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Indigenous peoples' right to self-determination and the principle of state sovereignty over natural resources: A human rights approach and its constructive ambiguity

Dorothée Cambou*

Introduction

The rights of Indigenous peoples to natural resources have been a controversial topic ever since the time of colonization of their land and territories. While such rights are essential for the existence of Indigenous peoples and their right to self-determination, historically, states have often jeopardized the relationship that Indigenous peoples have with natural resources while appropriating and exploiting their lands and territories for their own benefits. Under international law, legal mechanisms have also been adopted for consolidating state authority over Indigenous land and natural resources, which has facilitated the colonization and the appropriation of resources located on the territories of Indigenous peoples.[1] The principle of state Permanent Sovereignty over Natural Resources (PSNR), which is considered customary international law,[2] is one of the legal devices that has consolidated state control over natural resources and continues today to support their authority in the governance of the land and territories of Indigenous peoples.

However, the principle of PSNR does not only give rise to the unfettered rights of states to govern natural resources located on its territory.[3] PSNR also implies the duties of states to govern natural resources for the well being of the people.[4] Although such an interpretation has for a long time being restricted in practice, the development of human rights law is supportive of such an understanding. Specifically, the recent development of the rights of Indigenous peoples has opened an avenue to ascertain a human rights approach to the right to control natural resources based on their right to self-determination.[5] The adoption of the International Labour Organization Convention 169 in 1989 materialised a shift in the discourse of international law by supporting the rights

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[1] James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 22.

[2] See in particular, International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports, 2005.

[3] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

[4] See also Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries' (2006) 39 New York University journal of international law and politics 417; Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38 George Washington international law review. 33; Jérémie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?' (2013) 31 Netherlands quarterly of human rights 314. Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018) 12-31.

[5] In his most recent work, Gilbert concurs with such an interpretation: Gilbert, *Natural Resources and Human Rights* (n 4) 26–28.

of Indigenous peoples to land and natural resources.[6] Subsequently, the adoption process of the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) culminated with the recognition of the right of Indigenous peoples to self-determination and the reassertion of their rights to land and natural resources.[7]Although the UNDRIP does not recognise the right of Indigenous peoples to PSNR, it recognises the obligations of states to guarantee the rights of Indigenous peoples to land, territories and resources. On this basis, this chapter argues that the UNDRIP supports a human rights approach to the right to dispose of natural resources, in so far as the Declaration recognizes the rights of Indigenous peoples to land, territories and resources as a basis for their right to self-determination and the correlative duties of the states to respect these rights.

By revisiting the evolution of contemporary international law concerning the development of PSNR and its interaction with the rights of Indigenous peoples to self-determination, the purpose of this analysis is to show how international law supports a human rights approach to the right to control natural resources, which seeks to conciliate Indigenous peoples' rights to self-determination with state sovereignty over governance of land and resources. Such an approach is emerging but increasingly supported by scholars on the basis of the development of human rights and the recognition of the rights of Indigenous peoples.[8]

To undertake such an analysis, the chapter is divided into four main sections. Section 1 examines the emergence of the doctrine of PSNR in the decolonization context and explains its link to the right to self-determination. Section 2 explains how the discourse of international law concerning natural resources has evolved from a state-centred approach towards a human rights approach that includes the obligations of states to guarantee the rights and interests of the people in the governance of resources. This section primarily concerns the development of the right to self-determination as a human right, which provides a basis for peoples to freely dispose of their natural resources. Section 3 describes the recognition of the right of Indigenous peoples to self-determination. It focuses on the adoption process of the UNDRIP and examines the relationship between the rights of Indigenous peoples to self-determination, PSNR and their rights to land and natural resources. In analyzing the provisions of the UNDRIP, section 4 clarifies the scope and content of Indigenous peoples' rights to land, territories

[6] ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), signed 27.6.1989, entered into force 5.9.1991, 28 ILM 1382, 1989.
[7] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Resolution 61/295.2007. For a recent commentary of the UNDRIP, see Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018).
[8] See in particular Dorothée Cambou and Stefaan Smis, 'Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic' (2013) 22 Michigan State international law review 347; Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018); Jérémie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?' (2013) 31 Netherlands quarterly of human rights 314. Lillian Aponte Miranda, 'The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development' (2012) 45 Vanderbilt journal of transnational law 785; Endalew Lijalem Enyew, 'Application of the Right to Permanent Sovereignty over Natural Resources to Indigenous Peoples' (2017) 8 Arctic Review on Law and Politics 222.

and resources and the correlative duties of states. As it will be demonstrated, the recognition of these rights lies in a constructive ambiguity, which ascertains Indigenous peoples' rights to natural resources located on their traditional territories without challenging the primacy of states' permanent sovereignty over natural resources.

1-The right to natural resources as a basis for PSNR: from states rights to duties

After the Second World War, the issue of control over natural resources emerged as an issue of concerns among states at the United Nations (UN) General Assembly. In an effort to provide newly independent states with a legal shield against infringements of their economic sovereignty, a number of resolutions were adopted. [9] One of the first UN resolutions concerning the issue was adopted in 1952 and recognized "the right of under-developed countries to freely determine the use of their natural resources to further their economic development in accordance with their national interests". [10] This was followed by Resolution 626, which proclaimed the right of each under-developed country to freely use and exploit natural wealth and resources, as is inherent in their sovereignty.[11] As reflected in these resolutions, the right to control natural resources emerged as a means of guaranteeing economic independence for developing countries and their self-determined development.[12]

In parallel, the issue of control over natural resources expanded beyond newly independent states. Because there was an increasing consciousness that political independence was not enough for determining their own development, developing countries asserted that peoples still living under colonial rule should be able to freely dispose of their natural wealth and resources.[13] This led to the establishment in 1958 of a commission on Permanent Sovereignty over Natural Resources (PSNR) to conduct a full survey of the status of the right of peoples and nations to permanent sovereignty over their natural wealth and resources as a basic constituent of the right to self-determination. [14] The work of the commission culminated in the adoption of the Declaration on PSNR at the General Assembly in 1962. The Declaration proclaims the right of peoples and nations to PSNR,[15] but ambiguously also recognizes the right of states to natural resources. Although the simultaneous terminology of people and states creates ambiguity as to the subject of PSNR, it has convincingly been explained that the term 'people' refers to people under colonial rule and developing states.[16] In this regard, Resolution 1803 suggests the idea that in addition to developing states, colonised people "possess a latent sovereignty over resources and, therefore, an

[9] Nico Schrijver, 'Natural Resources, Permanent Sovereignty over' [2010] Max Planck Encyclopaedia of Public International Law.

[10] UN General Assembly, Resolution 523 (VI) of 12 January 1952.

[11] UN General Assembly, Resolution 626 (VII) of 21 December 1952.

[12] Schrijver (n 3) 24–25.

[13] See i.e. UN General Assembly, Resolution 1514 (XV) of 14 December 1960.

