

PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN THE 21ST CENTURY: NATURAL RESOURCE GOVERNANCE AND THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES UNDER INTERNATIONAL LAW

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Permanent sovereignty over natural resources has emerged as a fundamental principle in international law, allowing postcolonial states to assert full sovereignty or 'sovereign rights' over natural resources found within the limits of their jurisdiction. Despite the postcolonial context in which the first United Nations General Assembly resolutions in the field were adopted, there has been an increasing recognition that the right to permanent sovereignty should be given a wider scope and could start to legitimise the claims of non-state actors and communities in defining ownership and usage rights over the natural resources within a state. Indeed, international law has evolved to recognise a number of substantive and procedural rights for indigenous peoples, including: ownership rights over natural resources; the right to participate in decision-making and to prior and informed consent in the context of natural resources extraction projects; and the sharing of benefits arising from the exploration and commercial exploitation of natural resources in indigenous lands. This paper argues that the principle of permanent sovereignty over natural resources complements and further refines the right of self-determination of 'peoples' under international law while establishing important parameters for the allocation of property rights in natural resources. Moreover, by implementing substantive and procedural rights that allow indigenous peoples to exercise resource rights, it is suggested that states have transferred sovereign powers over natural resources to non-state actors, thus upsetting the notion of permanent sovereignty as a right belonging to states.

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I INTRODUCTION

Indigenous peoples in many parts of the world have had a tragic history of forced assimilation and deprivation of their lands. While descendants of European settlers achieved political independence from colonial powers, indigenous peoples within the former colonies remained the target of discrimination and deprivation of their lands ('internal colonialism'¹). As indigenous peoples did not hold title to land in a way that European legal systems recognised, it was easy to divorce them from their ancestral territories to make way for colonial landowners. Tribes were assigned to reservations on marginal land, but even the rights of indigenous peoples over this land have rarely been regarded as sacrosanct, even today.

Indian treaties with European powers concerning their land rights were usually disregarded once colonies gained independence.² From that time until relatively recently, indigenous rights — unlike the rights of religious and other minorities — were not recognised as an issue of international concern.³ In a pivotal determination made by a British-American arbitration tribunal in 1926 in the *Cayuga Indians* dispute,⁴ it was held that the Cayuga Nation and the Cayuga as individuals had no legal status under international law.⁵ However, the growth of international human rights law has challenged this view, calling for the modernisation of classical international law to make individuals, as well as groups of individuals, beneficiaries of international human rights.⁶

¹ Erica-Irene A Daes, 'Protection of the World's Indigenous Peoples and Human Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (UNESCO and Ashgate, 2000) 301, 302.

² Hurst Hannum, 'The Protection of Indigenous Rights in the Inter-American System' in David J Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Oxford University Press, 1998) 323, 324.

³ Ibid.

⁴ *Cayuga Indians (Great Britain v United States) (Awards)* (1926) 6 RIAA 173.

⁵ Ibid 179; W Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' (1995) 89 *American Journal of International Law* 350, 351; Ricardo M Pereira, 'The Right to Reproductive Self-Determination of Indigenous Peoples under Human Rights Law' in Sabine Berking and Magdalena Zolkos (eds), *Between Life and Death: Governing Populations in the Era of Human Rights* (Peter Lang, 2009) 303, 304.

⁶ Pereira, 'The Right to Reproductive Self-Determination', above n 5, 304. See also Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in James Crawford (ed), *The Rights of Peoples* (Oxford University Press, 1988) 17, 17–37.

Although the International Labour Organization ('ILO') and the United Nations General Assembly ('UNGA') have adopted instruments that recognise specific fundamental rights for indigenous peoples — including the right to land and natural resources⁷ — none of the following major international or regional agreements refer specifically to indigenous peoples: the *Universal Declaration of Human Rights*,⁸ the 1966 international human rights covenants,⁹ the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁰ or the European¹¹ and inter-American human rights instruments, including the *American Convention on Human Rights* ('*American Convention*').¹²

A state's claim to sovereignty over natural resources is often put to the test when local communities, including indigenous groups, claim individual or group resource rights. These claims often clash with the interests of economic operators in the natural resources sector. The notion of permanent sovereignty over natural resources, although originally established in the postcolonial period as the legal basis for the claims of sovereignty over natural resources by developing states, has been given a wider purpose in more recent years and could arguably be used as the basis to legitimise the claims of non-state actors and communities in defining ownership and usage rights over the natural resources within a state. Thus, the right to permanent sovereignty accrues not only to states in the postcolonial period, but has also been recognised as a basis for individuals and communities to challenge their government's decisions to grant exploration and exploitation rights to foreign companies, which may be regarded as disadvantageous.¹³ The classical Westphalian conception of sovereignty¹⁴ is arguably no longer able to live up to the evolutionary nature of international law

⁷ See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess., 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('*United Nations Declaration on the Rights of Indigenous Peoples*') art 29 ('*UNDRIP*'); *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) art 15 ('*ILO Convention 169*').

⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess., 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁹ See *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

¹¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) ('*European Convention on Human Rights*').

¹² *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('*American Convention*'). See also Pereira, 'The Right to Reproductive Self-Determination', above n 5, 304.

¹³ See, eg, *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th sess., 1194th plen mtg, UN Doc A/RES/1803(XVII) (14 December 1962) ('*RPSNR*'). The *RPSNR* is discussed further below. See also Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33, 61.

¹⁴ That is, the modern form of state sovereignty based on the principle of territorial integrity as established in the Peace of Westphalia of 1648.

because it is increasingly moving away from its primarily state-centred focus towards recognising the rights of participation of non-state actors in decision-making and the access of these actors to justice.¹⁵

This article aims to assess the extent to which the rights to permanent sovereignty over natural resources and to self-determination of 'peoples' (meaning a collective group of individuals within a state) have been elaborated into specific substantive and procedural norms of international law in order to advance indigenous peoples' collective claim for self-determination over land and natural resources. This article also analyses the extent to which these rights and duties upset the notion of permanent sovereignty, primarily conceived as a right belonging to states. As such, it deals with the often-thorny dilemma of reconciling state sovereignty and collective rights over natural resources and contends that permanent sovereignty over natural resources and the right to self-determination are rights to be accorded to all peoples — including indigenous peoples. It will be argued that both rights are to be regarded as complementary in securing indigenous peoples' claims for autonomy over their land and natural resources, revitalising the debate on the interplay between state sovereignty over natural resources on the one hand and the rights of peoples to assert resource rights on the other.

Part II reviews the historical evolution and the legal nature of the principle of permanent sovereignty over natural resources in international law. Part III discusses the notion of indigenous peoples' right to self-determination under international law, in both its external and internal forms. Part IV reviews the substantive and procedural international norms that allow for the realisation of indigenous peoples' land and natural resource rights. In particular, the paper discusses the extent to which international law recognises communal land systems traditionally applied by indigenous peoples, which are often not in line with the Western conventional land system of registration. Moreover, the article assesses procedural obligations to give effect to those land and natural resources rights — notably the right of indigenous communities to be consulted and to prior and informed consent in connection with extractive industries' projects — and assesses the extent to which the exercise of these participatory rights conflict with the principle of state sovereignty. Finally, Part V assesses the international forums available for the assertion of indigenous peoples' land and natural resources rights, with reference to the jurisprudence of international and regional courts and tribunals and treaty monitoring bodies. The paper concludes that the formulation of indigenous peoples' land and natural resources rights under international law, which includes both substantive and procedural elements, goes beyond addressing the question of allocation of property rights to redefine the fundamental notion of the sovereignty of states over natural resources.

¹⁵ See generally Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 *Texas International Law Journal* 155, 160.

II THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

A *Historical Evolution of the Principle of Permanent Sovereignty over Natural Resources*

The struggle for sovereignty over natural resources arguably began in the 19th century when the movement for political independence started to develop in some regions, including Latin America.¹⁶ Following the end of the World War II in 1945, the movement gained impetus as postcolonial developing country regimes — particularly in Africa and Asia — started to claim the right to sovereignty over natural resources.¹⁷ The decolonisation period was a catalyst for many developing countries (in particular those in Latin America) to start to contest the validity of concession agreements which their governments had entered into with foreign investors — or were imposed during colonial times — for exploration and exploitation of natural resources. One of the major points of contention was the fact that these concession agreements tended to be largely one-sided and they strongly favoured the interests of the foreign investor.¹⁸

¹⁶ See generally Mats Ingulstad and Lucas Lixinski, 'Raw Materials, Race, and Legal Regimes: The Development of the Principle of Permanent Sovereignty over Natural Resources in the Americas' (2013) 29(1) *World History Bulletin* 34.

¹⁷ Ricardo Pereira, 'The Exploration and Exploitation of Energy Resources in International Law' in Karen E Makuch and Ricardo Pereira (eds), *Environmental and Energy Law* (Blackwell, 2012) 199, 199. See also Yinka Omorogbe and Peter Oniemola, 'Property Rights in Oil and Gas under Domanial Regimes' in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 115, 120–2, 124. As regards onshore resources, states have permanent sovereign rights over natural resources under general international law. Hence, they are free to determine whether subsoil resources are owned by the state or private landowners. Most civil law countries vest ownership of subsoil resources in the surface landowner, though an exception is usually made for energy resources such as oil, gas and coal, which are subject to state ownership. The Netherlands, Norway, Poland and Spain as well as the United Kingdom (which is not a civil law country) follow this model. As regards offshore energy resources, coastal states have 'sovereign rights' in the continental shelf and functional jurisdiction for purposes of exploring and exploiting, but not ownership rights. Notwithstanding, several states claim not only the right to regulate but also the ownership of offshore oil and gas in their continental shelves: for example Denmark, the Netherlands, Norway and Spain. The allocation of states' rights and duties in the different maritime zones is regulated under the *United Nations Convention on the Law of the Sea*: opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*Convention on the Law of the Sea*'). See also Pereira, 'Exploration and Exploitation of Energy Resources', above n 17, 200.

¹⁸ This is so, in particular, because concession agreements accord vast areas of acreage committed for long periods to one company. As such, little or no control is possessed by the sovereign over the multinational corporation's operations and host states participate merely on a royalty basis. Hence the traditional concession agreements posed a threat to the host state's permanent sovereignty over natural resources. Therefore they have largely fallen into disuse, giving way to new contractual forms — production sharing agreements, risk service contracts, joint ventures and 'modern concessions' in particular: M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000) 43. These reflect a more balanced distribution of rights and duties between the foreign oil companies and the host state. For a discussion of this: see, eg, at 43; M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 38–41; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) 174–5; Anita Ronne, 'Public and Private Rights to Natural Resources and Differences in their Protection?' in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 60, 68–9; Pereira, 'Exploration and Exploitation of Energy Resources', above n 17, 200.

The will to reinforce the sovereignty of newly independent and other developing states and, subsequently, the desire to secure the benefits of natural resource exploitation for non-self-governing peoples, led to the adoption of the UN General Assembly *Resolution on Permanent Sovereignty over Natural Resources* ('RPSNR') on 14 December 1962.¹⁹ The RPSNR recognised the right of the host state to nationalise and expropriate the property of the foreign investor, provided that appropriate compensation is paid. It asserted each country's rights to choose its own economic system and exercise sovereignty over natural resources.

The debate concerning permanent sovereignty received a new dimension in 1974 when developing countries pressed for a 'new deal' in their relations with developed countries. This pressure was reflected in the passing of the *Charter of Economic Rights and Duties of States* ('*Charter of Economic Rights and Duties*').²⁰ Adopted by the UNGA in December 1974, the *Charter of Economic Rights and Duties* reinforced the essential elements of the right to permanent sovereignty as agreed in 1962, yet with some fundamental differences.²¹ One important difference between the two is that, unlike the 1962 RPSNR, the 1974 *Charter of Economic Rights and Duties* controversially favoured the laws and jurisdiction of the courts of the host state for the settlement of investment disputes.²² Moreover, the RPSNR includes reference to international law, while

¹⁹ RPSNR, GA Res 1803 (XVII), UN GAOR, 17th sess, 1194th plen mtg, UN Doc A/RES/1803(XVII) (14 December 1962). The RPSNR is based on the work of the United Nations Commission on Permanent Sovereignty over Natural Resources and the Economic and Social Council. The RPSNR affirmed that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the state concerned. Particularly, at para 4,

[n]ationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

It also provided, at para 8, that

[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; State and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the [*Charter of Economic Rights and Duties of States*] and the principles set forth in the present resolution.

The RPSNR was passed with 87 votes in favour and 2 votes against (France and South Africa), with 12 abstentions: Schrijver, above n 18, 76.

²⁰ *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN GAOR, 29th sess, 2315th plen mtg, Agenda Item 48, Supp No 31, UN Doc A/RES/3281(XXIX) (12 December 1974) annex ('*Charter of Economic Rights and Duties of States*') ('*Charter of Economic Rights and Duties*').

²¹ The *Charter of Economic Rights and Duties* affirmed in art 2(1): 'every state has and shall freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities'. See also, Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 201–2.

²² Article 2(2)(c) of the *Charter of Economic Rights and Duties* also recognised the right of each state to (emphasis added):

the *Charter of Economic Rights and Duties* omits such a reference — which could be regarded as a move by developing countries to constrain the ability of foreign investors to rely on international standards in the event of expropriation of the investment.²³ These differences certainly help to explain why the *Charter of Economic Rights and Duties* was backed by a majority of developing countries, but virtually no developed countries.²⁴

These two UNGA permanent sovereignty resolutions need to be read in light of the general principles and standards of international law. A fundamental customary international rule — often regarded as the cornerstone of international environmental law — is that no state can use its territory to cause serious environmental damage to other states or to areas beyond national jurisdiction. This is enshrined in major declarations outlining principles of international environmental law, as well as in treaties.²⁵ So whilst international law recognises a state's 'sovereign right to exploit [its] own [natural] resources pursuant to [its] own environmental and developmental policies',²⁶ it limits state sovereignty over the way natural resources are managed.²⁷ Hence states do not have an absolute and unfettered right to explore and exploit their natural resources, in that they have an obligation to respect the rights of other states and not cause

nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

²³ Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 202; Schrijver, above n 18, 103–9.

²⁴ The *Charter of Economic Rights and Duties of States* was adopted by 120 States voting in favour, 6 against (Belgium, Denmark, Germany, Luxembourg, UK, United States) and 10 abstentions: Schrijver, above n 18, 110; Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 201–2.

²⁵ The no harm-rule is elaborated, for instance, in Principle 2 of the *Rio Declaration* and Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*: see *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol.1) (12 August 1992) annex 1 principle 2 ('*Rio Declaration on Environment and Development*') ('*Rio Declaration*'); *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch 1 principle 21 ('*Declaration of the United Nations Conference on the Human Environment*'). It is also present in international environmental agreements: see, eg, *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 14(1)(d) ('*CBD*'); *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) Preamble ('*UNFCCC*'). As an example of the application of this principle, see *Trail Smelter Case (United States v Canada) (Awards)* (1935) 3 RIAA 1905; Ricardo Pereira, 'Compliance and Enforcement in International, European and National Environmental Law' in Karen E Makuch and Ricardo Pereira (eds), *Environmental and Energy Law* (Blackwell Publishing, 2012) 561, 561.

