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FIGHTING THE RESOURCE CURSE: THE RIGHTS OF CITIZENS OVER NATURAL RESOURCES

*Leif Wenar & Jérémie Gilbert**

ABSTRACT—Respect for the rights of peoples over natural resources is crucial for the flourishing of communities and states. This article confirms that international law ascribes robust resource rights both to indigenous peoples and to citizens of independent states. These resource rights include indigenous peoples' right to free, prior, and informed consent and citizens' rights that resource revenues are never used corruptly but are used first to secure their means of subsistence. Resource rights are human rights, respect for which requires substantial reforms in the practices of corporations and investors as well as in the laws of resource-importing and resource-exporting states.

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INTRODUCTION

Improving humanity's use of Earth's natural resources must be a top international priority. Today's climate crisis is one reason. Another is that, in many countries, resources benefit the few at the expense of the many. Absent accountability to the people of a territory, a rich natural resource endowment can be a curse. Most authoritarian regimes today are in resource-

rich states.[1] Most highly corrupt regimes are in resource-rich states.[2] Most civil wars today are in resource-rich states,[3] most of the worst hunger crises are in these states,[4] and most refugees today are fleeing from these states.[5] And, strikingly, most of the world's severe poverty will soon be in resource-rich states.[6]

While these are only correlations, the preponderance of social scientific research supports causal connections.[7] For example, in the developing world, oil states are fifty percent more likely than non-oil states to be ruled by authoritarian regimes, and twice as likely to suffer armed civil conflict.[8] Moreover, in contrast to states that are not primary producers, the major oil states outside the West have gone decades becoming no richer, freer, or more peaceful than they were in 1980.[9]

Vast revenues are flowing into resource-exporting states, in the Middle East, the former Soviet Union, Africa, and the Americas. Crude oil exports alone were worth an enormous $1.1 *trillion* in 2019.[10] Yet, where these revenues are controlled by elites and armed groups, they fuel further oppression, corruption, strife, and suffering. In Angola, for example,

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[1] *See* INTERNATIONAL MONETARY FUND, THE COMMODITIES ROLLER COASTER: A FISCAL FRAMEWORK FOR UNCERTAIN TIMES 21 (2015); *See* FREEDOM HOUSE, FREEDOM IN THE WORLD 18-19 (2021) (displaying "authoritarian regimes" as "Not Free" states).

[2] *See* TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2019 3 (2020), https://www.transparency.org/en/cpi/2019/results/table (displaying "corrupt regimes" as states with corruption scores of 20 or below).

[3] *See UCDP Battle-Related Deaths Dataset*, UPPSALA CONFLICT DATA PROGRAM, http://www.ucdp.uu.se/downloads (lasted visited Jan 2, 2021) (showing civil conflicts that had over 1000 violent deaths in 2016-19).

[4] *See* FOOD SECURITY INFORMATION NETWORK, GLOBAL REPORT ON FOOD CRISES 21 (2020) https://docs.wfp.org/api/documents/WFP-0000114546/download/ (listing the 10 worst food crises in 2019).

[5] *See Refugee Population by Country or Territory of Origin*, THE WORLD BANK, https://data.worldbank.org/indicator/sm.pop.refg.or?year_high_desc=true (last visited Dec. 28, 2020) (providing the top eight refugee source countries in 2018).

[6] *See Share of the World's Poor Living in Resource-Rich Countries May Peak at 75% in 2030*, BUSINESS A.M. (Mar. 9, 2018), https://www.businessamlive.com/share-of-the-worlds-poor-living-in-resource-rich-countries-may-peak-75-in-2030/ (predicting that most of the world's severe poverty will be in resource-rich states).

[7] Wilson Prichard, Paola Salardi, & Paul Segal, *Taxation, Non-Tax Revenue and Democracy: New Evidence Using New Cross-Country Data*, 109 WORLD DEV. 295 (2018); David Wiens, Paul Poast, & William Roberts Clark, *The Political Resource Curse: An Empirical Re-evaluation*, 67 POL. RES. Q. 783 (2014); Michael Ross, *What Have We Learned About the Resource Curse?* 18 ANN. REV. POL. SCI. 239 (2015).

[8] MICHAEL ROSS, THE OIL CURSE: HOW PETROLEUM WEALTH SHAPES THE DEVELOPMENT OF NATIONS 1 (2012).

[9] *Id.*

[10] Daniel Workman, *Crude Oil Exports by Country*, WORLD'S TOP EXPORTS (Jan. 3, 2020), http://www.worldstopexports.com/worlds-top-oil-exports-country/.

resource revenues sustained the power and wealth of corrupt state officials while the children of the country died of poverty at the highest rate in the world.[11] In Azerbaijan, an unaccountable government has used resource revenues for years forcefully to suppress protests of its policies.[12] The oil-funded militants of ISIS and the mineral-funded militants in the Democratic Republic of Congo have shown how non-state actors who sell off resources can pay for the recruits and weapons needed to start or sustain civil conflict.[13]

The root problem in such cases, we argue, is that resources are exported without accountability to the citizens of the state. Violations of accountability are not only bad in themselves—they enable further violations as state (and sometimes non-state) actors become empowered by resource revenues to escape accountability in the future, often leading to further human rights violations as well.[14] By contrast, in states where citizens can hold the state accountable for natural resource management, the risks of these pathologies are substantially reduced.[15] Accountable yet highly resource-dependent states, such as Norway with its oil and Botswana with its diamonds, do not suffer the resource curse (indeed, they lead their regions in peace and prosperity).[16] Accountability to citizens for resource management is crucial for the flourishing of individuals, communities, and whole regions of the earth.[17]

International law can lead in lifting the resource curse. Under international human rights law, citizens have fundamental rights over the resources of their territory.[18] This is firmly expressed in common Article 1

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[11] *See* RICARDO SOARES DE OLIVEIRA, MAGNIFICENT AND BEGGAR LAND: ANGOLA SINCE THE CIVIL WAR 25-200 (2015); UNICEF, LEVELS & TRENDS IN CHILD MORTALITY 18-27 (2015).

[12] *See Azerbaijan Events of 2020*, HUM. RTS. WATCH (2021), https://www.hrw.org/world-report/2021/country-chapters/azerbaijan.

[13] *See* LEIF WENAR, BLOOD OIL: TYRANTS, VIOLENCE, AND THE RULES THAT RUN THE WORLD 48-64 (2017).

[14] *Id.* at 17-47.

[15] *Id.* at 14-20.

[16] *Id.* at 11-16. (This article concerns the "political resource curses" of repression, corruption, and conflict; there is also the macroeconomic phenomenon of slower growth in resource-rich states, not discussed here, that is also called a "resource curse").

[17] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS [ACHPR], State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment, ¶ 11 (May 22, 2017) (The African Commission defines "natural resources" and "wealth" as referring respectively to "a people's tangible and intangible possessions having socio-economic value and to both the non-renewable resources including oil, gas and minerals and renewable resources including surface and groundwater, wind, fauna and flora. Natural resources thus encompass all assets or materials that constitute the natural capital of a nation."); *See* Ramez Abubakr Badeeb, Hooi Lean, & Jeremy Clark, *The Evolution of the Natural Resource Curse Thesis: A Critical Literature Survey*, 51 RESOURCES POL'Y 123 (2017).

[18] JÉRÉMIE GILBERT, NATURAL RESOURCES AND HUMAN RIGHTS: AN APPRAISAL (2019).

of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which states that:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . In no case may a people be deprived of its own means of subsistence.[19]

Moreover, both of the Covenants also reaffirm this right in their last substantive article:

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.[20]

Significantly, this is the only human right that is stated twice in the two Covenants; no other Covenant right is reemphasized in this way. The Covenants are, in turn, accepted by the preponderance of states. Ninety-eight percent of the world's population lives in a state that is party to at least one of these treaties.[21]

Despite their prominence in the Covenants, the rights of peoples over natural resources are neglected rights and the subjects of widespread misunderstandings.[22] For example, it is sometimes said that states are (or can be) the only holders of rights over resources. Or it is said that states always act in the interest of the people, whatever states may do with the territory's resources. Or it is said that popular ownership of resources requires "resource nationalism" or that it forbids privatization. Such claims fail to register the many developments in the international law of natural resources since World War II. This article will show that international law regarding natural

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[19] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 1 (Dec. 16, 1966) [hereinafter ICESCR]. Together referred to as the "Covenants".

[20] ICCPR, *supra* note 19, at art. 47; ICESCR, *supra* note 19, at art. 25.

[21] *Ratification of 18 International Human Rights Treaties*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., http://indicators.ohchr.org/ (last visited Dec. 31, 2020); *Total Population by Country 2020*, WORLD POPULATION REV., http://worldpopulationreview.com/countries/ (last visited Dec. 31, 2020). These sets of data show that out of the 169 member states of the United Nations, more than six out of seven states are party to at least one of the Covenants, including all of the states in the Americas, Europe, and Africa (except South Sudan and some small islands) and nearly every state in Asia, including China and India. Excluding states with populations of less than a million finds that 95 percent of states are party to one of the Covenants.

[22] Wenar, *supra* note 13, at 208-19; Jérémie Gilbert, *The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?* 31 NETH. Q. HUM. RTS. 314, 341 (2013).

resources has evolved dramatically since 1945, ascribing ever more specific and substantive rights to citizens.

This article first surveys the historical development of peoples' rights over resources in international law, highlighting the progress that has been made across several domains. The article then explores how these rights can be used to fight the resource curse, by securing for citizens powers of accountability over their natural wealth.

Part I begins the historical study with the era of decolonization in the 1950s and 1960s, when national populations came to be recognized as having rights against the exploitation of resources by foreign states. Part II explores the 1990s and 2000s, when indigenous peoples gained significant rights to resources within their ancestral territories and moved the debate from theoretical issues to the practical specification of natural resource rights. Part III then traces the evolution of the ascription of natural resource rights to all the citizens of a state, which solidified the idea that the resources of the state are the "birthright" of its population.

Building on this historical survey, Part IV analyzes the content of the rights of citizens over natural resources, detailing the substantive, procedural, and remedial dimensions of these rights. Part V then envisages a world where the resource rights of peoples are respected. The focus here is not only on reforms in resource-cursed states, but also on reforms in states whose corporations operate in resource-cursed states ("corporate-home states") and in states that import resources from those states. The aim of these reforms is for corporate-home states and resource-importing states to reduce their contributions to the violation of the human rights of peoples in resource-cursed states, and to do so without running afoul of the principle of non-intervention in the affairs of other states.[23] Indeed, corporate-home and resource-importing states should believe that they are required to make such reforms out of respect for human rights and the self-determination of peoples.[24]

These reforms are required because the domestic legal default of every state today is to allow its corporations to make deals with unaccountable actors to exploit foreign resources, and to import resources that have been extracted with no accountability to the people of the state of origin.[25] These

[23] U.N. Charter art. 2, ¶¶ 4, 7; G.A. Res. 2131A (XX), Declaration on the Inadmissibility of Intervention and Interference the Domestic Affairs of States (Dec. 21, 1965); G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

[24] ICCPR, *supra* note 19, at Pmbl. (declaring an obligation of states under the UN Charter to promote respect for and observance of human rights, including the self-determination of peoples).

[25] *See* Leif Wenar, *Coercion in Cross-Border Property Rights*, 32 SOC. PHIL. & POL'Y 171 (2015).

legal defaults drive the resource curse, as they send substantial (and sometimes massive) revenues to authoritarian regimes, corrupt officials, and armed groups, empowering them to escape accountability further.

Yet since human rights and self-determination require resource management to be at least minimally accountable to citizens, these legal defaults violate primary norms of international law. Indeed, if we take seriously the Covenants' propertarian language that each state's resources belong to its people, then these legal defaults authorize commercial dealings with foreign actors who are entirely unaccountable to the owners of the resources. That is, every state today is authorizing commercial deals for goods stolen from their owners, the people. Using one established metric for accountable governance finds that over fifty percent of the world's traded oil, worth hundreds of billions of dollars every year, should be considered to be stolen goods.[26]

Human rights and self-determination require states to reform their domestic laws to prohibit their corporations and importers from making resource deals with foreign actors who are entirely unaccountable to their citizens. Such reforms would require significant changes in transnational practices regarding the extraction of and trade in natural resources. We examine the challenges to responsible unilateral and multilateral adoption of these reforms, drawing on historical parallels such as the strengthening of transnational anti-corruption laws. We also touch on potential impacts of reforms in related areas of transnational law, such as corporate regulation and investor-state relations.

In all, this article will argue that an historical analysis of the international law on peoples' rights to natural resources supports the ascription of robust rights over natural resources to the citizens of independent states. The neglect of these fundamental rights creates a vicious cycle that reinforces the resource curse; legal recognition for these rights is vital for the lives of millions around the world today.

I. THE EARLY HISTORY OF THE RIGHTS OF PEOPLES OVER NATURAL RESOURCES

As the passages from the human rights Covenants show, peoples hold rights over natural resources as part of their right to self-determination. Yet this raises a special interpretive challenge, because international law also recognizes the rights of states over natural resources. Sovereignty over natural resources is traditionally one of the attributes of state sovereignty,

[26] FREEDOM HOUSE, *supra* note 1; Workman, *supra* note 10. Using the Freedom House "Not Free" category as a measure of non-accountable governance, cross-referenced with the top 15 crude oil exporting states.

and the assumption under general international law is that state sovereignty entails jurisdictional rights over resources within the territory.[27] This dual ascription of rights has been clarified and regimented through the historical development of international law of natural resources, along several dimensions.

