International law and governance of natural resources in conflict and post-conflict situations

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3 A closer look at peoples as subjects and beneficiaries of the principle of permanent sovereignty over natural resources

3.1 Introductory Remarks

The principle of permanent sovereignty accrues to both States and to peoples. For States, the right to freely dispose of their natural resources is an attribute of their sovereignty, while for peoples, the right to freely dispose of their natural resources is an inherent part of their right to self-determination. In both cases, it is the government of a State which has the primary responsibility for exercising the associated rights and for fulfilling the associated obligations on behalf of the State and its people. The responsibility of the government to exercise permanent sovereignty on behalf of the State and its people takes shape in an obligation to exercise the right to permanent sovereignty over natural resources for the purpose of promoting national development and ensuring the well-being of the people. This chapter aims to determine the implications of this obligation for the governance of natural resources within a sovereign State. What is meant by saying that natural resources must be exploited for national development and the well-being of the people? This chapter also examines the implications of considering peoples as subjects of the right to self-determination. What is meant by saying that peoples have the right to freely dispose over their natural resources?

These questions are examined from the perspective of the right to self-determination and the closely related right to development. Both rights have an external and an internal dimension. This chapter argues that the internal dimension of these rights must be interpreted first and foremost as entailing a corresponding obligation for governments to provide the possibility for peoples to participate in a State's decision-making processes. In addition, it is argued that the right to development entails a right for peoples as well as for individuals to enjoy the benefits deriving from development.

In order to fully understand the rights to self-determination and to development, as well as their implications for the governance of natural resources, it is essential to determine first which groups are eligible to exercise these rights. Therefore section 2 examines the notion of "peoples". Sections 3 and 4 of this chapter discuss the evolution, contents, nature and legal status of the right to self-determination and the right to development, as well as the implications of these rights for peoples living in sovereign States. Finally, section 5 draws some final conclusions.

3.2 A MORE DETAILED DEFINITION OF "PEOPLES"

International law does not contain a formal definition of the term "peoples". This section examines some of the definitions that have been elaborated to define peoples in order to identify the groups eligible to exercise peoples' rights.

3.2.1 A definition of "peoples"

International human rights law has granted peoples several rights, including the right to exist, the right to self-determination and the right to development. Over the years, several attempts have been made to identify the groups eligible to exercise the associated rights. Some of these definitions have focused on distinguishing peoples from minorities in order to determine which groups are entitled to exercise the right to external self-determination.[1] However, attempts have also been made to draft more general definitions which would apply to all "third generation" rights.

Most definitions focus on a combination of common characteristics of group members on the one hand, and self-identification as a people on the other. For example, Yoram Dinstein argues that "peoplehood must be seen as contingent on two separate elements, one objective and the other subjective". In his opinion, "the objective element is that there has to exist an ethnic group linked by common history", while the subjective basis for peoplehood consists of "an ethos or state of mind".[2]

While Yoram Dinstein opts for a narrow interpretation of the term people by confining its scope to ethnic groups, a broader definition emerged from an international meeting of experts convened by UNESCO in 1989 under the chairmanship of Justice Michael Kirby. The final report of the group of experts describes a "people" as a group of individuals who enjoy certain common features, such as a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and a common economic life. In addition, the group must have a size that exceeds a mere association of individuals within a State, it

1 On the issue of minority rights, see S. Wheatley, *Democracy, Minorities and International Law*, Cambridge: Cambridge University Press (2005); L.A. Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century*, Leiden: Nijhoff (2005); Y. Dinstein & M. Tabory (ed.), *The Protection of Minorities and Human Rights*, The Hague: Martinus Nijhoff Publishers (1992); P. Thornberry, *International Law and the Rights of Minorities*, Oxford: Oxford University Press, reprint (2001); B. Vukas, 'States, Peoples and Minorities', *Receuil des Cours,* Vol. 231 (1991), pp. 263-524.

2 Y. Dinstein, 'Collective Human Rights of Peoples and Minorities', *International & Comparative Law Quarterly* Vol. 25 (1976), p. 104. It should be noted that Dinstein primarily looked at the notion from the perspective of self-determination.

must either have the will to be identified as a people or the consciousness of being a people and the group must be able to express its common characteristics and will for identity in the form of institutions or by other means.[3]

The first drawback of this definition is that it does not properly recognise that the term people refers to more than a "group of individuals". A people is an entity in itself, which – as a community – can have interests that do not coincide with the interests of each individual member of the group. There may even be a conflict between the interests of the group as a whole and the interests of some individuals in that group.

This is illustrated by a case brought before the Human Rights Committee relating to the traditional right of an indigenous people to engage in reindeer husbandry. This case has not been chosen to discuss the status of indigenous peoples as "peoples" under international law,[4] but rather to illustrate the general point that communities have an identity that is distinct from their individual members.

