**Fighting the Resource Curse:**

**The Rights of Citizens over Natural Resources**

INTRODUCTION

There is no more important challenge than to improve the use of the planet’s natural resources. 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 the territory, a rich national resource endowment can be a curse. Consider that most authoritarian regimes today are in resource-rich states. Most of the most highly corrupt regimes are in resource-rich states. Most civil wars today are in resource-rich states, most hunger crises are in these states, and most refugees today are fleeing from these states. And, strikingly, soon most of the world’s severe poverty will be in resource-rich states.[[1]](#footnote-2)

While these are only correlations, the preponderance of social scientific research supports causal connections.[[2]](#footnote-3) For example, oil states in the developing world are 50 percent more likely than non-oil states to be ruled by authoritarian regimes, and twice as likely to suffer armed civil conflict. Moreover, in contrast to states that are not primary producers, the major oil states outside the West are today, on average, no richer, no freer and no more peaceful than they were even in 1980.[[3]](#footnote-4)

Vast resource revenues are flowing into resource-rich states from Russia and Central Asia through the Middle East to Africa and the Americas. Crude oil exports alone were worth an enormous $1.1 *trillion* in 2018.[[4]](#footnote-5) Yet where these revenues are controlled by elites and armed groups, they fuel further oppression, corruption, strife, and suffering. The root problem is accountability: in many states, resources are exported without minimal 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.

In Angola, for example, resource revenues have sustained the power and wealth of corrupt state officials while the children of the country were dying of poverty at the highest rate in the world.[[5]](#footnote-6) In Azerbaijan, an unaccountable government has used resource revenues for years forcefully to suppress protests of its policies.[[6]](#footnote-7) 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.[[7]](#footnote-8) In all of these cases, violations of the rights of the citizens over their national resources empowered actors who then further violated the people’s rights.

By contrast, in states where citizens can hold the state accountable for natural resource management, the risks of these pathologies are substantially reduced.[[8]](#footnote-9) 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). Accountability to citizens for resource management is crucial for the flourishing of individuals, communities, and whole regions of the earth.[[9]](#footnote-10)

International law can play a leading role in meeting the challenges of the resource curse. Correctly interpreted, international law requires resource management to be accountable to citizens. Under international human rights law, peoples have fundamental rights over resources that require accountable governance. This is firmly expressed in common Article 1 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.[[10]](#footnote-11)

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.[[11]](#footnote-12)

Significantly, this is the only human right that is stated twice in the two Covenants; no other Covenant right is restated in this way. Thus in each treaty, the rights of peoples over resources are affirmed more than any other right. The Covenants are, in turn, accepted by the preponderance of states. 98% of the world’s population lives in a state that is party to at least one of these treaties.[[12]](#footnote-13)

Despite their prominence in the Covenants, the rights of peoples over natural resources are neglected rights, the subjects of widespread misunderstandings.[[13]](#footnote-14) 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 resource revenues. 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. Indeed, this article will show that international law regarding natural resources has evolved dramatically since 1945, ascribing ever more substantive and specific rights to citizens.

To evidence this development, this article surveys the historical development of peoples’ rights over resources in international law, highlighting how this right has been interpreted to affirm the rights of all citizens over their natural resources. The article then explores how this right can be used to fight the resource curse, emphasizing throughout the transformative potential of understanding resource rights as belonging first not to states but to their citizens.

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 period in 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—the idea that the resources of the state are the ‘birthright’ of its population.

Building on this analysis of the evolution of the meaning of citizens’ rights, 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 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 do so without running afoul of the principle of non-intervention in the affairs of other states.[[14]](#footnote-15) Indeed, these corporate-home and importing states should believe that they are required to make such reforms out of respect for human rights and the principle of the self-determination of peoples.[[15]](#footnote-16)

These reforms are required because today every state’s domestic legal default is to allow its corporations to make deals with unaccountable actors to exploit foreign resources.[[16]](#footnote-17) More, every state’s legal default is to allow its persons to import foreign resources that have been extracted with no accountability to the people of the state of origin. These 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 if human rights and self-determination require resource management to be at least minimally accountable to the people, then 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 stolen goods. Using one established metric for accountable governance finds that this problem affects over 50% of the world’s traded oil, imports worth hundreds of billions of dollars every year.[[17]](#footnote-18)

Human rights and self-determination require states to reform their domestic laws to make it illegal for their corporations and importers to make 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 challenges to responsible unilateral and multilateral adoption of these reforms, drawing on historical parallels in the solidification of transnational anti-corruption laws and the end of the Atlantic slave trade. We also touch on potential impacts of reforms in related areas of transnational law, such as investment arbitration.

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 respect 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, for international law also recognizes the rights of states over natural resources. Sovereignty over natural resources is traditionally one of the attributes of state sovereignty, and the assumption under general international law is that state sovereignty entails jurisdictional rights over resources within the territory.[[18]](#footnote-19) This dual ascription of rights has been progressively clarified and regimented through the historical development of international law of natural resources, along several dimensions.

*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.[[19]](#footnote-20) 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.[[20]](#footnote-21)

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. This external right was emphasized in many treaties and declarations, particularly in the post-colonial context where inequitable treaties with foreign investors and the nationalization of resources were significant issues.[[21]](#footnote-22)

However, UN General Assembly Resolutions also continued to affirm peoples’ *internal* rights of self-determination: rights of peoples against their own state. For example, in these resolutions peoples are often ascribed a right to benefit from their country’s natural resources.[[22]](#footnote-23) Nico Schrivjer suggests that this was a reflection of 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.[[23]](#footnote-24)

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 Assembly Resolution on *Permanent Sovereignty over Natural Resources* asserts 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.’[[24]](#footnote-25)

This particular phrasing was reaffirmed only once, although several further resolutions dealing with permanent sovereignty do raise specific concerns for peoples as distinct from states.[[25]](#footnote-26) 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.[[26]](#footnote-27)

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. 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.

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 over natural resources, but focused only on the right of states to be free from outside coercion.[[27]](#footnote-28) 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.[[28]](#footnote-29)

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. For example, 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.[[29]](#footnote-30) In 1989, the ICJ affirmed the importance of the right of the Nauruan people to sovereignty over their natural resources before their independence from Australia.[[30]](#footnote-31) 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.[[31]](#footnote-32)

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 roundly criticized by other state parties. States including France, Pakistan and Germany objected to India’s reservation because it ‘attached impermissible conditions. . . on a right to self-determination’ which ‘applies to all peoples.’[[32]](#footnote-33) 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.

Furthermore, the UN Human Rights Committee (HRC) has confirmed that Article 1 in the ICCPR does not apply only to peoples living under foreign domination. For example, 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.’[[33]](#footnote-34) As Rosalyn Higgins has written,[[34]](#footnote-35)

The 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. 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.

As this passage indicates, the rights of peoples to internal self-determination are not ‘only colonial.’ Indeed, these rights continued to develop and solidify after the lull in the early 1970’s.

*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 (of any type) 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 constrains 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.

However, historically the proposition that peoples and states have separate legal personalities has sometimes been denied. For example, in 1950 Hans Kelsen said of the UN 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.”’[[35]](#footnote-36) 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.[[36]](#footnote-37)

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.[[37]](#footnote-38) The citizens in the territory must give their explicit consent to any territorial transfer, ideally through a referendum. To take another example, the peoples of independent territories, such as Gibraltar and Puerto Rico, have an ongoing right in international law to choose the terms of their association with the larger state.[[38]](#footnote-39) 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.[[39]](#footnote-40) 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.[[40]](#footnote-41) Higgins explains the link in this way, ‘There is a close relationship between Article 1 and 25 of the ICCPR.’ While Article 1 guarantees peoples 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.).’[[41]](#footnote-42) Citizens’ collective rights to internal self-determination, including their right freely to dispose of natural resources, are exercised independently of the state, as citizens exercise their individual political rights.

In sum, as Antonio Cassese says about the Covenants, ‘To 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.’[[42]](#footnote-43)

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

From the 1970’s onward, the state’s permanent sovereignty over natural resources was confirmed in many resolutions and instruments.[[43]](#footnote-44) 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 3 and 4).

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. In fact, much of the international jurisprudence and literature on the right to freely dispose of natural resources focuses on indigenous peoples’ rights to natural resources.[[44]](#footnote-45)

This is likely because most of the many legal disputes in which indigenous peoples have been involved have had some connection to resource extraction.[[45]](#footnote-46) 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.[[46]](#footnote-47)

Three major legal developments have supported this evolution, which we 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.

*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, in part to ground efforts to gain redress for the wrongs of colonization.[[47]](#footnote-48) More significantly, however, indigenous rights advocates have established new interpretations of the meaning of self-determination under international law.[[48]](#footnote-49)

Historically, the right to self-determination was seen as a postcolonial right to national political independence.[[49]](#footnote-50) Yet the Western legal conception of statehood is foreign to most indigenous communities, who organized their land and territories outside the Westphalian state system before the colonial era.[[50]](#footnote-51) Indigenous peoples have successfully argued that self-determination is not only or even mostly about statehood, but about their fundament rights to help determine how the land and natural resources of their ancestral territories will be managed.[[51]](#footnote-52) 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.’[[52]](#footnote-53)

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 is a good illustration this shift of focus from a ‘political’ to a ‘natural resources’ interpretation of self-determination. The battle over the right to self-determination was at the heart of the 22 years of negotiations that led to adoption of the Declaration.[[53]](#footnote-54) 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 have the right to determine how natural resources should be used.[[54]](#footnote-55) 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.’[[55]](#footnote-56)

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 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 UNDRIP captures this crafted right of self-determination, proclaiming the rights of indigenous peoples while denying a right to secession. And regarding the resource rights of indigenous peoples, Article 26 of the Declaration is specific:

(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

(3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

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,[[56]](#footnote-57) 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 Kingsbury calls the new ‘relational approach to self-determination.’[[57]](#footnote-58) Under this ‘relational approach,’ self-determination is about organizing the relationship between states and indigenous peoples regarding the natural resources on their ancestral territories.[[58]](#footnote-59) This new interpretation of self-determination as a ‘relational’ principle was then 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 1990’s, 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.[[59]](#footnote-60) Several indigenous complaints then led to 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.[[60]](#footnote-61) For example, in its Concluding Observations on Canada in 1999, the HRC emphasized that ‘the right to self-determination requires, *inter alia*, 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).’[[61]](#footnote-62) 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.’[[62]](#footnote-63) The HRC also made reference to indigenous peoples’ right to self-determination in its Concluding Observations on Mexico, Panama, Australia, Denmark and Sweden.[[63]](#footnote-64)

