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Résumé de l'article

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CONSTITUENT POWER, THE RIGHTS OF NATURE, AND UNIVERSAL JURISDICTION

*Joel Colón-Ríos**

This article provides a justification for the exercise of universal jurisdiction in cases of serious environmental damage. This justification rests in important ways on the theory of constituent power. The theory of constituent power has an intergenerational component that requires the protection of the environmental conditions that allow future generations to engage in constitution-making episodes. This article maintains that, by virtue of the connections between constituent power, the right to self-determination, and state sovereignty, the justification for the exercise of universal jurisdiction for serious environmental damage is at least as compelling as the justification for its exercise with respect to egregious human rights infringements. In those scenarios, courts exercising universal jurisdiction would be acting to protect the ability of present and future peoples to participate in the constitution and reconstitution of the states that make up the international community. Such a jurisdiction would rest on the authority of humanity as a whole rather than on that of any state or people.

Cet article tente de justifier l'exercice de la juridiction universelle dans les cas de grave dommage à l'environnement. Cette justification se base de façons importantes sur la théorie du pouvoir constituant. Cette théorie comporte un élément intergénérationnel qui exige la protection des conditions environnementales qui permettraient aux générations à venir d'entreprendre à leur tour des épisodes de création de constitutions. Cet article soutient qu'en vertu des connexions entre le pouvoir constituant, le droit à l'autodétermination, et à la souveraineté de l'état, la justification de l'exercice de la juridiction universelle dans les cas de grave dommage à l'environnement est au moins aussi puissante que la justification de son exercice dans le contexte des violations flagrantes des droits humains. En exerçant la juridiction universelle dans ces scénarios, les tribunaux agiraient pour protéger la capacité des peuples actuels et futurs à participer à la constitution et à la reconstitution des états qui composent la communauté internationale. Une telle juridiction se fonderait sur l'autorité de l'humanité dans l'ensemble plutôt que sur l'autorité d'un état ou d'un peuple en particulier.

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Introduction

On 26 November 2010, a number of citizens from Ecuador, India, Colombia, and Nigeria initiated an action before the Constitutional Court of Ecuador, seeking a remedy for the harms caused by the British Petroleum oil spill in the Gulf of Mexico.[1] They asked the court to issue a number of orders requiring the company to make public information related to the disaster and its impact and to take measures destined at correcting its effects.

The action was unusual for two reasons. First, the acts in question did not occur in Ecuador's territory and did not involve Ecuadorian citizens. In fact, the plaintiffs asked the court to issue the orders against a British corporation based on the principle of universal jurisdiction. Second, none of the plaintiffs claimed to have suffered individual harms as a result of the oil spill. Relying on Article 71 of the new *Constitution of Ecuador*,[2] they did not ask the court to protect their rights, but "the rights of the ocean".[3]

If one looks at the issues raised by this case from the perspective of constitutional theory, an interesting question arises: Even if one accepts that certain rights are necessary for democracy to exist and that the limits they create on elected representatives are thus justified from a democratic perspective, does this justification extend to the rights of nature? Should the "rights of the ocean", the "rights of a river", or the "rights of trees" limit the decisions of elected institutions of government—decisions that, while having negative environmental impacts, would normally seek to advance a number of legitimate human interests? From an international law perspective, the case raises the no-less-interesting question of whether a constitutional court operating under a constitution that recognizes the rights of nature should exercise jurisdiction in cases of serious harms to the environment, even if those harms are caused by non-citizens outside the country's territory.

Since they arise from an unprecedented scenario, these are questions that have not been fully considered before. They force us to explore deeper issues about the relationship between democracy, state sovereignty, and

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1 *Demanda Por lor Derechos del Mar Bajo el Principio de Jurisdicción Universal*, action before the Constitutional Court of Ecuador (26 November 2010). At the time of writing, a decision on this case is still pending [*Demanda*].

2 *Constitution of the Republic of Ecuador, 2008*, Registro Oficial 449 [*Constitution of Ecuador*]. English quotations to the *Constitution of Ecuador* are taken from the English translation available on the Political Database of the Americas (31 January 2011), online: PDBA <pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

3 *Demanda*, *supra* note 1 at 1 [translated by author].

environmental protection. The answers that this article will provide to those questions are profoundly intertwined with and rest in important ways on the theory of constituent power.

The theory of constituent power is a central concern of modern constitutional theory, and it has been highly influential in the countries where the idea of the rights of nature has gained legal approval: namely, Ecuador and Bolivia. Because of its relationship with democracy and the right to self-determination, the theory of constituent power allows us to directly address the issues raised by the questions posed above.

The first question—whether the recognition of the rights of nature can be justified from a democratic perspective—is the subject of Part I. I argue that some rights (including the rights of nature) serve to protect basic conditions that are necessary for the future exercise of constituent power. These basic conditions provide a baseline without which citizens could not meaningfully participate in any type of democratic political action. They include, for instance, the ability of associating with others, the possibility of receiving an education, and the prospect of living in a natural environment in which human life can flourish. Under this view, the fact that the rights of nature would frequently limit the decision-making power of elected officials is not more democratically objectionable than that which occurs when human rights impose similar limits. Rather, respect for these rights (or for their underlying objective) makes democracy possible in the first place. I develop this argument in four steps.

In Part I.A., I introduce the theory of constituent power, according to which in all constitutional orders there is an unlimited constitution maker, an entity not subject to any form of positive law. In a democratic society, that entity cannot be an individual or elite, but the people on whose authority the constitution rests. In Part I.B., I argue that respect for certain rights is necessary for any democratic exercise—including the exercise of constituent power—to take place. This argument does not commit one to any particular institutionalization of judicial review of legislation. Rather, the idea is that a democratically legitimate constitutional regime must respect the rights (or the interests they protect) that are necessary for democracy to exist. In Part I.C., I show that the theory of constituent power has an important intergenerational component: All generations should be able to become authors of their own constitution. Even though most discussions about constituent power are about past episodes of constitution making, the theory of constituent power is mostly about the future. Finally, in Part I.D., I argue that the intergenerational component of the theory of constituent power requires protection of the environmental conditions that would allow future generations to engage in constitution-making episodes, and that the attribution of rights to nature is an attempt to ensure that those conditions are protected.

The second question posed earlier—whether the exercise of universal jurisdiction directed at the protection of the rights of nature in cases of serious environmental damage[4] is justified—is the subject of Part II. The answer that I provide is also informed by the theory of constituent power. I argue that, by virtue of the connections between constituent power, the right to self-determination, and state sovereignty, the justification of the exercise of universal jurisdiction for serious violations of the rights of nature is at least as compelling as the justification for its exercise with respect to egregious human rights infringements. This argument rests on the premise that the objections—which are normally based on the principle of state sovereignty—to the exercise of universal jurisdiction in the context of certain international crimes, do not apply with the same force in the context of serious environmental harms.

After all, the reason that the principle of state sovereignty remains so influential in the twenty-first century is that it is closely connected to the right of self-determination—the external manifestation of the exercise of constituent power. In other words, states are presumed to have been created by their peoples, and that is a very good reason for treating them as sovereign entities. Accordingly, in cases of serious environmental harms—and therefore of grave violations of the rights of nature—the exercise of universal jurisdiction should be seen as a means of protecting the right to self-determination—and, indirectly, state sovereignty. As suggested above, without the presence of certain ecological conditions, any form of democratic political action would be impossible. In other words, courts exercising universal jurisdiction would be acting to protect the ability of present and future peoples to participate in the constitution and reconstitution of the states that make up the international community. Such a jurisdiction, I will argue, would rest on the authority of humanity as a whole, rather than on that of any state or people.

I will advance this argument in four steps. In Part II.A., I examine the resistance of some countries to international norms that limit the ability of domestic governments to regulate the economy or to advance certain types of policies. I explain why the conception of universal jurisdiction advanced in this article does not fall within that category of international norms. Universal jurisdiction, as understood here, seeks to enhance rather than constrain democratic political power. In Part II.B., I provide a brief overview of the principle of universal jurisdiction, emphasizing its

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[4] As will be noted later, for the purposes of this paper, "serious environmental damage" will be understood as damage that is irreversible and that has a potential negative impact in the life and self-governing powers of human populations, harms which would also amount to grave violations of the rights of nature in the context of constitutions that recognize such rights.

historical development, and its adoption—and rejection—by some states and international courts. In Part II.C., I discuss some of the objections to the exercise of universal jurisdiction, which are usually based on the principle of state sovereignty. Finally, in Part II.D., I bring together the ideas briefly mentioned above and advance a justification for the exercise of universal jurisdiction in cases of serious environmental damage. As noted above, in such cases, national courts should not be seen as acting in the name of the states or in the name of the international community, but on behalf of the world's peoples. This idea nevertheless requires us to recognize "humanity" as a relevant political category and as the bearer of an ultimate, transnational, constituent power.

I. The Rights of Nature Justified from a Democratic Perspective

A. Constituent Power: A Brief Introduction

The theory of constituent power, as it is known today, was initially articulated by Emmanuel Sieyès during the French Revolution.[5] This does not mean that the idea of constituent power itself originated in France but that it was there that it received its first major theoretical formulation.[6] The theory of constituent power, simply put, holds that in every society there must be a legally unlimited constitution maker—someone who can create constitutions at will.[7] In a democracy, that power always remains with the people. This idea was, of course, influential during the American Revolution, even if not expressed in the language of constituent power. Thomas Paine, for example, maintained that "[e]very age and generation must be as free to act for itself, in all cases, as the ages and generations that preceded it."[8] Thomas Jefferson, for his part, attempted to give that view a practical application, suggesting that, at set intervals, all laws and

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5 Emmanuel Joseph Sieyès, *What Is the Third Estate?*, translated by M Blondel (London: Pall Mall, 1963). On the theory of constituent power and its implications for contemporary constitutional theory, see Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (New York: Routledge, 2012) [Colón-Ríos, *Weak Constitutionalism*].

6 The term "constituent power" was used in other jurisdictions well before the French Revolution. See Joel Colón-Ríos, "Five Conceptions of Constituent Power" (2014) 130:2 Law Q Rev 306 [Colón-Ríos, "Five Conceptions"].

7 *Ibid* at 306.

8 Thomas Paine, "The Rights of Man" in Philip Foner, ed, *The Life and Major Writings of Thomas Paine* (New York: Citadel, 1961) at 251.

institutional arrangements should lapse and constitutional conventions be convened.[9]

Sieyès expressed these ideas through his famous distinction between the constituent power and the constituted powers. The former was to be understood as an unlimited power to create new constitutions, which saw the people, or in Sieyès's terminology, "the nation", as its bearer.[10] The latter referred to the ordinary governmental institutions, whose power was always limited by constitutional law.[11] Since ordinary representatives exercise constituted (rather than constituent) power, they lack the ability to replace the existing constitution with a new one. The constitution, after all, is the norm that allows the representative assembly to exist and to engage in different exercises of power, such as the production of ordinary laws. Sieyès believed that in the same way that it was correct to say that ordinary representatives are bound by the constitution and cannot replace it, "[i]t would be ridiculous to suppose that the nation itself could be constricted by the procedures or the constitution to which it had subjected its mandatories."[12] The nation was therefore free to unbind itself from the constitutional regime at any moment. The mere fact of expressing its will "puts an end to positive law, because [the nation] is the source and the supreme master of positive law."[13]

In fact, Sieyès understood the nation, as the bearer of the constituent power, to be in the same position as individuals living in the state of nature, and consequently, the exercise of its will had to be superior to and independent of any constitutional form.[14] "The manner in which a nation exercises its will," wrote Sieyès, "does not matter; the point is that it does exercise it; any procedure is adequate, and its will is always the supreme law."[15] Being in the state of nature, however, presupposed being bound by certain moral obligations that arose out of the natural rights of individu-

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9 Thomas Jefferson, *Writings*, Merrill Peterson, ed (New York: Library of America, 1984) at 1402. In a similar vein, James Wilson maintained that "[a]s our constitutions are superior to our legislatures, so the people are superior to our constitutions. ... The consequence is, that the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them" ("Speech before the Pennsylvania Convention" (26 November 1787) in Jonathan Elliot, ed, *The Debates in the Several States Conventions on the Adoption of the Federal Constitution*, 2nd ed, vol 2 (Philadelphia: JB Lippincott, 1901) at 432).