A. Drafting History: From Decolonization to the New Economic Order

The dynamic between peoples' and states' rights over resources first became vivid in 1952, when the UN General Assembly included in the draft Covenants two paragraphs on the rights of peoples to political and economic self-determination.[28] International law regarding natural resources then became partially bifurcated. Permanent sovereignty over natural resources was primarily understood as an *external* right of state self-determination: a right of a state vis-à-vis other states.[29] This external right was emphasized in many treaties and declarations, particularly in the post-colonial context where inequitable contracts with foreign investors and the nationalization of resources were significant issues.[30]

However, UN General Assembly Resolutions also continued to affirm peoples' *internal* rights of self-determination: the rights of peoples against their own state. For example, in these resolutions peoples have often been ascribed a right to benefit from their country's natural resources.[31] Nico Schrijver suggests that this reflected the desire of many states to link self-determination to the realization of socio-economic rights during the human rights codification process of the 1950s and 1960s.[32]

The separation of peoples' and states' rights can be seen in several UN General Assembly resolutions that recognized permanent sovereignty as a right of peoples as well as states. For example, Article 1 of the 1962 General

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[27] *See* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 48-50 (2007). State sovereignty over natural resources is limited by several duties, such as a duty to take due care of the environment and a duty to settle transborder resource issues equitably.

[28] G.A. Res. 54/5 (VI), Inclusion in the International Covenant or Covenants on Human Rights of Article Relating to the Right of Peoples to Self-Determination (Feb. 5, 1952); *see id.* at 49-53. Chile attempted to add a third paragraph that stated, "The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources." Yet this formulation was ultimately rejected, in part because the notion of sovereignty was deemed not applicable to peoples.

[29] Wenar, *supra* note 13, at 174-89.

[30] Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT'L L. 785, 796-97 (2012).

[31] G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, art. 1 (Dec. 14, 1962); G.A. Res. 2158 (XXI), Permanent Sovereignty over Natural Resources, art. 5 (Nov. 25, 1966); G.A. Res. 2692 (XXV), Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development, art. 2 (Dec. 11, 1970).

[32] Schrijver, *supra* note 27, at 295.

Assembly Resolution on *Permanent Sovereignty over Natural Resources* asserts that, "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the State concerned."[33]

Concurrently, the human rights Covenants were being drafted in the General Assembly. After long debates, the two articles quoted above—common Article 1(2) of the ICCPR and ICESCR and the identical articles 47 of the ICCPR and 25 of the ICESCR—affirmed and then reaffirmed the human rights of peoples over their natural resources.[34] The Covenants were adopted by the General Assembly in 1966, and came into force in 1976 after the deposit of the thirty-fifth instrument of ratification or accession.[35]

It is worth noting that through the early 1970s there were several General Assembly resolutions on permanent sovereignty over natural resources that did not refer to the rights of peoples. For example, the 1972 Resolution on the *Permanent Sovereignty over Natural Resources of Developing Countries* reaffirmed the right of states to permanent sovereignty but focused only on the right of states to be free from outside coercion.[36] Similarly, the 1974 *Declaration on the Establishment of a New International Economic Order* made no mention of the rights of peoples, again focusing only upon states' rights to sovereignty over natural resources as against other states.[37]

Some have taken this pause in the 1970s to imply that the rights of peoples are extinguished after the end of colonial rule. And it is correct that the term "peoples" in international instruments can, and in the past often did, refer to peoples under colonial occupation or trusteeship.[38] For example, in

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[33] G.A. Res. 1803 (XVII), *supra* note 31, art. 1 (This phrasing was reaffirmed only once in G.A. Res. 2692 (XXV), *supra* note 31, art. 2); G.A. Res. 2158 (XXI), supra note 31, art. 5 (Several further resolutions dealing with permanent sovereignty do raise specific concerns for peoples as distinct from states: for example, Article 5 of the 1966 General Assembly Resolution on *Permanent Sovereignty over Natural Resources* requires states to take due regard of the development needs and objectives of the people when engaging with foreign enterprises.)

[34] ICCPR, *supra* note 19, art. 1(2), 47; ICESCR, *supra* note 19, art. 1(2), 25.

[35] ICCPR, *supra* note 19, art. 49; ICESCR, *supra* note 19, art. 27.

[36] G.A. Res. 3016 (XXVII), Permanent Sovereignty over Natural Resources of Developing Countries, art. 1-2 (Dec. 18, 1972).

[37] G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

[38] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21) (in 1971 the International Court of Justice (ICJ) affirmed the sovereignty of the Namibian people over its natural resources against the mandatory administration of South Africa); G.A. Res. 2145 (XXI), Question of South West Africa (Oct. 27, 1966). A UN Special Committee called Namibia's natural resources "the birthright of the Namibian people." G.A. Res. 34/92, *infra* note 138.

1989 the ICJ affirmed the importance of the right of the Nauruan people to sovereignty over their natural resources before their independence from Australia.[39] Yet an "only colonial" interpretation of the rights of peoples has been consistently rejected by authoritative sources.

For example, upon becoming parties to the ICESCR, both India and Bangladesh attempted to limit the meaning of "peoples" in Article 1 to peoples under some form of foreign domination. Yet their reservations were firmly rejected by other state parties.[40] Furthermore, the UN Human Rights Committee (hereinafter HRC) has confirmed that Article 1 in the ICCPR does not apply only to peoples living under foreign domination.[41] As Rosalyn Higgins writes, "[T]he idea has been consistently fostered by the Committee on Human Rights, acting under the Covenant on Civil and Political Rights, that self-determination is of continuing applicability; and the idea has undoubtedly taken a general hold."[42]

The rights of peoples to internal self-determination are not "only colonial." Indeed, as we will see, these rights continued to develop and solidify after the lull in the early 1970s.

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[39] Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgement, 1992 I.C.J. (June 26); Case T-512/12, Front Polisario v. Council, 2015 E.C.R. ¶¶ 207-08, 223-47 (in 2015 the European Court of Justice (ECJ) annulled the part of a trade agreement between the European Union and Morocco that pertained to Western Sahara, citing among other grounds a letter from the UN Legal Counsel affirming permanent sovereignty over natural resources of the peoples of non-self-governing territories).

[40] ICESCR, Declarations and Reservations, Objections (Dec. 16, 1966), https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf. India's declaration was that the right of self-determination applies "only to the peoples under foreign domination," and that the words referring to the right "do not apply to sovereign independent States or to a section of a people or nation - which is the essence of national integrity." Bangladesh's declaration was that Article 1 is understood as applying in "the historical context of colonial rule, administration, foreign domination, occupation and similar situations." Yet France's objection was that India's reservation "attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination." Germany said that, "Germany strongly objects . . . to the declaration made by the Republic of India in respect of Article 1 . . . The right of self-determination . . . applies to all peoples and not only to those under foreign domination." Pakistan made a similar statement. Though the reservations are still registered, these strong objections to attempts at narrowing the scope of the right show that many states understand the right as applying more broadly than only to peoples under colonial occupation.

[41] HRC, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*, ¶ 6, U.N. Doc. CCPR/C/79/Add.38 (Aug. 3, 1994) (in 1994 the HRC criticized Azerbaijan's narrow view of self-determination and declared that "under Article 1 of the Covenant, that principle applies to all peoples, and not merely colonized peoples.").

[42] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 116-17 (1994) ("The Committee on Human Rights, when examining the report of a state party to the Covenant, asks not only about any dependent territories that such a state party may be responsible for (external self-determination) but also about the opportunities that its own population has to determine its own political and economic system (internal self-determination). Virtually no states refuse to respond to probing comments and questions on internal self-determination, and the Committee is not told that no such right exists. Rather, it is accepted that the right exists.").

B. Peoples as Holding and Exercising Rights

Before proceeding with the historical development of peoples' rights, a conceptual point that has puzzled many can be clarified. The proposition that the human rights Covenants grant rights to peoples rests on the assumption that peoples and states have separate legal personalities. Given the wording of the Covenants and other international instruments, this is a plausible proposition. Moreover, since all human rights are, in the first instance, rights against the state, the Covenants appear to be asserting that peoples' rights over natural resources constrain the discretion of states in the management of natural resources, putting limits on what a state may do in the name of those who reside in its territory.

Historically, the proposition that peoples and states have separate legal personalities has sometimes been denied.[43] Moreover, even when the legal personalities of peoples and states have been distinguished conceptually, it was sometimes claimed that peoples either cannot hold or cannot exercise rights independently of their state.[44]

This conceptual point is now settled: international law now affirms decisively that peoples can hold and exercise rights independently of their state. First, territorially defined groups can hold and exercise territorial rights. For instance, a state may not legally transfer territory to another state without the consent of the population of that territory, and the peoples of independent territories such as Puerto Rico have an ongoing right to choose their terms of association with the larger state.[45] None of these rights can be held by or exercised by the state in question, but only by the people.

Second, citizens are also capable of exercising rights independently of their state through the exercise of rights to participate in government. Article 21 of the Universal Declaration of Human Rights and Article 25 of the ICCPR both provide for the participation of every citizen in public affairs, including the right to vote.[46] Citizens' collective rights to internal self-

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[43] For instance, Hans Kelsen said of the U.N. Charter's ascription of "equal rights and self-determination of peoples" that the word "'peoples' . . . means probably 'states,' since only states have 'equal rights' according to general international law . . . so 'self-determination of peoples' . . . can mean only 'sovereignty of states.'" HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 52 (1950).

[44] *See* Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (VOLUME 137) 419, 562-65 (1974).

[45] The citizens in the territory must give their explicit consent to any territorial transfer, ideally through a referendum. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 132-33, 189-90 (1995); *See* Higgins, *supra* note 42, at 119-20 (discussing independent territories).

[46] G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 21 (Dec. 10, 1948) [hereinafter UDHR]; ICCPR, *supra* note 19, art. 25; Higgins, *supra* note 42, at 120-21 (Higgins explains the link in

determination, including their right freely to dispose of natural resources, are exercised independently of the state, as citizens exercise their individual political rights.[47]

In sum, as Antonio Cassese says about the Covenants, "[t]o hold that peoples as such are not entitled to any legal claim proper means to gloss over the significance of the step taken in 1966 by member states of the UN when adopting Article 1—a step designed to *upgrade* peoples to the status of *co-actors* in the world community, of participants in at least some international dealings."[48]

II. INDIGENOUS PEOPLES AND NATURAL RESOURCES: FROM THEORY TO PRACTICE

From the 1970s onward, the state's permanent sovereignty over natural resources was confirmed in many resolutions and instruments.[49] Simultaneously, natural resource rights were increasingly affirmed for two distinct kinds of peoples: for indigenous peoples (discussed in this part) and for all citizens of an independent state (discussed in parts III and IV).

It is well established that "peoples" in international law may refer to a portion of a population and especially to marginalized communities such as indigenous peoples or minority groups that have a particular interest in, or proximity to, specific territory or natural resources.[50] Indeed, much of the international jurisprudence and literature on the right to freely dispose of natural resources focuses on indigenous peoples' rights to natural resources.[51]

This is likely because most of the legal disputes in which indigenous peoples have been involved have had some connection to resource

this way, "There is a close relationship between Article 1 and 25 of the ICCPR." While Article 1 guarantees people's free choice of political status and free pursuit of their economic, and cultural development, Article 25 "concerns the *detail* of how free choice is to be provided (periodic elections on the basis of universal suffrage, etc.)."

47 Committee on the Elimination of Racial Discrimination, General Recommendation 21, *The Right to Self-Determination*, ¶ 4, U.N. Doc. A/51/18, Annex. VIII (Mar. 8, 1996). As the Committee on the Elimination of Racial Discrimination has stated, these individual rights are linked to the people's rights to internal self-determination.

48 CASSESE, *supra* note 45, at 144.

49 Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) 2005 I.C.J. 168, 251 (Dec. 19) (in 2005, the I.C.J. determined that permanent sovereignty over natural resources is customary international law).

50 *See* Gilbert, *supra* note 18, at 26.

51 *See* James Anaya & Robert Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 79 (2001).

extraction.[52] Over the last three decades, indigenous peoples have successfully pushed for the recognition of their rights to land and natural resources as part of their human rights. This has resulted in the emergence of a significant body of jurisprudence on indigenous peoples' natural resource rights.[53]

Three major legal developments have supported this evolution, which this part will address in turn. The first concerns a reinterpretation of the right to self-determination and the meaning of sovereignty over natural resources. The second is the emergence of rights to participation and consent with regard to "developmental" resource projects located on indigenous territories. The third is a recognition of a fundamental link between natural resources and cultural rights. As argued below, by deploying human rights norms regarding self-determination, development, and cultural rights, indigenous peoples have achieved substantially heightened recognition of their rights over natural resources.

A. The Revival of the Right to Self-determination over Natural Resources

The right to self-determination has been one of the anchors of the decades-long indigenous movement, which has partly aimed at redressing the wrongs of colonization.[54] More significantly, indigenous rights advocates have established new interpretations of the meaning of self-determination under international law.[55]

Historically, the right to self-determination has been associated with a right to national political independence and statehood.[56] Yet the Western legal conception of statehood is foreign to most indigenous communities, who organized their land and territories outside the Westphalian state system

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[52] *See* PATRICIA I. VASQUEZ, OIL SPARKS IN THE AMAZON: LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES (2014); IN THE WAY OF DEVELOPMENT: INDIGENOUS PEOPLES, LIFE PROJECTS, AND GLOBALIZATION (Mario Blaser, Harvey A. Feit, & Glenn McRae eds., 2004).

[53] *See* Anaya & Williams, *supra* note 51, at 33; *see also* JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS (2016).

[54] *See* ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE, AND LAND (2007); JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2002); MAIVAN LAM, AT THE END OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000).

[55] See Jeff Corntassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous Rights Discourse*, 33 ALTERNATIVES 105 (2008).

