

# The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development

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## ABSTRACT

*State natural resource development projects have become sites of intense political, social, and cultural contestation among a diversity of actors. In particular, such projects often lead to detrimental consequences for the empowerment, livelihood, and cultural and economic development of historically marginalized communities. This Article fills a gap in the existing literature by identifying and analyzing emerging international law approaches that impact the intrastate allocation of land and natural resources to historically marginalized communities, and thereby, carve away at states' top-down decision-making authority over development. It argues that while international law may have only been originally concerned with the allocation of land and natural resources in an interstate context, it plays a distributive role today in an intrastate context. Ultimately, this Article proposes that an emerging human rights approach to the allocation of land and natural resources supports a peoples-based development model potentially capable of more readily*

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*alleviating conditions of inequity and continued subordination for historically marginalized communities.*

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## I. INTRODUCTION

During the past decade, Brazil has been actively pursuing, in conjunction with a consortium of private business actors, a hydroelectric dam project of massive proportions along the Xingu River: the Belo Monte Dam project.<sup>1</sup> Belo Monte constitutes the second largest dam project in Brazil and the third largest dam project in the world.<sup>2</sup> Brazil proposes that the dam will produce 11,233 megawatts of primarily clean energy by diverting water to regions in need of access, thereby furthering economic development and contributing to a higher standard of living for the nation as a whole.<sup>3</sup> Multiple communities living along the river—some who claim an indigenous identity,<sup>4</sup> others who live off the river in conditions of poverty, and others who use nearby land for agricultural purposes—have voiced significant concerns about the impact of the project on their local livelihood as well as their cultural and economic development.<sup>5</sup> It is

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1. For a general overview of the history regarding the Belo Monte Dam project, see SERVIÇO PÚBLICO FEDERAL MINISTÉRIO DE MINAS E ENERGIA [PUB. SERV. MINISTRY OF MINES & ENERGY], PROCESSO NO. 48500.003805/2010-81, CONTRATO DE CONCESSÃO NO. 01/2010-MME-UHE BELO MONTE [AGREEMENT ON CONCESSION NO. 01/2010-MME-UHE BELO MONTE] (2010), available at [http://www.aneel.gov.br/aplicacoes/Contrato/Documentos\\_Aplicacao/Contrato%20Belo%20Monte.pdf](http://www.aneel.gov.br/aplicacoes/Contrato/Documentos_Aplicacao/Contrato%20Belo%20Monte.pdf) (Braz.) and *Belo Monte Hydroelectric Power Plant, Brazil*, POWER-TECH., <http://www.power-technology.com/projects/belomontehydroelectr> (last visited Apr. 1, 2012).

2. See PUB. SERV. MINISTRY OF MINES & ENERGY, *supra* note 1; *Belo Monte Hydroelectric Power Plant*, *supra* note 1.

3. *Belo Monte Hydroelectric Power Plant*, *supra* note 1. But see Brent Millikan, *Lack of Private Sector in Belo Monte Consortium Signals Investor Concerns over Financial Risks*, INT'L RIVERS (July 16, 2010), <http://www.internationalrivers.org/2010-7-15/lack-private-sector-belo-monte-consortium-signals-investor-concerns-over-financial-risks> (warning about the risky rate of return for investors); Wilson Cabral de Sousa, Jr., & John Reid, *Uncertainties in Amazon Hydropower Development: Risk Scenarios and Environmental Issues Around the Belo Monte Dam*, WATER ALTERNATIVES, [http://www.water-alternatives.org/index.php?option=com\\_content&task=view&id=111&Itemid=1](http://www.water-alternatives.org/index.php?option=com_content&task=view&id=111&Itemid=1) (last visited Apr. 1, 2012) (questioning the economic success of the project).

4. See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Rep. by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Human Rights Council, ¶ 49, U.N. Doc. A/HRC/15/37/Add.1 (Sept. 15, 2010) (by S. James Anaya) [hereinafter *Anaya Human Rights Council Report 2010*] (“The construction of the hydroelectric dam in Belo Monte would directly affect the indigenous peoples located in the Xingu river basin, including the following communities: Kaiapo, Xavante, Juruna, Kaiabi, Suia, Kamaiura, Kuikuro, Ikpeng, Panara, Nafukua, Tapayuna, Yawalapiti, Waura, Mehinaku and Trumai (in total, some 13,000 persons).”); Kenneth Rapoza, *NGOs Look to Sue Brazil over Amazon Dam*, FORBES (June 16, 2011), <http://blogs.forbes.com/kenrapoza/2011/06/16/ngos-look-to-sue-brazil-over-amazon-dam> (discussing suits filed against Brazil alleging human rights violations of indigenous peoples who will be forced to relocate due to flooding).

5. See *Fact Sheet: The Belo Monte Dam*, AMAZON WATCH, <http://amazonwatch.org/assets/files/BMD2011-fact-sheet.pdf> (last visited Apr. 1, 2012) (discussing the potential effects of the dam on indigenous peoples); *Impacts of the Belo*

projected that thousands of people will be displaced and that approximately 500 square kilometers will be flooded as a result of the project.<sup>6</sup> Critics also suggest that damming the river could diminish fisheries and ultimately contaminate the water used by local communities.<sup>7</sup>

In the context of such a large-scale development project, multiple communities have potentially legitimate interests with respect to ownership or occupancy of land near the river and access to the river as a natural resource.<sup>8</sup> Given the significant impacts to be borne by indigenous and other communities,<sup>9</sup> the federal prosecutor of Pará has filed several cases during the last decade challenging Brazil's failure to engage in an adequate process of consultation.<sup>10</sup> The lack of an adequate consultation process has also led the Inter-American Commission on Human Rights to request that Brazil suspend construction of the dam.<sup>11</sup> In light of Brazil's resistance, the Inter-American Court of Human Rights is expected to address the issue.<sup>12</sup> Recent reports indicate that the Brazilian government has granted a license approving the construction of the Belo Monte Dam.<sup>13</sup>

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*Monte Dam*, RAINFOREST FOUND., <http://www.rainforestfoundation.org/impacts-belo-monte-dam> (last visited Apr. 1, 2012) (familiarizing those who will be impacted by the dam with their rights).

6. *Anaya Human Rights Council Report 2010*, *supra* note 4, ¶ 50(g); *see also Fact Sheet: The Belo Monte Dam*, *supra* note 5 (discussing the projected scope of the dam's impact).

7. *Anaya Human Rights Council Report 2010*, *supra* note 4, ¶ 49(b); *Impacts of the Belo Monte Dam*, *supra* note 5.

8. *See Anaya Human Rights Council Report 2010*, *supra* note 4, ¶ 50(g) (referencing Brazil's assertion that the Belo Monte Dam project "involves at least ten different indigenous territories and about eight different ethnic groups, each with their own social system, cosmology and social organization").

9. *See id.* ¶ 49(b) (addressing the concerns of indigenous communities and noting that "[i]t is also expected that the increased population in the area, brought by the dam construction, would incense conflict over lands and natural resources and would increase land speculation in the area").

10. *See Alexei Barrionuevo*, *Brazil, After a Long Battle, Approves an Amazon Dam*, N.Y. TIMES, June 2, 2011, at A10 (discussing approval of the dam by the Brazilian environmental authority); *Brazil Court Reverses Amazon Monte Belo Dam Suspension*, BBC (Mar. 3, 2011), <http://www.bbc.co.uk/news/world-latin-america-12643261> (announcing court approval of the dam construction); Pedro Peduzzi, *Greens Lose, Tractors Already Roaring in Brazilian Amazon's Belo Monte*, BRAZZIL MAG. (July 6, 2011), <http://www.brazzilmag.com/component/content/article/100-july-2011/12617-greens-lose-tractors-already-roaring-in-brazilian-amazons-belo-monte.html> (announcing the beginning of construction on the dam).

11. Inter-Am. Comm'n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10 (Apr. 1, 2011) (granting modification of precautionary measures).

12. *See Global Insider: Brazil's Belo Monte Dam*, WORLD POL. REV., June 17, 2011, at 1.

13. *See Belo Monte Hydroelectric Dam*, INTERAMERICAN ASS'N FOR ENVTL. DEF., <http://www.aida-americas.org/en/project/belomonte> (last visited Apr. 1, 2012)

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As is evident in the dynamics produced by the Belo Monte Dam project, state natural resource development projects have become sites of intense political, social, and cultural contestation among a diversity of actors. In particular, such projects often lead to detrimental consequences for the empowerment, livelihood, and cultural and economic development of historically marginalized communities. As international law evolves in response to such consequences, increased analysis is merited regarding its potential role and impact.

Since its genesis, international law has addressed issues of land and natural resource allocation.<sup>14</sup> In the last century alone, international law has played a significant role in global debates regarding ownership, use, control, and development of land and natural resources. More specifically, in the period of colonial dissolution, the international doctrine of permanent sovereignty over natural resources was developed and applied to interstate disputes between colonizing states and newly independent colonies.<sup>15</sup> This

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(discussing recent developments regarding the licensing and construction of the Belo Monte Dam).

14. See Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, 32 U. HAW. L. REV. 391, 409 (2010) (contending that the discovery doctrine was used in the colonial era by European powers “to justify the acquisition of colonial territory” and “preclude[] native peoples from asserting ancestral property claims”); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 675 (“[F]or purposes of international law, indigenously occupied territories can be regarded as terra nullius—that is, as lands without a recognized owner and available for occupation by a civilized member of the Western family of nations.”); cf. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (rejecting the historical practice of unchallenged acquisition by states of traditionally occupied indigenous lands).

15. See Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec. 14, 1962) (“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 the well-being of the People of the State concerned.”); Antony Anghie, *“The Heart of My Home”: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT’L L.J. 445, 474 (1993) (arguing that the doctrine of permanent sovereignty over natural resources framed the dispute between newly independent nations and foreign claims of entitlement to continued rights over natural resources acquired during the colonial period); Emeka Duruigbo, *Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT’L L. REV. 33 (2006) (providing an in-depth discussion of the doctrine of permanent sovereignty over natural resources); Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 1, 53 (2004) (asserting that the doctrine of permanent sovereignty over natural resources emerged as “newly independent states quickly sought to renegotiate or void the extraordinarily inequitable arrangements that had been imposed upon them during the colonial period”). For a comprehensive analysis, see GEORGE ELIAN, *THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL*

doctrine emerged with the aim of protecting newly independent states from economic recolonization resulting from the appropriation of their natural resource base by foreign actors.<sup>16</sup> In more recent debates, the doctrine of permanent sovereignty over natural resources has been alluded to by scholars in the context of interstate disputes between developed and developing states pursuant to the same rationale: protecting a developing state's ability to seek growth through the economic benefits gained from an entitlement to commercialize its natural resource base.<sup>17</sup> Nevertheless, natural resource development projects have given rise to complex intrastate disputes involving the interests of multiple marginalized communities, including indigenous peoples, racial and ethnic minorities, and the rural poor.<sup>18</sup>

While the doctrine of permanent sovereignty over natural resources emerged in the context of interstate debates,<sup>19</sup> its role in current intrastate debates has received limited scholarly analysis. Undeniably, at the core of current debates is a distributional concern based on the potentially legitimate claims of multiple marginalized communities vis-à-vis the broader national polity and vis-à-vis the state. How has international law evolved to address the allocation of land and natural resources to historically marginalized communities

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RESOURCES (1979) and NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997).

16. SCHRIJVER, *supra* note 15, at 36.

17. See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 213 (2005) (discussing the different legal arguments proposed by the West and the Third World in the formulation of a New International Economic Order); SCHRIJVER, *supra* note 15, at 42–43; see also G.A. Res. 3281 (XXIX), at 4, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974) (recognizing that every state has the right to freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth and natural resources); G.A. Res. 3202 (S-VI), at 5, U.N. Doc. A/RES/S-6/3202 (May 1, 1974) (requiring that member states make all efforts to “defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources”); G.A. Res. 3201 (S-VI), at 4, U.N. Doc. A/RES/S-6/3201 (May 1, 1974) (emphasizing sovereignty and equality as the bases for developing countries to “regain effective control over their natural resources and economic activities”).

18. See Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT'L L. 699 (2008) (examining the jurisprudence of the Inter-American Court of Human Rights, which has recognized the right of a nonindigenous group to the natural resources within its lands); Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009) (discussing the use of community referenda in Peru, Argentina, and Guatemala as a means of effectuating indigenous peoples' right to free, prior, and informed consent in development projects which endanger traditionally occupied lands).

19. SCHRIJVER, *supra* note 15, at 9 (“[T]he extent to which the people in a resource rich-region of a State . . . benefit from resource exploitation in their region is in principle a matter of domestic politics.”).

in the context of natural resource development projects? What are the consequences of such evolution?

This Article addresses the evolution of international law, and its infiltration into what has been deemed a sacred prerogative of states—sovereignty over their natural resources—and thereby, ultimate decision-making authority regarding the course of development. To that end, this Article fills a gap in the existing literature by identifying, analyzing, and evaluating emerging international law approaches that impact the intrastate allocation of land and natural resources to historically marginalized communities, and thus, carve away at states' top-down decision-making authority over development. Specifically, Part II discusses an emerging approach—grounded in notions of sovereignty—toward the intrastate allocation of land and resources. It surveys the evolution of the doctrine of permanent sovereignty over natural resources with a focus on the most recent interpretive argument, which locates sovereign rights over natural resources in the “peoples” of a state.<sup>20</sup> Part III discusses a second emerging approach toward the intrastate allocation of land and resources that finds its roots in human rights precepts. It charts the evolving human rights jurisprudence regarding indigenous peoples' rights over land and resources with a focus on contemporary analyses that tie such rights primarily to communal identity and cultural preservation.<sup>21</sup> Part IV surveys a third approach, based on evolving principles of good governance, that obviates a “rights/duties” dichotomy and promotes a regulatory solution. It focuses on initiatives that regulate the disclosure of state profit margins in natural resource extraction projects.<sup>22</sup> Part V analyzes the potential of these three distinct approaches, and the models of development that they support, for alleviating conditions of inequity and continued subordination for marginalized communities in the context of natural resource development projects.<sup>23</sup>

This Article asserts that while international law may have only been originally concerned with the allocation of land and natural resources in an interstate context, today it plays a role in debates regarding proper intrastate allocation. In addition, this Article suggests that emerging approaches under international law that implicate the intrastate allocation of land and natural resources pose a challenge to the traditional state-based model of development.<sup>24</sup> It

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20. See discussion *infra* Part II.

21. See discussion *infra* Part III.

22. See discussion *infra* Part IV.

23. See discussion *infra* Part V.

24. See generally Lila Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water*, 11 ANN. SURV. INT'L & COMP. L. 1, 2 (2005) (noting that the existing legal paradigm in

ultimately proposes that an emerging human rights approach based on the substantive land and resource rights of peoples supports a peoples-based model of development potentially capable of more readily alleviating conditions of inequity and continued subordination for historically marginalized communities.

## II. INTRASTATE NATURAL RESOURCE ALLOCATION AND THE DOCTRINE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

One approach under international law to resolving debates regarding the allocation of land and natural resources has its basis in the principle of sovereignty. The principle of sovereignty has been explicitly tied to the allocation of land and natural resources through the emergence and evolution of the doctrine of permanent sovereignty over natural resources. Such evolution reveals the doctrine's potential applicability to debates regarding the allocation of land and resources in present-day, intrastate natural resource development projects.

The doctrine of permanent sovereignty over natural resources arose in the context of decolonization and developed in subsequent debates regarding the human right of peoples to self-determination and the right of developing states to exercise control over the goals and means of their economic growth. Indeed, three historical processes in particular have shaped the original contours of the doctrine of permanent sovereignty over natural resources: (1) the decolonization of overseas territories,<sup>25</sup> (2) the recognition of peoples'

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Latin America frequently favors "macroeconomic notions of development and per capita growth regardless of actual or potential infringement of international human rights"); Benjamin Manchak, *Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law*, 30 B.C. THIRD WORLD L.J. 417, 424 (2010) ("A state's right to development occupies an exalted position in international law."); Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 799 (2011) ("[S]tates have interpreted the right to develop 'on their own terms' in order to prosper 'as they see fit.'").