²⁶ *Rio Declaration*, UN Doc A/CONF.151/26/Rev.1 (Vol.1), principle 2.

²⁷ *Ibid.*

cross-boundary harm.²⁸ The right to permanent sovereignty over natural resources, given that it includes an element of both the right of self-determination and the principle of state sovereignty, is also subject to the general limitations of the principle of state sovereignty under international law.²⁹ Hence it has been suggested that it is at least questionable that a state's claim of sovereign rights to freely explore, exploit and dispose of its natural resources can be based on the assertion commonly made that 'the extent to which the peoples in a resource rich region of a State ... are entitled to (extra) benefit from resource exploitation in their region is ... a matter of domestic politics'.³⁰ The principle of permanent sovereignty continues to be of the greatest significance in connection to alien economic interests within a country's territory, carefully balancing the host state's right to nationalisation and expropriation with the right to prompt, fair and adequate compensation for foreign investors.³¹ Yet it is also firmly established that the right to permanent sovereignty does not exempt states from the imperatives of international law generally. Nor does it specifically exempt states from the rules of human rights law as they relate to management and governance of natural resources.³² Hence it has been correctly suggested that

²⁸ Ibid. This obligation includes duties to undertake environment impact assessment and notify other states in cases where the exploitation or uses of natural resources have the potential to cause harm to other states. The International Court of Justice ('ICJ') recognised a duty to undertake trans-boundary impact assessment as a duty under international law: see, eg, *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 72–3 [204].

²⁹ Hersch Lauterpacht suggests that 'sovereignty is not in the nature of an absolute and rigid category': Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons, 1958) 324. On the historical evolution of the notion of state sovereignty: see generally Duruigbo, above n 13, 38–40; Schrijver, above n 18, 377.

³⁰ Schrijver, above n 18, 9. See also Lila Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 *Annual Survey of International and Comparative Law* 43.

³¹ Notably, the law on state responsibility developed in response to the treatment of US foreign investments in Latin America, which led to Cordell Hull's (Secretary of State during the Mexican expropriations of 1938) statement that 'under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor': Letter from US Secretary of State to Mexican Ambassador (22 August 1938), reproduced in Andreas F Lowenfield, *International Economic Law* (Oxford University Press, 2nd ed, 2008) 478. This statement, also known as 'the Hull formula', suggested that the foreign investor was entitled to dispute resolution before an overseas tribunal if the remedies provided by the host state proved inadequate.

³² See, eg, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) art 1. This article recognises the right to property as a fundamental human right:

Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

'[a]s understood today, permanent sovereignty over natural resources is as much an issue of state duties as it is one of state rights'.³³

B *Permanent Sovereignty over Natural Resources as the Right of Peoples*

Drawing from political theorisations of sovereignty, it has been suggested that

resource sovereignty cannot be territorially circumscribed within the national space and institutionally circumscribed within the state apparatus. Rather, sovereignty must be understood in relational terms and take into account the global geography of non-state actors that shape access to and control over natural resources.³⁴

Hence there is evidence that the classical Westphalian notion of state sovereignty is increasingly being superseded by a less state-centric conception of sovereignty that recognises the rights of non-state actors.³⁵

Although the right to permanent sovereignty, as recognised under the *Charter of Economic Rights and Duties*, is a right belonging to 'states',³⁶ the 1962 *RPSNR* clearly explains that peoples are also beneficiaries of the right to permanent sovereignty.³⁷ Further evidence of state practice recognising the sovereign rights of peoples is found in art 1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')³⁸ and art 1 of the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'), which recognises the right of peoples to self-determination.³⁹

On the other hand, since one of the main aims of the UNGA permanent sovereignty resolutions, particularly the *RPSNR* (and the right to self-determination in general), was to facilitate the ending of colonial rule (as

³³ Barrera-Hernandez, above n 30, 44. See also Jona Razzaque, 'Resource Sovereignty in the Global Environmental Order' in Elena Blanco and Jona Razzaque (eds), *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 81, 83–90.

³⁴ Jody Emel, Matthew T Huber and Madoshi H Makane, 'Extracting Sovereignty: Capital, Territory and Gold Mining in Tanzania' (2011) 30 *Political Geography* 70, 70.

³⁵ See generally Lenzerini, above n 15, 156–60. Participatory rights for non-state actors are recognised under certain treaty regimes. For example, art 3 of the *Aarhus Convention* recognises specific procedural rights for non-governmental organisations ('NGOs') and individuals and requires national legal systems to be consistent with this obligation: *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) art 3 ('*Aarhus Convention*'). The *Aarhus Convention* also includes a noncompliance procedure under which NGOs may bring complaints: at art 15.

³⁶ *Charter of Economic Rights and Duties*, UN Doc A/RES/3281(XXIX), annex art 2(1).

³⁷ *RPSNR*, UN Doc A/RES/1803, para 1.

³⁸ *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁹ *ICESCR*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Article 1(2) states that

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

Article 47 of the *ICCPR* states that '[n]othing 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'.

well as to allow newer states to guard their sovereignty)⁴⁰ it could be argued that once the peoples in a state gained independence, it would no longer be necessary to focus on the rights of peoples in any discussion of permanent sovereignty. Indeed, ‘if governments are vested with a right, it is not necessary to also vest it in the people they represent’.⁴¹ This is reflected in the fact that many documents dealing with the principle of permanent sovereignty after 1962 contain few or no references to ‘peoples’.⁴²

Yet there are strong grounds for peoples to be entitled to the right to permanent sovereignty.⁴³ One important practical implication of the recognition that the right of permanent sovereignty over natural resources is held by peoples is that it could arguably form the basis of a challenge to a government’s decision to authorise multinational companies to operate in the natural resource sector in a state’s territory.⁴⁴ Governments would also be bound to utilise natural resources with a view towards benefiting the whole population.⁴⁵ Hence, the realisation of the right to permanent sovereignty as belonging also to peoples adds new relevancy to the *RPSNR* in the postcolonial period, directing sovereign states to use resources for ‘the well being of their peoples’.⁴⁶ In order to ensure that states respect public goods, there are recognised limits imposed on the way sovereignty over natural resources is exercised, through, among other things, the allocation of property rights and the establishment of procedures for communities to participate in the adoption of, or to challenge, decisions affecting these resources.⁴⁷ Hence, the right to permanent sovereignty needs to be exercised ‘for national development and [the] well being of the people of the state concerned’.⁴⁸ Moreover, states should enter into foreign investment agreements in good faith and respect the ‘sovereignty of peoples and nations over their natural wealth and resources’.⁴⁹

⁴⁰ See Schrijver, above n 18, 34–5; Duruigbo, above n 13, 51.

⁴¹ Duruigbo, above n 13, 49.

⁴² Ibid 52; Schrijver, above n 18, 9. This idea is reflected not just in the idea of ‘representative democracy’, but also has a grounding in regional ideas. Particularly in Africa, the idea of moving away from the concept of ‘peoples’ towards a state focus is closely connected to the protection of *uti posseditis*. It was important for the stability of decolonised Africa that boundaries were kept and, therefore, that ‘peoples’ were made synonymous with ‘states’: see generally Freddy D Mnyongani, ‘Between a Rock and a Hard Place: The Right to Self-Determination versus *Uti Possidetis* in Africa’ (2008) 41 *Comparative and International Law Journal of Southern Africa* 463, 463–79.

⁴³ See, eg, *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) (*‘African Charter’*) (which recognises ‘peoples’ rights). See also Duruigbo, above n 13, 38–67. This is confirmed by the preparatory work of the UN General Assembly (*‘UNGA’*): see at 53, citing W Ofuatye-Kodjoe, ‘Self-Determination’ in Oscar Schachter and Christopher C Joyner (eds), *United Nations Legal Order* (Cambridge University Press, 1995) 349, 364; Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 202.

⁴⁴ Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 203. See also Duruigbo, above n 13, 49.

⁴⁵ Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) 491.

⁴⁶ *RPSNR*, UN Doc A/RES/1803, para 1, quoted in Barrera-Hernandez, above n 30, 43.

⁴⁷ See below Part IV.

⁴⁸ *RPSNR*, UN Doc A/RES/1803, para 1; Razzaque, above n 33, 83.

⁴⁹ *RPSNR*, UN Doc A/RES/1803, para 8. This is reflected in some national constitutions which require that states use natural resources for the benefit of the people: see, eg, *Constitution of Kenya 2010* (Kenya) art 69(1)(h) (which requires the state to ‘utilise the environment and natural resources for the benefit of the people’).

C *The Legal Status of the Principle of Permanent Sovereignty over Natural Resources*

The fact that the principle of permanent sovereignty emerged from a resolution of the UNGA made it possible for it to gain more rapid acceptance among states than if it had been developed only through the practice of individual states.⁵⁰ Yet from a legal perspective, one significant limitation of the UNGA resolutions is that they are not legally binding. They are also not recognised as formal sources of international law under art 38(1) of the *Statute of the International Court of Justice*.⁵¹ Nonetheless, such resolutions can provide the basis for the formation of customary international law. For instance, the *RPSNR* was adopted by most developed and developing states with few objections and abstentions. It could be argued that this reflects the evolution of state practice and *opinio juris* leading to the recognition of the principle of permanent sovereignty as having the status of customary international law. Further evidence of state practice giving legal recognition to the permanent sovereignty principle is its incorporation in national constitutions and foreign investment codes.⁵²

In contrast, most commentators do not consider that the *Charter of Economic Rights and Duties* has transitioned into a rule of customary international law.⁵³ Indeed, one of the most contentious aspects of the *Charter of Economic Rights and Duties* is that it suggests that only the courts and the law of the host state are to be applied to foreign investment disputes.⁵⁴ The origins of this are often traced back to the so-called ‘Calvo Doctrine’, which is widely upheld by developing states in the context of the expropriation of foreign-owned investment.⁵⁵ Hence,

⁵⁰ Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 203. See also Schrijver, above n 18.

⁵¹ On the other hand, the UNGA recommends that its resolutions be taken into consideration by the ICJ because of the means by which international law is reflected by declarations and resolutions of the UNGA: *Review of the Role of the International Court of Justice*, GA Res 3232 (XXIX), UN GAOR, 29th sess, 2280th plen mtg, Agenda Item 93, UN Doc A/RES/3232(XXIX) (12 November 1974) Preamble para 8. See also *Texaco Overseas Petroleum Case (Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic) (Awards)* (1977) 53 ILR 389 (International Arbitral Tribunal) (‘Texaco’). The *Texaco* arbitration analysed UNGA voting powers and the relevance and legal force of their resolutions.

⁵² See, eg, *Constitution of the Republic of Namibia* (Namibia) art 100; *Constituição da República Federativa do Brasil* [Constitution of the Federative Republic of Brazil] (Brazil) art 20 (‘*Constitution of Brazil*’). See also Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 202–3. On the incorporation of the principle of permanent sovereignty over natural resources in foreign investment codes, see, eg, Antonio R Parra, ‘Principles Governing Foreign Investment, as Reflected In National Investment Codes’ in Ibrahim F I Shihata (ed), *Legal Treatment of Foreign Investments: The World Bank Guidelines* (Martinus Nijhoff, 1993) 311, 311–12.

⁵³ Schrijver documents some of the early issues with the *Charter of Economic Rights and Duties* and the lack of international agreement: see Schrijver, above n 18, 98–100.

⁵⁴ Schrijver, above n 18, 109. See also *Charter of Economic Rights and Duties*, UN Doc A/RES/3281(XXIX), annex art 2(1).

⁵⁵ The ‘Calvo Doctrine’ was advocated by some Latin American states in the 1930s. First enunciated by Carlos Calvo — an eminent Argentinean jurist who claimed that any foreign investment dispute should be settled before the courts of the host state — the Calvo Doctrine prohibits the investor from seeking diplomatic protection for third-party judicial settlement before local remedies are exhausted: see, eg, Patrick Julliard, ‘Calvo Doctrine/Calvo Clause’ (2007) *Max Planck Encyclopedia of Public International Law*.

it is difficult to consider the *Charter of Economic Rights and Duties* in its entirety as developing principles of international law or customary international law, as it has been primarily only developing states and economies in transition that have supported it.⁵⁶

Despite these different interpretations of the two UNGA permanent sovereignty resolutions, today it is generally accepted that permanent sovereignty over natural resources is a prerequisite for economic development and is therefore a fundamental principle of contemporary international law.⁵⁷ In the *East Timor* case,⁵⁸ the International Court of Justice ('ICJ') had the opportunity to rule upon a claim in which the question of permanent sovereignty over natural resources was raised.⁵⁹ However, the ICJ did not address the legal status of permanent sovereignty over natural resources. Despite Portugal's claim that Australia had violated East Timor's right to permanent sovereignty over its natural resources, the majority opinion of the ICJ found that it lacked jurisdiction to decide the case on the merits, as it considered that Indonesia was an essential party to the dispute and it had not accepted the ICJ's compulsory jurisdiction since East Timor had been incorporated into Indonesian territory.⁶⁰ Yet there is support for the view that permanent sovereignty over natural resources has legally binding consequences in the two dissenting opinions of the judgment. These opinions embraced the view that permanent sovereignty is one of the essential principles of contemporary international law with *erga omnes*

⁵⁶ One hundred and twenty states voted in favour, six states voted against and there were ten abstentions. The negative votes were Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the UK and the United States. The states that abstained were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain: S Azadon Tiewul, 'The United Nations Charter of Economic Rights and Duties of States' (1975) 10 *Journal of International Law and Economics* 645, 645. As discussed above, the *RPSNR* includes a reference to international law, while the *Charter of Economic Rights and Duties* does not. Furthermore, the reference to 'international law' was an essential factor for the support given by several Western countries to the *RPSNR*: Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 202. See also *RPSNR*, UN Doc A/RES/1803, para 4; *Charter of Economic Rights and Duties*, UN Doc A/RES/3281(XXIX), annex. Another view, which would imply that a stronger legal weight is accorded to the 1974 *Declaration on the Establishment of a New International Economic Order*, is that those states which voted in favour of the resolution will be bound by it as part of customary international law, whereas those who voted against it or abstained might not bound by the emerging rule as they would remain 'persistent objectors' to the formation of the customary law (unless they become bound by the rule following the ratification of a treaty): *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UN GAOR, 6th spec sess., 2229th plen mtg., Agenda Item 7, UN Doc A/RES/S-6/3201 (1 May 1974). See also Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 203; Schrijver, above n 18, 112.

⁵⁷ See, eg. Schrijver, above n 18, 3–4. See also Duruigbo, above n 13, 39; Barrera-Hernandez, above n 30.