[56] See Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice* 43 INT'L & COMP. L.Q. 241, 249 (1994); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); CASSESE, *supra* note 45, at 71-74.

before the colonial era.[57] Indigenous peoples have successfully argued that self-determination is not only or even mostly about statehood, but about their fundamental rights over their lands and natural resources.[58]

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 is a good illustration of this shift. The battle over the right to self-determination was at the heart of the twenty-two years of negotiations that led to adoption of the Declaration.[59] Most states' representatives resisted the recognition of an indigenous right to self-determination, which they feared meant a right to secession and the creation of independent states. Yet the indigenous advocates instead emphasized an interpretation of self-determination that centered on rights to govern their own land and natural resources. As the negotiations revealed, the overwhelming majority of indigenous peoples do not want to secede, but rather seek the protection of their traditional territories from further encroachment and the right to determine how natural resources will be used.[60]

The negotiations over the drafting of the UNDRIP resulted in a compromise. Article 3 states that, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political

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[57] See PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES (2003); ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2012).

[58] See INDIGENOUS PEOPLES: SELF-DETERMINATION, KNOWLEDGE, INDIGENEITY (Henry Minde ed., 2008); Jeff Corntassel & Cheryl Bryce, *Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revitalization*, 18 BROWN J. WORLD AFF. 151 (2011); Ted Moses, *Self-Determination and the Survival of Indigenous Peoples*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 155, 162 (Pekka Aikio & Martin Scheinin eds., 2001) (as Ted Moses, the former Grand Chief of the Grand Council of the Crees, has stated: "Self-determination may make some people think of the right to vote, or the right to belong to political parties or the right to self-government. . . . But when I think of self-determination I think also of hunting, fishing, and trapping. I think of the land, of the water, the trees, and the animals.").

[59] See Timo Koivurova, *From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination* 15 INT'L J. MINORITY & GROUP RTS. 1 (2008); Isabelle Schulte-Tenckhoff, *Treaties, Peoplehood and Self-Determination: Understanding the Language of Indigenous Rights*, *in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 64 (Elvira Pulitano ed., 2012).

[60] See MAIVÂN CLECH LÂM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000); Erica-Irene A. Daes (Chairperson of the Working Group on Indigenous Populations), *Discrimination Against Indigenous Peoples—Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1993/26/Add.1, ¶ 26, (July 19, 1993); James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 31 TRANSNAT'L L. & CONTEMP. PROBLEMS 143 (1993) (as James Anaya, the former UN special rapporteur on the rights of indigenous peoples, noted "[F]ull self-determination, [which] necessarily means a right to choose independent statehood, ultimately rests on a narrow state-centered vision of humanity and the world . . . [that] is blind to the contemporary realities of . . . a world in which the formal boundaries of statehood do not altogether determine the ordering of communities and authority.").

status and freely pursue their economic, social and cultural development." Article 4 adds that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." However, Article 46 denies that the Declaration should be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states."

The Declaration marks a significant evolution in the international law of self-determination. It represents one of the first instruments to recognize the right of self-determination for peoples other than peoples territorially organized as states and colonies,[61] and it moves the law from a post-colonial understanding of self-determination focused on political independence to a contemporary interpretation of self-determination concerning rights over natural resources. This does not mean that states have lost their ultimate sovereignty over natural resources, but that in exercising their sovereignty they must respect the rights of indigenous peoples over the natural resources located on their ancestral territories. This is what is referred to as the new "relational approach to self-determination."[62]

This new interpretation of self-determination as a "relational" principle is supported by the progressive jurisprudence of several international human rights bodies, which drew out its implications for common Article 1 of the human rights Covenants.

Until the 1990s, little human rights jurisprudence concerned the implementation of Article 1 of the Covenants. Indeed, until it was used by indigenous peoples, the HRC did not include Article 1 as a ground for individual complaints.[63] Several indigenous complaints then led the HRC to adopt a new approach to self-determination, within which it has referred several times to Article 1(2) of the Covenant in relation to indigenous peoples.[64] For example, in its Concluding Observations on Canada in 1999, the HRC emphasized that "the right to self-determination requires, *inter alia*,

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[61] *See* Dorothée Cambou, *The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective*, 23 INT'L J. HUM. RTS. 34, 35 (2019).

[62] Benedict Kingsbury, *Reconstructing Self-Determination: A Relational Approach*, *in* Aikio & Scheinin eds., *supra* note 58, at 19, 22.

[63] *See* HRC, *Chief Ominayak and Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990); HRC, *Kitok v. Sweden*, UN Doc. CCPR/C/33/D/197/1985 (July 27, 1988); HRC, *I. Länsman et al. v. Finland*, UN Doc. CCPR/C/57/1 (June 11, 1992); HRC, *J. Länsman et al. v. Finland*, UN Doc. CCPR/C/58/D/671/1995 (Aug. 28, 1995).

[64] *See, e.g.*, HRC, *Apirana Mahuika et al. v. New Zealand*, UN Doc. CCPR/C/70/D/547/1993 (Oct. 27, 2000). For analysis, see Martin Scheinin, *The Right to Self-Determination Under the Covenant on Civil and Political Rights*, *in* Aikio & Scheinin eds., *supra* note 58, at 179.

that all peoples must be able to freely dispose of their natural resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)."[65] In the same year, the Committee invited Norway to report "on the Sami peoples' right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article."[66] The HRC also referred to indigenous peoples' right to self-determination in its Concluding Observations on Mexico, Panama, Australia, Denmark, and Sweden.[67]

The UN Committee on Economic, Social and Cultural Rights (CESCR) has adopted a similar approach, referring to Article 1 of its Covenant in several of its Concluding Observations.[68] For instance, in its Concluding Observations regarding Paraguay, the CESCR expressed its concerns "about the fact that the State party has not yet legally recognized the right of indigenous peoples to dispose freely of their natural wealth and resources or put in place an effective mechanism to enable them to claim their ancestral lands (art. 1)."[69] Thus, both the HRC and CESCR now interpret self-determination as requiring that indigenous peoples play a role in decision-making over the management of natural resources on their ancestral territories.

The UN Committee on the Elimination of Racial Discrimination (CERD) has also supported this connection between self-determination and natural resources. In its General Recommendation XXI on the right to self-determination, CERD pointed out that the right to self-determination implies an obligation for states to act to preserve the culture of ethnic groups within their territory. The Committee found that this obligation arises as a consequence of the right of self-determination, and stated that this right gives persons belonging to ethnic groups "the right to engage in such activities which are particularly relevant to the preservation of the identity of such

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[65] HRC, *Concluding Observations: Canada*, UN Doc. CCPR/C/79/Add.105, ¶ 8 (Apr. 7, 1999).

[66] HRC, *Concluding Observations: Norway*, UN Doc. CCPR/C/79/Add.112, ¶ 17 (Oct. 26, 1999).

[67] *See* HRC, *Concluding Observations: Mexico*, UN Doc. CCPR/C/MEX/CO/5 (Mar. 26, 2010); HRC, *Concluding Observations: Panama*, UN Doc. CCPR/C/PAN/CO/3 (Apr. 4, 2008); HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (Apr. 2, 2009); HRC, *Concluding Observations: Denmark*, UN Doc. CCPR/C/DNK/CO/5 (Oct. 13, 2008); HRC, *Concluding Observations: Sweden*, UN Doc. CCPR/CO/74/SWE (Apr. 24, 2002).

[68] *See* CESCR, *Concluding Observations: Argentina*, UN Doc. E/C.12/ARG/CO/3 (Dec. 14, 2011); CESCR, *Concluding Observations: Finland*, UN Doc. E/C.12/FIN/CO/6 (Dec. 17, 2014); CESCR, *Concluding Observations: Guatemala*, UN Doc. E/C.12/GTM/CO/3 (Dec. 9, 2014); CESCR, *Concluding Observations: Cambodia*, UN Doc. E/C.12/KHM/CO/1 (June 12, 2009).

[69] CESCR, *Concluding Observations: Paraguay*, ¶ 6, UN Doc. E/C.12/PRY/CO/4 (Mar. 20, 2015).

persons or groups."[70] This right encompasses a right of indigenous peoples to participate in decisions affecting their territories.[71]

This approach to self-determination has been echoed in the jurisprudence of the regional human rights institutions. The Inter-American Court of Human Rights (IACtHR) has invoked Article 1 of the ICCPR and ICESCR to interpret the right of indigenous peoples over their ancestral natural resources. For example, in the case of the *Saramaka People*, the IACtHR explained that "property rights must be interpreted so as not to restrict their right to self-determination, by virtue of which indigenous peoples may 'freely pursue their economic, social and cultural development' and may 'freely dispose of their natural wealth and resources'."[72] A similar approach was adopted in the case of the Kaliña and Lokono peoples against Suriname.[73] The Court stated: "[T]he right to property protected by Article 21 of the American Convention, and interpreted in light of the rights recognized in Article 1 common to the two Covenants, and Article 27 of the ICCPR which cannot be restricted when interpreting the American Convention in this case, confer on the members of the Kaliña and Lokono peoples the right to the enjoyment of their property in keeping with their community-based tradition."[74]

The African Commission on Human and Peoples' Rights has also highlighted the connection between the indigenous right to self-determination and control of natural resources. In its *Endorois* decision concerning Kenya, the Commission found that the non-respect of the right to land of the Endorois community violated Article 21 of the African Charter on Human and People's Rights, which states that "[a]ll peoples shall freely dispose of their wealth and natural resources."[75] In finding a violation of Article 21, the Commission acknowledged that the right to freely dispose of

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[70] CERD, General Recommendation XXI (Forty-eighth session) on Self-Determination, ¶ 5, UN Doc. A/51/18, annex VIII (Mar. 8, 1996).

[71] *See* CERD, General Recommendation XXIII (Fifty-first session) on Rights of Indigenous Peoples, UN Doc. A/52/18, annex V (Sept. 26, 1997) (calling upon state parties to ensure indigenous peoples effective participation, but making no mention of self-determination per se).

[72] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 93 (Nov. 28, 2007).

[73] Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).

[74] *Id.* at ¶¶ 124, 126. Interestingly, the Court has also included an examination of Article 23 of the American Convention relating to the right to participate in government.

[75] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya [Endorois Case], Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 268 (Feb. 4, 2010), https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf ; Org. of African Unity [OAU], African Charter on Human and Peoples' Rights [African Charter] art. 21 ¶ 1, CAB/LEG/67/3 rev. 5 21, I.L.M. 58 (1982) (June 27, 1981).

natural resources is of crucial importance to indigenous peoples and their way of life.[76] This was later confirmed in the African Court's decision regarding the Ogiek community, in which the Court ruled that the government of Kenya had violated Article 21 of the Charter by restricting access to territories and natural resources that were essential to guarantee the Ogiek's access to food.[77]

Overall, a survey of the human rights treaty monitoring bodies and the regional human rights institutions demonstrates a substantive international jurisprudence affirming the self-determination rights of indigenous peoples over natural resources located on their ancestral territories.

B. "Self-determined Development" and the Right to Free, Prior, and Informed Consent

The principle of self-determined development arose as a reaction to what indigenous communities across the world have called "imposed development" and "development aggression."[78] This refers to the imposition of top-down economic development policies, usually involving major projects to exploit natural resources on indigenous territory. Indigenous peoples have often become victims of such policies, with the "development" projects leading to forced displacement, land dispossession, and environmental degradation.[79] In response, indigenous peoples have called for the recognition of a right to "self-determined development," a hybrid of the right to self-determination and the right to development.[80]

This call for self-determined development was answered in 1986 in the UN Declaration on the Right to Development (UNDRTD).[81] Its Preamble recalls "the right of peoples to exercise . . . full and complete sovereignty over all their natural wealth and resources," and Article 1(2) states that "the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of

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[76] Endorois Case, *supra* note 75; *see also*, Social and Economic Rights Action Center and the Center for Economic, and Social Rights v. Nigeria [SERAC v. Nigeria], Communication 155/96, Afr. Comm'n H.P.R., (May 27, 2002), https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf (showing the correlation between cultural rights and access to natural resources).

[77] African Commission on Human and Peoples' Rights v. Republic of Kenya [Ogiek Case], App. No. 006/2012, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 201 (May 26, 2017).

[78] *See* Cathal Doyle & Jérémie Gilbert, *Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"*, 8 EUR. Y.B. OF MINORITY ISSUES 219, 220, 223 (2009).

[79] *See* IN THE WAY OF DEVELOPMENT, *supra* note 52.

[80] *See* INDIGENOUS PEOPLES' INT'L CTR. FOR POL'Y RSCH. & EDUC. [TEBTEBBA], TOWARDS AN ALTERNATIVE DEVELOPMENT PARADIGM: INDIGENOUS PEOPLES' SELF-DETERMINED DEVELOPMENT (Victoria Tauli-Corpuz, Leah Enkiwe-Abayao, & Raymond de Chavez eds., 2010).

[81] G.A. Res. 41/128, Declaration on the Right to Development, at Pmbl. (Dec. 1986).

their inalienable right to full sovereignty over all their natural wealth and resources."

Indigenous peoples have contributed positively to specifying concrete and justiciable rights to development.[82] These rights retained the Covenants' idea of a people's right to freely dispose of its natural resources, specified as a right of peoples to participate in decisions which impact their ancestral territories.

The *Endorois* case is a good illustration of this.[83] The case concerned the forced removal of an indigenous community in the name of development (tourism and mining), which resulted in the community losing access to essential natural resources (water and pastoral lands). Linking self-determination with development, the community highlighted that they had "suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them."[84] The African Commission ruled that regarding "any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[85]

This is one of the first international human rights cases to affirm communities' right to free, prior, and informed consent (FPIC).[86] The establishment of a right to FPIC is one of the most significant developments in the human rights-based approach to natural resources management.[87] It recognizes that indigenous peoples have the right to determine and develop priorities for the use of their lands or territories and other resources. This requirement has been endorsed by international human rights treaty monitoring bodies. For example, in its 1999 Annual Report on Canada, the HRC links aboriginal self-government with the right freely to dispose of natural resources and urges the government to address issues of land and resource allocation.[88] Likewise, in its 2014 review of the United States, the HRC urged the government to "ensure that consultations are held with the

[82] *See* Jérémie Gilbert & Corinne Lennox, *Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development*, 23 INT. J. HUM. RTS. 104 (2019).