[14] For a summary of the genesis of Resolution 1803 see, General Assembly Resolution 1803 (XVII) Permanent Sovereignty over natural Resources, United Nations Audio-visual Library of International Law, < http://legal.un.org/avl/ha/ga_1803/ga_1803.html> (last accessed 23 November 2018).

[15] UN General Assembly, Resolution 1803 (XVII) of 14 December 1962, para. 1.

[16] Schrijver (n 3) 8; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) 217.

accompanying right to their natural resources".[17] However, because international law defined colonized peoples in the narrow sense as the homogenous population of colonized territory separated from colonial states by the sea,[18] Indigenous peoples have not been recognised with the right to claim the benefit of PSSR pursuant to the right of self-determination in the context of decolonization.

Subsequently, the idea of PSNR as a basic constituent for self-determination fell into disuse and was replaced by the right of developing states to PSNR. As rightly explained by Schrijver, this conclusion can be illustrated by "the fact that initial references to the principle of self-determination and to peoples as subjects of the right of permanent sovereignty—as they occur—for example in General Assembly Resolutions 837 (IX), 1314 (XIII) and 1803 (XVII)—were later abandoned and replaced by an increasing emphasis on sovereignty, first of developing countries and later of all States".[19] Consequently, the economic aspect of self-determination became "a mere accompanying tool for ensuring economic independence for the newly independent states, rather than an independent and distinct right".[20] This development had a further consequence that "the doctrine of PSNR became primarily tied to mediating interstate sovereignty over natural resources", [21] rather than a right for peoples to be claimed for their own benefit at the intrastate level.

Afterwards, the state-centric orientation of the right to control natural resources ostensibly increased with the call for the establishment of a New International Economic Order.[22] In 1974, the UN General Assembly adopted without a vote Resolution 3201 (S-VI) otherwise entitled "Declaration on the Establishment of a New International Economic Order". This instrument proclaims the "Full permanent sovereignty of every State over its natural resources and all economic activities".[23] The declaration also stipulates "the right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation arid depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples". Such provisions therefore confirmed the sovereign and state-centred approach to the rightto natural resources in international law.

Nonetheless, whereas the rights of states feature prominently in the development of the doctrine of PSNR, the significance of their duties has also become the object of a developing corpus of international law.[24] This evolution is more linked with the development of environmental law, which has increasingly placed the responsibilities

[17] In other words, PSNR provides "the right of an entity which had not yet acquired independence to some sort of recognition and protection by the international legal system". Anghie (n 16) 217.
[18] See in particular the salt water doctrine: Hurst Hannum, 'Self-Determination in the Post-Colonial Era', *Self-Determination: International Perspectives* (Donald Clark and Robert Williamson, St Martin's Press 1996) 18.
[19] Schrijver (n 3) 370.
[20] Farmer (n 4) 423.
[21] Miranda (n 8) 795.
[22] Schrijver (n 9); Schrijver (n 3).
[23] UN Doc.A/RES/S-6/3201, para 4(e).

[24] Schrijver (n 3) 306-367.

of states at the center of attention in relation to the governance of natural resources. For example, in 1972, the UN General Assembly adopted the Stockholm Declaration of the United Nations Conference on the Human Environment to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. The declaration emphasizes the sovereign right of states to control natural resources, but also underlines their correlative duty to respect and protect the environment and the need to cooperate at the international level. For instance, principle 21 of the declaration indicates that states have "the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States".[25] Thus, while reiterating the state-centred orientation of the right to control natural resources, the declaration also enshrined limitation to the exercise of PSNR.[26]

Therefore, in the development of modern international law pertaining to the governance of natural resources, the focus has shifted from the rights of states towards the inclusion of their mutual obligations. In addition, many legal instruments emphasize the obligations of states to govern natural resources for the benefit of peoples. Resolution 1803, for instance, underlines that the principle of PSNR "must be exercised in the interest of their national development and of the well-being of the people of the State concerned". Similarly, article 7 of the Charter of Economic Rights and Duties of States indicates that "every State has the primary responsibility to promote the economic, social and cultural development of its people". In light of these provisions, it has been increasingly argued that peoples hold rights against their states to ensure their well-being in the governance of natural resources.[27] However, these latter instruments did not clarify the nature of the obligation of states in this context, which undermined the legal right of peoples to claim rights at the domestic level. In addition, this development did not entail the rights of Indigenous peoples to natural resources located on their traditional land. At least until the 1990s, Convention 107 on Indigenous and Tribal Populations, adopted by the International Labour Organization in 1951,[28] was the only instrument featuring obligations concerning the rights of Indigenous peoples under international law. This instrument, which was clearly paternalistic in its tone, was also only ratified by a few states.[29]

Nevertheless, with the development of a separate corpus of human rights law and the recognition of the internal aspect of self-determination, the idea that the interest of

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[25] Over the years, other instruments have also contributed to ascertain the responsibility of states in relation to the environment: The 1975 Convention on Trade in Endangered Species, the 1982 UN Convention on the Law of the Sea and the 1993 Convention on Biological Diversity are only a few example among these global instruments that includes clarification on the obligations of states in the governance of natural resources

[26] For an analyzis of the the obligations of states pertaining to the principle of PSNR, see Schrijver (n 3) 306-367.

[27] Farmer (n 4); Duruigbo (n 4).

[28] ILO, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959) Geneva, 40th ILC session (26 June 1957).

[29] The International Labour Office has sought to persuade parties to C107 to ratify C169 which would result in their automatic denunciation of C107, but a number of states remain parties to C107.

peoples might be a limitation to states' sovereignty over natural resources eventually crystalized. The following section describes how the approach of international law concerning the right to natural resources shifted from mediating inter-state relations towards a focus on the relations between states and the people at the intra state level.

2. The 'rebirth' of self-determination in support of the human right to dispose of natural resources

While PSNR originally vested the right to natural resources in developing states and colonized countries, from the lens of the human right to self-determination, the right to natural resources belongs more generally to peoples. As explained by Gilbert, "this dichotomy is the result of the development of two branches of international law that focus on different actors but address the same right: the right to dispose of…natural resources".[30] This differentiation has been underlined by several authors who warned about the consequences of conflating the rights of peoples with the rights of states: "equating peoples and States undoubtedly further strengthens the State and subordinates the rights of the people to the whims of those in power."[31] Facing the increasing reality that many governments hijack natural resources for their own benefits, it has increasingly been argued that a "reinvigorated notion of economic self-determination" that "allows peoples to assert control over their own natural resources…is an essential tool for human rights realization" that should be promoted above the interests of states.[32] This conceptualization is based on the assertion of a right to self-determination that provides a basis for peoples to control natural resources beyond the decolonization context.