⁵⁸ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

⁵⁹ See Franz Xaver Perrez, 'The Relationship between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage' (1996) 26 *Environmental Law* 1187, 1192.

⁶⁰ However, East Timor was also a non-self-governing territory under the administration of Portugal that then fell under Indonesian occupation between 1975 and 1999. Australia had negotiated a treaty with Indonesia that created a zone of cooperation in the Timor Gap, which forms part of the continental shelf near East Timor: *ibid*.

character.⁶¹ Subsequently in the *Armed Activities on the Territory of the Congo* case,⁶² the ICJ recognised the potential limitations of applying international law in the context of illegal resource exploitation taking place during armed conflicts.⁶³ The ICJ has, for the first time, expressly recognised that *RPSNR* has attained the status of customary international law.⁶⁴ The Court's reasoning — which relied on the UNGA permanent sovereignty resolutions — has been criticised because UNGA lacks the power to make legally binding resolutions.⁶⁵

According to some scholars, permanent sovereignty could be regarded as *jus cogens* — that is, a peremptory norm — similar to the prohibition on slavery or the general prohibition on the use of force, making it unlawful for states to derogate from that norm in future agreements.⁶⁶ Although the main elements of the principle of permanent sovereignty over natural resources have been included in several multilateral treaties,⁶⁷ and have been recognised in international arbitral awards,⁶⁸ it is not clear that one could go as far as to label the principle of permanent sovereignty as *jus cogens*. Nico Schrijver, for example, contends that 'at most one may conclude that some of its core elements such as that of the prohibition of appropriation carry this status'.⁶⁹ In particular, a state should not be precluded from entering into an agreement freely in which it accepts a partial limitation of the exercise of its sovereignty in respect of certain resources in

⁶¹ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 142, 197–9, 204 (Judge Weeramantry), 264, 270, 276 (Judge Skubiszewski). See also Perrez, above n 59, 1193.

⁶² *Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment)* [2005] ICJ Rep 168.

⁶³ *Ibid* 251–2 [244]. See also Robert Dufresne, 'Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the *Armed Activities* Case' (2008) 40 *New York University Journal of International Law and Politics* 171, 173, 190–1.

⁶⁴ *Armed Activities on the Territory of the Congo* [2005] ICJ Rep 168, 251–2 [244]. See also Dufresne, above n 63, 213.

⁶⁵ A Mark Weisburd, 'The International Court of Justice and the Concept of State Practice' (2009) 31 *University of Pennsylvania Journal of International Law* 295, 330.

⁶⁶ Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 207. See also Subrata Roy Chowdhury, 'Permanent Sovereignty over Natural Resources' in Kamal Hossain and Subrata Roy Chowdhury (eds), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (Frances Pinter, 1984) 1, 7–8. See also Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 511. Article 53 of the *Vienna Convention on the Law of Treaties* contains the following definition of the concept of peremptory norms:

For the purposes of the present *Convention*, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980).

⁶⁷ See, eg, *ICCPR*; *ICESCR*; *African Charter* art 21; *Vienna Convention on Succession of States in Respect of Treaties*, opened for signature 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996) art 13; *Convention on the Law of the Sea* art 137; *CBD* art 3.

⁶⁸ See, eg, *Texaco* (1977) 53 ILR 389, 422. In *Texaco*, the arbitrator concluded that the *RPSNR* expressed the *opinio juris communis* on nationalisation of foreign property under international law: at 491–2 [71]. See also *RPSNR*.

⁶⁹ Schrijver, above n 18, 221–2. See also *Government of Kuwait v American Independent Oil Company (Awards)* (1982) 21 ILM 976, [90] (International Arbitral Tribunal) ('*Aminoil*').

particular areas for a specified and limited period of time.⁷⁰ Conversely, there is support for the view that the *jus cogens* status has been achieved in light of the fact that the principle of permanent sovereignty meets the test of being widely accepted and recognised by a very large majority of states.⁷¹

Regardless of whether permanent sovereignty over natural resources is to be regarded as a rule of customary international law, an emerging rule or as a preemptory norm, it seems clear that it has evolved into a legal form, binding all states to respect it as a rule of international law. One of the important consequences of this is that, increasingly, natural resource contracts tend to be regarded as a temporary alienation of inherent rights which may be called on at any time (provided that proper compensation is paid).⁷²

III THE RIGHT OF PEOPLES TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

The evolution of the principle of permanent sovereignty over natural resources coincides with the consolidation of the right of self-determination of peoples. This Part examines the extent to which the right of self-determination is an appropriate basis for indigenous communities to secure a degree of autonomy and self-government (that is, internal self-determination) and, in more limited circumstances, in which it could provide the basis for the indigenous right to secession from an oppressive state that fails to address the land and resource rights of indigenous communities (in other words, external self-determination).

A *The Right to External Self-Determination under International Law*

Self-determination allows peoples 'the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development'.⁷³ It emerged as a principle of international law at the San Francisco Conference at which the *Charter of the United Nations* was adopted.⁷⁴ This culminated in the inclusion of the principle in both arts 1(2) and 55 of that instrument.⁷⁵ In addition, an express reference to the right of

⁷⁰ *Aminoil* (1982) 21 ILM 976, [90].

⁷¹ See Brownlie, above n 66, 511.

⁷² Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 202. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 142–5.

⁷³ *Final Act of the Conference on Security and Cooperation in Europe* (1975) 14 ILM 1292, art VIII.

⁷⁴ Frederic L Kirgis, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 *American Journal of International Law* 304, 304; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 312.

⁷⁵ Kirgis, above n 74, 304.

self-determination is made in art 1 of both the *ICCPR* and *ICESCR*.⁷⁶ However, there is no definition in the *Charter of the United Nations* or in any human rights instrument of who the peoples entitled to be beneficiaries of the right to self-determination are.⁷⁷ Yet it appears reasonable to suggest that if self-determination in international law is a right accruing to 'all peoples', then indigenous peoples can be recognised as beneficiaries of the right.

Against the so-called 'blue water' principle (which recognises self-determination only to those territories colonised by 'foreign invaders'),⁷⁸ a less restrictive doctrine suggests that the right of self-determination remains applicable even after the colonial period.⁷⁹ This view is supported by the *Declaration on the Granting of Independence to Colonial Countries and Peoples* ('*Declaration on the Granting of Independence*')⁸⁰ and *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations* ('*Declaration on International Law concerning Friendly Relations*'),⁸¹ both of which expand the concept of self-determination beyond colonialism. They do this by recognising the right of secession of peoples when states do not conduct 'themselves in compliance with the principle of equal rights and self-determination of peoples'⁸² or do not 'possess ... a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.⁸³

The ICJ was initially reluctant to endorse the principle of self-determination beyond its anti-colonialist form, as seen in its 1971 advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia*

⁷⁶ See Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 202. Article 1(1) of both the *ICCPR* and the *ICESCR* states: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Further, art 1(2) of both the *ICCPR* and the *ICESCR* states that

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

⁷⁷ Gudmundur Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 41, 44-5; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 312.

⁷⁸ *The Right of Peoples and Nations to Self-Determination*, GA Res 637 (VII), UN GAOR, 7th sess, 403rd plen mtg, UN Doc GA/RES/637(VIII) (16 September 1952).

⁷⁹ Natan Lerner, 'The 1989 ILO Convention on Indigenous Populations: New Standards?' in Yoram Dinstein and Mala Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff, 1991) 213, 218; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 312.

⁸⁰ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 11, UN Doc A/RES/1514(XV) (14 December 1960).

⁸¹ *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/RES/2625(XXV) (24 October 1970) annex ('*Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*').

⁸² *Ibid.*

⁸³ *Ibid.*

(*South West Africa*) notwithstanding Security Council Resolution 276 (1970)⁸⁴ and in its 1975 advisory opinion *Western Sahara*.⁸⁵ Yet in its 2010 advisory opinion on the declaration of independence by Kosovo,⁸⁶ the ICJ has found no prohibition on unilateral declarations of independence in either general international law or in the practice of the Security Council.⁸⁷ The ICJ noted that

[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.⁸⁸

This suggests that territories which are not governed by their own peoples — and populations which are subject to oppression and subjugation by the state — have a right under international law to separate from that state.⁸⁹

Therefore in any country where the government adopts a policy of exclusion of peoples on grounds of race, creed or colour from political representation, or introduces policies that aim at the subjugation or extermination of minority groups or indigenous peoples, the right of self-determination arises in its external form. Thus the right to external self-determination will depend on the degree to which a government is democratically representative and the fundamental rights that are available to indigenous peoples. Antonio Cassese and Ian Brownlie contended that self-determination is a legal principle which has achieved *jus cogens* status from which states cannot derogate.⁹⁰ Frederic Kirgis, more cautiously, treats it as only attaining this status in its anti-colonialist form.⁹¹

On the other hand, state and judicial practices have in general been reluctant to accept a general right to external self-determination. This can be seen in the *Aaland Islands* case,⁹² in which the Council of the League of Nations rejected the right claimed by a vast majority of the population of the Aaland Islands to secede from Finland, as it would ‘destroy order and stability within [states] and

⁸⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 31 [52].

⁸⁵ *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 33 [59] (*‘Western Sahara’*); Pereira, ‘The Right to Reproductive Self-Determination’, above n 5, 313.

⁸⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 (*‘Kosovo Advisory Opinion’*).

⁸⁷ *Ibid* 437 [81].

⁸⁸ *Ibid* 436 [79]. However, this comment is only obiter dicta. The ICJ has so far evaded the possibility of completely embracing the right to self-determination as applicable to the unilateral secession of Kosovo: at 437–8 [81].

⁸⁹ See Dinah Shelton, ‘Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon’ (2011) 105 *American Journal of International Law* 60, 61.

⁹⁰ See Cassese, above n 45, 202–3; Brownlie, above n 66, 511. On the ICJ’s interpretation of the principle of *jus cogens*: see, eg, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 304 [90] (Judge Ammoun). See also Hector Gros Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN.4/Sub.2/405/Rev.1 (1980).

⁹¹ Kirgis, above n 74, 305.

⁹² ‘Minutes of the Fourteenth Meeting of the Council, June 24th’ [1921] *League of Nations Official Journal* 697.

[also] inaugurate anarchy in international life'.⁹³ A similar approach was taken by the Supreme Court of Canada in *Reference Re Secession of Quebec*.⁹⁴

States have been strenuously opposed to the recognition of a right of self-determination for indigenous peoples, fearing that it might give rise to claims of independent statehood.⁹⁵ They have also preferred to refer to indigenous 'groups' avoiding the term 'peoples' (or requiring that the 's' of peoples be dropped), as they believe that this level of recognition could be the basis for claims of independence and encourage dismemberment of their boundaries.⁹⁶ They argue that their constitutions do not permit the possibility of more than one 'people' within their national territory, thus objecting to the term 'indigenous nations' or the recognition of autonomous indigenous legal and

⁹³ Kirgis, above n 74, 304, quoting 'The Aaland Islands Question' (Report to the Council of the League by The Commission of Rapporteurs), League of Nations Doc B.7.21/68/106 (1921) 28.

⁹⁴ *Reference Re Secession of Quebec* [1998] 2 SCR 217.

⁹⁵ See, for example, India's reservation to art 1 of the ICCPR, wherein it was declared that the words 'the right of self-determination' applied only to the peoples under foreign domination and that these words did not apply to sovereign independent states or to a section of a people or nation — the essence of national integrity: United Nations Treaty Collection, *International Covenant on Economic, Social and Cultural Rights* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec> (India's declarations apply equally to art 1 of both the ICCPR and the ICESCR). This declaration led the French Government to enter an objection to India's reservation, arguing that it 'attaches conditions not provided for by the *Charter of the United Nations* to the exercise of the right of self-determination': World Intellectual Property Organization, *International Covenant on Economic, Social and Cultural Rights* <http://www.wipo.int/wipolex/en/other_treaties/details_notes.jsp?treaty_id=380>. Also, several states insisted on referring to indigenous 'people' (instead of 'peoples') in the final document during the World Conference on Human Rights of 1993. See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) ('*Vienna Declaration and Programme of Action*').

⁹⁶ Peter-Tobias Stoll and Anja von Hahn, 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer Law International, 2008) 7, 15.

political systems.⁹⁷ They argue that any ethnic nationalism is dangerous, as it does not contribute to inter-ethnic peace and understanding in a society.⁹⁸

Yet, thus far, claims for external self-determination and the establishment of an independent state has not featured as the main claim in cases brought by indigenous peoples before regional human rights bodies. Instead, they have demanded recognition and title for their ancestral lands and ‘the right to decide on the scope and nature of development projects that affect their lands and resources’ (internal self-determination).⁹⁹ Although, as will be discussed below, the Inter-American Court of Human Rights (‘Inter-American Court’) and the Inter-American Commission on Human Rights have taken a progressive approach in many cases towards the recognition of indigenous peoples’ rights to land and natural resources, it has not recognised a full right to self-determination.¹⁰⁰ Evidence of this is the report of the Inter-American Commission on Human Rights, which concerned complaints relating to the relocation of a large number of the native American Miskito people on the Atlantic coast of Nicaragua during the civil war.¹⁰¹ The Commission concluded that international law does not recognise a right of the indigenous Miskito population to secession and that they were not beneficiaries of

⁹⁷ Benedict Kingsbury, ‘Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy’ (1998) 92 *American Journal of International Law* 414, 424. Kingsbury refers to the argument made by particular states, including Brazil, Malaysia and Ecuador, that their constitutions do not allow for more than one people to exist in the national territory: at 424, 424 n 33. See also Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 53rd sess, Agenda Item 24, UN Doc E/CN.4/1997/102 (10 December 1996) [132], [134], [137] (‘*Report of the Working Group*’).

⁹⁸ As an example, for the statement made by a Ukrainian Government representative, see *Report of the Working Group*, UN Doc E/CN.4/1997/102 [187]. See also Kingsbury, above n 97. This general opposition led to the inclusion in art 1(3) of *ILO Convention 169*, which reads: ‘The use of the term “peoples” in this *Convention* shall not be construed as having any implications as regards the rights that may attach to the term under international law’. Similar provision can be found in the *Proposed American Declaration on the Rights of Indigenous Peoples* and the *Vienna Declaration and Programme of Action on Human Rights: Inter-American Commission on Human Rights, Proposed American Declaration on the Rights of Indigenous Peoples* (26 February 1997) art III; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/Conf.157/23 (12 July 1993) para 2. However, art 3 of the *UNDRIP* (which recognises indigenous peoples’ right to self-determination) does not have a similar limitation and would therefore permit their claims of external self-determination. The Preamble to the *UNDRIP* does not contain any constraints upon the exercise of the right to external self-determination either and states, at para 18, that ‘nothing in [the] *Declaration* may be used to deny any peoples their right to self-determination, exercised in conformity with international law’.

⁹⁹ Shelton, above n 89, 73.

¹⁰⁰ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OAS Doc OEA/Ser.L/V.II.62 (29 November 1983) pt 2(B) [15].