[83] Endorois Case, *supra* note 75 at ¶ 268.

[84] *Id.* at ¶ 129.

[85] *Id.* at ¶ 291.

[86] For analysis, *see* Jérémie Gilbert, *Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges, and Limitations*, 66 INT'L & COMP. L.Q. 657 (2017).

[87] *See* CATHAL DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE, PRIOR, AND INFORMED CONSENT (2014).

[88] HRC, *Concluding Observations: Canada*, UN Doc. CCPR/C/79/Add.105, ¶ 8 (Apr. 7, 1999).

indigenous communities that might be adversely affected by the state party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities."[89] In a similar fashion, the CESCR committee has urged Colombia to seek the consent of the indigenous peoples concerned by the implementation of timber, soil, and sub-soil mining projects affecting them.[90]

The Inter-American Commission, in a case concerning a Mayan community in Belize, recognized that the authorities had violated the rights of the community to property by allowing the exploitation of timber and oil on their ancestral lands without the community's full informed consent.[91] The Commission highlighted that such consent requires "at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."[92] The Commission held that the obligation to obtain indigenous peoples' "consent applies to all state decisions, including the granting of natural resource exploitation concessions, that may have an impact upon indigenous lands and communities."[93]

As these examples illustrate, since the adoption of the UNDRIP in 2007, a significant body of decisions and recommendations from international human rights bodies have emphasized that development projects on indigenous territories need the free, prior and informed consent of the communities involved.[94] The right to FPIC is a direct application of the right to self-determination over natural resources, requiring that indigenous peoples be able to give or withhold consent to development projects that would affect the natural resources of their ancestral lands.

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[89] HRC, *Concluding Observations: United States*, UN Doc. CCPR/C/USA/CO/4, ¶ 25 (Aug. 23, 2014).

[90] CESCR, *Concluding Observations: Colombia*, UN Doc. E/C.12/1/Add.74, ¶¶ 12, 33 (Nov. 30, 2001); *see also Concluding Observations: Brazil*, UN Doc. E/C.12/1/Add.87, (May 23, 2003). The CERD has also referenced indigenous peoples' right to consent to decisions directly affecting them in many of its Concluding Observations. For a compilation of these recommendations, see *Legal Companion to the UN-REDD Programme - Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC*, UN-REDD PROGRAMME, Jan. 2013.

[91] Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n. H.R., Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, ¶ 117 (2004).

[92] *Id.* at ¶ 142.

[93] *Id.*

[94] *See* Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT'L J. HUM. RTS. 1 (2012); Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54 (2011).

C. Cultural Rights and Natural Resources

Cultural rights are an important element of human rights law, embedded in several international and regional human rights treaties.[95] Cultural rights are the third area of law used by indigenous peoples to press for recognition of their rights over natural resources. Human rights law recognizes that the protection of traditional practices of using natural resources can be essential to ensuring the cultural survival of indigenous peoples.

An important legal norm supporting the connection between natural resources and indigenous cultural rights has been article 27 of the ICCPR, which reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." This article has been interpreted to protect indigenous rights over natural resources. The connection between cultural rights and natural resources has been at the heart of several Concluding Observations and decisions in individual communications of the Committee.[96] The HRC heard several complaints by indigenous peoples in the 1990s, and its decisions in cases such as *Ominayak v Canada*,[97] *Lansman v Finland*,[98] and *Lovelace v Canada*[99] have become key elements of international jurisprudence.[100] All of the Committee's pronouncements emphasize that resource-related activities that form an essential element of indigenous peoples' culture should be protected under article 27 of the ICCPR.

The Inter-American system of human rights has also recognized the significant connection between cultural rights and natural resources for indigenous peoples. In several of its cases on indigenous peoples' rights, the IACtHR has highlighted how traditional understandings of natural resources

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[95] UDHR, *supra* note 46, at art. 27; ICESCR, *supra* note 19, at art. 15; African Charter, *supra* note 75, at art. 17; Inter-American Commission on Human Rights [IACHR], *American Declaration of the Rights and Duties of Man*, art. 13, May 2, 1948, *available at* https://www.refworld.org/docid/3ae6b3710.html. For analysis, *see* ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND (2007); THE CULTURAL DIMENSION OF HUMAN RIGHTS (Ana Vrdoljak ed., 2013).

[96] *See* FOREST PEOPLES PROGRAMME, A COMPILATION OF UN TREATY BODY JURISPRUDENCE, SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL, AND THE ADVICE OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES, Vol. V, at III (Fergus MacKay ed., 2013).

[97] HRC, *Chief Ominayak and Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990).

[98] HRC, *J. Länsman et al. v. Finland*, UN Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

[99] HRC, *Sandra Lovelace v. Canada*, UN Doc. A/36/40 (July 30, 1981).

[100] For analysis, *see* Martin Scheinin, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH (Theodore S. Orlin et al. eds., 2000), 163-64.

form an essential element of indigenous peoples' right to cultural identity. In the *Saramaka* case, for instance, the Court highlighted that, for indigenous peoples, "the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land."[101] A similar approach has been adopted by the African Commission and Court.[102] In the Court's ruling concerning the Ogiek community of Kenya, for example, it stated that, "in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment."[103]

At least part of the success of indigenous peoples in asserting their right to dispose of natural resources is attributable to their unique and well-recognized cultural rights. Both the Inter-American Court and the African Commission "draw a clear link between the recognition of indigenous peoples' substantive rights to own, use, occupy, control, and develop their traditional land and resources and the cultural survival of indigenous communities."[104] The significance placed on the survival of a group's traditions and customs is clear. Indeed, the Inter-American Court explicitly states that when determining what limits to the right are permissible, a "crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members."[105] Since the exploitation of land and resources are recognized as potentially jeopardizing the cultural survival of indigenous groups, courts and UN treaty bodies have been particularly vigilant in recognizing indigenous rights to natural resources.

In sum, from the 1980s onward, advocates for indigenous peoples invigorated the links between international human rights law and peoples' rights over natural resources. Indigenous peoples challenged the orthodox state-centered interpretations of sovereignty and self-determination over

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[101] Saramaka People v. Suriname, *supra* note 72, ¶ 122; *see also* Case of the Kichwa Indigenous People of Sarayaku, Merits and Reparation, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 220 (June 27, 2012); Case of Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 125 ¶ 135 (June 17, 2005).

[102] African Commission on Human and Peoples' Rights, *Resolution on the Protection of Sacred Natural Sites and Territories*, ACHPR /Res. 372 (LX) (May 22, 2017) (the Commission makes a direct connection between human rights and state obligations to protect and respect natural sacred sites).

[103] Ogiek Case, *supra* note 77, at ¶ 164; *see also* Endorois Case, *supra* note 75.

[104] Miranda, *supra* note 30, at 820.

[105] Saramaka People v. Suriname, *supra* note 72, at ¶ 128.

natural resources, adding a human rights-based dimension which insists on the resource rights of peoples. In doing so, they moved the legal discussion from a theoretical debate about sovereignty over natural resources to a more practical emphasis on consent and cultural attachment.

III. THE RIGHTS OF CITIZENS OVER NATURAL RESOURCES

International law recognizes three types of "peoples" as having rights over natural resources: peoples under colonial occupation (examined in Part I), indigenous peoples (examined in Part II), and all of the citizens of an independent state (examined here). Respect for the rights of citizens of independent states are of the greatest importance for peace and good governance in resource-rich states and regions. These rights are sometimes misunderstood, so in this part we take up three preliminary points before discussing the historical specification of the content of the rights in Part IV.

First, we discuss the meaning of the term "people" in international law. Second, we expand on how international law divides resource rights between citizens and states. Third, we show how citizens' rights over resources are compatible with a wide variety of political and economic systems and that citizens' rights in no way require "resource nationalism."

A. "People" as All Citizens of a State

Understanding the meaning of the term "people" is essential for correct interpretation of the many international instruments in which it occurs.[106] As we have seen, "people" can often refer to indigenous and other national subgroups, yet the term does not refer exclusively to such groups.[107] Authoritative bodies, such as the CESCR, often refer to "people" in the sense of "all citizens of a state."[108] Indeed, the CESCR has helped to establish this as a focal sense of "people" by "insisting that states are procedurally accountable to the 'general public,' as the relevant 'people,' in their dealings with the state's natural resources."[109]

For example, in its 1997 Concluding Observations for Azerbaijan, the CESCR "calls attention to [A]rticle 1 on the right of self-determination," stresses that the state must manage the privatization of the country's oil

[106] BEN SAUL, DAVID KINLEY, & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 25–27 (2014).

[107] Neither the ICESCR nor the ICCPR specifically mention "indigenous" peoples, and in no case or commentary have rights over natural resources been interpreted as applying only to indigenous peoples or other subgroups.

[108] *See* Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) [Guinea v. DRC], Judgement, 2010 I.C.J. 639, ¶ 66 (Nov. 30) (the opinions of the treaty bodies are significant, as these opinions are recognized as having substantial weight by the International Court of Justice).

[109] Saul, Kinley, & Mowbray, *supra* note 106, at 52.

resources in a way that is "sufficiently transparent to ensure fairness and accountability," and regrets that it is not able to assess the extent that "the general public is able to participate" in this privatization.[110] Similarly, in its 2009 Concluding Observations on the Democratic Republic of Congo (DRC), the CESCR uses the "all citizens" sense of "people" instead of limiting Article 1(2) to a specific subgroup or community.[111] Concerned with the manner in which the DRC's extensive mineral resources are being exploited, the CESCR calls on the DRC government to "review without delay the mining contracts in a transparent and participatory way" and to "repeal all contracts which are detrimental to the Congolese people."[112] Finally, in respect to Article 1(2), in its 2009 Concluding Observations on Cambodia, the CESCR focuses on the people of Cambodia as a whole when it strongly recommends that the "granting of economic concessions take into account the need for sustainable development and for all Cambodians to share in the benefits of progress." [113] The CESCR again ascribes the right to all of the citizens of the state.

The Human Rights Committee has been less engaged than the CESCR in clarifying common Article 1(2) of the Covenants.[114] It has, however, addressed the right freely to dispose of natural resources and demonstrated its preference for a wide interpretation of the term "people."[115] Moreover, in its 1984 comment on the right to self-determination of peoples, the HRC states that Article 1 of the ICCPR affirms the "inalienable" right of all peoples freely to "determine their political status and freely pursue their economic, social and cultural development."[116] Article 1(2) "affirms a

[110] CESCR, *Concluding Observations: Azerbaijan*, E/C.12/1/Add.20, ¶ 16 (Dec. 22, 1997). The CESCR further states that the "ability of people to defend their own economic, social and cultural rights depends significantly on the availability of public information . . . it is important that the privatization process should be conducted in an open and transparent manner and that the conditions under which oil concessions are granted should always be made public." *Id.* ¶ 29. In the case of Azerbaijan, there was no subset of the population within the country that was specifically affected by the oil concessions; the Committee uses "people" to refer to the citizenry as a whole.

[111] CESCR, *Concluding Observations: Democratic Republic of Congo*, E/C.12/COD/CO/4, ¶ 13 (Dec. 16, 2009).

[112] *Id.* Importantly, the CESCR purposely frames its call to action in broad terms ("the Congolese people") instead of focusing on the specific community that would be most affected by the exploitation of natural resources (those Congolese living in Katanga). This suggests that while local populations may have special interests in their region's natural resources, the right of Article 1(2) is held in the first instance by all of the citizens of the state.

[113] CESCR, *Concluding Observations: Cambodia*, E/C.12/KHM/CO/1, ¶ 15 (June 12, 2009).

[114] SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY, 162 (3d ed. 2013).

[115] For example, when it criticized Azerbaijan's narrow view of self-determination as only applying to colonized peoples. HRC, *Concluding Observations: Azerbaijan*, *supra* note 110, ¶ 6.

[116] HRC, *General Comment No 12: Article 1 (Right to Self-Determination)*, 21st Sess., ¶ 2 (Mar. 13, 1984).

particular aspect of the economic content of the right of self-determination," namely the right of peoples to freely dispose of their natural wealth and resources.[117] The broad right of self-determination of peoples is of particular importance, the HRC says, "because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[118] As individual human rights are not limited to subgroups or populations under colonial control, it is reasonable to presume that the HRC interprets Article 1(2) as applying to the whole citizenry of independent states.

This interpretation is further supported by the statement of the CERD on the right to self-determination of peoples,[119] and in the work of the African human rights institutions.[120] For example, in its communication on *Front for the Liberation of the State of Cabinda v. Republic of Angola*, the Commission is explicit that the term "peoples" in the Article of the African Charter dealing with natural resources can mean either the entire people of a state or a people within the state.[121]

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[117] *Id.*

[118] *Id.* ¶ 1.

[119] "The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social, and cultural development without outside interference. In that respect there exists a link with *the right of every citizen* to take part in the conduct of public affairs at any level . . . Governments are to represent *the whole population without distinction* as to race, colour, descent or national or ethnic origin." CERD, *General Recommendation XXI*, *supra* note 70, ¶ 4 (emphasis added). *See* G.A. Res. 2625 (XXV), *supra* note 23, at 2.