In the case of *Kitok* v. *Sweden*, Swedish law restricted the right to engage in reindeer husbandry to members of Sami villages in order to protect the culture of the Sami community. There were important reasons for restricting the number of reindeer herders, above all to ensure the survival of the Sami community as a whole. Swedish legislation left it to the Sami community to determine who was a member of the community and who was not. The complainant was of Sami origin, but because his community did not accept him as a member of a particular Sami village, he could not engage in reindeer herding for a living. Therefore there was a clear conflict between the right of Mr. Kitok as a member of the Sami community to engage in an economic activity and the right of the Sami community as a whole to preserve its culture by refusing individual members the right to engage in this economic activity. In this case, the Human Rights Committee considered that the Swedish government had not violated Mr. Kitok's right to enjoy his culture. Specifically, the Committee considered that the method selected by the Swedish government to protect the interests of the Sami community as a whole was reasonable and consistent with Article 27 of the ICCPR.[5]

Despite the wording of Article 27 of the ICCPR, which proclaims a right for individuals belonging to particular minorities to enjoy their culture, it can therefore be concluded from the application of Article 27 in this case that a community is more than a group of individuals. It has a separate identity.

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3 Final Report and Recommendations of the International Meeting of Experts on further study of the concept of the rights of peoples, UNESCO, Doc. SHS-89/CONF.602/7, 22 February 1990, p. 8.

4 It is relevant to note here that indigenous peoples do not constitute 'peoples' for the purpose of exercising a right to external self-determination. However, as this chapter will illustrate, indigenous peoples are eligible to assert particular peoples' rights.

5 Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, *CCPR/C/33/D/197/1985* (1988).

This is not adequately recognised in the UNESCO definition of peoples. Furthermore, as acknowledged by the UNESCO report itself, the practical relevance of the definition – or any definition for that matter – is limited. Not only are the elements that the definition identifies not sufficiently specific to distinguish peoples from other groups, but in addition the notion of peoples by its very nature is a dynamic concept which may have different meanings in different contexts.[6] As Budislav Vukas noted: "International practice does not even tend to provide and use one single definition and meaning of the expression 'people'. We witness an always more diversified use of this term simultaneously with the increased interest for the individual and different groups in international relations and in international law".[7]

In fact, depending on the particular context in which it is used, the term "people" can refer to a variety of groups or entities, even within a single document. For example, as regards the UN Charter, there are slight variations in the use of the term throughout. The reference to "We the peoples of the United Nations" in the opening words of the Charter – read together with the reference to "our respective governments" in the closing paragraph of the preamble – may be said to refer to the peoples living in UN member States.[8] Articles 1(2) and 55 of the UN Charter – which indicate that friendly relations among nations should be based on respect for the principle of equal rights and self-determination of peoples – refer to peoples in a generic sense, including peoples living in UN member States as well as other peoples.[9] Finally, Article 73 of the UN Charter uses the term "peoples" exclusively to designate the inhabitants of non-self-governing territories.

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6 In this respect, the UNESCO report indicates that "[I]t is possible that, for different purposes of international law, different groups may be a 'people'. A key to understanding the meaning of 'people' in the context of the rights of peoples may be the clarification of the function protected by particular rights. A further key may lie in distinguishing between claims to desirable objectives and rights which are capable of clear expression and acceptance as legal norms". Final Report and Recommendations of the International Meeting of Experts on further study of the concept of the rights of peoples, UNESCO, Doc. SHS-89/CONF.602/7, 22 February 1990, p. 8.

7 B. Vukas, 'States, Peoples and Minorities', *Recueil des Cours,* Vol. 231 (1991), p. 318.

8 It is relevant to note that the reference to "We the peoples" was inserted at the instigation of the United States delegation, which considered the reference as an expression of the democratic basis on which the new organization was to be founded. However, as pointed out by the Netherlands, not all governments represented in San Francisco could be regarded as deriving their mandate directly from the people. This issue was resolved by establishing a connection between "We the peoples" and "our respective governments". See O. Spijkers, *The United Nations, the Evolution of Global Values and International Law*, School of Human Rights Research Series, Vol. 47, Cambridge, Antwerp, Portland: Intersentia (2011), pp. 66-67.

9 Indeed, the *travaux préparatoires* specify that "peoples" should be understood to designate "groups of human beings who may, or may not, comprise states or nations". See Memorandum of the Secretary on a List of Certain Repetitive Words and Phrases in the Charter, Document WD381, CO/156, 18 June 1945, in *Documents of the United Nations Conference on International Organization* (UNCIO), Vol. 18, New York: United Nations (1954), p. 658.

Another example is provided by the African Charter of Human and Peoples' Rights, which recognises, *inter alia,* the rights of peoples to exist (Article 20), to self-determination (Article 20), to freely dispose of their wealth and natural resources (Article 21), to development (Article 22) and to an adequate environment (Article 24). A closer analysis of the use of the term "peoples" in this legal instrument reveals that it refers to such groups as the populations of non-self-governing territories, to the State itself, to the entire population of a state and to indigenous peoples.[10] Therefore it may be concluded that several groups are eligible to qualify as peoples for the purpose of exercising the rights associated with the term.