¹⁰¹ *Ibid.*

self-determination.¹⁰²

In light of these recognised constraints, most commentators tend to argue against a general right of indigenous peoples to secession, defending instead the creation of regimes of autonomy and self-government for indigenous peoples.¹⁰³ Erica-Irene Daes goes further to argue that indigenous peoples have no intention to segregate completely and create new nation-states.¹⁰⁴ She then concludes that the right of self-determination of indigenous peoples involves 'belated state-building'¹⁰⁵ which she defines as a process not of assimilation, but of recognition of distinct peoples and their incorporation into the fabric of the state, on agreed terms; in particular because indigenous peoples' conceptions of social order are often founded upon cultural integrity and kinship (between humans, animals, plants and landforms).¹⁰⁶ This kinship evolved into a general suspicion of the very concept of the nation-state as it has developed in the modern era.¹⁰⁷

Yet, although there is certainly no consensus in the international indigenous peoples' movement on this issue, it must be noted that some indigenous groups have indeed demanded the creation of 'Indian Nations' and restoration of their ancestral rights (which could also be regarded as a way by which they would be

¹⁰² The final report of the Inter-American Commission on Human Rights ('IACHR') stated that

[t]he present status of international law does recognize the observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self-determination of any ethnic group as such.

Ibid pt 2(B) [9]. But the IACHR also stated that

[a]lthough the current status of international law does not allow the view that the ethnic groups of the Atlantic zone of Nicaragua have a right to political autonomy and self-determination, special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of the ancestral and communal lands.

Ibid pt 2(B) [15] (emphasis added). See also Pereira, 'The Right to Reproductive Self-Determination', above n 5, 313.

¹⁰³ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1991) 333; Falk, above n 6, 33–5; Rosalyn Higgins, 'Postmodern Tribalism and the Right to Succession' in Catherine Brölmann, René Lefebvre and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, 1993) 29, 29; Douglas Sanders, 'Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 55, 80.

¹⁰⁴ Daes, above n 1, 303.

¹⁰⁵ Ibid 304.

¹⁰⁶ Ibid 303.

¹⁰⁷ Ibid 303. This view finds support in Martínez Cobo's report, which states that self-determination

constitutes the exercise of free choice by indigenous peoples ... in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.

José Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations: Final Report (Last Part)*, UN Doc E.CN.4/Sub.2/1983/21/Add.8 (30 September 1983) 74 [581].

able to better organise themselves internationally).¹⁰⁸ There are at least some legitimate arguments for the right to external self-determination of indigenous peoples to be recognised.¹⁰⁹ In particular, there is no principled reason why, in the circumstances envisaged more generally under either the *Declaration on the Granting of Independence* or the *Declaration on International Law concerning Friendly Relations* or elaborated under the ICJ's advisory opinion *Accordance with International Law of the Unilateral Declaration of the Independence in Respect of Kosovo* ('*Kosovo Advisory Opinion*'),¹¹⁰ indigenous peoples (like any other peoples subject to oppression and subjugation by a state) could not be considered beneficiaries of self-determination in its external form. The kind of violations of indigenous peoples' rights that arguably could give rise to a right to external self-determination are not, in the authors' view, the injustices that they have suffered in the past but, rather, the more immediate oppression and subjugation that some indigenous peoples' groups suffer today.¹¹¹

Given the constraints on recognising a right of indigenous peoples to secede from a state, it is the right to internal self-determination which is realistically more achievable for indigenous peoples. It provides a legitimate legal basis to dispute the undue interference with and invasion of their lands by economic operators in the natural resources sector, who often act with the implicit or explicit consent of national authorities.

B *Indigenous Peoples' Right to Internal Self-Determination*

James Anaya, presently the UN Special Rapporteur on Indigenous People, notes that governments have increasingly moved away from the tendency to equate the word 'self-determination' with an absolute right to form an

¹⁰⁸ See, eg, Lerner, above n 79, 109, citing David Ahenakew, 'Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms' (1938) 61 *Canadian Bar Review* 919. Similarly, the Iroquois Six Nation Confederacy does not wish to discard the option of independence and speak of having their own passport: Garth Nettheim, 'Peoples and Populations: Indigenous Peoples and the Rights of Peoples' in James Crawford (ed), *The Rights of Peoples* (Oxford University Press, 1988) 107, 120.

¹⁰⁹ Gudmundur Alfredsson, for example, argues that indigenous peoples as well as overseas peoples and countries controlled by colonial powers should be the subjects of decolonisation (the so-called Belgian thesis of the 1950s). She also argues that the concepts to justify dependency, such as the theories of terra nullius or 'discovery', have been discredited in recent years, with indigenous peoples entering as equals into treaties of peace and friendship with the colonising powers or with their successor states (often including recognition of boundaries and mutual trade relations). Accordingly, these agreements were of an international character until the international status of one of the parties changed: Alfredsson, above n 77, 47. Also see the statement by then-US President Ronald Reagan, that

European colonial powers ... entered into treaties with sovereign Indian Nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis ... and despite periods of conflict ... [this relationship] ... has endured.

Sanders, above n 103, 56, quoting President Ronald Reagan, 'American Indian Policy' (Policy Statement, 24 January 1983).

¹¹⁰ *Kosovo Advisory Opinion* [2010] ICJ Rep 403.

¹¹¹ This is not to suggest that indigenous peoples should not be entitled to compensation and reparations for past injustices. As Andreas Follesdal contends, the obstacles of 'liberal contractualism' are, in fact, an unjustifiable and outdated barrier to such reparations: see Andreas Follesdal, 'Indigenous Minorities and the Shadow of Injustice Past' (2000) 7 *International Journal on Minority and Group Rights* 19, 22–30.

independent state.¹¹² He cites the example of the Australian government which, in a statement to the 1991 session of the UN Working Group on Indigenous Populations, put forward the view that self-determination must be considered broadly — not only as the attainment of independent statehood but as the assertion of identity, language, cultures, tradition, self-management and autonomy.¹¹³ Therefore, if external self-determination is not realistically available or politically feasible, it is possible to argue that another form of self-determination can be a substitute for its external application.¹¹⁴ The UN Human Rights Committee ('HRC') coined the term 'internal self-determination',¹¹⁵ which is now a term used by most authors when referring to forms of self-government, autonomy, territorial integrity or exclusive enjoyment of indigenous lands and resources.

'Self-government' refers to 'the overarching political dimension of ongoing self-determination'.¹¹⁶ Values such as democracy and cultural and political pluralism have reinforced the claims of indigenous groups for governmental and administrative autonomy for their communities.¹¹⁷ The principle of subsidiarity — the idea that decisions should be made at the most local level possible — is employed in many Western societies and reinforces the view that indigenous communities should be able to maintain their traditional decentralised systems of governance and to gain access, control and the sharing of benefits over natural resources in their territory.¹¹⁸ Indigenous peoples should maintain their own institutions of governance, which includes their customary and written law, as well as dispute resolution and adjudication mechanisms that have existed not only de facto, but also de jure, as recognised in arts 6 and 7 of *ILO Convention No 169 concerning Indigenous and Tribal Peoples* ('*ILO Convention 169*').¹¹⁹

The right to internal self-determination of indigenous peoples is at the heart of the *United Nations Declaration on the Rights of Indigenous Peoples*

¹¹² See S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996) 79, 86; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 313.

¹¹³ Anaya, *Indigenous Peoples in International Law*, above n 112, 86.

¹¹⁴ Ibid 86; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 313–4.

¹¹⁵ See Sanders, above n 103, 80.

¹¹⁶ Anaya, *Indigenous Peoples in International Law*, above n 112, 109.

¹¹⁷ Ibid 110; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 314.

¹¹⁸ Pereira, 'The Right to Reproductive Self-Determination', above n 5, 314. For instance, in Uganda, legal tenure and management control of forests can now be secured by the kingdoms, with the management of responsibility delegated to the traditional leaders in trust for the community. However, there are no statutory requirements compelling the traditional leaders to consult or account to members of their communities on issues pertaining to the management and exploitation of the forests. Hence, decentralising management control has not necessarily led to enhanced rural community participation: Fui S Tsikata, Abeeku Brew-Hammond and Y B Osafo, 'Increasing Access to Clean Energy in Africa: Challenges and Initiatives' in Donald N Zillman et al (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press, 2008) 163, 176–7.

¹¹⁹ *ILO Convention 169*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) arts 6, 7; Anaya, *Indigenous Peoples in International Law*, above n 112, 110; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 314.

(‘*UNDRIP*’),¹²⁰ adopted by the UNGA on 13 September 2007 following 20 years of difficult negotiations.¹²¹ The *UNDRIP* states that

[i]ndigenous 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.¹²²

Although resolutions of the UNGA are not legally binding, in this case the *UNDRIP* was adopted by so many states with so few objections and abstentions that it might very well attain the status of customary international law.¹²³ Indeed, a number of indigenous rights enshrined in the *UNDRIP* have been recognised as having evolved into customary law. For example, the Inter-American Commission on Human Rights argued in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (‘*Awas Tingni*’)¹²⁴ that ‘there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands’.¹²⁵ The fact that Australia, Canada, New Zealand and the United States originally withheld their support for the *UNDRIP* suggests that it lacks the solid status necessary for the formation of customary international law and, even if it were considered as such, that those states might not be bound by it, as they could be regarded as ‘persistent objectors’. Moreover, because these four countries host important and representative groups from among the world’s indigenous peoples,¹²⁶ it was suggested that the *UNDRIP* might not reach the status of customary international law.¹²⁷ However, since those four countries

¹²⁰ *UNDRIP*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (‘*United Nations Declaration on the Rights of Indigenous Peoples*’).

¹²¹ The Working Group on Indigenous Peoples started the negotiations on *UNDRIP* in the 1980s. The discussions were moved to the UN Human Rights Commission in the mid-1990s. *UNDRIP* was adopted by the Human Rights Council in 2006 and finally adopted by the UNGA on 13 September 2007. For a commentary: see generally Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 *European Journal of International Law* 141, 143–4.

¹²² *UNDRIP*, UN Doc A/RES/61/295, annex art 4.

¹²³ Pereira, ‘The Right to Reproductive Self-Determination’, above n 5, 316; Claire Charters, ‘Indigenous Peoples and International Law and Policy’ (2007) 18 *Public Law Review* 22, 34.

¹²⁴ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-Am Court HR (ser C) No 79 (‘*Awas Tingni Community*’).

¹²⁵ *Ibid* 70, quoted in Alexandra Xanthaki, ‘Indigenous Rights in International Law over the Last 10 Years and Future Developments’ (2009) 10 *Melbourne Journal of International Law* 27, 35. Customary international law also includes the rights to ‘demarcation, ownership, development, control and use of the lands which [indigenous peoples] have traditionally owned or otherwise occupied and used’: Xanthaki, above n 125, 35, quoting Siegfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’ (1999) 12 *Harvard Human Rights Journal* 57, 109.

¹²⁶ Recent estimates have shown that there are between 257 million and 350 million indigenous people worldwide, equating to just under 6 per cent of the world’s total population. It includes at least 5 000 distinct indigenous peoples in over 72 countries. Almost 200 million indigenous people are from Asia (China, South Asia, Southeast Asia and the former Soviet Republic), while 28 million are from Latin America, 2.7 million are from Canada and the US and 600 000 are from Australia and New Zealand: Carolyn Stephens et al, ‘Indigenous Peoples’ Health — Why Are They behind Everyone, Everywhere?’ (2005) 366 *Lancet* 10, 11. See also Diana Vinding and Sille Stidsen (eds), *The Indigenous World 2005* (International Work Group for Indigenous Affairs, 2005); Pereira, ‘The Right to Reproductive Self-Determination’, above n 5, 305.

¹²⁷ See Xanthaki, above n 125, 36.

have subsequently endorsed the *UNDRIP*, their (non-) participation is no longer considered a barrier to the consolidation of indigenous customary law rights under the *UNDRIP*.¹²⁸ Still, the better view appears to be that although it may not represent customary international law, a number of rights enunciated in it — including those to land and natural resource rights — already form part of customary international law.¹²⁹

Therefore, autonomous governance is not only instrumental but also necessary for indigenous peoples to control the development of their distinctive cultures, including the use of land and resources against undue interference by powerful economic interests or government.

The next Part examines one fundamental aspect of the transposition of states' obligations under international law giving effect to the right to internal self-determination; in particular, the extent to which the rights to property and natural resources of indigenous peoples are established in international law.

IV INTERNATIONAL LAW AND INDIGENOUS PEOPLES' LAND AND NATURAL RESOURCE RIGHTS

Some indigenous communities tend to view their rights as being more than a mere share in the proceeds arising from the exploration and exploitation of natural resources and claim additionally the right to control and manage natural resources located in their land.¹³⁰ 'Social property' models of natural resource ownership establish stewardship models of holding, in which public and community interests are of paramount importance.¹³¹ One of the distinguishing features separating minorities in general and indigenous peoples includes the indigenous claim to have collective property rights to land and natural resources, as well as their historical association with the environment — not to mention their specific request for some degree of autonomy and self-determination.¹³²

¹²⁸ The Australian Government 'endorsed' the *UNDRIP* in April 2009: Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Press Statement, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>. The US Government endorsed the *UNDRIP* in December 2010: Susan E Rice, 'Statement by Ambassador Susan E Rice, US Permanent Representative to the United Nations, on the Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples' (Media Release, 16 December 2010) <<http://usun.state.gov/briefing/statements/2010/153009.htm>>. This follows from the Canadian Government's endorsement of the *UNDRIP* in October 2010 and New Zealand's in April 2010: Aboriginal Affairs and Northern Development Canada, Government of Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (Statement, 12 November 2010) <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>; Pita Sharples, 'New Zealand Statement' (Statement, New Zealand Permanent Mission to the United Nations, 19 April 2010) <[http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c/455c627c.dir/declarendors_NZ.pdf#search="Pita%20SHARPLES](http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c/455c627c.dir/declarendors_NZ.pdf#search=)>.

¹²⁹ See Engle, 'On Fragile Architecture', above n 121, 163. Engle argues that the though the *UNDRIP* emphasises collective rights to self-determination it also privileges individual civil and political rights. See also Karen Engle, *The Elusive Promise of Indigenous Development* (Duke University Press, 2010).

¹³⁰ Pereira 'Exploration and Exploitation of Energy Resources', above n 16, 207.

¹³¹ See, eg, *Commons Act 2006* (UK) c 26, s 39 (recognising the wider community interest in the sustainable management of land).

¹³² Daes, above n 1, 302; Pereira, 'The Right to Reproductive Self-Determination', above n 5, 307.

Historically, *uti possidetis juris*¹³³ has been raised as a legal basis for the expropriation of indigenous lands, based primarily on concepts of effective occupation of land.¹³⁴

The main international agreement recognising indigenous peoples' rights to land and natural resources currently in force is *ILO Convention 169*.¹³⁵ It provides for the recognition of indigenous land tenure systems, which are typically based on customary rules. Article 14(1) of *ILO Convention 169* affirms that 'the rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised' and that

measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Under *ILO Convention 169*, indigenous land and resource rights are of a collective character and they include a combination of possessive use and management rights.

