

# THE RIGHT TO FREELY DISPOSE OF NATURAL RESOURCES: Utopia or Forgotten Right?

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## *Abstract*

*Control, ownership and exploitation of high value natural resources have often led to two types of situations: conflicts and extreme poverty. Very little legal analysis has been undertaken of the elementary issue of ownership and control of natural resources. Legally, control over natural resources is traditionally one of the attributes of State sovereignty, but under human rights law it is also a right of peoples. Despite being a key aspect of the human rights approach to self-determination affirmed in Article 1 of the two International Covenants, the right to freely dispose of natural resources has been largely absent from human rights litigation and advocacy, and has usually escaped any practical implementation. This article examines the potential offered by the affirmation of the right of peoples to freely dispose of their natural resources and calls for its revival by arguing that by being a key human rights of peoples, such a right offers some strong legal tools to ensure that States exercise their sovereignty over natural resources with some form of accountability.*

**Keywords:** environment; indigenous peoples; investments; natural resources; peoples; self-determination

## 1. INTRODUCTION

Being endowed with natural resources should be a synonym for wealth and development, however recently natural resources have been labelled a 'curse'. The 'resource curse' denotes the paradox under which regions, or countries, rich in raw natural resources have a tendency to be less economically developed than other

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countries with fewer natural resources.<sup>1</sup> Also labelled ‘the paradox of plenty’,<sup>2</sup> the ‘resource curse’ specifically concerns countries with high value non-renewable resources like minerals and fuels, and which tend to have less economic growth and worse development outcomes than countries with fewer natural resources. There is also a correlation between abundance of high value natural resources and conflicts.<sup>3</sup> Most of the recent conflicts have had a strong connection between exploitation, natural resources and violence.<sup>4</sup> The link between natural resources and conflicts is so deeply entrenched that such conflicts have been labelled ‘resource wars’.<sup>5</sup> At the heart of such conflicts, the fight to gain control over natural resources is either a goal in itself or a way to fuel the conflict in providing resources to support the war effort.<sup>6</sup> The fight to control natural resources has resulted in conflicts between national authorities and regional factions (Biafra, Cabinda, Katanga) or more general civil wars (Democratic Republic of Congo and Sudan).<sup>7</sup> Overall, control, ownership and exploitation of high value natural resources have often led to two types of situations: conflicts and extreme poverty.

Very little legal analysis has been undertaken on the elementary issue of ownership and control of natural resources. Legally, control over natural resources is traditionally one of the attributes of State sovereignty,<sup>8</sup> but under human rights law it is also an issue of peoples’ rights. The right of peoples to freely dispose of their natural resources is affirmed in common Article 1 of the two International Covenants. It affirms that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic

<sup>1</sup> Richard Auty, *Sustaining Development In Mineral Economics: The Resource Curse Thesis* (Routledge 1993); Jeffrey Sachs and Andrew Warner, ‘The Curse of Natural Resources’ (2001) 45 *European Economic Review* 827–38.

<sup>2</sup> See: Terry Lynn Karl, *The Paradox Of Plenty: Oil Booms And Petro-States* (University of California Press 1997).

<sup>3</sup> Paul Collier and Anke Hoeffler, ‘On Economic Causes of Civil War’ (1998) 50 *Oxford Economic Papers* 563; Paul Collier and Anke Hoeffler, ‘Greed and Grievance in Civil War’, Working Paper WPS 2000–18 (World Bank 2001); Paul Le Billon, ‘The Political Ecology of War: Natural Resources and Armed Conflict’ (2001) 20 *Political Geography* 561.

<sup>4</sup> See: Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (World Bank 2003); Paul Le Billon, *Geopolitics of Resource Wars: Resource Dependence, Governance and Violence* (Routledge 2005).

<sup>5</sup> See: Michael Klare, *Resource Wars: The New Landscape Of Global Conflict* (Henry Holt and Company 2002); Christa N. Brunnschweiler and Erwin H. Bulte, ‘Natural Resources and Violent Conflict: Resource Abundance, Dependence, and the onset of Civil Wars’ (2009) 61 *Oxf. Econ. Pap.* 651, 674.

<sup>6</sup> See: Paul Le Billon, *Fuelling War* (Routledge 2005).

<sup>7</sup> See: N. Shaxson, *Poisoned Wells: The Dirty Politics of African Oil* (Palgrave Macmillan 2008).

<sup>8</sup> See: George Elian, *The Principle of Sovereignty over Natural Resources* (Sijthoff & Noordhoff 1979); James N. Hyde, ‘Permanent Sovereignty over Natural Wealth and Resources’ (1956) 50 (4) *AJIL* 854, 867; Karol Gess, ‘Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis’ (1964) 13 *ICLQ* 398, 449; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008).

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>9</sup>

Despite such prominence within international human rights law, the right of peoples to freely dispose of their natural resources has been remarkably inconsequential in legal jurisprudence. Parallel to this legal insignificance, the issue of control over natural resources is increasingly becoming a rallying cry for many people around the world.<sup>10</sup> Most peoples not only do not participate, or benefit from the exploitation of their natural resources, but in several situations the exploitation of the natural resources has expressly gone against their interests and fundamental human rights.

This article aims at analysing to what extent the right of peoples to freely dispose of their natural resources could serve as a platform for people to reclaim their fundamental right to benefit from the exploitation of their own natural resources and not suffer from the 'curse' of such resources. To undertake such analysis the article is divided into three main parts. The first part focuses on the emergence of a right for peoples to freely dispose of their natural resources under international law. As examined, there is a fundamental dichotomy in international law when it comes to control over natural resources since two legal personalities are entitled to some form of control over the resources: States and peoples. This dichotomy is the result of the development of two branches of international law that focus on different actors but address the same right: the right to dispose of the natural resources. The first part asks whether human rights affirmation of the right for peoples to freely dispose of their natural resources is not an 'utopian' ideal that is ultimately overshadowed by the principle of State sovereignty over the same natural resources.

The second part of the article examines how the issue of natural resources has become a central normative argument for the rights of indigenous peoples and for the rights of peoples to have access to food and water (subsistence rights). In analysing the current articulation of the right of peoples to freely dispose of their natural resources, it asks why such a right is becoming 'restricted' in its current interpretation regarding its scope, as in recent years it is mainly indigenous peoples who have managed to claim such a right and not all peoples. Similarly in relation to its content, it has become a right mainly associated with access to water and food and not all natural resources. Despite the importance of such developments, the article examines why a right, which was granted to all peoples over all natural resources, has become restricted in its application.

<sup>9</sup> International Covenant on Civil and Political Rights, Article 1, (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights, Article 1, (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.

<sup>10</sup> See: Peter Newell and Joanna Wheeler (eds), *Rights, Resources and the Politics of Accountability* (Zed Books 2006).

The third part examines to what extent the right of peoples to freely dispose of their natural resources has been ‘forgotten’, or side-tracked, within the development of other expanding branches of international law. International investment law has been one of the most prolific areas of international law in recent years; arguably this is partly due to the expansion of international regulatory frameworks on investment treaties regarding the exploitation of natural resources.<sup>11</sup> The article explores to what extent the right of peoples to freely dispose of their natural resources could, or should, potentially play an important legal role in future disputes over investments involving natural resources. Likewise, recent developments regarding international environmental law are bringing a new angle to the issue of control over natural resources. International environmental law is witnessing the emergence of new regulations to restrict the use of remaining natural resources with the aim of preserving these resources. Under the new regulatory frameworks, key natural resources are becoming part of a global market that is externally controlled. In this arena of trading and control of natural resources, little, if any, attention is dedicated to the right of the local population to freely dispose of their natural resources. The article examines to what extent such a fundamental human right has been predominately absent in the development of a new international legal framework regulating the trading and preservation of natural resources.

## 2. UTOPIA: STATES VERSUS PEOPLES?

The issue of control over natural resources predominately emerged from two spheres of international law that developed principally during the 1960’s; the post-colonial agenda for a new international economic order that put the emphasis on State sovereignty over natural resources, and decolonisation and human rights law supporting the rights of peoples to reclaim control over their natural resources. This ‘double birth’ gives rise to a very ambiguous discourse under international law as to who the rights holders are (States or peoples) and leading to further opacity over its normative content. The following analysis examines to what extent the principle of sovereignty over natural resources overshadowed the emergence of a human rights-based approach to the right of peoples to control their natural resources. It then explores how this start created an ambiguous discourse on the exercise of the rights of peoples to freely dispose of their natural resources.