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 it Concluding Observations.[[64]](#footnote-65) 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).’[[65]](#footnote-66) 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 in order 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 activities which are particularly relevant to the preservation of the identity of such persons or groups.’[[66]](#footnote-67) This right encompasses a right of indigenous peoples to participate in decisions affecting their territories.[[67]](#footnote-68) For example, in its Concluding Observations on Russia, the Committee expressed concern for the ‘precarious situation of indigenous communities in the state party, affecting their right to self-determination under Article 1 of the Covenant.’[[68]](#footnote-69)

This new 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 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”.’[[69]](#footnote-70) A similar approach was adopted in the case of Kaliña and Lokono peoples against Suriname.[[70]](#footnote-71) 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.’[[71]](#footnote-72)

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 ‘all peoples shall freely dispose of their wealth and natural resources.’[[72]](#footnote-73) In finding a violation of Article 21, the Commission acknowledged that the right to freely dispose of natural resources is of crucial importance to indigenous peoples and their way of life.[[73]](#footnote-74) 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.[[74]](#footnote-75) These are only illustrations, as there is a much wider jurisprudence linking indigenous peoples’ right to self-determination and their rights over natural resources.[[75]](#footnote-76)

Overall, a survey of the human rights treaty monitoring bodies and the regional human rights institutions now finds a substantive international jurisprudence affirming the self-determination rights of indigenous peoples over natural resources located on their ancestral territories. The ‘relational’ and ‘interpretative’ understandings of self-determination were the first path to reaching this result. The second path was the principle of ‘self-determined development.’

*‘Self-determined Development’ and the Right to Free, Prior, and Informed Consent*

A human right to development emerged through several General Assembly resolutions.[[76]](#footnote-77) The principle of self-determined-development arose as a reaction to what indigenous communities across the world have called ‘imposed development’ and ‘development aggression.’[[77]](#footnote-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.[[78]](#footnote-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.[[79]](#footnote-80)

This call for self-determined development was answered in 1986 in the UN Declaration on the Right to Development (UNDRTD). Its Preamble recalls ‘[T]he right of peoples to exercise… full and complete sovereignty over all their natural wealth and resources,’[[80]](#footnote-81) 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 their inalienable right to full sovereignty over all their natural wealth and resources.’

The right to development has struggled in international legal jurisprudence, despite been expressed in several treaties and international resolutions.[[81]](#footnote-82) Critics have attacked the right to development for being too theoretical and ‘shallow’ for practical implementation.[[82]](#footnote-83) These critiques have focused especially on specifying the duties of ‘developed’ toward ‘developing’ states, and on the lack of feasible legal enforcement mechanisms.[[83]](#footnote-84) In practice, however, indigenous peoples have contributed positively to specifying much more concrete and justiciable rights to development.[[84]](#footnote-85) 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.[[85]](#footnote-86) 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.’[[86]](#footnote-87) In addressing this claim to self-determined development, 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.’[[87]](#footnote-88)

This is one of the first international human rights cases to affirm communities’ right to free, prior and informed consent (FPIC).[[88]](#footnote-89) The establishment of a right to FPIC is one of the most significant developments in the human rights-based approach to natural resources management.[[89]](#footnote-90) The right to FPIC is proclaimed in the UNDRIP, with article 32 stating that,

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions 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 their mineral, water or other resources.

The reference to consent opens a whole new approach to the meaning of development. The right to development, as operationalized with the right to FPIC, requires that indigenous territories are to be included in developmental projects only when there is meaningful accountability to the communities concerned.

This requirement of accountability 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.[[90]](#footnote-91) The HRC’s understanding of Article 1(2) as a participatory right was also clearly expressed in its comments on Australia in its 2000 Annual Report.[[91]](#footnote-92) There, the Committee accepts the Australian government’s understanding that ‘self-determination’ in the case of indigenous peoples could be understood as ‘self-management’ and ‘self-empowerment’, but still criticizes the government for making insufficient progress toward ensuring a strong role for aboriginals in decisions over their traditional lands and natural resources.[[92]](#footnote-93) Likewise, the HRC’s 2002 Annual Report expresses concern about the limited extent to which Sweden allows the Sami Parliament, the legislative body of the minority Sami people, to be involved in decisions regarding their traditional lands and economic activities.[[93]](#footnote-94) In its 2014 review of the United States, the HRC urged the government to ‘ensure that consultations are held with the 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.’[[94]](#footnote-95)

Likewise, the CESCR in its Concluding Observations on Colombia urged the state party to consult and seek the consent of the indigenous peoples concerned by the implementation of timber, soil, and sub-soil mining projects affecting them.[[95]](#footnote-96) The CERD has also made reference to indigenous peoples’ right to consent to decisions directly affecting them in many of its Concluding Observations.[[96]](#footnote-97)

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.[[97]](#footnote-98) 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.’ 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.’[[98]](#footnote-99)

As these examples show, 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.[[99]](#footnote-100) 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.

*Cultural Rights and Natural Resources*

Cultural rights are an important element of human rights law, embedded in several international and regional human rights treaties.[[100]](#footnote-101) Cultural rights are the third area of law used by indigenous peoples to press for the recognition of their rights to natural resources. Natural resources carry significant cultural values for many indigenous communities as they are central to their traditional food production systems such as rotational farming, pastoralism, artisanal fisheries, and hunting. Natural resources are also often integral to indigenous religious and spiritual practices. Human rights law recognizes that the protection of cultural practices and traditional methods of using natural resources can be essential to ensure 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. For example, in its General Comment on article 27, the HRC stated that

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[[101]](#footnote-102)

Since this Comment, the connection between cultural rights and natural resources has been at heart of several Concluding Observations and decisions in individual communications of the Committee.[[102]](#footnote-103) The HRC heard several complaints by indigenous peoples in the 1990s, and its decisions in cases such as *Ominayak v Canada*,[[103]](#footnote-104) *Lansman v Finland*,[[104]](#footnote-105) and *Lovelace v Canada*[[105]](#footnote-106) have become key elements of international jurisprudence.[[106]](#footnote-107) All of the Committee’s pronouncements emphasize that resource-related activities that form an essential element of indigenous peoples’ culture should be protected under the minority protection offered under article 27 of the ICCPR.

This strand of international jurisprudence has not been limited to the HRC and 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 form an essential element of indigenous peoples’ right to cultural identity. In the *Saramaka* case, the Court highlighted that, ‘members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries.’[[107]](#footnote-108) More specifically concerning natural resources, the Court stated that, ‘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.’[[108]](#footnote-109)

In the case of *Sarayaku*, the Court considered that the failure to consult indigenous peoples before undertaking development on their lands ‘affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them.’[[109]](#footnote-110) In the case of the Yakye Axa community of Paraguay, the Court ruled that, ‘the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, 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 religiosity, and therefore, of their cultural identity.’[[110]](#footnote-111)

A similar approach has been adopted by the African Commission and Court.[[111]](#footnote-112) In the case of the Endorois community in Kenya, the African Commission noted that ‘dispossession of land and its resources is a major human rights problem for indigenous peoples…. [that] threatens the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities.’[[112]](#footnote-113) The Commission also highlighted the strong connections between natural resources, traditional cultural practices and religion in its 2017 ‘Resolution on the Protection of Sacred Natural Sites and Territories.’ Here the Commission makes a direct connection between human rights and state obligations to protect and respect natural sacred sites. The resolution calls on ‘States parties to recognize sacred natural sites and territories, and their customary governance systems, as contributing to the protection of human and peoples’ rights.’[[113]](#footnote-114) This imperative received further emphasis in the ruling concerning the Ogiek community of Kenya, where the African Court noted 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.’[[114]](#footnote-115)

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.’[[115]](#footnote-116) 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.’[[116]](#footnote-117) 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 natural resources, adding a human rights-based dimension which insists on the resource rights of peoples. In so doing, they moved the legal discussion from a theoretical debate about sovereignty over natural resources to a more practical emphasis on consent and cultural attachment. And they also energized legal discussions of the human rights over resources of a different type of people: those peoples that are constituted by all of the citizens of a state. The resource rights of citizens are the subject of the next two parts.

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 1), *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 often 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 the sense of ‘all citizens.’ Second, we expand on how international law divides resource rights between citizens and states. Third, we show how that 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.’

*‘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.[[117]](#footnote-118) While ‘people’ can often be read to refer to indigenous and other national sub-groups, there is no support in international law for the proposition that the term refers *exclusively* to such groups. Neither the ICESCR nor the ICCPR specifically mention ‘indigenous’ peoples, and, tellingly, in no case or commentary have rights over natural resources been interpreted as applying only to indigenous peoples or other subgroups. As Higgins writes:

Who exactly is entitled to the right to self-determination? We have seen from the [ICCPR] and other instruments that it is ‘all peoples’ who are entitled to that right. But what are we to understand by that? There are really two possibilities—that ‘peoples’ means the entire people of a state, or that ‘peoples’ means all persons comprising distinctive groupings on the basis of race, ethnicity, and perhaps religion… The emphasis in all the relevant instruments, and in state practice… means that ‘peoples’ is to be understood in the sense of *all* the people of a given territory. [[118]](#footnote-119)

Authoritative bodies, such as the CESCR, often refer to ‘people’ in the sense of ‘all citizens of a state.’[[119]](#footnote-120) As Ben Saul, David Kinley, and Jacqueline Mobray say, 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 country’s natural resources.’[[120]](#footnote-121)

For example, in its 1997 Concluding Observations for Azerbaijan, the CESCR ‘calls attention to Article 1 on the right of self-determination,’ and stresses that the state must manage the privatization of the country’s oil resources in a way that is ‘sufficiently transparent to ensure fairness and accountability’ and that ensures that the ‘general public is able to participate.’[[121]](#footnote-122) 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.’[[122]](#footnote-123) 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.

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. 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.’[[123]](#footnote-124) 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.

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.’[[124]](#footnote-125) Here again the CESCR ascribes the right to all of the citizens of the state when interpreting the ICESCR.