10 Sieyès, *supra* note 5 at 122–24.

11 *Ibid*.

12 Sieyès, *supra* note 5 at 125–26.

13 *Ibid* at 128.

14 *Ibid*.

15 *Ibid*.

als. This is why Sieyès maintained that "[p]rior to and above the nation, there is only *natural* law."[16] That notion imposes limits on the kind of constitution that a constituent subject may legitimately adopt. In other words, in order to exercise constituent power in a way consistent with natural law, a nation is morally bound to respect certain rights, particularly (for Sieyès) the right to property, and to protect "the common security, the common liberty and, finally, the common welfare."[17]

Sieyès's theory was further developed by Carl Schmitt, the controversial German jurist, who unlike the French author did not rely on natural law considerations. Schmitt defined constituent power as "the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence."[18] These fundamental political decisions generally refer to the basic structure of the state, whether it takes the form of a republic or a monarchy, of a unitary or a federal system, of a liberal democracy or a socialist order.[19] Crucially, Schmitt did not think that after those decisions are in place constituent power vanishes or is forever channelled through the ordinary constitutional amendment procedure. On the contrary, he maintained that even after being exercised, constituent power, as an unlimited power, continued to exist "alongside and above the constitution."[20]

In Latin America, one of the most active regions of the world in terms of constitution making, the idea of the constituent power of the people has long been the subject of debate among constitutional theorists.[21] It played

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16 *Ibid* at 124 [emphasis in the original].

17 *Ibid* 156–57. See also JL Talmon, *The Origins of Totalitarian Democracy: Political Theory and Practice during the French Revolution and Beyond* (Middlesex: Penguin Books, 1952) at 76.

18 Carl Schmitt, *Constitutional Theory*, translated by Jeffrey Sitzer (Durham, NC: Duke University Press, 2007) at 125.

19 *Ibid* at 77–78.

20 *Ibid* at 125–26.

21 The literature in Latin American constitutional theory about constituent power is much more extensive than that in English speaking jurisdictions. See e.g. Carlos Sánchez Viamonte, *El Poder Constituyente: Origen y Formación del Constitucionalismo Universal y Especialmente Argentino* (Buenos Aires: Bibliográfica Argentina, 1957); Germán José Bidart Campos, *Derecho Político* (Buenos Aires: Aguilar, 1962); Gabriel Melo Guevara, *Poder Constituyente* (Bogotá: Desarrollo, 1979); Luis Carlos Sáchica, *Esquema para una Teoría del Poder Constituyente* (Bogotá: Temis, 1978); Rodrigo Borja, *Derecho Político y Constitucional* (México: Fondo de Cultura Económica, 1991); Ricardo Combellas, *Poder Constituyente* (Caracas: Altalitho, 1999); Jorge Reinaldo A Vanossi, *Teoría Constitucional* (Buenos Aires: Ediciones Depalma, 2000); Gonzalo Ramírez Cleves, *Límites a la Reforma Constitucional en Colombia: El Concepto de Constitución como Fundamento de la Restricción* (Bogotá: Universidad Externado de Colombia, 2005); Vladimir Díaz Cuellar, *Crítica de la Teoría del Poder Constituyente: Los Límites del*

an important role in the recent constitution-making episodes that have taken place in some Andean countries,[22] and even if not clearly articulated at the level of constitutional theory, it was present in early nineteenth century political practice. The Haitian Revolution is the earliest example.[23] The revolution was both a slave insurrection, culminating in the abolition of slavery, and a constitution-making exercise that brought about in a number of constitutions and led to an external act of self-determination that resulted in a new state.[24] The Haitian Revolution exemplifies the many dimensions of constituent practice, some of which I will discuss later in this article.

From the perspective of constitution making, one of the key moments of the Haitian revolution occurred in 1801, when Toussaint L'Ouverture announced that the time had come to create "laws appropriate for our habits, our traditions, our climate, our industry," and called for the convocation of a Constituent Assembly that would draft a constitution for Saint-Domingue.[25] The Constituent Assembly was composed of representatives of each of Saint-Domingue's departments, as selected by local assemblies. The constitution, adopted in 1801, abolished slavery but fell short of declaring independence from France.[26] Independence was finally constitutionalized in Article I of the Imperial Constitution of 1805: "The people who live on the island formerly called Saint-Domingue agree to constitute themselves in a free and sovereign State that is independent from all other powers of the universe."[27]

Proceso Constituyente Boliviano (La Paz: Instituto de Investigación, Capacitación y Formación Democrática Carlos Montenegro, 2008).

22 For a discussion, see Colón-Ríos, *Weak Constitutionalism*, *supra* note 5.

23 In a certain way, the Haitian revolution turned seventeenth century theories of resistance, which are strongly connected with the theory of constituent power, on their head. According to Locke's formulation of the right of resistance, which was highly influential in North America, the people's right to constitute a new government is triggered when those in power are unable or unwilling to protect individuals' property, understood as including people's lives, liberties, and estates (John Locke, *Two Treatises of Government* (New York: Hafner, 1947) at 232–33). As recently suggested by Illan rua Wall, in Haiti, it was the "property" that rebelled against the individuals and eventually became a constituent people (Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (New York: Routledge, 2012) at 18). The most famous account of the Haitian Revolution can be found in CLR James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution* (London: Allison & Busby, 1980).

24 See Sibylle Fischer, *Modernity Disavowed: Haiti and the Cultures of Slavery in the Age of Revolution* (Durham, NC: Duke University Press, 2004) at 227–44.

25 Laurent Dubois, *Avengers of the New World: The Story of the Haitian Revolution* (Cambridge, Mass: Belknap, 2004) at 242–43.

26 Fischer, *supra* note 24 at 227.

27 *Ibid* at 275.

Later in the nineteenth century, the theory of the people's constituent power was frequently put into practice in Latin America, as constituent assemblies were convened after successful independence struggles. These were followed by periodic constitution-making episodes. One of the first and most important examples is provided by the Constitution of the *Gran Colombia,* adopted in 1821 by a special assembly. Directly appealing to the theory of constituent power, some of the delegates were at pains to describe the assembly as a constituent, not a constituted, body.[28] More recently, in the twentieth and twenty-first centuries, constituent power has not only been associated with the view that the people possess a legally unlimited constitution-making power (a power that, as the highest courts of Colombia and Venezuela have determined, may be even exercised in violation of existing amendment rules).[29] It has also been associated with the idea that constitutions have to be adopted through highly participatory procedures.[30] In fact, as I have argued elsewhere, constituent power and democracy are connected in important ways.[31]

First, as noted above, both democracy and constituent power attribute to the people—understood as including all the human beings that live in a particular territory and are subject to state power—the right to participate in creating all laws, including fundamental laws. Put differently, in order to understand a constitution-making act as a true exercise of the constituent power *of the people*, it must take place through the most participatory procedures possible.

Second, both democracy and constituent power are uncomfortable with permanent constitutions. Permanent constitutions may be consistent with the idea of placing legal limits on the ordinary institutions of government (that is, the constituted powers) as a way of protecting the basic conditions of democracy, even if such limits thwart the will of present-day electoral majorities or of their representatives. However, both democracy and constituent power recommend against any legal limits being applicable to the "the people themselves", that is, to the citizenry acting through participatory mechanisms of constitutional change.

Third, and as we will see in the next part of this article, the exercise of both constituent power and democracy requires respect for certain rights

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28 Juanita Sanz de Santamaría Samper, ed, *Actas del Congreso de Cucuta, 1821* (Bogotá: Fundación Francisco de Paula Santander, 1989).

29 See Joel I Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia" (2011) 18:3 Constellations 365.

30 *Ibid* at 368.

31 Colón-Ríos, "Five Conceptions", *supra* note 6.

(including not only rights of political participation, but also for example, rights that protect individual autonomy).

This brief account should not be taken to suggest that the theory of the people's constituent power is uncontroversial. On the one hand, it is in no way clear that there could be such a thing as a constituent people, a people that literally gives itself a set of fundamental laws. In that vein, it has been argued that the idea of the people as an ultimate constitution maker is based "on an unacceptable political mythology",[32] and that any act of the people—a people that is only capable of action through representation—is determined by prior electoral and procedural rules that must be given to the people by someone else.[33] From a different perspective, but providing support for this critique, Enrique Dussel has argued that, although constituent power is always possessed by the political community, it must be delegated or institutionalized in order to be exercised. It must accordingly be transformed from an original power—*potentia*—into an organized or institutionalized power—*potestas*.[34]

On the other hand, it has been suggested that the category of the people should be abandoned, that the people should not be seen as the default bearer of the constituent power. Paolo Virno, for example, attributes to the concept of the people an inherently conservative character; its end is always to bring into existence a state, to create a sovereign with a single political will.[35] This, Virno maintains, is why Hobbes could say that in any form of government—even in an absolute monarchy—the people rules.[36] Moving away from the category of the people, Virno, like Antonio Negri,[37] attributes constituent power to a multitude that never seeks a unified centre of power. "The multitude" is anti-statist and anti-popular. Accord-

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[32] Andrew Arato, "Redeeming the Still Redeemable: Post Sovereign Constitution Making" (2009) 22:4 International Journal of Politics, Culture, and Society 427 at 437.

[33] See *ibid* at 437–38; Hans Lindahl, "Sovereignty and Representation in the European Union" in Neil Walker, ed, *Sovereignty in Transition* (Oxford: Hart, 2003) 87 at 105–107.

[34] Enrique Dussel, *Twenty Theses on Politics*, translated by George Ciccariello-Maher (Durham, NC: Duke University Press, 2008) at 18–23.

[35] Paolo Virno, *Virtuosismo y Revolución: La Acción Política en la Época del Desencanto* (Madrid: Traficantes de Sueños, 2003) at 194.

[36] *Ibid.*

[37] See Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, translated by Maurizia Boscagli (Minneapolis: University of Minnesota Press, 1999) at 304.

ingly, it challenges both the sovereignty of the state and the sovereignty of the people.[38]

There are, of course, other approaches that attempt to redeem the people as a desirable political category. Ernesto Laclau, for example, sees the people not as the collection of human beings that inhabit a particular territory but as comprised of diverse groups, such as indigenous peoples, environmentalists, workers, and others, who are at different moments brought together by unfulfilled political demands.[39] Under such a conception, the category of the people is to be constructed—and reconstructed—in the context of particular political struggles that in the last instance challenge those institutions and officials who claim to act in the people's name.[40]

My account of the theory of constituent power should not be understood as an attempt to settle any of the debates that I have summarily reviewed in the previous two paragraphs. On the contrary, and as will become clear in the next parts, my aim is to show that the theory of constituent power, as currently understood by mainstream constitutional theory has important implications for the relationship between peoples, states, and the protection of nature. When those implications are made explicit, or, put in a different way, when one brings to the surface the transformative potential of the modern notion of the constituent power of the people, the result is an expanded understanding of the rights required for democratic self-government, of the limits of state sovereignty, and of humanity as a relevant political category.

B. Democracy, Rights and Constituent Power

That there cannot be a democracy without respect for certain rights has become a common view among democratic and constitutional theorists. Even academics who are strongly critical of the counter-majoritarian character of judicial review of legislation, like Jeremy Waldron, identify a strong connection between rights and democracy.[41] And this not only ap-

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38 Virno, *supra* note 34 at at 104. For an illuminating discussion, see Illan rua Wall, "Notes on an 'Open' Constituent Power" (3 October 2013) Law, Culture and the Humanities, DOI: 10.1177/1743872113501840.

39 Ernesto Laclau, *On Populist Reason* (London: Verso, 2007) at 79–82.

40 *Ibid at* 171.