<sup>11</sup> See: M. Sornarajah, *The International Law on Foreign Investment* (3<sup>rd</sup> edn, Cambridge University Press 2010); Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights and The Environment: A Perspective From South Asia on the Role of Public International Law For Development* (Brill 2007); Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2<sup>nd</sup> edn, Hart 2012).

## 2.1. SOVEREIGNTY OVER NATURAL RESOURCES: THE AMBIGUOUS DISCOURSE

Traditionally under public international law, the issue of control over natural resources falls under the category of sovereignty rights.<sup>12</sup> More precisely, territorial sovereignty conventionally includes the ownership and control over natural resources.<sup>13</sup> However, it was not until the 1950s that the issue of control over natural resources received more focused attention. One of the first international resolutions on the issue was adopted in 1952 and concerned “the right to exploit freely natural wealth and resources.”<sup>14</sup> The issue of sovereignty over natural resources then became a focal point with the adoption of a General Assembly resolution in 1958, which established the Commission on Permanent Sovereignty over Natural Resources.<sup>15</sup> Its mandate was to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination.<sup>16</sup>

In the following years, the movement for decolonisation provided a strong platform for the development of international law on the issue of control over natural resources. Exploitation and control of natural resources having been central to colonisation, it was only logical that it also became vital to the decolonisation movement.<sup>17</sup> This renewed focus on sovereignty over natural resources aimed at ensuring that peoples that had lived under colonial exploitation could now gain their rights to benefit from the exploitation of the resources found within their territories.<sup>18</sup>

Probably the clearest expression of the close relationship between decolonisation and control over natural resources was expressed in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. The declaration marked an important step in the affirmation by the newly independent States of their rights to take full control over their natural resources. Its preamble affirms “that 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

<sup>12</sup> For an in depth analysis, see: Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008).

<sup>13</sup> See: Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 376–90.

<sup>14</sup> UNGA Res 626 (VII) (21 December 1951). See: James Hyde, ‘Permanent Sovereignty over Natural Wealth and Resources’ (1956) 50 AJIL 854.

<sup>15</sup> UNGA Res 1314 (XIII) (12 December 1958).

<sup>16</sup> The initial proposed resolution was entitled ‘Recommendations concerning international respect for the rights of peoples and nations to self-determination’.

<sup>17</sup> On this point, see: Eric Hobsbawm, *The Age of Empire: 1875–1914* (Abacus 1989).

<sup>18</sup> See: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); see also: Karol Gess, ‘Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis’ (1964) 13 International & Comparative Law Quarterly 398–449.

upon the principle of mutual benefit, and international law.”<sup>19</sup> Again it is peoples, not States, that have the right to freely dispose of their natural resources.

However, another Resolution entitled “Concerted action for Economic Development of the Less Developed Countries” was adopted on the same day and invited States to respect the “sovereign rights of every State to dispose of its wealth and its natural resources.”<sup>20</sup> Hence, two resolutions of the General Assembly adopted on the very same day put forward the need to respect sovereignty over natural resources, but in one resolution peoples are the subjects while in the other States are. This ambiguity as to who are the subjects and rights holders of the rights to natural resources was to remain a central feature in the development of a right to control natural resources.

Two years later, in 1962, the General Assembly adopted resolution 1803 (XVII) entitled “Permanent Sovereignty over Natural Resources.”<sup>21</sup> The preamble declares that “any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States.” The preamble also notes that: “the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence.” Based on such premises, paragraph 1 states:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.<sup>22</sup>

This introduced the idea that the interest of the people might be a limitation to States’ sovereignty over natural resources. Probably one of the most important elements of the 1962 resolution was the affirmation that States, including colonial States, have to exercise their sovereignty over natural resources “in the interest of the national development and of the well-being of the people.” As Cassese spells out in his book on self-determination: “Given that the people of every sovereign State have a permanent right to choose by whom they are governed, it is only logical that they should have the right to demand that the chosen central authorities exploit the territory’s natural resources so as to benefit the people.”<sup>23</sup>

<sup>19</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res.1514 (14 December 1960), preamble.

<sup>20</sup> UNGA Res 1515 (XV) (15 December 1960), para 5.

<sup>21</sup> The resolution was adopted on 14 December 14 1962 by 87 votes against 2 (France and South Africa) with 12 abstentions.

<sup>22</sup> Permanent Sovereignty over Natural Resources, UNGA res 1803 (XVII) (14 December 1962), para 1.

<sup>23</sup> Antonio Cassese, *Self-determination of Peoples: a Legal Reappraisal* (Cambridge University Press 1999) 59.

The affirmation of the principle of sovereignty over natural resources was further established under the emergence of a 'New International Economic Order'. The issue of sovereignty over natural resources became central to the development of international economic law during the 1970s. In the 1974 Declaration on the Establishment of a New International Economic Order the issue of sovereignty over natural resources was seen as being a central principle for the establishment of the new international economic order. The declaration affirmed that the new economic order should be founded on full respect for the "full permanent sovereignty of every State over its natural resources and all economic activities."<sup>24</sup> Likewise, Article 2 of the Charter of Economic Rights and Duties of States reads: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."<sup>25</sup> Under the new economic order, the emphasis was on the affirmation of States' sovereignty over their natural resources and the need to allow all States to enjoy such sovereignty.

The principle of States' sovereignty over their natural resources is also encapsulated in various international treaties, such as the 1978 Vienna Convention on Succession of States in Respect of Treaties,<sup>26</sup> the 1982 Convention on the Law of the Sea,<sup>27</sup> the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debt,<sup>28</sup> and the 1993 Convention on Biological Diversity.<sup>29</sup> Overall, under public international law the principle of States' permanent sovereignty over their natural resources is a well-established principle affirmed in more than eighty resolutions and instruments of different bodies of the United Nations. Recently, the International Court of Justice (ICJ), in its 2005 ruling in the case between Uganda and the DRC, reiterated that permanent sovereignty over natural resources is a principle of customary international law.<sup>30</sup> One of the main features of all the different resolutions, declarations and treaties mentioning, or focusing on natural resources, is the assertion that States enjoy an absolute sovereignty over their natural resources.<sup>31</sup>

<sup>24</sup> Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (1 May 1974) UN Doc A/RES/S-6/3201, para 4(e).

<sup>25</sup> Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/29/3281, art 2.

<sup>26</sup> Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 17 ILM 1488, see art 13.

<sup>27</sup> Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, see arts 56, 193.

<sup>28</sup> Vienna Convention on Succession of States in Respect of State Property, Archives and Debt (adopted 8 April 1983, not yet in force) 25 ILM 1640, see art 38(2).

<sup>29</sup> Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 143, art 15.

<sup>30</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 116, para 244.

<sup>31</sup> One of the only limitation concern the respect for foreign investments, this is discussed in section 3 of this article. On this issue, see: A. Akinsanya, *Expropriation of Multinational Property in the Third World* (Praeger 1980).



Within this framework, States are clearly the holder of such a right, with the only constraint that they should exercise such a right to support the well-being of their own peoples. However, it would be wrong to stop the analysis here, as in parallel to the affirmation of a principle of sovereignty over natural resources for States, the issue of control over natural resources has also been developed as a right for peoples under another branch of international law, namely human rights law.

## 2.2. PEOPLES' RIGHTS OVER NATURAL RESOURCES: AN AMBIGUOUS RIGHT

In international human rights law the issue of control over natural resources was given a prominent place by being inscribed in Article 1 of the two international Covenants. With common Article 1(2), control over natural resources became a central aspect of the exercise and enjoyment of peoples' right to self-determination. The fact that article 1 of the two Covenants puts forward the same right to self-determination deserves to be highlighted. It is the only common article building a bridge on the divide between civil and political rights and economic, social and cultural rights. It is also the first article of some of the first binding international treaties on human rights.<sup>32</sup> This position cannot be brushed aside. Classically, Article 1 on self-determination is often understood as being divided: in paragraph 1 focusing on the so-called 'political' aspect of self-determination; and in paragraph 2 focusing on the 'economic' aspect of self-determination. This dichotomy is not only erroneous as paragraph 1 includes political, economic and social development, but it also fails to capture the central importance given to the issue of control over natural resources. Paragraph 2 is very specific to control over natural resources, which clearly is one aspect of economic development, but only partially since 'economic self-determination' is much broader and should include all other aspects of economic development covered in the first paragraph. The inaccurate partition that sees paragraph 1 as the political aspect of self-determination and paragraph 2 as its economic wing, has more to do with the historical division between civil and political rights and economic, social and cultural rights, a divide that was not reproduced in article 1 which is common to both Covenants. In many ways, the correct label given to paragraph 2 should be 'natural resources self-determination'.

