



DRAFT

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Re: IHRP Clean Trade Treaty - Memo on Article 1(2) of the ICCPR and ICESCR

1. Issue

What are the legal bases in international law for the proposition that there is an inherent right held by the people of a state to control or own their natural resources?

- a) Is the right to freely dispose of natural resources afforded to the State or to peoples?
- b) What is the definition of 'peoples' in this context?
- c) What is the content of the right to freely dispose of natural resources?

2. Short conclusion

International law has not settled on a single authoritative interpretation of the scope of the right of peoples to freely dispose of their natural wealth and resources as protected in Article 1(2) of both the ICCPR and ICESCR. However, there is sufficient agreement among the relevant sources¹ to draw the following conclusions:

- a) The right to freely dispose of their natural resources includes a right held by people within a state to be exercised against that people's government (i.e. it is an "internal" right).
- b) The definition of 'peoples' encompasses all people of a state, though specific sub-groups in a state may have additional or heightened rights in their natural resources on the basis of a particular interest, geographic proximity, or status as indigenous or other recognized group.
- c) The content of the right does not amount to 'control' or 'ownership' of the natural resources, but rather requires states to ensure that their population:
 - i. benefits from the exploitation of natural resources, and
 - ii. is afforded meaningful participation in decision-making over these resources.

¹ Sources relied upon for this memo include: UN General Assembly Resolutions, the International Covenants on Human Rights, their travaux préparatoires, their interpretive bodies (the Human Rights Committee and the Committee for Economic, Social, and Cultural Rights), and other relevant international agreements, including the African Charter on Human and Peoples' Rights and the American Convention on Human Rights and their interpretive bodies. Recourse has also been had to numerous scholars of international law.

3. Analysis

a) The Right to Freely Dispose of Natural Resources: The Right of Peoples, or the Right of States?

The proposition that Article 1(2) in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) grants peoples the right to control or own natural resources rests on the assumption that States and peoples have separate legal personalities for the purposes of international law.

While this is not a controversial position given the wording of most provisions in the Covenants, rights over natural resources pose an additional challenge as international law recognizes both states' and peoples' rights to natural resources. Although the language of declarations and agreements on this topic is frequently inconsistent, the most persuasive understanding of natural resource rights is that they grant to states external rights to be claimed against other states, and to peoples' internal rights which they may claim against the state.

The struggle between the concept of peoples' rights and states' rights has been part of the international law of natural resources since at least 1952, when the UN General Assembly included in the draft covenants on human rights two paragraphs which would embody the right of peoples to political and economic self-determination.² Chile attempted to add a third paragraph which would have stated, "The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources." This formulation was ultimately rejected, in part because the notion of sovereignty was deemed not applicable to peoples.³

International law regarding natural resources then became partially bifurcated. Permanent sovereignty over natural resources was primarily understood as the right of a state vis-à-vis other states, particularly in the post-colonial context where inequitable treaties with foreign investors and nationalization projects were significant issues.⁴ However, UN General Assembly Resolutions continued to recognize peoples' right to benefit from their state's natural resources.⁵ At least one author suggests that this was a reflection of the desire of many states to link self-determination to the realization of socio-economic human rights during the human rights codification process of the 1950s and 1960s.⁶

The partial but incomplete separation of state and peoples' rights can be seen through several UN General Assembly resolutions which recognized that permanent sovereignty was a right of peoples as well as states. For example, Article 1 of the 1962 General Assembly

² *Inclusion in the International Covenant or Covenants on Human Rights of article relating to the right of peoples to self-determination*, GA Res 545 (VI), UNGAOR, 6th Sess (1952), art 1. See Nico Schrijver, *Sovereignty over Natural Resources: balancing rights and duties* (New York: Cambridge University Press, 2007) at 49.

³ Schrijver, *ibid*, at 53.

⁴ Lillian Aponte Miranda, "The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development" (2012) 45 Vand J Transnat'l L 785 at 796.

⁵ *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UNGAOR, 17th Sess (1962) art 1; *Permanent Sovereignty over Natural Resources*, GA Res 2158 (XXI), UNGAOR, 21st Sess (1966) art 5; *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development*, GA Res 2692 (XXV), UNGAOR, 25th Sess (1970) art 2.

⁶ Schrijver, *supra* note 1 at 311.

Resolution on *Permanent Sovereignty over Natural Resources* states: “the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and the well-being of the people of the state concerned.”⁷

This particular phrasing was reaffirmed only once,⁸ although several resolutions dealing with permanent sovereignty do raise specific concerns for peoples as differentiated from states. For example, in the 1966 General Assembly Resolution on *Permanent Sovereignty over Natural Resources*, there is no reference made to peoples in the paragraph on permanent sovereignty,⁹ but Article 5 requires countries to take due regard of the development needs and objectives of the people concerned when engaging with foreign enterprises.

At the same time, the Human Rights Covenants were being adopted by the General Assembly. Article 1(2) in both the ICCPR and ICESCR introduce the language of peoples’ right to freely dispose of their natural wealth and resources. As these rights are the subject of this paper, more will be said subsequently about their interpretation. However, it is worth pointing out that they did not initially have a major impact on the language the General Assembly used in resolutions around states’ rights and responsibilities in regards to natural resources.

Through the early 1970s there were several General Assembly resolutions on permanent sovereignty over natural resources which did not include any language regarding the rights of peoples. For example, the 1972 Resolution on the *Permanent Sovereignty over Natural Resources of Developing Countries*¹⁰ reaffirmed the right of states to permanent sovereignty over natural resources, but focused only on the right of states to be free from outside coercion. Similarly, the 1974 *Declaration on the Establishment of a New International Economic Order*¹¹ made no mention of the rights of people, again focusing only upon states’ rights to sovereignty over natural resources as against each other.

However, privileging states’ rights to natural resources to the exclusion of peoples’ rights did not last. While permanent sovereignty over natural resources as a state’s right would continue to be an important principle in international law,¹² the distinction between the rights of states and the rights of peoples over natural resources returned in two forms. First, a human right to development emerged through several General Assembly resolutions and contained much of the earlier concept of a peoples’ right to freely dispose of their natural resources, but reframed as a right of all people to participate in decisions which would impact them.¹³ As will be discussed, participatory rights are now treated as a significant component of peoples’ right to their natural resources by a variety of international bodies.