41 Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 282–85. There are, however, critiques, both from the left and the right of the political spectrum, of the usefulness or desirability of the idea of constitutional rights and of rights discourse in general. See e.g. Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique*

plies to rights relating to political participation, but to other types of rights as well. That is to say, there are some rights, like the right to vote, that can be described as constitutive of democracy, since they are part of the formal requirements for citizen participation in the political process. There are also rights, like the right to freely associate with others and the right to express one's opinions without fear of punishment, without which it would very difficult, if not impossible, for citizens to engage in genuine acts of democratic participation and deliberation.[42] All these rights can be properly described as political rights, as they are closely connected to each person's ability to participate in both the ordinary political process and in any extraordinary process of constitutional change—that is, in the exercise of constituent power.

But there are other rights, which may be called individual rights, that are less obviously connected to democracy. These rights create a private sphere in which the state cannot intervene, a dimension of the life of citizens that is not for others to intrude on. The right to privacy, freedom of conscience, and the right to private property fall within this category. Nevertheless, there are ways of understanding these rights as fundamental to the existence of democracy. Without a secure place in the world to think and act free of state interference, for example, individuals can hardly form political opinions and develop their capacities of deliberating with others. This is why Frank Michelman has written that the right to privacy can be understood as a precondition to meaningful political participation, as it protects "the intimate associations through which personal moral understandings and identities are formed and sustained."[43]

Like other republicans, Michelman also maintains that the right to private property can be thought of as necessary "to imbue citizens with the independence" to engage in popular self-government.[44] More recently, Corey Brettschneider has argued that freedom of conscience is essential to democracy because it "ensures that self-rulers will be able to think for themselves about political problems without being subject to external co-

(Durham, NC: Duke University Press, 2002); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

42 For a brief discussion of these rights and their relationship to democracy, see Walter F Murphy, "Constitutions, Constitutionalism, and Democracy" in Douglas Greenberg et al, eds, *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993) 3 at 3–5.

43 Frank Michelman, "Law's Republic" (1988) 97:8 Yale LJ 1493 at 1536.

44 Frank I Michelman, "Possession vs. Distribution in the Constitutional Idea of Property" (1987) 72:5 Iowa L Rev 1319 at 1332. See also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999) at 160–61.

ercion,"[45] But the most ambitious attempt to demonstrate that both political and individual rights are fundamentally connected to democracy is probably Jürgen Habermas's cooriginality thesis. Habermas argues that citizens can only make proper use of their public autonomy, of their ability to make laws in the exercise of their political rights, "if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct."[46]

At the same time, they can only enjoy a sphere of private autonomy if they "make an appropriate use of their political autonomy"[47] and determine the specific interests that need to be protected through individual rights.[48] Only when both types of rights are fully realized are citizens able to see themselves as authors and addressees of the law. Citizens become authors of the law by virtue of the exercise of political rights, and its addressees by possessing a private autonomy that serves as a boundary to law.[49] Habermas maintains that, in addition to the political and individual rights described earlier, the recognition of "[b]asic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded" might also be necessary to provide citizens an opportunity to exercise other rights.[50] Without adequate access to things such as health, education, and food, it would be difficult for any citizen to effectively participate in the political process.[51]

It is not that non-political rights, such as individual, social, or economic rights, have value only because of their relationship to rights of political participation. Rather, the point is that the fact that non-political rights

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45 Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2007) at 45.

46 Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" (2001) 29:6 Political Theory 766 at 767 [Habermas, "Constitutional Democracy"].

47 *Ibid.*

48 See Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy" (1995) 3:1 European Journal of Philosophy 12.

49 *Ibid* at 17.

50 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996) at 123 [Habermas, *Between Facts and Norms*]. For a discussion, see David Ingram, *Habermas: Introduction and Analysis* (Ithaca: Cornell University Press, 2010) at 169–170, 184–89. As the reference to ecology suggests, Habermas considers that different forms of environmental rights may be necessary for the exercise of other rights. See Michael Mason, *Environmental Democracy: A Contextual Approach* (London: Routledge, 1999) at 59.This idea will be discussed in the next section of this article.

51 For a discussion, see Michael Saward, *The Terms of Democracy* (Cambridge: Polity Press, 1998) at 94–101.

act as limits to the decisions of democratically elected officials—limits which in most constitutional orders are legally, rather than merely politically, enforceable—is not necessarily problematic from a democratic perspective because these rights are necessary for democracy to exist. Nevertheless, this does not mean that the *constitutionalization* of rights does not create certain tensions with the democratic ideal. For example, even if the rights mentioned above are necessary for democracy to exist, their meaning and scope will frequently be a matter of controversy. When that occurs, who should have the power to make a final, legally binding, decision about what is required by rights? If courts are attributed that power, should the citizenry—as opposed to judges and legislators—be able to change the constitution in order to redefine the rights in question?

Part of the immense body of literature about the legitimacy of judicial review of legislation revolves precisely around the first of those questions. It is not my intention here to engage in that debate since, as will become clear shortly, my argument will move in a different direction. It suffices to accept as plausible what I think is Habermas's answer to the second question (whether citizens should have the power to redefine the content of rights), without attempting to engage in a defence or attack of the institution of judicial review of legislation. What I want to stress here is that even if both political and individual rights are necessary components of a democratic legal system, the constitutionalization of those rights should not be imposed on the citizenry by either courts or legislatures, or be determined by *a priori* moral norms.[52] On the contrary, the citizenry should be able to create and redefine rights whenever they consider it necessary.[53]

As Habermas maintains, the act of founding a constitution should not be seen as a one-time event in which a set of rights is permanently fixed. "[L]ater generations," he writes, "have the task of actualizing the still untapped normative substance of the system of rights," in a dynamic and self-correcting process "which is not immune to contingent interruptions and historical regressions."[54] This is why he has expressed reservations about John Rawls's theory of justice.[55] Rawls's theory, he has suggested, implies a society in which citizens "cannot reignite the radical democratic embers of the original position in the civil life of their society ... and they

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52 Habermas, *Between Facts and Norms*, *supra* note 50 at 104–105.

53 *Ibid* at 125–26.

54 Habermas, "Constitutional Democracy", *supra* note 46 at 774.

55 Jürgen Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism" (1995) 92:3 Journal of Philosophy 128. John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1999).

find the results of the theory already sedimented in the constitution."[56] The idea is that rights not only allow citizens to live *under* a democracy but also to exercise their constituent power and to make decisions about the very basis of their constitutional order. Regardless of the specific institutionalization that rights enforcement takes, their content must never be out of the scope of the original power of the citizenry.

C. Constituent Power through Time

If citizens have the ability to rewrite their constitution, to exercise their constituent power at any moment, then there is always the possibility that they might abolish the rights that make democracy possible. Despite his reliance on natural law, this is certainly a possibility under Sieyès's theory, since there are no means of enforcing any legal or moral limits on a misguided constituent subject.[57] However, as we will see, the theory of constituent power has an important intergenerational dimension. As noted in Part I.A., Sieyès (and Schmitt) insisted that constituent power continues to exist after the constitutional order is in place. In that sense, his theory implicitly suggests a limit to the exercise of constituent power that is independent of any notion of natural law. In order to be consistent with itself, an act of constituent power must not deprive future generations of the opportunity of becoming constitution makers. Interestingly, and despite his insistence on the sovereignty of the people of the present, Thomas Jefferson was one of the most powerful defenders of constituent power's intergenerational dimension.

Jefferson famously wrote that "[t]he earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please."[58] As mentioned earlier, Jefferson also suggested that every time a new generation came into existence, which occurred every nineteen years according to his interpretation of the European tables of mortality, all laws and institutional arrangements should lapse and constitutional conventions be convened. Those conventions would allow the present generation to exercise the "right to choose for itself the form of government it believes most promotive of its own happiness."[59] Jefferson's immediate concern was to prevent

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56 *Ibid.*

57 Sieyès, *supra* note 5 at 124.

58 Letter from Thomas Jefferson to James Madison (6 September 1789) in Merrill D Peterson, ed, *The Portable Thomas Jefferson* (New York: Viking Press, 1975) at 449.

59 Letter from Thomas Jefferson to Samuel Kercheval (12 July 1816) in Merrill D Peterson, ed, *The Portable Thomas Jefferson* (New York: Viking Press, 1975) at 560.

the past from ruling the present—he famously insisted that "the dead have no rights."[60] His argument, however, has an obvious implication for the rights of future generations. That is to say, no generation has the right to impose a constitution on another, and that applies equally to past and present peoples.

Most modern constitution makers have ignored Jefferson's advice and, consequently, have adopted constitutions that are in tension with the theory of constituent power and its intergenerational component. These constitutions are not only difficult to change but they lack mechanisms designed to allow citizens to become authors of their constitutional regime. The result is that the amending power is usually left in the hands of government and legislative supermajorities. This approach to constitutional change, to the extent that it attributes to government a power that it denies to the citizenry, provides an example of what Dussel described as political power becoming "self-referential".[61] That is, a situation in which those exercising different forms of delegated or institutional power (*potestas*), lose sight of the fact that all political functions—including the amending power—must have "as their primary and ultimate reference point the *power of the political community*."[62]

The intergenerational component of the theory of constituent power is radically inconsistent with such a state of affairs, since it requires state officials to recognize that it is in present and future peoples that the ultimate authority to change the constitution rests. The constitutions recently adopted in some Latin American countries seek to avoid the problem identified by Dussel by providing citizens with the faculty of transforming the constitutional order, acting outside the ordinary institutions of government.[63] These constitutions do this through provisions that allow citizens to trigger through popular initiative a referendum on whether an extraordinary assembly should be convened and a new constitution created. I have examined the constitutional theory behind those constitutions in my previous work,[64] but what I would like to stress here is the fact that these constitutions exemplify the intergenerational dimension of constituent power. They do so in the following way.

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60 *Ibid.*

61 Dussel, *supra* note 34 at 4.

62 *Ibid* [emphasis in the original].

63 See e.g. *Constitution of Ecuador*, *supra* note 2, art 444; *Political Constitution of the State of Bolivia, 2009*, Gaceta Oficial, NCPE 10 Bs, art 411 [*Constitution of Bolivia*, translated by author]; *Constitution of Bolivarian Republic of Venezuela, 1999*, Gaceta Oficial No 36.860, art 347 [*Constitution of Venezuela*, translated by author].

64 Colón-Ríos, *Weak Constitutionalism*, *supra* note 5.

These are constitutions that recognize generous catalogues of political, individual, social, and economic rights. These rights, as we have seen, are connected in fundamental ways to democracy and constituent power. At the same time, they allow citizens to create a new constitutional order without being bound by any form of positive law. They reflect constituent power's intergenerational component because they assume that, regardless of how "progressive" or "advanced" a constitution might be, its content should never be put out of the scope of the decisions of present and future generations, who always retain the faculty of triggering new constitution-making episodes. These constitutions can thus be seen as resulting from the implicit self-imposition on the part of the constituent subject of two intergenerational obligations.

First, one must not exercise constituent power in a way that prevents future generations from becoming authors of a new constitution. Second, one must exercise constituent power in a way that facilitates the occurrence of future constituent episodes. Or, as crisply put by Dennis Thompson, "present sovereigns should act to protect popular sovereignty itself over time."[65] The constitutional implications of this approach are easily grasped if one examines the *Constitution of Ecuador*, adopted in 2008. The *Constitution of Ecuador* was drafted by a Constituent Assembly triggered by referendum and composed of elected delegates. Moreover, before the constitution came into force, it was ratified by the citizenry in an additional referendum. Even though this constitution-making process was not by any means perfect, Latin American constitutions have not been traditionally drafted with these levels of popular involvement. Rather, in the best of cases, and with only some exceptions, they were drafted by legislative assemblies that assumed constituent functions.[66]

The *Constitution of Ecuador* recognizes traditional political rights, such as the right to vote and to be a candidate for office,[67] as well as individual rights, such as the rights to privacy and non-discrimination.[68] It also recognizes different social and economic rights, including the right to education,[69] and the right to food and water.[70] Moreover, it establishes a

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65 Dennis F Thompson, "Democracy in Time: Popular Sovereignty and Temporal Representation" (2005) 12:2 Constellations 245 at 248. See also Dennis F Thompson, "Representing Future Generations: Political Presentism and Democratic Trusteeship" (2010) 13:1 Critical Review of International Social and Political Philosophy 17.