Beyond the purely semantic aspect, what matters is that under Article 1 the distinction is not between political and economic self-determination but rather the emphasis is on the specificity of control over natural resources, which is set aside in a distinct paragraph. This specificity of control over natural resources, or the resources aspect of self-determination, shows how this issue is significant and specific. One might also add that it shows how the two Covenants are ground-breaking regarding the comprehension of self-determination, which encompasses the right of peoples to

<sup>32</sup> See also the fact that only India and Bangladesh have made a reservation regarding the scope of Article 1 (limited to foreign occupation).



freely dispose of their natural resources. Under the current global economic system, which is so focused on the exploitation of natural resources, this fundamental aspect of self-determination is undeniably meaningful.

To understand the extent to which the article is far reaching, it is necessary to go back to its drafting history.<sup>33</sup> Originally, the reference to natural resources was integrated into paragraph 3 of draft Article 1 to the two Covenants. It read:

The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.<sup>34</sup>

The proposed draft faced strong opposition from most of the Western industrialised States. As noted by Nowak in his commentary on the ICCPR, the wording of this draft article introduced by Chile “was heavily amended to the point that its legal meaning has become extremely unclear.”<sup>35</sup> Two principle issues became the centre of deliberation during the drafting process.

The first issue concerned the insertion of the notion of ‘permanent sovereignty’ in an article concerning peoples’ rights, not States. Hence the first objection to the drafting of this paragraph was a pragmatic one as it highlighted that including ‘permanent sovereignty’ was itself a contradiction since international law was already asserting that States exercised permanent sovereignty over natural resources, not peoples. As highlighted earlier, States’ right to permanent sovereignty over their natural resources was becoming a strong principle of international law, being given prominence in several UN declarations and resolutions throughout the 1960s. However, on the other side of the spectrum it was argued that the right to self-determination and the concept of permanent sovereignty over natural resources should reflect “the simple and elementary principle that a nation or people should be master of its own natural wealth or resources.”<sup>36</sup> Ultimately the reference to ‘permanent sovereignty’ was removed. In the trade off, the reference to the fact that peoples “shall” have a right to self-determination over their natural resources was changed to the more positive affirmation that peoples “have” such a right, making the right much more undeviating.

The second issue of concern related to the scope of the right to self-determination. Several States saw the inclusion of a right to permanent sovereignty for peoples as

<sup>33</sup> See UNCHR, UN Doc. E/CN.4/SR.256–257; UN Doc. E/CN.4/L.24; and Official Records of the General Assembly, Ninth Session, Third Committee, 567<sup>th</sup>, 568<sup>th</sup>, 573<sup>rd</sup> and 576<sup>th</sup> meetings.

<sup>34</sup> See: UNGA, “Annotations on the text of the draft International Covenants on Human Rights”, UN Doc.A/2929 (1955), p. 15, at para 19.

<sup>35</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, (Engel 1993) 24; see also: Manfred Nowak, *UN Covenant On Civil And Political Rights. CCPR Commentary*, (2<sup>nd</sup> edn, Engel 2005).

<sup>36</sup> UNGA: “Annotations on the text of the draft International Covenants on Human Rights”, UN Doc.A/2929 (1955), p. 15, para 21.

‘dangerous’, since “it would sanction unwarranted expropriation or confiscation of foreign property and would subject international agreements and arrangements to unilateral renunciation.”<sup>37</sup> This concern resulted in the insertion of two major limitations to peoples’ right over natural resources: such a right should not impair or conflict with international treaties that aim at promoting international economic cooperation; and it may not violate international norms protecting the rights of foreign investors. The issue of protecting foreign investments was seen as particularly important. It was emphasized that the right to self-determination “was not intended to frighten off foreign investment by a threat of expropriation or confiscation; it was intended rather to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence.”<sup>38</sup> Regarding foreign investments, the drafting history of Article 1(2) shows that the aim of the drafters was dual – to ensure that the expropriation or nationalisation of foreign investments would be adequately protected and compensated, and that such a right would not undermine foreign investments.<sup>39</sup>

The introduction of a restriction to self-determination to protect foreign investment engendered a much larger debate on the potential limitations to peoples’ right to control their own natural resources. As noted:

It was feared that States might invoke allegedly acquired rights in order to thwart the implementation of the right of peoples to self-determination and to the control of their natural resources. Concepts such as public order or prevention of disorder, which were open to broad interpretations, might easily nullify the whole concept of self-determination.<sup>40</sup>

In general, the limitations added to the right to self-determination over natural resources were seen as a potential Pandora’s box that could open the opportunity for States to seriously undermine peoples’ rights. As a result, an additional provision was added to each of the Covenants. Article 47 of the ICCPR and article 25 of the ICESCR further stipulate that: “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.” Hence, when focusing on the rights of peoples to freely dispose of their natural resources it is necessary to look beyond common article 1, as this right is also re-affirmed in other articles of the two Covenants, making it one of the few human rights to be stipulated twice in the same instrument. As Cassese notes,

<sup>37</sup> Ibid, para 20.

<sup>38</sup> Ibid.

<sup>39</sup> See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1999) 56.

<sup>40</sup> UNGA: “Annotations on the text of the draft International Covenants on Human Rights”, UN Doc.A/2929 (1955), p. 25, para 52.

these provisions were inserted in the Covenants much later than article 1(2) and were aimed at ‘rectifying’ it.<sup>41</sup>

As an illustration, during the debate that led to the adoption of article 25 of the ICESCR, the delegate from Ethiopia highlighted that one of the rationales to include such an article was the effort of “underdeveloped countries to seek to protect their resources against the imperialist powers which sought to exploit them under the cloak of technical assistance or international economic co-operation.”<sup>42</sup> This statement echoes the position of several other countries supporting the inclusion of article 25, which viewed the restrictions on the rights of peoples to dispose of their own natural resources as a way of ensuring the continuous economic exploitation of such resources. Fourteen States introduced the new draft article after article 1 had already been adopted.<sup>43</sup> The drafting of this article raised huge debates in the Third Committee of the General Assembly. Several States opposed the introduction of the article stressing that it would run against the content of article 1, with the representative of the United Kingdom highlighting “that the proposed article created an internal contradiction within the Covenant, which would render the Covenant impossible of interpretation.”<sup>44</sup> In the end, the article was adopted with 75 votes in favour, four against and 20 abstentions.<sup>45</sup> The equivalent article 46 of the ICCPR was adopted the following month in November 1966, with less discussion following the prior adoption of article 25 of the ICESCR.

Hence, the two Covenants offer an ambiguous approach regarding peoples’ rights to dispose of their natural resources: it is a qualified right under article 1, and an absolute right under article 25 of the ICESCR and 46 of the ICCPR. From the very beginning, at the drafting stages, the two issues that will haunt the right of peoples to freely dispose of their natural resources were raised; the definition of who are the rights holders (peoples or States) and its limitations, especially when it comes to the protection of foreign investments.

In the development of human rights law, the next step regarding the affirmation of peoples’ right to control their natural resources came with the adoption of the African Charter on Human and Peoples’ Rights.<sup>46</sup> Article 21(1) of the African Charter

<sup>41</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1999) 57. Some authors have even suggested that Article 47 was intended to override Article 1(2).

<sup>42</sup> See: Provisional Summary Record (27 October 1966) UN Doc A/C.3/SR.1405, para 3. See: David Halperin, ‘Human Rights and Natural Resources’ (1968) 9 William and Mary Law Review 770.

<sup>43</sup> Chile, Ghana, Guinea, India, Iran, Iraq, Nepal, Nigeria, Pakistan, Sudan, United Arab Republic, United Republic of Tanzania, Venezuela and Yugoslavia.

<sup>44</sup> Lady Gaitskell, in UNGA: Provisional Summary Record, UN Doc. A/C.3/SR. 1405 (27 October 1966), para 5.

<sup>45</sup> For the list of countries, see: Provisional Summary Record, Document A/C.3/SR. 1405, para 11–12. For a detailed analysis of the process, see: David Halperin, ‘Human Rights and Natural Resources’ (1968) 9 William and Mary Law Review 770.