In conclusion, the term "peoples" refers to a dynamic concept that can be applied to different groups, depending on the context and the particular right that is invoked. The term "peoples" is used first and foremost to designate those groups that are eligible to exercise a right to external self-determination. In this sense, as explained in the following section, the term "peoples" refers exclusively to colonial peoples and to peoples under external subjugation. Nevertheless, other groups are also eligible to exercise peoples' rights. In particular it is possible to identify two categories of peoples in the context of the sovereign State. These are the population of a State as a whole, as well as specific groups within a State, in particular, indigenous peoples and peoples that constitute a minority in independent States.[11]

All these groups benefit from the general protection provided by human rights law to the population of a State as a whole and to individuals within a society. Moreover, minorities and indigenous peoples have been assigned a special status in international law in order to protect their culture. They are eligible to exercise people's rights only for this purpose. This section briefly discusses the position of indigenous peoples in international law, because these peoples have a special relationship with their lands and the natural resources situated on their lands.

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10 For a detailed analysis of the different meanings of the term 'peoples' in the African Charter on Human and Peoples Rights, see R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', *American Journal of International Law,* Vol. 82, No. 1 (1988), pp. 80-101.

11 As regards minorities, a distinction can be made between four types of minorities, as recognised in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly Resolution 47/135, 18 December 1992. With the exception of national minorities, these groups enjoy the rights referred to in Article 27 of the ICCPR.

3.2.2 "Peoples" in the sense of indigenous peoples

Indigenous peoples are communities in society that are descended from the traditional inhabitants of a country.[12] These communities have their own culture and traditions that differ from the dominant culture in a given society. Examples include the Maori in New Zealand, the Sami in Finland and the San people in Southern Africa. More specifically, indigenous peoples can be defined as:

> "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".[13]

In many cases, indigenous peoples have a special relationship with the land they live on, which is an essential part of their culture. In order to protect their traditional way of life and their identity as a community, indigenous peoples have been granted a number of rights, including rights over land and natural resources.[14]

The principal binding legal instrument in which the rights of indigenous peoples were formulated is ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.[15] However, this Convention has been ratified by only 20 States. The hesitancy of States to ratify the Convention is indicative of the controversies surrounding the recognition of indigenous

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12 For a more detailed analysis of the special position of indigenous peoples in international law, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge studies in international and comparative law, Cambridge: Cambridge University Press (2007); and N.J. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in Boerefijn, I. & Goldschmidt, J. (ed.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman*, Antwerp/Oxford/Portland: Intersentia (2008), pp. 85-98. See also the final report of the Special Rapporteur of the Commission on Human Rights, Mrs. Erica Daes, on Indigenous peoples' permanent sovereignty over natural resources, *UN Doc. E/CN.4/Sub.2/2004/30* of 13 July 2004 and its addendum, *UN Doc. E/CN.4/Sub.2/2004/30/Add.1* of 12 July 2004.

13 Article 1(1)(b) of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989 (entry into force: 5 September 1991), *28 ILM 1382 (1989)*.

14 For a general account of the position of indigenous peoples in international law, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge studies in international and comparative law, Cambridge: Cambridge University Press (2007).

15 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989 (entry into force: 5 September 1991), *28 ILM 1382 (1989)*. This Convention has been ratified by only 22 States.

rights. Key provisions of the Convention focus on the protection of the culture of indigenous peoples (Article 5), consultation with indigenous peoples regarding matters that directly affect them (Article 6) and the right of indigenous peoples to control their own development (Article 7).

Furthermore, in order to avoid any misunderstandings regarding the legal status of indigenous peoples under the Convention, Article 1(3) of ILO Convention 169 specifies that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". This provision should be interpreted as a safeguard to prevent indigenous peoples from claiming a right to secession.

In 2007, the General Assembly adopted a Declaration on the Rights of Indigenous Peoples.[16] This declaration does not define the term "indigenous peoples", but it does indicate in Article 2 that "indigenous peoples and individuals are free and equal to all other peoples and individuals".[17]

The Declaration carefully defines and outlines the rights of indigenous peoples. Article 3 of the Declaration grants a right to self-determination to indigenous peoples, which, according to Article 4, concerns "matters relating to their internal and local affairs".[18] Other substantive rights regulate specific matters relating to the special position of indigenous peoples, such as the rights to practice their cultural and religious traditions, as formulated in Articles 11 and 12 of the declaration.

The Declaration also contains detailed provisions regarding the protection of indigenous peoples' traditional lands. Article 26, for example, formulates a right for indigenous peoples "to own, use, develop and control the lands, territories and resources that they possess". In addition, Article 27 formulates an obligation for States to establish an impartial, open and transparent process "to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources". Finally, and of the utmost importance for the current book, Article 32 determines that States must

> "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".

16 United Nations Declaration on the Rights of Indigenous Peoples, Annex to *UN General Assembly Resolution 61/295*, 2 October 2007.

17 Author's emphasis added.

18 In this regard, also see Article 46(1), which determines that nothing in the declaration may be construed as "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". This provision thus confirms that for indigenous peoples the right to self-determination does not entail a right to secession.