25. See Anghie, *supra* note 15 (arguing that the doctrine of permanent sovereignty over natural resources framed the dispute between newly independent nations and foreign claims of entitlement to continued rights over natural resources acquired during the colonial period); Duruigbo, *supra* note 15 (examining the doctrine of permanent sovereignty over natural resources); Gordon & Sylvester, *supra* note 15, at 53 (asserting that the doctrine of permanent sovereignty over natural resources emerged as newly independent states sought to renegotiate or void the inequitable arrangements imposed upon them during the colonial period); see also Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver" – Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 391–93 (2005) (discussing the effects of decolonization); Natsu Taylor Saito, *Decolonization, Development, and Denial*, 6 FLA. A&M U. L. REV. 1, 6–12



human right to self-determination,<sup>26</sup> and (3) the recognition of developing states' claims for a New International Economic Order.<sup>27</sup>

During the 1950–1960s, the doctrine originated in the context of decolonization as a precondition for the effective exercise of political self-determination by newly independent states.<sup>28</sup> Thereafter, the doctrine continued to evolve as part of two interrelated concerns under international law: the recognition of peoples' human right to self-determination and the recognition of developing states' right to exercise control over the goals and means of economic growth.<sup>29</sup> First, as the human rights regime began to take shape in the aftermath of decolonization, the doctrine became enshrined in two foundational human rights documents that recognize peoples' right to self-determination: the International Covenant on Civil and Political

(2010) (discussing the decolonization process and states' transition into independent development).

26. See Duruigbo, *supra* note 15, at 52–54 (discussing the meaning of “peoples” in the context of permanent sovereignty over natural resources). For a discussion of peoples' human right to self-determination, see Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 296–97 (2005) (examining the “international legal debate concerning self-determination of indigenous peoples and the effect of this debate on indigenous land and resource rights”); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 212 (1992) (discussing the initial rejection of the term “peoples” and preference for the term indigenous “populations” by states so as “to avoid any implication that indigenous peoples are thereby entitled to the right . . . to self-determination”); J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in The New Millennium*, 15 AM. U. INT'L L. REV. 151, 164 (1999) (“[D]iscussions on self-determination . . . address the meaning of the terms ‘self’ and ‘peoples.’”).

27. See ANGHIE, *supra* note 17, at 211 (examining the call for a New International Economic Order); see also G.A. Res. 3281, *supra* note 17 (declaring the establishment of a New International Economic Order); G.A. Res. 3202, *supra* note 17 (implementing a Programme of Action on the Establishment of a New International Economic Order); G.A. Res. 3201, *supra* note 17 (discussing the establishment of a New International Economic Order); ROBERT L. ROTHSTEIN, GLOBAL BARGAINING: UNCTAD AND THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER 3 (1979) (noting the impact of developing states' demands for greater participation in the wealth derived from cultivating commodities); SCHRIJVER, *supra* note 15, at 4–5 (suggesting that the doctrine of state permanent sovereignty over natural resources has been shaped by myriad international events and inspired, in part, by the following “important concerns and developments”: (1) concerns regarding the “scarcity and optimum utilization of natural resources,” (2) deterioration regarding the “terms of trade of developing countries,” (3) the “promotion and protection of foreign investment,” (4) the succession of newly independent states over previously colonized territories, (5) nationalizations of property and natural resources in Latin America, (6) Cold War economic ideological rivalry, (7) demand by developing states for “economic independence and strengthening of sovereignty,” and (8) the design of “human rights”); THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH–SOUTH DEBATE (Jagdish Bhagwati ed., 1977).

28. See SCHRIJVER, *supra* note 15, at 43–44.

29. For a general analysis of the link between human rights, self-determination, and natural resources, see *id.* at 49–50.

Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>30</sup> Second, the doctrine continued to develop outside of the context of the human rights framework, particularly when debates resurfaced in the 1970s regarding the right of developing states to own and control their natural resource wealth vis-à-vis potential entitlements by states and corporate actors in the developed world.<sup>31</sup> In the context of such debates, developing countries reactivated a call for permanent sovereignty over their natural resource wealth as a means of securing better prospects for economic growth.<sup>32</sup> While some ambiguity lingered regarding the potential intrastate applicability of the doctrine of permanent sovereignty over natural resources given its incorporation into the human rights system, the doctrine ultimately became primarily tied to mediating interstate sovereignty over natural resources.<sup>33</sup>

Nevertheless, two recent historical processes have reignited discussion regarding the potential intrastate applicability of the doctrine of permanent sovereignty over natural resources: (1) the capture of natural resource wealth by state elites with detrimental consequences for the nation as a whole,<sup>34</sup> and (2) the affronts of state development on the land and resource claims of particular communities that rely on such natural wealth for their cultural survival or subsistence.<sup>35</sup> Stemming from this renewed attention,

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30. See International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (providing for the right to self-determination); International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (same).

31. See SCHRIJVER, *supra* note 15, at 50.

32. See ANGHIE, *supra* note 17, at 205 (discussing the plight of newly independent developing countries seeking control of their natural resources).

33. See SCHRIJVER, *supra* note 15, at 310–11 (noting the relative lack of authority for interpreting the doctrine of permanent sovereignty over natural resources to impose duties on states vis-à-vis their populations).

34. See generally Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 335 (2004) (stating that “violence used by or condoned by state authorities to protect vested interests in resource exploitation” is a common occurrence in many developing states); Duruigbo, *supra* note 15, at 34 (stating that “kleptocratic rulers” often appropriate the gains of natural resources in resource-rich countries).

35. See, e.g., Sean Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, 20 MINN. J. INT'L L. 123 (2011) (discussing the plight of the Yakye Axa indigenous peoples of Paraguay); David E. Cahn, *Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama*, 28 FORDHAM INT'L L.J. 232 (2004) (describing the struggles of the Chocoe Indians of Panama with respect to land rights); Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 454 (2010) (examining the land claims of the Sawhoyamaxa community of Paraguay); Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004) (exploring the territorial claims resulting from the environmental damage asserted by Ecuador's indigenous peoples); Jose Mencio Molintas, *The Philippine Indigenous Peoples' Struggle for Land*

scholars have advanced two recent arguments suggesting the relevance of the doctrine of permanent sovereignty over natural resources to fourth-world debates regarding the intrastate allocation of land and natural resources. First, the right to permanent sovereignty over natural resources has been argued to inhere in the “peoples” of a state. This shifts the locus of the doctrine to an intrastate level by positing the nationals of a state as sovereign rights bearers vis-à-vis the state.<sup>36</sup> Second, the right to permanent sovereignty over natural resources has been argued to inhere specifically in “indigenous peoples” existing within the territorial boundaries of a state.<sup>37</sup> This interpretation also shifts the applicability of the doctrine to an intrastate level by positing indigenous peoples as sovereign rights bearers vis-à-vis the state.

These two arguments are relevant to analyzing the role of international law in the domestic allocation of land and natural resources to historically marginalized communities. At the core of these arguments is a significant concern regarding the ability of a state to translate an absolute sovereign right to own and develop natural resources into equitable gains for the national polity or specific communities of people within its borders. Ultimately, these arguments challenge a state’s uncontested claim to ownership over natural resources and, thereby, to chart the goals and means of development aimed at distributing economic gains.

*and Life: Challenging Legal Texts*, 21 ARIZ. J. INT’L & COMP. L. 269 (2004) (providing an account of indigenous land claims in the Philippines); Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT’L L.J. 1663 (2004) (reporting on the environmental damage inflicted on the territories of the Japo and Chuquiña communities of Bolivia); Larisa Wick, *Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria*, 12 MICH. ST. J. INT’L L. 63 (2003) (assessing human rights violations in the context of land rights).

36. Duruigbo, *supra* note 15, at 65 (“The right of peoples to sovereignty over natural resources necessarily imports an entitlement to demand that governments manage these resources to the maximum benefit of the people. It has been correctly observed that, ‘if the phrase “rights of peoples” has any independent meaning, it must confer rights on peoples against their own governments’ . . . . Primarily, this duty would restrain irresponsible use and management of resources by public officials and positively utilize the resources for peoples’ benefit.”); *see also* Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 N.Y.U. J. INT’L L. & POL. 417, 424 (2007) (“[Economic] self-determination [is] a peoples’ right.”).

37. United Nations Economic & Social Council [ECOSOC], Comm’n on Human Rights, Sub-comm’n on the Promotion & Protection of Indigenous Peoples, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, ¶ 32, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (by Erica-Irene A. Daes); *see also* Duruigbo, *supra* note 15, at 52 (arguing that the right to permanent sovereignty over natural resources is vested in peoples, including indigenous peoples).

### A. *The Interstate Debate: Accounting for the Third World*

The principle of permanent sovereignty over natural resources emerged during the international process of decolonization. It continued to evolve in the post-colonial international legal order through its engagement with the human rights regime<sup>38</sup> and through its engagement with the claims by developing states for a New International Economic Order.<sup>39</sup> Therefore, in one vein, the principle of permanent sovereignty over natural resources became inextricably tied to the human right of peoples to self-determination. In another vein, the principle retained its emphasis on sovereignty, particularly state sovereignty. Ultimately, the principle experienced a shift in emphasis from its association with the human right of peoples to self-determination to its association with developing states' sovereign demands for a New International Economic Order.<sup>40</sup>

#### 1. Permanent Sovereignty over Natural Resources and Decolonization

International law played a significant role in the decolonization process.<sup>41</sup> Colonization had produced an unequal distribution of power and wealth. The international system attempted reformation, in part, through the grant of political self-determination to overseas colonial territories as a whole.<sup>42</sup> The genesis of the doctrine of permanent sovereignty over natural resources has been traced to General Assembly Resolution 626 (VII) of December 21, 1952,

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38. See *supra* note 25 and accompanying text.

39. See *supra* note 26 and accompanying text.

40. See Fritz Visser, *The Principle of Permanent Sovereignty over Natural Resources and the Nationalization of Foreign Interests*, 21 COMP. & INT'L L.J. S. AFR. 76, 76 (1988) ("[There has been a] shift in emphasis . . . from the notion that the concept [of permanent sovereignty over natural resources] was a corollary of [the] political and legal call for decolonisation and self-determination, to its transformation into the political demand for a New International Economic Order.").

41. James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1043 (2007) (discussing the relationship between English common law and international law and its effects on the decolonization of British protectorates); Kelly, *supra* note 25, at 372–83 (noting that notions of nationhood and sovereignty shaped the decolonization process); Saito, *supra* note 25, at 20 (stating that, after decolonization, recognition of newly independent states depended on their agreement to comply with international law).

42. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960) [hereinafter Declaration of Independence to Colonial Peoples] ("All peoples have the right to self-determination."); see also G.A. Res. 1541 (XV), princ. IV, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 15, 1960) (hinging the application of self-determination to geographically separate territories).

entitled, Right to Exploit Freely Natural Wealth and Resources.<sup>43</sup> As reflected in General Assembly Resolution 626, the principle emerged as a means of guaranteeing the benefits of exploiting natural resources for peoples liberated from colonial rule and as a means of providing newly independent states with protection against encroachments of their sovereignty by foreign states or business actors.<sup>44</sup>

Because of its potential to effectuate a significant redistribution of economic capital, the principle gave rise to debates on three primary issues: (1) the elements of sovereignty, (2) the legal entity capable of exercising sovereignty over natural resources, and (3) the scope of natural resources tied to sovereign disposal. As understood in the decolonization process, state sovereignty encompassed independence from subordination in relation to other states and internal supremacy of power.<sup>45</sup> While during the beginning of the decolonization process the right to permanent sovereignty over natural resources appeared to be vested in both “peoples and nations,” different terms have been utilized thereafter to identify the subjects entitled to freely dispose of natural resources, including “underdeveloped countries,” “developing countries,” and “states.”<sup>46</sup> Under the interpretation as a right of states, permanent sovereignty over natural resources “includes the right . . . to freely exploit . . . resources and wealth on the basis of . . . economic independence.”<sup>47</sup> State’s sovereignty over natural resources has been

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43. Right to Exploit Freely Natural Wealth and Resources, G.A. Res. 626 (VII), U.N. Doc. A/PV.411 (Dec. 21, 1952).

44. *Id.* ¶¶ 1–2; SCHRIJVER, *supra* note 15, at 24–25.

45. See ELIAN, *supra* note 15, at 6 (discussing various conceptions of sovereignty). The elements of sovereignty and the distribution of sovereignty at the international level continue to be a subject of contestation under international law. While for some scholars historical processes of colonization do not significantly impact the concept of sovereignty or its international distribution, for others colonization is at the heart of strategic formulations of sovereignty as posited in “states.” See Anghie, *supra* note 15, at 497 (arguing that, during the period of decolonization, principles relating to the sovereignty doctrine “were developed, refined, and extended” by former colonizing states so as to further a “dual process of exclusion and intervention” in newly independent nations); Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT’L L. 1 (2010) (contending that international law “jettisoned classical natural law constructs of sovereign equality . . . and turned to positivism based on actual practice of states” as a result of colonization). In a contemporary context, state sovereignty is generally elaborated upon by principles of noninterference and domestic jurisdiction. See Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1100 (2011) (discussing territoriality as the cornerstone of Westphalian concepts of state sovereignty, formal equality, and nonintervention).

46. SCHRIJVER, *supra* note 15, at 8.

47. ELIAN, *supra* note 15, at 15.

defined under international law as “permanent,” “absolute,” and “inalienable.”<sup>48</sup>

As a result, in the decolonization era, the principle of permanent sovereignty over natural resources emerged as a way of securing a proper allocation of natural resource wealth at the international level between newly independent states and colonizers. In this context, “peoples” and newly independent states appeared to be synonymous and interchangeable for purposes of determining the proper entity bearing the right of permanent sovereignty over natural resources, and thus possessing decision-making authority regarding the goals and means of economic development. Accordingly, the doctrine was perceived as mediating concerns regarding the proper interstate distribution of natural resource wealth, which was tied to the exercise of political and economic power in the post-colonial international legal order.

## 2. Permanent Sovereignty over Natural Resources and the Promotion of Self-Determination

The principle of permanent sovereignty over natural resources continued to evolve not only as part of global debates regarding the political right of colonized peoples to self-determination, but also the human right of peoples to self-determination.<sup>49</sup> In the post-World War II period, wherein the contemporary human rights framework was being designed, permanent sovereignty over natural resources was framed as an issue of peoples’ human right to self-determination. Governments of newly independent states expressed concern that the exercise of a human right to self-determination would be impossible without providing peoples of the state with a right to permanent sovereignty over natural resources.<sup>50</sup>

More specifically, substantial controversy arose with regard to the right to self-determination of peoples during the early drafting process of the two pillar human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>51</sup> The controversy became even more acute when a proposal was made to include a paragraph specifically stating that “[t]he right of peoples to self-determination shall also include permanent sovereignty over

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48. SCHRIJVER, *supra* note 15, at 2.

49. *Id.* at 49 (providing a summary of the development of the principle of permanent sovereignty over natural resources during the years 1952–1955, which marked the emergence of the human right of peoples to self-determination).

50. Farmer, *supra* note 36, at 423 (“[E]conomic self-determination was seen as a corollary, a mere accompanying tool for ensuring economic independence for the newly independent states, rather than an independent and distinct right.”).