<sup>46</sup> Neither the European Convention on Human Rights nor the American Convention on Human Rights address the rights of peoples to control their natural resources. For a review of the drafting history of these two conventions and the reason for the non-inclusion of self-determination,

affirms: “All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.” Compared to the language used in the international Covenants, the African Charter put a greater emphasis on the “exclusive interest” of the peoples. This is more far-reaching than the rights of peoples to use their natural resources for their own ends since it puts forward the notion that the interest of the people should be the exclusive driving force behind any use of natural resources.<sup>47</sup> However, the language used in this article creates ambivalence on whether peoples or States are the right holder of the right to self-determination over natural resources. Adding to such ambiguity, paragraph 4 of the same article stipulates: “States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.” Under this phrasing it seems that States are the right holders of a right over natural resources. Kiwanuka sees this as an expression of a State’s duty to act as trustee of their own peoples.<sup>48</sup> While the right is clearly a right that belongs to the people, States are the entities who will ultimately exercise the enjoyment of the right.<sup>49</sup>

More generally, the phrasing used in the African Charter is representative of the general ambivalence regarding the right to freely dispose of natural resources under human rights law. Clearly, with the adoption of the two Covenants and the African Charter, international human rights law supports the claim that the right to freely dispose of natural resources is a right of the people.<sup>50</sup> But at the same time, the human rights framework has not entirely dealt with the controversial issue of how such a right interacts with the international legal principle of States’ sovereignty over their natural resources.<sup>51</sup> While human rights law supports and affirms that peoples are ultimately

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see: Thomas Buergenthal, ‘The American Convention on Human Rights: Illusions and Hopes’ (1971–1972) 21 Buff L Rev 121; Patrick Thornberry, ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’ (1989) 38 ICLQ 867; A. W. Brian Simpson, *Human Rights And The End of Empire: Britain and the Genesis of the European Convention* (rev edn, Oxford University Press 2004).

<sup>47</sup> This right was central in the Ogoni case in which Nigeria was found to have violated Article 21, see: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria*, Communication 155/96 (27 October 2001), paras 55 to 58.

<sup>48</sup> Richard Kiwanuka, ‘The Meaning of Peoples in the African Charter on Human and Peoples’ Rights’ (1988) 82 AJIL 80.

<sup>49</sup> For further discussion see: Peter Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (1999) 21(1) HRQ 80; Natan Lerner, *Group Rights And Discrimination In International Law* (Martinus Nijhoff 2003); Frank Thomas, *The Empowered Self: Law And Society In The Age Of Individualism* (Oxford University Press 2000); Philip Alston (ed.), *Peoples’ Rights* (Oxford University Press 2001).

<sup>50</sup> Note that the American Convention on Human Rights does not address the issue of control of the natural resources (or self-determination) and that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘Protocol of San Salvador’) mentions it only in its preamble.

<sup>51</sup> For an enlightening discussion and analysis on whether the right belongs to the peoples or the states see: E. Duruigbo, ‘Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law’ (2006) 38 Geo Wash Int’l L Rev.

the holders of the right to freely dispose of their natural resources, in practice such a right clashes head-on with the international legal principle of State sovereignty over such resources. This goes to the heart of the fundamental complexity of the international legal system, which has been developed by States and for States, while allowing some room for peoples' and individual rights within the system under the banner of human rights law.

Of all the human rights issues that are directly challenging States' absolute sovereignty over their peoples and territories, control over natural resources probably remains one of the most contentious. Under the contemporary drive to exploit natural resources and the value of such resources, such a claim might even be perceived as utopian. The somewhat imperfect human rights affirmation that people should freely dispose of their natural resources could be seen as idealistic since ultimately governments are *de facto* and *de jure* exercising control over the natural resources.<sup>52</sup> More positively, the affirmation of a right for the people could be seen as a compromise that needed to be reached to articulate the fundamental idea that States should exercise control for the interest of their peoples. From this perspective, the affirmation of a people's right over natural resources creates a restriction to States' sovereignty, namely that States must ensure that their people freely dispose of their natural resources. This compromise remains extremely ambiguous with the affirmation of two rights holders. Nonetheless, human rights law proposes an alternative to the overarching principle of States' permanent sovereignty over natural resources and puts forward the perspective of peoples' fundamental right over their own natural resources. Only the practical implementation of the right of people to freely dispose of their natural resources can guide us on the impact of such an affirmation; the next part of this article delves into the operationalization of such a right.

### 3. A RESTRICTED RIGHT: CONSENT AND SUBSISTENCE

Despite being at the centre of these controversies, the right of peoples to freely dispose of their natural resources has remained a toned-down issue in human rights jurisprudence. Ultimately very few peoples – apart from the failed attempts in Katanga<sup>53</sup>, Biafra<sup>54</sup> and the Western Sahara<sup>55</sup> – have claimed their fundamental

<sup>52</sup> Most of the national laws assert that the State owns the natural resources. See: Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandezet (eds), *International And Comparative Mineral Law And Policy: Trends And Prospects* (Kluwer 2005); Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010).

<sup>53</sup> See: René Lemarchand, 'The Limits of Self-Determination: The Case of the Katanga Secession' (1962) 56(2) *The American Political Science Review*; Thomas Franck and Paul Hoffman, 'The Right to Self-Determination in Very Small Places' (1975–1976) 8 *NYU J Int'l L & Pol* 331, 404–416.

<sup>54</sup> See: David A. Ijalye, 'Was 'Biafra' at Any Time a State in International Law?' (1971) 65 *AJIL* 551; Nayar, M. G. Kaladharan, 'Self-Determination Beyond the Colonial Context: Biafra in Retrospect' (1975) 10 *Tex Int'l L J* 321; Onyeonoro S. Kamanu, 'Secession and the Right of Self-Determination: An OAU Dilemma', (1974) 12 *The Journal Of Modern African Studies* 355.

<sup>55</sup> Hans Morten Haugen, 'The Right to Self-Determination and Natural Resources: The Case of Western Sahara' (2007) 3(1) *Lead Law, Environment And Development Journal* 70; Joshua Castellino,

human rights to freely dispose of their natural resources against State sovereignty. However, in recent years, a peoples' right to freely dispose of their natural resources has been reclaimed and used in two principal contexts. First, this right has been anchored as one of the key rights for indigenous peoples. Second, the right has been summoned in situations where peoples have seen their right to access food and water inhibited. The following analysis, in focusing on these two situations, examines why such a right granted to all peoples has become restricted to specific situations.

### 3.1. INDIGENOUS PEOPLES AND NATURAL RESOURCES: A RIGHT TO CONSENT

Under international law, one of the central claims by indigenous peoples is for the recognition of their fundamental rights over their lands and territories.<sup>56</sup> This territorial claim includes a strong call for the recognition of their rights over the natural resources contained in their ancestral lands. For most indigenous communities the notion of territory includes a collective rights-based approach to the access, disposal and use of the natural resources. This has been captured in the UN study on indigenous peoples' permanent sovereignty over natural resources.<sup>57</sup> The study has notably highlighted that for indigenous peoples, a territorial claim implies the direct enjoyment of their right to self-determination over their natural resources, including the right to freely dispose of such resources. It is within this context of territorial claims that one of the most advanced practical implementations of the right of peoples to freely dispose of their natural resources has taken place. This has been achieved through the practical 'operationalization' of the right to freely dispose of natural resources at two levels.

The first application of indigenous peoples' rights to freely dispose of their natural resources came with the development of a strong legal corpus on the rights of indigenous peoples to their lands. In claiming land rights, indigenous peoples made clear that such a right to the land should include the natural resources contained in the territories. In the words of the Inter-American Court of Human Rights in the Saramaka case against Suriname, indigenous peoples' land rights would be rendered meaningless "if not connected to the natural resources that lie on and within the

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'A Territorial Interpretation of Identity in International Law: The Case of the Western Sahara' (1999) 29 *Millennium Journal Of International Studies* 523; Laurence S. Hanauer, 'The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case', (1995) 9 *Emory Int'l L. Rev.* 133.

<sup>56</sup> See: James Anaya and Robert Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System,' (2001) 14 *Harv Hum Rts J* 33; Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law* (Brill 2007).

<sup>57</sup> UNCHR 'Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes' (13 July 2004) UN Doc E/CN.4/Sub.2/2004/30 and Add.1.

land”.<sup>58</sup> At the international level, the Human Rights Committee has made a direct connection between article 1 (2) of the ICCPR and indigenous peoples’ right to lands.<sup>59</sup> In several of its observations on States reports, the Human Rights Committee has highlighted that in the case of indigenous peoples article 1 comports an obligation to ensure a right for indigenous peoples to control their lands and natural resources.<sup>60</sup> For example, in the case of Norway, the Committee invited the Government to report “on the Saami peoples’ right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”.<sup>61</sup> This aspect of a peoples’ right to dispose of their natural resources is based on the special relationship that indigenous peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples.<sup>62</sup> This represents one of the very few practical implementations of common article 1(2) of the two Covenants within international human rights law jurisprudence.