This provision constitutes the basis for the obligations of governments regarding the exploitation of natural resources on indigenous lands. This obligation was also recognised by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. The Guidelines of both Committees indicate that a proper implementation of the right to self-determination implies the recognition and protection of the rights of indigenous peoples to ownership of the lands and territories that they traditionally occupy or use for their livelihood. It also requires the establishment of procedures allowing for indigenous and local communities to be duly consulted, as well as the adoption of decision-making processes which seek the prior informed consent of indigenous peoples and local communities regarding matters that affect their rights and interests under the Covenant.[19]

Of course, neither the Declaration on the Rights of Indigenous Peoples nor the Guidelines of these two authoritative human rights committees are legally binding. Nevertheless, the obligation to consult indigenous peoples has also been recognised in the case law of the Human Rights Committee itself and in the case law of other human rights bodies, notably in relation to the protection of minority rights and the right to self-determination. This case law is discussed in section 3 of this chapter in relation to the right to self-determination.

3.2.3 Concluding remarks on the definition of peoples

The notion of "peoples" is a dynamic concept which can apply to different groups.[20] However, in the context of a sovereign State, the term "peoples" refers in particular to all persons within a State as the sum of all the peoples living in the State, *i.e.*, the population as a whole, and to distinct groups within a State possessing certain common characteristics, in particular, minorities and indigenous peoples.

This book focuses on the rights of peoples in relation to the exploitation of natural resources. In this respect, two rights are of particular importance. The first is the right to self-determination, because it is inextricably linked to the principle of permanent sovereignty over natural resources. The second is the right to development, which is both a logical extension of the right to

19 Guidelines for the treaty-specific document to be submitted by States parties under Article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1; Guidelines for the treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2008/2* of 24 March 2009.

20 For a study of the implementation of United Nations Resolutions regarding the right of colonial peoples to self-determination, see in particular, H. Gros-Espiell, 'The Right to Self-Determination: Implementation of United Nations Resolutions – A Study', *UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980)*.

self-determination and an expression of the obligation of States to exploit their natural resources for national development and the well-being of the people of the State concerned. The following sections examine both rights in turn and analyse their implications for peoples living in sovereign States.

3.3 THE RIGHT TO SELF-DETERMINATION

The right to self-determination refers to a right for peoples to "freely determine their political status and freely pursue their economic, social and cultural development".[21] The most relevant aspect for this book is the fact that the right to self-determination, as enshrined in the 1966 Human Right Covenants, includes a right for peoples to freely dispose of their natural resources. This section examines the evolution, nature and legal status of the right to self-determination, with an emphasis on its relation to the exploitation of natural resources. It also explores the implications of the right to self-determination for peoples living in independent States.

3.3.1 Evolution of the right to self-determination

Self-determination as a political postulate

The origins of the right to self-determination can be traced back to the birth of the nation state, which was based on the idea that governmental authority should be derived from the consent of the governed. The 1581 Dutch Act of Abjuration was the first document to propose that the government is responsible for its population and that populations whose rights and freedoms are not respected have the right to choose another government.[22]

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21 The identical Articles 1 of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

22 The Dutch Act of Abjuration (Plakkaat van Verlatinghe) states as follows: "Whereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. And when he does not behave thus, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, then he is no longer a prince, but a tyrant […]. And particularly when this is done deliberately […], they may not only disallow his authority, but legally proceed to the choice of another prince for their defence". English translation, available through <http://www.let.rug.nl/~usa/D/1501-1600/plakkaat/plakkaaten.htm>, last consulted on 7 June 2013. The idea that governmental authority should be derived from the consent of the governed was not entirely new. Already in 1215, English barons had forced King John of England, hated for his oppressive government, to sign a document in which their basic freedoms were recognised. However, this document, known as the *Magna Carta*, did not pronounce itself on the relationship between the government and the governed. It is rather a precursor to

Thus in its original form, self-determination refers to the right of a population of a State to choose its own government. This right has an internal and an external dimension. While the internal dimension of the right concerns the right of a population to choose its preferred form of government, the external dimension concerns a nation's right to determine its international status.[23]

These two dimensions of self-determination also form the basis of the 1776 American Declaration of Independence, which states that:

> "to secure certain unalienable rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."[24]

In contrast, the 1789 French Declaration of the Rights of Man and of the Citizen focuses primarily on internal self-determination, when it determines that any form of governmental authority must be derived expressly from the people.[25] Of course, these differences can easily be explained from a historical perspective. While the American Declaration was a proclamation of independence from the British Empire, the French Declaration was drafted after an internal revolution.

In conclusion, it should be noted that these early expressions of the concept of self-determination give peoples a central place. Peoples have the right to choose the form of government that best represents their interests. Moreover, the declarations postulate the idea that the government must be based on the consent of the governed. These ideas were further developed in later stages during the evolution of the concept of self-determination.

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the idea that 'rule' should be according to 'law'. For the Magna Carta, see J.C. Holt, *Magna Carta*, Cambridge: Cambridge University Press (1992), pp. 441-473.

23 See D. Raič, *Statehood and the Law of Self-determination*, The Hague: Kluwer Law (2002), p. 205, who explains that external self-determination "denotes the determination of the *international* status of a territory and a people", while internal self-determination "refers to the relationship between the government of a State and the people of that State".