[120] In its discussion of natural resource rights in the African Charter, the African Commission affirms that "[a]lthough natural resources under Article 21 are often localized in a particular region, this does not mean that entitlement to the benefits from the sustainable and human rights compliant use of such natural resources is limited to affected people living on or near such territory – the peoples of the State as a whole are also entitled to benefit from such resources." ACHPR, *supra* note 17, ¶ 23. *See also* the Commission's explicit definitions of "people" in ¶ 14, which includes both "the entire population of a State'" and "sub-national groups." *Id.* ¶ 14. The Commission further demonstrates its support for the wide interpretation of the term "people" by calling on state parties to reaffirm that the "state has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the *population*" and must ensure "participation, including the free, prior and informed consent of *communities*, in decision making related to natural resource governance." AFR. COMM'N, *Resolution on a Human Rights-based Approach to Natural Resource Governance*, Res. 224, 51st Sess., ¶ 15 (2012) (emphasis added). By choosing to use both the general term "population" and the more specific term "communities" in reference to the right to freely dispose of natural resources, the Commission favors a broad interpretation over a narrow one that would limit "people" only to subsets of the population.

[121] Front for the Liberation of the State of Cabinda v. Republic of Angola, Communication 328/06, AFR. COMM'N H.P.R., [Angola], ¶ 130 (Nov. 5, 2013). Furthermore, the Commission has prioritized membership in national peoples over membership in subnational peoples in cases where the two have conflicted. When presented with a plea to recognize the independence of the Katangese people from Zaire, the Commission demurred partly because no evidence had been submitted that the human right of individuals in Katanga to participate in government was being denied. As individuals in Katanga could participate in the government of Zaire, their human right to participate was fulfilled by their rights as

It is also the opinion of scholars of international law that the right of peoples to freely dispose of natural wealth and resources did not originally apply to identity-based communities within the territorial boundaries of a state.[122] Lillian Miranda argues that common Article 1(2) of the Covenants is best understood as mediating the relationship between the state and the national polity, and that it creates obligations for the government of a state to its people as a whole.[123] This is consistent with other rights protected by the Covenants, all of which are rights exercised by citizens against their state. Thus, the preponderance of evidence supports an interpretation of international legal texts that often understands a "people" as designating all of the citizens of an independent state.

B. The "Internal-External" Interpretation of Peoples' and States' Resource Rights

International law ascribes to peoples *internal* rights over resources, to be claimed against the state, and ascribes to states *external* rights over resources, to be claimed against other states. Peoples' rights over resources are thus an aspect of internal self-determination, while states' rights over resources are an aspect of external self-determination.

Today, the "internal-external" interpretation of peoples' and states' rights to natural resources is endorsed by many authoritative sources, as illustrated in the African context. The African Charter on Human and Peoples' Rights uses similar language to describe the rights of "peoples" and "states" over natural resources: Article 21(1) asserts the right of peoples to freely dispose of natural resources while Article 21(4) recognizes the rights of states to freely dispose of their wealth and natural resources.[124]

To resolve this tension, the African Commission has explained that the people's right is an internal one against its state, while the state's right is an external one against other states. For the external right, the African Commission has said in its *Guidelines for National Periodic Reports* that Article 21 ensures that the material wealth of states is not exploited by aliens for no or little benefit to the African countries.[125] Similarly, in its *Angola* communication, the Commission states that "Article 21 of the Charter . . .

citizens within the national people. Katangese Peoples' Congress v. Zaire, Communication 75/92, AFR. COMM'N H.P.R. ¶ 6 (Oct. 1995).

[122] *See, e.g.*, Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141, 154 (2011); Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 133 (2011).

[123] Miranda, *supra* note 30, at 800.

[124] African Charter, *supra* note 75.

[125] ACHPR, *supra* note 17, at 16.

triggers an obligation on the part of the state parties to protect their citizens from exploitation by external economic powers."[126]

At the same time, the Commission has also confirmed that Article 21 of the Charter carries with it internal rights held by peoples, which place duties upon their states. In Resolution 224, *A Human Rights-Based Approach to Natural Resource Governance*, the Commission asserts that the state has the main responsibility for ensuring natural resource stewardship with, and in the interest of, the population.[127] The Commission is even more firm in its 2017 guidance on Article 21, which refers to the "the unquestionable and inalienable right to self-determination" of peoples in Article 20.

First and foremost, the right to freely dispose of wealth and natural resources is an inviolable right of all peoples, an extension and central element of the right to self-determination provided for in Article 20 of the Charter. The right and the entitlements arising from it belong to peoples. States only have a delegated role entailing the exercise of this right. Article 21 is emphatic that this role of states must be executed in the exclusive interest of the people. The last provision of Article 21(5) explicitly affirms that peoples of states party to the African Charter are entitled to "fully benefit from the advantages derived from their national resources."[128]

Legal scholars support the principle that peoples' rights to their natural resources correspond to duties owed to them by their state as a trustee.[129] In sum, when international instruments ascribe resource rights to states, these are most plausibly understood as external rights of a state against other states. When these instruments ascribe resource rights to peoples, these are most plausibly understood as internal rights of citizens against their state, corresponding to state duties toward its citizens.

C. A People's Resource Rights Do Not Require Resource Nationalism

When discussing the rights of citizens over natural resources, it is worth bearing in mind that many early debates over these rights took place at the height of the Cold War.[130] One lingering legacy of the ideological battles

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[126] Angola, *supra* note 121, ¶ 129.

[127] ACHPR, *Resolution on a Human-Rights Based Approach to Natural Resource Governance*, Res. 224, at 1 (May 2, 2012).

[128] ACHPR, *supra* note 17, at 10; AFR. COMM'N, *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector*, ACHPR/Res. 367 (LX), at 1 (2017).

[129] *See, e.g.*, Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 65 (2006); Miranda, *supra* note 30, at 804; Richard Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80 (1988).

[130] Schrijver, *supra* note 27, at 6.

between capitalism and communism is the mistaken idea that any rights ascribed to "peoples" require some form of continuing collective ownership and control.

In this context, it is critical that the legal rights of peoples over resources be understood as permissive in two ways. First, these rights do not require any specific political-economic system to be institutionalized within a state. Second, these rights do not require "resource nationalism": that is, they are neutral regarding state ownership or control over natural resources. Both of these points can be demonstrated by surveying how citizens' rights over natural resources are declared within national constitutions.

Rights of the people over natural resources are proclaimed in national constitutions in all world regions.[131] Many of these constitutions use propertarian language (for example, "natural resources belong to the people" or "are owned by the people").[132] While all of these national constitutions affirm the right of the people over natural resources, the diversity of these instruments show that these rights do not require any particular political or economic model. Both resource privatization to individuals and state resource management, for example, are compatible with the people's rights.

This can be seen by comparing three states' constitutional and statutory provisions for natural resource ownership. According to the Mexican constitution, resource privatization is permitted.[133] Zambia's 2005 draft constitution, on the other hand, sets itself against privatization.[134] Papua New Guinea's Land Act designates the great bulk of the country's land (currently

[131] For example, in the constitutions of Bolivia, Egypt, Ethiopia, Ghana, Indonesia, Iraq, Kiribati, Liberia, Moldova, Mongolia, Niger, Senegal, Solomon Islands, Syria, Tunisia, Ukraine, and Vietnam. *See Constitute Project*, https://www.constituteproject.org/search?lang=en&q=natural%20resources &status=in_force (last visited Feb. 12, 2021) (providing sections concerning "natural resources" in the respective constitutions for each country).

[132] For example: "The natural resources belong to the people." SENEGAL [CONSTITUTION] 2001 rev. 2016, art. 25-1; "Oil and gas are owned by all the people of Iraq in all the regions and governorates." IRAQ [CONSTITUTION] 2005, art. 111; "The land, its mineral wealth, atmosphere, water and other natural resources within the territory of Ukraine, the natural resources of its continental shelf, and the exclusive (maritime) economic zone, are objects of the right of property of the Ukrainian people." UKRAINE [CONSTITUTION] 1996 with amendments through 2016, art. 13.

[133] "The Nation has an original right of property over the land and waters within the boundaries of the national territory. The Nation has and will have the right to transfer its property's domain to private individuals in order to create private property rights." MEXICO [CONSTITUTION] 1917 with amendments through 2019, art. 27. Article 27 further specifies: "The Nation owns what follows: all natural resources at both the continental platform and the islands' seafloor . . . all the oil and all solid, liquid and gaseous hydrocarbons." The Mexican constitution carefully distinguishes "the Nation" (la Nación) from "the State" (el Estado).

[134] "The State shall devise land policies which recognize ultimate ownership of land by the people."; "The management and development of Zambia's natural resources shall not bestow private ownership of any natural resource." ZAMBIA [CONSTITUTION of Zambia Act, 2005 (the "Mung'omba Draft")] 1, art. 10v, 339f.

97 percent) as "customary land," "owned by the Indigenous People of Papua New Guinea."[135]

Privatization to individual owners (as in the United States), management by a national authority (as in Norway and Venezuela), indigenous rights (as in Papua New Guinea), and mixed systems (as in Indonesia) are all legal regimes that are compatible with the rights of citizens over natural resources. The natural resources of a state start out in the people's hands at independence—as a United Nations special commission once put it, the country's natural resources are a people's "birthright."[136] After independence, citizens may then "freely dispose" of their resources in many different ways. Depending on how citizens freely dispose of the territory's resources, any number of resource management regimes may result. "Resource nationalism," where the state owns or controls the territory's key natural resources, is one possibility but is in no way required. Resource privatization is, as the national laws above show, equally available as an option. A people's right to dispose of their resources is a discretionary right, and so is neutral as to the disposition of resource ownership that will result from its exercise.

IV. THE CONTENT OF RESOURCE RIGHTS: CITIZENS' RIGHTS AND STATE DUTIES

International law recognizes that states enjoy external rights over a territory's natural resources insofar as states have permanent sovereignty which must not be interfered with by other states.[137] A state's sovereign right, however, is not absolute; it is encumbered by the internal rights of its people freely to dispose of these same natural resources. This is consonant with the broader human rights project of ensuring state accountability to citizens through individual rights that create corresponding state obligations.[138] While states' rights correspond to duties on other states, human rights correspond to duties on the state to protect and empower citizens.

The right of peoples to their natural resources has been recognized and elaborated by a variety of different sources acknowledged as persuasive in

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[135] *See* Palais Wilson (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Urgent Request. Violation of Indigenous Peoples' Property Rights and the Right to Effective Remedy*, Office of the High Commissioner for Human Rights, ¶ 4 (Jan. 31, 2011) https://archive.org/stream/PngUnsrip2011Final2ReducedSizeAnnexes/png-unsrip-2011-final2-reduced-size-annexes_djvu.txt.

[136] G.A. Res. 34/92, ¶ 3 (Dec. 12, 1979).

[137] *See supra*, section IIIb.

[138] *See* THOMAS BUERGENTHAL, *Human Rights*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, 8 (2007).

the interpretation of international law.[139] These include General Assembly Resolutions, both before and after the drafting of the Covenants, and the statements of the Covenants' respective monitoring bodies.[140] Consideration here has also been given to other regional human rights agreements and their treaty bodies, as these are treated, by the ICJ at least, as subsidiary means of determining the rules of international law.[141]

Attending to all of these sources demonstrates that the general right of peoples over their natural resources is best understood as a set of rights, corresponding to three broad categories of state duties: substantive duties, procedural duties, and remedial duties.

(1) Substantive rights require the state to use the territory's natural resources in ways that benefit citizens;

(2) procedural rights require states to act transparently, to provide public information regarding resource management, and to ensure participatory decision-making; and

(3) remedial rights require the state to pursue asset recovery in cases where resources belonging to the people have been wrongfully expatriated.

The content of these rights is now explored in more detail.

A. Substantive Rights

The principle that states owe a duty to their citizens to manage natural resources for their benefit has been affirmed throughout the post-war period. This duty has frequently been asserted as a corollary of the right to permanent sovereignty over natural resources. Article 1 of the 1962 Resolution on Permanent Sovereignty over Natural Resources specifies that "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and the well-being of the people of the state concerned."[142] Similarly, Article 5 of the 1966 Resolution on Permanent Sovereignty over Natural Resources requires that states pay due regard to the development needs and objectives

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[139] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, art. 31, *opened for signature* May 23, 1969 (entered into force Jan. 27, 1980).

[140] *See, e.g.*, Guinea v. DRC, *supra* note 108, ¶ 66: The ICJ stated that "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the states obliged to comply with treaty obligations are entitled." *Id.* While the ICJ was referring to the HRC, similar reasoning could apply to the CESCR.

[141] *Charter of the United Nations and Statute of the International Court of Justice*, art. 38 ¶ 1(d), June 26, 1945, 59 Stat. 1055.

[142] G.A. Res. 1803 (XVII), *supra* note 31, art. 1.

of the people concerned.[143] Article 2 of the 1970 Resolution on Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development says that nations and peoples must exercise their rights over natural resources for the well-being of the people of the state concerned.[144]

In these early texts, the duty of the state to manage natural resources for the people's "well-being" or "developmental needs" is firm but vague. It is left unspecified what aspects of citizens' "well-being" must be attended by the state, and how much benefit is owed to the people from resource exploitation. Without further clarification, exactly what these duties require of states regarding the management of a country's resources would have been uncertain.

The language of the major human rights instruments provides this clarification along two dimensions. First, the human rights Covenants specify that states have a duty to prioritize the potential of natural resource exploitation to provide citizens with means of subsistence. Second, both the Covenants and the African Charter require that the benefits of resource exploitation be used only for the benefit of the people. Thus, on the first dimension, the treaties define a "floor" of citizen well-being: the benefits of resource exploitation must first be used to provide citizens with means of subsistence. On the second dimension, the treaties define a "wall" that states must respect: all of the benefits of resource exploitation must be devoted to public uses, not to other uses.