Unlike the CESCR, the Human Rights Committee has ‘shed very little light’ on the terms of Article 1(2) of the ICCPR.[[125]](#footnote-126) It has, however, addressed the right freely to dispose of natural resources on a limited number of occasions. While most of the HRC’s significant statements on the right have been in the context of indigenous land rights, the HRC demonstrated its preference for a wide interpretation of the term ‘people’ when it criticized Azerbaijan’s narrow view of self-determination as only applying to colonized peoples.[[126]](#footnote-127)

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.’[[127]](#footnote-128) Article 1(2) ‘affirms a particular aspect of the economic content of the right of self-determination,’ namely the right of peoples to freely to dispose of their natural wealth and resources. 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.’[[128]](#footnote-129) As individual human rights apply, by definition, to all human beings, it is reasonable to presume that the HRC interprets Article 1(2) as applying to the whole citizenry of independent states, and not merely to subgroups of populations (or populations under colonial control).

This interpretation is further supported by the CERD, in its statement on the right to self-determination of peoples:

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, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent *the whole population* *without distinction* as to race, colour, descent or national or ethnic origin.[[129]](#footnote-130)

This interpretation is also evidenced in the work of the African human rights institutions. For example, in its discussion of natural resource rights in the African Charter, the African Commission affirms both the ‘local community’ and the ‘all citizens’ meaning of ‘people’:

The rights guaranteed… are also underpinned by the principles of solidarity and the shared interests of individuals, communities, and the peoples of a State as a whole… On a human rights-based approach to the governance of natural resources, in accordance with the principle of State sovereignty over natural resources, the State has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the population. Although 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 with full respect to the interests specific to the communities living on or near such territory.[[130]](#footnote-131)

The Commission further demonstrated 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.’[[131]](#footnote-132) 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. In its communication on *Front for the Liberation of the State of Cabinda v Republic of Angola*, the Commission is even more explicit, noting 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.[[132]](#footnote-133)

Furthermore, the Commission has prioritized membership in the national people over membership in a subnational people 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 citizens within the national people.[[133]](#footnote-134)

It is also the opinion of international law scholars, such as Lillian Miranda, 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.[[134]](#footnote-135) 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. This is consistent with other rights protected by the Covenants, all of which are rights exercised by citizens against their state. Overall, the evidence supports an interpretation of international legal texts that often understands a ‘people’ as designating all of the citizens of an independent state.

*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 states’ rights to free disposal of their wealth and natural resources. 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 are not exploited by aliens to no or little benefit to the African countries.[[135]](#footnote-136) Similarly, in its *Angola* communication, the Commission states that ‘Article 21 of the Charter… triggers an obligation on the part of the state parties to protect their citizens from exploitation by external economic powers.’[[136]](#footnote-137)

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.[[137]](#footnote-138) 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 has to 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.’[[138]](#footnote-139)

Legal scholars support the principle that peoples’ rights to their natural resources correspond to duties owed to them by their state. As Emeka Duruigbo writes, ‘if the phrase “rights of peoples” has any independent meaning, it must confer rights on peoples against their own governments.’[[139]](#footnote-140) Lillian Miranda clarifies that peoples’ rights ‘carve away at the notion of a state's unqualified right to dispose of natural resources and suggest a shift in the evolution of the doctrine of permanent sovereignty over natural resources from state rights to state duties.’[[140]](#footnote-141) Richard Kiwanuka further specifies this state duty as a duty to act as a trustee of the people.[[141]](#footnote-142)

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.

*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. One lingering legacy of the ideological battles 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 for understanding the legal rights of peoples over resources to see that these rights are 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 (for example, Bolivia, Egypt, Ethiopia, Ghana, Indonesia, Iraq, Kiribati, Liberia, Moldova, Mongolia, Niger, Senegal, Solomon Islands, Syria, Tunisia, Ukraine, and Vietnam). Many of these constitutions use propertarian language, for example:

‘The natural resources belong to the people’ (Constitution of Senegal);

‘Oil and gas are owned by all the people of Iraq in all the regions and governorates’ (Constitution of Iraq);

‘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.’ (Constitution of Ukraine).[[142]](#footnote-143)

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 provisions for natural resource ownership. According to the Mexican constitution, resource privatization is permitted: ‘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.’[[143]](#footnote-144) Zambia’s constitution, on the other hand, sets itself against privatization: ‘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.’[[144]](#footnote-145) Papua New Guinea’s Land Act designates the great bulk of the country’s land (currently 97 percent) as ‘customary land’: ‘owned by the Indigenous People of Papua New Guinea whose ownership rights and interest are regulated by their customs.’[[145]](#footnote-146)

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), mixed systems (as in Indonesia): any of these legal regimes is compatible with the right of citizens over natural resources. This makes sense if we understand that the natural resources of a state start out in the people’s hands at independence—as a United Nations special commission once put it, that the country’s natural resources are a people’s ‘birthright.’[[146]](#footnote-147) 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 possible but is 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 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. 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.[[147]](#footnote-148) 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 the interpretation of international law.[[148]](#footnote-149) These include General Assembly Resolutions, both before and after the drafting of the Covenants, and the Covenants’ respective monitoring bodies.[[149]](#footnote-150) Here consideration 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.[[150]](#footnote-151)

Attending to all of these sources, 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 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;

(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.

*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.

For example, Article 1 of the 1962 Resolution on Permanent Sovereignty over Natural Resources specifies 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 the well-being of the people of the state concerned.’[[151]](#footnote-152) 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 of the people concerned.[[152]](#footnote-153) 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.[[153]](#footnote-154)

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.

Language in 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 must 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. The ‘floor’ and the ‘wall’ dimensions of citizens’ resource rights will be discussed in turn.

Beginning with the ‘floor’ that requires priority to citizens’ subsistence, here again is the relevant text from common Article 1(2) of 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.

The ‘floor’ dimension of the substantive rights of peoples is marked by the unequivocal language of the final sentence: ‘In no case may a people be deprived of its own means of subsistence.’ Benefits that accrue from exploiting the countries 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 achieving the realization of the rights in that Covenant.[[154]](#footnote-155) 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 obligations, which include making sure that their fiscal regimes are adequate to support such progressive realization of human rights.’[[155]](#footnote-156) A 2015 ECJ ruling that annulled an EU-Morocco trade deal further supports the principle that resource exploitation must benefit, and must not infringe the fundamental rights of, the population of that territory.[[156]](#footnote-157)

This ‘floor’ interpretation, which requires the exploitation of a nation’s resources be devoted first to the sustaining of the basic needs of the nation’s people, is supported by the travaux preparatoires 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.’[[157]](#footnote-158)

This Nauru example is particularly revealing, because it shows that actions stretching over a long period (the overexploitation of phosphates for 50 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 include also resources whose exploitation yields a ‘source of national wealth’ that can provide citizens with the means to subsist.[[158]](#footnote-159)

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. 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.’[[159]](#footnote-160) In interpreting the state duty to fulfil fundamental rights like this one, the 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).’[[160]](#footnote-161) 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 right 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.

Here it is the inherent right of peoples to ‘enjoy fully’ their natural wealth and resources that indicates a duty on states. The benefits of the country’s resources must be fully devoted to public purposes. Any use of these benefits for non-public purposes, 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.’[[161]](#footnote-162)

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*.’[[162]](#footnote-163)

In its *Angola* communication, the African Commission highlighted 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.’[[163]](#footnote-164) And as the Commission stated in 2017, ‘Underlying the right of peoples to freely dispose of their wealth and natural resources is the principle that the use of natural resources should be for the exclusive interest and benefit of the citizens of a State.’[[164]](#footnote-165)

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 of common Article 1(2) of the Covenants,

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.[[165]](#footnote-166)

*Procedural Rights*

Beyond substantive rights, contemporary interpretations of peoples’ rights to natural resources have added procedural rights regarding natural resource management. Already in 1974, Article 7 of the Charter of Economic Rights and Duties of States makes clear that every state has the responsibility to ‘ensure the full participation of its people in the process and benefits of development.’[[166]](#footnote-167) 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 view that includes 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.[[167]](#footnote-168) First, this 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.[[168]](#footnote-169) Article 1(2) of the Declaration states that, ‘The human right to development... implies the full realization of the right of peoples to self-determination, which includes... the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.’

Further specificity on the content of this right is found in the Declaration, where several articles stress that the right to participation is fundamental. For example, Article 1(1) 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,

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. 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.[[169]](#footnote-170)

Such participatory rights regarding environmental matters were elaborated extensively in the Aarhus Convention of 1998, now ratified by 47 parties in Europe and Central Asia.[[170]](#footnote-171) As Elena Blanco and Jona Razzaque describe the Convention’s three pillars, they are

*Access to environmental information:* public authorities have a duty to make information available to the public when requested and the Convention lays out time frames for responding to these requests. Article 4 creates a presumption in favour of information disclosure and public authorities can deny a request for information only on the basis of a list of specific grounds for refusal… The governments should establish a publicly accessible database to provide information on a range of activities including water, energy and other resource use.

*Participation in the environmental decision-making:* the public should be able to participate in the decision-making of a project, plan, policy or programme relating to the environment. According to the Convention, public participation can be ensured with an early notice of the decision-making process when ‘all options are open’ to people to provide comments or input into the process. Public authorities need to take public participation into account in the final decision… and failure to take public input into consideration could be a basis for legal challenge.

*Access to justice in environmental matters:* the Convention allows individuals and NGOs to seek recourse to an administrative or judicial remedy when public authorities or corporations do not comply with the Aarhus obligations… Closely linked to the provision on information and public participation, this pillar mandates the establishment of procedures which are fair, equitable, timely and not prohibitively expensive.

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, as well as to give meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities.[[171]](#footnote-172)

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), for example, 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.[[172]](#footnote-173) Similarly, in its 2009 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.[[173]](#footnote-174)

Second, the CESCR emphasizes that the human rights framework includes the right for those affected by decisions to participate in the relevant decision-making processand specifically applies this right in relation to Article 1(2).[[174]](#footnote-175) In its 2009 Concluding Observations on the DRC, the CESCR urges the government to review mining contracts in a participatory fashion.[[175]](#footnote-176) It also encourages national debate on investment in agriculture in its 2009 Concluding Observations on Madagascar.[[176]](#footnote-177) 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.[[177]](#footnote-178)

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.’[[178]](#footnote-179) 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, ‘All 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, describes the duty of the state to enable participation, which includes

enacting the relevant implementing legislation and elaborating policies and action plans for enabling the general public and particularly potentially affected local people to have access to all the relevant information on natural resources and the environment. It also entails that the relevant regulatory bodies are equipped with and duly mandated to disseminate such information, and undertake awareness creation and public education activities. In the current reality of limited resources and institutional capacity, one way of realizing the duty to promote is to create the conducive legal conditions that would enable members of society, local communities and civil society actors to organize and engage in promotional activities particularly those relating to public education and awareness creation as well as effective participation in decision-making processes.