⁷ GA Res 1803 (XVII), *supra* note 4, art 1.

⁸ *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development*, GA Res 2692 (XXV), UNGAOR, 25th Sess (1970).

⁹ GA Res 2158 (XXI), *supra* note 4.

¹⁰ *Permanent Sovereignty over Natural Resources of Developing Countries*, GA Res 3016 (XXVII), UNGAOR, 27th Sess (1972) art 1.

¹¹ *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UNGAOR, 6th Spec Sess (1974).

¹² In 2005, the ICJ determined permanent sovereignty over natural resources to be customary international law: *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at 251.

¹³ See *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UNGAOR, 29th Sess (1974) art 7; *Declaration on the Right to Development*, GA Res 41/128, UNGAOR, 41st Sess (1986) art 3(2).

Second, another stream of scholarship, jurisprudence, and resolutions emanating from UN bodies focused on the claims of indigenous peoples to sovereignty over natural resources. This work draws a distinction between the state and "peoples" of a state, but conceptualizes "peoples" as discrete communities within the national polity.

The exact relationship between states and peoples' rights over natural resources is an evolving part of international law, but the external-internal model of state and peoples' rights to natural resources remains useful. For example, the African Charter on Human and Peoples' Rights (African Charter) suggests that both 'peoples' and 'states' have the same rights over natural resources: Article 21(1) states the right of peoples to freely dispose of natural resources while Article 21(4) recognizes states' rights to free disposal of their wealth and natural resources.

To resolve this tension, the African Commission on Human and Peoples' Rights (African Commission) has provided clarification that the states' component of the right is an external one against other states, while the peoples' component of the right is an internal one. As the African Commission states in its *Guidelines for National Periodic Reports*, Article 21 ensures that the material wealth of the countries are not exploited by aliens to no or little benefit to the African countries.¹⁴ Similarly, in its communication on *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013), the African Commission recalled its jurisprudence which traces the origin of Article 21 to the colonial era when human and material resources in Africa were exploited for the benefit of powers from outside the continent.¹⁵

At the same time, the African Commission has also endorsed the notion that Article 21 carries with it internal rights possessed by people or peoples, which place duties upon their state. In Resolution 224, *Human Rights-Based Approach to Natural Resource Governance*, the African Commission reaffirms that the state has the main responsibility for ensuring natural resource stewardship with and in the interest of the population, but also confirms that governments must ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.¹⁶

The understanding that peoples' rights to their natural resources is expressed through duties owed to them by their state is also supported by international legal scholars. As Emeka Duruigbo writes, "if the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own governments."¹⁷ Lillian Miranda clarifies that peoples' rights are not so much about ownership or control, but "more accurately represent demands for qualified state sovereignty."¹⁸ As she states, these rights "carve away at the notion of a state's unqualified right to dispose of natural resources and suggest a shift in the evolution of the doctrine of permanent sovereignty over natural resources from state rights to state duties."¹⁹

¹⁴ African Commission on Human and Peoples' Rights. *Guidelines for National Periodic Reports* (1989) <http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf>.

¹⁵ *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013), African Commission on Human and Peoples' Rights Communication No 328/06 (54th Sess) [Angola] at para 129.

¹⁶ *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, African Commission on Human and Peoples' Rights Resolution 224, 51st Sess (2012) [Resolution 224].

¹⁷ Emeka Duruigbo, "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law" (2006) 38 Geo Wash Int'l L Rev 33 at 65.

¹⁸ Miranda, *supra* note 4 at 804.

¹⁹ *Ibid.*

The understanding of peoples' rights being primarily expressed as states' duties also makes sense from a structural standpoint. Robert Dufresne points out that: "[a]s public prerogatives are always exercised through a form of representative body, there is a structural representational gap between peoples, who are the nominal and residual holders of the prerogatives over natural resources, and governmental representatives, who actually exercise the prerogatives."²⁰

The subsequent sections will analyze the meaning of the term 'peoples' in Article 1(2) of the ICCPR and ICESCR and the specific content of the right to natural resources enjoyed by them.

b) The Definition of 'Peoples'

Defining 'peoples' in the context of the right of peoples to freely dispose of their natural resources is essential to understanding to whom this right extends. However, the term has remained undefined throughout the many instruments in which it is utilized, and has been the subject of a long-standing debate in international law.²¹ Despite this, treaty bodies have managed to shape the definition of 'peoples' over time.²²

The most persuasive definition of 'peoples' in Article 1(2) of the Human Rights Covenants is 'all of the people within a given state.' Alternative definitions of the term exist, including 1) those people under colonial occupation, or 2) only a portion of a state's population, such as indigenous peoples.²³ In light of all relevant international law factors, these common alternatives are less persuasive definitions. That being said, there is evidence that specific sub-groups in a state have additional or heightened rights in regards to their natural resources on the basis of a particular interest, geographic proximity, or status as indigenous or other recognized group.

i. Peoples of a State

Based on the analysis below, it is arguable that 'peoples' in Article 1(2) can be read to encompass all people within a state, and is not necessarily limited to a smaller subset of the population.

This interpretation of Article 1(2) finds support in the practice of the UN Committee on Economic, Social and Cultural Rights (CESCR), the treaty monitoring body for the ICESCR. The CESCR gives a broad meaning to the word 'peoples', one that encompasses the whole population of a state, by "insisting that states are procedurally accountable to the 'general public', as the relevant 'people', in their dealings with the state's natural resources."²⁴ For example, in its 1997 Concluding Observations for Azerbaijan, the CESCR stresses the importance of managing the privatization of their oil resources in a way that is "sufficiently transparent to ensure fairness and accountability" and ensures the "general public is able to

²⁰ Robert Dufresne, "The Opacity of Oil: Oil Corporations, Internal Violence, and International Law" (2004) 36 NYU J Int'l L & Pol 331 at 356.