51. SCHRIJVER, *supra* note 15, at 49.

their natural wealth and resources.”<sup>52</sup> The paragraph further stated that in “no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.”<sup>53</sup> The proposal was aimed at enabling the peoples of a state to remain in control of their own natural wealth and resources, and thereby, their own means of subsistence and economic growth.<sup>54</sup>

While some states viewed the principle of permanent sovereignty over natural resources as a necessary corollary to the human right of peoples to self-determination, others viewed the notion as having nothing to do with human rights, but rather, as a derailment of global economic progress. The human right to self-determination, as elaborated upon by the principle of permanent sovereignty over natural resources, was pitted against international cooperation in global economic development and the preservation of fundamental international obligations regarding the expropriation of property rights.<sup>55</sup> Indeed, the proposal was met with overwhelming resistance by Western states. These states feared that it would present a barrier to international cooperation regarding the use and management of natural resources and promote an autarchic conception of such sovereignty.<sup>56</sup> Resistance was fueled by concerns over the ability of newly independent states to invalidate natural resource concession agreements to foreign investors, and thus effectuate expropriations without compensation.<sup>57</sup> There was also a concern regarding use of the term “sovereignty” in relation to “peoples,” which Western countries repeatedly argued were not sovereign “states.”<sup>58</sup>

Following the establishment of an ad hoc working group to debate the inclusion of such a provision in the human rights covenants, and a second round of debate in the Third Committee of the Commission on Human Rights over the alternative textual wording produced by the ad hoc working group, the following text was adopted:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>59</sup>

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 52.

56. *Id.* at 50.

57. *Id.*

58. *Id.* at 58.

59. ICCPR, *supra* note 30, art. 1(2); ICESCR, *supra* note 30, art. 1(2).

Subsequently, the Third Committee of the Human Rights Commission decided to insert an additional article in the ICCPR (Article 25) and ICESCR (Article 47): “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”<sup>60</sup>

As in the context of decolonization, state and “peoples” were initially treated synonymously. Therefore, the right of peoples to freely dispose of natural wealth and resources in common Article 1 of the ICCPR and ICESCR did not originally account for identity-based communities within the territorial boundaries of a state.<sup>61</sup> The iteration of the doctrine of permanent sovereignty over natural resources in these foundational human rights documents is best understood as mediating the relationship between the state, represented as a governmental abstraction, and the “peoples” of a state, represented by the national polity. In this context, the doctrine possesses an intrastate dimension: one that was originally qualified as an obligation of the government of a state to its peoples as a whole.

### 3. Permanent Sovereignty over Natural Resources and the Promotion of Economic Development

The principle of permanent sovereignty over natural resources continued to evolve as part of global debates regarding the ability of developing states to engage in economic growth. Developing states began to emphasize the link between control over their natural resources and the ability to facilitate national economic progress. They advanced arguments for the recognition of their rights along two primary axes: (1) the assignment of ownership, possession, use, or exploitation of natural resources to private individuals or commercial interests, and (2) the ultimate direction of socio-economic development based on the use and exploitation of their resources.<sup>62</sup>

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60. ICCPR, *supra* note 30, art. 25; ICESCR, *supra* note 30, art. 47.

61. Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141, 154 (2011) (noting that the Human Rights Committee decided “relatively early on to consider cases brought under the Optional Protocol using Article 27 rather than Article 1” of the ICCPR without explicitly denying that the rights contained therein might apply to indigenous peoples); Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 133 (2011) (addressing the argument that “the establishment and development of indigenous cultural institutions and systems” is not within “the sphere of self-determination addressed by Article 1 of the ICCPR”).

62. See ELIAN, *supra* note 15, at 14 (“The State is understood to possess authority to at any time intervene through legislative and juridical means in the process of exploiting its own resources, because the conditions in which the latter are to be exploited and used is a vital matter of its social-economic development.” (internal quotation marks omitted)).



In 1958, after renewed efforts by the Commission on Human Rights, the General Assembly established the Commission on Permanent Sovereignty over Natural Resources.<sup>63</sup> The Commission ultimately produced General Assembly Resolution 1803 (XVII) of 1962, entitled Declaration on Permanent Sovereignty over Natural Resources.<sup>64</sup> It declares that both peoples and nations have a right to exercise sovereignty over natural resources.<sup>65</sup> Through its provisions, the Commission attempted to balance concerns regarding the rights and concessions of foreign investors over natural resources and the interests of developing states in safeguarding and promoting the national economy.<sup>66</sup>

Thereafter, the UN General Assembly further elaborated upon the principle of permanent sovereignty over natural resources in the Charter of Economic Rights and Duties of States.<sup>67</sup> The Charter expanded upon the applicability of the principle beyond the physical natural resource wealth of the state to include economic activities.<sup>68</sup> In this elaboration, the principle came to support the sovereign right of states to pursue economic activities commensurate with national development goals.<sup>69</sup> Over time, the principle of permanent sovereignty over natural resources developed as a shield utilized by developing states to control the goals and means of their economic development.<sup>70</sup>

In this vein, the “third world” controversy was one regarding the just allocation of natural resources and the decision-making authority

63. G.A. Res. 1314 (XIII), U.N. Doc. A/RES/1314(XIII) (Dec. 12, 1958). In 1954, the Commission on Human Rights recommended that the General Assembly, through ECOSOC, establish a commission tasked with further elaborating upon the substantive contours of the right of “peoples” and “nations” to “permanent sovereignty over their natural wealth and resources,” which they deemed a “basic constituent of the right to self-determination;” however, it was not until 1958 that the General Assembly established the Commission on Permanent Sovereignty over Natural Resources. SCHRIJVER, *supra* note 15, at 59.

64. G.A. Res. 1803, *supra* note 15.

65. See Duruigbo, *supra* note 15, at 45 (concluding that the textual reference in Resolution 1803 to “nations” and “peoples” “evidences the progression of international law in this area through the heavy influence of international human rights law”).

66. G.A. Res. 1803, *supra* note 15, ¶¶ 1, 8.

67. G.A. Res. 3281, *supra* note 17.

68. *Id.* art. II(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.”).

69. See Noel G. Villaroman, *The Right to Development: Exploring the Legal Basis of a Supernorm*, 22 FLA. J. INT’L L. 299, 318 (2010) (“[T]he inclusion of economic activities in the principle assures the people’s sovereign right to regulate or oversee all economic activities within their country for their own ends.”).

70. See *id.* at 319 (“Aside from the principal right to possess, use, and dispose of their natural resources, this principle supports inter alia the right of a people ‘to withdraw from unequal investment treaties and to renounce contractual relations when one party unjustly enriches itself thereby.’”).

over development among states of the world, versus the state and its peoples. Indeed, the notions of “state” and “peoples” were generally collapsed and interchangeable, thus making the state the salient unit of analysis.<sup>71</sup> The territorial boundaries of a state marked the “peoples” of the state without any further inquiry into enclaves of indigenous communities or other groups that viewed themselves as distinct from, and often in subordination to, the state.<sup>72</sup>

### *B. The Intrastate Debate: Accounting for the Fourth World*

In an intrastate context, the principle of permanent sovereignty over natural resources is at the center of natural resource development projects that often bear myriad objectives, including: (1) promotion of state economic sovereignty, (2) promotion of state economic development, (3) promotion of, and respect for, peoples’ human rights, and (4) promotion of sustainable development.<sup>73</sup> Natural resource development projects ignite a range of concerns regarding the proper allocation of land and natural resources to multiple intrastate constituencies with potentially legitimate claims.<sup>74</sup>

It is striking to note how some of the debates that surfaced in the 1950s regarding the right of “peoples” to permanent sovereignty over natural resources are now present again, but within the context of a different world order and different sensibilities. Debates today focus on how to account for state permanent sovereignty over natural resources with respect to the claims and rights of vulnerable and historically marginalized communities, such as indigenous peoples—particularly because these communities are often situated at the site of state natural resource development projects.

There are two primary contexts in which such claims are formulated. One context involves the capture by state elites of the natural resource wealth of the country as a means of advancing personal gain with little regard for distributional impacts on the national polity.<sup>75</sup> Another context involves the claims of local

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71. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 19–22 (2d ed. 2004) (discussing the dominance of the early Eurocentric modern state system).

72. *Id.* at 22.

73. SCHRIJVER, *supra* note 15, at 29 (“The international law status of the principle of [permanent sovereignty over natural resources] has increasingly been recognized and permanent sovereignty is expected to serve a host of causes, including promoting the economic development of developing countries, contributing to the attainment of self-determination of peoples and effectuating State economic sovereignty, promoting respect for peoples’ and human rights and optimal utilization of the world’s natural resources, enhancing nature conservation and pursuing sustainable development.”).

74. See sources cited *supra* note 34.

75. See sources cited *supra* note 33.

communities of peoples likely to be adversely affected by the state's decision to assert ownership over land and resources for the purpose of engaging in economic development.<sup>76</sup> In both of these contexts, the doctrine of permanent sovereignty over natural resources often bolsters states' claims of unqualified authority to own the resources at issue, to dispose or develop them in accordance with particularized state goals, and ultimately to reap benefits "at the top," with a minimal trickle-down effect on historically marginalized communities.

While concerns regarding the inequitable distribution of power and wealth between states have dominated international law over the past centuries, concerns regarding the inequitable distribution of resources within state borders have infiltrated international legal thought. Because of renewed concern over the detrimental consequences to intrastate communities when permanent sovereignty over natural resources is interpreted as a right of states, scholars and activists have responded by arguing for alternative interpretations. One stream of scholarship that is particularly concerned with the capture of natural resource wealth by state elites draws a distinction between the state and "peoples" of a state.<sup>77</sup> It posits that sovereignty over natural resources inheres in the peoples of a state. Another stream of scholarship and jurisprudence emanating from UN bodies emphasizes the claims of particularly vulnerable communities, such as indigenous peoples, at the site of natural resource development projects.<sup>78</sup> Such scholarship and jurisprudence also draws a distinction between the state and "peoples" of a state, but conceptualizes "peoples" as more discrete communities within the national polity. These alternative arguments propose that even more discrete communities, such as indigenous peoples, bear sovereign rights over land and natural resources.<sup>79</sup>

Accordingly, these arguments suggest the potential applicability of the doctrine of permanent sovereignty over natural resources in intrastate contexts of land and natural resource allocation. Importantly, these arguments draw on the evolution of the doctrine of

76. See sources cited *supra* note 34.

77. Dufresne, *supra* note 34, at 356 ("As public prerogatives are always exercised through a form of representative body, there is a structural representational gap between peoples, who are the nominal and residual holders of the prerogatives over natural resources, and governmental representatives, who actually exercise the prerogatives."); Duruigbo, *supra* note 15, at 33 (analyzing the doctrine of permanent sovereignty over natural resources); Farmer, *supra* note 36, at 424 ("[T]he United Nations Charter refers to the 'self-determination of peoples,' establishing self-determination as a principle for peoples, not nations.").

78. See generally ECOSOC, *supra* note 37 (presenting the final report from a UN study on indigenous peoples' permanent sovereignty over natural resources).

79. *Id.* ¶ 67.

permanent sovereignty over natural resources to address distributional inequities befalling either the national polity of the state vis-à-vis state elites or marginalized communities of peoples impacted by state development projects. Accordingly, they represent an appropriation of the doctrine in contexts that may not have been envisioned in its original formulation. Moreover, these arguments do not explicitly or primarily draw on the human rights strand implicated in the evolution of the doctrine; rather, they emphasize that “peoples” are entitled to greater rights over the natural resource wealth of the country as a matter of sovereignty.

However, while these arguments rely on the language of peoples’ sovereignty, they more accurately represent demands for qualified state sovereignty.<sup>80</sup> The thrust of these arguments is based on notions of state sovereignty characterized by duties toward peoples.<sup>81</sup> They carve away at the notion of a state’s unqualified right to dispose of natural resources and suggest a shift in the evolution of the doctrine of permanent sovereignty over natural resources from state rights to state duties.<sup>82</sup> These arguments suggest that the doctrine can no longer be utilized as a sword by states against their internal constituencies, but rather, can serve as a shield by peoples to seek greater accountability from states with respect to distributional outcomes. Indeed, the shift in discourse indicates resistance to an orthodox state-based model of development. It emphasizes the dark sides of unfettered state ownership over natural resource wealth and decision-making authority over development.

#### 1. Permanent Sovereignty over Natural Resources by Peoples of a State

While certainly the textual and doctrinal evolution of permanent sovereignty over natural resources references the rights of “peoples,” there has been a lack of clarity regarding who exactly constitutes a “peoples.”<sup>83</sup> The doctrine’s reference to peoples appeared to be

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80. See Subrata Roy Chowdhury, *Permanent Sovereignty over Natural Resources*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 1, 3 (Kamal Hossain & Subrata Roy Chowdhury eds., 1984) (discussing the development of the principle of permanent sovereignty over natural resources and noting its expression in terms of a “sovereign right of all countries” as well as a right of “peoples”); Duruigbo, *supra* note 15, at 34 (discussing the use of the doctrine of permanent sovereignty over natural resources “as a tool to empower and benefit people, rather than a vehicle for their immiseration or the glorification of a handful of rulers”).

81. See Duruigbo, *supra* note 15, at 37 (“[T]he right to permanent sovereignty over natural resources is vested in *peoples*, not states . . .”).

82. See SCHRIJVER, *supra* note 15, at 308 (discussing the obligation of states to utilize their resources for development of the well-being of their populations).

83. See *id.* at 9–10 (discussing possible meanings of the term “peoples”).

interchangeable with “state” throughout much of its interpretative evolution; however, scholars have increasingly scrutinized such understanding.

During the process of decolonization, “the term ‘peoples’ was originally meant to refer to those peoples which had not yet been able to exercise their right to political self-determination.”<sup>84</sup> Following the emergence of the human rights regime and in the aftermath of negotiating a New International Economic Order, the legal significance of “peoples” remained ambiguous. More often than not, the term served as a proxy for “state.”<sup>85</sup> This understanding further cemented the applicability of the doctrine to “states” irrespective of internal communities with legitimate interests in benefitting from the natural resource wealth of the country.

There is, however, an emerging debate regarding the ability of “peoples” within the territorial boundaries of a state to exercise a right to permanent sovereignty over natural resources. Such debate stems from the recognition that the term “peoples” is not necessarily synonymous with “state.” “Peoples” can also refer to: (1) those under colonial occupation, (2) a portion of the population, such as indigenous peoples, or (3) the whole of the population.<sup>86</sup> Particularly, over the past fifteen years, the doctrine of permanent sovereignty over natural resources has been tempered by the claims of “peoples,” which demand a more “restricted, relative, or functional sovereignty.”<sup>87</sup>

The importance of recognizing a “peoples” right to sovereignty over natural resources is that “peoples” can seek to hold states accountable under international law for the misuse of natural resources. This interpretation, for example, could support claims by the national polity against the state for spoliation or perhaps even for passing title to a corporate actor over natural resource wealth in the context of an extractive industry project.<sup>88</sup> In this vein, a series of scholars have explicitly supported an interpretation of the doctrine of permanent sovereignty over natural resources—particularly as grafted onto Resolution 1803—that recognizes a right of “peoples” to

84. *Id.* at 9.

85. *See id.* at 309.

86. James A. Graff, *Human Rights, Peoples, and the Right to Self-Determination*, in *GROUP RIGHTS* 186, 186 (Judith Baker ed., 1994).

87. *See* SCHRIJVER, *supra* note 15, at 2 (questioning whether in the contemporary age of globalization, where states have become more interdependent, the principle of state’s “absolute” or “permanent” sovereignty over natural resources may become qualified by demands for a more “restricted,” “relative,” or “functional” sovereignty).