66 See generally Gabriel Negretto, *Making Constitutions, Presidents, Parties, and Institional Choice in Latin America* (Cambridge, UK: Cambridge University Press, 2014).

67 *Constitution of Ecuador*, *supra* note 2, arts 61, 62.

68 *Ibid*, art 66.

69 *Ibid*, art 26.

70 *Ibid*, art 12.

number of mechanisms for the enforcement of those rights,[71] and grants a Constitutional Court the power to strike down unconstitutional legislation.[72] Nevertheless, this constitution also includes a mechanism that could be used to abolish all of these rights and to create a constitutional order based on a totally different set of values.

Such a result could be achieved not through the ordinary legislative process or through a constitutional amendment, but through an extraordinary assembly—a Constituent Assembly—that can be convened by a referendum triggered through a popular initiative in accordance with Article 444. The assembly would be composed of elected delegates, which are given the mandate to draft a new constitution that only becomes valid if ratified by a majority of the electorate. Article 444 thus attempts to make available, for present and future generations, a constitution-making mechanism as participatory as the one used when the constitution was originally adopted.

Despite its apparent democratic features, it might be argued that this approach, which is also present in the constitutions of Bolivia and Venezuela,[73] is built on a fundamental and dangerous contradiction. That is to say, it gives the maximum protection possible to political, individual, social, and economic rights, but it also provides an avenue for their destruction.

But that would miss the point. These constitutions are better understood as attempting to reconcile the idea that there are some rights without which democracy would not be possible, with the view that in a truly democratic society, a society in which citizens govern themselves, present and future peoples should be able to adopt any constitution they want. Rights may, therefore, serve as limits to ordinary political power, but those limits do not apply to the people. Even if unlikely, the mechanisms that facilitate the exercise of constituent power could be used to produce an undemocratic constitution. For example, a constitution could deny the very rights that make democracy possible, thereby making future exercises of democratic constitution-making impossible. Such a constitution, however, would be inconsistent with the intergenerational component of the theory of constituent power—the idea that all peoples have the right to become authors of the constitutional order under which they live. And in that respect, it would be a democratically illegitimate constitution.

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71 See e.g. *ibid*, arts 86, 88 (allowing any person, community or nationality to ask a court for their enforcement).

72 *Ibid*, art 436.

73 *Constitution of Bolivia*, *supra* note 63, art 411; *Constitution of Venezuela*, *supra* note 63, art 347.

D. The Democratic Legitimacy of the Rights of Nature

The rights that we normally have in mind as imposing limits on government are *human* rights, the rights of the people alive now and perhaps the rights of the descendants of today's people. The *Constitution of Ecuador*, however, also attributes rights to *nature*. Article 71 defines nature—or *Pachamama*[74]—as the place "where life is reproduced and occurs" and attributes to it the "right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes." It also states that "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature."[75]

There is an interesting body of literature that examines the very coherence of the idea that nature may have rights of its own and whether nature has an intrinsic value separate from any benefits it may provide to human beings.[76] What interests me here is not to engage in that debate but rather to consider whether the attribution of rights to nature can be justified from a democratic perspective.[77]

One possibility is to say that the decision-making power of democratically elected officials should be limited by the rights of *humans*, and quite another to say that it should also be limited by the rights of *nature*. In the first scenario, political power is limited in order to satisfy what is taken to be a higher human interest, namely, the protection of human rights. In the second scenario political power is limited in order to protect the envi-

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74 Article 71 of the *Constitution of Ecuador* makes the terms nature and Pachamama equivalent, but the latter term can be understood as being much broader. The official Spanish text of the relevant part of Article 71 reads as follows: "La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos." For a linguistic analysis of the term Pachamama, see Rosaleen Howard-Malverde, "'Pachamama Is a Spanish Word': Linguistic Tension between Aymara, Quechua, and Spanish in Northern Potosí (Bolivia)" (1995) 37:2 Anthropological Linguistics 141.

75 *Constitution of Ecuador*, *supra* note 2, art 71.

76 See e.g. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980); Alberto Acosta & Esperanza Martinez, eds, *La Naturaleza con Derechos: De la Filosofía a la Política* (Quito: Abyayala, 2011); Christopher D Stone, *Should Trees Have Standing?: Law, Morality and the Environment*, 3rd ed (Oxford: Oxford University Press, 2010).

77 It is worth noting that, at the time of writing, the legislature of Ecuador passed a revised Criminal Code (*Código Orgánico Integral Penal*) that includes a chapter on "Crimes against the Environment and Nature or Pacha Mama". See *Código Orgánico Integral Penal* (2014), Registro Oficial Suplemento 180 (Ecuador).

ronment, even if that limit runs contrary to activities that may at least result in short-term benefits to society.[78]

It is worth noting an obvious fact at this stage: No human rights could be exercised in the absence of a natural environment capable of sustaining human life. As stated by Alberto Acosta, one of the drafters of the 2008 *Constitution of Ecuador*: "[T]he destruction of nature eliminates the conditions required for the existence of the human species and therefore violates all human rights."[79]

The International Court of Justice has also emphasized the close relationship between human rights and the protection of nature. For example, in *Hungary v. Slovakia*, then Vice-President Weeramantry stated, in a separate opinion, that "the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."[80] Justice Weeramantry added that it was not necessary to elaborate on that point because it was clear that "damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments."[81] Under this seemingly uncontroversial line of reasoning, the attribution of rights to nature can be understood as a means of indirectly protecting the possibility of the enjoyment of human rights. As noted earlier, some of these rights are necessary for democracy to exist. Thus, when the rights of nature act as limits to the decisions of the ordinary institutions of government, such limits are no more democratically objectionable than those posed by freedom of speech or freedom of conscience.

A similar result is reached if one considers the most likely purpose behind the constitutionalization of nature's rights. The attribution of rights to nature would normally be, in the last instance, an attempt to protect what may be called "nature as we know it". By this, I mean a natural environment which provides for the basic conditions for human life, such as clean water, relative abundance of food, and land. It is also, therefore, an environment in which persons are able to engage in practices such as cul-

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78 Economic development through the destruction of a forest is one example. Moreover, there is always the possibility that the rights of nature will collide with human rights, as in, for example, a case in which upholding the "rights of a forest" would result in a negation of a community's right to housing.

79 Alberto Acosta, "Los Derechos de la Naturaleza: Una Lectura sobre el Derecho a la Existencia" in Alberto Acosta & Esperanza Martínez, eds, *La Naturaleza con Derechos: De la Filosofía a la Política* (Quito: Abya-Yala, 2011) at 355 [translated by author].

80 *Case concerning the Gabčíkovo-Nagymaros (Hungary v Slovakia)*, Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 88 at 91.

81 *Ibid* at 91–92.

tural or artistic activities, that go beyond mere physical survival and are considered valuable by human populations.

In other words, when seen from a *human* perspective, the constitutionalization of the rights of nature is a means to ensure that those subject to a constitutional order will live, in the present and in the future, in an adequate context for the realization and enjoyment of life. It seems trite to say that if those conditions did not exist, any meaningful deliberation in a democratic process would be impossible. In this sense, the movement toward the constitutionalization of the rights of nature, instead of being seen "as a serious threat to democratic freedom,"[82] should in fact be understood as seeking to promote the existence of democracy in the future.

This view is clearly reflected in UNESCO's 1997 *Declaration on the Responsibilities of the Present Generations towards Future Generations*.[83] "Each generation inheriting Earth temporarily", the document states, "should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems,"[84] so that "future as well as present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity."[85]

This idea has also been advanced by various academics. Robyn Eckersley, for example, has maintained that "there are certain basic ecological conditions essential to human survival," which "provide the very preconditions ... for present and future generations of humans to practice democracy."[86] Accordingly, adds Eckersley, environmental rights "might be seen as even more fundamental than the human political rights that form the ground rules of democracy."[87]

Some authors have challenged this approach. It has been argued, for instance, that if these environmental provisions are imposed on the people

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82 For a discussion of these criticisms in the context of profound ecology, see Eugenio Raúl Zaffaroni, "La Pachamama y el Humano" in Alberto Acosta & Esperanza Martínez, eds, *La Naturaleza con Derechos: De la Filosofía a la Política* (Quito: Abya-Yala, 2011) at 85.

83 UNESCOR, 29th Sess, UN Doc C/RES/31/44, online: UNESCO <www.unesco.org/cpp/uk/declarations/generations.pdf>.

84 *Ibid*, art 4.

85 *Ibid*, art 2.

86 Robyn Eckersley, "Greening Liberal Democracy: The Rights Discourse Revisited" in Brian Doherty and Marius de Geus, eds, *Democracy and Green Political: Sustainability, Rights and Citizenship Thought* (London: Routledge, 1996) 212 at 224.

87 *Ibid.*

by a well-intentioned, but undemocratic, constitution maker, their allegedly democracy-promoting character would be put into question.[88] In fact, even if they are adopted by a democratic constitution maker, seeking to protect nature through *constitutional* means deprives present and future majorities of the opportunity of deciding whether environmental concerns should act as limits to the policy choices made by their elected representatives.[89]

These, however, are problems that apply to the constitutionalization of different forms of environmental rights in a typical liberal constitution—for example, a constitution that can only be amended by legislative supermajorities. In the context of constitutions that facilitate the exercise of constituent power through participatory mechanisms of constitutional change, such as the ones discussed above, those concerns would be misplaced. In those systems, the constitution itself can be altered by democratic means, even if those means are not accessible to the ordinary institutions of government.

Of course, attributing rights to nature might not be necessary to protect the ecological conditions that make democratic decision making possible. A constitutional order may achieve the protection of nature by recognizing the human right to a healthy environment.[90] For example, Article 33 of the Bolivian Constitution states that: "People have a right to a healthy, protected, balanced environment. The exercise of this right allows individuals and communities of present and future generations, as well as other living things, to develop in a normal and permanent manner."[91]

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88 It is of course possible to defend the constitutionalization of different forms of environmental rights from the perspective of intergenerational justice, and without any reference to democracy. See Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: The United Nations University, 1989). For general discussions about moral obligations to future generations, see RI Sikora & Brian Barry, eds, *Obligations to Future Generations* (Philadelphia: Temple University Press, 1978); Tim Mulgan, *Future People: A Moderate Consequentialist Account of our Obligations to Future Generations* (Oxford: Clarendon, 2006). *Cf* Richard P Hiskes, *The Human Right to a Green Future* (Cambridge, UK: Cambridge University Press, 2009).

89 Tim Hayward, *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005) at 147–48.

90 For a discussion, see David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012).

91 *Constitution of Bolivia*, *supra* note 63, art 33. Moreover, Article 34 states that: "Any person, as an individual or as part of a collective group, is empowered to take legal action in defence of the right to the environment, without prejudice to the obligation of public institutions to act against environmental attack". In 2010, Bolivia adopted the

In fact, "nature as we know it" may be protected in a particular territory without the formal recognition of any type of environmental right. For example, this would be the case in a society in which respect for nature is a deeply embedded value or in a society that has not developed the technological capabilities to cause significant ecological damage. It is the continuing existence of nature as we know it that is a precondition for democracy, not the existence of any particular constitutional forms directed at protecting the environment.

In certain contexts, however, the attribution of rights to nature may be seen as an effective means of achieving that goal (that is, protecting what above I called "nature as we know it"). In such a situation, the constitutionalization of the rights of nature can be justified as *a* constitutional form that—just as the right to vote or the freedom of assembly—will tend to promote a state of things in which different forms of democratic decision making, including the exercise of constituent power, will be possible. The relationship between nature and the exercise of constituent power is in fact recognized in the preamble of the Bolivian Constitution, which states: "We found Bolivia anew, fulfilling the mandate of our peoples, *with the strength of our Pachamama* and with gratefulness to God."[92] Without the strength given by nature, which always forms an integral part of the many meanings that can be attributed to the concept of *Pachamama*, this preamble suggests, it would not have been possible for the Bolivian people to adopt a new constitution.