²¹ Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (New York: Oxford University Press, 2014) at 25.

²² *Ibid* at 27.

²³ Miranda, *supra* note 3 at 805.

²⁴ Saul et al, *supra* note 20 at 52.

participate,” in order to comply with Article 1.²⁵ This reference to the ‘general public’ precludes a narrow interpretation of the scope of this right. The CESCR further states that the “ability of people to defend their own economic, social and cultural rights depended significantly on the availability of public information”. In the case of Azerbaijan, there was no subset of peoples within the country that was affected by the oil concessions specifically; the Committee refers to the citizens as a whole.

Similarly, in the 2009 Concluding Observations on the Democratic Republic of Congo (DRC), the CESCR uses broad terminology instead of limiting the right of Article 1(2) to a specific subgroup or community. Concerned that the DRC’s extensive mineral resources continued to be exploited to the detriment of the rights of the people within its resource-rich province of Katanga, the CESCR calls on the DRC to “review without delay the mining contracts in a transparent and participatory way” and to “repeal all contracts which are detrimental to the Congolese people.”²⁶ Importantly, the CESCR seems purposely frame its call to action in broad terms (“the Congolese people”) instead of focusing on the specific community that would be most affected by the exploitation of natural resources (those living in Katanga). This suggests that while the right can be afforded to a local population, it is only a subset of a right afforded to all citizens in the country.

Finally, in its 2009 Concluding Observations on Cambodia, the CESCR states, in respect to Article 1(2), its concern about the adverse effects of granting economic land concessions on the loss of livelihood for rural communities that depend on land and forest resources for their survival. Supporting the notion that the right is not just available to subgroups, the CESCR focuses on the people of Cambodia as a whole when it strongly recommends that the “granting of economic concessions take into account the need for sustainable development and for *all Cambodians* to share in the benefits of progress” [emphasis added].²⁷ So, while economic disadvantage was an identifying criterion that engages Article 1(2) of the ICESCR, ultimately the CESCR applies the right in relation to all people in the state.

Unlike the CESCR, the Human Rights Committee (HRC), which monitors the ICCPR, has “shed very little light” on the terms of Article 1(2) of the ICCPR.²⁸ Nonetheless, it has addressed the right to freely dispose of natural resources on a limited number of occasions. While most of the HRC’s significant statements on the right have been in the context of indigenous land rights, the HRC demonstrated its preference for a wide interpretation of the term ‘peoples’ when it criticized Azerbaijan’s narrow view of self-determination as only applying to colonized peoples.²⁹

The African Court of Human Rights (ACHR) has not yet interpreted or applied Article 21, the African Charter’s near-equivalent version of Article 1(2). However, the African Commission demonstrated its support for a wide interpretation of the term ‘peoples’ by calling on states parties to reaffirm that the “State has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the *population*” and must ensure “participation, including the free, prior and informed consent of *communities*, in decision making related to

²⁵ CESCR, Concluding Observations: Azerbaijan, E/C.12/1/Add.20 (22 December 1997) at para 16.

²⁶ CESCR, Concluding Observations: Democratic Republic of Congo, E/C.12/COD/CO/4 (16 December 2009) at para 13.

²⁷ CESCR, Concluding Observations: Cambodia, E/C.12/KHM/CO/1 (22 May 2009) at para 15.

²⁸ Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3d ed (Oxford: Oxford University Press, 2013) at 162.

²⁹ HRC, Concluding Observations: Azerbaijan, CCPR/C/79/Add.38 (3 August 1994) at para 6.

natural resource governance” [emphasis added].³⁰ By choosing to use both the general term “population” and the more specific term “communities” in reference to the right to freely dispose of natural resources, the Court favors a broad over a narrow interpretation limiting peoples only to a subset of the population.

The interpretation that ‘peoples’ refers to the entire population of a state is supported by the relationship between Article 1(1) and 1(2) in the Covenants. The HRC states that Article 1(2) of the ICCPR is the economic component of the right to self-determination.³¹ The definition of peoples given to Article 1(1) is thus helpful to understand the scope of the right to freely dispose of natural resources. While the HRC does not provide extensive clarification on Article 1(1), it explicitly states the right to self-determination is an essential precondition to the effective guarantee and observance of individual human rights.³² As individual human rights apply, by definition, to all human beings, it is reasonable to presume that Article 1(2), as part of the guarantor of these rights, also applies indiscriminately.

It is also the opinion of international law scholars, such as Lillian Miranda, that Article 1 of the Covenants treats states and “peoples” as synonymous, and therefore the right of peoples to freely dispose of natural wealth and resources did not originally account for identity-based communities within the territorial boundaries of a state.³³ Miranda argues that the iteration of the doctrine of permanent sovereignty over natural resources in the Covenants is best understood as mediating the relationship between the state and the national polity, and creates obligations for the government of a state to its peoples as a whole. This is consistent with other rights protected by the Covenants, that is, they are rights exercised by citizens against their own state.

This interpretation is further supported by the Committee on the Elimination of Racial Discrimination (CERD) statement on the right to self-determination of peoples:

The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social, and cultural development without outside interference. In that respect there exists a link with *the right of every citizen* to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent *the whole population without distinction* as to race, colour, descent or national or ethnic origin.³⁴ [emphasis added]

This statement clearly identifies the intention that the right to self-determination of peoples applies to all *citizens* of a state; in particular, to the *whole population*, and not only to a small group or community within the state. This should not be confused with the proposition that the right *only* extends to peoples in the sense of the whole population of a state, however. In

³⁰ Resolution 224, *supra* note 15.

³¹ HRC, General Comment No 12: Article 1, 21st Sess (1984).

³² *Ibid.*

³³ Miranda, *supra* note 4 at 800. See also Karen Engle, “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights” (2011) 22 Eur J Int’l L 141 at 154 (noting that the HRC decided “relatively early on to consider cases brought under the Optional Protocol using Article 27 rather than Article 1” of the ICCPR without explicitly denying that the rights contained therein might apply to indigenous peoples); Siegfried Wiessner, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22 Eur J Int’l L 121 at 133 (addressing the argument that “the establishment and development of indigenous cultural institutions and systems” is not within “the sphere of self-determination addressed by Article 1 of the ICCPR”).