In addition to and related to information is the provision of guarantees for undertaking consultations with and ensuring the participation of the wider public in general and local people in particular. As part of the duty to promote, States are accordingly required to ensure that the public is availed of adequate opportunities for consultation about and rich and rigorous participation in decision-making processes on plans for both industrial exploration and extraction of natural resources and other large-scale activities with potential environmental and social impacts.[[179]](#footnote-180)

More, in a rare joint declaration, and one specifically on natural resource governance, The Inter-American Commission the African Commission affirmed that states

should place natural resources governance under transparency, including through open budgeting and certification processes and protection of the freedoms of the press, information, and expression. 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 understand the extent and value of their natural resources and the payments for those resources received and disbursed by their governments.[[180]](#footnote-181)

Finally, the transnational drive toward greater transparency around natural resource extraction has been supported by state legislation such as the US Dodd Frank Act sections 1502 and 1504, 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.[[181]](#footnote-182)

*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. A parallel jurisprudence on remedial rights is also well-developed in the Inter-American system.[[182]](#footnote-183)

As noted above, Article 21(1) of the African Charter provides for the general right of peoples to their natural resources, echoing Article 1(2) of the ICESCR and ICCPR in stating that, ‘All peoples shall freely dispose of their wealth and 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.’ Moreover, Article 21(2) provides a strikingly concrete remedial right for people in relation to their natural resources, declaring that, ‘In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.’[[183]](#footnote-184) 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. This requirement of a specific remedy may develop further into a tool for ensuring adequate regard for people’s natural resource rights.

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.[[184]](#footnote-185)

As can be seen, 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. States outside of these regions occasionally express reluctance to accept the interpretations of such bodies, yet these regional bodies have developed their jurisprudence in response to pressing human rights situations in their member states based on international human rights norms. 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.[[185]](#footnote-186) 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. The point of respecting the interpretation of all of these human rights institutions 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.’[[186]](#footnote-187) 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 then 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. As we have seen, 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 the use of their territory’s resources. All citizens of independent states have rights (both ‘floor’ and ‘wall’) to benefit from the exploitation of the territory’s natural resources, rights to meaningful participation in decision-making over these resources, and rights to access to remedy in case these rights are not fulfilled.

The rights of peoples over natural resources correspond to significant state obligations and duties towards 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 the rights into national laws, and to ensure effective and adequately resourced institutions to supervise and enforce the corresponding standards, as well as 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 for managing concessions and measures to prevent illicit financial flows.[[187]](#footnote-188)

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.’ 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, ‘The right to share in the benefits derived from the development or sale of natural resources extends to all peoples of a state.’[[188]](#footnote-189) State duties to respect peoples’ resource rights thus demand extensive and proactive state action.

A particularly 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 are 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.[[189]](#footnote-190) 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.[[190]](#footnote-191) The Guiding Principles also provide substantial detail to flesh out the complementary conclusion that corporations themselves have responsibilities to respect human rights. In this area, 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. While the Guiding Principles are a soft law instrument, the HRC has established a working group to develop a corresponding binding treaty. The working group is making considerable progress in developing ever-more sophisticated drafts of this treaty. 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.[[191]](#footnote-192)

Moreover, there is jurisprudence increasingly emerging from human rights institutions focused on the intersection of human rights obligations, corporations and natural resources. The African Commission has done the most to specify the obligations of corporations in the context of the extraction of natural resources.[[192]](#footnote-193) The Commission sets out a suite of corporate obligations corresponding to the rights in the African Charter.[[193]](#footnote-194) The first is an obligation to do no harm and take due care: firms should ensure that their actions do not result in the curtailment or deprivation of Charter rights, either deliberately or through neglect. This obligation entails putting in place mechanisms for rectifying negative human rights impacts, and for ensuring responsible supply chain management. 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.[[194]](#footnote-195) More, as noted above, 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 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.[[195]](#footnote-196)

On corporate criminal liability, the Commission quotes the Malabo Protocol of 2014, and specifically its Article relating to natural resources.[[196]](#footnote-197) 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.’[[197]](#footnote-198)

*Reforms to Lift the Resource Curse*

Today peoples’ rights over resources are stated clearly in law and mostly not respected in fact. Yet the day might be foreseen when these rights are respected more fully. 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 of the violation of the ‘inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.’ 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 groups, and armed groups in countries of extraction. Moreover, these major economies are also the main importers of natural resources and so 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 end the resource curse, this must change. We take up corporate home-state regulation and the laws of resource-importing states in turn.

*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.[[198]](#footnote-199) Were the substantive, procedural, and remedial rights described above to become more internationally recognized, 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 broader state accountability to citizens. 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 that any regulations should 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 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 comparison from the 1970s is the pressure that the private sector put on states to standardize multilateral standards for export credit agencies. This corporate pressure produced today’s OECD and WTO regulatory instruments intended create a ‘level playing field’ for states’ financial support for their firms operating abroad.[[199]](#footnote-200)

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 operate abroad. An illustration of the development of such home-state standards 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.[[200]](#footnote-201) Starting with the US Foreign Corrupt Practices Act of 1977, major states began to pass anti-bribery legislation binding their own corporations.[[201]](#footnote-202) 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.[[202]](#footnote-203) A broader multilateral instrument, the UN Convention Against Corruption, came into force in 2005 and now counts 186 state parties.[[203]](#footnote-204) The OECD has been attempting to persuade China in particular to join its more rigorous anti-corruption regime.[[204]](#footnote-205)

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 would 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.[[205]](#footnote-206) The addition of this human rights argument—based in the principle of self-determination of peoples to which the great preponderance of states are at least ideologically committed—adds weight to calls for stronger home-state regulation of corporate corruption abroad.[[206]](#footnote-207)

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 appears to require firms not to make resource deals with authoritarian regimes or armed groups. One way to frame this argument takes the propertarian language of the various international instruments seriously to conclude that firms should not make deals for stolen goods—good 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’?[[207]](#footnote-208) 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.[[208]](#footnote-209) 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 to protest what the government is doing without reasonable fear of losing their jobs, freedoms, or lives. Third, if a majority 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.[[209]](#footnote-210) Possible biases in these metrics can be balanced out by combining them into ‘metrics of metrics,’ which have already been developed.[[210]](#footnote-211) 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,’ while autocracies and failed states like Turkmenistan and South Sudan are below it. Perhaps surprisingly, the clarity and predictability required for evaluating respect for citizens’ procedural rights over their natural resources appear to be achievable.

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 the international legal discussions on these issues.

*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 by respect 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 securitized 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 extractive site is located.[[211]](#footnote-212) 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 (until importing states imposed sanctions, which made this illegal for their persons to buy oil from ISIS).[[212]](#footnote-213) Today’s default transnational legal regime means that whoever can control resource-rich territory can receive substantial (and sometimes immense) revenues from selling the resources of that territory to foreigners. In essence, today whoever can keep coercive control over some holes in the ground can get rich.

In many resource-rich countries, this means that any regime that can keep control over oil wells or gem mines can get the funds it needs to stay in power and to suppress or buy off opposition to its rule. Examples include the governments of Azerbaijan and Bahrain. For non-state actors, an armed group that can seize extractive sites can get the funds it needs to start or escalate civil conflict. Examples have been ISIS (oil) and the militants in the eastern Congo (metals). For both state and non-state actors, what is notable about the power they gain from resource revenues is that it is unaccountable power. Unlike foreign loans from banks, resource revenues need never be paid back. Unlike aid from foreign allies, resource revenues come with no conditions attached. Most significantly, resource revenues today flow to state and non-state actors beyond accountability to the population. Resource-empowered actors typically do not need a healthy, educated, or skilled citizenry to gain the revenues that keep them in power; indeed, resource revenues can continue to flow even in the midst of a civil war, as in Libya after the fall of Gaddafi.[[213]](#footnote-214)

Under the current transnational legal regime, large resource revenues go to state and non-state actors who are entirely unaccountable to citizens for the management of those resources. Indeed, in many countries these revenues enable these actors further to abuse and neglect citizens, often while enriching themselves. This helps to explain the correlations with which we began: today most authoritarian regimes, most highly corrupt regimes, most civil wars, and most hunger crises are in resource-rich states. Most refugees have been fleeing from these states, and soon most severe poverty will be located in these states.[[214]](#footnote-215) In many resource-rich states, citizens can only watch as the valuable resources of their country are extracted and sold off by actors who will use the revenues further to oppress or 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. 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.[[215]](#footnote-216) 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 those exports. There will be practical considerations for individual states that want to stop all 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]](#footnote-217) 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 impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.[[217]](#footnote-218)

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,’ the resources start out in the people’s hands at independence (though they may thereafter be privatized). As we have also seen, many national constitutions and laws use similar propertarian language. If this language is accepted literally, then anyone selling off a territory’s 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, that is, be enforcing property rights—the property rights of peoples to their 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.