Yet, the human rights framework has not fully clarified the relationship between the human right to control natural resources with the international legal principle of states' sovereignty over their natural resources.[33] While the adoption of common article 1.2 of the UN Covenants recognizes that the right to dispose of natural resources forms a basis of the right of all peoples to self-determination, international law has been slow in clarifying the subject and meaning of this provision. During the decolonisation period, the right to economic self-determination "was an appendage to political self-determination",[34] "a poor second cousin",[35] which aimed to provide colonized countries and newly independent states with control over resources dominated by colonial and imperialistic interests. This was reflected in the debates regarding the adoption of UN resolutions on the right to control natural resources and equally mirrored by the drafting process of common article 1.2 of the UN Covenants concerning the resource dimension of the right of peoples to self-determination. As evidenced in

[30] Gilbert, The Right to Freely Dispose of Natural Resources (n 4) 316; See also Gilbert, *Natural Resources and Human Rights* (n 4) 12–31.
[31] Schrijver (n 3) 370–71.
[32] Farmer (n 4) 421.
[33] Gilbert, The Right to Freely Dispose of Natural Resources: (n 4) 325.
[34] Farmer (n 4) 421.
[35] Ibid 423; J Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) 15 American University international law review 151, 169–72.

the *travaux preparatoires* of article 1.2, the inclusion of the right to natural resources was clearly advocated as a proxy for developing countries to gain economic independence, rather than as right for peoples to be claimed at the intrastate level. In this context, it was perceived that PSNR constituted an element of the rights of peoples to self-determination, a right that was ascribed for developing states and colonized countries, [36] as opposed to a right for peoples against their states.

Furthermore, the integration of the principle of PSNR as a basic constituent of self-determination in the UN Covenants was not explicitly recognised due the controversies it raised between western states and newly independent as well as socialist states.[37] From a legal perspective, a number of western states argued that PSNR was "relevant to the rights and duties of states rather than to human rights" and that the use of sovereignty in relation to "peoples," was problematic because "peoples" were not sovereign "states".[38] In other words, it was perceived that PSNR belongs to the realm of inter-state relations, as opposed to intra-state relations. In contrast, the significance of natural resources for the exercise of self-determination was perceived by most newly independent states as a sine qua non condition to pursue economic independence. As a result, the inclusion of PSNR in the human rights covenants was not accepted. Instead, it is the right to natural resources as a basic dimension of self-determination which has been recognized, though with substantive limitations to ensure that the right would not completely jeopardize western interests and international economic cooperation. Consequently, the discussion held during the adoption process of common article 1.2 of the UN Covenants resulted in the following textual compromise:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Hence, the idea of enshrining PSNR as a basis for self-determination was diluted by reference to the right to freely dispose of natural resources. Although this wording has allowed international law to temporarily decouple the right to control natural resources from PSNR, it did not help to clarify the relationship between the right to control natural resources and the human right of self-determination beyond the decolonization context. Despite the adoption of article 1.2, the development of the resources dimension of self-determination remained primarily concerned with external interference in peoples self-determination and their right to govern natural resources for their own benefits against foreign interference. "As the HRC observed, the freedom of dealing with natural resources involves a correlative duty of other states not to interfere with such freedom".

[36] "The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States."

[37] For an analysis of the *travaux préparatoires* of Article 1.2 see Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 12–132.

[38] Schrijver (n 3) 49.

[39] Hence, the right to freely dispose of natural resources originally focused on the rights of peoples qua states to be free from outside interference. It did not entail the rights of peoples against their states, or the rights of Indigenous peoples to claim control over natural resources at the domestic level.

Eventually, a shift of emphasis concerning the conceptualization of the right to freely dispose of natural resources occurred in the 1990's when the doctrine of internal self-determination emerged. As explained by Cassese in 1998,

> [G]iven that the people of every sovereign State have a permanent right to choose by whom there are governed, it is only logical that this right should have the right to demand that the chosen central authorities exploit the territory natural resources so as to benefit the people. Herein enters Article 1.2, which provides that the right to control and benefit from a territory's natural resources lies in the inhabitants of the territory. This right, and the corresponding duty of the central government to use the resource in a manner which coincides with the interests of the people, is the natural consequence of the right to political self-determination.[40]

Accordingly, it became increasingly clear that the right to self-determination concerns the right of the population of independent states to claim the benefit of the governance of natural resources against states at the intrastate level. In practice, one of the first consecrations of this interpretation occurred in 1997 when the Committee on Economic, Social and Cultural Rights (CESCR) found that the privatization by Azerbaijan of its oil resources required respect for rights to information and participation in the process in order to comply with the right to self-determination as enshrined in Article 1.[41] From this lens, the CESCR confirmed the position that the right to self-determination is violated when the government of a state is exploiting its resources for the sole benefit of a certain class or group of society. The right to self-determination can be considered "as a shield by peoples to seek greater accountability from states to distributional outcome[s]" of resource development and exploitation.[42] This interpretation supports the idea that peoples, as opposed to states, are the legal holders of the right to control natural resources. It also confirms the idea that self-determination is not fulfilled by political and economic independence or the absence of external interference. Beyond the decolonization context, the right to control natural resources found application in the demand of the population that their natural wealth and resources be exploited for their own benefits.[43] The right to freely dispose of natural resources becomes the economic counterpart of political self-determination, interpreted as a right of peoples to democratic governance applied to the natural resources context.[44]

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[39] Saul, Kinley and Mowbray (n 37) 62.
[40] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 55–56.
[41] CESR, Concluding observation: Azerbaidjan. UN Doc E/C.12/1/Add. 20 (1997).
[42] Miranda (n 8) 804.
[43] Cassese (n 40) 103.
[44] On the relationship between self-determination and democratic governance see Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46.

Despite the importance of this evolution for strengthening a human rights approach to the right to dispose of natural resources, one caveat of this development has been its focus on the right of the population of sovereign territories. With this approach, the "rebirth" of economic self-determination did not question the distinctive rights of local communities or Indigenous peoples at the intra-state level.[45] Until the turn of the century, the subject of the rights to internal self-determination and to natural resources were the state's population, regardless of their ethnic, cultural or minority status. Consequently, the question of the rights of Indigenous peoples to land and natural resources constituted a blind spot in international law: an issue that remained to be addressed by the state as a part of its domestic affairs. That said, the development of the doctrine of internal self-determination resolutely opened the doors to re-conceptualize the right to self-determination as it allowed a shift of emphasis from its inter-state to its intra-state application while thus positing the inhabitants of a state as human rights bearers of the right to natural resources vis-à-vis the state.[46]

The next stage in the evolution of international law in this field came with the recognition of the right of Indigenous peoples to self-determination. The implications of this development for the assertion of a human right approach to control natural resources are further discussed in the following sections.