The continuing existence of nature as we know it, I have argued, is a necessary precondition for the future exercise of constituent power as well as for any form of political action. If that is correct, then the fact that the rights of nature may limit the decision-making power of elected officials—which would be more clearly exemplified when judges are authorized to invalidate exercises of ordinary political power that violate those rights—does not create a problem, at least not from a democratic perspective. This approach assumes, of course, that the constitution itself will always remain open to future episodes of popular constitutional change, an assumption that can only be made in a handful of constitutional systems around the world. Interestingly, the idea of the rights of nature has only achieved legal recognition in the context of those very systems, such as those of Bolivia and Ecuador, which operate under constitutions that contain provisions designed to facilitate future constituent episodes.

Law of the Rights of Mother Earth (*Ley de Derechos de la Madre Tierra* (2010), Ley No 071 (Bolivia)), which also attributed rights to nature.

92 *Ibid*, Preamble [emphasis added]. The official Spanish text reads as follows: "Cumpliendo el mandato de nuestros pueblos, con la fortaleza de nuestra Pachamama y gracias a Dios, refundamos Bolivia."

II. Justifying the Protection of the Rights of Nature through Universal Jurisdiction in Cases of Serious Environmental Damage

A. International Law and Constituent Power

There is, however, another question I promised to address: Would a constitutional court be justified in exercising jurisdiction and enforcing the rights of nature in cases involving acts by foreigners occurring outside the state's territory? By considering the principle of universal jurisdiction, this part of the article directly engages with international law and indirectly attributes to it the potential of protecting a transnational constituent power. Some comments are accordingly necessary before moving further. Despite numerous attempts at promoting democracy and human rights through international law, international norms are not always on the side of basic democratic principles. One of the most salient examples is the international investment rules regime, protected by hundreds of bilateral investment treaties (BITs) that typically allow investors to enforce their provisions against states before international investment tribunals.[93]

The effect, according to David Schneiderman, is a system that sets legal limits on democratic decision making, and that "bind[s] states to a version of economic liberalism" by "assigning to investment interests the highest possible protection."[94] In a similar way, Stephen Gill has argued that this framework amounts to a new form of constitutionalism which has at its objective not the protection of human rights or the separation of powers, but the insulation of "key aspects of the economy from the influence of politicians or the mass of citizens by imposing, internally and externally, 'binding constraints' on the conduct of fiscal, monetary and trade and investment policies."[95]

It should, therefore, not come as a surprise that some states, particularly states which have adopted constitutions that rest in important ways on the theory of constituent power and that provide means for its exercise,

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[93] David Schneiderman, *Constitutionalizing Economic Globalization: Investments Rules and Democracy's Promise* (Cambridge, UK: Cambridge University Press, 2008) at 2 [Schneiderman, *Constitutionalizing Economic Globalization*]. See also Robert Howse, "How to Begin to Think About the 'Democratic Deficit' at the WTO" in Stefan Griller, ed, *International Economic Governance and Non-economic Concerns* ((New York: Springer, 2003); Gus Van Harten, "Investment Rules and the Denial of Change" (2010) 60:3 UTJL 893; Stephen Clarkson, *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State* (Toronto: University of Toronto Press, 2002).

[94] Schneiderman, *Constitutionalizing Economic Globalization*, *supra* note 93 at 206, 4.

[95] Stephen Gill, *Power and Resistance in the New World Order* (Basingstoke: Palgrave Macmillan, 2003) at 132.

such as Bolivia, Ecuador, and Venezuela, have resisted these international arrangements in different ways. In fact, David Schneiderman has noted that "[b]y any number of indicators, Latin America has become the principal site of resistance to the rules and institutions of international investment law."[96]

This resistance is reflected, for instance, by Bolivia, Ecuador, and Venezuela's recent decisions to withdraw their consent to the International Centre for the Settlement of Investment Disputes, as well as to terminate a number of BITs.[97] Moreover, some of the new Latin American constitutions contain provisions that seek to limit the power of the state to enter into agreements that recognize a foreign arbitration tribunal's jurisdiction over its acts—at least in certain contexts. For example, Article 422 of the *Constitution of Ecuador* prohibits the adoption of international treaties in which the government cedes "sovereign jurisdiction" to international arbitration tribunals in commercial or contractual disputes.[98] The Constitutional Court of Ecuador recently declared that article inconsistent with thirteen BITs made with states such as Germany, the United States, France, and the United Kingdom.[99] Stressing the tensions between constituent power and international norms, Article 73 of the *Constitution of Venezuela*, allows the electorate, by popular initiative, to trigger a referendum on any treaty that may "compromise national sovereignty or that transfers competences to supranational organs."[100]

Even outside the context of international investment law, the countries mentioned above have voiced opposition to other international ar-

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96 David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Toronto: Palgrave Macmillan, 2013) at 150 [Schneiderman, *Resisting Economic Globalization*].

97 See Federico M Lavopa, Lucas E Barreiros & M Victoria Bruno, "How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties" (2013) 16:4 JIEL 869; Katia Fach Gómez, "Latin America and ICSID: David versus Goliath" (2011) 17 Law & Bus Rev Americas 197.

98 *Constitution of Ecuador*, *supra* note 2, art 422. The text in Spanish reads: "No se podrá celebrar tratados o instrumentos internacionales en los que el Estado ecuatoriano ceda jurisdicción soberana a instancias de arbitraje internacional, en controversias contractuales o de índole comercial, entre el Estado y personas naturales o jurídicas privadas." See also *Constitution of Bolivia*, *supra* note 63, art 466.

99 See Schneiderman, *Resisting Economic Globalization, supra* note 96, at 151–52.

100 *Constitution of Venezuela*, *supra* note 63. The official text of the relevant part of Article 73 reads as follows: "Los tratados, convenios o acuerdos internacionales que pudieren comprometer la soberanía nacional o transferir competencias a órganos supranacionales, podrán ser sometidos a referendo por iniciativa del Presidente o Presidenta de la República en Consejo de Ministros; por el voto de las dos terceras partes de los o las integrantes de la Asamblea; o por el quince por ciento de los electores o electoras inscritos e inscritas en el Registro Civil y Electoral."

rangements. A good example is Bolivia's denunciation of the UN Single Convention on Narcotic Drugs in 2011, which states that "coca leaf chewing must be abolished."[101] This is a particularly telling example. It shows the extent to which international agreements, which are voluntarily ratified by governments of different ideological persuasions, can sometimes clash with local practices. Such agreements can therefore significantly limit the ability of some communities to govern themselves in a culturally appropriate manner. Similarly, but more controversially, Venezuela recently denounced the Inter-American Convention on Human Rights, and, in addition to Venezuela, the governments of Bolivia, Ecuador, and Nicaragua have engaged in strong criticisms of the Inter-American human rights system.[102] In both cases, the claims were not against international human rights law but were based on the allegation that institutions created for the protection of human rights were being used to advance an imperialist project.[103]

This resistance, however, does not extend to international law as a whole. Even countries that place their people's constituent power above international norms are often prepared to engage with international law in profound ways. For example, the *Constitution of Ecuador*, while clearly establishing its supremacy over international treaties,[104] states in Article 424 that "international human right treaties ratified by the state that recognize rights more favourable to those contained in the Constitution will prevail over any other juridical norm or act of public power."[105] Simi-

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[101] *Single Convention on Narcotic Drugs*, 30 March 1961, 520 UNTS 151, 30 TIAS 6298 art 49 (entered into force 13 December 1964). Bolivia returned to the *Convention* in 2012, with a reservation allowing for traditional uses of the coca leaf. See Sven Pfeiffer, "Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing" (2013) 5:1 Goettingen Journal of International Law 287 at 303–305.

[102] Mónica Pinto, "The Crisis of the Inter-American System" in *Proceedings of the 101st Annual Meeting of the American Society of International Law, vol 107 (Washington, DC: American Society of International Law,* 2013) 127 at 128; Johan Karlsson Schaffer, Andreas Føllesdal & Geir Ulfstein, "International Human Rights and the Challenge of Legitimacy" in Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein, eds, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge, UK: Cambridge University Press, 2007) 1 at 7.

[103] Pinto, *supra* note 102 at 127–28. See also Schaffer, Føllesdal & Ulfstein, *supra* note 102 at 7.

[104] *Constitution of Ecuador*, *supra* note 2, art 425.

[105] *Ibid*, art 424. The full text of Article 424 reads as follows: "La Constitución es la norma suprema y prevalece sobre cualquier otra del ordenamiento jurídico. Las normas y los actos del poder público deberán mantener conformidad con las disposiciones constitucionales; en caso contrario carecerán de eficacia jurídica. La Constitución y los tratados internacionales de derechos humanos ratificados por el Estado que reconozcan derechos

larly, Article 13 of the *Constitution of Bolivia* states that "[t]he rights and duties protected by this constitution will be interpreted in conformity with international human rights treaties ratified by Bolivia."[106] Perhaps most tellingly, Article 74 of the *Constitution of Venezuela* explicitly disallows referenda for the abrogation of laws that "protect, guarantee, or develop human rights or ratify international treaties."[107]

These provisions suggest that these countries' resistance to international norms is directly connected to instances in which international law establishes limits that constrain the government's ability to pursue certain policies favoured by their populations independently of the wishes of other states. These are the types of limits presented by international investment law, or by international human rights organizations when they are perceived—perhaps wrongly—as agents of foreign domination. As exemplified by the constitutional provisions quoted above, the limits established by the human rights recognized in different international treaties, when properly applied, are different. They may limit the political power of government but at the same time promote the people's ability to govern themselves and to engage in diverse forms of democratic political action.

In other words, since respect for human rights is a necessary condition for the future exercise of constituent power, these countries' embrace of ratified international human rights treaties as an essential part of their constitutional order should not come as a surprise. The same applies to other forms of engagement with international law that are perceived to be consistent with popular self-government. For instance, outside the context of human rights, these countries are engaged in different international initiatives, like the Bolivarian Alliance for the Peoples of Our America (ALBA) and the Peoples' Trade Treaty. These initiatives involve the use of international law to reach new levels of regional integration and have the "declared objective of constructing a more democratic multi-polar world order."[108] Put differently, just as Haitian slaves embraced the French Dec-

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más favorables a los contenidos en la Constitución, prevalecerán sobre cualquier otra norma jurídica o acto del poder público."

106 *Constitution of Bolivia*, *supra* note 63, art 13. The relevant text in Spanish reads: "Los derechos y deberes consagrados en esta Constitución se interpretarán de conformidad con los Tratados internacionales de derechos humanos ratificados por Bolivia."

107 *Constitution of Venezuela*, *supra* note 63. This does not mean, of course, that those laws can never be repealed through other participatory mechanisms, but that the "referendum for the abrogation of laws" cannot be used for those purposes. The official text of the relevant part of Article 74 of the *Constitution of Venezuela* reads as follows: "No podrán ser sometidas a referendo abrogatorio las leyes ... que protejan, garanticen o desarrollen los derechos humanos y las que aprueben tratados internacionales."

108 Thomas Muhr, "Conceptualising the ALBA-TCP: Third Generation Regionalism and Political Economy" (2011) 3:2 International Journal of Cuban Studies 98 at 105. It is

laration of the Rights of Man and the Citizen because it supported their demands for freedom, despite knowing that the declaration was not intended to apply to them,[109] these countries are willing to engage with international law as long as it does not place constraints on their self-government capacities.

As we will see shortly, the exercise of universal jurisdiction in cases of serious environmental damage strengthens, rather than limits, constituent power. It does so, however, by recognizing humanity as the bearer of a transnational constituent power that serves as the basis for the extraterritorial exercise of jurisdiction. Extraterritorial jurisdiction may appear inconsistent with the localized model of constituent power under which states such as Ecuador and Bolivia operate, since this model rejects any form of foreign interference with national self-government. Nevertheless, the existence of a transnational constituent power does not diminish in any way the ability of peoples to govern themselves and engage in exercises of constituent power within their constitutional orders. On the contrary, it enlarges their capacity to do so, in the present and in the future, by protecting some of the conditions necessary for popular political action to take place. As we will see, this goes a long way in justifying the democratic credentials of the exercise of universal jurisdiction in cases of serious environmental damage. In those cases, the exercise of universal jurisdiction on behalf of humanity can have radical democracy-enhancing effects.