The individual and peoples' rights to natural resources are also recognised in regional human rights treaties. Under the *African Charter on Human Peoples' Rights* ('*African Charter*')¹³⁶ and the *American Convention*, the collective rights of indigenous peoples to land and natural resources are recognised.¹³⁷ As will be discussed in Part V below, this has allowed for the development of a substantial body of international jurisprudence recognising the rights of indigenous peoples to natural resources.

The adoption of the *UNDRIP* in 2007 marked another significant development towards the recognition of the indigenous rights to land and natural resources. Specifically, it recognises the indigenous rights not to be subjected to forced assimilation or destruction of their culture,¹³⁸ not to be forcibly removed from their lands or territories and not to be relocated without their free, prior and informed consent.¹³⁹ It similarly ensures the conservation and protection of the

¹³³ *Uti possidetis iti possideatis* literally means 'as you possess, so may you possess', which ironically could also be used to justify indigenous territorial claims.

¹³⁴ Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 207; Reisman, 'Protecting Indigenous Rights in International Adjudication', above n 5, 352.

¹³⁵ *ILO Convention 169* has been ratified by 20 states at the time of writing. Virtually all Latin American states with large indigenous populations have ratified it, although it has not in general attracted many ratifications — arguably because it adopts a progressive approach to the recognition of indigenous peoples' rights. The earlier *ILO Convention 107* represented the first attempt to codify the international obligations of states with respect to indigenous and tribal populations, particularly with regard to land, territories and resources. However, it was been criticised for its integrationist approach: International Labour Organization, *Convention No 107 (2013)* <<http://www.ilo.org/indigenous/Conventions/no107/lang-en/index.htm>>. See also *Convention (No 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*, signed 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) (note that this is no longer in force).

¹³⁶ *African Charter*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 21.

¹³⁷ *American Convention*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978). On the basis of art 21, '[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society'.

¹³⁸ *UNDRIP*, UN Doc A/RES/61/295, annex art 8(1).

¹³⁹ *Ibid* annex art 10.

environment and the productive capacity of their lands or territories and resources,¹⁴⁰ as well as the right to redress by means that can include restitution or (when this is not possible) just, fair and equitable compensation for lands, territories and resources which have been ‘confiscated, taken, occupied, used or damaged’.¹⁴¹ The *UNDRIP* also recognises the indigenous ‘right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources’.¹⁴²

In addition to the well-documented difficulties experienced by indigenous peoples in having their land rights recognised, their natural resource claims often clash with those of the state and other economic actors. The legal challenges surrounding this are particularly evident in the case of subsoil natural resources. In most legal systems, ownership over subsoil natural resources such as oil and gas is vested in the state.¹⁴³ The origins of this property rights regime can be traced back to the regalian regime, later integrated into the domanial system, under which ownership of natural resources is vested in the sovereign.¹⁴⁴ So while the state vests in itself mineral resources, the landowners only have a right of compensation for the loss of surface rights.¹⁴⁵ States that apply the domanial regime tend to explicitly spell out in their constitutions and legislation their sovereignty and control over oil and gas resources.¹⁴⁶

ILO Convention 169 falls short of explicitly upholding indigenous peoples’ rights to mineral or other sub-surface resources and hence does not condemn the

¹⁴⁰ Ibid annex art 29(1).

¹⁴¹ Ibid annex art 28(1).

¹⁴² Ibid annex art 32(1). The *UNDRIP* also requires, in art 32(2), that states ‘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’.

¹⁴³ In the US, unlike most other jurisdictions, a regime of private ownership of mineral resources (as well oil and gas) is applied: ‘In certain jurisdictions, ownership of oil in situ is not recognised, and ownership is said to occur only when the oil has been produced and reduced into possession’: Omorogbe and Oniemola, above n 17, 118. See also Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 204–5.

¹⁴⁴ Omorogbe and Oniemola, above n 17, 120.

¹⁴⁵ Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 207. Under the regalian system, petroleum belongs to, or is controlled by, the state. The regalian system originated under Roman law, which established that the *dominium directum* (dominion of soil) was vested immediately either in the Sovereign or in feudal landlords. This was separate from *dominium utile* (the possessory title), the right to use and profit from the soil: Pereira, ‘Exploration and Exploitation of Energy Resources’, above n 16, 207; Omorogbe and Oniemola, above n 17, 120. It is evident that property cannot be understood apart from its public function. Indeed, excludability (one essential feature of private property) is limited by physical, legal and moral considerations: ‘property rights exist not for their own sake but because they facilitate certain states of affairs’: Richard Barnes, *Property Rights and Natural Resources* (Hart, 2009) 123–4.

¹⁴⁶ See, eg, *Constitution of Brazil* art 20. Article 20(XI) goes further to state that ‘those lands traditionally occupied by the Indians’ belong to the federal government. The regime has, on occasion, been reinforced by decisions of national courts (for example, Nigeria), which can establish ownership of oil and gas by the federal or state governments: see, eg, *Attorney-General of the Federation v Attorney-General of Abia State* (2002) 6 NWLR Part 764, 542–905 (Supreme Court of Nigeria). See also Omorogbe and Oniemola, above n 17, 120–1.

practice of states that retain for themselves the ownership of those resources.¹⁴⁷ Yet, given that under general international law the unilateral expropriation of surface rights is generally prohibited, the same argument logically appears to apply in the case of a state's concession for the extraction of subsoil resources in indigenous lands.¹⁴⁸ The Constitutional Court of South Africa, for example, has held that under indigenous law and by virtue of traditional occupation and use, ownership of subsoil and minerals may vest collectively in indigenous peoples.¹⁴⁹

A *Indigenous Peoples' Right to Prior and Informed Consent and Participation in Decision-Making*

It is a generally accepted principle in international law that indigenous peoples should be consulted in the event that decisions made by national authorities and others could affect them.¹⁵⁰ The right to consultation is enshrined in *ILO Convention 169*, which employs different standards ranging from consultation to participation and, in the case of relocation, informed consent.¹⁵¹ For example, according to art 6(2), consultation must be undertaken 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent'. Furthermore, states must also guarantee the protection of indigenous peoples' rights to natural resources throughout their territories, including their right 'to participate in the use, management and conservation of [those] resources'.¹⁵² Participation at the broadest level of governance (including in national parliamentary debates) must not supplant local participation in connection with specific projects.¹⁵³ The *UNDRIP* also recognises the right of indigenous peoples to participate in decision-making in matters that could impact their rights — through representatives chosen by them in accordance with their own procedures — as well as the right to maintain and

¹⁴⁷ *ILO Convention 169* states, in art 15(2), that

[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples ... before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

Yet pursuant to the norm of non-discrimination, indigenous peoples must not be denied sub-surface and mineral rights where such rights are otherwise accorded to landowners: see James Anaya, 'Indigenous Peoples' Participatory Rights in relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of International and Comparative Law* 7, 10. See also Fergus MacKay, 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review' (2004) 4(2) *Sustainable Development Law & Policy* 43, 51.

¹⁴⁸ *ILO Convention 169* art 15(2). See also MacKay, above n 147, 54.

¹⁴⁹ *Alexkor Ltd v Richtersveld Community* [2004] 5 SA 460 (Constitutional Court of South Africa) 64.

¹⁵⁰ Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 7.

¹⁵¹ This is also recognised in art 19 of the *UNDRIP*.

¹⁵² *ILO Convention 169* art 15(1).

¹⁵³ Bartolomé Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22 *Arizona Journal of International and Comparative Law* 41, 49. This implies that national procedures regarding project approval and development — such as environmental impact assessment and strategic impact assessment — must recognise indigenous peoples' right to consultation.

develop their own indigenous decision-making institutions.¹⁵⁴ States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent¹⁵⁵ before adopting and implementing legislative or administrative measures that may affect them.¹⁵⁶ It is thus recognised in both *ILO Convention 169* and the *UNDRIP* that consultation is an obligation when indigenous peoples' land and resource imperatives are concerned.¹⁵⁷ In this vein, Anaya argues that the 'widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law'.¹⁵⁸

The extent of this duty of consultation has been intensely debated. In particular, it is contended that the right of indigenous peoples to participate must include the right to veto decisions affecting them.¹⁵⁹ *ILO Convention 169* generally falls short of requiring the consent of indigenous peoples, instead requiring merely that consultations are carried out and the right to participate in decision-making is respected.¹⁶⁰ The exception is the case of relocation, which can only take place as an exceptional measure and requires free and informed consent.¹⁶¹ Other provisions, although not establishing a legal requirement that

¹⁵⁴ *UNDRIP*, UN Doc A/RES/61/295, annex art 18.

¹⁵⁵ Bartolomé Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22 *Arizona Journal of International and Comparative Law* 41, 42. Free, prior and informed consent means that there is consent of indigenous peoples determined in accordance with their customary laws and practices. This is an administrative process which enables both the affected indigenous peoples and the project proponents to put all their concerns forward and identify solutions to problems before the affected groups decide on whether to give consent. MacKay notes that '[c]onsent must be obtained without coercion, prior to commencement of activities, and after the project proponent's full disclosure of the intent and scope of the activity, in language and process understandable to the affected indigenous peoples and communities': MacKay, above n 147, 49. 'Free' should involve no coercion, intimidation or manipulation; and 'prior' should require that consent has been sought sufficiently in advance of any authorisation or commencement of activities and time requirements of indigenous consultation/consensus processes respected. 'Informed' should require that information is provided that includes (but is not limited to) the following aspects: the nature, size, pace and scope of any proposed project or activity as well as the reasons for the project or activity and the duration. It also includes the localities affected and a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing: at 55–6. See also Margaret Satterthwaite and Deena Hurwitz, 'The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects' (2005) 22 *Arizona Journal of International and Comparative Law* 1.

¹⁵⁶ *UNDRIP*, UN Doc A/RES/61/295, annex art 19.

¹⁵⁷ Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 10–12.

¹⁵⁸ *Ibid* 7.

¹⁵⁹ *Ibid*.

¹⁶⁰ See, eg, *ILO Convention 169* art 15(2). As discussed in Part IV above, *ILO Convention 169* falls short of upholding rights to mineral or sub-surface resources in cases where the state generally retains ownership of those resources. On the other hand, the *Convention* requires that indigenous peoples are to be consulted in any resource exploration or extraction on their lands and are to benefit from those activities.

¹⁶¹ *ILO Convention 169* art 16(2).

consent be obtained, could be read broadly as requiring an element of participation (and arguably also consent) by indigenous peoples.¹⁶²

The *UNDRIP* also incorporates the obligation of ‘prior and informed consent’, calling on states to prohibit forcible removal of indigenous peoples from their lands and declaring that ‘[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned’.¹⁶³ It also incorporates the right to participation in decision-making in matters which would affect their rights,¹⁶⁴ before the adoption and implementation of legislative or administrative measures that may affect them.¹⁶⁵

Therefore, the state duty to give effect to the indigenous right to prior and informed consent is largely dependent on the nature of the substantive rights concerned. In certain areas, such as the use of traditional knowledge,¹⁶⁶ resettlement and certain development-related activities affecting indigenous peoples’ traditional lands, international law requires not only that indigenous peoples’ right to consultation is followed, but also establishes that they have the right to give or withhold their consent.¹⁶⁷ The duty to obtain this consent, at least in the cases involving relocation or removal of indigenous peoples from their lands (in the absence of which, special procedures for relocation must take place) appears to have evolved into customary international law.¹⁶⁸ It has gradually been evolving towards the recognition of indigenous peoples’ right to free, prior and informed consent in relation to specific fundamental rights under international law. Since indigenous peoples’ underlying interests are significantly different in each circumstance, it is expected that the nature and extent of consultations required would also differ.¹⁶⁹

¹⁶² See, for example, art 7(1) of *ILO Convention 169*, which provides that

[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

¹⁶³ *UNDRIP*, UN Doc A/RES/61/295, annex art 10.

¹⁶⁴ *Ibid* art 18.

¹⁶⁵ *Ibid* art 19.

¹⁶⁶ See below Part IV(B).

¹⁶⁷ See MacKay, above n 147, 55–6.

¹⁶⁸ There is support for this view in the case law of the Inter-American Court and Commission on Human Rights and jurisprudence of international human rights bodies: see, eg, *Sawhoyamaxa Indigenous Community v Paraguay* [2006] Inter-Am Court HR (ser C) No 146 (‘*Sawhoyamaxa*’); *Moiwana Community v Suriname* [2005] Inter-Am Court HR (ser C) No 124 (‘*Moiwana*’). See also Anaya, ‘Indigenous Peoples’ Participatory Rights’, above n 147, 13–16. This is discussed further in Part V. Prior and informed consent has also been recognised and accepted by a number of intergovernmental organisations and international bodies, as well as in the domestic laws and jurisprudence of some countries, which has generally required indigenous peoples’ consent in mining, oil and gas projects: see Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (17 February 2005) 10–13 [40]–[50]; World Bank Operational Manual, *OP 4.10 — Indigenous Peoples* (July 2005) World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>>. See also MacKay, above n 147, 52; Satterthwaite and Hurwitz, above n 155, 3; Clavero, above n 155, 41.

¹⁶⁹ Anaya, ‘Indigenous Peoples’ Participatory Rights’, above n 147, 7.

The right of indigenous peoples to consent to the development of extractable resources located in their lands is hotly contested by those in the extractive industries and governments:¹⁷⁰

At the heart of the debate are disagreements about the extent of tribal and community self-determination and state sovereignty, the legitimacy of ad-hoc ‘participation’ schemes initiated by industry and governments, and the role of human rights law in solving such disputes.¹⁷¹

Anaya argues that international law is developing to require consent by indigenous peoples where their property rights are affected by natural resource extraction:

Where property rights are indirectly but still significantly affected, for example in the extraction of subsoil resources that are deemed to be under state ownership, the state’s consultations with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward ... and ... [that] the state must show that indigenous concerns were heard and accommodated, though without the heavy burden of mitigation that exists where property rights are at issue.¹⁷²

This is recognised in the *UNDRIP*, which refers specifically to the need to obtain the prior, free and informed consent of indigenous peoples in the context of extractive projects in their territories.¹⁷³ Anaya’s argument also finds support in the implementation of the duty of free, prior and informed consent under the law in some countries, including the law applying to mining in, for example, the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).¹⁷⁴ The many barriers to implementation of the right to prior and informed consent in national legislation include inadequacy of laws and regulations, lack of articulated community procedures and the lack of desire to facilitate access by some local communities.¹⁷⁵

B *Access and Sharing of Benefits over the Exploitation of Genetic and Forestry Resources*

Both *ILO Convention 169* and the *UNDRIP* deal inadequately with the sharing of benefits that arise from the exploration and exploitation of the natural resources found on indigenous lands. The only provision of *ILO Convention 169*

¹⁷⁰ Satterthwaite and Hurwitz, ‘The Right of Indigenous Peoples to Meaningful Consent’, above n 155, 1.

