriate forms of partnerships with them. Even in the case of short-term engagement of the private sector, minimum guarantees should be provided from the outset of respect for environmental and socio-cultural rights of indigenous peoples and the non-preclusion of their successive development of benefit-sharing arrangements. Such guarantees should focus on non-discrimination and the prevention of violations of human rights dependent on biodiversity.

6. CONCLUSIONS

The previous sections have discussed how the international benefit-sharing obligations and their inter-linkages with environmental assessments and consultation processes can provide iterative processes to balance national sovereignty and the human rights, aspirations, knowledge and needs of indigenous peoples, other resource-dependent communities and rural women. This is to support indigenous peoples' right to self-determination through agency and other human rights holders' political, social, cultural and economic rights. In line with the Draft Principles that encourage cooperation among relevant actors, including international organizations, with respect to post-armed conflict environmental assessments and remedial measures,[207] other states' and international organizations collaborating in peacebuilding efforts are also to support the implementation of fair and equitable benefit-sharing obligations as part of a global partnership.[208] That is a 'new level of cooperation' between developed and developing states[209] and a form of cosmopolitan cooperation[210] that is inspired by a vision of public trusteeship.[211] For instance, the UN Security Council, the Peacebuilding Commission, the World Bank and other international organizations that are active in environmental peacebuilding are expected to play a facilitating role in including in peace agreements matters relating to the restoration and protection of the environment damaged by the conflict.[212] They should work towards supporting, or at least preventing any undermining, of the implementation of benefit-sharing obligations vis-à-vis indigenous peoples, local communities and rural women through external control of natural resources.

---

206 Special Rapporteur Anaya (n 34), paras 62, 88 and 92.
207 ILC Draft principle 25.
208 Rio Declaration (n 57), Preamble and Principles 7 and 27.
209 Pierre-Marie Dupuy, 'The Philosophy of the Rio Declaration', in Viñuales (n 57) 65, at 69, 71.
210 Ibid., at 72; F Francioni 'The Preamble of the Rio Declaration' in Viñuales (n 57) 85, at 89.
211 Sand (2015) 617, who refers as a concrete example to the ITPGRFA.
212 ILC Draft principle 24.

Benefit-sharing obligations should thus be reflected in the standards developed by the UN Security Council for the governance of natural resources,[213] which so far tend to make reference to the 'benefit of its people' as passive enjoyment.[214] Benefit-sharing should also be a consideration in the design of the Security Council's sanctions aimed at bringing about great structural reforms in governance of natural resources and at setting due diligence requirements for companies involved in natural resource extraction.[215] In addition, benefit-sharing should be a consideration in the establishment of programmes set up by international organizations and states to assist the government to operationalize these requirements that are directly linked to sanctions imposed by the Security Council.[216]

The UN Peacebuilding Commission's role has also benefit-sharing implications in assisting governments in laying the foundations for sustainable development. This role includes natural resource management, as well as prevent illegal exploitation of natural resources, including institutional and legal reforms to break the link between natural resources and conflict financing.[217] The UN Peacebuilding Commission could thus foresee the inclusion of legal guarantees of non-repetition of human rights violations related to biodiversity and access to justice in connection to environmental assessments, FPIC, and fair and equitable benefit-sharing.

The UN Peacebuilding Commission is considered uniquely positioned to highlight lessons learned and make recommendations to the UN Security Council for improving UN operations.[218] It could include benefit-sharing considerations in its coordination and integrated strategy,[219] its assessment of natural resource base,[220] the review of different contractual arrangements relating to exploitation for natural resources,[221] the establishment of commissions for managing strategic natural resources,[222] the provision of assistance in restoring proper administration of natural resources,[223] the inspection and surveillance of natural resource extraction sites,[224] and land reforms.[225] In addition, the UN Peacebuilding Commission could advise on the need to ensure justiciability of benefit-sharing obligations in the context of the strengthening of justice systems[226] and the creation of mechanisms to ensure accountability and transparency in collection and disbursement of revenues accruing from exploitation of natural resourc-

---

[213] Dam-de Jong (n 4), at 29 (and Chapter 9 in this volume).

[214] Eg UNSC Resolution 1457(2003), para. 4; UNSC Resolution 1521(2003) para. 11; and UNSC Resolution 2571 (2021), para. 10. See also Dam-de Jong (n 4), at 45–46.

[215] Dam-de Jong (n 4), at 358–59.

[216] Daniëlla Dam-de Jong, 'Standard-setting Practices for the management of Natural Resources in Conflict-Torn States: Constitutive Elements of Jus Post Bellum' in Stahn et al (n 140) 169, 190–191

[217] Dam-de Jong (n 4), at 263 and 329–32 344–45.

[218] Bruch et al (n 119).

[219] Dam-de Jong (n 4), at 345

[220] Ibid., at 333: Second Progress Report of the Secretary General, UN Doc S/24578 (1992) para. 57.

[221] Dam-de Jong (n 4), at 334: Second Progress Report of the Secretary General, UN Doc S/24578 (1992) para. 57.

[222] Dam-de Jong (n 4), at 335; First Progress Report on the Secretary General, UN Doc S/1999/1223, para. 5 and Third report, UN Doc S/2000/186, paras 48–49.

[223] Dam-de Jong (n 4), at 337; UNSC Res 1509(2003) para. 3.

[224] Dam-de Jong (n 4), at 337; UNSC Res 1607 and 1647 (2005).

[225] Dam-de Jong (n 4), at 349.

[226] Ibid., at 341; UNSC Res 1952(2010) para. 16.

es.[227] That said, the Commission has limited capacity[228] and its cooperation with certification schemes[229] and the World Bank may prevent it from effectively coordinating.[230] The role of the World Bank and the private sector in relation to the implementation of the fair and equitable benefit-sharing obligations can also be discussed in and of itself.

Overall, the clarifications provided at the intersection of international biodiversity law and international human rights law on benefit-sharing obligations provide an approach to the assessments and consultations over the use of natural resources that belong, are considered sacred by, or may impact on indigenous peoples, local communities and rural women in post-conflict processes. International benefit-sharing obligations are relevant for states, international organizations and the private sector to support the consideration in international peace-keeping cooperation of civil and political rights, as well as economic, cultural and social rights,[231] of indigenous peoples, local communities and rural women that may be affected by decisions on natural resources and may lead to renewed conflict. Benefit-sharing obligations can thus support the effective and culturally appropriate participation in decision-making of indigenous peoples, local communities and rural women and through that opportunities to move away from top-down towards co-developed equitable and sustainable approaches to natural resource allocation, conservation and development.[232] Given the time pressure and involvement of a variety of international organizations and other actors in peacebuilding processes, emphasis should be placed on devising iterative approaches of partnership building that include minimum guarantees to prevent human rights violations and ensure access to justice.

---

[227] Ibid., at 337 and 351; First Progress Report on the Secretary General on the UN Mission in Liberia, UN Doc S/2003/1175 (2003), paras 38 and 40.

[228] Ibid., at 342.

[229] Ibid., at 343.

[230] Ibid., at 350.

[231] Karen Hulme, 'Using a Framework of Human Rights and Transitional Justice for Post-Conflict Environmental Protection and Remediation' in Stahn et al (n 116), 119, at 120.

[232] Ibid., at 140.