24 The American Declaration of Independence, text available through the Avalon Project, <http://avalon.law.yale.edu/18th_century/declare.asp>, consulted on 21 October 2008.

25 *Déclaration des droits de l'Homme et du citoyen*, 26 August 1789, Article 3: "Le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément", accessible through <http://www.textes.justice.gouv.fr>. In French, the word 'nation' is used in the sense of the Latin word 'natio' and designates the population of a state. The Larousse defines 'nation' as a "grande communauté humaine, souvent installée sur un même territoire, qui possède une unité historique, linguistique et constitue une entité politique". See the Dictionnaire Larousse, édition 2010.

Self-determination as a legal principle

The notion of self-determination only became firmly rooted in international law well into the twentieth century.[26] While the concept of self-determination does not appear at all in the Covenant of the League of Nations, despite a proposal by the American President Wilson to insert a provision on self-determination in the Covenant,[27] and is only hinted at in the 1941 Atlantic Charter,[28] the notion finally appeared and was recognised as a legal principle in the UN Charter.[29]

Self-determination figures prominently as one of the main principles on which the new world order is based. Article 1(2) of the UN Charter determines that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Furthermore, Article 55 of Chapter IX of the UN Charter on International Economic and Social Cooperation states that the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations "based on the principle of equal rights and self-determination of peoples".

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26 See generally on the right of self-determination, A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995); P. Alston, 'Peoples' Rights: The State of the Art at the Beginning of the 21st Century', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 259-293; D. Thürer & T. Burri, 'Self-Determination', in R. Bernhardt, Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, available as an online resource (2009); J. Crawford, 'The Right of Self-Determination in International Law', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 7-67; D. Raič, *Statehood and the Law of Self-determination*, The Hague: Kluwer Law (2002).

27 Wilson's proposal stated: "The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations of present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those peoples […]". See A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 23.

28 The Atlantic Charter expresses the principle that territorial changes must accord "with the freely expressed wishes of the peoples concerned' and proclaims a right of all peoples "to choose the form of government under which they will live". Atlantic Charter, *Yearbook of the United Nations* (1946-47), New York: United Nations (1947), p. 2.

29 Or, as Cassese puts it: "The adoption of the UN Charter marks an important turning-point: it signals the maturing of the political postulate of self-determination into a legal standard of behaviour". A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 43. On the debates at San Francisco, see O. Spijkers, *The United Nations, the Evolution of Global Values and International Law*, School of Human Rights Research Series, Vol. 47, Cambridge, Antwerp, Portland: Intersentia (2011), Chapter VII.

However, the Charter does not contain any further indications regarding the implications of the principle of self-determination for inter-state relations. In particular, it does not clarify whether the principle entails a right of secession for peoples. The discussions of the Committee drafting the relevant provision at San Francisco suggest that – at least as regards the opinion of some of the Committee members – the principle of self-determination was supposed to refer only to self-government.[30] In other words, the principle of self-determination was not supposed to entail a right for peoples to establish an independent State.

However, a closer look at the UN Charter as a whole warrants a broader reading of the UN Charter principle of self-determination. This is illustrated by the text of Article 76 of the UN Charter regarding the international trusteeship system, which is aimed at the "progressive development towards self-government or independence" for trust territories. The reference to independence was inserted at the instigation of the USSR, which considered self-government alone, as proposed by the UK, to be an inadequate objective in the context of trustee territories.[31] Interestingly, the USSR stated that the reference in Article 76 to the purposes of the United Nations, including the principle of self-determination, implied that "this principle could hardly be omitted from the trusteeship chapter", thus hinting at a broader definition of self-determination.

In any case, it can be concluded that the drafters of the UN Charter clearly wanted to exclude the possibility that in the UN Charter, self-determination would be interpreted as entailing a right to secession for colonial countries. In order to prevent any confusion on this matter, the term "self-determination" is not mentioned at all in Article 73 of the UN Charter, the provision dealing with colonial countries. Article 73 refers only to "self-government", without any general reference to the purposes of the United Nations as stated in Article 1 of the UN Charter.

Despite the general confusion about the scope of the principle of self-determination in the UN Charter, it is therefore clear that colonial peoples were not considered to have a right to independence. This can be regarded as one of the last manifestations of the era of colonialism. Since then the political landscape has changed considerably as a result of the process of decolonisation. These changes have had a significant impact on the concept of self-determination as well. One of the most profound impacts is related to the recognition of self-determination as a human right, because the internal dimension of self-

30 The records note that "the principle [of self-determination] conform[s] to the purposes of the Charter only insofar as it implie[s] the right of self-government of peoples and not the right of secession". *Documents of the United Nations Conference on International Organization*, Sixth Meeting of Committee I, May 16, 1945, Vol. 6 (1945), p. 296.

31 See *Documents of the United Nations Conference on International Organization*, Fourth Meeting of Committee II/4, May 14, 1945, Vol. 10 (1945), p. 441.

determination was strengthened as a result. Moreover, the range of subjects to which the principle applies was significantly extended.