The second meaningful application of the right of peoples to freely dispose of their natural resources is to be found in the development of the right to free, prior and informed consent. The right to free, prior and informed consent is central to the rights of indigenous peoples and is affirmed in the UN Declaration on the Rights of Indigenous Peoples adopted in 2007. Article 32 of the declaration specifically provides that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

While self-determination over natural resources is not specifically mentioned in this article, the development of the norm of free, prior and informed consent represents a direct application of the right of peoples to freely dispose of their natural resources.

<sup>58</sup> *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007), para 122.

<sup>59</sup> See: Human Rights Committee, *Mahuika et al v New Zealand*, Communication No 547/1993 (27 October 2000) UN Doc A/56/40; Martin Scheinin, ‘The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land’ in Theodore S. Orlin and Martin Scheinin (eds), *The Jurisprudence Of Human Rights: A Comparative Interpretive Approach* (Åbo Akademi University Institute for Human Rights 2000) 198.

<sup>60</sup> Among others see: Human Rights Committee, ‘Concluding observations: Canada’ (7 April 1999) UN Do. CCPR/C/79/Add.105, para 8; and Committee on Economic, Social and Cultural Rights, ‘Concluding observations: Canada’ (10 December 1998) UN Doc E/C.12/1/Add.31, para 18.

<sup>61</sup> Human Rights Committee, ‘Concluding Observations: Norway’ (1999) UN Doc CCPR/C/79/Add.112.

<sup>62</sup> See: *Indigenous Community Sawhoyamaya v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006), para 118; *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005), para 137.



The establishment of a right to free, prior and informed consent before the exploitation of any natural resources contained on indigenous territory constitutes a concrete application of the right to freely dispose of natural resources.<sup>63</sup> The notion of consent is pivotal to the idea of a right for peoples to freely dispose of their natural resources. The interconnection between control over natural resources and consent is also strongly established within the jurisprudence. In a case concerning a Maya community in Belize, the Inter-American Commission recognised that the authorities had violated the rights of the community to property by allowing the exploitation of timber and oil on their ancestral lands.<sup>64</sup> The Commission highlighted that the exploitation of the resources contained on the lands of the indigenous community would require the fully informed consent of the community, which requires “at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”<sup>65</sup> This approach was echoed in the African Commission on Human and Peoples’ Rights decision in the case of the Endorois community of Kenya.<sup>66</sup> In this case the African Commission found Kenya in violation of article 21 of the African Charter affirming peoples’ right to freely dispose of their natural resources for not having undertaken proper consultation with the concerned indigenous community and not having obtained their consent.<sup>67</sup>

To summarise, in the context of indigenous peoples’ rights, the rights of peoples over their own natural resources has embraced two incarnations: as a right to use and enjoy the natural resources that lie within their traditional territories; and as a right to give or withhold their consent to any exploitation, exploration and extraction of natural resources in such territories. This calls for two main comments. First, while the emergence of a right to consent before the exploitation of the natural resources is certainly a positive development that underlines that peoples should be in control of the way in which their natural resources are used, it nonetheless represent a restricted application of that control. Strictly speaking, this does not constitute a full right to freely dispose of the natural resources but a right to consent when someone else undertakes such disposal. In other words, States maintain their absolute control over the natural resources, but when exploitation of these resources is taking place on indigenous territories they have to

<sup>63</sup> See: Cathal Doyle and Jérémie Gilbert, ‘Indigenous Peoples and Globalization: From “Development Aggression” to “Self-Determined Development”’ (2009) 8 *European Yearbook of Minority Issues* 219–262.

<sup>64</sup> *Maya Indigenous Community of the Toledo District v Belize*, Inter-American Commission on Human Rights Case 12.053 Report No 40/04 (2004), Doc OEA/Ser.L/V/II.122 Doc. 5, rev. 1, para 117 (2004).

<sup>65</sup> *Ibid.*, 142.

<sup>66</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003 (2010) African Commission on Human and Peoples’ Rights, (hereinafter: Endorois Case). The decision was adopted by the African Commission in May 2009 and approved by the African Union at its January 2010 meeting.

<sup>67</sup> See: Jérémie Gilbert, ‘Indigenous Peoples’ Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples’ Rights’ (2011) 60 *ICLQ* 37.

obtain the consent of the indigenous communities before undertaking any exploitation. In this context, the application of the right of peoples to freely dispose of their natural resources is limited to a post-facto situation, when other actors decide on the use of the natural resources. The promise contained in the affirmation that peoples should freely dispose of their natural resources is only partially realised when the authorities decide on the exploitation of the natural resources and seek the consent of the peoples affected; the idea that people should freely decide on the use is not yet attained. Nonetheless, it is certain that the emergence of consent as a practical application of the right to self-determination over natural resources is a significant breakthrough.

The second comment relates to the scope of the application of the right to freely dispose of natural resources. This incarnation of the right over natural resources is limited to indigenous peoples only. It is because indigenous communities have a special attachment to their ancestral lands and are especially marginalised that they have a specific right to free, prior and informed consent. While clearly this is justified due to the nature of indigenous communities' attachment to the land, it nonetheless raises questions as to the application of the right to freely dispose of natural resources as it applies to other communities. This restricted application raises a danger of compartmentalisation of human rights law under which only specific peoples – indigenous peoples – would have a specific right to freely dispose of their natural resources as expressed in the limited sense of consent. Nonetheless, the success of indigenous peoples in getting the recognition of their right to consent should serve as a basis for other communities in the vicinity of natural resources to push for the recognition that their right to freely dispose of their natural resources implies a fundamental right to consent to any form of exploitation of such resources. The development of a connection between self-determination over natural resources and the idea of consent should serve as a platform to develop a practical application of the somewhat theoretical right of peoples to freely dispose of their natural resources.

### 3.2. FOOD AND WATER: A RIGHT TO 'SUBSISTENCE'

A peoples' right to control their own natural resources usually resurfaces in the worst situations, when access to these resources becomes a question of survival, such as in the situation of famine or extreme drought. The formulation of article 1(2) of the Covenants indicates: "in no case may a people be deprived of its own means of subsistence." In this context Alston argues that common article 1(2) of the two Covenants should be understood as inviting States "to take measures to ensure that its own people are not in any case deprived of its own means of subsistence, including food [...] and to investigate any situation where such deprivation is alleged to be occurring."<sup>68</sup> This interpretation of article 1(2) has gained some recognition. The

<sup>68</sup> Philip Alston, 'International Law and the Human Right to Food', in Philip Alston and K. Tomasevski (eds), *The Right To Food* (Martinus Nijhoff 1984) 9–40.

landmark decision of the African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* focused on article 21 of the African Charter, which also affirms that in no case shall a people be deprived of its means of subsistence. In this case, the African Commission found that the destruction and contamination of food sources (e.g. water, soil and crops) by the Nigerian government and by the Nigerian State oil company violated the right to food of the Ogoni people. In the Commission's view, the Government had violated Article 21 of the African Charter because of its failure to protect the right of the Ogoni people to freely dispose of their wealth and natural resources.

This correlation between the right to freely dispose of natural resources and the right to food has found some echoes in the work of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, in the context of the global food crisis. The UN Special Rapporteur has put an emphasis on the correlation between large-scale acquisition of land, notably in Africa, by major food-importing States that are losing confidence in the global market as a stable and reliable source of food, and the consequent loss of control by the local people of their capacity to feed themselves. The Special Rapporteur has highlighted in his reports how this large-scale acquisition threatens peoples' right to food as well as their fundamental right to freely control the use of their natural resources.<sup>69</sup> In this context the application of the right of peoples to freely dispose of their natural resources is to ensure the realisation of their right to food. The focus is on access to natural resources to ensure food supply. As captured in a recent study undertaken on behalf of the UN Food and Agriculture Organisation:

The normative content of the right to adequate food has major implications for access to natural resources. In much of Africa, access to natural resources is a main source of food for the majority of the rural population. Land and water are central to food production. Forest resources provide a basis for subsistence harvesting as well as for income-generating activities (e.g. through timber production). There is therefore an important relationship between realizing the right to food and improving access to natural resources.<sup>70</sup>

The interconnection between the right to food and the right of peoples to freely dispose of their natural resources has gained momentum with the emergence of the concept of 'food sovereignty'. Using the human rights based argument of a combined right to food and self-determination, local communities and family farmers have called

<sup>69</sup> Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, 'Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', UN Doc. A/HRC/33/13/Add.2.