Even without the propertarian idea, states committed to human rights and the self-determination of peoples may consider what justification they could mount for authorizing their persons to buy resources from foreign actors entirely unaccountable to the citizens of their country. ‘We’ve always done it,’ and ‘some of our economic growth is now tied to it’ are not legally respectable justifications for maintaining a flawed practice, any more than these were in the cases of the Atlantic slave trade or colonial rule. Nor are these parallels accidental: the legitimacy of the slave trade rested on the legalized purchase of human beings from whomever could control those humans by force, and the legitimacy of colonial rule rested on the legal recognition of sovereignty in whoever could control foreign territory by force. Today’s default rule of states to legalize the purchase of natural resources from whoever can control them by force is a remnant of a pre-modern era of law, whose translation of ‘might’ into ‘right’ is difficult to square with the norms of the modern international legal order.[[218]](#footnote-219) States committed to human rights and the self-determination of peoples may consider the implications of these commitments for their laws on resource imports, as well as for their regulation of their corporations operating abroad.[[219]](#footnote-220)

Finally, beyond these two types of reforms, stronger affirmation of peoples’ resource rights may impact further 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.[[220]](#footnote-221) Some international investment tribunals have held that investor-state contracts that were obtained by corruption are either invalid or unenforceable. It has been held that the anti-corruption norms affirmed in several international instruments are a matter of international public policy, and so that tribunals are obliged to comply with these norms in their decisions.[[221]](#footnote-222) 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.[[222]](#footnote-223) As two distinguished jurisprudes have summarized this line of reasoning, ‘corruption inducing an investment transaction invalidates it, and… in such cases the loss lies where it falls.’[[223]](#footnote-224)

Were citizens’ resource rights to become more consistently implemented, the parallel 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 convicting evidence’ that the contract had been concluded without consultation or possible participation either of the relevant indigenous peoples or of the citizens of the state.[[224]](#footnote-225) The contract, the claimant state would argue, thus contradicts international public policy. A consistent line of decisions by tribunals accepting this argument would do much to increase respect for peoples’ resource rights in fact, and would further the development of metrics of adequate respect for such rights that would be needed for security of future investor-state agreements.[[225]](#footnote-226) The idea that corruption could lead tribunals to annul investment contracts seemed theoretical but a few years ago; the law is waiting for lawyers to take parallel actions on behalf of citizens’ resource rights.

It remains to be seen how long it will be before international public policy requires respect for the rights of peoples over their natural resources. What is certain is that sooner is better. Natural resources are crucial for the cultural integrity and the very survival of indigenous peoples. Natural resources are also essential to secure the subsistence and the economic health of national populations. Without sufficient accountability to them, peoples can find that the revenues from their territory’s resources are being spent without benefit to them or are even being used against them. The shockingly high prevalence of authoritarianism, corruption, poverty, and civil conflict in contemporary resource-rich states demonstrate 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.