³⁴ CERD, General Recommendation No 21: Right to self-determination, A/51/18 (23 August 1996).

fact, there are many instances where a subpopulation within a country is found to have the right to freely dispose of natural resources. This simply supports the proposition that the right is broad and seems to apply to all people within a state, but is not prevented from being narrowed in specific circumstances.

Overall, these examples demonstrate that ‘peoples’ in Article 1(2) can be read to encompass all people within a state. The bulk of cases and commentary coming out of the international and regional bodies interpreting the right to freely dispose of natural resources has been in the context of indigenous peoples, which will be discussed below. Nonetheless, though the term is more frequently (and successfully) used in the context of indigenous peoples, there is no authoritative source that limits the applicability of the term from encompassing a state’s population as a whole. The other two prominently argued interpretations of the term ‘peoples’ will now be addressed.

ii. People under Colonial Occupation

Limiting the scope of the term ‘peoples’ to those under colonial occupation has consistently been identified as incorrect in the context of the right to freely dispose of natural resources.

Firstly, reservations seeking to promote this meaning to limit the scope of Article 1 were declared by a small number of states upon becoming parties to the ICESCR, and were objected to by other states parties. Both India³⁵ and Bangladesh³⁶ sought to exclude the right of self-determination from the peoples of independent states, agreeing only to the right as applying to peoples under some form of foreign domination. These interpretations were objected to by a number of States; for example, India’s reservation saw objections from states including France, Pakistan and Germany, on the basis that it “attached impermissible conditions [. . .] on a right to self-determination” which “applies to all peoples.”³⁷ Though the declarations are still registered, this clear objection to attempts at narrowing the scope of the right supports the notion that many states understand it as applying more broadly than only to those under colonial occupation.

The term ‘peoples’ is used numerous times throughout the 1986 UN Declaration on the Right to Development. It clearly employs a broad use of the word, referencing the elimination of “violations of the human rights of peoples and human beings”, which cannot be reasonably limited only to peoples under colonial occupation.

³⁵ India’s declaration: the right of self-determination applies “only to the peoples under foreign domination” and the words “do not apply to sovereign independent States or to a section of a people or nation - which is the essence of national integrity”

<https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#EndDec>.

³⁶ Bangladesh’s declaration: Article 1 is understood as applying in “the historical context of colonial rule, administration, foreign domination, occupation and similar situations”

<https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#EndDec>.

³⁷ France’s objection: India’s reservation “attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination”; Germany’s objection: “Germany strongly objects ... to the declaration made by the Republic of India in respect of article 1... The right of self-determination ... applies to all peoples and not only to those under foreign domination”

<https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#EndDec>.

Finally, the HRC confirms that Article 1 in the ICCPR does not apply only to those peoples living under foreign domination. As mentioned, the HRC criticized Azerbaijan's narrow view of self-determination and declared that "under Article 1 of the Covenant, that principle applies to all peoples, and not merely colonized peoples."³⁸

iii. Peoples as a Portion of the Population

The notion that 'peoples' in Article 1(2) refers to a portion of a population, particularly vulnerable communities such as indigenous peoples, has some support in the international jurisprudence. This interpretation conceptualizes 'peoples' as "more discrete communities within the national polity."³⁹ In fact, much of the international jurisprudence and literature on the right to freely dispose of natural resources focuses on indigenous and tribal rights to natural resources. However, there is no support for the proposition that the term refers *exclusively* to indigenous and tribal peoples. A full reading of the right suggests, instead, that indigenous and tribal peoples are a specific example of a more general rule, and that these subsets do not encompass the totality of the right.

Neither the ICESCR nor the ICCPR specifically mention 'indigenous' peoples in Article 1, nor are they referred to expressly in any other section of the Covenants. The reality, however, is that when Article 1(2) arises in the international and regional sphere, it tends to do so in the context of indigenous rights (or the rights of other subgroups of the State). This is demonstrated by the fact that the leading cases on rights to natural resource use at the Inter-American Court of Human Rights and Inter-American Commission on Human Rights,⁴⁰ numerous communications from the African Commission on Human Rights,⁴¹ multiple Annual Reports of the HRC,⁴² and a large proportion of Concluding Observations from the CESCR⁴³ all involve indigenous or tribal groups asserting this right.

Other international legal instruments also discuss the specific rights of indigenous peoples to natural resources, and require their participation in decision-making. For example,

³⁸ HRC, Concluding Observations: Azerbaijan, CCPR/C/79/Add.38 (3 August 1994), at para 6.

³⁹ Miranda, *supra* note 3 at 803

⁴⁰ See e.g. *Case of the Saramaka People v Suriname* (2007) Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 172 [*Saramaka People*] (interpreted Article 21, the right to property, in light of Articles 1 and 27 of the ICCPR, finding that tribal and indigenous peoples have a right to natural resources in land to ensure their physical and cultural survival, and granting to the Saramaka community the right to enjoy property in accordance with their communal tradition); *Maya Indigenous Community of the Toledo District v Belize* (2004), Inter-Am Comm HR, No 40/04 (Belize's failure to provide effective consultation and obtain the informed consent of the Maya people before granting logging and oil concessions that resulted in environmental damage was a violation of the right to property of the Maya people).

⁴¹ See e.g. *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria (The Ogoni Case)*, African Commission Communication No 155/96, 2001 AHRLR 60 [*SERAC v Nigeria*]; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission Communication No 276/2003, 2009 AHRLR 75 [*Endorois v Kenya*]; *Angola*, *supra* note 14 at para 104.

⁴² See e.g. HRC Report: Australia (ICCPR), A/55/40 vol. I (2000); HRC Report: Mexico (ICCPR), A/54/40 vol. I (1999) criticizes both Canada and Mexico: Committee stated that Mexico needed to take all necessary measures to enable indigenous communities to enjoy the usufruct of their lands and natural resources.