88. Duruigbo, *supra* note 15, at 63 (“[A]ctions not grounded in the peoples’ interest taken by government which involve natural resources could be open to challenge as violations of international law.”).

permanent sovereignty over natural resources. This interpretation implicates a commensurate duty of states to engage in natural resource development for the benefit of “peoples.” For example, Emeko Duruigbo concludes the following:

The right of peoples to sovereignty over natural resources necessarily imports an entitlement to demand that governments manage these resources to the maximum benefit of the people. It has been correctly observed that “[i]f the phrase ‘rights of peoples’ has any independent meaning, it must confer rights on peoples against their own governments.” . . . Primarily, this duty would restrain irresponsible use and management of resources by public officials and positively utilize the resources for peoples’ benefit.<sup>89</sup>

In addition, Duruigbo has proposed that “[n]ot only should governments proactively use resources for the benefit of people, they are also prevented from exercising permanent sovereignty in a way that would cause substantial harm to their peoples.”<sup>90</sup> Likewise, Kamal Hossain has observed that “permanent sovereignty reflects the inherent and overriding right of a state to control the exploitation and the use of its natural resources. However, a state has to exercise this right for the benefit of its citizens.”<sup>91</sup> Finally, scholars have generally reaffirmed that “Resolution 1803 on [permanent sovereignty over natural resources] directs sovereign states to use resources for the well being of their peoples” and that “as understood today, permanent sovereignty over natural resources is as much an issue of state duties as it is one of state rights.”<sup>92</sup>

Ultimately, such arguments bolster the intrastate claims of “peoples,” when primarily conceived as the national citizenry, against the state for abuses in the development of natural resource wealth. They implicitly challenge the notion that the state, through the commercialization of its natural resource base or through large-scale infrastructure projects that impact natural resource allocation, will necessarily engage in development commensurate with the goals and values of the national polity and promote an equitable distribution of gains.

## 2. Permanent Sovereignty over Natural Resources by Indigenous Peoples and Other Historically Marginalized Communities

Increased complexity has been added to the debates regarding the right of “peoples” to sovereignty over natural resources as a result

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89. *Id.* at 67.

90. *Id.* at 66–67.

91. Kamal Hossain, *Introduction* to PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW, *supra* note 80, at ix–xx (internal quotation marks omitted).

92. SCHRIJVER, *supra* note 15, at 311.

of the transnational indigenous peoples' movement.<sup>93</sup> Arguments for indigenous peoples' sovereignty over land and natural resources should be distinguished from arguments that indigenous peoples' bear human rights with respect to ownership, use, and control of their traditional land and resources. While the first line of argument draws from an applicability of the interpretative evolution of the right to permanent sovereignty over natural resources under international law, the second argument draws from the interpretative evolution of multiple human rights precepts.

There is a discrete body of international legal authority that specifically addresses the applicability of the principle of permanent sovereignty over natural resources to indigenous peoples.<sup>94</sup> The argument proposes that because indigenous peoples are similarly situated to the colonial peoples to whom the principle originally applied, indigenous peoples bear sovereign rights over the land and natural resources that they have traditionally used and occupied. Such an argument stems from the two-pronged premise that the principle of permanent sovereignty over natural resources emerged as a precondition to both: the right to self-determination and the right to development.<sup>95</sup> It follows, then, that because discrete indigenous communities now bear the legal personality of "peoples" under international law,<sup>96</sup> they are entitled to the full exercise of self-determination and development.<sup>97</sup>

93. For an excellent overview of the transnational peoples' movement under international law, see ANAYA, *supra* note 71, at 56–72; *see also* Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 205–27 (2010).

94. *See generally* ECOSOC, *supra* note 37, ¶ 46; Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993) (tracing the development of the right to self-determination in the context of indigenous peoples); Janeth Warden-Fernandez, *The Permanent Sovereignty over Natural Resources: How It Has Been Accommodated Within the Evolving Economy* (Ctr. for Energy, Petroleum & Mineral Law & Policy, Annual Review Article No. 4, 2000), *available at* <http://www.dundee.ac.uk/cepmlp/car/html/car4art4.htm> (chronicling the evolution of the doctrine of permanent sovereignty over natural resources since World War II).

95. *See* Chowdhury, *supra* note 80, at 1–2 (suggesting that the principle of permanent sovereignty over natural resources comprises rights to both economic and political self-determination).

96. Miranda, *supra* note 93, at 244–48.

97. ECOSOC, *supra* note 37, ¶ 17. Special Rapporteur Erica Irene Daes notably specified in her report on indigenous peoples' right to permanent sovereignty over natural resources that

[n]owadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance. In order to be meaningful, this modern concept of self-determination must logically and

More specifically, a report entitled *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples Permanent Sovereignty over Natural Resources*, produced by the UN Special Rapporteur on Indigenous Issues in 2004, suggests the following reasons for the direct applicability of the doctrine of permanent sovereignty over natural resources to the intrastate context of indigenous peoples vis-à-vis the state:

- (a) Indigenous peoples are colonized peoples in the economic, political and historical sense;
- (b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;
- (c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;
- (d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this; and
- (e) The natural resources originally belonged to the indigenous peoples concerned and were not, in most situations, freely and fairly given up.<sup>98</sup>

On the other hand, arguments for indigenous peoples' permanent sovereignty over natural resources have been careful to emphasize that such sovereignty may be exercised without placing in jeopardy the territorial integrity of the state and may be reconcilable with national development goals.<sup>99</sup> Such caveats suggest that the "sovereignty" attributed to indigenous peoples may be something different, or less, than what has been traditionally associated with the sovereign rights of states. Indeed, sovereignty in this sense is again more suggestive of an increased emphasis on state duties in the context of allocation, use, and management of natural resource wealth rather than a complete shift to the inherent sovereign rights of peoples.

Nevertheless, such application of the doctrine of permanent sovereignty over natural resources clearly emphasizes the intrastate distributional inequities that befall indigenous communities. Like colonial peoples and developing states, indigenous peoples have been subject to an inequitable distribution of developmental gains. In this vein, application of the doctrine of permanent sovereignty over natural resources to indigenous peoples serves as a necessary platform for indigenous peoples' control over the means and goals of

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legally carry with it the essential right of permanent sovereignty over natural resources.

*Id.*

98. *Id.* ¶ 32.

99. *Id.* ¶ 46.



their own progress. One logical consequence of this line of reasoning is that indigenous peoples will benefit from greater distributional gains if they are able to better control the direction of their own development within the state apparatus.

What makes the context of natural resource development projects particularly complicated is that, typically, a number of different communities beyond indigenous peoples will bear detrimental consequences.<sup>100</sup> These communities include ethnic or racial minority groups, the rural poor, subsistence farmers, and landless communities.<sup>101</sup> Nevertheless, application of the doctrine of permanent sovereignty over natural resources to such marginalized groups has been even more limited. Several factors have contributed to this result: (1) the lack of collective international legal personality afforded to such communities, (2) the lack of emphasis on the distinct impacts of natural resource capture by state elites on diverse local communities, and (3) concerns regarding the potential activation of secessionist movements that would challenge the territorial integrity of states.<sup>102</sup>

100. Ariel E. Dulitzky, *Cuando los afrodescendientes se transformaron en "pueblos tribales": El Sistema Interamericano de Derechos Humanos y las comunidades rurales negras* [When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities], in ACTUALIDAD DE LAS LUCHAS Y DEBATES DE LOS AFRODESCENDIENTES A UNA DÉCADA DE DURBAN [NEWS OF THE STRUGGLES AND DEBATES OF AFRICAN DESCENDANTS TO A DECADE OF DURBAN] 13, 13–48 (2010); Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387, 454–55, (2003) (documenting the mechanisms established by native Hispano-Coloradans to combat efforts to undermine their existing land rights); Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135, 139–40 (2007) (charting the abuse and displacement of Burmese rural workers in Myanmar in connection with the Yadana Pipeline Project); Devon G. Peña & Joseph C. Gallegos, *Nature and Chicanos in Southern Colorado*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 141, 141 (Robert D. Bullard ed., 1993) (examining the disproportionate effects of industrial mining in Colorado's San Luis Valley on the area's Chicano population).

101. Robert D. Bullard, *Conclusion: Environmentalism with Justice*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 100, at 197; Hicks & Peña, *supra* note 100, at 454–55 (documenting the mechanisms established by native Hispano-Coloradans to combat efforts to undermine their existing land rights); Maassarani et al., *supra* note 100, at 138–40 (chronicling human rights violations at the hands of the hydrocarbon industry).

102. Duruigbo, *supra* note 15, at 56 ("The national, regional, and international instability that is likely to be attendant on such attempts at 'balkanization' make it difficult to contend that this result was within the contemplation of international policymakers when the right to PSNR was created. This is not to say that segments of a population, such as indigenous peoples or minority ethnic groups, cannot stake a claim for resources or that national constitutions cannot grant them such right, but it would be more realistic for entire populations to make such claims against leaders using the resources irresponsibly.").

Accordingly, the transnational indigenous peoples' movement aimed at the attainment of greater self-determination constitutes an additional, contemporary process that has shaped the doctrine of permanent sovereignty over natural resources. Interpretative arguments hinging permanent sovereignty over natural resources on indigenous identity further bolster the intrastate claims of indigenous communities against the state for abuses in the development of the natural resource wealth of the country. They implicitly challenge the notion that the state, through the commercialization of its natural resource base or through large-scale infrastructure projects, will promote economic development with an equitable distribution to indigenous communities.

Undoubtedly, the discourse of permanent sovereignty over natural resources has constituted a terrain for interstate struggles over the allocation of land and resources, development, and distributional gains. The evolution of the doctrine over the past sixty years has occurred, in part, as a reaction to significant international events that implicate such interstate disputes. More recently, the discourse of state's permanent sovereignty over natural resources has infiltrated the intrastate terrain. The evolution of the principle in the intrastate context evidences the appropriation of the term by peoples primarily affected by domestic natural resource development projects. Indeed, over the past decade, the principle of permanent sovereignty over natural resources has saliently resurfaced in discussions regarding the appropriate balance between states' development projects and the observance of peoples' claims and rights.

### III. INTRASTATE NATURAL RESOURCE ALLOCATION AND HUMAN RIGHTS

While a sovereignty approach to the intrastate allocation of land and natural resources has received some attention, a human rights approach has received far more jurisprudential development.<sup>103</sup> Such a trend suggests that matters of intrastate allocation of land and resources appear to be more palatable when framed as issues of human rights rather than as issues of sovereignty. This may be a natural consequence of two distinctive characteristics of the human rights regime. Human rights are aimed at regulating the domestic relationship between governments and their nationals. Furthermore, core precepts are generally understood as commensurate with the territorial integrity of states.

Although the human rights regime developed during the 1960s, primarily in response to the atrocities committed during WWII, it did

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103. See discussion *infra* Part III.A–B (discussing jurisprudence from the Inter-American Commission on Human Rights and Inter-American Court of Human Rights).

address the issue of intrastate natural resource allocation. As discussed under Part II, the doctrine of permanent sovereignty over natural resources was incorporated in two foundational human rights documents, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>104</sup> Article 1 of both of these documents recognizes that “[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources.”<sup>105</sup> Furthermore, both Covenants also provide that “[n]othing in the present Covenant[s] shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”<sup>106</sup>

Nevertheless, it was not until the 1990s that the human rights regime began to consistently entertain issues of intrastate natural resource allocation in response to the claims of “peoples.”<sup>107</sup> Today, human rights jurisprudence treats the issue of intrastate natural resource allocation not as one of sovereignty but rather as one of culture. Much of the jurisprudence that specifically addresses the natural resource rights of peoples is premised on a discussion of cultural attachment to land and resources. Accordingly, such jurisprudence essentially shifts the issue of allocation away from a sovereign right to cultural entitlement.

The emerging human rights jurisprudence regarding the rights of peoples, or more specifically, indigenous peoples, impacts the analysis of intrastate natural resource allocation in two ways. First, it indirectly bolsters the arguments for peoples’ permanent sovereignty over natural resources. Second, it directly serves as a platform for an independent analysis of intrastate natural resource allocation based on notions of human dignity represented in human rights precepts.

For example, the arguments outlined under Part II that seek to interpret the doctrine of permanent sovereignty over natural resources as applicable to “peoples” or “indigenous peoples” find additional, albeit indirect, support in contemporary human rights jurisprudence. In this light, human rights jurisprudence may be viewed as a “backdoor” to peoples’ claims of sovereignty.<sup>108</sup> It can be

104. See *supra* Part II.A.2.

105. ICCPR, *supra* note 30, art. 1(2); ICESCR, *supra* note 30, art. 1(2).

106. ICCPR, *supra* note 30, art. 47; ICESCR, *supra* note 30, art. 25.

107. See *infra* Part III.A–B (discussing the evolution of human rights notions of natural resource allocation); *infra* notes 110–11 and accompanying text.

108. See Lila Barrera-Hernández, *Sovereignty over Natural Resources Under Examination: The Inter-American System for Human Rights and Natural Resource Allocation*, 12 ANN. SURV. INT’L & COMP. L. 43, 57 (2006) (“While the rights to self-determination and development provided the original basis for the collective claim to sovereignty during decolonization and independence, individual human rights as interpreted by the [human rights] organs now operate to distribute the attributes of sovereignty over natural resources among individuals populating sovereign states.”).

understood as aiming to rectify distributional inequities stemming from a lack of recognition of certain “peoples” as sovereign rights holders.<sup>109</sup> In such vein, it may be viewed as supporting the emerging shift in the doctrine of permanent sovereignty over natural resources away from absolute state entitlement and toward a model premised on state duties.<sup>110</sup> Human rights jurisprudence serves to carve a set of core duties into the doctrine.<sup>111</sup>

In the second vein, contemporary human rights jurisprudence can be viewed as providing an independent legal basis for the claims of peoples to own, occupy, use, control, and develop land and resources as a matter of human dignity.<sup>112</sup> In this context, human rights jurisprudence serves as a direct platform for the claims of “peoples” against the state for distributional inequities irrespective of sovereign entitlement.<sup>113</sup> Such claims frame distributional inequities related to natural resource development projects as affronts to human rights precepts of self-determination, nondiscrimination, cultural integrity, and property ownership.<sup>114</sup> In this stream, human rights

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109. *Id.* at 57–58.

110. See SCHRIJVER, *supra* note 15, at 1–5 (mapping how the principle of state’s permanent sovereignty over natural resources has evolved as part of “other trends in international law,” including international human rights law).

111. *Id.* at 1, 258–367 (asserting that, under modern international law, the principle of states’ permanent sovereignty over natural resources not only provides the basis for states’ rights to the ownership and management of natural resource wealth but also a basis for state duties to its national population regarding such ownership and management).

112. See S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous People’s Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 36 (2001) (“[The] Inter-American human rights system recognizes and protects indigenous peoples’ rights over their traditional lands and resources.”); Barrera-Hernández, *supra* note 108, at 50–58 (examining the decisions of the Inter-American Commission of Human Rights and jurisprudence of the Inter-American Court of Human Rights with regard to indigenous claims); Brunner, *supra* note 18, at 701–02 (discussing the human rights claims of the Saramaka peoples of Suriname over ancestral territories); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa*, 18 AM. U. INT’L L. REV. 851, 867 (2003) (explaining the breadth of recognition of human rights under the African Charter and examining the case of the Ogoni peoples of Nigeria).

113. See discussion *infra* Part V.A.

114. See generally ANAYA, *supra* note 71, at 148 (“It is thus evident that certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law.”); MAIVÂN C. LÂM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION 51–62, 123–35 (2000) (discussing the history and development of norms relevant to self-determination claims and the application through the United Nations of these norms to indigenous peoples); Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples’ Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OR. REV. INT’L L. 419, 421–22 (2008) (suggesting that indigenous peoples have deliberately

jurisprudence functions as an allocator of lands and resources at an intrastate level.<sup>115</sup>

This evolution of human rights jurisprudence, particularly in the context of the status and rights of indigenous peoples, also demonstrates that international human rights law has the potential to impact the intrastate allocation of land and resources. At the core of human rights arguments is the same distributional concern present in sovereignty arguments which posits that “peoples” bear a right to permanent sovereignty over natural resources. The evolving human rights jurisprudence regarding the land and resource rights of peoples similarly challenges the ability of states to translate development projects into equitable, trickle-down distributional gains, particularly in the context of peoples’ potential alternative cultural visions of progress. Ultimately, arguments regarding the allocation of land and resources grounded in human rights further challenge a state’s unqualified role in charting the goals and means of development.