<sup>70</sup> Lorenzo Cotula, Moussa Djiré and Ringo W. Tenga, *The Right To Food and access to Natural Resources: Using Human Rights Arguments and Mechanisms to improve Resource Access for the Rural Poor* (Food and Agriculture Organisation 2008) 21.

for the respect of their ‘food sovereignty’.<sup>71</sup> One of the central aspects of the concept of ‘food sovereignty’ is the peoples’ right to freely define the food and agricultural policies that are best suited to them. While the concept of ‘food sovereignty’ is not part of the international legal human rights framework *per se*, it has become a central point of a legally based argument for the implementation of the right to food. As highlighted by a recent study from the Food and Agriculture Organisation: “Because of its different conceptual underpinnings, the political (rather than legal) concept of food sovereignty places more specific emphasis on access to resources. (...) the food sovereignty framework provides more far-reaching ammunition than the right to food for calls to improve resource access.”<sup>72</sup>

Parallel to this development, the right of peoples to freely dispose of their natural resources has also been reawakened by the focus on the human right to water. The CESCR in its General Comment 15 has affirmed: “Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.”<sup>73</sup> While the right to food and the right to water are stand-alone human rights, the right of peoples to freely dispose of their natural resources is becoming instrumental in the articulation of these rights by providing a solid grounding of their realisation as a right of peoples. This places access to food or water within the context of a right to subsistence. It primarily focuses on one aspect of the right of peoples to freely dispose of their natural resources, namely that “in no case may a people be deprived of its own means of subsistence.” In this context, the right of peoples to freely dispose of their natural resources could be seen as a remedy to situations where States have not acted in the public interest of their own peoples resulting in food and water shortages – an approach not far from the ‘remedial’ understanding of self-determination under international law.<sup>74</sup> This approach to the right of peoples to freely dispose of their natural resources is, however, limited as it focuses on a post-facto situation when the use of the natural resources has not ensured the minimum to guarantee their subsistence. Again, this is a restrictive application of the inherent right of people to freely dispose of their natural resources.

Critically, the application of the right of peoples to freely dispose of their natural resources in this context highlights the fact that in many ways the battle is taking place

<sup>71</sup> See: C. Schiavoni, ‘The Global Struggle for Food Sovereignty: from Nyéléni to New York’ (2009) 36 *Journal of Peasant Studies* 682–689.

<sup>72</sup> Lorenzo Cotula, Moussa Djiré And Ringo W. Tenga, *The Right To Food And Access To Natural Resources: Using Human Rights Arguments And Mechanisms To Improve Resource Access For The Rural Poor* (Food and Agriculture Organisation 2008) 24.

<sup>73</sup> UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 15: The Right to Water’ (2002) UN Doc E/C.12/2002/11 para 7.

<sup>74</sup> On the remedial aspect of self-determination, see: Hurst Hannum, ‘Self-Determination in the Post-Colonial Era’, in Donald Clark and Robert Williamson (eds), *Self-Determination: International Perspectives* (Palgrave Macmillan, 1996), 12–44.

at another level. The food crisis and the drinking water shortage have drawn attention to the sheer increase of foreign investments on agricultural lands, water and other natural resources in recent years.<sup>75</sup> In both situations the right of peoples to freely dispose of their natural resources has been claimed where peoples and their representative governments have lost control over the use of their natural resources to foreign investments. Ironically this contemporary clash between peoples' right to dispose freely of their natural resources and foreign investments goes back to the original debate in the drafting of article 1(2) of the Covenants, in which the issue of protection of foreign investment was seen as fundamental and inscribed as one limitation to the right. In many ways, the battle to ensure that people maintain enough control over the use of their natural resources to secure their means of subsistence puts into perspective the fact that the battle for a proper realisation of the right to self-determination over the natural resources is taking place within international investment law. Increasingly, it is the law that is regulating the rights regarding the use of natural resources.

#### 4. A FORGOTTEN RIGHT: FOREIGN INVESTMENTS AND CLIMATE CHANGE

Several branches of international law contain norms that are directly relevant to the exercise of the right of peoples to freely dispose of their natural resources. International law is traditionally compartmentalized into specialised branches that rarely cross-pollinate;<sup>76</sup> however, the issue of control over natural resources is becoming a key aspect in several of the expanding areas of international law. This notably includes international investment law, which is increasingly focusing on the rules and customs regulating investments over natural resources, or international environmental law, which is concerned with the preservation of these resources. Arguably these two branches of international law have seen some of the most rapidly expanding frameworks for the regulation of the use of natural resources in the last decade. In examining some of the recent developments of these different branches of international law, the following part of this article analyses to what extent the rights of peoples to freely dispose of their natural resources has been integrated. It is argued that the right of peoples to freely dispose of their natural resources has been largely forgotten in the development of areas of international law that have had a direct impact on the issue of control over natural resources.

<sup>75</sup> See: Michael Taylor, *The Global 'Land Grab': Mitigating The Risks And Enhancing The Opportunities For Local Stakeholders* (International Land Coalition 2009); Lorenzo Cotula et al, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (Iied 2009).

<sup>76</sup> Classically the branches of international law are consular and diplomatic law; international aviation law; international criminal law; international environmental law; international law of peaceful dispute settlement; international humanitarian law; international human rights law; law of the sea; international space law; international trade law; law of state responsibility.

#### 4.1. FOREIGN INVESTMENTS VERSUS PEOPLES' RIGHTS?

From the very early stages the need to protect foreign investments has been a key figure in the development of the law regarding the use and control of natural resources. As examined earlier, the drafting of article 1(2) of the two Covenants focused largely on the need to ensure respect for international norms regarding the protection of foreign investments. Broadly speaking, the international rules on foreign investment are concerned with both ensuring adequate security and non-discrimination of investors and allowing the host state some rights to control the actions of the foreign investors.<sup>77</sup> Investment in the area of exploitation of natural resources has played a central role in the development of international law on foreign investment.<sup>78</sup> While the correlation between control over natural resources and foreign investment is not new, it has gained some prominence in recent years. Numerous countries have profoundly reformed their national legislations to create more 'harmonization and stability' in their economic sector by remodelling in depth their regulatory framework on foreign direct investments concerning the exploitation of their natural resources. This has notably resulted in a large increase of foreign direct investments in the extractive industries sector. By and large, these legal frameworks have benefited industries involved in the exploitation of natural resources, but rarely the peoples living in the countries where these resources are exploited.<sup>79</sup>

The right of peoples to freely dispose of their natural resources and the laws regarding the protection of foreign investments do not usually meet, and remain two very distinct areas of international law. However, in the last decade the recourse to arbitration over investments has dramatically increased, and several of these cases directly concern the control and use of natural resources.<sup>80</sup> Hence the closest encounter between these two sets of rules could probably be found in the area of arbitral investments disputes. While local populations and peoples do not have access to these arbitral settings, arbitral disputes on investments often concern the right of the State to curtail some of the foreign investments on their natural resources.

The connection between arbitral awards on investments and the human right to natural resources is still extremely tenuous.<sup>81</sup> Nonetheless, the inclusion of regulations

<sup>77</sup> At national, bilateral, regional and multilateral level; for references see: Americo Beviglia Zampetti and Pierre Sauvé, 'International Investment' in Andrew Guzman and Alan Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar 2007) 211–270.

<sup>78</sup> See: M. Sornarajah, *The International Law on Foreign Investment* (3<sup>rd</sup> edn, Cambridge University Press 2010).

<sup>79</sup> For a review, see notably: B. Campbell (ed), *Regulating Mining in Africa for Whose Benefit?* (Nordic African Institute 2004).

<sup>80</sup> See the ICSID figures for the last ten years that reveal an ever increasing number of cases: 7 of 12 cases launched in 2000, 12 of 14 in 2001, and 16 of 19 in 2002. See: <http://icsid.worldbank.org/ICSID/Index.jsp> (last consulted 11/07/2013).