⁴³ See e.g. CESCR, Concluding Observations: Colombia, E/C.12/COL/CO/5 (7 June 2010); CESCR, Concluding Observations: Philippines, E/C.12/PHL/CO/4 (1 December 2008).

the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴⁴ sets out individual and collective rights of indigenous peoples, including:

(1) the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;⁴⁵

(2) the right to own, use, develop, and control the lands, territories and resources that they possess by reason of traditional ownership, occupation or use;⁴⁶

(3) the right to be consulted by states to obtain their free and informed consent prior to the approval of any project affecting the natural resources associated with such land;⁴⁷ and

(4) the right to redress, by means that can include restitution or compensation for such lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.⁴⁸

Additionally, the International Labour Organization (ILO) Conventions (No. 107 and its revised version, No. 169) recognize the rights of indigenous peoples to exercise control, to the extent possible, over their own economic, social and cultural development.⁴⁹ Convention No. 169 requires consultation and participation in relation only to specific development projects, but also to broader questions of governance, and the participation of indigenous and tribal peoples in public life.

At least part of the success of indigenous peoples in asserting their right to dispose of natural resources is attributable to their unique and well-recognized cultural rights. For example, both the African Commission and the Inter-American Court “draw a clear link between the recognition of indigenous peoples' substantive rights to own, use, occupy, control, and develop their traditional land and resources and the cultural survival of indigenous communities.”⁵⁰ The significance placed on the survival of a group's traditions and customs is clear; indeed, the Inter-American Court explicitly states that when determining what limits to the right are permissible, “another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.”⁵¹ Since the exploitation of land or resources, or both, is recognized as having the potential effect of jeopardizing the survival of indigenous groups, courts and treaty bodies have been particularly vigilant in recognizing indigenous rights to natural resources.

While indigenous peoples have most frequently been successful in asserting their rights to natural resources, other sub-populations have been recognized as having particular rights to natural resources on the grounds of their special relationship to a territory. As mentioned, in reference to Article 1, the CESCR states its concern about the adverse effects of granting

⁴⁴ *UN Declaration on the Rights of Indigenous Peoples*: GA Res 61/295, UNGAOR, 61st Sess (2007).

⁴⁵ *Ibid* art 26(1).

⁴⁶ *Ibid* art 26(2).

⁴⁷ *Ibid* art 32(2).

⁴⁸ *Ibid* art 28(1)

⁴⁹ ILO Convention No 169 concerning Indigenous and Tribal Peoples Convention (adopted 27 June 1989), entered into force 5 September 1991).

⁵⁰ Miranda, *supra* note 3 at 820.

⁵¹ *Saramaka People*, *supra* note 39 at para 128.

economic land concessions on the loss of livelihood for rural communities that depend on land and forest resources for their survival in Cambodia.⁵²

Courts and treaty bodies also occasionally recognize both group rights and the rights of the broader population to natural resources at the same time. In *Front for the Liberation of the State of Cabinda v Republic of Angola*⁵³ the African Commission combines specific indigenous and community rights with a larger right to the people of the state:

129. The Commission recalls its jurisprudence which traces the origin of Article 21 to the colonial era when human and material resources in Africa were exploited for the benefit of powers from outside the continent. However, the Commission has also held that the rights in Article 21 of the Charter are still applicable in post-colonial Africa in favour of groups within states to the extent that it triggers an obligation on the part of the State Parties to protect their citizens from exploitation by external economic powers (*SERAC v Nigeria*)⁵⁴ and to ensure that groups and communities, directly or through their representatives, are involved in decisions relating to the disposal of their wealth (*Endorois v Kenya*).⁵⁵

This interpretation of the right to freely dispose of natural resources suggests a broad right afforded to the people of a country (by the use of the word “citizens”) interpreted in a way that includes a right to “groups and communities” within the state. It is illustrative of the preferred interpretation and application of the right by other regional bodies as well; in fact, the Inter-American Court’s analysis of the right to natural resources and indigenous and tribal groups in the *Saramaka People* decision was drawn on heavily by the African Commission to inform the analysis of Article 21 in *Endorois v Kenya*.

These sources indicate that, at the very least, the right to freely dispose of natural resources is particularly significant for indigenous peoples, and possibly for other sub-groups within a state who can demonstrate a special connection to a territory or resource. Therefore, two possible interpretations arise: the first is that indigenous and tribal groups really do, in fact, have specific rights that are not afforded to the more general population. The second possibility is that recognizing the right as applying to indigenous and tribal groups is simply a specific example of a more general right that is afforded to the peoples of a state as a whole.

While both are possible explanations about the state of the law, the latter is preferable. It is clear that the right to freely dispose of natural resources tends to arise in the context of indigenous or tribal rights. However, this tendency could be attributed to other factors having little to do with the definition of ‘peoples’ in relation to natural resources. For example, it could simply be a reflection of the groups that are empowered to pursue remedies at the international level after exhausting domestic remedies.⁵⁶ Furthermore, as discussed above, there are still significant, though admittedly less numerous, instances of the right being discussed in a general sense, as applicable to all peoples of a state. Tellingly, in no case or commentary has the right been interpreted as *only* applying to indigenous peoples, or some other subgroup; in fact,

⁵² CESCRC, Concluding Observations: Cambodia, E/C.12/KHM/CO/1 (12 June 2009) at para 15.

⁵³ *Angola*, *supra* note 14 at para 104.

⁵⁴ *SERAC v Nigeria*, *supra* note 40 (in reference to the Ogoni peoples, though the term indigenous was not used).

⁵⁵ *Endorois v Kenya*, *supra* note 40 (where the African Commission found that the Endorois are an indigenous people).