¹⁷¹ *Ibid* 2.

¹⁷² Anaya, ‘Indigenous Peoples’ Participatory Rights’, above n 147, 17; Lisl Brunner and Karla Quintana, ‘The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku’ (2012) 16(35) *American Society of International Law: Insights* <<http://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku>>.

¹⁷³ *UNDRIP*, UN Doc A/RES/61/295, annex art 32(2).

¹⁷⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Under s 11A(3), consent is obtained through statutory, indigenous-controlled Land Councils, which may withhold consent to a mining rights license unless they are satisfied that the traditional Aboriginal owners of the land understand the nature of the activity and are able to consent as a group: see generally MacKay, above n 147, 51. See also Anaya, ‘Indigenous Peoples’ Participatory Rights’, above n 147, 17.

¹⁷⁵ Anne Perrault, ‘Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge’ (2004) 4(2) *Sustainable Development Law and Policy* 21, 23.

dealing with this issue is art 15(2), which states that ‘the peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities’. Although it is not uncommon for international treaties to use vague language to allow for flexible implementation by states parties (this is particularly so in the case of so-called ‘framework-treaties’),¹⁷⁶ it is disappointing that the main legally-binding international instrument on indigenous peoples’ rights does not deal satisfactorily with the question of benefit-sharing. The *UNDRIP* is even more deficient from this perspective as it does not contain any legal provisions on the sharing of benefits from resources found on indigenous lands.¹⁷⁷

More elaborate international norms relating to access and benefit-sharing are found in biodiversity-related international environmental agreements. The *Convention on Biological Diversity* (‘*CBD*’)¹⁷⁸ requires that free, prior and informed consent be obtained from contracting parties providing access to genetic resources.¹⁷⁹ Although one of the main objectives of the *CBD* is to facilitate access to genetic resources, it does not require biodiversity-rich host states to allow foreign nationals access to genetic resources. Article 15(4) authorises states to limit or place conditions on access to genetic resources and states that ‘access, where granted, shall be on mutually agreed terms’.

In addition, parties must ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ... and promote their wider application with the approval and involvement of the holders of such knowledge’,¹⁸⁰ yet only ‘as far as possible and as appropriate’¹⁸¹ and ‘subject to ... national legislation’.¹⁸² However, the *CBD* does not clarify how the benefits arising from exploration and exploitation of genetic resources are to be shared, only stating that benefit-sharing is ‘fair and equitable’ and that sharing from ‘results of research and development and ... commercial and other

¹⁷⁶ See, eg, *UNFCCC* art 4; *CBD* art 4.

¹⁷⁷ The *UNDRIP* addresses the question of compensation and redress arising due to violation of natural resource rights and loss of indigenous lands: *UNDRIP*, UN Doc A/RES/61/295, annex arts 10, 28.

¹⁷⁸ *CBD*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

¹⁷⁹ *Ibid* art 15(5).

¹⁸⁰ *Ibid* art 8(j).

¹⁸¹ *Ibid* art 8.

¹⁸² *Ibid* art 8(j). This sets the *CBD* apart from the 1995 World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* on protection of intellectual property rights, which does not contain provisions protecting traditional knowledge: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (‘*Agreement on Trade-related Aspects of Intellectual Property Rights*’) (‘*TRIPS Agreement*’). On the compatibility between the *CBD* and the *TRIPS Agreement*: see, eg, Richard G Tarasofsky, ‘The Relationship between the *TRIPS Agreement* and the *Convention on Biological Diversity*: Towards a Pragmatic Approach’ (1997) 6 *Review of European Community and International Environmental Law* 148, 148–54.

utilization of genetic resources ... [must take place on mutually agreed terms'.¹⁸³ The parties thus recognised the need to further harmonise national laws by adopting the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization* ('*Bonn Guidelines*')¹⁸⁴ — voluntary guidelines setting the obligations and rights of parties with respect to genetic resources and traditional knowledge¹⁸⁵ — and the *Nagoya Protocol on Access and Benefit Sharing* ('*Nagoya Protocol*')¹⁸⁶ (which is, however, not yet in force).¹⁸⁷ The *Nagoya Protocol*, if adopted and implemented by the states that ratify it, will provide further (albeit limited) guidance on the implementation of the *CBD* provisions on access and benefit-sharing.¹⁸⁸ But, perhaps more significantly, the *Nagoya Protocol* would go some way towards protecting indigenous traditional knowledge, which is

¹⁸³ *CBD* art 15(7). An example of benefit-sharing arrangements between a state, corporations and local communities is Samoa's agreement in 2004 with the University of California, Berkeley ('UCB'), permitting the University to isolate the gene for a promising anti-AIDS drug Prostatin from the mamala tree (*homalanthus nutans*): see Rudolph C R yser, 'Samoa's "Mamala Tree Agreement" Promotes Profit Not Healing' on *Fourth World Eye Blog: Center for World Indigenous Studies* (November 2004) <<http://cwis.org/FWE/archive-2004-2007/samoas-mamala-tree-agreement-promotes-profit-not-healing/>>. The agreement, signed by the Prime Minister of Samoa and the Vice Chancellor for Research at UCB, gives both parties equal shares to any commercial development from the genetic resource, while a 50 per cent share allocated to the Samoan government will be distributed at various levels to the villages and families who initially shared their traditional knowledge. Ranjan Gupta, Bjarne Gabrielsen and Steven M Ferguson, *Nature's Medicines: Traditional Knowledge and Intellectual Property Management. Case Studies from the National Institutes of Health (NIH), USA* (8 September 2009) National Institutes of Health <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2739453/>>. Also see the agreement between the state-owned Council of Scientific Research ('CSIR') and the San People of Namibia regarding the exploitation of Hoodia, which requires CSIR to share with the San People a portion of the royalties from potential drug sales.

The monetary benefits are 8 per cent of milestone payments received by CSIR from Phytopharm during the product development period and 6 per cent of the royalty income received by CSIR from Phytopharm as a result of the successful exploitation of products arising from the patent's licensing income or sales anywhere in the world.

Kabir Bavikatte, Harry Jonas and Johanna von Braun, *Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective* (31 March 2009) United Nations University Institute of Advanced Studies <http://www.unutki.org/news.php?news_id=165&doc_id=39&mode=archive>.

¹⁸⁴ Secretariat of the *Convention on Biological Diversity*, 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization' (Guidelines, 2002) ('*Bonn Guidelines*').

¹⁸⁵ The *Bonn Guidelines* also provide some guidance on possible elements of free and informed consent procedures, including: consent of the national authority and indigenous and local communities; mechanisms for the involvement of stakeholders; reasonable timing and deadlines; specification of the type of uses; direct linkage with mutually agreed terms; detailed procedures for obtaining consent; and a description of the general process for access: Perrault, above n 175, 22.

¹⁸⁶ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, opened for signature 2 February 2011, UN Doc UNEP/CBD/COP/DEC/X/1 (not yet in force) ('*Nagoya Protocol*').

¹⁸⁷ At the time of writing, the *Nagoya Protocol* has attracted 26 ratifications. Under art 33(2), it requires the deposit of the 50th instrument of ratification, acceptance or approval before it enters into force.

¹⁸⁸ Article 8(j) of the *CBD* states that 'as far as possible and as appropriate' and 'subject to its national legislation', states must 'respect, preserve and maintain knowledge'.

currently insufficiently protected in international intellectual property law instruments.¹⁸⁹ Article 5(5) of the *Nagoya Protocol* provides that

[e]ach party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge.¹⁹⁰

This is qualified by the caveat under art 5(2) of the *Nagoya Protocol*, which requires that the benefit-sharing regime be ‘in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources’.¹⁹¹ It leaves considerable discretion to parties with regards to the implementation of access and benefit-sharing provisions. Either nationally implemented legislative measures or policy documents would satisfy these provisions. Although art 5(4) and the *Nagoya Protocol*’s annex provide some guidance on the types of monetary and non-monetary benefits that could accrue from the exploration and exploitation of genetic resources,¹⁹² the *Nagoya Protocol*, like the *CBD*, leaves considerable for discretion to the parties in negotiating the terms of any agreement, which (according to the *Nagoya Protocol*) shall be ‘upon mutually agreed terms’.¹⁹³

States’ willingness to negotiate international standards in relation to access and benefit-sharing may be further tested in the context of Reduced Emissions from Deforestation and Forest Degradation (‘REDD’) projects. Although at the time of writing a legally binding international agreement on REDD has not been adopted,¹⁹⁴ the World Bank (which is expected to play a significant role in REDD-financing projects) has adopted guidelines for the participation of

¹⁸⁹ See, eg, *Nagoya Protocol* arts 5(5), 7. There is an extensive literature examining the relationship between the *TRIPS Agreement* and the *CBD*: see generally Daniel Gervais, ‘Traditional Knowledge and Intellectual Property: A *TRIPS*-Compatible Approach’ [2005] *Michigan State Law Review* 137, 163; Tarasofsky, above n 182, 148–54. See also Carlos Correa, ‘Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge’ (Discussion Paper, Quaker United Nations Office, November 2001).

¹⁹⁰ *Nagoya Protocol* art 5(5).

¹⁹¹ *Ibid* art 5(2) (emphasis added).

¹⁹² *Ibid* art 5(4).

¹⁹³ *Ibid* arts 5(1)–(2), (5).

¹⁹⁴ The premises upon which an international agreement on Reduced Emissions from Deforestation and Forest Degradation would be based are enshrined in the *Copenhagen Accord* (2009) and the *Cancun Agreements* (2010), which were agreed upon at the 15th (COP15) and 16th (COP16) Conference of the Parties held under the *UNFCCC*: see Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 — Addendum — Part 2: Action Taken by the Conference of the Parties at Its Fifteenth Session*, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) Decision 2/CP.15 (‘*Copenhagen Accord*’); Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 — Addendum — Part 2: Action Taken by the Conference of the Parties at Its Sixteenth Session*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) Decision 1/CP.16 (‘*Cancun Agreements*’).

indigenous peoples in REDD projects.¹⁹⁵ One significant shortcoming of the World Bank guidelines, however, is that they do not clarify how the economic benefits arising from REDD projects are to be shared by local and indigenous communities.

It could be argued that the traditional culture of many indigenous societies is antithetical to the very idea of economic progress and development, as generally understood by the dominant society.¹⁹⁶ This concept of economic development is the driving force behind the commercial exploitation of natural resources, but it also underlies the recognition of intellectual property rights for indigenous peoples, which would yield important revenue. There are a number of initiatives and proposals under consideration or already adopted — including the establishment of revenue distribution agreements or funds linked to projects for conservation of indigenous peoples' lands and natural resources — which could implement a benefit-sharing regime without compromising indigenous peoples' traditional culture and lifestyle.¹⁹⁷

So far there has been only a timid attempt by states to adopt binding international standards relating to access and benefit-sharing arising from commercial exploration and exploitation of natural resources. These have been adopted almost exclusively in the context of international environmental treaties

¹⁹⁵ Forest Carbon Partnership Facility and UN-REDD Programme, 'Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities' (Guidelines, 20 April 2012). See also *Programme of Action for the Second International Decade of the World's Indigenous People*, UN GAOR, GA Res 142, 60th sess, 64th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/60/142 (7 February 2006). The guidelines require the recipient country to engage in a process of free, prior and informed consultation. The World Bank will provide financing only where the 'free, prior and informed' consultation results in broad community support with regards to: the traditional lands and territories; the cultural integrity and collective rights of the indigenous peoples; and any other aspect of their lives. The REDD Programme also aims to provide for indigenous peoples' issues to be integrated into the international negotiations process on REDD. For a commentary on the impact of the CBD benefit-sharing provisions on REDD project activities: see generally Elisa Morgera and Elsa Tsioumani, 'The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods' (2010) 19 *Review of European Community and International Environmental Law* 150, 150–73. See also *Programme of Action for the Second International Decade of the World's Indigenous People*, UN GAOR, GA Res 60/142, 60th sess, 64th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/60/142 (7 February 2006)

¹⁹⁶ On the other hand, it is rightly suggested that it is not for human rights law to advocate that indigenous cultures are kept 'frozen in time', but to allow indigenous peoples to develop in their own way and to protect their right to enjoy their own traditional culture: see generally Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 *European Journal of International Law* 121.

¹⁹⁷ For example, the 1995 *Raglan Agreement* has been used as a benchmark for First Nations agreements in the mining industry in Canada. In Australia, a Community Partnership Agreement was signed between the Gnaala Karla Booja and the mine operators and owners in 2006, which acknowledged the traditional owners and established a charitable trust to manage funds for investment in local business development and community projects. In Laos, the Sepon Trust Fund was established to implement the Community/Indigenous Peoples' Development Plan, developed for the Sepon gold and copper project. All projects supported by the Sepon Trust Fund must be aligned with the government's plan to improve sustainability for the area: see Elizabeth Wall and Remi Pelon, 'Sharing Mining Benefits in Developing Countries: The Experience with Foundations, Trusts, and Funds' (Working Paper, World Bank Oil, Gas and Mining Unit, 2011) 17–18. See also Glencore, *Raglan Agreement* (2013) <<http://www.xstratanickelraglan.ca/EN/Commitments/Pages/RaglanAgreement.aspx>>.

and soft law guidelines. They leave a large margin of appreciation to states as regards decisions to grant access to genetic resources and the implementation of the benefit-sharing regimes. The existing attempts to regulate access and benefit-sharing largely preserve the principle of state sovereignty over natural resources.

V INTERNATIONAL AND REGIONAL JUDICIAL AVENUES FOR THE ASSERTION OF INDIGENOUS PEOPLES' LAND AND NATURAL RESOURCE RIGHTS

The substantive norms discussed in the previous sections could be easily disregarded by states if there were no effective legal and extra-judicial mechanisms for enforcement and dispute settlement in place. This Part examines the judicial avenues that are available internationally and regionally for the assertion of indigenous peoples' land and natural resource rights. It also examines the judicial avenues for challenging government policies and the actions by economic operators that infringe upon those rights. The enforceability of these norms is an essential prerequisite for peoples to effectively exercise resource rights.

A *The International Court of Justice*

The ICJ is not a particularly suitable forum for the assertion of indigenous peoples' rights, given that its jurisdiction is limited to adjudication of disputes between states.¹⁹⁸ In the few disputes where the ICJ has had the opportunity to discuss the issue of indigenous peoples' rights to land, it has not taken a particularly progressive stance.¹⁹⁹ In the *Western Sahara* advisory opinion,²⁰⁰ the ICJ recognised the invalidity of the titles of acquisition (including the doctrines of discovery, conquest and terra nullius) used by Western states for claiming their sovereignty over indigenous traditional lands. However, the ICJ has not recognised the validity of indigenous traditional land tenure systems as such.²⁰¹ According to the ICJ, at the time of the colonisation of Western Sahara by Spain, such territory was *not* terra nullius, since it 'was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them'.²⁰² Nevertheless, the ICJ appeared to place more weight on the European notion of acquisition of title than non-European

¹⁹⁸ *Statute of the International Court of Justice* art 34(1). This could change if, as discussed above, indigenous peoples were able to establish independent states.