Self-determination as a human right

Not long after being established as a legal principle, self-determination was also recognised as a human right.[32] At the instigation of the USSR, the right to self-determination was included in the identically formulated Articles 1 of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.[33]

This Article consists of three components. Article 1(1) of the 1966 Covenants formulates a right for all peoples to "freely determine their political status" and to "freely pursue their economic, social and cultural development". In order to pursue development, States must be in control of their economic means. This is recognised in Article 1(2) of the 1966 Covenants, which formulates a right for peoples to freely dispose of their natural resources and formulates a prohibition against depriving peoples of their means of subsistence. Finally, Article 1(3) formulates a positive obligation for States to promote the realisation of the right to self-determination and a negative obligation to respect the right.

The right to self-determination has civil and political, as well as economic and social dimensions. The inclusion of the right to self-determination in both human rights Covenants emphasises the comprehensive nature of the right to self-determination.[34] This section first takes a closer look at the political dimension of self-determination and subsequently discusses the economic dimension. It should be noted that these two dimensions are mutually interdependent. The right to political self-determination cannot be achieved if the State does not control its own natural resources, while the right to economic self-determination cannot be achieved without proper structures for the governance of natural resources.

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32 Alston calls this development the second phase in the evolution of peoples' rights in international law. See P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 262-264.

33 International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, Annex to UNGA Resolution 2200 (XXI) of 16 December 1966, *993 UNTS 3*; International Covenant on Civil and Political Rights (ICCPR), New York, Annex 2 to UNGA Resolution 2200 (XXI) of 16 December 1966, *999 UNTS 171.* For the proposal of the USSR to include a provision on self-determination, see the 1950 Yearbook of the United Nations, pp. 526-527.

34 See J. Crawford, 'The Right of Self-Determination in International Law', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), p. 27, who argues that " [i]ts inclusion in both Covenants suggests that self-determination is both a civil and political right and an economic, social and cultural right".

The right to political self-determination

The concept of political self-determination, as it developed over time, has two basic tenets, giving rise to two separate yet interrelated rights. The right to external self-determination concerns the right of peoples to determine their international status, while the corresponding right to internal self-determination concerns the right of peoples to choose a political system.[35] While the right to external self-determination is primarily important in inter-state relations, the right to internal self-determination determines the relationship between the government and the peoples living within a State. In the light of the aim of this book, which deals primarily with questions relating to the governance of natural resources within States, the emphasis of this section is therefore on internal rather than on external self-determination. The right to external self-determination is discussed mainly to provide the necessary context for a better understanding of the right to internal self-determination.

If the right to self-determination is interpreted as a right for peoples to determine their international status and/or a right to choose a political system, two questions immediately spring to mind. The first concerns the modalities for exercising the right to self-determination, while the second concerns the legal subjects of the right. Both questions were considered in some detail in two authoritative declarations of the UN General Assembly dealing with the issue of self-determination, i.e., the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, as well as in the case law of the International Court of Justice.

As regards the modalities for exercising the right to self-determination, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples interprets the right to self-determination principally as a right for colonial peoples to gain independence. In particular, the Declaration refers to the need

> "to transfer all powers to the peoples of [Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence], without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom".[36]

35 See R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press (1994), p. 120, who argues that the right of peoples to freely pursue their economic, social and cultural development implies their right to choose their government.

36 Declaration on the Granting of Independence to Colonial Countries and Peoples, *UN General Assembly Resolution 1514 (XV)*, 14 December 1960, paras. 2 and 5. In addition, see J-F. Dobelle, 'Article 1 Paragraphe 2', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies: Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 341.

In addition, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations – which treats self-determination alternatively as a principle and as a right – determines that the principle of equal rights and self-determination entails a right for all peoples to "freely determine, without external interference, their political status and to pursue their economic, social and cultural development".[37] Furthermore, the 1970 Declaration distinguishes between four modes of exercising the right to self-determination. The Declaration determines:

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".[38]

It is important to note that both declarations base the exercise of the right to self-determination on the free expression of the will of the peoples concerned. This interpretation of the right to self-determination as requiring a free and genuine expression of the will of the peoples concerned lies at the heart of the right to self-determination. This is also how the right to self-determination is interpreted by the International Court of Justice, which, in its Advisory Opinion on the *Western Sahara*, expressly provided that self-determination must be understood as "the need to pay regard to the freely expressed will of peoples".[39] This interpretation of the right to self-determination also explains the focus of United Nations practice on organizing elections to determine the will of the people. In the context of decolonisation, the UN has provided assistance for the organization of a number of plebiscites and elections for the purpose of determining the will of the people with regard to their political future.[40]

The right to self-determination is also invoked in relation to UN-supervised elections in States that have suffered from internal armed conflicts. Reference can be made in particular to UN Security Council resolutions in relation to the elections in Cambodia in 1993. In Resolution 745 (1992), the UN Security Council explicitly stated that it desired to assure "the right to self-determination of the Cambodian people through free and fair elections".[41] Furthermore,

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37 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970, principle 5.

38 *Ibid*., para. 4.

39 International Court of Justice, *Western Sahara*, Advisory Opinion of 16 October 1975, *1.C.J. Reports* 1975, para. 59.