Beginning with the "floor" that requires priority to citizens' subsistence, recall the unequivocal language of the final sentence of common Article 1(2) of the Covenants: "In no case may a people be deprived of its own means of subsistence."[145] This language requires that benefits accruing from a state's natural resources must first be directed toward securing citizens' most basic needs, now and in the future. Any other use of these benefits, until this floor is reached, will deprive the people of its own means of subsistence.

Moreover, state parties to the ICESCR are required under Article 2(1) to take steps "to the maximum of its available resources" to achieve the realization of the rights in that Covenant.[146] This means that "governments must demonstrate that every effort has been made to use all resources at their disposal to satisfy, as a matter of priority, their minimum core human rights

[143] G.A. Res. 2158 (XXI), *supra* note 31, art. 5.

[144] G.A. Res. 2692 (XXV), *supra* note 31, art. 2.

[145] ICCPR, ICESCR, *supra* note 19, art. 1(2).

[146] ICESCR, *supra* note 19, art. 2(1).

obligations, which include making sure that their fiscal regimes are adequate to support such progressive realization of human rights."[147]

This "floor" interpretation, which requires the exploitation of a nation's resources be devoted first to meeting the basic needs of the nation's people, is supported by the travaux préparatoires (drafting history) of the Covenants. Discussing the proposed language in Article 1(2), the delegate from El Salvador gave the following example of a case where a people was being deprived of its own means of subsistence: "In Nauru the only source of national wealth, phosphates, was being unwisely overexploited by a British company, with the result that in about 50 years' time the population of the island would have to be resettled elsewhere because no resources would remain."[148]

This Nauru example is particularly revealing, because it shows that actions stretching over a long period (the overexploitation of phosphates for fifty years) can violate people's resource rights if the people will lack means of subsistence after that time. Presumably, the violation of the people's resource rights will be a matter of even greater urgency in cases where resources are being exploited in ways that currently leave citizens beneath the level of subsistence. The Nauru example also shows that the relevant resources are not limited to food and water, but also include resources whose exploitation yields a "source of national wealth" that can provide citizens with the means to subsist.[149]

In *SERAC v. Nigeria*, the African Commission begins with a general analysis of the state obligations imposed by the resource rights guaranteed under the African Charter.[150] At the primary level, the Commission finds the state obligation to respect fundamental rights, and in particular that "the state is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others . . . And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs."[151] In interpreting the state duty to fulfill fundamental rights like this one, the

[147] Gilbert, *supra* note 18, at 86. A 2015 ECJ ruling that annulled an EU-Morocco trade deal further supports the principle that resource exploitation must benefit and not infringe the fundamental rights of the population of that territory. *See* Case T-512/12, Front Populaire pour la Liberation de la Saguia-El-Hamra et du Rio de Oro (Front Polisario) v. Council, EU:T:2015:953 ¶¶ 208–09, 227–29.

[148] U.N. GAOR, 10th Sess., 3d Comm.: 674th mtg., UN Doc. A/C.3/SR.674, ¶ 8 (Nov. 28, 1955). The Nauru example was of a national people under colonial domination, yet as shown above, the resource rights of peoples persist after independence.

[149] On the legal texts concerning the deprivation of peoples directly to access to food and water, *see* Gilbert, *supra* note 18, at 93–97.

[150] SERAC v. Nigeria, *supra* note 76.

[151] *Id.* ¶ 45.

Commission says that this means "a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights . . . . It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)."[152] Thus states have an obligation to use natural resources or resource revenues to secure a "floor" of the people's subsistence needs.

The "wall" dimension of the substantive rights of peoples requires that all of the proceeds of resource exploitation benefit the people, not other parties. This wall is marked in the final substantive article of both Covenants, which characterizes peoples' resource rights in this way: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[153]

The benefits of the country's resources must be fully devoted to public purposes. Any use of these benefits where the people are not the primary beneficiaries will violate the right of a people to the full enjoyment of their natural wealth.

This "wall" dimension of a people's substantive resource rights is also affirmed in the African Charter, which states in Article 21 that: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised *in the exclusive interest of the people*. In no case shall a people be deprived of it."[154]

The insistence on the exercise of resource rights in the exclusive interest of the people is reaffirmed later in the same article, in the context of foreign exploitation: "State parties to the present Charter shall undertake to eliminate all forms of foreign exploitation, particularly that practiced by international monopolies *so as to enable their peoples to fully benefit from the advantages derived from their national resources*."[155]

In its *Angola* communication, the African Commission highlights that peoples can be beneficiaries of the right in Article 21 to the extent that the Article imposes a duty on the state "to ensure that resources are effectively managed for the sole and equal benefit of the entire peoples of the state."[156] And as the Commission stated in 2017, "[u]nderlying the right of peoples to freely dispose of their wealth and natural resources is the principle that the

[152] *Id.* ¶ 47.

[153] ICESCR, *supra* note 19, art. 25.

[154] OAU, *supra* note 75, art. 21(1) (emphasis added).

[155] *Id.* art. 21(5) (emphasis added).

[156] Angola, *supra* note 122, ¶ 131.

use of natural resources should be for the exclusive interest and benefit of the citizens of a State."[157]

The multifarious modalities of state resource management may in some cases leave it uncertain whether either the "floor" or the "wall" of the people's substantive rights are being breached. Yet some cases that breach the floor or the wall are beyond doubt. As Cassese says:

> Article 1(2) can have an impact in extreme situations, where it is relatively easy to demonstrate that a government is exploiting the natural resources in the exclusive interest of a small segment of the population and is thereby disregarding the needs of the vast majority of its nationals. Similarly, it may be invoked with some success where it is apparent that a government has surrendered control over its natural resources to another State or to foreign private corporations without ensuring that the people will be the primary beneficiaries of such an arrangement. Either of these situations would constitute a clear violation of Article 1(2) of the Covenants.[158]

B. Procedural Rights

Beyond substantive rights, contemporary interpretations of peoples' rights to natural resources have also added procedural rights regarding natural resource management. Already in 1974, Article 7 of the Charter of Economic Rights and Duties of States made clear that every state has the responsibility to "ensure the full participation of its people in the process and benefits of development."[159] This is the historical transition point between the older focus on the duty of states to use natural resources for the benefit of their people and a newer emphasis on the state duty to ensure participation by the citizenry.

The duty to ensure participation was significantly elaborated by the General Assembly in its 1986 Declaration on the Right to Development.[160] Article 1(2) of the Declaration reintroduces the concept of peoples' permanent sovereignty over natural resources, which had lain dormant since Chile unsuccessfully proposed including language of peoples' permanent sovereignty over natural resources in the Covenants in 1952.[161] Article 1(1)

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[157] ACHPR, *supra* note 17, at 20. The CESCR, the CERD, the African Court, the Inter-American Court on Human Rights, the ILO, and the UN Special Rapporteur on the Rights of Indigenous Peoples have all affirmed the importance of the state sharing the benefits of resource exploitation with those indigenous peoples who occupy the territory where the extraction is located. Since these subgroups are part of the national people, these requirements do not violate the requirement that all benefits go to the people.

[158] Cassese, *supra* note 45, at 56.

[159] G.A. Res. 3281 (XXIX), *supra* note 78, at 52.

[160] G.A. Res. 41/128, *supra* note 78, ¶ 2.

[161] Schrijver, *supra* note 27, at 53.

states that the human right to development entitles every human person to participate in, contribute to, and enjoy economic, social, cultural and political development. Similarly, Article 2(3) places a duty on states to develop policies to improve the well-being of the entire population on the basis of their active, free, and meaningful participation. Finally, Article 8(2) calls on states to encourage popular participation in all spheres as an important factor in development and in the full realization of human rights.

Simultaneous with the rise of citizens' rights to participate in resource decisions, parallel rights were being affirmed in cognate areas of the law and especially with respect to the environment. For example, the Rio Declaration of 1992 states that, "Each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in decision-making processes."[162] Such participatory rights regarding environmental matters were further detailed in the Aarhus Convention of 1998, now ratified by 47 parties in Europe and Central Asia.[163] The African Commission has also found that a people's right to a "general satisfactory environment favorable to their development" under Article 24 of the African Charter requires states to make relevant environmental information public and to give meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities.[164]

Returning to citizens' procedural rights over their natural resources proper, the CESCR has provided significant guidance on the content of these rights. While the CESCR has never provided a list of the specific procedural duties that Article 1(2) requires, its numerous reports set out three procedural duties that bind states in relation to natural resources.

First, the CESCR repeatedly calls on states to act with greater transparency in their decision-making around natural resources. Referring to Article 1(2), in its 1997 Concluding Observations on Azerbaijan, the CESCR stresses the need for transparency, fairness, and accountability in relation to the privatization of the country's oil resources.[165] Similarly, in its 2009

[162] "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I, principle 10 (June 3, 1992).

[163] U.N. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 2161 U.N.T.S. 447. As Elena Blanco and Jona Razzaque describe the Convention's three pillars, they are duties on public authorities to disclose environmental information, to take public participation into account in decision-making, and to provide reasonable access to judicial remedies. *See* ELENA BLANCO & JONA RAZZAQUE, GLOBALISATION AND NATURAL RESOURCES LAW 157–58 (2011).

[164] SERAC v. Nigeria, *supra* note 76, ¶¶ 50, 53.

[165] CESCR, *Concluding Observations: Azerbaijan*, *supra* note 110, ¶ 16.

Concluding Observations on the Democratic Republic of the Congo, the CESCR criticizes the government's lack of transparency around the review process for new and existing mining contracts.[166]

Second, the CESCR emphasizes that the human rights framework includes the right for those affected by decisions to participate in the relevant decision-making process and specifically applies this right in relation to Article 1(2).[167] In its 2009 Concluding Observations on the DRC, the CESCR urges the government to review mining contracts in a participatory fashion.[168] It also encourages national debate on investment in agriculture in its 2009 Concluding Observations on Madagascar.[169] As noted above, the CESCR's call for national accountability and debate in the Azerbaijan case shows that participation is a right held by all the citizens of the state.

Third, the CESCR suggests that free and fair elections are a crucial component of the right to participate. It also warns that such elections are not sufficient to ensure that vulnerable citizens, such as those living in poverty, will enjoy the right to participate in key decisions affecting their lives.[170]

Regional human rights agreements, and their implementation bodies, also affirm the procedural rights of citizens over their natural resources. The 2004 Arab Charter on Human Rights declares in Article 2(1) that "All peoples have the right of self-determination and control over their natural wealth and resources."[171] As noted above, Article 21 of the African Charter asserts the right of peoples to participate in the management of their natural resources, echoing Article 1(2) of the ICESCR and ICCPR when it states that, "[a]ll peoples shall freely dispose of their wealth and natural resources."

The African Commission, in its 2017 interpretation of the articles in the African Charter related to extractives, requires that states "ensure that the public is availed [of] adequate opportunities for consultation about [sic] rich and rigorous participation in decision-making processes on plans for both industrial exploration and extraction of natural resources."[172] More, in a rare joint declaration, and one specifically on natural resource governance, the Inter-American Commission and the African Commission affirmed the right of access to information and to documents generated by the government, or to which the government is a party, that are necessary for citizens to

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[166] CESCR, *Concluding Observations: Democratic Republic of Congo*, *supra* note 111, ¶ 13.

[167] CESCR, *Poverty and the ICESCR*, U.N. Doc. E/C.12/2001/10, ¶ 12 (May 4, 2001).

[168] CESCR, *Concluding Observations: Democratic Republic of Congo*, *supra* note 111, ¶ 13.

[169] CESCR, *Concluding Observations: Madagascar*, U.N. Doc. E/C.12/MDG/CO/2, ¶ 12 (Dec. 16, 2009).

[170] CESCR, *Poverty and the ICESCR*, *supra* note 167, ¶ 12.

[171] League of Arab States, *Arab Charter on Human Rights*, 12 INT'L HUM. RTS. REP. 893 (2005).

[172] ACHPR, *supra* note 17, ¶ 52.

understand the extent and value of their natural resources and the payments for those resources received and disbursed by their governments.[173]

Finally, the transnational drive toward greater transparency around natural resource extraction has been supported by state legislation, such as the U.S. Dodd Frank Act, the European Union Accounting and Transparency Directive, and the OECD Guidelines for Multinational Enterprises, as well as by voluntary initiatives such as the Extractive Industries Transparency Initiative and civil society coalitions such as Publish What You Pay.[174]

C. Remedial Rights

States have both substantive and procedural duties regarding citizens' rights over resources, and violation of either of these types of rights may trigger remedial state duties. The law regarding remedy is most extensively developed in the African context, perhaps because of the unusually specific language in the African Charter.[175]

As noted above, Article 21(1) of the African Charter provides for the general right of peoples to their natural resources. In its Guidelines on Article 21, the African Commission has remarked that "the right to remedy is inherent in and central to all human rights and is also embedded in the right to access to justice."[176] Moreover, Article 21(2) provides a concrete remedial right for people in relation to their natural resources, declaring that, "[i]n case of spoliation[,] the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."[177] While the Commission has interpreted the language of spoliation primarily in terms of the dispossession of land, it has not limited the language to this scenario.[178] This requirement of a specific remedy may develop further into a tool for ensuring adequate regard for people's natural resource rights.

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[173] ACHPR, Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2, 2012), https://www.achpr.org/sessions/resolutions?id=243.

[174] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 780), secs. 1502, 1504; European Union, *Directive 2004/109/EC of the European Parliament and of the Council*, EUR-LEX (Dec. 15, 2004), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0109; OECD, *OECD Guidelines for Multinational Enterprises*, OECD.ORG (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf; EITI, *The Extractive Industries Transparency Initiative*, EITI.ORG, https://eiti.org/; Publish What You Pay, PWYP.ORG, http://www.publishwhatyoupay.org/.

[175] A parallel jurisprudence on remedial rights is well-developed in the Inter-American system. *See* Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113 (2014).