¹⁹⁹ See generally *Western Sahara* [1975] ICJ Rep 12; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment on Application by Nicaragua for Permission to Intervene)* [1990] ICJ Rep 92, 133 [95]–[96] ('*El Salvador v Honduras*'). See also Reisman, 'Protecting Indigenous Rights in International Adjudication', above n 5, 354–7.

²⁰⁰ *Western Sahara* [1975] ICJ Rep 12, 39 [80]–[81].

²⁰¹ Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 207–8.

²⁰² *Western Sahara* [1975] ICJ Rep 12, 39 [81].

(including indigenous) conceptions of land tenure.²⁰³ Therefore, indigenous claims to title which fall outside this European-oriented criterion of land tenure — such as their claim of political organisation in their territory or consciousness of possession — are unlikely to be recognised as legally relevant.

Another case in which a similarly narrow interpretation was applied by the ICJ to indigenous land rights involved a dispute over six land boundary lines between El Salvador and Honduras. In the *Land, Island and Maritime Frontier Dispute* case,²⁰⁴ the ICJ held that

[i]t was the administrative boundaries between the Spanish colonial administrative units, not the boundaries between the Indian settlements as such, that were transformed, by the operation of the *uti possidetis juris*, into international boundaries in 1821.²⁰⁵

This narrow interpretation of the law by the ICJ has been vehemently criticised by Michael Reisman, who argues that the position of the ICJ reflects a

personal detachment and disengagement of judicial responsibility, not from past tragedies that may be irreparable, but from the contemporary, continuing tragedy of indigenous peoples caused by the inertial, and apparently unthinking, application of anachronistic law.²⁰⁶

States generally refrain from instituting proceedings before the ICJ in contentious disputes as an exercise of general enforcement or policing powers towards other states²⁰⁷ — for example, in order to ensure that other states comply with international law, but without a more immediate or specific interest of that state being affected by the non-compliance of the other state.²⁰⁸ So it appears unlikely that states will bring proceedings before the ICJ to ensure that

²⁰³ In *Western Sahara*, Morocco and Mauritania sought title to parts of territory in Western Sahara based on non-European theories and practices of governance. The ICJ ruled that the nomadism of the great majority of the tribal peoples of Western Sahara at the time of its colonisation by the Spanish gave rise to certain ties between the territory of Western Sahara and the 'Mauritanian entity'. However, the ICJ concluded that there was nothing to establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity: ICJ Rep 12, 63 [149]. See also Reisman, 'Protecting Indigenous Rights in International Adjudication', above n 5, 354.

²⁰⁴ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, 393 [50].

²⁰⁵ Ibid.

²⁰⁶ Reisman, 'Protecting Indigenous Rights in International Adjudication', above n 5, 357.

²⁰⁷ This is despite the fact that the 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* expressly recognise the right of a state other than the 'injured state' to invoke the responsibility of another state if 'a) the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group, or b) the obligation breached is owed to the international community as a whole': see International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) art 48(1) ch IV(E) ('*Draft Articles on Responsibility of States for Internationally Wrongful Acts*').

²⁰⁸ Joseph Warioba notes that 'international courts do not have the power of enforcement because there is no world executive similar to national governments. International law as it has been developed, particularly since the 17th Century, is based on the equality of states': Joseph Sinde Warioba, 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts' (2001) 5 *Max Planck Yearbook of United Nations Law* 41, 49. See generally Ricardo Pereira, 'Compliance and Enforcement in International, European and National Environmental Law' in Karen Makuch and Ricardo Pereira, *Environmental and Energy Law* (Wiley-Blackwell, 2012) 561, 561–75.

other states give effect to their duty to protect the rights of their own indigenous peoples as recognised under international law.²⁰⁹ Moreover, the jurisdiction of the ICJ is, as a rule, consensual. The ICJ only has compulsory jurisdiction if the parties to the dispute have accepted this type of jurisdiction of the court.²¹⁰ Therefore, the role of the ICJ in developing the international jurisprudence on indigenous peoples' rights is likely to remain limited. An indication of this is the fact that the ICJ rulings discussed in this section have focused on land boundaries disputes — being disputes with trans-boundary implications — and not as such on a state's duty to protect indigenous peoples' rights.

B *International Human Rights Treaties' Monitoring Bodies*

The compliance and monitoring bodies established under specific international human rights treaties are some of the main international avenues through which violations of indigenous peoples' land and natural resource rights can be asserted.

The HRC, which can receive submissions of non-states parties alleging violations of the *ICCPR*, has continued to favour an interpretation of art 27 of the *ICCPR* that includes strong indigenous land, cultural and language rights.²¹¹ So although it does not provide protection per se for indigenous peoples' rights to land, the HRC has extended the scope of art 27 to include essential parts of indigenous culture. Therefore, activities relating to the use of the land are to be recognised as constituting an essential element of indigenous culture.²¹²

²⁰⁹ As regards states' unwillingness to bring judicial proceedings in international courts regarding another state's damage to its own environment, see Philippe Sands and Jacqueline Peel, *Principles of International Environments Law* (Cambridge University Press, 2012) 145.

²¹⁰ For a list of the countries which have recognised the compulsory jurisdiction of the ICJ, see International Court of Justice, *Jurisdiction: Declarations Recognizing the Jurisdiction of the Court as Compulsory* <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>>.

²¹¹ See, eg, Human Rights Committee, *Views: Communication No 24/1977: Canada*, 13th sess, UN Doc CCPR/C/13/D/24/1977 (30 July 1981) ('*Lovelace v Canada*').

²¹² For a discussion of the cases involving the Sami communities from Sweden and Finland, see Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 12. At the heart of the debate is the applicability of art 27 of the *ICCPR* to indigenous groups, especially where it mentions 'persons belonging to such minorities', leading some authors to conclude that the right belongs to the individual. Netheim writes that art 27 is focused on individuals, though it is predicated on the group: *ICCPR* art 27; Netheim, above n 108, 116. Hurst Hannum criticises art 27 for being 'minimalistic and individually' oriented: Hurst Hannum, 'Minorities, Indigenous Peoples, and Self-Determination' in Louis Henkin and John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (American Society of International Law, 1994) 1, 5. In *Kitok v Sweden*, the Human Rights Committee suggested that an indigenous community's interest in survival may take priority over the individual interest of a member of that community. Ivan Kitok (ethnically Sami but who lost membership in his ancestral village) challenged the Swedish *Reindeer Husbandry Act*, which reserved reindeer breeding rights exclusively for members of Sami villages. The Committee held that his right under art 27 of the *ICCPR* had not been violated, prioritising group rights over those of the individual: Human Rights Committee, *Views: Communication No 197/1985*, 33rd sess, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) ('*Kitok v Sweden*'). In this case, the Human Rights Committee interpreted the decision in *Lovelace v Canada* as concluding that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole': at [9.8]. For a discussion of this case: see Anaya, *Indigenous Peoples in International Law*, above n 112, 101.

As regards the duty to consult indigenous peoples in the context of extractive activities, the HRC has considered multiple cases of alleged violations by Finland of art 27 of the *ICCPR* against Sami cultural rights, which involved the logging and quarrying of Sami reindeer herding areas by private companies, activity that was permitted under Finnish law.²¹³ Although Sami advisory bodies had been consulted and changes to the licenses had been made, certain Sami constituencies continued to oppose the logging and quarrying.²¹⁴ On the basis that consultation had taken place, as well as the limited nature of the resource extraction, the HRC found that the *ICCPR* had not been violated.

In a similar vein, the UN Committee on Economic, Social and Cultural Rights ('UNCESCR') has upheld indigenous natural resource rights by interpreting the *ICESCR* broadly. In one instance UNCESCR noted that 'the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem'.²¹⁵ It has recommended that states 'ensure the participation of indigenous peoples in decisions affecting their lives'²¹⁶ and required states parties to consult and seek the consent of the indigenous peoples concerned.²¹⁷

Similarly, the Committee on the Elimination of Racial Discrimination ('CERD') has also intensified its monitoring of indigenous issues and has encouraged many states to review their policies concerning indigenous peoples.²¹⁸ It has employed the 'Urgent Action Procedure' in order to address the discriminatory policies of some states.²¹⁹ It has also supported the duty of consultation of indigenous peoples when extractive projects have the potential to affect them.²²⁰

²¹³ Human Rights Committee, *Views: Communication No 511/1992*, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) ('*Ilmari Länsman v Finland*'); Human Rights Committee, *Views: Communication No 671/1995*, 58th sess, UN Doc CCPR/C/58/D/671/1995 (30 October 1996) ('*Jouni Länsman v Finland*').

²¹⁴ However, 'in neither case did the Committee consider that the Sami had property rights in the lands in question in addition to the cultural interests in those lands, in which case a more demanding duty of consultation would at least arguably have applied': Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 12.

²¹⁵ Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, UN Doc E/2002/22 and E/C/12/2001/17 (2002) [761].

²¹⁶ Jan Lüdert, *Deliberating Justice — Indigenous Peoples, the World Bank and the Principle of Free Prior Informed Consent* (GRIN, 2007) 27.

²¹⁷ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Columbia 11/30/2001*, 27th sess, UN Doc E/C.12/1/Add.74 (6 December 2001) [33]. See also MacKay above n 147, 51.

²¹⁸ Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 13.

²¹⁹ See Xanthaki, above n 125, 28.

²²⁰ The Committee on the Elimination of Racial Discrimination called upon states parties to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent': MacKay, above n 147, 51, quoting *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (1997) annex V [4] ('*General Recommendation on the Rights of Indigenous Peoples*') ('*General Recommendation 23*'). This quote 'relates the right to informed consent to the right to participate found in [art] 5(c) of the [ICERD] and has made repeated reference to the preceding language in its decisions and concluding observations': MacKay, above n 147, 51.

C The ILO Compliance Committee

One of the most significant developments in the field of international law has been the emergence of non-compliance procedures under various multilateral treaties.²²¹ For example, parties to *ILO Convention 169* are required to report on measures taken to ensure its implementation and on any problems encountered to the Committee of Experts on the Application of Conventions and Recommendations ('Compliance Committee'). The Compliance Committee may take specific action against non-compliance and has the power to submit 'observations' and make 'direct requests'.²²² However, its powers to impose sanctions for non-compliance are more limited.²²³ The right to public participation, which is envisaged in art 24 of the *Constitution of the International Labour Organization*, allows individuals and organisations to make representations when a party fails to comply with *ILO Convention 169*.²²⁴

The Compliance Committee has recognised that consultations must be held when indigenous peoples' interests are involved, including in cases involving disputes over land and natural resources.²²⁵ For example, in a complaint concerning the Embera Katio people of Colombia, the Compliance Committee found that despite a consultative process that had led to an agreement with the indigenous populations concerning the flooding of their lands for a hydroelectric project, the duty to consult had not been fully complied with due to

²²¹ The first noncompliance procedure in a multilateral environmental agreement was established under the *Montreal Protocol* on phasing out of ozone depleting substances: *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989) art 8 ('*Montreal Protocol*'). The Implementation Committee may undertake information-gathering in the territory of the party concerned (at the invitation of the party) and has the power to suspend specific rights and privileges under the *Montreal Protocol*: see Sands and Peel, above n 209, 163–4.

²²² These are sent directly to the government in question. In them, the Committee asks for more information on specific subjects. Additionally, there are several ways in which indigenous peoples can ensure that their concerns are taken into account, through the regular supervision of *ILO Convention 169*. These include sending information directly to the International Labour Organization ('ILO') on a new policy, law or court decision. Indigenous peoples can strengthen their alliances with workers' organisations and ensure that issues of concern are raised. Finally they can benefit from technical cooperation: see International Labour Organization, *Supervision* (2013) <<http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm>>.

²²³ Yet on the basis of art 33 of the *Constitution of the International Labour Organization*, if satisfactory compliance is not forthcoming, then 'the Governing Body may recommend to the [General] Conference [of the ILO] such action as it may deem wise and expedient to secure compliance therewith'.

²²⁴ Kimberly Ann Elliott, 'The ILO and Enforcement of Core Labor Standards' (International Economics Policy Brief No 00-6, Peterson Institute for International Economics, July 2000) 2.

²²⁵ See generally Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 7–17.

modifications to the project undertaken after the agreement.²²⁶ In another case, this time involving an oil exploration concession in Ecuador and Colombia,²²⁷ the Compliance Committee found that the concessions had been granted with little consultation with the indigenous peoples concerned.²²⁸ The Compliance Committee upheld the local indigenous peoples' right to consent when surface resources are at stake. Furthermore, it employed art 6(2) of *ILO Convention 169* to make clear that consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement with the affected indigenous peoples.²²⁹

D Regional Human Rights Treaties

Regional human rights bodies, in particular in the Americas, have been sympathetic to indigenous peoples' land and natural resource rights. Some of the most prominent regional developments are the decisions of the inter-American human rights bodies,²³⁰ which have in general taken a progressive stance on

²²⁶ See Governing Body, International Labour Organization, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention*, 1989 (No 169), *Made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)*, 282nd sess, ILO Doc GB.282/14/3 (November 2001). The ILO Compliance Committee pointed out that the objective of such consultations should be understood in connection with *ILO Convention 169's* other provisions and its general mandate that governments develop, 'with the participation of the peoples concerned, coordinated and systematic action to protect their rights and to guarantee respect for their integrity': Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 7, quoting Governing Body, International Labour Organization, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention* 1989 (No 169), *Made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association*, 282nd sess, ILO Doc GB.282/14/4 (November 2001) [58].

²²⁷ See Governing Body, International Labour Organization, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples' Convention*, 1989 (No 169), *Made under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, 282nd sess, ILO Doc GB.282/14/2 (November 2001) [38].

the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.

²²⁸ *Ibid* [40].

²²⁹ The Compliance Committee has adopted a similar stance in other cases involving disputes over natural resources: see, eg, Governing Body, International Labour Organization, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention*, 1989 (No 169), *Made under Article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR)*, 289th sess, ILO Doc GB.289/17/3 (March 2004) [102].