<sup>81</sup> See: Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization' (2005) 2 NYU Global Law Working Paper No 01; R. Bachand and S. Rousseau, *International Investment and Human Rights: Political And Legal Issues* (Rights & Democracy,

relating to human health, the environment and public safety in some of the most recent Bilateral Investments Treaties (BITs) has contributed to the introduction of human rights based arguments in some of the arbitrations.<sup>82</sup> This has led to an increase of cases involving national authorities and investors on issues relating to water access and delivery,<sup>83</sup> tax treatment of foreign investors in the natural resource sector,<sup>84</sup> and environmental regulations.<sup>85</sup>

A recent arbitration case has put into perspective how the right of peoples to freely dispose of their natural resources could be at the centre of investment disputes. In 2007, several investors from Italy and Luxemburg filed a claim against the Republic of South Africa for violation of its obligations under two of its Bilateral Investment Treaties (BITs) under the arbitration settlement mechanism of the International Centre for Settlement of Investment Disputes.<sup>86</sup> At the heart of the dispute was the impact of new mining legislation, the Mineral and Petroleum Resources Development Act (MPRDA), adopted by the Parliament in 2002. Under the MPRDA, all existing mineral rights had to revert to the Government unless companies and corporations having mineral rights convert their “old order” exploration and mining rights into “new” rights under terms specified in the new legislation. The foreign investors argued that this legislation was undermining their mineral rights without providing them with adequate compensation and was, as such, unfairly discriminating against them.<sup>87</sup>

While not directly concerning peoples’ rights to freely dispose of their natural resources, this case touches heavily on the issue of defining to what extent a government could regulate the exploitation of its own natural resources with the aim of guaranteeing social justice. The principal objective of the new national mining legislation was to increase the participation of historically disadvantaged and marginalised communities of South Africa by introducing the need to achieve ‘Broad Based Black Economic Empowerment’ targets when undertaking mining activities in the country. The aim was also to ensure the implementation of the constitutional

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Background Paper, 2003); J. Fry, ‘International Human Rights Law in Investment Arbitration: Evidence of International Law Unity’ (2007) 18 *Duke J Comp & Int’l L* 77; J. Taillant and J. Bonnitcha, ‘International Investment Law and Human Rights’ in Cordonier Segger and al (eds), *Sustainable Development in World Investment Law* (Kluwer 2011) 53–80.

<sup>82</sup> For a review, see: Dupuy, Petersmann, and Francioni (eds), *Human Rights In International Investment Law and Arbitration* (Oxford University Press 2009).

<sup>83</sup> For a review, see: Fabrizio Marella, ‘On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration’ (2010) 12 *International Community Law Review* 335–359.

<sup>84</sup> See the arbitration concerning the revocation of tax and customs exemptions granted to mining investors in Burundi, *Antoine Goetz & others v Republic of Burundi* (Case No ARB/01/2).

<sup>85</sup> See that arbitration concerning the failure by Mexican authorities to renew a permit for a toxic waste facility, *Técnicas Medioambientales Tecmed, SA v United Mexican States* (Case No ARB(AF)/00/2).

<sup>86</sup> *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/01.

<sup>87</sup> The foreign investors argued that such legislation was violating their rights by effectively ‘extinguishing’ their mineral rights without providing adequate compensation, something that is guaranteed under several BITs signed by South Africa.



principle that the country's natural resources belong to all its citizens, and that the Government bears responsibility for ensuring that the benefits from the exploitation of these minerals are equally shared.<sup>88</sup> Hence, at the heart of the dispute lay the issue of defining whether a country could introduce legislation aiming at ensuring a fairer disposal of the country's natural resources in the name of its peoples, something not far from a straight application of the rights of peoples to freely dispose of their natural resources. While in this case the claimants sought a discontinuance of the arbitral proceedings, the case is symptomatic of the increasing interconnection between the rules regarding foreign investments and a human rights based approach to natural resources. Several other recent cases of arbitration have concerned the privatisation of the delivery of public services, notably the delivery of essential natural resources such as water.<sup>89</sup> However, the fundamental issue of peoples' rights over natural resources has not yet been put formally in the balance. As summarised by Peterson and Gray: "While the arbitration of investment disputes has surged over the past few years, as yet, there are no known investment treaty arbitrations which have seen Tribunals explicitly grapple with the role of human rights which a host state may have international obligations to respect."<sup>90</sup>

Several reasons can be advanced to explain the reluctance of the arbitral tribunals in applying human rights based arguments. The limitations concern both the subject of these arbitrations, as only investors and States are party to disputes, and the applicable law, as investment treaties are the specialised body of international law governing these disputes. Such arbitrations concern foreign investors and host States, not peoples. From this perspective, the right of peoples to freely dispose of their natural resources seems remote from this area of international investment law. However, the increased impact that foreign investments have directly on host States' ability to control freely the use of their natural resources is challenging traditional approaches to arbitration. While theoretically the principal relevant law remains the investment treaties, a human rights based argument could be used to support the host States' right to enforce its police powers or to mitigate the level of damages owed to investors.

While in the past the law governing foreign investments was mainly defined by consensual rules agreed between the parties, tribunals are increasingly referring to

<sup>88</sup> See: Shari Bryan and Barrie Hofmann (eds), *Transparency and Accountability in Africa's Extractive Industries: The Role of The Legislature* 88–94 (National Democratic Institute for International Affairs 2007).

<sup>89</sup> See: *Biwater Gauff (Tanzania) Ltd (UK) v United Republic of Tanzania* ICSID (W. Bank) ARB/05/22 (Award) (24 July 2008); *Compañía de Aguas del Aconquija, SA & Vivendi Universal (France) v Argentine Republic*, ICSID (W. Bank) ARB/97/3; *Aguas del Tunari SA (Spain) v Republic of Bolivia*, ICSID (W. Bank) ARB/02/03; *Waste Management Inc (US) v Mexico*, ICSID (W. Bank) ARB(AF)/98/2.

<sup>90</sup> Luke Eric Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (International Institute for Sustainable Development 2005) 5.

customary international law.<sup>91</sup> So far the right of peoples to freely dispose of their natural resources has not yet reached any arbitral tribunal but in the future there might be some scope for States to use this nascent legal argument. This could prove to be one avenue to ensure a human rights based approach to control of investment in natural resources. However, this implies a serious shift in the mind-set of host States, investors, arbitrators and international lawyers. Obviously arbitrators are called upon to resolve disputes, not to examine peoples' human rights, but when the investment dispute directly concerns the ability of a people to use essential resources, weight should be given to the impact an award might have on the well-being of the citizens of that country. Until now, most host States, investors and lawyers have shown very little regard to the issue of peoples' rights to freely use their own national natural resources. As highlighted by Peterson, the area of investment arbitration is still very much in development and not well known to human rights advocates. It will take a lot of ingenuity and creativity from lawyers, state officials and advocates to introduce a more human rights based approach into this field.<sup>92</sup>

The forgotten rights of peoples to dispose of their natural resources might prove to be a useful legal tool to support this inclusion. For the States, interest lies in providing them with legal support in their claims to regain control over their natural resources or to ensure the good use of these resources. In the near future, the on-going surge in foreign investment on agricultural lands and over scarce water resources might seriously undermine the capacity of several national authorities to regulate their food, land and water sectors, and ultimately runs contrary to the fundamental right of their own peoples to freely dispose of their natural resources. Arbitral disputes between foreign investors and host States over the control of these resources, when access is crucial to the local populations, could represent a platform where the 'forgotten' right of peoples to freely dispose of their natural resources could be revived. Until then, the law protecting foreign investment often denies the fundamental right of peoples to freely dispose of their natural resources.

#### 4.2. ENVIRONMENTAL LAW VERSUS PEOPLES RIGHTS?

The recent concerns with climate change, loss of biological diversity and resources depletion have triggered some significant developments in international environmental law. While the drive for reform is primarily guided by conservation, this inherently touches on the issue of determining the use of natural resources. The continuing developments regarding regulations to tackle climate change are pushing for an

<sup>91</sup> See: Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide To The Key Issues* (OUP 2010).

<sup>92</sup> See Luke Eric Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (International Institute for Sustainable Development 2005).

approach that gives a market value to the ecosystem itself. In these debates, natural resources and their ecosystem are being valued by the external market. For example, one of the main outcomes of the climate change negotiations is the establishment of the Reducing Emissions from Deforestation and Forest Degradation (REDD) framework. While REDD still lacks a fully comprehensive structure, it nonetheless puts in place a 'carbon market' under which forests and forestry products are becoming financial assets.<sup>93</sup> The way these natural resources are used will be determined by market considerations including the potential to attract forest carbon investment. Within this new framework the view of the local populations on the way their resources should be used is largely secondary. While there has been a call to recognise "the need for full and effective engagement of indigenous peoples and local communities" and their knowledge for monitoring and reporting REDD decisions, these references remain marginal.<sup>94</sup> The REDD framework is only one illustration of a range of initiatives, with others including the Kyoto Protocol's Clean Development Mechanism (CDM). The focus on supporting a transition from food production to agro-fuel production also lacks consideration of their direct impact on the local population's ability to use their own natural resources.