⁵⁶ While this specific reason has not been thoroughly addressed here (partly due to an apparent lack of literature on the subject) it could explain why there are simply more cases involving indigenous groups and other subpopulations versus whole populations.

referring to the obligations of States towards indigenous groups specifically does not detract from a more general interpretation of the right. Authoritative bodies, such as the CESCR, continue to refer to peoples in a general sense, highlighting that both are possible interpretations. This is significant, as the opinion of treaty bodies empowered to interpret agreements is recognized as having significant weight by the International Court of Justice.⁵⁷ It is therefore both possible and probable that international legal bodies and other authorities recognize a heightened right to freely dispose of natural resources for indigenous groups, above the rights afforded to all people of a state. But this does not take away from the likelihood that the term 'peoples' in Article 1(2) refers to 'all people within a state'.

c) The Content of the Right to Freely Dispose of Natural Resources

Peoples' right to freely dispose of their natural resources is best understood as a package of rights and duties for both states *and* their people.

There is no single authoritative source which states the exact content of Article 1(2) of the ICCPR and the ICESCR. Rather, the right of peoples' to their natural resources has been recognized and elaborated on by a variety of different sources acknowledged as persuasive in the interpretation of international law.⁵⁸ In the case of the Covenants, these include General Assembly Resolutions, both before and after the drafting of the Covenants, and the Covenants' respective monitoring bodies.⁵⁹ Consideration has also been given to other regional human rights agreements and their treaty bodies, as these are treated, by the ICJ at least, as subsidiary means of determining the rules of international law.⁶⁰

International law recognizes that states enjoy external rights over their natural resources insofar as they have permanent sovereignty which cannot be interfered with by another state. A state's right, however, is not absolute; it is encumbered by the internal rights of its people to freely dispose of these same natural resources. This is entirely consistent with the broader human rights project of ensuring state accountability to their citizens through guaranteeing individuals' rights and creating state obligations.⁶¹ Peoples' rights to their natural resources are currently most concretely expressed through a variety of duties placed on states. These duties can be divided into two broad categories: substantive duties and procedural duties.

Substantive duties typically require a state to use its natural resources in a way that benefits its people. How a state does so, and how benefit is to be measured, is generally left

⁵⁷ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 639 [*Guinea v DRC*] at para 66.

⁵⁸ *Ibid*; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31.

⁵⁹ See e.g. *Guinea v DRC*, *supra* note 56 at para 66: the ICJ stated "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled." While the ICJ was referring to the Human Rights Committee, similar reasoning could apply to the CESCR.

⁶⁰ *Statute of the International Court of Justice*, 18 April 1946, art 38(d). It should also be noted that the ICJ has recognized that the interpretation of the right to freely dispose of natural resources as it appears in regional agreements will rely heavily on the independent bodies which have been specifically created by these agreements in *Guinea v DRC*, *supra* note 56 at 67.

⁶¹ See Thomas Buergenthal, "Human Rights" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2007) at 8.

unspecified, although protection from exploitation frequently appears as a minimum requirement. In contrast, procedural duties have been elaborated on by the UN General Assembly, treaty bodies, and, in more recent human rights agreements, in the text of the treaties themselves. Procedural duties range from requiring states to provide public information and act transparently, to ensuring participatory decision making and obtaining free and informed consent from those with an interest in the resource being exploited.

There is also a persuasive amount of evidence that states' duties will vary between different subsections of their population depending on factors such as interest in a resource, geographic proximity, impact suffered from a given resource-related decision, and status as indigenous or vulnerable group. That being said, while states' duties to specific groups may be heightened, they do not appear to be of a fundamentally different character than their duty to people more generally.

i. Substantive Rights and Duties

The concept that states owe a duty to their populations to use their natural resources to the population's benefit has existed since the post-WWII period. This duty is frequently asserted as the corollary of States' rights to permanent sovereignty over their natural resources, rather than an independent right of peoples. For example, Article 1 of the 1962 Resolution on *Permanent Sovereignty over Natural Resources* specifies that "...the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and the well-being of the people of the state concerned."⁶² Similarly, Article 5 of the 1966 Resolution on *Permanent Sovereignty over Natural Resources* requires that states pay due regard to the development needs and objectives of the people concerned.⁶³ Finally, Article 2 of the 1970 Resolution on *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development* states that nations and peoples must exercise their rights over natural resources for the well-being of the people of the state concerned.⁶⁴

Natural resource rights are also recognized in the African Charter in a manner which points to their dual nature, containing both a duty on states to use natural resources to benefit their people, and a right of peoples to participate. In terms of the duty to provide benefit, Article 21 suggests that peoples and the state share in the right to freely dispose of their wealth and natural resources, but that this right must be "exercised in the exclusive interest of the people." States parties to the African Charter are also bound by Article 21(5) which obliges them to eliminate foreign exploitation to enable their peoples to fully benefit from their natural resources.

The African Commission affirms that the state has the main responsibility for ensuring natural resource stewardship with and in the interest of the population. The stewardship role was reiterated in *SERAC v Nigeria*, where the African Commission, on the basis of Article 21(5), found that the Nigerian Government failed to prevent the destruction of the Ogoni people's lands by foreign oil companies and was thus in violation of the Charter.⁶⁵

ii. Procedural Rights and Duties

⁶² GA Res 1803 (XVII), *supra* note 4.

⁶³ GA Res 2158 (XXI), *supra* note 4.

⁶⁴ GA Res 2692 (XXV), *supra* note 4.

⁶⁵ *SERAC v Nigeria*, *supra* note 40 at para 58.

More contemporary interpretations of peoples' rights to natural resources have shifted the duty of states from solely providing benefit to their people, to a duty to also ensure participation in decision making. Article 7 of the 1974 *Charter of Economic Rights and Duties of States* makes clear that every State has the responsibility to "...ensure the full participation of its people in the process and benefits of development."⁶⁶ This appears to be a transition point between the older focus on the duty of states to use their natural resources for the benefit of their people, and the emerging duty of ensuring participatory rights for their people.