²³⁰ Twenty-one of the 35 member states of the Organization of American States have accepted the Inter-American Court of Human Rights' jurisdiction: Inter-American Court of Human Rights, 'Annual Report 2012' (Report, 2012) 6.

indigenous peoples' land rights.²³¹ For example, in *Sawhoyamaxa Indigenous Community v Paraguay* ('*Sawhoyamaxa*')²³² the Inter-American Court ruled that Paraguayan legislation failed to provide an effective judicial remedy that protected legitimate land claims laid by indigenous communities.²³³ This constituted a violation, per se, of the *American Convention*²³⁴ and the displacement and expropriation of indigenous' lands amounted to a violation of the right to life.²³⁵ In *Yakye Axa Indigenous Community v Paraguay*,²³⁶ the Inter-American Court considered that the members of the community were empowered, even under domestic law, to file claims regarding traditional lands.²³⁷ The Inter-American Court took this further in *Sawhoyamaxa* when it 'ordered the State, as a measure of reparation, to individualize those lands and transfer them on a for no consideration basis'.²³⁸ It also held that

[t]he members of indigenous peoples who have unwillingly lost possession ... are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.²³⁹

A similar approach was taken by the Inter-American Court in *Moiwana Community v Suriname*,²⁴⁰ where the Court considered that the members of the N'djuka people were the 'legitimate owners of their traditional lands',²⁴¹ although they did not have possession of them, due to acts of violence against them that had driven them away.²⁴² The Inter-American Court also held that traditional possession of lands by indigenous peoples has the equivalent legal effect as state-granted full property title,²⁴³ undermining claims that the customary mechanisms of land title used by indigenous peoples held less legal weight than European-oriented conceptions. Importantly, in

²³¹ Pereira, 'Exploration and Exploitation of Energy Resources', above n 16, 208. On the other hand, the Inter-American Court of Human Rights has been criticised for not giving sufficient weight to the rights concerning natural resources on indigenous lands enshrined in the *UNDRIP*: Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 *Wisconsin International Law Journal* 51, 97.

²³² [2006] Inter-Am Court HR (ser C) No 146.

²³³ *Ibid* [109]–[111].

²³⁴ *Ibid* [112]. See also, at [128]:

the members of indigenous peoples who have unwillingly lost possession ... are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

²³⁵ *Ibid* [166].

²³⁶ [2005] Inter-Am Court HR (ser C) No 125 ('*Yakye Axa*').

²³⁷ *Ibid* [84]. This principle has been recognised in more recent case law: see, eg, *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-Am Court HR (ser C) No 214, [110]–[111].

²³⁸ *Sawhoyamaxa* [2006] Inter-Am Court HR (ser C) No 146, 73 [127]. See also *Yakye Axa* [2005] Inter-Am Court HR (ser C) No 125, [217].

²³⁹ *Sawhoyamaxa* [2006] Inter-Am Court HR (ser C) No 146, [128].

²⁴⁰ [2005] Inter-Am Court HR (ser C) No 124.

²⁴¹ *Ibid* [134].

²⁴² *Ibid* [108], [134].

²⁴³ *Ibid* [133].

Saramaka People v Suriname,²⁴⁴ the Inter-American Court referred for the first time to the right of self-determination in its interpretation of indigenous land and resource rights recognised in art 21 of the *American Convention*.²⁴⁵

The Inter-American Court takes the view that states have both positive and negative obligations in respecting the right to life. For example, in *Sawhoyamaya*,²⁴⁶ it gave an expansive interpretation of art 4 of the *American Convention*. It recognised indigenous peoples' collective rights over land and resources and made the following observation:

In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.²⁴⁷

It is thus well-established that failure by a state to provide effective protection against threats to indigenous populations — including their lands — can lead to the liability on the part of the state. This brings disputes over natural resources between indigenous peoples and economic operators onto the international plane. Similarly, the Inter-American Commission on Human Rights also considers that possession of land should suffice for indigenous communities otherwise lacking real title to the land in order to obtain official recognition of property rights for consequent registration.²⁴⁸ The Inter-American Court has also accepted that the human right to property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions and that 'possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property'.²⁴⁹

As regards the indigenous right to consultation and prior and informed consent, the inter-American bodies have articulated a duty for states to obtain the consent of indigenous peoples when actions would affect indigenous property rights.²⁵⁰ The Inter-American Court has found that such a duty exist on the basis

²⁴⁴ [2007] Inter-Am Court HR (ser C) No 172.

²⁴⁵ Ibid [159]–[174]. See also Shelton, above n 89, 75.

²⁴⁶ [2006] Inter-Am Court HR (ser C) No 146.

²⁴⁷ Ibid [155].

²⁴⁸ The Inter-American Commission has found violations of the international human rights to due process and property and recognised the following rights under international law:

- (i) 'the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property';
- (ii) 'the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied'.

Inter-American Commission on Human Rights, *Mary and Carrie Dann v US*, Report No 75/02, Case No 11.140 (27 December 2002) [130]. It was further stated that international law requires 'special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent': at [131].

²⁴⁹ *Awes Tingni Community v Nicaragua* [2001] Inter-Am Court HR (ser C) No 79, [151] ('*Awes Tingni*').

²⁵⁰ Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v Belize*, Report No 40/04, Case No 12.053 (12 October 2004) [5].

of traditional land tenure.²⁵¹ Furthermore, the Inter-American Commission on Human Rights, in *Maya Indigenous Communities of the Toledo District v Belize*,²⁵² dealing with Mayan land rights in their traditional territories in the south of Belize, found that the government's grant of the oil exploration and logging concessions 'without effective consultations with and the informed consent of the Maya people'²⁵³ constituted a violation of human rights guarantees under the *American Convention* and that indigenous peoples' land and resource rights under international law are independent of domestic law.²⁵⁴ In *Awas Tingni Community v Nicaragua*, the Inter-American Court received evidence from the Inter-American Commission on Human Rights which concluded that the state 'is actively responsible for violations of the right to property ... by granting a concession ... without the consent of the Awas Tingni indigenous community'.²⁵⁵ Thus the Inter-American Court has articulated a link between the right to consultation and full and informed consent and protection of indigenous peoples' property rights.

In the more recent decision of *Kichwa Indigenous People of Sarayaku v Ecuador*,²⁵⁶ the Court assessed whether Ecuador had violated the property rights of the Kichwa people of Sarayaku by awarding a private company an oil exploration and exploitation concession which partially covered ancestral lands, without a consultation process or their free, prior and informed consent. The Inter-American Court found that Ecuador had violated art 21 of the *American Convention*,²⁵⁷ although it did not elaborate further on the obligations to consult and to obtain consent in the context of large-scale extractive industry projects that impact on indigenous territories.²⁵⁸

Within the African human rights system, the African Court on Human and Peoples' Rights ('ACHPR'), established in 2004,²⁵⁹ can receive applications or complaints submitted to it either by the African Commission on Human and

²⁵¹ In the *Awas Tingni* case, the Inter-American Court recognised indigenous peoples' collective rights to land and resources on the basis of art 21 of the *American Convention on Human Rights: Awas Tingi* [2001] Inter-Am Court HR (ser C) No 79, [142], [153].

²⁵² Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v Belize*, Report No 40/04, Case No 12.053 (12 October 2004).

²⁵³ *Ibid* [153].

²⁵⁴ Hence the Inter-American Commission requires, at a minimum, that all members of a community are fully and accurately informed of the nature and consequences of the process and that they are provided with an effective opportunity to participate individually or collectively in decision-making. This applies to decisions by the state that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories: see, eg, Anaya, 'Indigenous Peoples' Participatory Rights', above n 147, 15; MacKay, above n 147, 43. In a similar vein, see the Inter-American Court decision in *Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-Am Court HR (ser C) No 245, [145]–[147].

²⁵⁵ *Awas Tingni* [2001] Inter-Am Court HR (ser C) No 79, 5 [25].

²⁵⁶ *Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-Am Court HR (ser C) No 245.

²⁵⁷ *Ibid* [232].

²⁵⁸ Efrén C Olivares Alanís, 'Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence from the Inter-American System of Human Rights' (2013) 5 *Goettingen Journal of International Law* 187, 212.

²⁵⁹ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, opened for signature 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004) art 1.

Peoples' Rights ('African Commission'), states parties to the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*,²⁶⁰ or other African intergovernmental organisations. The rules of standing of the ACHPR allow non-governmental organisations (with observer status before the African Commission) and individuals, from states which have made a declaration accepting the jurisdiction of the ACHPR, to institute cases directly.²⁶¹ However, so far only seven countries have made such a declaration²⁶² and the ACHPR is yet to decide on a case involving indigenous peoples' rights.²⁶³

The African Commission has dealt with very few cases involving indigenous peoples' land and natural resource rights.²⁶⁴ In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,²⁶⁵ it found that Nigeria had violated several articles of the *African Charter* and appealed to the government to ensure protection of the environment, health and livelihood of the Ogoni people.²⁶⁶ It did this by, inter alia, ensuring compensation to victims of human rights violations — including relief and resettlement assistance to victims of government raids — and undertaking a comprehensive clean-up of lands and rivers damaged by oil operators.²⁶⁷ The African Commission dealt with another case involving indigenous peoples' human rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.²⁶⁸

²⁶⁰ Ibid art 5.

²⁶¹ African Court on Human and Peoples' Rights, *African Court in Brief* (September 2013) <<http://www.african-court.org/en/index.php/about-the-court/brief-history>>.

²⁶² These countries are Burkina Faso, Ghana, Malawi, Mali, the Republic of Cote d'Ivoire, Rwanda and Tanzania: *ibid*.

²⁶³ The African Court on Human and Peoples' Rights has, at the time of writing, decided 20 cases out of 28 applications: *ibid*.

²⁶⁴ Xanthaki notes that despite the collective focus of the *African Charter*, indigenous rights did not appear as an item on the agenda of the African Commission on Human and Peoples' Rights ('African Commission') until 1999: Xanthaki, above n 125, 33. The following year, the Working Group on the Rights of Indigenous Populations/Communities in Africa ('WGRIPA') was established. Its establishment soon triggered discussions on indigenous rights in other parts of the African Commission's work. The first report of WGRIPA, submitted in 2003 (and later published in 2005), was a major development for indigenous rights in Africa, in that it included hunter-gatherers and pastoralists within the concept of 'indigenous peoples' and confirmed that indigenous groups are 'discriminated against': African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (Transaction, 2005) 15, 30.

²⁶⁵ African Commission on Human and Peoples' Rights, *Communication No 155/96: The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 30th sess (27 October 2001) [56] ('Ogoni').

²⁶⁶ *Ibid* [68]–[69].

²⁶⁷ *Ibid* [Holdings]. See also *SERAP v Federal Republic of Nigeria (Judgment)* (Court of Justice of the Economic Community of West African States, General List No ECW/CCJ/APP/08/09, Judgment No ECW/CCJ/JUD/18/12, 14 December 2012). See especially at [64] (where the plaintiff refers to the *Ogoni* case in making its claims alleging a violation of the right to natural wealth and resources under the *African Charter*, among other rights). The focus of this decision was largely on the right to a satisfactory environment favourable to development.

²⁶⁸ The African Commission on Human and Peoples' Rights, *Communication No 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 46th sess (25 November 2009).

This dispute involved a community which was forcefully evicted from their ancestral lands without consultation, consent, compensation or relocation. In its communication the Africa Commission extended individual and peoples' rights under the *African Charter* to indigenous people and recognised specific rights to development. It requested that the Kenyan Government submit progress reports on the implementation of its decision. These reports required, inter alia, the payment of adequate compensation to the community for all loss suffered.²⁶⁹ This was a progressive decision, calling for the compensation of victims for loss of property, development and natural resource rights, the freedom to practice their religion and culture and also requiring restitution of their land, with legal title and clear demarcation.²⁷⁰

This review of international courts and treaty-monitoring bodies, as well as of two regional human rights systems²⁷¹ suggests that states have an obligation under international law to protect indigenous peoples' collective rights to land and natural resources. They add further weight to the argument that some of these rights now form part of customary international law. They also redefine the classic, state-centred, perception of international law by recognising the positive obligation of states to guarantee indigenous peoples' land, natural resources and participatory collective rights.

VI CONCLUSION

Permanent sovereignty over natural resources emerged as a fundamental principle in international law, allowing postcolonial states to assert full sovereignty over natural resources. The right also accompanied by duties which limit how natural resources are to be managed within a state, particularly in order to protect other states against trans-boundary harms. It is contended that communities within a state must be regarded as beneficiaries of this right to permanent sovereignty.

So what type of governmental system would be available to meet the indigenous claims for some degree of independence in order to secure land and natural resources rights? Governments will not respond to demands which would threaten their existence. Therefore, attempts to create internationally binding legal standards for indigenous peoples will face difficulties. This is especially so because although certain indigenous groups and individuals in some parts of the

²⁶⁹ See Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 24, 25.

²⁷⁰ The African Commission found violations of the *African Charter's* rights to religion, property, culture, natural resources and development: see African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, above n 264. See also *African Charter* arts 14, 21, 22.

²⁷¹ For analysis of the regional developments in Asia and Europe, in particular in the context of reparations for loss of property and cultural rights: see, eg, Stefania Errico and Barbara Ann Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sami People' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2009) 363, 363–88; Chingmak Phutoli Shikhu, 'International Law and Reparations for Indigenous Peoples in Asia' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2009) 409, 409–65.

world favour integration with the dominant society, there is a considerable number of who instead favour a degree of self-government.

The main threat to indigenous peoples' survival arises from national policies which disregard their land rights and their cultural rights, including policies which condone the invasion and expropriation of their lands and deprive them of the benefits arising from the use and extraction of their natural resources. Because dispossession poses a major threat to their survival in many parts of the world, indigenous peoples' rights to land and natural resources need to be effectively protected and must be made enforceable under international human rights law.

Although the mechanisms established under international law to secure indigenous peoples' consultation and participation in decision-making often conflict with a state's sovereign claims to natural resources, these mechanisms in fact strengthen the normative impact of the right to permanent sovereignty. They bring a new meaning and relevance to participation and representation in the new century beyond the classic examples of expropriation and nationalisation of foreign-owned investment for which the right of permanent sovereignty was originally conceived. International law and international standards in this field are not however always well-developed. This is due to the mixture of hard- and soft-law instruments; while the challenges for international regulation are perhaps most noticeable in the context of access and benefit-sharing regimes, which remains underdeveloped despite their paramount importance for indigenous peoples to exercise resource rights. Moreover, there are evident limitations to the extent to which states will be willing to transfer the benefits arising from the exercise of sovereignty over natural resources to non-state actors, as can be seen from national laws that do not recognise property rights over subsoil resources to indigenous peoples.

Indigenous peoples' right to permanent sovereignty over natural resources is as an integral part of the right to self-determination under international law. These two rights delineate the degree of autonomy of indigenous peoples to self-government, including in relation to the governance of land and natural resources. The rights to self-determination and permanent sovereignty over natural resources provide the essential legal basis for indigenous peoples to triumph over assimilation and other neo-colonial practices. By establishing mechanisms that strengthen indigenous substantive and procedural rights to land and natural resources, states have redefined the notion of permanent sovereignty over natural resources. But although these developments appear to upset to a certain degree the classic notion of state sovereignty, they also strengthen states' right to permanent sovereignty over natural resources; adding a new meaning and relevance to these legal terms; giving indigenous peoples (who, after all, are also an essential component of a 'state'), the right to assert land rights; and to define the fate of the natural resources in their lands.