[176] ACHPR, *supra* note 17, ¶ 15.

[177] African Charter, *supra* note 75, art. 21.

[178] ACHPR, *supra* note 17, ¶ 15.

Additionally, in terms of state reporting requirements, the African Commission requires state parties to report on their grievance mechanisms for violations of any of the Charter's rights. In the context of the extractive industries, the Commission requires states to report on their judicial and non-judicial complaints mechanisms to adjudicate grievances, to report on their provision of legal aid to enable access to those mechanisms, and to publish statistics on how extensively these mechanisms are being used.[179]

As this section has shown, the regional human rights bodies such as the African Commission and the Inter-American Commission have been particularly concerned to fill in the detail of peoples' substantive, procedural, and remedial resource rights. Since human rights jurisprudence from these regional institutions is based on principles of cross-pollination and cross-fertilization, the jurisprudence developed by these regional institutions will have resonance in other jurisdictions across the globe.[180] Moreover, as the ICJ has argued, just as it ascribes great weight to the interpretations of the ICCPR by the HRC, it must for the same reasons take account of the regional bodies of their respective treaties. Respecting the interpretation of all human rights institutions "achieve[s] the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[181] For the sake of the rule of law in international affairs, the detailed interpretations of human rights developed by these human rights institutions should set the standard against which alternative interpretations can be measured.

V. THE FUTURE OF CITIZENS' RESOURCE RIGHTS

This article has discussed the bases in international law for affirming peoples' rights over natural resources as one dimension of peoples' right to self-determination. Three types of groups hold such rights. Peoples living under colonial occupation or trusteeship hold the rights against exploitation of their natural resources. Indigenous peoples hold rights over the natural resources located in their ancestral territories, including a right to exercise their free, prior, and informed consent before any development takes place on their lands and territories, and respect for the cultural rights connected to

[179] *Id.* ¶ 19.

[180] *See* Chiara Giorgetti, *Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings*, *in* PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS (Arman Sarvarian et al. eds., 2015); TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS (Carla Buckley, Alice Donald, & Philip Leach eds., 2016).

[181] Guinea v. DRC, *supra* note 108, ¶¶ 66–67.

the use of their territory's resources. All citizens of independent states have rights (subject to both a "floor" and a "wall") to benefit from the exploitation of the territory's natural resources. They also have rights to meaningful participation in decision-making over these resources, and rights to access remedies in case these rights are not fulfilled.

The rights of peoples over natural resources correspond to significant state obligations and duties toward their citizens. For example, the African Commission says that state parties to the African Charter have general obligations to recognize the rights enshrined in the Charter and to adopt legislative or other measures to give them effect. This implies specific duties to incorporate Charter-based rights into national laws, to ensure effective and adequately resourced institutions to supervise and enforce the corresponding standards, and to provide administrative and juridical mechanisms for seeking redress. States must also adopt beneficial legislation controlling all aspects of revenue generation from the extractive industries, including transparency over all systems that manage concessions and measures to prevent illicit financial flows.[182]

States may fail in their duties toward peoples through omission or commission, and failures to respect peoples' rights often occur because of weak regulatory regimes in the extractive sector. As the African Commission said in 2017, weak regulation can result in "human rights abuses [such as] lack of transparency about and egregious abuse by national actors of revenues received from the extractive industries."[183] The Commission adds that peoples must be "provided with the legal guarantee to participate in the prospecting and development" of major extractive resources, and that "[t]he right to share in the benefits derived from the development or sale of natural resources extends to all peoples of a state."[184] State duties to respect peoples' resource rights thus demand extensive and proactive state action.

An important issue is how this legal approach bears on corporations and other private actors that exploit natural resources. Corporate responsibilities to respect peoples' rights over natural resources form an emerging legal regime. The CESCR has affirmed states' obligations to take steps to prevent human rights abuses by corporations based in their jurisdiction, which has been echoed in an Advisory Opinion of the International Court of Justice.[185]

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[182] ACHPR, *supra* note 17, ¶¶ 53–65.

[183] *Id.* at iv.

[184] *Id.* at 22–23.

[185] CESCR, Statement on the Obligations of State Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights, U.N. Doc. E/C.12/2011/1, ¶ 5 (July 12, 2011); CESCR, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities U.N. Doc. E/C.12/GC/24, ¶ 11 (Aug. 10, 2017); Legal

This set of state obligations is set out most comprehensively in the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011.[186] The Guiding Principles also provide substantial detail on corporate responsibilities to respect human rights. The Guiding Principles encourage companies to conduct human rights impact assessments of their activities and to act with due diligence to avoid infringing those rights.[187] While the Guiding Principles are not legally binding, the HRC has established a working group to draft a corresponding binding treaty. This working group is developing ever-more sophisticated versions of this treaty.[188] A binding treaty would have significant impacts on states' understanding of their duties toward citizens with regard to natural resources and the obligations of companies in the extractive industries.

Moreover, jurisprudence is increasingly emerging from human rights institutions on the intersection of human rights obligations, corporations, and natural resources. The African Commission has done the most to specify the obligations of corporations with regard to the extraction of natural resources.[189] The Commission sets out a suite of corporate obligations corresponding to the rights recognized in the African Charter.[190] The first is an obligation to do no harm and take due care, which requires mechanisms for rectifying negative human rights impacts and for ensuring responsible supply chain management.[191] The second is an obligation for firms to respect all applicable fiscal and transparency obligations, and to inform and consult with the peoples affected by their operations.[192] Additionally, as noted above,

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Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 112 (July 9).

[186] Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4, ¶ 4 (July 6, 2011). John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*]. *See also* ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ¶¶ 24–27, https://www.etoconsortium.org/nc/en/mainnavigation/library/maastricht-principles/?.

[187] *Guiding Principles*, *supra* note 186, ¶¶ 17–24.

[188] *See Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx; *6th Session of the IGWG*, BUSINESS AND HUMAN RESOURCE CENTRE, http://www.business-humanrights.org/en/binding-treaty (last visited Mar. 2, 2021).

[189] ACHPR, *supra* note 17, ¶ 56.

[190] *Id.* ¶¶ 57–64.

[191] *Id.* ¶¶ 57–62.

[192] *Id.* ¶¶ 63–64. The African Commission's Niamey Declaration, *supra* note 128, art. 1(e, f, h), requests state parties to the African Charter to have legislation in place that makes the terms of concessionary contracts and the independent audits of all revenues received under them public

the Commission insists that a people's right freely to dispose of its natural resources is inviolable, and that states have only a delegated role in the exercise of this right. Given the Commission's detailed cataloguing of the substantial, procedural, and remedial rights that follow from this inviolable right, it appears that the Commission also sees corporations as bound to respect these rights of peoples where the rights bear on their conduct, on pain of criminal liability.[193]

A. Reforms to Lift the Resource Curse

Peoples' rights over resources are stated clearly in law and mostly not respected in fact. All of the reforms to laws and practices discussed so far have concerned the states where natural resources are extracted. Yet much, perhaps most, of the progress needed to secure peoples' rights over their resources can be made outside of the countries of extraction.

Around the world, it is the countries of extraction that are the sites where the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" are violated.[194] However, many of the legal reforms needed to counter such violations can be implemented in other states, and especially in the major economies of North America, Europe, and Asia. These states are the home states of the major extractive corporations, and so control the standards by which these corporations interact with state officials, indigenous peoples, and armed groups in countries of extraction. Moreover, these major economies are also the main importers of natural resources and the main sources of resource revenues going into countries of extraction. By making it legal for their persons to purchase natural resources from corrupt, violent, and oppressive actors in countries of extraction, importing states are today contributing to, and indeed sometimes sustaining, the continuing violation of the resource rights of peoples. To lift the resource

information, and that imposes criminal and administrative accountability on corruption within the extractive industries. Further, the Niamey Declaration Preamble affirms that the "extractive industries have the legal obligation to respect the rights guaranteed in the African Charter," and expresses alarm at the "low respect of human and peoples' rights in the extractive industries sector resulting in extensive individual and collective human rights violations."

[193] On corporate criminal liability, the African Commission quotes the Malabo Protocol of 2014, specifically its Article relating to natural resources. African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, art. 28L Bis at 32-33 (June 27, 2014) https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights. The Malabo Protocol will come into effect when it has 15 state parties; at the time of this writing there are 11. According to the Commission, acts triggering corporate criminal liability include concluding an agreement to exploit natural resources through corrupt practices, or concluding an agreement that is clearly one-sided, or that violates the legal procedures of the state concerned. Also triggering criminal liability is, the Commission says, "concluding an agreement to exploit resources, in violation of the principles of peoples' sovereignty over their natural resources." ACHPR, *supra* note 17, ¶ 60.

[194] ICCPR, *supra* note 19, art. 47; ICESCR, *supra* note 19, art. 25.

curse, this must change. In discussing methods for change, we take up corporate home-state regulation and the laws of resource-importing states in turn.

B. Realizing Peoples' Rights to Their Natural Resources: Home States Regulations

On corporate regulation, it is noteworthy that the major instruments to which many corporations and investors have already committed themselves require respect for "internationally recognized human rights." These instruments include the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the Equator Principles for financial institutions.[195] Were the substantive, procedural, and remedial rights described above to receive more international recognition, this would require corporations and investors committed to these instruments to evaluate, for example, whether a potential extractive project would break the "wall" of peoples' rights by directing resource revenues to corrupt officials who would use the funds for non-public purposes. Respect for peoples' rights might also require corporations to evaluate whether a potential project would exploit the resources of the territory beyond any possible accountability to the citizens. While many corporations and investors currently screen projects for corruption, few evaluate projects on their broader state accountability to citizens.[196] Evaluating and potentially rejecting potential extractive projects on this basis would require significant changes in their business practices.

Some corporations and investors do want to integrate human rights into their operational decisions. However, they also want regulations to be enforced equally on their competitors, and (especially in the extractive industries, where projects span years or even decades) they need clarity and predictability over how regulations will be applied. Stronger affirmation of citizens' human rights over their natural resources—for example, by the treaty bodies that oversee the Covenants—would increase pressures from business and finance for their home states to standardize the requirements for respect of these rights across competing firms, ideally with multilateral standardization and enforcement across all firms' home states. A historical parallel from the 1970s is the pressure that the private sector put on states to create multilateral standards for export credit agencies. This corporate

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[195] *Guiding Principles*, *supra* note 187; The Ten Principles of the UN Global Compact, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc (last visited Mar. 2, 2021); The Equator Principles, EQUATOR PRINCIPLES, https://equator-principles.com/ (last visited Mar. 2, 2021).

[196] Nathan M. Jensen & Edmund J. Malesky, *Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention*, 72 INT'L ORG. 33, 33–69 (2018).

pressure resulted in today's OECD and WTO regulatory instruments that create a "level playing field" for states' financial support for their firms operating abroad.[197]

Corporations are legal creations of their home states, and the regulatory standards of their home states can have great influence over which and how extractive projects proceed abroad. An illustration of the development of such home-state standards in a related domain is prohibitions on corporate bribery of foreign officials. Until the 1970s, no state regulated their firms' bribery of foreign officials; in some states, such bribes were even tax-deductible.[198] Starting with the U.S. Foreign Corrupt Practices Act of 1977, major states began to pass anti-bribery legislation binding their own corporations.[199] Coordination of these domestic laws was guided by OECD multilateral standards. All OECD member states have now passed anti-bribery laws, and these laws appear to have reduced bribery compared to nonmember states.[200] A broader multilateral instrument, the UN Convention Against Corruption, came into force in 2005 and now counts 186 state parties.[201]

Robust affirmation of the rights of citizens over natural resources should reinforce this existing anti-corruption regime. Home-state regulation of firms against making corrupt deals for natural resources can be characterized as protecting the "wall" of human rights that requires the disposition of natural resources to be made "in the exclusive interest of the people," instead of in the private interest of officials.[202] The addition of this human rights argument—based on the principle of self-determination of peoples, to which the great preponderance of states are committed—adds

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[197] *See* EXPORT CREDITS, OECD, https://www.oecd.org/trade/topics/export-credits/ (last visited Mar. 6, 2021); *Agreement on Subsidies and Countervailing Measures*, WTO, https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (last visited Mar. 6, 2021).

[198] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 929–1014 (2012).

[199] John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J. L. ETHICS & PUB. POL'Y 25, 25 (2012).

[200] On the OECD Convention, *see OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Mar. 6, 2021). On compliance, *see* Jensen & Malesky, *supra* note 196.

[201] *See* United Nations Convention against Corruption, G.A. Res. 58/4 (Oct. 31, 2003). The OECD has been attempting to persuade China in particular to join its more rigorous anti-corruption regime. Michael Griffiths, *OECD Wooing China to Sign Anti-Bribery Convention*, GLOBAL INVESTIGATIONS REV. (Aug. 17, 2018), https://globalinvestigationsreview.com/article/1173227/oecd-wooing-china-to-sign-anti-bribery-convention.

[202] African Charter, *supra* note 75, art. 21.

weight to calls for stronger home-state regulation of corporate corruption abroad.[203]

Respect for the resource rights of citizens requires firms to evaluate more broadly whether a potential project would exploit the territory's resources beyond any possible accountability to the people. As above, the procedural rights of citizens include rights to transparency and participation regarding the disposition of the territory's natural resources. For a corporation to remove resources from the territory under a non-transparent agreement with an unaccountable state or non-state actor would violate these procedural rights. Respect for the human right of self-determination thus requires firms not to make resource deals with authoritarian regimes or armed groups. Taking the propertarian language of the international instruments seriously, firms should not make deals for stolen goods—goods stolen from the people.