The duty to ensure participation is significantly elaborated upon by the General Assembly in the 1986 *Declaration on the Right to Development*.⁶⁷ First, it reintroduces the concept of peoples' permanent sovereignty over natural resources, which had lain dormant since Chile unsuccessfully proposed including language of peoples' permanent sovereignty over natural resources in the Covenants in 1952.⁶⁸ Article 1(2) states "[t]he human right to development...implies the full realization of the right of peoples to self-determination, which includes...the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." Yet, peoples' precise entitlements pursuant to their inalienable sovereignty over their natural wealth and resources are somewhat unclear. Guidance, however, can be found in the rest of the Declaration, where numerous articles stress that the right to participation is fundamental. For example, Article 1(1) states that the human right to development entitles every human person to participate in, contribute to, and enjoy economic, social, cultural and political development. Similarly, Article 2(3) places a duty on states to develop policies to improve the well-being of the entire population on the basis of their active, free and meaningful participation. Finally, Article 8(2) calls on states to encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

The CESCR and HRC also provide substantial guidance on the procedural rights flowing from peoples' right to their natural resources. Self-determination and participation feature several times in the HRC's commentary on Article 1(2) in its Annual Reports. In its 1999 Annual Report, the HRC links aboriginal self-government with the right to freely dispose of natural resources and urges Canada to address issues of land and resource allocation.⁶⁹ The HRC's understanding of Article 1(2) as a participatory right was also clearly expressed in its comments on Australia in its 2000 Annual Report.⁷⁰ There, the Committee accepts the Australian Government's understanding that "self-determination" in the case of indigenous peoples could be understood as "self-management" and "self-empowerment", but still criticizes the country for making insufficient progress toward ensuring a strong role for aboriginals in decisions over their traditional lands and natural resources.⁷¹ Likewise, the HRC's 2002 Annual Report expresses concern about the limited extent to which Sweden allows the Sami Parliament, the legislative body of the minority Sami people, to be involved in decisions regarding their traditional lands and economic activities.⁷²

The CESCR comments on countries' failures to respect peoples' right to freely dispose of their natural resources more frequently and in more detail than the HRC. While the CESCR

⁶⁶ *Charter of Economic Rights*, *supra* note 12.

⁶⁷ GA Res 41/128, *supra* note 12.

⁶⁸ Schrijver, *supra* note 1 at 53; see above Section a).

⁶⁹ HRC Report: Canada (ICCPR), A/54/50 vol. I (1999) at 230.

⁷⁰ HRC Report: Australia (ICCPR), A/55/40 vol. I (2000) at 506.

⁷¹ *Ibid* at 506-507.

⁷² HRC Report: Sweden (ICCPR), A/57/40 vol. I (2002) at 79(15).

has never provided a list of the specific duties that Article 1(2) requires, its numerous reports demonstrate at least four duties which bind states in relation to natural resources.

First, the CESCR repeatedly calls on states to act with greater transparency in their decision-making around natural resources. In its 1997 Concluding Observations on Azerbaijan, the CESCR stresses, with respect to Article 1(2), transparency, fairness, and accountability in relation to the privatization of the country's oil resources.⁷³ Similarly, in its 2009 Concluding Observations on the Democratic Republic of the Congo, the CESCR criticizes the government's lack of transparency around the review process for new and existing mining contracts.⁷⁴ In 2010, the CESCR likewise criticizes the Colombian government's lack of transparency over infrastructure, development, and mining mega-projects it was conducting.⁷⁵

Second, the CESCR emphasizes that the human rights framework includes the right for those affected by decisions to participate in the relevant decision-making process⁷⁶ and specifically applies this right in relation to Article 1(2). In its 2009 Concluding Observations on the DRC, the CESCR urges the government to review mining contracts in a participatory fashion,⁷⁷ and it encourages national debate on investment in agriculture in its 2009 Concluding Observations on Madagascar.⁷⁸ In its 2010 Concluding Observations on Columbia, the CESCR further recognizes that participation could occur through legitimate community representatives when it criticizes the fact that the legitimate representatives of Afro-Colombian and indigenous communities concerned with the impacts of certain infrastructure and development projects did not participate at all in the Government's consultation process. It also criticizes the Government's general framework for consultation as being insufficient, not least because it was developed without the participation of those communities.⁷⁹ The CESCR's observations on Columbia indicate that rights to participation in decision-making may vary depending, in part, on how affected a group is by those decisions. At the same time, the CESCR's call for a national debate on agriculture policy in Madagascar indicates that participation on certain issues can be a nation-wide right.

Third, the CESCR occasionally goes so far as to suggest that control over natural resources requires free, prior, and informed consent of those concerned. The CESCR made this recommendation in regards to agricultural investment contracts with foreign companies in Madagascar and in regards to infrastructure, development, and mining mega-projects in Columbia. In the case of Madagascar, the CESCR states that the duty on states to receive free and informed consent applies generally to 'the persons concerned',⁸⁰ while in Columbia, the consent was specifically required from affected indigenous and Afro-Colombian communities.⁸¹ It is also worth noting that the concept of free, prior, and informed consent is one of the major criteria set forth in the UN Declaration on the Rights of Indigenous Peoples and governs a number of the interactions between states and indigenous peoples.⁸²

⁷³ CESCR, Concluding Observations: Azerbaijan, E/C.12/1/Add.20 (22 December 1997) at para 16.

⁷⁴ CESCR, Concluding Observations: Democratic Republic of Congo, E/C.12/COD/CO/4 (16 December 2009) at para 13.

⁷⁵ CESCR, Concluding Observations: Colombia, E/C.12/COL/CO/5 (7 June 2010) at para 9.

⁷⁶ CESCR, Poverty and the ICESCR, E/C.12/2001/10 (10 May 2001) at para 12.

⁷⁷ CESCR, Concluding Observations: Democratic Republic of Congo, E/C.12/COD/CO/4 (16 December 2009) at para 13.

⁷⁸ CESCR, Concluding Observations: Madagascar, E/C.12/MDG/CCO/2 (16 December 2009) at para 12.

⁷⁹ CESCR, Concluding Observations: Colombia, E/C.12/COL/CO/5 (7 June 2010) at para 9.

⁸⁰ CESCR, Concluding Observations: Madagascar, E/C.12/MDG/CCO/2 (16 December 2009) at para 12.

⁸¹ CESCR, Concluding Observations: Colombia, E/C.12/COL/CO/5 (7 June 2010) at para 9.

⁸² UNDRIP, *supra* note 43. See arts 10, 11(2), 19, 28(1), and 29(2).