#### *A. Substantive Land and Resource Rights of Indigenous Peoples and Other Historically Marginalized Communities*

Over the past twenty years, there has been a robust development of jurisprudence regarding the land and resource rights of indigenous peoples under international law.<sup>116</sup> One of the goals of the contemporary indigenous rights movement has been to secure indigenous peoples’ rights to own, occupy, use, and control their traditional land and resources against the affronts of the state.<sup>117</sup> For

engaged in human rights litigation with respect to claims of ownership, occupancy, use, and control of ancestral lands).

115. See discussion *infra* Part V.A.

116. See generally Anaya & Williams, *supra* note 112 (noting that, since the late 1970s, the international human rights system has responded to indigenous peoples’ concerns, leading to myriad developments regarding indigenous peoples’ land and resource rights); Miranda, *supra* note 93, at 249–52 (discussing the jurisprudential development of indigenous peoples’ land and resource rights under international law); see also Jennifer A. Amcott, Note, *Environment, Equality, and Indigenous Peoples’ Land Rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL. L. 873 (2002) (discussing the seminal case *Awas Tingni v. Nicaragua* in which the Inter-American Court of Human Rights recognized the right of indigenous communities to their ancestral land as a basic human right).

117. See Special Rapporteur on the Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, *Indigenous Peoples and Their Relationship to Land*, ECOSOC, Comm’n on Human Rights, Sub-comm’n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (by Erica-Irene A. Daes) [hereinafter ECOSOC, *Indigenous Peoples’ Relationship to Their Land*] (discussing indigenous peoples’ unique cultural and religious ties to their land);

indigenous peoples, the ability to reside communally on their lands under traditional land tenure systems is inextricably tied to the preservation of communal identity, culture, religion, and traditional modes of subsistence.<sup>118</sup> Indigenous peoples have actively engaged the international human rights system as a means of translating their claims over ancestral land and resources into recognizable rights.<sup>119</sup> The international system has been generally responsive to indigenous peoples' articulation of a special relationship to their traditional land and resources, and as a result, states now bear specific human rights responsibilities toward indigenous peoples.<sup>120</sup>

Many human rights bodies have treated the issue of intrastate allocation of land and resources to indigenous peoples specifically in the context of natural resource development projects. These bodies include the Human Rights Council,<sup>121</sup> the UN Human Rights Committee,<sup>122</sup> the UN Committee on the Elimination of Racial

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ECOSOC, Comm'n on Human Rights, Sub-comm'n on Prevention of Discrimination and Protection of Minorities, *Transnational Investments and Operations in Land of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1991/49 (July 17, 1991) ("[W]ithout access to land, indigenous peoples cannot maintain their subsistence activities and their way of life."); see also Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 141–59 (2007) (discussing the threats of hybrid state-corporate activity on the ability of indigenous peoples to operationalize their internationally recognized land and resource rights).

118. See ECOSOC, *Indigenous Peoples' Relationship to Their Land*, *supra* note 117, at 7 (noting that it is challenging to "separate the concept of indigenous people's relationships with their lands, territories, and resources from that of their cultural differences and values").

119. See Miranda, *supra* note 93, at 205–27 (analyzing the processes through which indigenous peoples have successfully achieved recognition of their land and resource rights under international human rights law).

120. See Miranda, *supra* note 117, at 141–59 (examining developments in the recognition of indigenous peoples' land and resource rights).

121. See generally Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/9/9, add. 2, 5, 8 (Aug. 11, 2008) (by S. James Anaya) [hereinafter *Anaya Human Rights Council Report 2008*] (reporting on the legal instruments and opinions that support the recognition of indigenous peoples' human rights).

122. See *Länsmann v. Finland*, Views, Human Rights Comm., 52d Sess., No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994) (finding that Finland had not violated Article 27 of the Covenant on Civil and Political Rights by allowing stone quarrying on land where the indigenous Saami herd reindeer because "reindeer herding in the area does not appear to have been adversely affected by such quarrying"); *Lubicon Lake Band v. Canada*, Views, Human Rights Comm., 38th Sess., No. 267/1984, Annex IX, U.N. GAOR, 45th Sess., Supp. No. 40, (Vol. II), U.N. Doc. A/45/40 (Vol. II) (Oct. 4, 1990) (finding that Canada had violated Article 27 of the Covenant on Civil and Political Rights by allowing the province of Alberta to grant oil and gas leases as well as timber development rights to a corporate actor within the land of the Lubicon Lake Band of Cree Indians).

Discrimination,<sup>123</sup> the African Commission and Court on Human Rights,<sup>124</sup> the Inter-American Commission on Human Rights,<sup>125</sup> and the Inter-American Court of Human Rights.<sup>126</sup> The most recent

123. See, e.g., Rep. of the Comm. on the Elimination of Racial Discrimination, Annex V, U.N. GAOR, 52d Sess., Supp. No. 18, U.N. Doc. A/52/18, at 3 (Aug. 22, 1997) (finding that indigenous peoples have been “deprived of their human rights and fundamental freedoms and in particular . . . have lost their land and resources to colonists, commercial companies, and State enterprises”); International Convention on the Elimination of All Forms of Racial Discrimination, Feb. 20–Mar. 10, 2006, *Warning and Urgent Action Procedure: Decision 1(68): United States*, ¶ 8, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) (issuing recommendations to the United States to observe the Western Shoshone peoples internationally recognized rights to their ancestral land).

124. See Soc. & Econ. Rts. Action Ctr. v. Nigeria, Afr. Comm’n on Human & Peoples’ Rts., Comm’n No. 155/96, ¶¶ 1, 69 (2001) (finding that Nigeria violated Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter by engaging in oil drilling activities that caused environmental degradation and health issues among the Ogoni peoples); Ctr. for Minority Rights Dev. v. Kenya, Afr. Comm’n on Human & Peoples’ Rts., Comm’n No. 276/2003, ¶ 298 (2009) (addressing the claims of the Endorois community and finding Kenya in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter).

125. See, e.g., Kichwa Peoples of Sarayaku Cmty. v. Ecuador, Petition, Inter-Am. Comm’n H.R., Report No. 64/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶ 74 (2004) (examining the admissibility of claims that the state of Ecuador violated the human rights of the Petitioners’ by allowing oil exploration on the ancestral land of the Sarayaku community); Maya Indigenous Cmty. v. Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶¶ 120, 144 (2004) (finding that the state of Belize violated the American Declaration of the Rights and Duties of Man by granting logging concessions to private entities on land traditionally occupied by the Maya peoples); Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 ¶¶ 1, 14 (2002) (concluding that the United States failed to ensure the Petitioners’ human right to property under the American Declaration of the Rights and Duties of Man by appropriating land in the Western Shoshone ancestral territory); Enxet-Lamenxay & Kayleyphapopyet (Riachito) Indigenous Cmties. v. Paraguay, Case 11.713, Inter-Am. Comm’n H.R., Report No. 90/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 12 (1999) (discussing the friendly settlement reached between the state of Paraguay and the Enxet-Lamenxay and Kayleyphapopyet-Riachito indigenous communities stemming from a complaint that the state violated the American Convention on Human Rights); Yanomami Peoples v. Brazil, Case 7615, Inter-Am. Comm’n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 ¶¶ 1–3 (1985) (declaring that the state of Brazil violated the Yanomami peoples human right to property under the American Declaration of the Rights and Duties of Man for displacing this indigenous community from their ancestral land).

126. See Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); Saramaka Peoples v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) (finding the state of Suriname in violation of the American Convention on Human Rights for engaging in the exploitation of natural resources located on indigenous land); Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) (stating that the state of Paraguay violated the human rights of the Sawhoyamaya peoples for displacing this indigenous community from its traditionally occupied territory); Moiwana Vill. v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 1–4 (concluding that the forced relocation and massacre of the Moiwana

developments regarding the human rights of indigenous peoples over their ancestral land and resources, however, are particularly well-represented in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>127</sup> and in the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>128</sup> Both UNDRIP and the jurisprudence of the Inter-American Commission and Court carve away at notions of permanent sovereignty over natural resources that are unqualifiedly deemed to inhere in the state. Indeed, UNDRIP and the decisions of the Inter-American Commission and Court evidence an emphasis on the recognition of indigenous peoples' land and resource claims on the basis of cultural attachment.

In particular, the jurisprudence emanating from the Inter-American Commission and Court highlights the clash between notions of states' permanent sovereignty over natural resources and indigenous peoples' claims to own, occupy, use, and control their traditional land and resources. As set forth under subpart II.A, the political right of self-determination that emerged during the decolonization process applied to overseas colonial territories as a whole, irrespective of preexisting enclaves of indigenous peoples.<sup>129</sup> Moreover, as the doctrine of permanent sovereignty over natural resources developed in furtherance of the human right to self-determination and developing states' claims for a New International Economic Order, it ultimately served to bolster state authority to dispose freely of natural resource wealth.<sup>130</sup> Accordingly, cases before the Inter-American Commission and Court which involve state natural resource development projects with potential human rights violations toward indigenous peoples often include arguments by states that implicate the doctrine of permanent sovereignty over natural resources. States often utilize this doctrine, implicitly or explicitly, as a sword against the interests of indigenous peoples

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peoples constituted human rights violations under the American Convention on Human Rights).

127. See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 5, 15, 17–19, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP] (recognizing indigenous peoples' right to possess and control their traditionally occupied lands and natural resources); see also *Anaya Human Rights Council Report 2008*, *supra* note 121, ¶¶ 85, 88 (asserting that UNDRIP represents “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. . . . The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of the United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples. . . .”).

128. See *infra* text accompanying notes 143–58.

129. See generally Declaration of Independence to Colonial Peoples, *supra* note 42.

130. See *supra* Part II.



rather than as a shield to protect their independence from foreign economic control.<sup>131</sup>

The international human rights regime did not always specifically account for indigenous peoples' human rights to land and resources.<sup>132</sup> Initially, indigenous activists and scholars seeking to engage the human rights system toward the recognition of indigenous peoples' claims to land and resources relied primarily on generally applicable human rights precepts of self-determination, cultural integrity, and property ownership.<sup>133</sup> The application of these human rights precepts in a nondiscriminatory manner established a sound foundation for the recognition of land and resource rights specific to indigenous peoples.<sup>134</sup>

For the most part, indigenous peoples have succeeded in establishing substantive rights to own, use, enjoy, control, and develop land and the surface resources therein.<sup>135</sup> However, the recognition of such substantive rights with respect to subsurface resources has been more challenging and subject to greater scrutiny.<sup>136</sup> The strongest argument for substantive rights with respect to subsurface resources may be grounded in the indigenous

131. See Dufresne, *supra* note 34, at 354 (finding it clear that "the treatment of legal issues concerning natural resources through the prism of permanent sovereignty is a legacy of the decolonization era" and that such doctrine "translates the assertive discourse of decolonized states that tried to rectify or counter pre-existing vectors of economic domination into legal concepts"); see also Kichwa Peoples of Sarayaku Cmty. v. Ecuador, Case 167/03, Inter-Am. Comm'n H.R., Report No. 64/04, OEA/Ser.L.V/II.122, doc. 5 rev. 1 ¶ 38 (2004) (addressing Ecuador's argument that the oil concession was permissible pursuant to the "constitutional principle of public domain over natural resources of the subsoil").

132. See ANAYA, *supra* note 71, at 104–07.

133. See *id.* at 104–05.

134. See *id.*; see also UNDRIP, *supra* note 127, arts. 8, 26–28, 32; INT'L LAW ASS'N, INTERIM REPORT ON THE RIGHTS OF INDIGENOUS PEOPLES 20 (2010) [hereinafter ILA INTERIM REPORT], available at <http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D> ("The UNDRIP provisions on lands, territories and resources were fought for, in effect, over many centuries, and blood and tears were spilled in the process. Along with the right to self-determination, they are the most important and contested provisions in the Declaration, and are the most explicit and comprehensive in international law in comparison with other pertinent instruments.").

135. See ILA INTERIM REPORT, *supra* note 134, at 20–21 (noting that while UNDRIP "reflects the level to which the land rights provisions were accepted by the international community," three significant ambiguities remain: (1) the lack of an "accepted definition of indigenous peoples' lands, territories and resources in international law;" (2) lack of clarity regarding indigenous peoples' "rights to lands, territories and resources that they traditionally possessed and controlled, but no longer possess and control;" and (3) lack of clarity regarding indigenous peoples' rights over natural resources (as opposed to land)).

136. Miranda, *supra* note 117, at 150–51.

community's traditional use of such resources for their survival, development, and the continuation of their way of life.<sup>137</sup>

In sum, the substantive land and resource rights of indigenous peoples include the following: (1) the right to legal recognition, demarcation, and titling of land that indigenous peoples have traditionally owned, occupied, used, or acquired;<sup>138</sup> (2) the right to ownership, use, enjoyment, control, and development of such land irrespective of formal title and in accordance with indigenous peoples' own land tenure systems;<sup>139</sup> and (3) the right, at a minimum, to the use of natural resources associated with such land where the resources represent an essential element of the indigenous community's cultural identity.<sup>140</sup>

More specifically, UNDRIP emphasizes the distinctive relationship of indigenous peoples to their traditional land and resources.<sup>141</sup> It specifically provides in the preamble that "control by

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137. See *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 64, 122 (Nov. 28, 2007); ILA INTERIM REPORT, *supra* note 134, at 23 (suggesting that international law is "increasingly supporting (either directly or indirectly)" the recognition that "indigenous peoples possess resources they are unable to access but that reside within their lands and territories, and despite State assertions of ownership of minerals, oil, and gas").

138. See UNDRIP, *supra* note 127, art. 26(2); ILA INTERIM REPORT, *supra* note 134, at 22–23 (suggesting that the right expressed under Article 26(2) "reflects[] a vast range of other international instruments" and "can be reasonably considered as being part of customary international law"); see also 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 on Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 60 ("Indigenous rights to the land mean little unless they have official title to their lands.").

139. See UNDRIP, *supra* note 127, arts. 26(2), 28; see also Ctr. for Minority Rights Dev. v. Kenya, African Comm'n on Human & Peoples' Rts., Comm'n No. 276/2003, ¶ 204 (2009) ("The jurisprudence under international law bestows the right of ownership rather than mere access . . . if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.").

140. See UNDRIP, *supra* note 127, art. 32; see also ILA INTERIM REPORT, *supra* note 134, at 21 (expressing that while the extent of indigenous peoples' rights over natural resources remains contested under international law, "the rights of indigenous peoples over the said resources are strongly reinforced by the fact that the latter usually represent an essential element of these peoples' cultural identity"); 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*, 22 ARIZ. J. INT'L & COMP. L. 7, 7 (2005) (analyzing the "extent and content of the duty of consultation owed to indigenous peoples" based on their substantive land rights); Miranda, *supra* note 117, at 150–52 (providing a synthesis of indigenous peoples' land and resource rights under international law).

141. See INTERIM ILA REPORT, *supra* note 134, at 21 ("[I]ndigenous peoples' lands, territories and resources [in UNDRIP] must be interpreted broadly, consistently with [indigenous peoples'] own understanding of the whole of the symbolic space in which a particular indigenous culture has developed, including not only the land but

indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs . . . .”<sup>142</sup> Furthermore, several articles of UNDRIP that reference the land and resource rights of indigenous peoples draw a specific link between the protection of indigenous peoples’ traditional land and resources and the preservation of indigenous communal identity and culture. For example, Article 8 links indigenous peoples’ right not to be subject to the destruction of their culture to the provision by states of effective mechanisms “for prevention of, and redress for: [a]ny action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources.”<sup>143</sup> Article 25 makes the relationship between indigenous peoples’ rights to land and resources and cultural preservation clear: “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>144</sup> Article 26 specifically delineates the rights of indigenous peoples to their land and resources: subsection (1) expresses the general right of indigenous peoples to lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired in the past, while subsection (2) expresses their right to own, use, develop, and control the lands, territories and resources they possess currently.<sup>145</sup> As a means of additionally recognizing the potentially different uses of land and resources when tied to cultural preservation, Article 32 of UNDRIP reaffirms indigenous peoples’ right to chart their own “priorities and strategies” with respect to the “development or use of their lands or territories and other resources.”<sup>146</sup> Notably, the interim report of the International Law Association Committee on the Rights of Indigenous Peoples (ILA), which interprets the substantive scope and applicability of UNDRIP, specifically emphasizes the grounding of indigenous peoples’ rights over land and resources upon the preservation of culture.<sup>147</sup>

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also the sacred landscape that corresponds to their world view.”(internal quotation marks omitted)).