B. Universal Jurisdiction: A Brief Introduction

In this Part, I use the term "pure" universal jurisdiction to refer to non-subsidiary jurisdiction that is exercised in the absence of a treaty and by a state with no connections whatsoever to the acts in question. Pure universal jurisdiction, even in the case of genocide, is far from being uncontroversial. This is why the President of the International Court of Justice, Justice Gilbert Guillaume, in a separate opinion in *Democratic Republic of the Congo v. Belgium*, insisted that "international law knows only one true case of universal jurisdiction: piracy."[110]

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worth noting that Article 423 of the *Constitution of Ecuador* requires the state to promote the integration of the countries of Latin America and the Caribbean through the consolidation of supranational organizations and the adoption of international treaties.

[109] For a discussion, see Wall, *supra* note 23 at 17.

[110] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Separate Opinion of President Guillaume, [2002] ICJ Rep 3 at 42 [*Democratic Republic of the Congo v Belgium*]. It has been argued that most judges in this case understated the prevalence of universal jurisdiction. See Paul R Dubinsky, "Human Rights Meets Private Law Harmonization: The Coming Conflict" (2006) 30 Yale J Int L 211 at 278; Rog-

It is not my purpose to provide a legal argument for the validity of universal jurisdiction under international law or to produce anything resembling a full treatment of the topic.[111] What I intend to do in these last three Parts is to show that if the external or international implications of the theory of constituent power are taken seriously, the justification of the exercise of universal jurisdiction in cases of serious environmental damage is at least as compelling as the justification for its exercise with respect to piracy, genocide, and crimes against humanity. But, as will be seen, in order to reach that conclusion, it is necessary to adopt a different understanding of the relationship between universal jurisdiction and state sovereignty.

The *Charter of the United Nations* provides that that organization "is based on the principle of the sovereign equality of all its members."[112] In the last few years, a number of academics, generally associated with cosmopolitanism, have suggested that the classical notion of state sovereignty should be abandoned in favour of a conception that puts human rights at its centre.[113] At the same time, the emergence of supranational decision-making bodies and the increasing inability of states to act as autonomous agents, have led some scholars to suggest that the age of sovereign states is over.[114] Despite those challenges, however, state sovereignty remains one of the basic principles of international law. It is normally understood as resting on the following rules. First, each state possesses exclusive jurisdiction over its territory and over the human beings found there, as well as over actions that have an impact in the national territory. [115] Second, each state has a duty of non-intervention in matters that fall under the jurisdiction of other states.[116]

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er O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 Journal of International Criminal Law 735.

111 There are many academic works discussing this issue. See e.g. Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2006).

112 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2(1).

113 See e.g. Anne Peters, "Humanity as the Alpha and Omega of Sovereignty" (2009) 20:3 Eur J Int L 513–44.

114 Most of this literature deals with developments in Europe. See e.g. Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).

115 The term jurisdiction may be used to describe the ability of a state to adopt legislation applicable to certain events or entities, to conduct legal proceedings, and to use its coercive power to enforce its laws and judicial determinations. Kenneth C Randall, "Universal Jurisdiction under International Law" (1988) 66 Tex L Rev 785 at 786.

116 Ian Brownlie, *Principles of International Law* (Oxford: Oxford University Press, 1990) at 285. Further, state sovereignty implies that state obligations arising under customary law and international treaties must be based on consent.

These two rules were economically formulated by the Permanent Court of International Justice in *Lotus*, in which it was held that a state "may not exercise its power in any form in the territory of another State."[117] However, the court in *Lotus* also stated that the exercise of jurisdiction by a state outside its territory could be allowed "by virtue of a permissive rule derived from international custom or from a convention."[118] In fact, a set of exceptions has developed which justifies the exercise of extraterritorial jurisdiction in a number of scenarios. For example, under the principle of nationality, a state may exercise jurisdiction over its nationals for criminal conduct that occurred in the territory of another state.[119] The principle of protection permits a state to punish acts committed in foreign territory, regardless of the nationality of the suspect, "provided that they adversely affect its interests, security, or the exercise of the prerogatives of public power."[120] Under the passive personality principle, the state has the power to prosecute and punish acts committed by non-nationals in foreign territory when the victims are its nationals.[121]

These three principles assume that there is some link between the state that is authorized to exercise jurisdiction and the victim or the perpetrator. In the case of the principle of protection, the acts in question put the interests of the state at risk—for example, planning a *coup d'état* from

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117 *SS Lotus (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 18 [*Lotus*].

118 *Ibid* at 19. Those statements referred specifically to enforcement jurisdiction. With respect to prescriptive jurisdiction, the court expressed:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States. In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty (*ibid* at 19).

119 Jan-Michael Simon, "Jurisdicción Universal: La Perspectiva del Derecho Internacional Público" (2002) 4 Revista Electrónica de Estudios Internacionales at 21.

120 *Ibid* at 22.

121 *Ibid.*

a foreign territory. In contrast, universal jurisdiction is based solely in the nature of the relevant act, regardless of the place in which it occurred, of the nationality of the victim or perpetrator, or of the existence of any special connections with the state exercising it.[122] The doctrine is a reflection of the idea that there are interests that are common to all states and to the international community as a whole and that these interests are sometimes not sufficiently protected by territorial jurisdiction and its traditional exceptions. As noted by Bassiouni, universal jurisdiction relies on the view that by exercising it, a state "acts on behalf of the international community because it has an interest in the preservation of the world order as a member of that community."[123]

Or, in the words of the Spanish Constitutional Tribunal:

> International, cross-border prosecution that attempts to impose the principle of universal jurisdiction is based exclusively on the particular characteristics of the crimes subject to it, whose harmfulness (paradigmatically in the case of genocide) transcends the specific victims and affects the international community as a whole.[124]

Put differently, by exercising universal jurisdiction, a state conducts an *actio popularis*—an action in the name of the people—against an individual for committing an act (for example, piracy, slavery, war crimes, genocide, and torture) that renders him an *hostis humani generis*—an enemy of the human race.[125]

The oldest case of universal jurisdiction is piracy, and there are two main reasons for this:[126] first, the gravity of the crime; and, second, the absence of a state with territorial jurisdiction over the relevant act, because it occurs at the high seas.[127] For most of the twentieth century, in cases of crimes other than piracy, universal jurisdiction, if recognized, was viewed as strictly subsidiary. That is to say, it would exist only when states that would normally have jurisdiction were not in a position to ex-

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[122] See "Principle I – Fundamentals of Universal Jurisdiction" of "The Princeton Principles on Universal Jurisdiction" in Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2006) 18 at 21.

[123] M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) 42 Va J Int L 81 at 88.

[124] Constitutional Tribunal (Second Chamber), Judgment No 237/2005, 258 BOE 45 at 57 (Spain).

[125] Bassiouni, *supra* note 123 at 88.

[126] International law clearly recognizes universal jurisdiction over piracy. See e.g. the *Convention on the High Seas*, 29 April 1958, 450 UNTS 11, art 19 (entered into force 30 September 1962).

[127] Bassiouni, *supra* note 123 at 88.

ercise it or in cases in which extradition to the state with territorial jurisdiction was not possible.[128]

The most important developments of the principle of universal jurisdiction, however, took place after the Second World War. These developments were the result of the consensus that the most egregious violations of human rights concerned the entire international community, as they involved the denial of fundamental values and threatened international peace and security.[129] Naturally, a large part of these discussions have revolved around the crime of genocide.[130] Other important developments are related to the adoption in 1998 of the *Rome Statute* of the International Criminal Court.[131] Although the *Rome Statute* did not explicitly recognize universal jurisdiction, it indirectly resulted in its exercise by some states. Spain's extradition request against Augusto Pinochet is one of the most important examples.[132] Moreover, various states expanded their criminal jurisdiction in preparation for the ratification of the *Rome Statute*.[133] Bel-

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[128] One example of this is the inclusion in some treaties of dispositions that give effect to the principle of *aut dedere aut judicare* (extradite or prosecute). See e.g. the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 5(2) (entered into force 26 June 1987) [*Convention against Torture*]: "Each State Party shall likewise take such measures as maybe necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article."

[129] This consensus is exemplified in *The Crime of Genocide*, GA Res 96, UNGAOR, 1st Sess, UN Doc A/RES/1/96 (1946) 187, in which the parties undertook to prevent and punish those who commit the crime of genocide. See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Antwerp: Intersentia, 2005) at 21.

[130] This does not necessarily mean that international law recognizes the existence of (pure) universal jurisdiction over the crime of genocide. In fact, the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, 288 ILM 761, art VI (entered into force 21 January 1951) [*Convention on Genocide*] states: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

[131] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, 37 ILM 999 (entered into force 1 July 2002) [*Rome Statute*].

[132] Inazumi, supra note 129 at 83. In the context of the Pinochet case, Judge Baltasar Garzón's extradition request was based on the principle of universal jurisdiction, but the decision of the House of Lords revolved mainly around the obligations of the United Kingdom and Spain under the *Convention against Torture* (see *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (1999), [2000] 1 AC 47, [1999] 2 WLR 827).

[133] Canada amended its legislation in order to implement the *Rome Statute*. See *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

gium, for example, amended its national legislation to recognize universal jurisdiction over genocide and crimes against humanity.[134] The Belgian legislation is particularly interesting because it authorized courts to exercise universal jurisdiction *in absentia*—even if the suspect has not, is not, and will not be present in the state's territory—for some international crimes.[135]

In 2000, as a result of an arrest warrant issued in Belgium against the Minister of Foreign Affairs of the Democratic Republic of the Congo at the time, the International Court of Justice examined the consistency of the Belgian approach with international legality. Although the case was not decided on the principle of universal jurisdiction but on the doctrine of the absolute jurisdictional immunity of a sitting foreign minister, some judges spoke strongly against it. For example, then President of the court, Justice Gilbert Guillaume, noted that with the exception of piracy and subsidiary universal jurisdiction as recognized in certain treaties, "international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*."[136] Not all judges agreed with that approach. Some, for example, argued that there is no rule of customary international law or any treaty prohibiting the exercise of universal jurisdiction in the absence of the suspect. In 2003, and under heavy pressure from the United States,[137] Belgium amended its national legislation in order to replace universal jurisdiction with other forms of extraterritorial jurisdiction, such as extraterritorial jurisdiction based on the passive personality

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[134] In 1993, Belgium adopted the *Act concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977*, JO, 5 August 1993, 17751 as part of efforts to implement Protocols I and II of the Geneva Conventions. This law was amended in 1999 to include genocide and crimes against humanity in order to incorporate the *Convention on Genocide* and the *Rome Statute*, respectively. In February 2003, the Belgian Supreme Court overturned a determination by the Court of Appeal which held that universal jurisdiction could be exercised only in cases where the defendant was present in Belgium Cass 2e ch, 12 February 2003, [2003] No 98 Pasicrisie Belge 307 at 317–18. For further discussion, see Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008" (2009) 30 Mich J Int L 927 at 934.

[135] Roger O'Keefe has challenged the idea that universal jurisdiction *in absentia* is a distinct type of universal jurisdiction to which certain special considerations apply (O'Keefe, *supra* note 110 at 750).

[136] *Democratic Republic of the Congo v Belgium*, *supra* note 110 at 44.

[137] Naomi Roht-Arraiza, "Universal Jurisdiction: Steps Forward, Steps Back" (2004) 17 Leiden J Int L 375 at 387.

principle.[138] Spain introduced similar amendments to its national legislation in 2009.[139]

C. Universal Jurisdiction and State Sovereignty

One of the main reasons for international law's resistance to recognizing universal jurisdiction is that its exercise might directly negate state sovereignty. An important aspect of the problem was reflected in a recent discussion in the Sixth Committee of the United Nations General Assembly. There, the delegate from Argentina expressed that although universal jurisdiction is an important element of the international justice system, its unlimited use could "be perceived as a tool for interference in the internal affairs of other States or as a hegemonic jurisdiction exercised by developed countries against nationals of developing countries."[140] Similarly, the delegate from Venezuela maintained that the principle of universal jurisdiction "must be exercised in accordance with the general principles of international law, especially non-interference in internal affairs and respect for the sovereignty of states."[141] When one considers the principle of universal jurisdiction from the perspective of the *states*, it is not difficult to see why it has been met with high degrees of resistance.