Fourth, the CESCR suggests that free and fair elections are a crucial component of the right to participate, although it also states that they are not enough to ensure that vulnerable people, such as those living in poverty, will enjoy the right to participate in key decisions affecting their lives.⁸³

Regional human rights agreements, and their relevant implementation bodies, also elaborate on the procedural rights peoples have over their natural resources. As stated above, Article 21 of the African Charter contains both provisions regarding a state's duty to use natural resources to benefit its people, and peoples' right to participate in the disposal of their resources. In terms of participation, Article 21(1) provides for the general right of peoples to their natural resources, echoing Article 1(2) of the ICESCR and ICCPR when it states, "All peoples shall freely dispose of their wealth and natural resources." Much more specifically, however, Article 21(2) provides a strikingly concrete remedial right for people in relation to their natural resources, as it stipulates that "In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation." While not strictly a procedural right in terms of decision making, the institutionalization of a specific remedy for the violation of a right is a potentially powerful tool to ensure adequate participation occurs in the first place.

Beyond the text of the African Charter, the African Commission affirms the notion that Article 21 carries with it participatory rights. In Resolution 224, it confirms that governments must ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.⁸⁴ The duty to ensure participation has been further supported by the Commission's jurisprudence. In the case of *Endorois v Kenya* the African Commission held that States must ensure that groups and communities, directly or through their representatives, are involved in decisions relating to the disposal of their wealth.⁸⁵

The African Commission has also found that peoples' right to a 'general satisfactory environment favourable to their development' under Article 24 of the African Charter requires states to provide relevant information, as well as meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities.⁸⁶ While not directly a right regarding natural resources, the relationship between development and resource control has been well established by the UN General Assembly.⁸⁷

In a similar vein, the 2004 Arab Charter on Human Rights at Article 2(1) declares that all peoples have the right to control over their natural wealth and resources.⁸⁸ The Arab Human Rights Committee, however, does not appear to have given any elaboration on the right.

By contrast, the American Convention does not expressly provide a right of peoples to freely dispose of natural resources. However, the Inter-American Court has ruled that the right to property enshrined in Article 21 of the American Convention protects the communal property interests of tribal or indigenous groups, including interests in the natural resources of their land. This is illustrated in *Saramaka People*, where the Inter-American Court invoked Article 1 of the

⁸³ CESCR, Poverty and the ICESCR, E/C.12/2001/10 (10 May 2001) at para 12.

⁸⁴ Resolution 224, *supra* note 15.

⁸⁵ *Endorois v Kenya*, *supra* note 40 at para 268.

⁸⁶ *SERAC v Nigeria*, *supra* note 40 at paras 57-58.

⁸⁷ GA Res 41/128, *supra* note 12, art 1(2).

⁸⁸ *Arab Charter on Human Rights*, League of Arab States, 15 September 1994.

ICCPR and ICESCR to expand the scope of Article 21 of the ACHR. Article 29 of the ACHR states that no provision of the Convention may limit any right recognized by another convention to which the state is party. The Inter-American Court thus found that, as Suriname was party to the ICCPR and ICESCR, the wording of Article 21 of the ACHR could not be used to interfere with the right of self-determination granted under the Covenants. This led the Court to rule that tribal communities, though non-indigenous, could enjoy "indigenous rights" if they share some characteristics (spiritual relations with the land, distinct culture, language, traditions, etc.) and are considered a tribal community protected by the international law.⁸⁹ The Court justified finding that tribal peoples have a right to the natural resources they have traditionally used within their territory by stating that, without them, the very physical and cultural survival of such peoples is at stake.⁹⁰ This ruling emphasizes how a community's special interest in natural resources, based on historic, cultural, and economic factors, can enhance a state's duties.

The Inter-American Court in *Saramaka People* also went on to specify numerous procedural duties Suriname owe to peoples under Article 21. These include the duty to ensure the effective participation of the affected community in decisions, a duty to ensure the community receives reasonable benefit from any such plan within their territory, and a duty to conduct prior independent social and environmental impact assessments.⁹¹

4. Conclusion

The foregoing analysis indicates that the principle of peoples' right to freely dispose of their natural resources has been given sufficient definition, by both the UN General Assembly and the various treaty bodies empowered to interpret the concept, to conclude that there is general agreement on the subjects and minimum content of the right. In short, peoples' right to freely dispose of their natural resources is a right held by all people against their state and obliges each state to ensure that their population both benefits from the exploitation of natural resources and is afforded meaningful participation in decision-making over these resources.

This conclusion may be helpful in supporting Dr. Wenar's theory of popular resource sovereignty in several ways. First, while state practice may not have caught up with the idea of popular resource sovereignty, the active use of Article 1(2) by the HRC and CDESCR to criticize states, and the recognition these bodies receive as being authoritative interpreters of the ICCPR and the ICESCR, provides evidence that popular resource sovereignty continues to be an active norm in international law.

Second, both the language of the agreements and the interpretive practice of their treaty bodies indicates that 'peoples' is not confined to indigenous peoples but can be read, fairly unproblematically, to include all the people of a territory. That being said, the interpretation of the Human Rights Covenants' Article 1(2), and similar provisions in other agreements, also suggests that a state's duties will vary according to the relationship a subset of the population has to a particular natural resource. This understanding may help to emphasize the possibility of a broad theory of popular resource sovereignty without infringing on the unique right of indigenous peoples.

Third, the current interpretive practice among treaty bodies is to read Article 1(2) as providing a fairly concrete set of procedural and participatory rights and duties. This interpretive practice corroborates Dr. Wenar's assertion that affirming popular resource sovereignty does

⁸⁹ *Saramaka People*, *supra* note 39 at para 86.

⁹⁰ *Ibid* at para 121.

⁹¹ *Ibid* at para 129.

not entail affirming any particular political or economic system. This practice also highlights several indicators of popular resource sovereignty which are both reasonably measurable and relatively uncontroversial, such as government transparency and democratic elections. These indicators could be more thoroughly formalized through state practice or international agreement to strengthen peoples' right to freely dispose of their natural resources as international law.