This conclusion, though seemingly inevitable in theory, immediately raises the question of how transparency and accountability could be measured with the clarity and certainty that the extractive industries need for planning their projects. How could companies evaluate whether any actor is transparent and accountable enough to the people to deal with, without fear of violating the rights of citizens "to enjoy and utilize fully and freely their natural wealth and resources"?[204] These might appear to be questions that go beyond the competence of businesses to answer individually and to agree on collectively.

The minimal requirements of transparency and accountability to citizens are not difficult to frame in the abstract.[205] To be able to hold their government accountable for its resource management, citizens must have at least bare-bones civil liberties and political rights. First, citizens must be able to find out what the government is doing with the territory's resources and where the resource revenues are going. Second, citizens must be able to discuss and peacefully protest what the government is doing without reasonable fear of losing their jobs, freedoms, or lives. Third, if a majority

[203] Whatever the realities of its policies, China is ideologically a "people's republic," based on the principle of both external and internal self-determination of peoples, as can be seen in the first paragraph of the Chinese constitution: "Feudal China was gradually reduced after 1840 to a semi-colonial and semi-feudal country. The Chinese people waged wave upon wave of heroic struggles for national independence and liberation and for democracy and freedom . . . After waging hard, protracted, and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat capitalism, won the great victory of the new-democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country." CHINA [CONSTITUTION] 1982, Pmbl.

[204] ICCPR, *supra* note 19, art. 47; ICESCR, *supra* note 19, art. 25.

[205] *See* Wenar, *supra* note 13, at 225–30.

of citizens strongly disagree with the government's management of the country's resources, then government policy must change to reflect this within a reasonable time.

These standards are not impossibly high; not every oil-exporter needs to be Norway to be above this rather low baseline. Moreover, there are respected independent metrics that evaluate all states on whether they are "above the line" on the relevant rights and liberties.[206] Possible biases in these metrics can be balanced out by combining them into a "'metrics of metrics," which have already been developed.[207] Using such a combined metric to evaluate which states are at least minimally accountable to citizens finds that states like Nigeria and Kuwait are "above the line" of public accountability, while autocracies and failed states like Turkmenistan and South Sudan are below it.[208] Perhaps surprisingly, the clarity and predictability required for evaluating respect for citizens' procedural rights over their natural resources are attainable.

Nevertheless, it might strain credulity to believe that extractive corporations and investors will by themselves coordinate sufficiently to pressure their home states to impose common standards to respect this aspect of peoples' resource rights. After all, these standards would restrict the set of states in which these companies could do business. Much of the initiative to set such standards would need to come from states themselves. States must come to understand that their obligation to respect the self-determination of peoples, which most states have historically committed to uphold, requires significant changes in their domestic law. This is precisely why the human rights-based approach to citizens' rights to natural resources is so important to these debates on transparency and accountability. It adds the legal and moral elements that have been missing so far in international discussions of these issues.

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[206] Transparency and accountability are measured, for example, by sub-indices of the World Bank's Worldwide Governance Index, by the indices published by the Economist Intelligence Unit, Freedom House, Transparency International, and others. *See* Daniel Kaufmann & Aart Kraay, *Worldwide Governance Indicators*, WORLD BANK, https://info.worldbank.org/governance/wgi/ (last visited Mar. 6, 2021); *Democracy Index 2020*, ECONOMIST INTELLIGENCE UNIT, https://www.eiu.com/topic/democracy-index (last visited Mar. 6, 2021); Freedom House, *supra* note 1; Transparency International, *supra* note 2.

[207] *See* Wenar, *supra* note 13, at 284–87; CLEAN TRADE, http://www.cleantrade.org/investors (last visited Mar. 6, 2021) (explaining the Clean Trade Governance Index).

[208] *Id.*

C. Realizing Peoples' Rights to their Natural Resources: Importing State Laws

The legal changes required for states to respect peoples' resource rights go beyond the regulation of their own corporations. The deepest domestic reform required for the self-determination of peoples concerns the legality of resource imports. States that import natural resources have sovereign authority over where it will be legal for their persons to source those resources. How states decide to exercise this sovereign authority can be decisive for whether peoples' rights over their resources will be respected or violated in the countries of extraction, as can be seen by reviewing the dynamics of today's resource curse.

Natural resources such as petroleum, metals, and gems are concentrated sources of economic value that can be extracted from relatively small and easily-secured sites. Under today's legal regime, the default rule of all states is for it to be legal for their persons to purchase resources from whatever state (and sometimes non-state) actor controls the territory where the extraction site is located.[209] This means that whoever controls resource-rich territory can receive substantial (and sometimes immense) revenues from selling the resources of that territory to foreigners. In essence, whoever can keep coercive control over some holes in the ground can get rich.[210]

In many resource-rich countries, a regime that can keep control over oil wells or mineral mines can get the funds it needs for the coercion or clientelism that will keep it in power. Examples include the governments of Azerbaijan (oil) and Zimbabwe (diamonds).[211] For non-state actors, an armed group that can seize extraction sites can get the funds it needs to start or escalate a civil conflict. Examples have been ISIS (oil) and the militants in the eastern Congo (metals).[212] For both state and non-state actors, what is notable about the power they gain from resource revenues is that this power comes with no accountability. Unlike foreign loans from banks, resource revenues need never be paid back. Unlike aid from foreign allies, resource revenues arrive with no conditions attached. Most significantly, resource revenues flow to state and non-state actors beyond accountability to the

[209] For example, when Saddam Hussain's junta took over Iraq in a coup in 1968, it became legal for the persons of all states to buy Iraq's oil from that junta. When ISIS took over some of those same wells in 2014, it became legal to buy Iraq's oil from ISIS. (Some importing states then imposed sanctions on ISIS, which made it illegal for their persons to buy oil from ISIS.) Wenar, *supra* note 25.

[210] *Id*.

[211] For examples of recent reporting on governance in Azerbaijan and Zimbabwe, *see* Radio Free Europe, *Critics Say Azeri Petrodollars Mask Poverty and Oppression* (Apr. 9, 2019), https://www.rferl.org/a/azerbaijan-critics/29870317.html; *Zimbabwe*, GLOBAL WITNESS, https://www.globalwitness.org/tagged/zimbabwe/ (last visited May 10, 2021).

[212] Wenar, *supra* note 13, at 49, 54–55.

people. Resource-empowered actors typically do not need a healthy, educated, or politically engaged population to gain the revenues that keep them in power. Indeed, resource revenues can even continue to flow during widespread civil conflict, as in Libya after the fall of Gaddafi.[213]

Under the current transnational legal regime, large resource revenues go to state and non-state actors who are entirely unaccountable to their citizens for the management of those resources. In many countries, these revenues enable these actors to abuse and neglect citizens, often while enriching themselves. This helps explain the correlations with which we began: today, most authoritarian regimes, highly corrupt regimes, civil wars, and hunger crises are in resource-rich states; most refugees have been fleeing from these states, and ever-more of the world's extreme poverty is located in these states.[214] In many resource-rich states, citizens can only watch as the natural resources of their country are extracted and sold off by actors who will use the revenues further to oppress, attack, or impoverish them. This is the resource curse.

The revenues that empower unaccountable actors in resource-exporting states come from resource-importing states. Yet this need not remain so; every sovereign state has the right to determine from whom it will be legal for its persons to buy resources.[215] It is within the legal authority of sovereign states to stop resource revenues from flowing from them to state and non-state actors who are not minimally accountable to citizens for exports. There will be practical considerations for individual states that want to stop such flows, such as energy security and diplomatic relations with traditional allies. Yet the legal authority itself is not in question.

It might be asked why states would consider exercising this authority.[216] A different perspective asks how they could justify not doing so. Recall the repeated affirmation of the people's resource rights in the Covenants:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . In no case may a people be deprived of its own means of subsistence. Nothing in the present Covenant shall be interpreted as

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[213] Irene Costantini, *Conflict Dynamics in Post-2011 Libya*, 5 CONFLICT SEC. & DEV. 405 (2016).

[214] *See supra*, notes 2–6.

[215] In 2011, for instance, the United States made it illegal for its persons to buy petroleum from the Libyan government; and in 2016 it prohibited transactions with the senior oil official of ISIS. Exec. Order No. 13566, 31 C.F.R. §570 Appendix A (July 1, 2011); *Treasury Sanctions Key ISIL Leaders and Facilitators Including a Senior Oil Official*, US DEPT. TREASURY (Feb. 11, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0351.aspx.

[216] The economic and diplomatic feasibility of states in North America and Europe tapering off oil imports from exporters that lack minimal accountability to citizens is discussed in LEIF WENAR ET AL., BEYOND BLOOD OIL: PHILOSOPHY, POLICY, AND THE FUTURE 18–23 (Rowman & Littlefield Publishing Grp. Inc. 2018).

> impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.[217]

Both articles of the Covenants use propertarian language: the resources of a country are the people's resources. As we have seen, this has been interpreted as meaning that the resources are the people's "birthright." At independence, the resources start out in the people's hands, although they may thereafter be privatized. Many national constitutions and laws use similar propertarian language. If this language is accepted literally, then anyone selling off a territory's public resources without any possible accountability to the owners of those resources, the citizens, is selling stolen goods. Importing states that use their authority to stop their nationals from buying resources from unaccountable resource vendors would be prohibiting their nationals from buying stolen goods. These importing states would be enforcing the property rights of peoples to their natural resources. Importing states that reform their domestic law to prohibit their persons from buying resources from unaccountable foreign actors would thus be correcting a flaw in today's global markets: a flaw that allows resources to be bought legally from actors unaccountable to the owners of those resources. Reforming importing states would be transforming a black market in stolen goods into a genuine market where stolen goods cannot be purchased under color of title. Brazil's Senate is now considering legislation, phrased in exactly these terms, that would reform its law in just this way.[218]

Finally, beyond these two types of reforms, stronger affirmation of peoples' resource rights may impact other areas of transnational law such as investor-state relations. To see possible impacts on investor-state relations, a parallel may be drawn to recent rulings regarding corruption.[219] Some international investment tribunals have held that investor-state contracts that were obtained by corruption are either invalid or unenforceable. It has been

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[217] *See* ICCPR, *supra* note 19; ICESCR, *supra* note 19.

[218] Senado Federal de Brasil, Projeto de Lei do Senado [Federal Senate of Brazil, Senate Bill] no. 460, de 2017. This legislation would prohibit Brazilian companies from importing oil from states that violate the principle of popular sovereignty over natural resources and would prohibit Brazil's national oil company from entering into new contracts with the governments of such states. The legislation is pending as of the time of this writing, March 2021.

[219] *See* Sophie Nappert, *Nailing Corruption: Thoughts for a Gardener*, *in* THE PRACTICE OF ARBITRATION 161 (P. Wautelet, T. Kruger, & G. Coppens eds., 2012); Hilmar Raeschke-Kessler & Dorothée Gottwald, *Corruption*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 586 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni, eds., 2009); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?* 60 INT'L COMP. L. Q. 573 (2011).

held that the anti-corruption norms affirmed in several international instruments are a matter of international public policy, and so tribunals are obliged to comply with these norms in their decisions.[220] In one much-discussed decision, a tribunal found that an investor could not enforce a contract because the state official that it had bribed to win the contract was acting beyond his legitimate state functions, so that his actions could not be imputed to the state itself.[221] As two distinguished scholars have summarized this line of reasoning, "corruption inducing an investment transaction invalidates it, and . . . in such cases the loss lies where it falls."[222]

Were citizens' resource rights to become more consistently recognized, the result would be a state appealing to a tribunal against the enforcement of a contract for natural resource exploitation made between an investor and a predecessor authoritarian regime. The state would allege that there was "reasonable certainty" or "clear and convincing evidence" that the contract had been concluded without the possible participation either of the relevant indigenous peoples or of the citizens of the state.[223] The contract, the claimant state would argue, thus contradicts international public policy. A consistent line of decisions by tribunals accepting this argument would increase respect for peoples' resource rights and further the security of future investor-state agreements.[224] The idea that corruption could lead tribunals to annul investment contracts seemed merely theoretical a few years ago; as the previous paragraph shows, this is now established practice. The law is now waiting for lawyers to take parallel actions on citizens' resource rights that will turn legal theory into legal reality.

CONCLUSION

After their long historical development, the rights of peoples over their natural resources are now ready for decisive international affirmation and enforcement. The sooner this recognition is given, the better. Natural resources are crucial for the cultural integrity and the survival of indigenous

[220] *See, e.g.*, Vladislav Kim et al. v. Republic of Uzbekistan, ICSID Case No. ARB/13/6 (1997) (undecided on public policy argument); Joachim Drude, *Fiat Iustitia, ne Pereat Mundus: A Novel Approach to Corruption and Investment Arbitration*, 35 J. INT'L ARB. 665 (2018). For a recent rejection of an appeal to public policy in a commercial dispute, *see Vantage Deepwater Co. v. Petrobras Am. Inc.*, No. 4:18-cv-02246, 2019 WL 2161037 (S.D. Tex., May 17, 2019).

[221] World Duty Free Co. Ltd. v. Kenya, ICSID Case No. ARB/00/7 ¶ 178 (Sep. 25, 2006).

[222] James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 27, 37 (M. Kinnear & G. R. Fischer et al. eds., 2015).

[223] On the standard of proof related to economic crimes such as corruption, *see* Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 INT'L COMP. L. Q. 577, 588–90 (2018).

[224] For the parallel to the current decisions involving corruption, *see id.* at 596–97.

peoples. Natural resources are also essential to secure the subsistence and the economic health of national populations. Without sufficient accountability, peoples can find that the revenues from their territory's resources are being spent without benefit to them or, in many cases, are even being used against them. The shockingly high prevalence of authoritarianism, corruption, poverty, and civil conflict in contemporary resource-rich states demonstrates the dangers of a lack of public accountability. Respect for the rights of peoples over their natural resources is essential for the resources of all states to become a blessing instead of a curse.