40 For examples, see A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), pp. 76-78.

41 UN Security Council Resolution 745 (1992), paragraph 4 of the preamble.

in a subsequent resolution, the Council recalled that "all Cambodians have […] the right to determine their own political future through the free and fair election of a constituent assembly".[42]

Therefore it can be argued that in UN practice, elections generally serve as the principal means of ascertaining that a people has been able to freely exercise its right to self-determination. However, despite the importance of elections for ascertaining the will of peoples, it is only a way of achieving their right to self-determination. The essence of the modern right to political self-determination, which can be construed as a right to representative government, forms the basis for this. Self-determination in this sense is most clearly described in the 1970 Friendly Relations Declaration, which indicates that the UN Charter principle of equal rights and self-determination requires a government "representing the whole people belonging to the territory without distinction as to race, creed or colour".[43]

This paragraph is important for several reasons. First, it can be interpreted as a confirmation that the right to self-determination accrues to peoples living within independent States, which had been a matter of considerable controversy until the adoption of this Declaration.[44] Secondly, the paragraph emphasises the importance of a representative and non-discriminatory government. This is also why the 1970 Declaration has often been quoted by advocates of the right to external self-determination for oppressed groups within a State. While the right to external self-determination is generally considered to accrue to colonial peoples and to peoples under alien subjugation,[45] some authors have argued in favour of extending the right to external self-determination to oppressed groups within States. These authors often point to the Friendly Relations Declaration and argue that the principle of equal rights and self-determination does not preclude action that would break down or harm the

42 UN Security Council Resolution 792 (1992), paragraph 6 of the preamble.

43 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970, principle 5.

44 See R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *American Journal of International Law,* Vol. 65(5) (1971), pp. 713-735, who argues on p. 732 that "a close examination of its text will reward the reader with an affirmation of the applicability of the principle to peoples within existing states and the necessity for governments to represent the governed".

45 See International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, para. 52; International Court of Justice, Western Sahara, Advisory Opinion of 16 October 1975, *1.C.J. Reports 1975*, paras. 54-59; International Court of Justice, East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports 1995*, p. 90.

territorial integrity or political unity of a State which is not "possessed of a government representing the whole population".[46]

The right for oppressed people within States to secede from that State is still an issue of considerable controversy. In the Advisory Opinion regarding Kosovo, the International Court of Justice had an opportunity to pronounce on the matter. In a general sense, the Court considered:

> "Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances".[47]

Instead of taking a stand on the matter, the Court adhered to a strict reading of the question formulated by the General Assembly in its request for an Advisory Opinion. This question concerned the legality of the Declaration of Independence issued by the Provisional Institutions of Self-Government of

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46 It should be noted that the relevant paragraph of the 1970 Declaration reads in full: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". For proponents of an *a contrario* reading of this paragraph, see, *i.e.,* A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), pp. 109-115; and J-F. Dobelle, 'Article 1 Paragraphe 2', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies : Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 351, who argues that "le droit à l'autodétermination externe est en principe exclu, à condition que le droit à l'autodétermination interne soit garanti. En revanche, la méconnaissance grave et persistante de ce dernier pourrait légitimement déboucher sur le droit à l'indépendance". For a more cautious perspective, see H. Gross Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Publication, Sales No. E/79.XIV.5, 1979, para. 60, who underlines that if "beneath the guise of ostensible national unity, colonial and alien domination in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated". He further posits that the Declaration on Friendly Relations "uses particularly apt language in spelling out this idea: it reaffirms the need to reserve the territorial integrity of sovereign and independent States, but ties this concept to the requirement that the States must be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

47 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 82.

Kosovo.[48] The Court concluded that international law does not in general prohibit the act of promulgating a declaration of independence.[49]

Although it concerns a national case, a previous judgment of the Supreme Court of Canada in the case of Quebec also illustrates this point. The Supreme Court was faced with the question whether the population of Quebec, a linguistic minority living in Canada, had the right to secede from Canada. In this instance the Supreme Court ruled as follows:

> "Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the 'people' issue [in relation to the right of self-determination] because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states".[50]

The Quebec case implies that the right to internal self-determination must first of all be achieved within the framework of the existing State. Whether a right to secession exists for peoples that are not represented through their government remains a matter of considerable controversy, as confirmed by the Kosovo Advisory Opinion. However, it can be argued that under current international law, questions about the representativeness of a government must primarily be resolved within the existing framework of the State. The following sections explain in greater detail how the right to self-determination can be achieved in an existing State.

The right to economic self-determination

The right to freely pursue economic, social and cultural development as enshrined in Article 1(1) of the Covenants not only requires that peoples can

48 See International Court of Justice, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution A/RES/63/3 (A/63/L.2) of 8 October 2008, 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo'.

49 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 79.

50 Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, Judgment of 20 August 1998.

choose the form of government to achieve this objective, but also that they have access to the economic means necessary to pursue development. Therefore, as a corollary of the political component of the right to self-determination, Article 1(2) of the Covenants contains a right for peoples to freely dispose of their natural wealth and resources.