142. See UNDRIP, *supra* note 127, pmbl.

143. See *id.* art. 8.

144. See *id.* art. 25.

145. *Id.* art. 26; see also ILA INTERIM REPORT, *supra* note 134, at 22.

146. UNDRIP, *supra* note 127, art. 32.

147. ILA INTERIM REPORT, *supra* note 134, at 20–24 (elaborating upon the key provisions of UNDRIP that delineate indigenous peoples’ rights to lands and resources with multiple references to the preservation of communal identity and culture). For an analysis of the “dark sides” produced by the “reification of indigenous culture” in

Additionally, the Inter-American Commission and Court have had an active docket of cases that implicate the claims of indigenous peoples over their traditional land and resources in the specific context of state resource development projects. Significantly, these cases showcase state arguments that explicitly or implicitly rely on the international doctrine of permanent sovereignty over natural resources to deny accusations of human rights violations.<sup>148</sup> They also illustrate how indigenous peoples ground their claims to ownership, occupancy, use, control, and development of their traditional land and resources in the preservation of communal identity and culture. The decisions of the Inter-American human rights bodies ultimately draw a clear link between the recognition of indigenous peoples' substantive rights to own, use, occupy, control, and develop their traditional land and resources and the cultural survival of indigenous communities.

There are several cases that have come before the Inter-American Commission and Court related to indigenous peoples' claims in the context of state development projects. Each of these cases engages human rights precepts found in either the American Declaration on the Rights and Duties of Man (American Declaration) or in the American Convention on Human Rights (American Convention), particularly the human right to property,<sup>149</sup> to allocate land and natural resources between the state and the indigenous peoples at issue.<sup>150</sup> In this context, human rights operate to allocate

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advocacy efforts on behalf of indigenous peoples, see KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY 1* (2010).

148. See e.g., *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 118 (Nov. 28, 2007) (discussing Suriname's argument that all rights to land, particularly its subsoil natural resources, are vested in the state, which can freely dispose of these resources in concessions to third parties); *Kichwa Peoples of Sarayaku Cmty. v. Ecuador*, Case 167/03, Inter-Am. Comm'n H.R., Report No. 64/04, OEA/Ser.L.V/II.122, doc. 5 rev. 1 ¶ 38 (2004) (noting Ecuador's argument that "the [granting of an] oil concession is a State decision governed by the constitutional principle of public domain over natural resources of the subsoil, and that the contract legally entered into with the [oil company] constitutes an act doctrinally known as an act of administrative concession through which the State authorizes private parties to carry out certain activities that, in principle, are under its purview" (emphasis omitted)).

149. Organization of American States [OAS], American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. 23 (July 18, 1978), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 17 (1992).

150. Indigenous peoples have also brought claims related to their land and resources pursuant to multiple articles in the American Declaration on the Rights and Duties of Man and multiple articles in the American Convention on Human Rights. Nevertheless, in the cases that deal with violations of indigenous peoples land and resource rights in the context of natural resource development projects, the Commission and Court have grounded their determinations in significant part on the

land and resources to indigenous peoples on, primarily, the basis of cultural preservation.<sup>151</sup>

For example, in *Yanomami Peoples v. Brazil*, one of the first cases before the Inter-American Commission to frame issues of natural resource exploitation as violations of indigenous peoples' human rights, the Commission acknowledged the potential link between state natural resource development projects and the destruction of indigenous communal identity and culture.<sup>152</sup> In concluding that Brazil violated the human rights of the Yanomami peoples under the American Declaration by approving a plan of exploitation and development of vast natural resources in the Amazon, the Commission considered, in part, that "after the discovery in 1976 of ores of tin and other metals in the region where the Yanomamis live, serious conflicts arose that led to acts of violence . . . affect[ing] the lives, security, health, and cultural integrity of the Yanomamis."<sup>153</sup> In the subsequent case of *Maya Indigenous Community v. Belize*, the Commission also concluded that the state of Belize had violated the Maya's human rights under the American Declaration by granting logging and oil concessions to corporate actors on land encompassing the Maya peoples' traditional territory.<sup>154</sup> It supported its decision by emphasizing "the distinct nature of the right to property as it applies to indigenous people, whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural, and spiritual vitality."<sup>155</sup> With regard to the human rights to property and equality, the Commission noted that "[f]or indigenous people, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."<sup>156</sup>

Finally, in the seminal case of *Awes Tingni Community v. Nicaragua*, the Inter-American Court determined that the state of Nicaragua had violated the human rights of the Awes Tingni peoples under the American Convention by granting a logging license to a Korean multinational company on the Awes Tingni's traditional

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interpretation of the right to property common to both human rights documents. See Miranda, *supra* note 114, at 433–44.

151. *Id.* 428–29; see also Brunner, *supra* note 18, at 704–05 ("For the Inter-American Court, a community's relationship with the land and the degree to which that relationship has given rise to a unique culture seems to be the basis for distinguishing indigenous and tribal peoples from other minority groups.")

152. *Yanomami Peoples v. Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 ¶ 7 (1985).

153. *Id.* ¶ 10(d).

154. *Maya Indigenous Cmty. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶¶ 192–96 (2004).

155. *Id.* ¶ 155.

156. *Id.*

lands.<sup>157</sup> In reaching its decision, the Court reaffirmed that “[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”<sup>158</sup> The Court further elaborated that “[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>159</sup>

The decision of the Inter-American Court in *Awes Tingni* opened the door for further claims by indigenous communities in the Americas facing a similar dilemma: affronts to the ownership, occupancy, use, control, and development of their land and natural resources in the context of state natural resource development projects. In the progeny of cases following *Awes Tingni*, the Commission and Court have continued to ground the apportioning role of human rights precepts on indigenous peoples’ unique relationship to their traditional land and resources. In *Saramaka Peoples v. Suriname*, the Inter-American Court determined that the state of Suriname had violated the rights of the Saramaka peoples by granting logging and mining concessions to foreign companies on land traditionally occupied by the Saramaka clan.<sup>160</sup> The Court specifically noted that:

[I]n analyzing whether restrictions on the property rights of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.<sup>161</sup>

In the subsequent case of *Kichwa Peoples of the Sarayaku Community v. Ecuador*, the Inter-American Commission asserted in its application to the Inter-American Court that the state of Ecuador had violated the rights of the Kichwa peoples by allowing the incursion of an oil company onto Sarayaku ancestral land.<sup>162</sup> The Commission also reaffirmed its long-standing position on the recognition of indigenous peoples’ land and resource rights by

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157. *Mayagna (Sumo) Awes Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001).

158. *Id.* ¶ 149.

159. *Id.*

160. *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 214 (Nov. 28, 2007).

161. *Id.* ¶ 128.

162. *Kichwa Peoples of the Sarayaku Cmty. v. Ecuador*, Application, Case 12.465, Inter-Am. Comm’n H.R., ¶ 1 (2010).

alluding to key excerpts in prior opinions that link such rights to cultural preservation.<sup>163</sup> In additional cases addressing similar allocation issues beyond the context of natural resource development projects, the Commission and Court have reiterated the significance of indigenous peoples' cultural attachment.<sup>164</sup>

The role of international human rights law in the intrastate allocation of land and resources to historically marginalized communities other than indigenous peoples and tribal groups has received less attention.<sup>165</sup> This is particularly noteworthy given that many state natural resource development projects affect the interests of multiple communities that may also bear indicia of marginalization, including ethnic minorities, landless communities, and the rural poor. While some of the cases decided by the Inter-American Commission and Court that deal with indigenous land rights issues make passing references to some of these groups, none explicitly discuss the potentially legitimate human rights claims of such groups against the state. Nevertheless, the continuously evolving human rights jurisprudence regarding the land and resource rights of indigenous peoples signals the potential for a more expansive role of human rights precepts in issues of intrastate allocation.

For example, in the *Saramaka Peoples* case, the Inter-American Commission and Court had to first determine the legal identity of the community alleging human rights violations before reaching a

163. *Id.* ¶¶ 102–05.

164. See *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 86 (Aug. 24, 2010) (“[T]he close relationships that the indigenous people maintain with the land must be recognized and understood as the essential basis of their cultures, their spiritual life, their integrity, and their economic survival.”).

165. See Juliet Hooker, *Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America*, 37 J. LATIN AM. STUD. 1, 1 (2005) (analyzing the reasons why indigenous groups have been more successful than Afro-Latino groups in gaining recognition of collective rights); DELEGATION ON AFRO-BRAZILIAN LAND RIGHTS, RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, BETWEEN THE LAW AND THEIR LAND: AFRO-BRAZILIAN QUILOMBO COMMUNITIES' STRUGGLE FOR LAND RIGHTS (2008), available at [http://www.utexas.edu/law/centers/humanrights/projects\\_and\\_publications/brazil-report.pdf](http://www.utexas.edu/law/centers/humanrights/projects_and_publications/brazil-report.pdf) (reporting on Brazil's Quilombo population's present situation and their historical struggle for land rights); DELEGATION ON AFRO-ECUADORIAN LAND RIGHTS, RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, FORGOTTEN TERRITORIES, UNREALIZED RIGHTS: RURAL AFRO-ECUADORIANS AND THEIR FIGHT FOR LAND, EQUALITY, AND SECURITY (2009), available at [http://www.utexas.edu/law/centers/humanrights/projects\\_and\\_publications/Ecuador%20Report%20English.pdf](http://www.utexas.edu/law/centers/humanrights/projects_and_publications/Ecuador%20Report%20English.pdf) (providing an overview of Afro-Ecuadorians' struggle for land rights); RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, UNFULFILLED PROMISES AND PERSISTENT OBSTACLES TO THE REALIZATION OF THE RIGHTS OF AFRO-COLOMBIANS (2007), available at [http://www.utexas.edu/law/centers/humanrights/projects\\_and\\_publications/colombia-report.pdf](http://www.utexas.edu/law/centers/humanrights/projects_and_publications/colombia-report.pdf) (providing an overview of the situation of Afro-Colombians and the progress made toward the recognition of collective property rights).

decision on the merits.<sup>166</sup> The complexity of this issue stems from the history of the Saramaka in the territory. The Saramaka did not constitute native inhabitants; rather, they were descendants of African slaves who escaped colonial Dutch rulers and formed a distinctive community.<sup>167</sup> Because the jurisprudence of the Commission and Court ties land and resource rights to indigeneity or tribal identity, the Saramaka needed to constitute a tribal community in order to be granted “special measures that guarantee the full exercise of their rights.”<sup>168</sup> The Saramaka argued that they shared characteristics with indigenous communities, such as social, economic, and cultural norms that distinguished them from the national community.<sup>169</sup> They further claimed that their communal identity was inextricably tied to their ancestral territory, with which they bore a significant cultural and spiritual relationship.<sup>170</sup> In reaching the conclusion that the Saramaka peoples comprise a tribal community, the Court stressed that the Saramaka share distinct social, economic, and cultural characteristics, including a special relationship with their ancestral territories “that require special measures under international human rights law in order to guarantee their physical and cultural survival.”<sup>171</sup>

The African Commission on Human and Peoples’ Rights also addressed the question of who constitutes a “peoples” entitled to benefit from the human rights protection of the African Charter on Human and Peoples Rights. Such protection not only includes a right to property,<sup>172</sup> but also a specific right of peoples to free disposition of their natural resources<sup>173</sup> and a right to development.<sup>174</sup> In the case of *Centre for Minority Rights Development v. Kenya*, the African Commission had to address the state of Kenya’s argument that the Endorois did not constitute an indigenous peoples entitled to the collective rights granted by the African Charter.<sup>175</sup> The African Commission admitted to the difficulty of articulating an absolute

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166. *Saramaka Peoples*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 78.

167. *Id.* ¶ 80.

168. *Id.* ¶ 85.

169. *Id.* ¶ 79.

170. *Id.* ¶ 82.

171. *Id.* ¶ 86; *see also* *Moiwana Vill. v. Suriname*, Judgment, Inter-Am Ct. H.R. (ser. C) No. 124, ¶¶ 129–35 (June 15, 2005) (recognizing that the Moiwana peoples do not constitute an indigenous community, but rather constitute descendants of African slaves who nevertheless bear a right to property under Article 21 of the American Convention on Human Rights given their unique and enduring cultural, spiritual, and subsistence ties to the territory at issue).

172. African Charter on Human and Peoples’ Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217.

173. *Id.* art. 21.

174. *Id.* art. 22.

175. *Ctr. for Minority Rights Dev. v. Kenya*, African Comm’n on Human & Peoples’ Rts., Commc’n No. 276/2003, ¶ 145 (2009).



meaning of “peoples,” while recognizing that “[w]hat is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such group expresses its desire to be identified as a people or have the consciousness that they are a people.”<sup>176</sup> Ultimately, the Commission concluded, *inter alia*, that the Endorois’ rights as a people to free disposition of their natural resources as well as their right to development had been violated.<sup>177</sup>

In sum, human rights jurisprudence that addresses the land and resource rights of indigenous communities and Afro-descendant groups generally emphasizes the unique and enduring cultural relationship of peoples to their territory. Where peoples can demonstrate a cultural relationship to land and resources, human rights precepts may ultimately perform an intrastate distributive role. The community at issue may benefit from the distributive role of human rights vis-à-vis other groups, the national polity, and the state.

#### *B. Procedural Land and Resource Rights of Indigenous Peoples and Other Historically Marginalized Communities*

Indigenous peoples’ procedural right to prior informed consultation or consent in the context of state natural resource development projects also has its genesis in the nondiscriminatory application of general human rights precepts. The recognition of indigenous peoples’ right to prior informed consultation functions as a corollary to indigenous peoples’ substantive rights to own, occupy, use, and control their traditional land and resources. It serves a gate-keeping function in the context of state development projects by requiring governments to engage in a meaningful dialogue and consensus-building process with indigenous communities that would bear the impacts of the project.<sup>178</sup>

176. *Id.* ¶¶ 147–51.

177. *Id.* ¶¶ 255, 268 (reaffirming the Commission’s jurisprudence in the *Ogoni* case, which made “clear that a people inhabiting a specific region within a state could also claim under Article 21 [right to free disposition of natural resources] of the African Charter”).

178. See Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 69 (2008) (“[E]xtractive industries can tackle the underlying causes of the growing opposition to their projects in the developing world by engaging in consent processes with communities and groups directly affected by projects with a view to obtaining their free prior and informed consent.”); McGee, *supra* note 18, at 571 (“The requirement that indigenous peoples provide FPIC to any development on their lands is an internationally recognized, but controversial, human right.”); Cesar Rodriguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEGAL STUD. 263, 263 (2011)

At a minimum, indigenous peoples bear a right to prior meaningful consultation when a state government seeks to engage in a development project that implicates traditional land and natural resources.<sup>179</sup> While it is clear that indigenous peoples are at a minimum entitled to a process of prior, meaningful consultation, there is some evidence that international law supports a heightened norm of prior informed consent with respect to large-scale state development projects.<sup>180</sup> The important distinction is that while prior, meaningful consultation arguably enables indigenous peoples to play a significant participatory role in the management of their land and resources, it may not be tantamount to the right to veto activity upon their lands.<sup>181</sup>

UNDRIP alludes to the link between indigenous peoples' right to prior consultation, control over development, and cultural survival. Pursuant to Article 32(1), indigenous peoples bear a right to "determine and develop priorities and strategies for the development or use of their lands and resources."<sup>182</sup> Article 32(2) suggests that such right to control their own development is in part a function of states' duty to engage indigenous communities in consultation with the aim of achieving their free and informed consent "prior to the approval of any project affecting [indigenous peoples'] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."<sup>183</sup> Attempting to elaborate upon the contentious issue of

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("[L]egal disputes over prior consultation are part of a broader process of juridification of ethnic claims . . .").