3. The right to natural resources as a basis for Indigenous peoples self-determination

As already mentioned, it is now largely recognised that the right to self-determination applies beyond the decolonization context.[47] With the adoption of the UN human rights Covenants, it became increasingly clear that self-determination is not only a right for colonized peoples.[48] The Human Rights Committee (HRC), charged with providing authoritative interpretations of the norms contained in the International Covenant on Civil and Political Rights (ICCPR), has interpreted article 1 as the peoples' right "to choose the form of their constitution or government" and in relation to the rights of individuals to participate in these processes.[49] Contrary to the colonial variant of self-determination, this latter form of self-determination must be exercised within the confines of existing states, respecting the principle of territorial integrity of sovereign states. International doctrine has labelled this interpretation of the right as "internal self-

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[45] See in particular Farmer (n 4); Duruigbo (n 4).
[46] For a similar argument but differently conceptualised on the premise of the right of peoples to PSNR see Miranda (n 8) 795.
[47] There is abundant literature on the topic:Cassese (n 40); Christian Tomuschat, *Modern Law and Self-Determination* (Martinus Nijhoff Publishers 1993); Franck (n 44); Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?', *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Stephen Allen, Alexandra Xanthaki, Hart Publishing 2011).
[48] Ibid.
[49] HRC, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service, UN Doc. CCPR/C/21/Rev.1/Add.7, 1996, para 2.

determination”.[50] Such an understanding is in accordance with the conception of self-determination conceptualized as a continuing right, a lasting process rather than a one-time affair, which is not exhausted once independence is achieved.

While the right to internal self-determination has been traditionally interpreted without considering ethnic divisions or the diversity of identities at the national level, it is now recognised that Indigenous peoples also have the right to self-determination. In recent decades, the practices of human rights bodies have increasingly acknowledged the application of the right to self-determination to Indigenous peoples, including the right to dispose freely of their land and resources. The HRC started to apply article 1 to the situation of Indigenous peoples in country reports as early as 1999. For instance, in its 1999 concluding observation on Canada, the HRC recognized that “without a greater share of lands and resources institutions of aboriginal self-government will fail”.[51] In this regard, the Committee also “emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)”.[52] In 1999, the HRC also expressed its concern over Norway’s failure to report on “the Sami people’s right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”.[53] Similarly, the Committee called on the government of Australia to take the “necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources”, as provided under article 1.2 of the Covenant.[54] Thus, even though the HRC refuses to directly assess individual communications on peoples’ right to self-determination,[55] it has confirmed the application of article 1.2 to the situation of Indigenous peoples through its recommendations in country reports, thereby making apparent that Indigenous peoples have the right to dispose freely of their natural resources pursuant to the right to self-determination.[56]

With the adoption of UNDRIP in 2007,[57] the UN General Assembly expressly recognized the right of Indigenous peoples to self-determination and has contributed to further ascertaining the rights of Indigenous peoples to natural resources.[58] This is in

[50] Cassese (n 40) 97–98; Allan Rosas, ‘Internal Self-Determination’, *Modern law of self-determination* (Christian Tomuschat, Marinus Nijhoff Publishers 1993) 231.
[51] HRC, Concluding Observation: Canada, UN Doc. CCPR/C/79/Add.105 (1999), para.8
[52] Ibid.
[53] HRC, Concluding Observation: Norway, UN Doc. CCPR/C/79/Add. 112 (1999), para.17.
[54] HRC, Concluding Observations, Australia, UN Doc. A/55/40 (2000), para. 507.
[55] However, the HRC confirmed the relevance of Article 1 to interpret other rights protected by the Covenant, in particular article 27 in its communications, see in particular Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), para 9.2.
[56] This was also confirmed in more recent conclusions such as HRC, Concluding Observation: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006), paras.8 & 9; UN Doc. CCPR/C/CAN/CO/6 (2015), para.16; Concluding Observation: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006), para.37; Concluding Observation: Mexico, UN Doc. CCPR/C/MEX/CO/5 (2010), para. 22.
[57] UN General Assembly, Declaration on the Rights of Indigenous Peoples, UN Doc. a/61/295, 2007.
[58] For a general analysis of the UNDRIP see also, Claire Charters, ‘Indigenous Peoples' Rights to Lands, Territories and Resources in the United Nations Declaration on the Rights of Indigenous Peoples Articles 25, 26, 27 and 10’, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Jessie Hohmann and Marc Weller, Oxford University Press 2018). Allen, S. ′The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project’, in

addition to the adoption of ILO Convention 169, which has also contributed to the progress of international law regarding Indigenous peoples,[59] but lacks recognition of the right of Indigenous peoples to self-determination and is only ratified by a limited number of countries. As such, the UNDRIP today constitutes the most advanced framework addressing the rights of Indigenous peoples.[60] In a similar wording as found in the UN human rights Covenants, article 3 of the UNDRIP affirms, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[61] On this basis, and in accordance with article 46 of the UNDRIP, it is now recognised that Indigenous peoples have the right to self-determination, short of unilateral secession.[62]

Hence, even though the declaration does not prevent secession in a case where international law would allow it,[63] its provisions mostly address the internal application of the right of Indigenous peoples to self-determination. In this regard, the exercise of the right of Indigenous peoples to self-determination is a right that is usually exercised through autonomous arrangements and the participation of Indigenous peoples in decision-making process affecting them. As also explained by Anaya, the right of Indigenous peoples to self-determination is "in essence a human right as opposed to a right of sovereigns or putative sovereigns".[64] It is a right that is focused on the relations between peoples and states and the ordering of the governance systems. Similarly, Erica Irene A. Daes, the former Chair of the Working Group on Indigenous Populations, argues that as ordinarily interpreted, Indigenous self-determination establishes the right to engage in "belated nation-building",[65] to negotiate with others within their states, to exercise control over their lands and resources, and to operate autonomously. Accordingly, the UNDRIP mandates the transformation of governance structures in order to secure the right for Indigenous peoples without challenging the basic principle of state sovereignty and their territorial integrity.

S. Allen and A. Xanthaki (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples (Portland: Hart Publishing 2011), 229; Burger, J., 'The Declaration on the Rights of Indigenous Peoples: from Advocacy to Implementation´, in Allen and Xanthaki (2011), 43;

[59] ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169) Convention concerning Indigenous and Tribal Peoples in Independent Countries (1991).

[60] For an analysis of the legal status of the UNDRIP, see International Law Association, 'The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report' (International Law Association 2010).

[61] UNDRIP, article 3.

[62] As stated by Daes, "The principle of self-determination as discussed within the Working Group and as reflected in the draft declaration was used in its internal character, that is short of any implications which might encourage the formation of independent States." UN Doc. E/CN.4/Sub2AC.4/1992/3 Add. 1 (1992) 5.

[63] Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments', *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Jessie Hohmann, Marc Weller, Oxford University Press 2017).

[64] James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', *Making the Declaration work: the United Nations Declaration on the Rights of Indigenous Peoples* (Claire Charters and Rodolfo Stavenhagen, IWGIA 2009) 186.

[65] Erica Daes, 'Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/26/Add.1', 1993, para 23.