It is no coincidence that universal jurisdiction achieved its greatest advances in the context of piracy. In addition to occurring in the high seas, piracy is a direct affront to the commercial interests of states and the economic security of the international community. Moreover, from the point of view of the due process of law, it seems preferable that the court of the territory where an act occurs exercise jurisdiction over it. That court will be better positioned to understand the social context of the crime, and there will be a greater chance that evidence and witnesses will be available.[142] In cases where universal jurisdiction is to be exercised *in absentia*, the accused's right to be present at trial and to defend herself would be directly infringed.[143] It is important to note, however, that leav-

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[138] *Act concerning the Punishment of Grave Breaches of International Humanitarian Law*, JO, 23 March 1999, 9286.

[139] See *Organic Law 1/2009*, 266 BOE 92089 at 92091.

[140] UNGAOR, 66th Sess, 12th & 13th Mtgs, UN Doc A/C.6/66SR.12 (2011).

[141] In cases in which the suspects are officials of foreign governments, the tension between universal jurisdiction and state sovereignty is accentuated even more.

[142] Hernán Salinas Burgos, "El Principio de Jurisdicción Internacional: ¿*Lex Lata* o *Lex Desiderata*?" (2007) 34 Revista Chilena de Derecho 107–34.

[143] In *AG v Yeung Sun-chun*, [1987] HKLR 997, for example, Lord Diplock expressed that the territoriality principle is rooted in jury trials where the accused is tried by his peers, that is, by the citizens of the locality where the crime occurred. See M Sornarajah, "Ex-

ing aside the enforcement of judgments—which would not normally occur without the consent of the state where the relevant persons or things are located—universal jurisdiction does not involve a literal exercise of a state's power in the physical territory of another.

That is to say, the exercise of universal jurisdiction takes place in the state that is adjudicating the issue,[144] not in the territory of the state where the acts to be judged occurred.[145] In this sense, hearing a case and issuing a judgment over acts occurring outside a state's territory and involving nationals of other states does not necessarily violate the principle of non-intervention or the rule in *Lotus* that a state "may not exercise its power in any form in the territory of another State."[146] This is particularly relevant in the context of universal jurisdiction in civil cases, where the remedy sought is not a suspect's arrest but some reparative actions on the part of the defendant, as in the Ecuadorian case mentioned in the Introduction.[147] In such situations, one might expect more tolerance from the

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traterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives" (1998) 2 Sing JICL 1 at 15.

144 I am referring here to what is sometimes termed "adjudicatory" universal jurisdiction (as opposed to "enforcement" universal jurisdiction). The same argument would apply, however, to prescriptive jurisdiction (i.e. the adoption of a domestic law that seeks to regulate activities occurring in foreign territory). For a discussion, see Huang Yao, "Universal Jurisdiction over Piracy and East Asian Practice" (2012) 11:4 Chinese Journal of International Law 623 at 626.

145 Inazumi, *supra* note 129 at 135. García Arán has stated:

> [D]eclarations of the extra-territoriality of criminal law made by a State [from a formal point of view] present an unproblematic interference with the sovereignty of others. States may not perform acts of sovereignty in the territory of another, but their sovereignty enables them to declare the ambit of their own punitive power. The degree of effectiveness of such statements depends, in turn, on the degree of international legitimisation that they receive, especially if the prosecuted subject is in the territory of another state and extradition must be requested (García Arán & López Garrido, ed, *Crimen Internacional y Jurisdicción Universal: El Caso Pinochet* (Valencia: Tirant lo Blanch, 2000).

146 *Lotus*, *supra* note 117 at 18.

147 This does not mean that the exercise of universal civil jurisdiction is not controversial. In fact, it is much less established than its criminal counterpart. See e.g. Donald Francis Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction" (2006) 100 *American Journal of International Law* 142. For a judicial statement in favour of the existence of universal civil jurisdiction (in cases in which the victim has also been subject to a crime against humanity and she wishes to bring a civil suit), see *Prosecutor v Furundzija*, IT-95-17/1-T, Judgment (10 December 1998) (International Criminal Tribunal for the Former Yugoslavia), 38 ILM 317. The most famous example of national legislation conferring (civil) universal jurisdiction is the US *Alien Tort Claims Act*, 28 USC § 1350 (2012). In the famous case of *Filartiga v Pena-Irala,* 630 F (2d) 876 (2d Cir 1980), the U.S. Court of Appeals for the Second Circuit stated that:

states in whose territory the relevant acts took place or from the states from which the perpetrators are nationals. If the defendant is not a state official, as would occur in many environmental cases where the damage would be caused by a private individual or corporation, state sovereignty would arguably be less threatened by the exercise of universal jurisdiction.

The case of enforcing a judgment issued in the exercise of universal jurisdiction is different, because in the absence of an express agreement, the arrest of a person in the territory of another state or the freezing of assets located abroad, would clearly be inconsistent with the sovereignty of one of the states involved. Nevertheless, even leaving aside the execution of judgments, it is undeniable that the unilateral and extraterritorial exercise of sovereignty may have an impact on the interests of other states and therefore may create friction between them.[148] Precisely for that reason, any exercise of extraterritorial jurisdiction must be justified by the state in question. States would usually attempt to frame any extraterritorial exercise of power within one of the recognized exceptions to the principle of territorial jurisdiction—that is, without having to resort to a claim of universal jurisdiction. But when there is no other option than the exercise of universal jurisdiction in the context of international crimes like genocide, torture, and slavery, the justification would typically take the following form:

> Consensus exists within the international community that certain acts involve such egregious violations of human rights that they should be punished irrespective of where they occur. In those cases, any state should be allowed to exercise universal jurisdiction on behalf of *all states* for the purpose of protecting an international order committed to the prevention and punishment of those acts.

In some cases, this justification could be enough. However, in the case of the exercise of universal jurisdiction to protect the rights of nature, this justification is insufficient. There is obviously a lack of consensus among the international community not only around recognizing the rights of nature, but also around whether acts which endanger the environment should be subject to jurisdictional rules similar to those that may apply to

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"Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind" (at XXX). See Ruti Teitel, "The Alien Tort and the Global Rule of Law" (2005) 57:185 International Social Science Journal 551–60.

[148] See Daniel Bodansky, "What's So Bad about Unilateral Action to Protect the Environment?" (2000) 11:2 Eur J Int L 339 at 341.

international crimes such as piracy and genocide.[149] Accordingly, if a state is determined to exercise universal jurisdiction over acts that resulted in serious environmental damage in the absence of a treaty or customary rule of international law authorizing it to do so, it must provide a special justification.

Such a justification, by itself, would not automatically make the exercise of universal jurisdiction "legal". It is nevertheless necessary to provide it because it is the only way that a state can attempt to show to the international community that it has engaged in a legitimate extraterritorial exercise of power. But to the extent that it refers to serious environmental harms—as opposed to, for instance, piracy or genocide—it must be a justification that does not rely on the premise that universal jurisdiction can only be exercised in respect of acts that *states* have determined that threaten international order. Rather than focusing on the states or on the international community, the justification must point toward the need to protect the ability of present and future generations, anywhere in the world, to govern themselves, to carry out acts of constituent power. As there is a fundamental connection between state sovereignty and the constituent power of the people, this justification does not require us to abandon the principle of state sovereignty. On the contrary, it makes it necessary to approach it from a different perspective.

D. The Extraterritorial Protection of the Rights of Nature

We must begin by asking why it is that the principle of state sovereignty still occupies such a privileged place in international law. The most powerful reason for respecting state sovereignty lies in its connection to the right of peoples to self-determination. Enshrined in Article 1 of the United Nations Charter, the right to self-determination is one of the pillars of international law, and respect for this right indirectly requires respect for the sovereignty of states. In other words, even though international law identifies the state as the entity that has sovereignty at an international level, it is the fact that states are presumed to have been created by self-determining peoples which provides the basis for state sovereignty.[150] As Jean Cohen has stated, "[i]n the aftermath of decolonization",

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[149] For the development of an international consensus around the protection of the environment, see Walter F Baber & Robert V Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (Cambridge, Mass: MIT Press, 2009) at 4.

[150] But see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14. This case seems to indicate the opposite, stating that a fundamental part of the principle of state sovereignty is each state's right to determine freely its political, economic, social, and cultural systems (*ibid* at 124).

sovereign equality "became interpreted in light of the concept of self-determination."[151] Gillian Triggs has even suggested that, to the extent that the right to self-determination has acquired the status of a *jus cogens* norm, "states may have a duty not to recognize a state created in violation of the principle of self-determination."[152] The self-determination of peoples, which empowers them to freely determine their political status, is nothing more than the external manifestation of *popular sovereignty*, of the people's unlimited constitution-making power.

That is to say, when a people exercises its right to self-determination and decides to become an independent or freely associated state, or to integrate into another state,[153] it is also engaging in an exercise of constituent power, just as it would if it was creating a new constitution under an already existing state. In the act of determining its international political status, a people inevitably produces a new constitutional order domestically. Or, put differently, the exercise of the right of external self-determination has internal implications. Looking at state sovereignty from this perspective—from the perspective of the *peoples* in which state sovereignty rests—is especially important for my purposes here. Given the unlikelihood of an interstate consensus about the idea that some acts against nature should be considered at least as serious as some violations of international law, one must look beyond the states to ground a justification for the exercise of universal jurisdiction in cases of serious environmental damage.[154]

After all, states have not demonstrated the same level of concern for protecting nature as they have for preventing actions of a different type,

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However, the point is that, from a democratic perspective, it is presumed that at the internal state level, it is the people or their representatives who make those determinations.

151 Jean Cohen, "Sovereign Equality vs. Imperial Right: The Battle over the 'New World Order'" (2006) 13:4 Constellations 485 at 492.

152 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (Canberra: Lexis Nexis Butterworths, 2006) at 160.

153 See *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, GA Res 1541, UNGAOR, 15th Sess (1960) 29 [*Resolution 1541*].

154 Serious environmental damage is understood here, as noted earlier, as damage that is irreversible and that has a potential negative impact in the life and self-governing powers of human populations, harms which would also amount to grave violations of the rights of nature in the context of constitutions that recognize them.

often incomparable in terms of gravity with some of the wrongs inflicted on the environment.[155]

The clearest case, again, is that of piracy. As suggested by Frédéric Mégret, it is telling that the international crime of piracy does not include harms to aquatic ecosystems. Boarding a boat and appropriating some of the goods stored there is, under the prevailing notion of universal jurisdiction, an act much more serious than using those goods for the intentional contamination of the oceans, which has global effects.[156] Serious environmental harms have not been treated in the same way as acts that have been ordinarily associated with claims to universal jurisdiction for several reasons.

First, unlike actions such as piracy, genocide, and torture, environmental damage at times can result in apparent social and economic benefits.[157] Second, harms to the environment frequently have extraterritorial and even worldwide effects, but again unlike acts such as genocide and torture, they usually do not have a particularized impact on specific groups or individuals.[158] Third, environmental damage in many cases will only affect future generations. The human victims of serious environmental harms will frequently be people who do not yet exist and who will not live within a determinable jurisdiction.[159] While the first reason is, of

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155 Interestingly, some of the crimes that are usually thought to be subject to universal jurisdiction, such as genocide, have been associated with violations of the right to (internal) self-determination, since "[t]he goal of such rights violations is always also the political death of a segment of the political community as well as the redefinition of the identity of that community through violence" (Cohen, *supra* note 151 at 501).

156 Frédéric Mégret, "The Problem of an International Criminal Law of the Environment" (2011) 36 Colum J Envtl L 195 at 205–206. It should be noted that the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, 16 ILM 1391 (entered into force 7 December 1978) provides in Article 35(3) that: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment."