The projects developed at the international level to mitigate the effects of climate change have been especially in lacking any integration of a peoples' rights based perspective to the use of their natural resources. By and large, all these environmental initiatives, which are being slowly translated into legal obligations, fail to fully integrate the potential impact that they might have on the local populations' right to use and dispose of their own natural resources. Some of the most recent developments have started to introduce a human rights perspective into the climate change negotiations, however, the focus is primarily on highlighting how individuals and communities are adversely affected by climate change.<sup>95</sup> Likewise, while the debates on climate change have filtered into the human rights arena with several notable studies, reports and resolutions from human rights bodies, the emphasis has predominately been on highlighting the consequences of climate change on human rights.<sup>96</sup> The fact that the new frameworks establishing mechanisms to mitigate the effects of climate change are directly affecting the ability of the local population to freely define the use of their own natural resources is still barely taken into the equation.

Regrettably, the lack of consideration for peoples' rights to control the use of their own natural resources within international environmental law is not new. In the past,

<sup>93</sup> For a general review, see: Liz Alden Wily, David Rhodes, Madhu Sarin, Mina Setra and Phil Shearman (eds), *The End of Hinterland: Forests, Conflict and Climate Change* (Rights and Resources 2009).

<sup>94</sup> See: Conferences of the Parties, "Decision 4/CP.15: Methodological guidance for activities relating to REDD and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries," FCCC/CP/2009/11/Add.1, available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> (30 March 2010), p. 11.

<sup>95</sup> See for example the Cancun Agreements, FCCC/AWGLCA/2010/L.7, paras 93–4.

<sup>96</sup> See: UNHCR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61; for references see: [www2.ohchr.org/english/issues/climatechange/index.htm](http://www2.ohchr.org/english/issues/climatechange/index.htm).

conservationists have advocated the establishment of people-free parks arguing that human occupation inevitability resulted in the loss of biodiversity.<sup>97</sup> This resulted in the forceful eviction of numerous indigenous and local communities from their traditional habitats without being consulted or compensated.<sup>98</sup> This approach has also been reflected in regulatory frameworks guiding the establishment of protected areas, which for a long time supported the absolute control of the natural resources, external to the wishes and views of the local populations. It was only at the end of the 1990s, notably with the adoption of a revised system by the World Conservation Union (1997), that the concerns of the local populations were starting to be included in the management and establishment of such parks.<sup>99</sup> After years of disregarding the local populations, this area of international law is finally starting to integrate them into the management of resources. The view is becoming that sustainable use of natural resources cannot be achieved unless fair access and control to natural resources are available to local people.<sup>100</sup> This change in orientation and the realisation of the need to include local communities in the management of natural resources should serve as model for the development of other areas of international environmental law.

While it is critical that international environmental law rises to the challenge of ensuring the conservation of our rapidly vanishing natural resources, the integration of local peoples' rights over such natural resources ought to remain part of the equation. When it comes to the management of natural resources, the right to self-determination represents a useful framework to ensure that peoples have a right to be integrated into the decision making process, but also in the self-management and enjoyment of the benefits generated by the use of these resources. The interaction and relationship between international environmental law and human rights are not new and have increasingly been developed in recent years.<sup>101</sup> Nonetheless, the increasingly

<sup>97</sup> For illustration, see: Kent H. Redford and Steven E. Sanderson, 'Extracting Humans from Nature' (2000) 14 *Conservation Biology* 1362–1364.

<sup>98</sup> See Marcus Colchester, 'Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation' UNRISD Discussion Paper 55 (Geneva 1994); Paige West, James Igoe, and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251–277.

<sup>99</sup> For a review and analysis, see: Marcus Colchester, 'Self-Determination or Environmental Determinism for Indigenous Peoples in Tropical Forest Conservation' (2000) 14 (5) *Conservation Biology* 1365–1367; A. Gillespie, *Protected Areas In International Environmental Law*, (Leiden: Martinus Nijhoff, 2007).

<sup>100</sup> See: L. Naughton-Treves, Holland Buck and K. Brandon, 'The Role of Protected Areas in Conserving Biodiversity and Sustaining Local Livelihoods' (2005) 30 *Annual Review of Environment and Resources* 219–252.

<sup>101</sup> See: UNCHR (Sub-Commission) 'Review of Further Developments in the Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Final Report Prepared by Ms. Fatma Zohra Ksentini, Special Rapporteur', (1994) UN Doc E/CN.4/Sub.2/1994/9; Alexandre A. Kiss, 'An Introductory Note on a Human Right to Environment', in E. D. Weiss (ed), *Environmental Change and International Law: New Challenges And Dimensions* (United Nations University Press 1992); R. Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 89(2) *AJIL* 274.

important role that international environmental law is playing in the management of natural resources needs to integrate a larger focus on the human rights of peoples to freely dispose of their natural resources.

## 5. CONCLUSION: A NEW PHASE FOR SELF-DETERMINATION?

The right of peoples to self-determination has already had many incarnations, as it has been a right that has lived through changing periods and evolved from being a support to the emergence of nationalism; a bedrock in the fight against colonial oppression; and a support to democracy.<sup>102</sup> Under international law, self-determination has predominately become attached to a right for peoples to both territorial and political sovereignty. The natural resources aspect of self-determination has yet to properly emerge. Despite having been drafted in the 1960s, article 1(2) of the International Covenants represent the potential to address one of the deepest causes of poverty, wars and corruption. Notwithstanding its ambiguous birth based on compromises between States' sovereignty over natural resources and the peoples' right approach, the affirmation that peoples have the right to freely dispose of their natural resources remains a powerful legal statement. Ultimately, such a controversial and ambiguous birth of the right does not affect its fundamental significance. The right to freely dispose of natural resources has been a powerful norm to ensure the development of a strong corpus on indigenous peoples' rights. This should be used as an example of powerful advocacy. There is no reason why other peoples will not be able to claim such a right. The fact that the right of peoples to use their natural resources becomes an issue only in adverse circumstances – when they have no access to food or water – is of concern. Self-determination ought to be a vehicle to ensure that people do not find themselves in a situation where their subsistence is at stake. Nonetheless, these slow and imperfect revivals of the right of peoples to freely dispose of their natural resources should be seen as encouraging signs. At least, the right to self-determination is being used and interpreted in the context of exploitation of natural resources. A connection that is often forgotten.

However, as argued in this article, the revival of the natural resources aspect of self-determination ought to take place also in other forums. The regulations defining the use of natural resources are mostly designed outside the human rights framework, usually within the expanding legal frameworks regulating investments

<sup>102</sup> See: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002); Thomas Musgrave, *Self-Determination and National Minorities* (Clarendon Press 1997); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1996); Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993); James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P. Alston (ed), *Peoples' Rights* (OUP 2001).

and environmental protection. In these areas the right of peoples to freely dispose of their natural resources is neglected. Again the integration of a peoples' perspective on the way their natural resources are used and controlled require the revival of the right to self-determination. This demands the integration of human rights arguments into areas of high economical interest. Regrettably, human rights lawyers and activists missed the opportunity to revive the natural resources aspect of self-determination within the recent debate on human rights and business. While the interconnection between business and human rights has received enormous attention in the last few years<sup>103</sup>, the rights of peoples to freely dispose of their natural resources has noticeably been neglected from these discussions. Corporations and companies are the actors who transform most of our natural resources in commodities used in our daily life. Hence, when it comes to the disposal of natural resources, it is certain that businesses are the central actors. The recently adopted 'Protect, Respect, Remedies' UN framework on business and human rights does not address or mention the fundamental rights of peoples to freely dispose of their natural resources.<sup>104</sup> Arguably, the right of people to freely dispose of their natural resources ought to play a more central role in the way the exploitation of the natural resources is undertaken. The issue of control over natural resources, whether they are minerals, agricultural lands, fisheries or forestry, certainly poses central questions about the allocation of wealth and power in society. Until now, and despite the affirmation in article 1 of the two main human rights treaties, the control has predominately been in the hands of States, investors and corporations. It is time for human rights advocates and peoples to revive the largely forgotten affirmation that peoples should freely dispose of their natural resources.

<sup>103</sup> See: D. Weissbrodt, 'Business and Human Rights' (2005–2006) 74 *U Cin L Rev* 55; J. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *AJIL* 819–840; ECOSOC (Sub-Commission on the Promotion and Protection of Human Rights) 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

<sup>104</sup> UNHRC 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (2008) UN Doc A/HRC/8/5.