From a practical perspective, this also means that PSNR implies the duties for states to supports transformations that will allow the realisation of the rights of Indigenous peoples to self-determination. The transformation required by the implementation of the right of Indigenous peoples to self-determination encapsulates several dimensions.[66] From a political perspective, it includes the rights of Indigenous peoples to determine their own development through autonomy and participation in mechanisms affecting them. This understanding is more specifically emphasised under articles 4 and 5 of the UNDRIP which recognized that Indigenous peoples "have the right to autonomy or self-government in matters relating to their internal and local matters" as well as the right "to participate fully, if they so choose, in the political, economic, social and cultural life of the state".[67] Although the right of Indigenous peoples to freely dispose of their natural resources is not explicitly mentioned in articles 3, 4, or 5 the UNDRIP, beyond the affirmation of its political aspect, the right of Indigenous peoples to self-determination also includes a resource dimension, which is implicitly linked with the right of Indigenous peoples to land, territories and resources in other provisions.

For example, the preamble of the Declaration recognizes "the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources". Then, article 20, first paragraph recognizes the "right of Indigenous peoples to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence […]." While not expressly replicating the wording of article 1 of the UN human rights Covenants, the latter provision reflects the content of paragraph 2, which recognizes the right of people to develop their resources and not to be deprived of their own means of subsistence. In addition, several other preambular provisions and articles are also concerned with the resource dimension of the right of Indigenous peoples to self-determination, including more specifically articles 25 to 32 of the Declaration, which focus on the rights of Indigenous peoples to land, territories and resources.

Thus, UNDRIP does not make the link between Indigenous self-determination and natural resources explicitly clear but it is nonetheless suggested throughout its provisions. Furthermore, the link between Indigenous rights and PSNR is also not affirmed. However, the drafting process of the UNDRIP suggests that the rights of Indigenous peoples to natural resources are connected to the duties of states to exercise PSNR in compliance with the right of Indigenous peoples to self-determination over natural resources. This is also based on the premise that the right to dispose of natural resources forms a basic component of the right of Indigenous peoples to self-determination, while states remains the primary subject of PSNR. In fact, the link between the right of Indigenous peoples to resources, self-determination and PSNR was substantially watered down, compared to what was stated in the drafting process of the

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[66] 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' (2019) 3 The International Journal of Human Rights 1

[67] UNDRIP, articles 4 and 5.

declaration that had been circulating in the years prior its adoption.[68] Originally, the 1994 draft Declaration, a document that had been negotiated and adopted by the Working Group on Indigenous Populations, an independent expert mechanism open to the representatives of Indigenous peoples and their communities and organizations, included under article 31 (later reframed as article 4 in the UNDRIP) the right of Indigenous peoples to self-government in matter relating to land and resources management.[69] This provision therefore made explicit that the right to manage land and resources, alongside other internal and local affairs such as culture, religion and education, forms a basis for the exercise of the right of Indigenous peoples to self-determination. Nevertheless, the revised language, which removed the link between self-determination and the right to resources, may have been seen as a necessary compromise in order to ensure the adoption of the declaration. As recounted by the *travaux preparatoires* of the UNDRIP, the question of the resources dimension of the right of Indigenous peoples to self-determination featured prominently in the demands of Indigenous peoples but was also opposed by many states in practice.

During the adoption process of the draft UNDRIP, Indigenous organizations considered that "the ownership and control of their lands, territories and resources" were "essential to the exercise of self-determination and continued health of their communities".[70] From the start, "many highlighted the profound spiritual, cultural, traditional and economic relationship indigenous peoples have to their total environment, which required that they have certain rights to the land on which they live".[71] In their view "without explicit recognition of their land rights, indigenous peoples would remain vulnerable to more powerful political and economic forces".[72] In this regard, it was quite clear that "without indigenous peoples' having the legal authority to exercise control over their lands and territories", meaningful self-determination would never be possible.[73] On the other hand, Indigenous peoples' claims stood in contrast with the positions of states, which expressed clear concerns about the reference made to the rights of Indigenous peoples to lands and territories as contained in the draft, especially because "they felt these references to be unclear and confusing with regard to a State's sovereignty over its territory".[74] In particular, one of the most important controversies in the drafting of the declaration concerned the assertion of the right of Indigenous peoples to land and resources on the basis of the claim that Indigenous peoples held

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[68] As mentioned by Stephania Errico, during the drafting process of the UNDRIP, there is no doubt that the rights to land and resources was "one of the most difficult area on which to reach a final agreement". In 'Control over Natural Resources and Protection of the Environment of Indigenous Territories: Articles 29, 30 and 32', *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Jessie Hohmann and Marc Weller, Oxford University Press 2018) 426.

[69] UN High Commissioner for Human Rights, UN Doc. 1994/45. Draft United Nations Declaration on the Rights of Indigenous Peoples, article 31.

[70] UN Commission of Human Rights, Report of the Working Group Established in Accordance with the Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc. E/CN.4/1996/84, 1996, para. 84.

[71] Ibid.

[72] Ibid.

[73] UN Sub-Commission on the Promotion and Protection of Human Rights, Indigenous peoples' permanent sovereignty over natural resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes, UN Doc E/CN.4/Sub.2/2004/30, 2004, para.8.

[74] Ibid., para 66.

permanent sovereignty over their land territories and resources.

Against this backdrop, Erica I. Daes was mandated in 2001 by the Sub-Commission on the Promotion and Protection of Human Rights to analyze the principle of permanent sovereignty over natural resources as applied to Indigenous peoples.[75] In her working paper submitted the next year, Daes underlined that “State claims for itself sovereignty over natural resources while denying this right, in whole or in part, to indigenous peoples” leads to an important problem that was required to be examined “in order to uphold indigenous peoples’ right to permanent sovereignty over their natural resources”.[76] However, it appears that the intention of the Rapporteur in applying the principle of PSNR to the situation of Indigenous peoples was aimed neither at guaranteeing the right of Indigenous peoples to economic independence nor at challenging the primacy of the state as a subject of PSNR.[77] In contrast, she emphasizes in her final report submitted in 2004 that Indigenous peoples’ sovereignty over natural resources did “not entail the right to unlimited authority of indigenous peoples over their land and natural resources”.[78] Rather, she argued for a more nuanced application of PSNR to the situation of Indigenous peoples, where “the term “sovereignty” refers not to the abstract and absolute sense of the term, but rather to governmental control and authority over the resources in the exercise of self-determination”.[79] In this context, she also underlined that PSNR did “not mean the supreme authority of an independent State” and that the use of the term in relation to Indigenous peoples did “not place them on the same level as States or place them in conflict with State sovereignty”.[80] Instead, she described the right of Indigenous peoples to PSNR as “a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources”.[81] On this basis, although the Rapporteur would not explicitly call for disentangling Indigenous peoples’ rights from the language of PSNR, she concluded that states and Indigenous peoples should concern themselves less with the assertion of Indigenous PSNR and “more with whether indigenous peoples’ ownership of and governing authority over all their natural resources are adequately recognized and protected”.[82]