157 In fact, Ecuador and Bolivia, as well as other Latin American countries with left-leaning governments, have recently authorized activities (such as mining projects) that, while contributing to the state's ability to advance different social objectives, have important negative environmental effects. For a discussion, see Eduardo Gudynas, "Estado Compensador y Nuevos Extractivismos: Las Ambivalencias del Progresismo Sudamericano" (2012) 237 Nueva Sociedad 128.

158 Mégret, *supra* note 156 at 228.

159 There are various initiatives directed at the establishment of "crimes against future generations" in international law. Such crimes relate to "acts or conduct undertaken in the present which seriously harm the natural environment, human populations, species or ecosystems in the present and which have consequences for the long-term" (World Future Council, "Crimes against Future Generations", online: WFC <www.worldfuturecouncil.org/crime.html>).

course, important, it is more a question of the political will of the members of the international community. Accordingly, I will focus on the second and third of these reasons: the extraterritorial aspects and intergenerational character of environmental damage. These two features are related to the fact that the effects of environmental harms can be global. They can have an impact that goes beyond individuals, states, and particular territories— an impact that reaches future generations.

It is difficult to deny that some harms to nature threaten the basic conditions that make human life on the planet possible.[160] Not surprisingly, one can find many international declarations that support this view, even if they have not been clearly translated into law. For example, after expressing concern that some human activities affect global climate in a way that threatens "present and future generations with potentially severe economic and social consequences," the United Nations General Assembly recognized climate change as a "common concern of mankind, since climate is an essential condition which sustains life on earth."[161] Some years earlier, in the Stockholm Declaration, it was proclaimed that "[t]hrough ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend."[162] Similarly, in the case of *Hungary v. Slovakia*, mentioned above, the International Court of Justice stated that the protection of the environment is important "not only for States but also for the whole of mankind."[163]

Because acts that result in serious environmental harms put at risk the very possibility of human life, the justification for the exercise of universal jurisdiction in those cases should be based on the idea that jurisdiction is being exercised primarily and principally on behalf of *humanity*— rather than on behalf of states, on behalf of a particular people, or on behalf of the "international community".[164] That is, the focus should not be on the existence of an international consensus about punishing the perpetrators of acts against nature, which is generally the emphasis when universal jurisdiction is discussed in the context of acts such as genocide or

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[160] Mégret, *supra* note 156 at 241, 245.

[161] *Protection of Global Climate for Present and Future Generations*, GA Res 53, UNGAOR, 43rd Sess, UN Doc A/RES/43/53 (6 December 1988).

[162] *Declaration of the United Nations Conference on the Human Environment*, UNCHEOR, 1972, UN Doc A/CONF.48/14, 3 at 3 [*Stockholm Declaration*].

[163] *Case concerning the Gabčíkovo-Nagymaros (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 38.

[164] For a discussion of the concept of humanity in the context of international law, see Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Leiden: Martinus Nijhoff, 2010).

slavery. Rather, the objective of the exercise of universal jurisdiction in those cases should be seen as that of protecting the life, and quality of life, of present and future peoples.

Such a perspective is probably less controversial in the twenty-first century than what it might appear at first sight. And it is not novel. For example, in the 1970s, Richard Bilder identified "a growing awareness that all peoples and nations inevitably share the planet earth and that they have responsibilities to each other and to future generations for preserving its environment."[165] The legitimacy of unilateral actions to protect the environment, he suggested, was thus strengthened by the fact that such actions are directed at protecting something which is shared and needed by everyone.[166]

Now, what does this have to do with state sovereignty? States, as I suggested in Part II.C., are treated as sovereign because it is presumed that they arose as a result of an exercise of self-determination. Under international law, the right to self-determination is not exhausted by being exercised once, just as under modern constitutional theory constituent power is not exhausted in the adoption of a constitution. On the contrary, it is a right retained at all times by all peoples, even if, as a matter of international law, it can arguably be exercised to create a new state by seceding from an already existing one only in cases in which a group is subject to serious human rights violations, or to a condition that amounts to "subjugation, domination and exploitation."[167]

In order for the right to self-determination to be exercised, respect for certain rights is necessary. These are the same rights that serve as a precondition for the exercise of constituent power. Only if those rights are respected, even if they are not recognized in a constitutional document, will a people be in a position to determine its political status and to create or transform a state that will enjoy sovereignty at an international level.[168] As any type of democratic political action, an act of self-determination is only possible within a natural environment compatible with the existence and enjoyment of human life. That type on environment is precisely what

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165 Richard B Bilder, "The Role of Unilateral State Action in Preventing International Environmental Injury" (1981) 14 Vand J Transnat'l L 51 at 73. See also, David Takas, "The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property" (2008) 16 NYU Envtl LJ 711.

166 *Ibid.*

167 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 2010 at 436. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217, 61 DLR (4th) 385; James Crawford, *The Creation of New States in International Law* (Oxford: Oxford University Press, 2006).

168 This idea is reflected in *Resolution 1541*, *supra* note 153.

the constitutional recognition of the rights of nature seeks to promote. With this line of reasoning as a point of departure, the justification for the exercise of universal jurisdiction in cases that involve serious harms to the environment would be based upon three fundamental principles.

First, these are harms that can potentially impact all parts of the planet.[169] As noted by Mégret, the effects of environmental harms "often do not respect territorial borders" and are "increasingly capable of provoking global consequences."[170] Second, universal jurisdiction would be exercised not only to prevent acts contrary to the interests of states—that is, the interests of the "international community"—but to protect the political power of the peoples on which state sovereignty rests, which is why the absence of a consensus between states about the existence of universal jurisdiction in the context of environmental damage should not be considered determinative.[171] Third, this concept of universal jurisdiction, by emphasizing the rights of all peoples to self-determination, points toward humanity—that is, toward the set of all peoples—as the place where the ultimate political authority over our planet rests. In that sense, in exercising universal jurisdiction over acts that result in serious harms to the environment, national courts would be acting principally in the name of

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[169] In this sense, it could be argued that there will always be a nexus between the state that exercises jurisdiction and the effect of the acts in question. Richard Bilder (writing in the 1970s) suggested that it is possible that, at some future time, the international community would recognize a right to self-defence which states could rely upon in cases where it was necessary to act unilaterally to prevent serious environmental damage, even if the acts in question occurred in foreign territory or in territory not subject to the jurisdiction of any state. Moreover, he has argued that the principle of protection (briefly discussed in Part II.A. of this paper) could be expanded in order to include certain types of threats to the environment (Bilder, *supra* note 165 at 53). In turn, he noted that territorial jurisdiction, which it is sometimes argued can be invoked by states in respect of acts that, despite occurring in foreign territory produce effects in national territory, could be used in cases of environmental damage, which often has impacts which are extraterritorial and of a global scale (*ibid* at 69, 78). See also Laurence Boisson de Chazournes, "Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues" (2000) 11:2 Eur J Int L 315 at 333–34.

[170] Mégret, *supra* note 156 at 196.

[171] As noted by Mégret, the effects of serious harms to the environment make the idea of waiting for the development of an 'international consensus' problematic. Mégret, *supra* note 156 at 256. That said, there are a number of international documents that in some ways point toward an awareness within the international community about the need for the protection of nature, some of the most famous examples being the *Stockholm Declaration*, *supra* note 162; the *Rio Declaration on Environment and Development*, UNCHEOR, 1992, UN Doc A/CONF.151/26; and OAS, General Assembly, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, OR OEA/Ser.L.V/II.82/Doc.6, rev.1 (1992).

humanity, not simply in the name of *a* constituent people, in the name of the international community, or in the name of international law.[172]

The idea of humanity as a political subject is, of course, not new. There are, for example, proposals for the creation of a UN Second Assembly composed of delegates called to represent the world's peoples rather than their states,[173] and the Council of Social Movements of the ALBA[174] has been described as representing the constituent power of the member states' peoples.[175] In the specific context of the rights of nature, it is worth remembering the proposal of the President of Bolivia, Evo Morales, for conducting a global referendum about climate change and the protection of "Mother Earth".

This type of proposal suggests that, during times of globalization, multilateral agreements, and the delegation of political power to supranational institutions, it is necessary to speak of the constituent power of *humanity*, of humanity as the bearer of a transnational constituent power. Serious environmental damage not only threatens the constituent power and the right to self-determination of particular peoples, but the ultimate sovereignty of humanity as a whole. Simply put, the exercise of universal jurisdiction in these cases would be directed at protecting that "originary tendency of all human beings" to remain alive, which Dussel has called

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[172] In the context of the debate on universal (criminal) jurisdiction during the first half of the twentieth century, Maurice Travers argued that the only mission of the states was to protect their own interests (e.g. not having a criminal walking free in its territory), and that in the exercise of state sovereignty, a state could never act on behalf of humanity. For a discussion, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003) at 32–35.

[173] See Daniele Archibugi, "The Reform of the UN and Cosmopolitan Democracy: A Critical Review" (1993) 30:3 Journal of Peace Research 301 at 303–309.

[174] The Social Movements Council (CMS) is officially described as

> the principal mechanism that facilitates integration and direct social participation in the Bolivarian Alliance for the Peoples of Our America / Peoples' Trade Treaty (ALBA-TCP). It is an anti-imperialist space, anti-neoliberal and committed to working in order to achieve, the greatest extent of social security and happiness possible, in harmony with nature, social justice and the real sovereignty of our peoples. Its mission is to articulate the Social Movements of the member countries of the ALBA-TCP and the non-member countries, which identify with this effort, and has the responsibility to contribute to the development and extension of the ALBA-TCP process (Bolivarian Alliance for the Peoples of Our America—Peoples' Trade Treaty, "Social Movements Council of ALBA-TCP", online: ALBA-TCP <alba-tcp.org/en/contenido/social-movements-council-alba-tcp>).

[175] For a discussion, see Daniele Archibugi, "From the United Nations to Cosmopolitan Democracy" in Daniele Archibugi & David Held, eds, *Cosmopolitan Democracy: An Agenda for a New World Order* (New York: Polity Press, 1995) 121 at 137–38. See also Muhr, *supra* note 108 at 109.

the "will-to-live" and that forms the very basis of collective political action.[176] Under this approach, the exercise of universal jurisdiction would be justified in cases that threaten the ability of present and future generations to participate in the constitution and reconstitution of the states that make up the international community. Grave violations of the rights of nature, such as those that affect the integrity of large ecosystems, would normally satisfy this criterion.

Conclusion

This article had two main objectives. The first one was to provide an answer to the question of whether recognizing the rights of nature could be justified from a democratic perspective. I argued that, just as political, individual, social, and economic rights, the rights of nature can serve to protect the conditions that make democracy possible. Without a natural environment that is capable of sustaining acceptable forms of human life, no collective and deliberative decision-making process could take place. We saw that this view is consistent with and supported by the traditional theory of constituent power, which insists that future generations must have the ability of becoming authors of their own constitution. This approach, reflected in the new constitutions of some Latin American countries, stresses constituent power's intergenerational component. By doing so, it agrees with Jefferson's suggestion that the people always retains the right to govern themselves "as they please", but with the caveat that the exercise of that right depends in important ways on the protection of nature.

The second objective of this article was to provide a justification for the exercise of universal jurisdiction in cases of serious harms to the environment. I argued that while universal jurisdiction is normally seen as posing a direct threat to state sovereignty, when state sovereignty is understood in light of its relationship with the right to self-determination, those threats become less pressing, at least in the context of universal jurisdiction in cases of serious environmental harms. When exercising universal jurisdiction in those cases, courts would be seen as acting not on behalf of states or on behalf of the international community, but on behalf of the peoples that constitute those states. In that sense, one might agree with Esperanza Martinez, an Ecuadorian activist and one of the claimants in the action mentioned in the Introduction, that since some acts against the environment have severe effects on the planet and affect the quality of life of present and future generations, they should be seen "as offence[s] against humanity as a whole, and highlight the need of adapt-

[176] Dussel, *supra* note 34 at 13.

ing the principle of universal [jurisdiction], to address such crimes against nature."[177]

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[177] Esperanza Martínez, "Prólogo" in Alberto Acosta & Esperanza Martínez, eds, *La Naturaleza con Derechos: De la Filosofía a la Política* (Quito: Abya-Yala, 2011) 7 at 19 [translated by author].