1. For ‘resource-rich states,’ see the International Monetary Fund’s definition of resource dependence: that natural resources provide at least 20% of exports or fiscal revenues. International Monetary Fund, THE COMMODITIES ROLLER COASTER: A FISCAL FRAMEWORK FOR UNCERTAIN TIMES 21 (2015). For ‘authoritarian regimes,’ see ‘Not Free’ states in the most recent Freedom House report. Freedom House, FREEDOM IN THE WORLD 14 (2019). For civil wars, see civil conflicts in 2016-18 that had over 1000 violent deaths, as recorded in the *UCDP Battle-Related Deaths Dataset*, *available at* http://www.ucdp.uu.se/downloads. For hunger crises, see the list of the ‘the world’s eight worst food crises in 2018’ in Food Security Information Network, GLOBAL REPORT ON FOOD CRISES 19-20 (2019). For refugees, see the top eight source countries from World Bank, *Refugee Population by Country or Territory of Origin, at* https://data.worldbank.org/indicator/sm.pop.refg.or?year\_high\_desc=true. For severe poverty, see James Cust’s prediction in *Share of the World’s Poor Living in Resource-Rich Countries May Peak at 75% in 2030*, BUSINESS A.M. (March 9, 2018) *at* https://www.businessamlive.com/share-of-the-worlds-poor-living-in-resource-rich-countries-may-peak-75-in-2030/. [↑](#footnote-ref-2)
2. Wilson Prichard, Paola Salardi, & Paul Segal, *Taxation, Non-Tax Revenue and Democracy: New Evidence Using New Cross-Country Data*,109 WORLD DEVELOPMENT 295 (2018); David Wiens, Paul Poast, & William Roberts Clark, *The Political Resource Curse: An Empirical Re-evaluation*,67 POLITICAL RESEARCH QUARTERLY 783 (2014); Michael Ross, *What Have We Learned About the Resource Curse?* 18 ANNUAL REVIEW OF POLITICAL SCIENCE 239 (2015). [↑](#footnote-ref-3)
3. Michael Ross, THE OIL CURSE: HOW PETROLEUM WEALTH SHAPES THE DEVELOPMENT OF NATIONS 1 (2012); data updated in personal communication with the corresponding author, June 2017. [↑](#footnote-ref-4)
4. Daniel Workman, *Crude Oil Exports by Country*, World’s Top Exports (Jan 3, 2020), http://www.worldstopexports.com/worlds-top-oil-exports-country/. [↑](#footnote-ref-5)
5. See UNICEF, LEVELS & TRENDS IN CHILD MORTALITY 18-27 (2015). [↑](#footnote-ref-6)
6. See Human Rights Watch, *Azerbaijan*, at https://www.hrw.org/world-report/2019/country-chapters/azerbaijan. [↑](#footnote-ref-7)
7. See <identifying references removed>. [↑](#footnote-ref-8)
8. See <identifying reference removed>. [↑](#footnote-ref-9)
9. 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 ground water, wind, fauna and flora. Natural resources thus encompass all assets or materials that constitute the natural capital of a nation.’ African Commission on Human and Peoples’ Rights, STATE REPORTING GUIDELINES AND PRINCIPLES ON ARTICLES 21 AND 24 OF THE AFRICAN CHARTER RELATING TO EXTRACTIVE INDUSTRIES [*Guidelines*] ACHPR 63, ¶15 (2017). 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.’ See Ramez Abubakr Badeeb, Hooi Lean, & Jeremy Clark, *The Evolution of the Natural Resource Curse Thesis: A Critical Literature Survey*, 51 RESOURCES POLICY 123 (2017). [↑](#footnote-ref-10)
10. International Covenant on Civil and Political Rights [ICCPR], art. 1, 999 UNTS 171 (Dec. 16, 1966); International Covenant on Economic, Social, and Cultural Rights [ICESCR], art. 1, 993 UNTS 3 (Dec. 16, 1966). [↑](#footnote-ref-11)
11. ICCPR, *supra* note 10, art. 47; ICESCR, *supra* note 10, art. 25. [↑](#footnote-ref-12)
12. UN High Commissioner for Human Rights, *Ratification of 18 International Human Rights Treaties*, *at* http://indicators.ohchr.org/; World Population Review, *Total Population by Country 2019, at* http://worldpopulationreview.com/countries/. These data show that out of the 169 member states of the UN, 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. [↑](#footnote-ref-13)
13. See <identifying reference removed>. [↑](#footnote-ref-14)
14. UN Charter, art. 2, ¶¶4, 7; *Declaration on the Inadmissibility of Intervention and Interference the Domestic Affairs of States*, GA Res 2131 (XX) (Dec 21, 1965); *Friendly Relations Declaration*, GA Res 2625 (XXV) (Oct 24, 1970). [↑](#footnote-ref-15)
15. UN Charter, art. 1, ¶¶2, 3; art. 2, ¶4. ICCPR, ICESCR, *supra* note 10, Preamble. [↑](#footnote-ref-16)
16. See <identifying references removed>. [↑](#footnote-ref-17)
17. Using the Freedom House “Not Free” category as a measure of non-accountable governance, cross-referenced with the top 15 crude oil exporting states. Freedom House, FREEDOM IN THE WORLD 2019, 16, https://freedomhouse.org/report/freedom-world/freedom-world-2019; Workman, *Crude Oil Exports by Country*, *supra* note 4. [↑](#footnote-ref-18)
18. 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. See Nico Schrijver, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 49 (2007), and <identifying reference removed>. [↑](#footnote-ref-19)
19. Inclusion in the International Covenant or Covenants on Human Rights of Article Relating to the Right of Peoples to Self-determination, GA Res 545 (VI), UNGAOR, 6th Sess., art. 1 (Feb. 5, 1952). See Schrijver, supra note 18, at 49, and <identifying reference removed>. [↑](#footnote-ref-20)
20. Schrijver, *supra* note 18 at 53. [↑](#footnote-ref-21)
21. <identifying reference removed>; 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. 796 (2012). [↑](#footnote-ref-22)
22. *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UNGAOR, 17th Sess., art. 1 (Dec. 14, 1962); *Permanent Sovereignty over Natural Resources*, GA Res 2158 (XXI), UNGAOR, 21st Sess., art. 5 (Nov. 25, 1966); *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development*, GA Res 2692 (XXV), UNGAOR, 25th Sess., art. 2 (Dec. 11, 1970). [↑](#footnote-ref-23)
23. Schrijver, *supra* note 18, at 311. [↑](#footnote-ref-24)
24. GA Res 1803 (XVII), *supra* note 22, art. 1. [↑](#footnote-ref-25)
25. GA Res 2692 (XXV), *supra* note 22, Preamble. [↑](#footnote-ref-26)
26. GA Res 2158 (XXI), *supra* note 22, art. 5. [↑](#footnote-ref-27)
27. Permanent Sovereignty over Natural Resources of Developing Countries, GA Res 3016 (XXVII), UNGAOR, 27th Sess., art. 1 (Dec. 18, 1972). [↑](#footnote-ref-28)
28. Declaration on the Establishment of a New International Economic Order, GA Res 3201 (S-VI), UNGAOR, 6th Spec. Sess. (May 1, 1974). [↑](#footnote-ref-29)
29. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. 53 (June 21). A UN Special Committee called Namibia’s natural resources ‘the birthright of the Namibian people.’ *Question of Namibia, infra* note 146, Preamble. [↑](#footnote-ref-30)
30. Case Concerning Certain Phosphate Lands in Nauru, 1992 I.C.J. (June 26). [↑](#footnote-ref-31)
31. Front Polisario v. Council, T-512/12 (ECJ, Dec. 10, 2015), ¶¶207-08, 223-47. See <identifying reference removed>. [↑](#footnote-ref-32)
32. 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.’ UN Treaty Collection Depository, *ICESCR Status* (accessed Aug. 5, 2019), *available at* https://treaties.UNorg/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\_no=iv-3&src=treaty#EndDec. 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’s objection was 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.’ *Id.* [↑](#footnote-ref-33)
33. HRC, Concluding Observations: Azerbaijan, CCPR/C/79/Add.38, ¶6 (Aug. 3, 1994). [↑](#footnote-ref-34)
34. Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 116-17 (1994). [↑](#footnote-ref-35)
35. Hans Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 52 (1950). [↑](#footnote-ref-36)
36. See, for example, 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 419, 562-65 (1974). [↑](#footnote-ref-37)
37. Antonio Cassese, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 132-33, 189–90 (1995). [↑](#footnote-ref-38)
38. Higgins, *supra* note 34, at 119-20. [↑](#footnote-ref-39)
39. Universal Declaration of Human Rights [UDHR], GA Res. 217A (III), UN Doc. A/810, art. 21 (Dec. 10, 1948); ICCPR, *supra* note 10, art. 25. [↑](#footnote-ref-40)
40. Committee on the Elimination of Racial Discrimination, General Recommendation 21, The Right to Self-determination, UN Doc. A/51/18, Annex VIII, ¶4 (Mar. 8, 1996). [↑](#footnote-ref-41)
41. Higgins, *supra* note 34, at 120-21. [↑](#footnote-ref-42)
42. Cassese, *supra* note 37, at 144 (italics in original). [↑](#footnote-ref-43)
43. <identifying reference removed>. In 2005, the ICJ determined that permanent sovereignty over natural resources is customary international law: 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). [↑](#footnote-ref-44)
44. See <identifying references removed>; James Anaya and 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 (2001). [↑](#footnote-ref-45)
45. See Patricia I. Vasquez, OIL SPARKS IN THE AMAZON: LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES (2014); Mario Blaser, Harvey A. Feit, and Glenn McRae, IN THE WAY OF DEVELOPMENT: INDIGENOUS PEOPLES, LIFE PROJECTS AND GLOBALIZATION (2004). [↑](#footnote-ref-46)
46. See Anaya and Williams, *supra* note 44, 33; <identifying reference removed>. [↑](#footnote-ref-47)
47. 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); Maivân Lâm, AT THE END OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000). [↑](#footnote-ref-48)
48. See Jeff Corntassel, Toward Sustainable Self-determination: Rethinking the Contemporary Indigenous Rights Discourse 33 ALTERNATIVES 105-132 (2008). [↑](#footnote-ref-49)
49. See Martii Koskenniemi, National Self-determination Today: Problems of Legal Theory and Practice 43 ICLQ 241, 249 (1994); Lea Brilmayer, Secession and Self-determination: A Territorial Interpretation, 16 YALE J. INT’L L. 177 (1991); Cassese, supra note 37, at 71-74. [↑](#footnote-ref-50)
50. See Paul Keal, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES (2003); Robert Miller, Jacinta Ruru, Larissa Behrendt, & Tracey Lindberg, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2012). [↑](#footnote-ref-51)
51. See Harald Gaski, INDIGENOUS PEOPLES: SELF-DETERMINATION, KNOWLEDGE, INDIGENEITY (2008); Jeff Corntassel and Cheryl Bryce, *Practicing Sustainable Self-determination: Indigenous Approaches to Cultural Restoration and Revitalization*, 18 BROWN J. WORLD AFF. 151 (2011). [↑](#footnote-ref-52)
52. Ted Moses, *Self-Determination and the Survival of Indigenous Peoples*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 162 (2001). [↑](#footnote-ref-53)
53. 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 RIGHTS 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). [↑](#footnote-ref-54)
54. See Maivân Clech Lâm, AT THE END OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000); Erica-Irene A. Daes, 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, 19, ¶26 (July 1993). [↑](#footnote-ref-55)
55. James Anaya, A Contemporary Definition of the International Norm of Self-Determination, 31 TRANSNAT’L L. & CONTEMP. PROBLEMS 143 (1993). [↑](#footnote-ref-56)
56. 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). [↑](#footnote-ref-57)
57. Benedict Kingsbury, *Reconstructing Self-determination: A Relational Approach, in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION (Pekka Aikio & Martin Scheinin eds., 2001), 22. [↑](#footnote-ref-58)
58. For further analysis, see <identifying reference removed>. [↑](#footnote-ref-59)
59. See HRC, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Comm. No. 167/1984, UN GAOR, 38th Sess., Supp. No. 40 (A/38/40) (Mar. 26, 1990); Kitok v. Sweden, Comm. No. 197/1985, CCPR/C/33/D/197/1985 442–45 (Jul. 27, 1988); I. Länsman et al. v. Finland, Comm. No. 511/1992, UN Doc. CCPR/C/57/1 (Jun. 11, 1992); J. Länsman et al. v. Finland, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (Aug. 28, 1995). [↑](#footnote-ref-60)
60. For example, see HRC, Apirana Mahuika et al. v. New Zealand, Comm. No. 547/1993, 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 and Scheinin, *supra* note 57, at 179. [↑](#footnote-ref-61)
61. HRC, Concluding Observations: Canada, UN Doc. CCPR/C/79/Add.105 (Apr. 7, 1999). [↑](#footnote-ref-62)