Ultimately, the assertion of Indigenous peoples’ PSNR did not make it into the final Declaration. Instead, the UNDRIP recognises the right of Indigenous peoples to land, territories and resources and the correlative duties of states to guarantee these rights. The final text of the declaration is thus in accordance with a human rights understanding of PSNR which puts emphasis on state obligations to respect the human rights of Indigenous peoples to self-determination over their lands and resources. As similarly described by Daes in her report, such a conception is reflective of the “growing

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[75] Erica-Irene A. Daes, Indigenous peoples' permanent sovereignty over natural resources: Working paper, UN Doc E/CN.4/Sub.2/2002/23, 2002.
[76] Ibid., para. 3.
[77] Final Report of the Special Rapporteur, Erica-Irene A. Daes, (n73), para.31.
[78] Ibid., para. 20.
[79] Ibid., para.18.
[80] Ibid.
[81] Ibid., para.40.
[82] Ibid., para.31.

recognition that an appropriate balance can be reached between the interests of States and the interests of indigenous peoples in the promotion and protection of their rights to self-determination, to their lands, territories and resources, and to economic development".[83] Although such an interpretation does not support the right of Indigenous peoples to PSNR, it caries the advantage that it supports the rights of Indigenous peoples to land and natural resources as a basis of their right to self-determination without challenging the principle of PSNR.

Yet, what today remains contentious is the content of the rights of Indigenous peoples to land, territories and resources and the obligations that they entail for states in practice. As we shall see, the UNDRIP provides some responses to this issue but does not resolve all ambiguities.

4 - The content of the right of Indigenous peoples to self-determination over land, territories and resources and its constructive ambiguities

The UNDRIP constitutes the most progressive instrument pertaining to the rights of Indigenous peoples, especially as it captures the most significant development of international human rights law in the field. However, the Declaration also reflects the fact that the interpretation of Indigenous peoples' rights in the domain concerning the rights to land and natural resources is still in progress. As mentioned by several scholars, the provisions concerning land and natural resources were among the most complicated and contentious provisions negotiated during the adoption of the UNDRIP.[84] Ultimately, it was thanks to the adoption of a constructive ambiguity in the drafting process that a consensus emerged for adopting the provisions on this particular issue.[85] Consequently, the UNDRIP must be read and interpreted in light of these compromises. While on the one hand, the Declaration offers basic guidelines to ensure that Indigenous peoples rights to land, territories and resources are guaranteed, on the other hand, the Declaration does not solve all legal uncertainties. It offers a framework that temporarily mediates opposing understandings by leaving the door open to ambiguities that should be solved by future development.

In light of these ambiguities, it is nonetheless possible to uncover to differing degrees the content of the rights of Indigenous peoples to dispose of their natural resources. From a general perspective, the right to natural resources is intertwined with the broader rights of Indigenous peoples to land and territories. However, the UNDRIP does not provide any clear definition of what constitutes Indigenous peoples' land, territories and resources. As rightly explained by Charters, the relationship of Indigenous peoples with their land, territories and resources is difficult to characterize based on non-Indigenous concept of law, which made it arduous to precisely define the content of

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[83] Ibid., para.8.

[84] Mattias Ahrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in *Making the Declaration work: the United Nations Declaration on the Rights of Indigenous Peoples* (Claire Charters and Rodolfo Stavenhagen, IWGIA 2009) 200; See also Charters (n 58); Errico (68).

[85] For an analyzis of the UNDRIP provisions pertainining to land and resources see Charters (n 58) 395–425; Errico (n 68) 425–457.

these rights in the Declaration.[86] Indigenous peoples' relations with their land, territories and resources go beyond a Western conception of legal property that focuses on the exclusive rights of individual owners to private property in order to support the market-oriented economy. The latter conceptualization clashes with a more collective and holistic conception of land, territories and resources held by Indigenous groups, which "are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy".[87] Moreover, during the drafting of the Declaration, "Indigenous peoples have also found problematic concrete terms such as lands, territories and resources, which unemotively express what many indigenousIndigenous peoples understand as Mother Earth".[88] As suggested by the Inter-American Court of Human Rights, it is thus important to understand that Indigenous rights to natural resources "go beyond the mere application of common principles regulating property regimes".[89] Instead, these rights are attached to their culture "developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their [religiousness], and therefore, of their cultural identity."[90]

The importance of the rights to land, territories and resources for the culture of Indigenous peoples is suggested in several provisions of the UNDRIP. For instance, article 25 speaks about Indigenous peoples' "right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources." At the same time, the Declaration is not very clear about what these rights entails or requires. In relation to article 25, for instance, it is unclear whether the right of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with their territories includes the right of Indigenous peoples to access their traditional land, territories and resources or a right to temporarily visit these places. Also, it is not clear to what extent Indigenous peoples can use resources when they have spiritual value since article 25 does not expressly recognize the right to maintain a material relationship with their lands, territories and resources.[91]

Nonetheless, the content of Indigenous peoples' rights to land and resources is further specified under article 26, which to some extent also clarifies the obligations for states in this context. At the outset, article 26 of the UNDRIP (which largely mirrors article 14 of ILO Convention (1)) acknowledges in its first paragraph that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned or occupied, including in the past. Then, article 26(2) refers to the rights of Indigenous peoples to own, use, develop and control the lands, territories and resources that they

[86] Charter in International Law Association (n 60) 20.
[87] Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of 31 August 2001, Series C, No. 79, para. 149.
[88] Charters in International Law Association (n 60) 21.
[89] Errico (n 68) 434.
[90] Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118.
[91] The word 'material' was removed from the provision during the drafting process.

currently possess under Indigenous traditional conceptions of "ownership". The recognition of "traditional ownership" emphasizes the fact that Indigenous peoples do not require legal title from the state or formal ownership rights in order for their interests to be recognized.[92] On the basis of their correlative duties, article 27 requires states to establish procedures to identify Indigenous peoples' lands and protect their rights of ownership and possession, in accordance with their own customs. The latter provision implies that the legal recognition of these rights does not require Indigenous peoples to show continuity in the possession of their land and resources or to occupy the land on a regular basis to benefit from it.[93] As further suggested under article 27, the recognition of Indigenous peoples' right to land can occur through demarcation and titling, and requires the establishment of mechanisms to resolve land claims between several parties.