179. See UNDRIP, *supra* note 127, art. 32; see also Int'l Labor Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, arts. 7, 13–15, ILO Convention C169 (June 27, 1989).

180. *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007); see generally Workshop on Free, Prior and Informed Consent, New York, N.Y., Jan. 17–19, 2005, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, U.N. Doc. PFII/2004/WS.2/8 (by Parshuram Tamang) (providing an overview of indigenous peoples' right to prior informed consent).

181. See Miranda, *supra* note 117, at 150–52 (providing a synthesis of indigenous peoples' substantive and procedural land and resource rights, including the right to prior consultation); see also Laplante & Spears, *supra* note 178, at 92 (discussing the challenges to implementation of free, prior, and informed consent); Pasqualucci, *supra* note 138, at 89–90 (noting that the Inter-American Court of Human Rights has not recognized indigenous' communities veto power and only requires informed consent for "large-scale development or investment projects that would have a major impact" on indigenous land); Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EUR. J. INT'L L. 165, 169 (2011) ("While specialized instruments generally recognize the right of indigenous peoples to be consulted in relation to matters affecting them, ambiguities persist over whether indigenous land rights encompass a right to veto decisions regarding development projects which are likely to affect indigenous traditional lands and resources.").

182. UNDRIP, *supra* note 127, art. 32.

183. *Id.*

competing claims by indigenous peoples and states to natural resources, the ILA Interim Report notes that “the language used, and meaning of, Article 32(2) is controversial” and also notes “[t]he linguistic opacity over whether indigenous peoples’ consent is always absolutely necessary before proceeding to resource projects.”<sup>184</sup> The Report, upon surveying the development of jurisprudence on this issue, concludes that “all consultation should be undertaken with the objective of obtaining indigenous peoples’ free, prior and informed consent and that, especially in cases of large-scale development or investment projects that would have a major impact on indigenous peoples’ territories, consent is necessary.”<sup>185</sup> The specific reference in UNDRIP to the right of prior consultation in the context of natural resource exploitation, and the further elaboration of such right by the ILA in the context of large-scale development or investment projects, is suggestive of the particularly costly consequences of such projects on the way of life of many indigenous communities.

Additionally, the Inter-American Commission and Court have elaborated upon indigenous peoples’ right to prior informed consultation and consent in the context of natural resource development projects. Similar to the recognition of indigenous peoples’ substantive land and resource rights, the Inter-American bodies’ recognition of the right to prior, informed consultation is also heavily grounded in the protection of communal identity and cultural survival. The right itself, furthermore, has been elaborated upon with cognizance of indigenous peoples’ own cultural approaches to information-sharing, consultation, and decision making. Significantly, in the *Saramaka Peoples* case, the Inter-American Court noted that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”<sup>186</sup> While the Court acknowledged that the State may grant concessions for the exploration and extraction of natural resources, it emphasized that it must do so with adequate participatory and other safeguards so as to “ensure their survival as a tribal people.”<sup>187</sup> Similarly, the Inter-American Commission’s application to the Inter-American Court in the *Kichwa Peoples* case<sup>188</sup>

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184. ILA INTERIM REPORT, *supra* note 134, at 24.

185. *Id.*

186. *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007).

187. *Id.* ¶ 129.

188. *Kichwa Peoples of the Sarayaku Cmty. v. Ecuador*, Application, Case 12.465, Inter-Am. Comm’n H.R., ¶ 1 (2010).

elaborated upon the contours of prior, informed consultation. The application asserted that:

[I]n cases of activities done by or under the authorization of the State—through, for example, bidding processes or concessions—that would have a meaningful impact in the use and enjoyment of such right, it is necessary that States ensure that the affected indigenous people have information regarding the activities that would affect them.<sup>189</sup>

The Commission noted that indigenous peoples must be afforded “the possibility of participating in the different processes to take decisions” as well as adequate “judicial protection and guarantees.”<sup>190</sup>

The aim of this gate-keeping right is to enable indigenous peoples to protect their substantive land rights, which in turn are related to the preservation of communal identity and culture. Even more, the right of indigenous peoples to free, prior and informed consultation in the context of a state development project challenges the orthodox state-based developmental model. It promotes the notion that states must engage particularly vulnerable communities of peoples in decision making regarding development in accordance with peoples’ cultural sensitivities and in promotion of peoples’ cultural preservation.

#### IV. INTRASTATE NATURAL RESOURCE ALLOCATION AND GOOD GOVERNANCE

Obviating a “sovereignty” approach or a “human rights” approach, developments under international initiatives geared at greater transparency in state development projects also play a role in the intrastate allocation of land and natural resources. Transparency initiatives certainly play a more indirect role through the promotion of transparency and accountability in natural resource development projects and the presumed “trickle down” of economic benefits.

For example, the Extractive Industries Transparency Initiative (EITI) is a civil society initiative that aims to strengthen governance by improving transparency and accountability in the extractives sector through the disclosure of government revenues.<sup>191</sup> One of the guiding principles of this initiative is that “the prudent use of natural

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189. *Id.* ¶ 121.

190. *Id.*

191. *EITI Principles and Criteria*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/eiti/principles> (last visited Apr. 1, 2012) (providing a concise statement of the aims of the initiative); see also PAUL D. OCHEJE, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI): VOLUNTARY CODES OF CONDUCT, POVERTY AND ACCOUNTABILITY IN AFRICA (2006), available at [http://www.jsd-africa.com/Jsda/Fall2006/PDF/Arc\\_the%20Extractive%20Industries%20Transparency%20Initiative.pdf](http://www.jsd-africa.com/Jsda/Fall2006/PDF/Arc_the%20Extractive%20Industries%20Transparency%20Initiative.pdf) (examining the EITI).

resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.”<sup>192</sup> The initiative relies primarily on a multi-stakeholder process whereby governments, corporate actors, civil society, and nongovernmental organizations contribute to a scheme of disclosure for payments issued to governments in relation with oil, gas, and mining revenues.<sup>193</sup> It is mainly geared at remediating the “resource curse”: the notion that resource-rich countries that lack transparency and accountability in government facilitate elite capture or corruption of resources, and are thus unable to trickle down the economic gains from resource development. While not bearing the imprimatur of binding authority, EITI is considered a “soft law” voluntary code of conduct for the management of natural resource wealth.

States implement EITI criteria by ultimately publishing all oil, gas, and mining payments from companies to governments as well as all material revenues received by such companies.<sup>194</sup> The state’s role in implementing EITI has been articulated as a three-step process involving initiation, implementation, and review.<sup>195</sup> Through this initiative, historically marginalized communities are represented within the rubric of “civil society.” The initiative provides the opportunity for civil society to actively engage in the “design, monitoring and evaluation” of the state disclosure scheme.<sup>196</sup>

While EITI is not directly tied to the doctrinal evolution of international law regarding natural resource allocation, it is nevertheless part of the broader picture regarding the role of international law in addressing the impacts of natural resource development projects on historically marginalized communities. It charts an alternative vision for global efforts at dealing with distributive issues associated with natural resource investment projects. Rather than responding to the claims of historically marginalized communities through a reassignment of rights bearers and duty-holders and a reinterpretation of rights, this approach suggests a regulatory solution. Such a regulatory solution implicitly supports the notion of state permanent sovereignty over natural

192. *EITI Principles and Criteria*, *supra* note 191.

193. *See id.* (“[I]n seeking solutions . . . all stakeholders have important and relevant contributions to make—including governments and their agencies, extractive industry companies, service companies, multilateral organizations, financial organizations, investors, and non-governmental organizations.”).

194. *See id.*

195. *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, SOURCE BOOK 10 (2005), available at <http://eiti.org/files/document/sourcebookmarch05.pdf>.

196. *EITI Principles and Criteria*, *supra* note 191.

resources and simply attempts to reform the state into a good governance model that may facilitate greater distributional equity.<sup>197</sup>

#### V. INTRASTATE NATURAL RESOURCE ALLOCATION AND THE DEVELOPMENT OF PEOPLES

Indisputably, there is a link between ownership of land and resources, the ability to chart the means and goals of development, and the potential to benefit from development. A state's engagement in a natural resource development project is premised on the state's ownership of the resources at issue. The revenues produced by such project are meant to foster the state's goals of economic and social growth, which arguably encompasses the well-being of historically marginalized communities.

It is evident that state natural resource development projects raise myriad issues related to entitlement and allocation. Where one local community claims rights to land and resources at the site of the development project, then the issue is one of entitlement and allocation to that community vis-à-vis the broader national polity and the state. Even more complex scenarios, however, involve project sites where multiple historically marginalized communities depend on the land and resources and claim potentially competing rights vis-à-vis each other in addition to the national citizenry and the state.

The three emerging approaches to intrastate natural resource allocation identified and analyzed in this Article signal an evolution in international law away from absolute state sovereignty over land and natural resources. Indeed, these approaches carve away at the notion of a state's unqualified authority to freely dispose of land and natural resources within its territory. Consequently, they challenge the orthodox top-down model of development, which prioritizes the state as the ultimate decision maker in charting a development strategy without permeating the abstraction of the "state" to account for the distinct and particularly vulnerable position of historically marginalized communities. Rather, these approaches emphasize two potentially alternative models of development: (1) a state-based model of development premised on state reformation through greater transparency, accountability, and the participatory engagement of civil society; or (2) a more local, peoples-based model of development premised on an intrastate community's direct decision-making authority regarding the goals and means of their collective well-being and growth. Ultimately, as international law continues to evolve in

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197. See *id.* ("[M]anagement of natural resource wealth for the benefit of a country's citizens is the domain of sovereign governments to be exercised in the interest of their national development.").

response to the seeming failure of an orthodox state-centered model of development to address issues of economic and social subordination for historically marginalized communities, further analysis is merited regarding these alternative models.

#### A. *Natural Resource Allocation Beyond State Sovereignty*

An interpretation of the doctrine of permanent sovereignty over natural resources that locates ownership, access to, and control over land and natural resources in the state affirms the orthodox state-based model of development. In effect, it puts faith in the ideology that the state, through the commercialization of its natural resource base or through large-scale infrastructure projects, will promote economic development. It then follows that the state, through a presumed “trickle down” of national economic gains, will enable the development of all communities, including those that have been subject to historical marginalization.

The emerging approaches under international law that impact the intrastate allocation of natural resources implicitly recognize the inability of states to distribute the benefits of such a state-centric model of development to historically marginalized communities in a consistent and equitable manner. This model of development is problematic with respect to distributional outcomes toward marginalized communities for two primary reasons: (1) the “state” has the potential to be captured by government elites,<sup>198</sup> and (2) the

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198. See Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 171, 214–15 (2008) (stating that the principle of permanent sovereignty over natural resources “has produced a concentration of the resource-based wealth in the hands of the political elites controlling state apparatuses, obscuring any assessment of the internal sharing among different groups”); Macartan Humphreys et al., *Introduction: What Is the Problem with Natural Resource Wealth?*, in ESCAPING THE RESOURCE CURSE 13 (Macartan Humphreys et al. eds., 2007) (“If oil and gas wealth accrues to political leaders simply by virtue of the fact that they maintain nominal control of a state, this increases the incentives of nonstate actors to attempt to capture the state in order to benefit from the resource wealth, often through the use of violence.”); Susan Rose-Ackerman, *Corruption and Post-Conflict Peace-Building*, 34 OHIO N.U. L. REV. 405, 407 (2008) (“State ‘capture’ implies that the state itself can be characterized as largely serving the interests of a narrow group of businessmen and politicians, sometimes involving criminal elements. Even if the influential group changes with the government, most of the citizens are left out. In post-conflict settings, the elite are frequently able to capture the political and economic benefits of reconstruction. If the elite can maintain their power base throughout the post-conflict period, they can position themselves to benefit because there are no other credible sources of power and institutional constraints remain weakened.”); Luke A. Whittemore, *Intervention and Post-Conflict Natural Resource Governance: Lessons from Liberia*, 17 MINN. J. INT'L L. 387, 392 (2008) (“[Natural resource] scarcity

“state” is capable of repeating patterns of historical subordination.<sup>199</sup> The emerging approaches are aimed at rectifying that reality in the context of natural resource extraction projects by either: (1) facilitating greater state transparency, accountability, and participatory efforts; or (2) reassigning rights bearers and duty-holders.

Each of the three emerging approaches—grounded in distinct discourses of sovereignty, human rights, and good governance—possess a distributional analysis. They each address, from an international law perspective, who is vested with the authority to freely dispose of land and natural resources within the territorial boundaries of a state, and derivatively, who is entitled to decide upon a particular development strategy. A reformulated sovereignty approach, grounded in the discourse of permanent sovereignty over natural resources, affirms the sovereignty of peoples to dispose freely of natural resources. However, such affirmation is more commensurate with the retention of ultimate decision-making power in the state alongside the imposition of government duties to execute such authority for the well-being of the national polity, including distinctive communities such as indigenous peoples.<sup>200</sup> A human rights approach, grounded in the discourse of peoples’ human dignity, acknowledges the procedural and substantive land and resource rights of identity groups who can demonstrate a cultural attachment to the land and resources at issue. The recognition of procedural land and resource rights that hinge on consultation rather than consent

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encourages powerful groups—elites—within a society to ‘capture’ resources, therefore marginalizing others in the process . . .”).

199. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999) (discussing the relationship between colonialism and international law); Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT’L L. & POL. 243, 245–46 (2000) (“Issues of racial superiority, cultural subordination, and economic exploitation played an extraordinarily prominent role in shaping the relationship between international law and colonialism . . . [C]onsiderable evidence suggests that globalization intensifies inequalities both within and between states and that, on the whole, it further undermines the precarious position of the poorest and most vulnerable, the vast majority of whom live in third world countries.”); Tayyab Mahmud, *Cluster Introduction: Space, Subordination, and Political Subjects*, 8 SEATTLE J. FOR SOC. JUST. 15, 15 (2009) (“A linear, progressive, and Eurocentric history is modernity’s primary frame of reference for experiencing time and constituting social orders. Due to its constitutive role, this schema has profound implications for the study of agents and structures of subordination and resistance.”); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 841 (2000) (“[T]he rules of ‘international governance’ have been exposed anew as inequitable, oppressive, destructive and highly hierarchically ordered by race.”); Saito, *supra* note 25, at 4 (“[R]ather than remedy[ing] past mistakes and injustices . . . the programs initiated by the most powerful states and their leaders have ignored the history of colonialism, thereby precluding substantive analyses of structural inequities.”).

200. See *supra* Part II.B.



are more commensurate with the retention of ultimate decision-making authority in the state alongside the participatory efforts of the affected identity group.<sup>201</sup> However, the recognition of substantive land and resource rights mark a more significant shift in ultimate decision-making authority from the state to the community at issue. A regulatory approach, grounded in the discourse of good governance, continues to vest ultimate decision-making authority in the state with the potential for state reformation.<sup>202</sup>

Accordingly, the emerging approaches under international law to the intrastate allocation of land and natural resources pose a challenge to the orthodox state-based model of development. While the emerging sovereignty approach, human rights approach based on the procedural land and resource rights of peoples, and good governance approach support a model of development that continues to vest ultimate decision-making authority in the state, they each signal a marked shift from an emphasis on state rights to state duties. These emerging approaches suggest the potential of historically marginalized communities to benefit from greater distributive outcomes where the state bears duties of transparency, accountability and participatory engagement throughout the development process. Nevertheless, the emerging human rights approach, grounded on the substantive land and resource rights of peoples, arguably supports a more significant departure from an orthodox state developmental model. To the extent that intrastate communities of peoples may collectively exercise substantive rights of ownership, occupancy, use, and control over land and natural resources, then they may bear a greater decision-making role regarding the direction of their own development.