62. HRC, Concluding Observations: Norway, UN Doc. CCPR/C/79/Add.112 (Oct. 26, 1999). [↑](#footnote-ref-63)
63. See HRC, Concluding Observations: Mexico UN Doc. CCPR/C/MEX/CO/5 (Mar. 26, 2010); Panama, UN Doc. CCPR/C/PAN/CO/3 (Apr, 4, 2008); Australia UN Doc. CCPR/C/AUS/CO/5 (Apr. 2, 2009); Denmark UN Doc. CCPR/C/DNK/CO/5 (Oct. 13, 2008); Sweden UN Doc. CCPR/CO/74/SWE (Apr. 24, 2002). [↑](#footnote-ref-64)
64. See CESCR, Concluding Observations: Argentina, UN Doc. E/C.12/ARG/CO/3 (Nov. 14, 2011); Finland, UN Doc. E/C.12/FIN/CO/6 (Dec. 17, 2014); Guatemala, UN Doc. E/C.12/GTM/CO/3 (Dec. 9, 2014); Cambodia, UN Doc. E/C.12/KHM/CO/1 (Jun. 12, 2009). [↑](#footnote-ref-65)
65. CESCR, Concluding Observations: Paraguay, UN Doc. E/C.12/PRY/CO/4 (Mar. 20, 2015). [↑](#footnote-ref-66)
66. CERD, General Recommendation XXI (48) on Self-Determination, UN Doc. CERD/48/Misc. 7/Rev. 3, ¶5 (Mar. 8, 1996). [↑](#footnote-ref-67)
67. CERD, General Recommendation XXIII (51) on Indigenous Peoples, UN Doc. CERD/C/365, in Supp. 18, A/52/18, Annex V, 122 (Sep. 26, 1997), calls upon state parties to ensure indigenous peoples effective participation but makes no mention of self-determination per se. [↑](#footnote-ref-68)
68. CESCR, Concluding Observations: Russia, UN Doc. E/C.12/1/Add.94, ¶11 (Dec. 12, 2003). [↑](#footnote-ref-69)
69. Saramaka People v. Suriname, Ser. C, No. 172, ¶93 (Inter-Am. C.H.R., Nov. 28, 2007). [↑](#footnote-ref-70)
70. Case of the Kaliña and Lokono Peoples v. Suriname (Merits, Reparations and Costs), Series C, No. 309 (Inter-Am. C.H.R., Nov. 25, 2015). [↑](#footnote-ref-71)
71. *Id.*, ¶124. Interestingly, the Court has also included an examination of Article 23 of the American Convention relating to the right to participate in government (para. 126). [↑](#footnote-ref-72)
72. Organization of African Unity, African Charter on Human and Peoples’ Rights [African Charter], CAB/LEG/67/3 rev. 5 21, ILM 58 (1982) (Jun. 27, 1981). [↑](#footnote-ref-73)
73. On the correlation between cultural rights and access to natural resources, see also African Commission on Human and Peoples’ Rights, Social and Economic Rights Action Center and the Center for Economic, and Social Rights v. Nigeria [*SERAC v. Nigeria*], Comm. No. 155/96 (May 27, 2002). [↑](#footnote-ref-74)
74. African Commission on Human and Peoples’ Rights v. Republic of Kenya [Ogiek Case], App. No. 006/2012, ¶201 (African Court on Human and Peoples’ Rights, May 26, 2017). [↑](#footnote-ref-75)
75. See Cambou, *supra* note 56, at 1-2, 34-50. [↑](#footnote-ref-76)
76. See *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UNGAOR, 29th Sess. (Dec. 12, 1974); *Declaration on the Right to Development*, GA Res 41/128, UNGAOR, 41st Sess. (Dec. 4, 1986). [↑](#footnote-ref-77)
77. See <identifying reference removed>. [↑](#footnote-ref-78)
78. See Mario Blaser, Harvey A. Feit, & Glenn McRae eds., IN THE WAY OF DEVELOPMENT: INDIGENOUS PEOPLES, LIFE PROJECTS, AND GLOBALIZATION (2004). [↑](#footnote-ref-79)
79. See Victoria Tauli-Corpuz, Leah Enkiwe-Abayao, & Raymond de Chavez eds., TOWARDS AN ALTERNATIVE DEVELOPMENT PARADIGM: INDIGENOUS PEOPLES’ SELF-DETERMINED DEVELOPMENT (2010); <identifying reference removed>. [↑](#footnote-ref-80)
80. Declaration on the Right to Development, *supra* note 76, Preamble. [↑](#footnote-ref-81)
81. See Isabella D. Bunn, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS (2012). [↑](#footnote-ref-82)
82. See Arne Vandenbogaerde, The Right to Development in International Human Rights Law: A Call for Its Dissolution, 31 NETH Q. J. OF HUM. RTS. 187 (2013); Peter Uvin, From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development, 17 DEVELOPMENT PRACTICE 597 (2007); Jack Donnelly, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, 15 CAL. W. INT’L L.J. 473, 507 (1985); Philip Alston, Making Space for New Human Rights: The Case of the Right to Development, 1 HARV. HUM. RTS. Y.B. 3, 7 (1988); Brigitte I. Hamm, A Human Rights Approach to Development, 23 HUM. RTS. Q. 1005, 1030 (2001); Arjun Sengupta, On the Theory and Practice of the Right to Development, 24 HUM. RTS. Q. 837, 889 (2002); Daniel Aguire, THE HUMAN RIGHT TO DEVELOPMENT IN A GLOBALIZED CONTEXT (2008). [↑](#footnote-ref-83)
83. See Olajumoke O. Oduwole, INTERNATIONAL LAW AND THE RIGHT TO DEVELOPMENT: A PRAGMATIC APPROACH FOR AFRICA (2014); Susan Marks ed., IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW (2008). [↑](#footnote-ref-84)
84. For analysis, see <identifying reference removed>. [↑](#footnote-ref-85)
85. African Commission on Human and Peoples’ Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya [Endorois Case], Comm. No. 276/2003 (2010). [↑](#footnote-ref-86)
86. *Id.*, ¶129. [↑](#footnote-ref-87)
87. *Id.*, ¶291. [↑](#footnote-ref-88)
88. For analysis, see <identifying reference removed>. [↑](#footnote-ref-89)
89. See Cathal Doyle, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE, PRIOR, AND INFORMED CONSENT (2014). [↑](#footnote-ref-90)
90. HRC, Report: Canada (ICCPR), UN Doc. A/54/50 vol. I, 230 (1999). [↑](#footnote-ref-91)
91. HRC, Report: Australia (ICCPR), UN Doc. A/55/40 vol. I, 506 (2000). [↑](#footnote-ref-92)
92. *Id.*, at 506-507. [↑](#footnote-ref-93)
93. HRC, Report: Sweden (ICCPR), UN Doc. A/57/40 vol. I, 79 (2002). [↑](#footnote-ref-94)
94. HRC, Concluding Observations: United States, UN Doc. CCPR/C/USA/CO/4, ¶25 (August 23, 2014). [↑](#footnote-ref-95)
95. 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, ¶58 (May 23, 2003). [↑](#footnote-ref-96)
96. For a compilation of these recommendations, see UN-REDD, Legal Companion to the UN-REDD Programme - Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC (2013). [↑](#footnote-ref-97)
97. Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5, rev. 1, ¶117 (Inter-Am. C.H.R., Oct. 12, 2004). [↑](#footnote-ref-98)
98. *Id.*, ¶142. [↑](#footnote-ref-99)
99. 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). [↑](#footnote-ref-100)
100. Article 27 of the UDHR, *supra* note 39; Article 15 of the ICESCR, *supra* note 10; Article 17 of the African Charter, *supra* note 72; Article 13 of Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man (May 2, 1948) *available at* https://www.refworld.org/docid/3ae6b3710.html. For analysis, see Elsa Stamatopoulou, CULTURAL RIGHTS IN INTERNATIONAL LAW (2007); Ana Vrdoljak ed., *The Cultural Dimension of Human Rights* (2013). [↑](#footnote-ref-101)
101. HRC, General Comment 23, Article 27, UN Doc. HRI/GEN/1/Rev.1 at 38, ¶7 (1994). [↑](#footnote-ref-102)
102. See Fergus MacKay ed., A COMPLIATION OF UN TREATY BODY JURISPRUDENCE, Vol. V, part III (2011-12). [↑](#footnote-ref-103)
103. *Supra* note 59. [↑](#footnote-ref-104)
104. Comm. No. 511/1992, UN GAOR, 52nd Sess., UN Doc. CCPR/C/52D/511/1992 (Nov. 8, 1994). [↑](#footnote-ref-105)
105. Comm. No. R.6/24, UN GAOR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (July 30, 1981). [↑](#footnote-ref-106)
106. For analysis, see Martin Scheinin, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in Martin Scheinin ed., THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETATIVE APPROACH 163-64 (2000). [↑](#footnote-ref-107)
107. Saramaka People v. Suriname, *supra* note 69, ¶121. [↑](#footnote-ref-108)
108. *Id.*, ¶122 [↑](#footnote-ref-109)
109. Case of the Kichwa Indigenous People of Sarayaku(Merits and Reparation), Series C No. 245, ¶220 (Inter-Am. C.H.R., Jun. 27, 2012). [↑](#footnote-ref-110)
110. Case of Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs), Ser. C, No. 125 ¶135 (Inter-Am. C.H.R., June 17, 2005). [↑](#footnote-ref-111)
111. Endorois Case, *supra* note 85; Ogiek Case, *supra* note 74. [↑](#footnote-ref-112)
112. Endorois Case, *supra* note 85, ¶244. The Commission here was referring to African Commission’s Working Group of Experts on Indigenous Populations/Communities, REPORT (2005), *available at* https://www.iwgia.org/images/publications//African\_Commission\_book.pdf. [↑](#footnote-ref-113)
113. African Commission on Human and Peoples’ Rights, Resolution on the Protection of Sacred Natural Sites and Territories, ACHPR/Res. 372 (LX) (May 22, 2017). [↑](#footnote-ref-114)
114. Ogiek Case, *supra* note 74, ¶164. [↑](#footnote-ref-115)
115. Miranda, *supra* note 21, at 820. [↑](#footnote-ref-116)
116. Saramaka People v. Suriname, *supra* note 69, ¶128. [↑](#footnote-ref-117)
117. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 25-27 (Ben Saul, David Kinley & Jacqueline Mowbray eds., 2014). [↑](#footnote-ref-118)
118. Higgins, *supra* note 34, at 124 (emphasis in original). [↑](#footnote-ref-119)
119. The opinions of the treaty bodies are significant, as these opinions are recognized as having substantial weight by the International Court of Justice; see Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) [*Guinea v. DRC*], 2010 I.C.J. 639, ¶66 (Nov. 30). [↑](#footnote-ref-120)
120. See Saul, Kinley, & Mobray, *supra* note 117, at 52. [↑](#footnote-ref-121)
121. CESCR, Concluding Observations: Azerbaijan, E/C.12/1/Add.20, ¶16 (Dec. 22, 1997). [↑](#footnote-ref-122)
122. *Id.*, ¶29. [↑](#footnote-ref-123)
123. CESCR, Concluding Observations: Democratic Republic of Congo, E/C.12/COD/CO/4, ¶13 (Dec. 16, 2009). [↑](#footnote-ref-124)
124. CESCR, Concluding Observations: Cambodia, E/C.12/KHM/CO/1, ¶15 (May 22, 2009). [↑](#footnote-ref-125)
125. Sarah Joseph & Melissa Castan, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY, 3rd. ed., 162 (2013). [↑](#footnote-ref-126)
126. HRC, Concluding Observations: Azerbaijan, *supra* note 33, ¶6. [↑](#footnote-ref-127)
127. HRC, General Comment No 12: Article 1 (Right to Self-determination), 21st Sess., ¶2 (Mar. 13, 1984). [↑](#footnote-ref-128)
128. *Id.*, ¶1. [↑](#footnote-ref-129)
129. CERD, General Recommendation XXI, *supra* note 61, ¶4 (emphases added). See *Declaration on Principles of International Law Concerning Friendly Relations*,GA Res 2625 (XXV), UN Doc A/RES/25/2625, Preamble (Oct. 24, 1970). [↑](#footnote-ref-130)
130. African Commission, *Guidelines*, *supra* note 9, ¶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.’ [↑](#footnote-ref-131)
131. African Commission, *Resolution on a Human Rights-based Approach to Natural Resource Governance*, Resolution 224, 51st Sess., ¶15 (2012) (emphases added). [↑](#footnote-ref-132)
132. African Commission, Front for the Liberation of the State of Cabinda v. Republic of Angola, Comm. No. 328/06(54th Sess.) [*Angola*], ¶130 (Nov. 5, 2013). [↑](#footnote-ref-133)
133. African Commission, Katangese Peoples' Congress v. Zaire, Comm. No. 75/92, IHRL 174 (ACHPR 1995) ¶6 (Oct. 1995). [↑](#footnote-ref-134)
134. Miranda, *supra* note 21 at 800. See also 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. 154 (2011), which notes that the HRC decided ‘relatively early on to consider cases brought under the Optional Protocol using Article 27 rather than Article 1’ of the ICCPR without explicitly denying that the rights contained therein might apply to indigenous peoples; Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT’L L. 133 (2011), which addresses the argument that ‘the establishment and development of indigenous cultural institutions and systems’ is not within ‘the sphere of self-determination addressed by Article 1 of the ICCPR.’ [↑](#footnote-ref-135)
135. African Commission, *Guidelines*, *supra* note 9, ¶28. [↑](#footnote-ref-136)
136. *Id.*, ¶129. [↑](#footnote-ref-137)
137. African Commission, Resolution 224, *supra* note 131. [↑](#footnote-ref-138)
138. African Commission, *Guidelines*, *supra* note 9, ¶29. Several aspects of the *Guidelines* are restated in African Commission, RESOLUTION ON THE NIAMEY DECLARATION ON ENSURING THE UPHOLDING OF THE AFRICAN CHARTER IN THE EXTRACTIVE INDUSTRIES SECTOR, ACHPR/Res. 367 (LX) (2017). [↑](#footnote-ref-139)
139. Emeka Duruigbo, Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law, 38 GEO. WASH. INT’L L. REV. 65 (2006). [↑](#footnote-ref-140)