Whereas articles 26 and 27 constitutes the cornerstone of Indigenous peoples' rights to land, territories and resources, at the same time these provisions remain ambiguous, especially concerning the content of the rights of Indigenous peoples to natural resources. As has been explained by Errico and Charters, the ambiguities stemming from the wording of these provisions "reflects a tension between the State's interest in resources and Indigenous Peoples' rights to own their resources".[94] This tension is especially acute in relation to the definition of resources. During the negotiation of the UNDRIP, many states sought to protect their rights to resources vested in them pursuant to domestic law.[95] As a result, the UNDRIP does not define which resources belong to Indigenous peoples or the extent of their rights to control these resources. Indeed, the declaration even avoids the use of the possessive 'their' to qualify Indigenous relationship with resources located on their traditional lands.

Nevertheless, while analyzing the UNDRIP and its provisions, it is possible to establish a distinction between the resources traditionally used by Indigenous peoples and other resources that are not considered of cultural importance to them. While such a dichotomy is certainly questionable in so far as it challenges the holistic view that many Indigenous communities hold concerning their land and territories, Åhren concurs that the protection allocated by the natural resource regime has conventionally prioritised the right of Indigenous peoples to own, use and develop the resources that they have traditionally used, to the same extent that it does with their rights in relation to the land and territories they have traditionally used.[96] This is explained by the fact that natural resources traditionally used by Indigenous peoples are integral to their culture. In addition to articles 26 and 27, article 31 of the declaration recognizes the rights of Indigenous peoples "to maintain, control, protect and develop their cultural heritage

[92] See for instance Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v Nicaragua, Series C No. 79 (2001) para 153. African Commission on Human and Peoples Rights, Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois Community) v. Kenya, Communication 276/2003 (2010), para. 62-66. ILO CEAR, 1995/65 Session.
[93] Charters (n 58) 419.
[94] Ibid 421.
[95] Ibid.
[96] Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016) 213.

and the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora". Although there remain great controversies about the scope and content of these rights, especially concerning the development of genetic resources,[97] this provision supports the idea that Indigenous peoples have the right to dispose of resources which are part of their cultural heritage.

By contrast, the rights of Indigenous peoples to the resources they have not traditionally used, in particular sub-surface resources, remains much more controversial. In fact, it clearly stems from the drafting process of the declaration that the majority of states strongly opposed the recognition of the rights of Indigenous peoples to subsurface resources.[98] This is reflected, for instance, in the rejection of a proposal made during the drafting process of the Declaration to include the right for Indigenous peoples to own, develop, control and use the lands [and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources].[99] This specific language was meant to highlight "the special relationship that indigenous peoples have not only with their lands, but also with the total environment, including surface and subsurface resources".[100] However, because none of the various attempts made by Indigenous representatives to include an express reference to subsurface resources were accepted, [101] it can be concluded that Indigenous peoples do not have the same rights to sub-surface resources that they have not used traditionally rights as they do over the resources they have traditionally used..

However the fact that the UNDRIP prioritises the rights of Indigenous peoples to the resources that they have traditionally used does not prevent Indigenous peoples from claiming rights over other resources beyond this context.[102] Article 32 ascertains the right of Indigenous peoples to develop and use their lands or territories and other resources, irrespective of their traditional importance. On the one hand, Article 32(1) stipulates as a general principle the right of Indigenous peoples to determine and develop strategies for the development or use of their lands, territories and other resources. In this regard, the provision implies that Indigenous peoples act as the empowered agents of their own development, which is consistent with their right to self-determination. On the other hand, article 32(2) recognizes that states have the right to exploit natural resources located on the land of Indigenous peoples limited by the obligation that they

> "must consult and cooperate with Indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

[97] UN Doc E/CN.4/2005/89 (2005) para. 39.
[98] UN Doc E/CN.4/2005/89 (2005) para. 33.
[99] UN Doc E/CN.4/2004.81 (2004); Errico (n 68) 436.
[100] Ibid. para 110.
[101] Errico (n 68) 436.
[102] Åhrén (n 96) 214-217.

While paragraph 1 supports the right of Indigenous peoples to self-determination over natural resources, the latter provision compromises with the right of the state to exercise PSNR. Thus, read jointly, the provisions of article 32 support a human rights approach to control natural resources based on the ambiguous formulation that Indigenous peoples have the right to govern their land and resources while states preserve a similar entitlement. This understanding is premised on the fact that article 32(2) sets limitations for the state's disposal of natural resources in order to ensure that the interests of Indigenous peoples are not overridden by those of the state. The obligations of states are further articulated under article 32(3) which requires that States provide effective mechanisms for just and fair redress for any Article 32(2) activities and to take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact. In this regard, and to ensure meaningful self-determination, what is relevant is not to guarantee that Indigenous peoples manage their own resources separately from the state, but rather to ensure that they can conduct their development free from the domination of the state.[103]

Accordingly, the principle of Free Prior and Informed Consent (FPIC) plays a pivotal role in ensuring the right of Indigenous peoples to freely pursue their right to develop their land, territories and resources.[104] According to Article 32, FPIC requires states not merely to consult Indigenous representatives but to obtain their consent prior to the approval of any project affecting their lands or territories and other resources. This reflects the view that states must effectively engage with Indigenous peoples, as opposed to merely informing them as simple stakeholders. This understanding is also the result of important negotiations concerning the formulation of article 32 based on the compromise language accepted by the General Assembly, which rejected language that States only "seek" Indigenous peoples' consent, and instead opted for the stronger requirement to "obtain" consent. However, from a human rights perspective,[105] it can also be argued that FPIC must not be interpreted as an integral veto right for Indigenous peoples, "but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned."[106] In this regard, FPIC operates as a device to ensure that Indigenous peoples are included in the decision-making regarding the development of their land and resources as partner rather than as a competing sovereign.[107] This said, international human rights jurisprudence

[103] In reference to Iris Marion Young, 'Two Concepts of Self-Determination', *Ethnicity, Nationalism, and Minority Rights* (Stephen May, Tariq Modood, Judith Squires, Cambridge University Press 2004).
[104] Errico (n 68) 456.
[105] On the different interpretation of the duty to consult and FPIC, see James Anaya and Sergio Puig, 'Mitigating State Soveriegnty: The Duty Fo Consult with Indigenous Peoples' (2017) 67 University of Toronto Law Journal 435.
[106] Report of the Special Rapporteur on the situation of human rights, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/12/34, 2009, para. 48.
[107] As also argued by Anaya and Puig "the dialogue engendered through consultations within the human rights framework is a means of building trust that can lead to agreed-upon outcomes for the implementation of projects that are both beneficial to Indigenous peoples and to the society at large." Anaya and Puig (n 105) 462. See also Barelli M, 'Free Prior and Informed Consent in the UNDRIP', *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Jessie Hohmann and Marc Weller, Oxford University Press 2018)

increasingly acknowledged that in cases where large-scale development projects would have a significant impact on the livelihoods of Indigenous peoples, the representatives of Indigenous peoples have the right to oppose the concerned development project.[108] This is in line with articles 10 and 29 of the declaration, which explicitly require states to obtain consent of Indigenous peoples in cases of relocation of Indigenous peoples from their lands or territories and in case of storage or disposal of hazardous materials on Indigenous peoples' lands or territories. In such circumstances, where the impact that may arise is considered significant for the livelihoods of Indigenous peoples, consent is therefore usually necessary.