*B. Natural Resource Allocation Based on Peoples' Human Rights: Toward a Peoples-Based Model of Development?*

International law scholars recognize a link between human rights and development through the promotion of a human right to development.<sup>203</sup> While the scope of a human right to development is

201. See *supra* Part III.B.

202. See *supra* Part IV.

203. See Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 7 (1988) (reviewing the status of the right to development by examining specific objections to it); Philip Alston, *The Shortcomings of a "Garfield the Cat" Approach to the Right to Development*, 15 CAL. W. INT'L L.J. 510, 511 (1985) (arguing that a few "characteristics which we perceive to be unpleasant" should not deter further exploration of the right to development and appreciation of its good points); Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1030 (2001) ("One may speak of a 'right to development' which is intrinsic to human rights, because, without development, human

broad enough to encompass the human rights approach to natural resource allocation, the latter more clearly supports an alternative peoples-based model of development. The human right to development challenges the orthodox model of state development premised exclusively on the growth of the economy and indicated primarily by GDP gains.<sup>204</sup> While the human right to development does promote an alternative vision of development premised on the growth of human capabilities—indicated by gains in the overall well-being of the collectivity of individuals and groups in a state—it nevertheless continues to emphasize a model of development that retains the primacy of the state in planning and implementation.<sup>205</sup> However, the jurisprudence underlying a human rights approach to natural resource allocation based on substantive land and resource rights presents a more robust challenge to the primacy of the state in development. In this way, the human rights approach to natural resource allocation pushes beyond the boundaries of a human right to

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rights cannot be realized.”); Ved. P. Nanda, *The Right to Development Under International Law: Challenges Ahead*, 15 CAL. W. INT’L L.J. 431, 440 (1985) (“The inquiry . . . should be focused on the function of the existing institutions, norms and procedures of international law toward the implementation of development goals even though theoretical refinements have yet to find a consensus.”); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 J. MARSHALL L. REV. 235 (1991) (arguing that the articulation and application of the “Human Right to Development” should play a central role in the efforts to create accountability for those who engage in certain activities in the name of development); Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 889 (2002) (“A program for realizing the right to development should not be seen as ignoring the policies of stability and sustainability of economic growth with efficient allocation of resources. Instead, it builds on those policies to channel the economic activities . . . to realize all the human rights and fundamental freedoms.”); Arjun Sengupta, *Realizing the Right to Development*, 31 DEV. & CHANGE 553, 553–78 (2000) (reviewing the nature and content of the right to development); N.J. Udombana, *The Third World and the Right to Development: Agenda for the New Millennium*, 22 HUM. RTS. Q. 753, 786 (2000) (arguing that Third World countries “have primary responsibility for their own economic and social development” while developed countries have a special responsibility “to create a global economic environment favorable to accelerated and sustainable development”). *But see* Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT’L L.J. 473, 507 (1985) (“My only conclusion is that misguided optimists and cynical opportunists alike have been caught up in the pleasing rhetoric of the right to development.”); Jack Donnelly, *The Theology of the Right to Development: A Reply to Alston*, 15 CAL. W. INT’L L.J. 519, 519 (1985) (presenting a critique of Alston’s major points).

204. See MARGOT E. SALOMON & ARJUN SENGUPTA, *THE RIGHT TO DEVELOPMENT: OBLIGATIONS OF STATES AND THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES* 6 (Minority Rights Grp. Int’l ed., 2003) (“[T]he human development approach added value to the conventional economic growth approach by replacing GDP growth with human development indicators such as the provisions of food, health, education, nutrition, gender parities and employment, as measurements of development.”).

205. See *id.* at 13 (“While minorities and indigenous peoples are considered as groups, the policies for their development should be designed as sub-plans of a national programme for development . . .”).

development and more clearly supports a local and direct peoples-based model of development.

More specifically, a human right to development recognizes that development constitutes a comprehensive “economic, social, cultural, and political process” aimed at improving the “well-being of the entire population and of all individuals.”<sup>206</sup> It vests in “every human person” and “all peoples” the right to participate in and enjoy “economic, social, cultural, and political development” wherein “all human rights and fundamental freedoms can be fully realized.”<sup>207</sup> Indeed, the right to development emphasizes human rights in two interrelated veins: the process (means) of development and outcomes (ends) of development. It accounts for a process, at least in theory, that observes human rights principles of nondiscrimination, transparency, accountability, and democratic engagement, by incorporating the meaningful participation of individuals and groups, including indigenous and other marginalized peoples.<sup>208</sup> It further envisions the ultimate outcome of development as the integrated realization of all human rights and fundamental freedoms, including those group rights that have been recognized for indigenous peoples and minorities.<sup>209</sup> Ultimately, the objective of the human right to development has been characterized as “the expansion of capabilities or freedoms of people to realize what they value.”<sup>210</sup>

Nevertheless, the human right to development continues to prioritize the state, as this entity remains at the helm of the development process and its execution. Such right is commensurate with the state’s decision-making authority over designing both the process of development, albeit subject to the duty of observing human rights principles in the engagement of civil society, and the outcomes of development, albeit with a duty to account for the integrated realization of all recognized human rights and fundamental freedoms.<sup>211</sup> It posits that a nondiscriminatory, transparent,

206. Declaration on the Right to Development, G.A. Res. 41/128, pmbl. para. 2, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). The Declaration on the Right to Development, subsequently reaffirmed in the 1993 Vienna Declaration, provides in the preamble that “development is a comprehensive economic, social, cultural, and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” *Id.*

207. *Id.* art. 1(1); see also SALOMON & SENGUPTA, *supra* note 204, at 4 (providing that the right to development has been understood to entail a “process of development” in which “all human rights are considered as an integrated whole in both the *process* and *outcomes* of development” (emphasis added)).

208. SALOMON & SENGUPTA, *supra* note 204, at 18.

209. *Id.* at 6–8.

210. *Id.* at 4.

211. *Id.* (proposing that the definition of development as a human right “recognizes individuals and peoples as rights-holders” and “also recognizes states,

accountable, and democratically engaged state aiming at the integrated realization of all human rights and fundamental freedoms is ultimately capable of increasing the “capabilities and freedoms of people to realize what they value.” Such proposition has been the subject of much jurisprudential discussion and debate from various angles, with passionate endorsers and critics.<sup>212</sup> In particular, the full realization of all human rights and freedoms as an end goal of development, while laudable in theory, remains plagued by challenges in practice.

While one strand of the human rights approach to natural resource allocation continues to prioritize the state in development, the other supports a more local and direct peoples-based model of development. As elaborated upon in Part III, human rights precepts have come to play a significant role in intrastate natural resource allocation between the state and peoples, particularly indigenous peoples.<sup>213</sup> In that context, human rights precepts serve as a platform for two types of land and resource rights: procedural and substantive.<sup>214</sup> Where the procedural right to prior, informed consultation short of consent is implicated, then it simply recognizes a state duty to account for the participation of indigenous peoples in the execution of a natural resource development project.<sup>215</sup> For example, in cases where the state claims ownership of a subsurface resource, then decision-making authority over the means and goals of such resource development remains with the state but with a duty to account for the participatory role of affected communities of indigenous peoples. Therefore, the recognition of peoples’ procedural right to prior, informed consultation is commensurate with the “process” aspect of the human rights approach to development.

On the other hand, where a peoples’ substantive right to ownership, occupancy, use, and development of land and resources is implicated, there is a significant challenge to the primacy of the state in development. In such context, there is arguably a greater shift in decision-making authority over the means and goals of development from the state to the peoples involved. Indeed, there is a difference between the vesting of procedural participatory rights with respect to land and resources and the vesting of substantive rights. For example, in cases where indigenous peoples are deemed to bear rights

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acting at the national level and cooperating at the international level, as duty-bearers”).

212. *Id.* (“With equal passion the legitimacy of a right to development has been both challenged and endorsed over the past decades.”).

213. *See supra* Part III.

214. *See supra* Part III.

215. *See* U.N. General Assembly, *Vienna Declaration and Programme of Action*, ¶ 20, U.N. Doc. A/CONF.157/23 (July 12, 1993) (recognizing the “inherent dignity” and “unique contribution of indigenous people to . . . development”).

of ownership, occupancy, use, and development of their land and resources, there is a shift in focus from state duties accounting for their participatory engagement to indigenous peoples' increased empowerment in charting their own collective well-being and growth. To the extent that indigenous peoples possess substantive ownership rights over their land and resources, then they have greater decision-making authority over the means and outcomes of development tied to the management and use of such land and resources. Accordingly, the emerging human rights approach to natural resource allocation based on substantive land and resource rights supports an alternative, local, and more direct peoples-based model of development. To the extent that the substantive land and resource rights of peoples are recognized within the human right to development through the integrated realization of all human rights and fundamental freedoms, they inevitably present a tension and challenge to the primacy of the state in the human right to development.

To the extent that international law continues to promote a state-based model of development, even in the context of a presumably "reformed" state with duties of nondiscrimination, transparency, accountability, and participatory engagement—the empowerment of historically marginalized communities may not be forcefully affirmed. For example, if processes of prior consultation are devoid of truly meaningful dialogue aimed at consensus-building, or are outright co-opted, then international law may serve the rather nefarious role of providing an imprimatur of legitimacy on state development processes while negating true distributive gains to historically marginalized peoples.

On the whole, a human rights approach to natural resource allocation grounded in substantive land and resource rights perhaps provides a more effective model for handling some of the nuances and distributional complexities of natural resource development projects. Still, there are several unresolved issues regarding the development of a human rights approach to land and natural resource allocation grounded in substantive land and resource rights, including: (1) the potential recognition of collective land and resource rights of communities other than indigenous peoples (such as ethnic or racial minorities, subsistence farmers, etc.), and (2) the legal bases for recognizing the land and resource rights of such communities.

The existing jurisprudence underlying the human rights approach to natural resource allocation fails to account for the more complex intrastate distributional concern implicating a range of communities with disparate developmental goals that may simultaneously suffer from varying forms of socio-economic subordination. Indeed, the recognition of indigenous peoples' substantive land and resource rights are premised to a significant

degree on indigenous peoples' distinctive cultural attachment to their ancestral land and resources. Accordingly, the potential for human rights to allocate land and resources directly to other historically marginalized communities, and thereby provide such communities with a more immediate and direct platform for charting their own development, may be limited.

Perhaps a human rights approach that explicitly engages land and natural resource allocation from a broader normative basis, and thereby provides a means of translating the legitimate interests of multiple marginalized communities into recognizable rights, offers a starting point for navigating the complex distributional dynamics of natural resource development projects. A human rights approach that (1) recognizes the particular tensions inherent in state-building and state-development by previously colonized territories, (2) identifies historical injustices tied to colonization or other continuing forms of socio-economic subordination of intrastate marginalized communities, and (3) performs an analysis of distribution based on broader notions of human dignity (whether tied to cultural survival or economic subsistence) may be better able to address the detrimental consequences of natural resource and large-scale infrastructure development projects that impact multiple marginalized communities in a given locality.

Of course, on the other hand, a human rights approach to natural resource allocation may be viewed as lacking the necessary local grounding to reconcile the potentially legitimate claims of multiple local communities. It may also be problematic to the extent that universal principles of human dignity were simply not designed to account for the historical complexity of colonization. Furthermore, the potentially heightened empowerment of historically marginalized communities that may result from a human rights approach to natural resource allocation may create confusion and discord, and potentially augment the possibility of violence. If the state is no longer at the helm of ultimate decision making in development, then autonomous communities may seek to reaffirm their distinctive attributes vis-à-vis each other and the national polity as a means of increasing empowerment and benefitting from greater distributive gains.

For example, how does a human rights approach to natural resource allocation based on substantive land and resource rights apply in the context of the Belo Monte Dam project? Under international human rights jurisprudence, indigenous communities whose identity and culture are inextricably tied to the land and resources at issue may be able to claim substantive land and resource rights over portions of the designated area for the project. In effect, such jurisprudence could operate to allocate substantive rights over land and resources implicated in the dam project to such indigenous communities vis-à-vis other local communities, the national polity,

and the state apparatus. Accordingly, under international law, these communities would bear a potentially heightened position of power in the execution of the development project. Through the recognition of their ownership and control of designated land and resources, they would be better able to design the goals and means of their communal development, which might be at odds with the comprehensive dam building project. While the state, of course, could object to such opposition and use its coercive power to override the recognition of such allocation, it would have to do so under the cloud of a human rights violation. What is missing in this application, however, is a comprehensive analysis of the relationship between, on the one hand, the allocation of land and natural resources and, on the other hand, the consequences of colonization and the observance of human dignity. How does human rights account for the particular tensions inherent in the state-building efforts of Brazil, a previously colonized territory? How does human rights factor historical injustices tied to colonization or other continuing forms of socio-economic subordination affecting Afro-descendant groups and rural, poor communities in Brazil? Should human rights perform an analysis of distribution based on broader notions of human dignity, whether tied to cultural survival or economic subsistence?

Ultimately, the important point is that legal scholars and activists concerned with the status and rights of historically marginalized communities over land and natural resources, particularly at the site of state natural resource development projects, need to recognize the significant infiltration and evolution of international law. In particular, there must be a recognition that there is an emerging human rights approach to intrastate natural resource allocation that while perhaps promising in its potential to lead to greater developmental gains for marginalized communities, is nevertheless nascent in its theoretical and doctrinal scope. Part of the task ahead is determining whether concepts of universal human dignity may be more broadly engaged as a justification, and measuring tool for, intrastate natural resource allocation. Can the human rights regime, through its recent evolution regarding the land and resource rights of historically marginalized communities, serve as a terrain for incremental shifts in power and wealth distribution? Or, is the human rights regime inherently incapable of facilitating such a formidable task? Worse yet, is it merely a tool in furthering states' continuing patterns of historical subordination?

## VI. CONCLUSION

In sum, international law has evolved to impact the intrastate allocation of land and natural resources. The three emerging

approaches to intrastate natural resource allocation signal a significant turning point in the evolution of international law. These emerging approaches address, explicitly or implicitly, a distributional concern regarding the gains of development projects for historically marginalized communities. First, these approaches indicate a continued move away from the notion of absolute state sovereignty over land and natural resources within a state's territorial boundaries. Second, they challenge the orthodox top-down, state-based model of development, and thereby support alternative models of development. Third, the emerging human rights approach based on substantive land and resource rights that hinges on a community's significant collective cultural attachment supports a more direct peoples-based model of development.

An analysis and comparative evaluation of these international law approaches sheds light on the potential means of alleviating the detrimental consequences of development projects for historically marginalized communities. In particular, as the emerging human rights approach to substantive land and resource rights continues to evolve, its theoretical justification, doctrinal contours, and practical impact must be further examined. This approach supports a peoples-based model of development potentially capable of more readily alleviating conditions of inequity and continued subordination for historically marginalized communities. However, as presently articulated, it does not effectively acknowledge or deal with the distributional concern in its most complex manifestation: the simultaneous legitimate interests of multiple historically marginalized communities (suffering from either vestiges of colonization, socio-economic subordination, or cultural domination) to the land and natural resources at issue vis-à-vis state development efforts.

Ultimately, as notions of absolute state sovereignty over land and natural resources continue to be challenged by the claims of subordinated intrastate communities seeking to exercise their human dignity, the international legal landscape has the potential to undergo further significant changes. Indeed, in the continued quest for social justice to historically marginalized communities, international law cannot be discounted.