140. Miranda, *supra* note 21, at 804. [↑](#footnote-ref-141)
141. Richard Kiwanuka, The Meaning of Peoples in the African Charter on Human and Peoples’ Rights, 82 AJIL 80 (1988). [↑](#footnote-ref-142)
142. Constitution of Senegal, art. 25(1) (2001 rev. 2016); Constitution of Iraq, art. 111 (2005); Constitution of Ukraine, art. 13 (1996). [↑](#footnote-ref-143)
143. Constitution of Mexico, art. 27 (1917). 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). [↑](#footnote-ref-144)
144. Constitution of Zambia, art. 10v, see art. 339f (1996). [↑](#footnote-ref-145)
145. See James Anaya, *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) *at* https://archive.org/stream/PngUnsrip2011Final2ReducedSizeAnnexes/png-unsrip-2011-final2-reduced-size-annexes\_djvu.txt. [↑](#footnote-ref-146)
146. Question of Namibia, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA A/RES/43/26, 32nd Session, ¶53 (Oct. 20, 1977). [↑](#footnote-ref-147)
147. See Thomas Buergenthal, *Human Rights*, in Rüdiger Wolfrum, ed., MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW 8 (2007). [↑](#footnote-ref-148)
148. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, art. 31 (May 23, 1969). [↑](#footnote-ref-149)
149. See, e.g., *Guinea v. DRC*, *supra* note 119, ¶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.’ While the ICJ was referring to the HRC, similar reasoning could apply to the CESCR. [↑](#footnote-ref-150)
150. United Nations, *Statute of the International Court of Justice*, art. 38(d) (April 18, 1946). [↑](#footnote-ref-151)
151. *Supra* note 22, art. 1. [↑](#footnote-ref-152)
152. *Id.*, art. 5. [↑](#footnote-ref-153)
153. *Id.*, art. 2. [↑](#footnote-ref-154)
154. *Id.*, art. 2(1). [↑](#footnote-ref-155)
155. <identifying reference removed>. [↑](#footnote-ref-156)
156. Front Polisario v Council, Case T-512/12, ¶208-09, 227-29 (Eur. Ct. J., Dec. 10, 2015). [↑](#footnote-ref-157)
157. Draft International Covenants on Human Rights,UN Doc. A/C.3/SR.674, ¶8 (Nov. 8, 1955). The Nauru example was of a national people under colonial domination, yet as shown above the resource rights of peoples persist after independence. [↑](#footnote-ref-158)
158. On the legal texts concerning the deprivation of peoples directly to access to food and water, see <identifying reference removed>. [↑](#footnote-ref-159)
159. *Supra* note 73, ¶45. [↑](#footnote-ref-160)
160. *Id.*, ¶47. [↑](#footnote-ref-161)
161. *Supra* note 72, art. 21(1) (emphasis added). [↑](#footnote-ref-162)
162. *Id.*, art. 21(5) (emphasis added). [↑](#footnote-ref-163)
163. *Angola*, *supra* note 132, ¶131. [↑](#footnote-ref-164)
164. African Commission, *Guidelines*, *supra* note 9, art. 24 (emphasis added). 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. See <identifying reference removed>. [↑](#footnote-ref-165)
165. Cassese, *supra* note 37, at 56. [↑](#footnote-ref-166)
166. Charter of Economic Rights, supra note 76. [↑](#footnote-ref-167)
167. Declaration on the Right to Development, supra note 76. [↑](#footnote-ref-168)
168. Schrijver, *supra* note 18, at 53. [↑](#footnote-ref-169)
169. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*,A/CONF.151/26, Principle 10 (June 3, 1992). [↑](#footnote-ref-170)
170. United Nationals Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447; 38 ILM 517 (Jun. 28, 1998). [↑](#footnote-ref-171)
171. SERAC v. Nigeria, supra note 72, ¶¶57-58. [↑](#footnote-ref-172)
172. CESCR, Concluding Observations: Azerbaijan, *supra* note 120, ¶16. [↑](#footnote-ref-173)
173. CESCR, Concluding Observations: Democratic Republic of Congo, *supra* note 123, ¶13. [↑](#footnote-ref-174)
174. CESCR, Poverty and the ICESCR, E/C.12/2001/10, ¶12 (May 4, 2001). [↑](#footnote-ref-175)
175. CESCR, Concluding Observations: Democratic Republic of Congo, *supra* note 123, ¶13. [↑](#footnote-ref-176)
176. CESCR, Concluding Observations: Madagascar, E/C.12/MDG/CO/2, ¶12 (Dec. 16, 2009). [↑](#footnote-ref-177)
177. CESCR,Poverty and the ICESCR, *supra* note 174, ¶12. [↑](#footnote-ref-178)
178. League of Arab States, *Arab Charter on Human Rights* (Sept. 15, 1994), https://www.refworld.org/docid/3ae6b38540.html. [↑](#footnote-ref-179)
179. African Commission, *Guidelines*, *supra* note 9, ¶¶64, 65. [↑](#footnote-ref-180)
180. Inter-American Commission on Human Rights and African Commission, *Declaration on a Human Rights-Based Approach to Natural Resources Management* (April 26, 2012). [↑](#footnote-ref-181)
181. 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); European Union, Accounting and Transparency Directive 2004/109/EC (Jan. 20, 2010); OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011) *at* http://www.oecd.org/daf/inv/mne/48004323.pdf; Extractive Industries Transparency Initiative *at* https://eiti.org/; Publish What You Pay *at* http://www.publishwhatyoupay.org/. [↑](#footnote-ref-182)
182. <identifying reference removed>. [↑](#footnote-ref-183)
183. African Commission, *Guidelines*, *supra* note 9, ¶34. [↑](#footnote-ref-184)
184. *Id.*, ¶19. [↑](#footnote-ref-185)
185. See Chiara Giorgetti, *Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings*, in Arman Savarian et. al. (eds.), PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS 223 (2015); Carla Buckley, Alice Donald, and Philip Leach (eds.), TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS (2016). [↑](#footnote-ref-186)
186. *Guinea v. DRC*, *supra* note 119, paras. 66-67. [↑](#footnote-ref-187)
187. *Id.*, ¶¶53-66. [↑](#footnote-ref-188)
188. *Id.*, ¶¶1, 31. [↑](#footnote-ref-189)
189. CESCR, Statement on the Obligations of State Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights, E/C.12/2011/1, ¶5 (Jul. 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 E/C.12/GC/24, ¶11 (Aug. 10, 2017); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶109-112 (Jul. 9). [↑](#footnote-ref-190)
190. HRC, Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 (Jul. 6, 2011). See also ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, prins. 24-27 *at* https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\_drblob\_pi1%5BdownloadUid%5D=23*.* [↑](#footnote-ref-191)
191. On a binding treaty, see https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx; http://www.business-humanrights.org/en/binding-treaty. [↑](#footnote-ref-192)
192. African Commission, *Guidelines*, *supra* note 9, ¶68. [↑](#footnote-ref-193)
193. *Id.*, ¶¶69-76. [↑](#footnote-ref-194)
194. The African Commission’s Niamey Declaration, *supra* note 133, art. 1(e, f, h), requests state parties to the African Charter to have in place legislation that makes public the terms of concessionary contracts as well as independent audits of all revenues received under them, and to impose criminal and administrative accountability on corruption involving the extractive industries. [↑](#footnote-ref-195)
195. Further, the African Commission’s ‘Niamey Declaration’ (*id.*, 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 extractives industries sector resulting in extensive individual and collective human rights violations.’ [↑](#footnote-ref-196)
196. African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (Malabo Protocol) (Jun. 27, 2014) *at* https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights; African Commission, *Guidelines*, *supra* note 9, ¶71. The Malabo Protocol will come into effect when it has 15 state parties; at the time of this writing there are 11. [↑](#footnote-ref-197)
197. African Commission, *Guidelines*, *supra* note 9, ¶71. [↑](#footnote-ref-198)
198. HRC, Human Rights and Transnational Corporations and Other Business Enterprises, *supra* note 190; UN Global Compact, https://www.unglobalcompact.org/; Equator Principles, https://equator-principles.com/. [↑](#footnote-ref-199)
199. On the OECD Arrangement, see https://www.oecd.org/trade/topics/export-credits/; on the WTO’s ‘Agreement on Subsidies and Countervailing Measures’ see https://www.wto.org/english/docs\_e/legal\_e/24-scm\_01\_e.htm. [↑](#footnote-ref-200)
200. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L.J. 929–1014 (2012). [↑](#footnote-ref-201)
201. John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J. LAW & PUB. POL. 25–38 (2012). [↑](#footnote-ref-202)
202. On the OECD Convention, see http://www.oecd.org/corruption/oecdantibriberyconvention.htm. On compliance, see Nathan M. Jensen & Edmund J. Malesky, *Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention*, 72 INTERNATIONAL ORGANIZATION 33-69 (2018). [↑](#footnote-ref-203)
203. On the UN Convention against Corruption, see https://www.unodc.org/unodc/en/treaties/CAC/. [↑](#footnote-ref-204)
204. Michael Griffiths, *OECD Wooing China to Sign Anti-Bribery Convention*, GLOBAL INVESTIGATIONS REVIEW, https://globalinvestigationsreview.com/article/1173227/oecd-wooing-china-to-sign-anti-bribery-convention. [↑](#footnote-ref-205)
205. African Charter, *supra* note 72, art. 21. [↑](#footnote-ref-206)
206. 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. [↑](#footnote-ref-207)
207. ICCPR, *supra* note 10, art. 47; ICESCR, *supra* note 10, art. 25. [↑](#footnote-ref-208)
208. See <identifying references removed>. [↑](#footnote-ref-209)
209. 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 World Bank, *Worldwide Governance Indicators*, https://info.worldbank.org/governance/wgi/; Economist Intelligence Unit, *Democracy Index*, https://www.eiu.com/topic/democracy-index; Freedom House, *Freedom in the World*, https://freedomhouse.org/report-types/freedom-world; Transparency International, *Corruption Perceptions Index*, https://www.transparency.org/research/cpi. [↑](#footnote-ref-210)
210. See <identifying reference removed>. [↑](#footnote-ref-211)
211. See <identifying references removed>. [↑](#footnote-ref-212)
212. See *infra*, note 210. [↑](#footnote-ref-213)
213. See <identifying reference removed.> [↑](#footnote-ref-214)
214. See *supra*, note 2. [↑](#footnote-ref-215)
215. US Executive Order 13566 Blocking Property and Prohibiting Certain Transactions Related to Libya, 76 FR 11315 (2011); US Department of Treasury, Treasury Sanctions Key ISIL Leaders and Facilitators Including a Senior Oil Official, https://www.treasury.gov/press-center/press-releases/Pages/jl0351.aspx. [↑](#footnote-ref-216)
216. The economic and diplomatic feasibility and desirability of states in North America and Europe tapering off oil imports from exporters that lack minimal accountability to citizens is discussed in <identifying references removed>. [↑](#footnote-ref-217)
217. See *supra*, note 10. [↑](#footnote-ref-218)
218. See <identifying references removed>. [↑](#footnote-ref-219)
219. For more discussion of the feasibility of these reforms, as well as more detail on their design and implementation, see <identifying references removed>. [↑](#footnote-ref-220)
220. 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, and 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 ICLQ 573 (2011). [↑](#footnote-ref-221)
221. See, e.g., Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6 (1997). The status of the appeal to public policy is not decided; see 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 the decision of the US District Court for the Southern District of Texas in Vantage Deepwater Company et al v. Petrobras Americas Inc. et al, No. 4:2018cv02246, Doc. 146 (S.D. Tex., May 17, 2019). [↑](#footnote-ref-222)
222. World Duty Free Company Limited v. Kenya, Award, ICSID Case No ARB/00/7 ¶178 (Sep. 25, 2006). [↑](#footnote-ref-223)
223. 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). [↑](#footnote-ref-224)
224. On the standard of proof related to economic crimes such as corruption, see Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 ICLQ 577, 588-90 (2018). [↑](#footnote-ref-225)
225. For the parallel in the current decisions involving corruption, see *Id.*, at 596-97. [↑](#footnote-ref-226)