Today, one of the most controversial issues concerning FPIC regards the definition of what constitutes a significant impact. To respond to this question, several scholars have convincingly explained the need to interpret FPIC in accordance with a sliding scale approach, which recognizes that the 'level of effective participation is essentially a function of the nature and content of the rights and activities in question'.[109] In other words, whether Indigenous peoples have a right to veto certain decisions or activities occurring on their lands is subject to the significance of the impact of the concerned activities on their livelihoods, which can only be determined on a case-by-case basis. In theory, Anaya explains that, "a significant, direct impact on Indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without Indigenous peoples' consent" and "in certain contexts that presumption may harden into a prohibition of the measure or project in the absence of Indigenous consent".[110] This interpretation, which is in line with the developing jurisprudence concerning Indigenous peoples' rights,[111] is more nuanced than an interpretation providing an unqualified veto right to Indigenous peoples. At the same time, it is also more practical especially when Indigenous peoples share their traditional territories with other groups. Finally, this interpretation is also concordant with a human rights approach to the right to control resources to the extent that it provides states with the duty to consult Indigenous peoples on the basis of FPIC in respect to their right to self-determination.

However, as already suggested, it is also important to stress that the implementation of FPIC should not solely occur in post-facto situation where the authority decides on projects and leave the population to consent. As suggested by Gilbert, the promise contained in the affirmation that peoples should freely dispose of their natural resources, as enshrined in the right to self-determination, would otherwise be only

[108] HRC, Poma Poma v. Peru, Communication No. 1457/2006/UN Doc. CCPR/C/95/D/1457/2006, 2009; Inter-American Court of Human Rights, Saramaka People v. Suriname, Judgment of 28 November 2007, IACtHR Series C, No. 172, para. 134; African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council), Kenya, 27th Activity Report: Jun 2009 – Nov 2009, 2009, para. 291.

[109] Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff Publishers 2009) 116; Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 International Journal of Human Rights 1, 14.

[110] James Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Un Doc. A/HRC/12/34, 15 July 2009 para. 47.

[111] Charters (n 58).

partially realized.[112] To ensure Indigenous peoples' self-determination, it is also important to guarantee that they are involved in all decision making processes that pertain to their land and resources through representatives chosen by themselves in accordance with their own procedures, as reflected in article 18 of the UNDRIP. Similarly, Errico suggests that whereas article 32 "is in fact pivotal to enabling Indigenous peoples to set and pursue their own development", it "requires participation and engagement at a broader level beyond ad hoc consultations on specific projects".[113] Accordingly, this interpretation suggests that the implementation of the right of Indigenous peoples to self-determination and natural resources based on the principle of FPIC is multi-scalar. It goes beyond the scope of questions concerning local projects and includes the right of Indigenous peoples to be involved in decision-making process from the local to the national as well as international levels when these processes have a bearing on the livelihoods of Indigenous peoples.

Thus, with this interpretation, the view that Indigenous peoples have full and absolute sovereign rights over their land territories and resources is dismissed. On the other hand, this understanding expands the reach of Indigenous prerogatives by recognizing their right to self-determination over land, territories and resources without compromising the sacrosanct principle of permanent sovereignty. In this regard, the UNDRIP points to a deal that strikes a balance between the exercise of the rights of Indigenous peoples to land, territories and resources as a basis for self-determination and the prerogative of states to exercise sovereignty over natural resources. However, because it remains unclearly charted how this balance must be achieved in practice, it can be concluded that the UNDRIP supports a constructive ambiguity.

Conclusion

This analysis demonstrates an evolution in international law from a state-centred interpretation of the right to dispose of natural resources towards a human rights-centred approach, which includes the rights of Indigenous peoples and the correlative duties of states to guarantee these rights. Whereas states have not lost their sovereign prerogatives over natural resources, over the years, states have been increasingly burdened with obligations that limit the exercise of their sovereign authority in the governance of natural resources. Today, those obligations are linked with the general duty of states to ensure the well being of peoples living within their territory in accordance with human rights law. This understanding is grounded in a human rights approach to the right over natural resources, which links PSNR with the duty of states to respect and protect human rights, in particular the right of peoples to self-determination. However, such an interpretation was for many decades restricted both in law and in practice to the situation of the right of the population of the state. Originally, international law did not clarify what the state obligations to ensure PSNR for the well being of peoples entailed and also restrictively focused on the rights of the population of the states regardless of their specific status and needs.

[112] Gilbert, The Right to Freely Dispose of Natural Resources (n 4) 330.
[113] Errico (n 68) 456.

With the development of Indigenous peoples' rights and the adoption of the UNDRIP, this chapter has demonstrated that it is now more firmly recognized that Indigenous peoples' interests must equally and distinctively be accounted for in the governance of natural resources. Since the adoption of the UNDRIP, it is more particularly recognized that Indigenous peoples, as a distinct group, have the right to self-determination. Pursuant to their right to self-determination, Indigenous peoples have the right to dispose of natural resources located on their traditional lands and territories and the right not be deprived of their means of subsistence. Simultaneously, the UNDRIP defines the correlative duties of states to guarantee these rights. On this basis, the recognition of the right of Indigenous peoples to self-determination over natural resources makes an important contribution in the assertion of a human rights approach to the right to dispose of natural resources. Besides, the development of Indigenous peoples' rights can "also [serve] as a catalyst and support to push for new battlegrounds" for other groups such as peasants, small scale farmers and local communities "to reclaim control over natural resources".[114]

However, it has been noted that the adoption of the UNDRIP has not solved all controversies. While the Declaration encapsulates the progress of international law relating to the rights of Indigenous peoples, it also reflects ambiguities about the content of the rights of Indigenous peoples to land, territories and resources and the correlative duties ascribed to states in this context. The lack of clarity in the provisions of the UNDRIP is due to the prevalence of the competing states' and Indigenous peoples' claims over natural resources. It is also due to the impossibility of creating analogous rules that would provide a solution for addressing the diverse situations and relationships that Indigenous peoples have developed with states around the world. In addition, the ambiguities of the UNDRIP testify to the fact that the development of the law is sill in progress. Thus, on the basis of its constructive ambiguities, the Declaration does not resolve, but temporarily mediates competing states' and Indigenous peoples' claims over natural resources. Ultimately, whether these ambiguities can allow a way forward in the realisation of the right of Indigenous peoples to self-determination must also be determined in practice. However, it must be clearly stated that those ambiguities will only become truly constructive when they ensure transformations that push beyond the status quo which maintains states' domination over Indigenous land, territories and resources and brings about fundamental changes for securing Indigenous peoples' rights instead.

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[114] Gilbert, *Natural Resources and Human Rights* (n 4) 32.