This provision was inserted in 1955 on the initiative of Chile. It proclaims a right for all peoples to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law" (…) "for their own ends".[51] Therefore the provision emphasises the freedom of peoples to control their natural resources while at the same time it points to the need to respect their obligations under international law. In this way, the drafters of the Covenants have sought to create a careful balance between the interests of States endowed with natural resources on the one hand, and the interests of foreign investors on the other.

Towards the end of the drafting process of the Covenants, when the composition of the UN had changed considerably as a result of the process of decolonisation, a safeguard provision was inserted in both covenants. Article 25 of the ICESCR and Article 47 of the ICCPR, dealing with the implementation of the covenants, determine that nothing in the Covenants "shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources". Some authors argue that Article 25 of the ICESCR and Article 47 of the ICCPR "were aimed at 'rectifying' Article 1(2) in order to meet new demands in the wake of the evolution of international politics and law that had taken place in the meantime".[52]

However, a more convincing interpretation of Article 25 of the ICESCR and Article 47 of the ICCPR is that the provisions were meant to prevent the erosion of the right of peoples to freely dispose of their natural resources using the argument of "obligations arising out of international economic co-operation". This is reflected in the wording of the provisions, which refer only to the Covenants themselves, and not to international law in general. Obligations

51 For the original proposal made by Chile in 1952, see *supra* note 110.

52 A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 57. Similarly, D.J. Halperin, 'Human Rights and Natural Resources', *William and Mary Law Review*, Vol. 9 (1967-1968), pp. 770-787, who demonstrates that Article 25 of the ICESCR and Article 47 of the ICCPR have a strong anti-colonialist connotation and J. Summers, *The Idea of the People: The Right of Self-Determination, Nationalism and the Legitimacy of International Law*, Doctoral Dissertation, University of Helsinki (2004), p. 146 who argues that Articles 25 and 47 formulate an absolute right and "can be seen […] as an attempt to change the interpretation of the balance in article 1(2) without actually being an amendment to the paragraph".

arising from other legal instruments or from general international law cannot be set aside by Article 25 of the ICESCR or Article 47 of the ICCPR.[53]

In addition to formulating a right for peoples to freely dispose over their natural resources, Article 1(2) of the ICESCR and the ICCPR also contains a prohibition stipulating that "[i]n no case may a people be deprived of its own means of subsistence". Although it was originally inserted with the aim of protecting newly independent States and developing countries from developed States and foreign investors, the prohibition is also a human right which can be invoked by peoples against their government. In this sense, the prohibition establishes the ultimate limits for governments with respect to the use of the State's natural resources. It provides that the exercise of permanent sovereignty by the government may never result in peoples being deprived of their means of subsistence.

The provision can also be read as a prohibition for governments to deny peoples the right of access to their means of subsistence. This right of access covers both physical and economic access.[54] For example, this means that local communities and indigenous peoples cannot be denied physical access to hunting grounds, rivers or forests, if this is necessary for their subsistence. In addition, the government is also precluded from denying peoples economic access to their means of subsistence. This means, for example, that governments cannot deny local communities access to mines if these communities are highly dependent on mining to earn a basic living. These issues, as well as their implications in situations of armed conflict, are examined in greater detail in Part II of this book.

The economic dimension of the right to self-determination was notably expressed in resolutions of the General Assembly relating to the principle of permanent sovereignty over natural resources, including the landmark 1962 Declaration on Permanent Sovereignty over Natural Resources and the 1974

53 This applies particularly for obligations arising out of the UN Charter. Article 103 of the UN charter determines that obligations under the UN Charter prevail over obligations under other international agreements. In this respect, Article 1(1) of the UN Charter determines that the purposes of the UN include the maintenance of international peace and security and that international disputes or situations which might lead to a breach of the peace must be adjusted or settled "in conformity with the principles of justice and *international law*". Author's emphasis added. It may be noted that in addition to the general rule contained in Article 103 of the UN Charter, both the ICESCR and the ICCPR contain explicit conflict clauses regulating the relation between the Covenants and the UN Charter. See Article 24 of the ICESCR and Article 46 of the ICCPR.

54 For the distinction between physical and economic access in relation to the right to an adequate standard of living, and in particular to adequate food, protected under Article 11 of the ICESCR, see Committee on Economic, Social and Cultural Rights, General Comment No. 12, *UN Doc. E/C.12/1999/5* of 12 May 1999, para. 13.

Charter on Economic Rights and Duties of States.[55] An early reference can also be found in the 1960 Decolonisation Declaration, albeit in its preamble.[56] It is striking that the 1970 Declaration on Friendly Relations contains no reference whatsoever to economic self-determination. A proposal to insert a reference to natural resources was discussed in relation to the principle of sovereign equality, rather than in relation to the principle of equal rights and self-determination. It therefore seems that the Friendly Relations Declaration considered the economic component of self-determination to be an attribute of state sovereignty rather than a right of peoples.[57] The aim of the Friendly Relations Declaration, to clarify and further develop the principles of inter-state relations, as enshrined in the UN Charter, explains this perspective.

As regards treaty law, the right to economic self-determination was also expressed in Article 21 of the African Charter of Human and Peoples' Rights, which formulates a right comparable to Article 1(2) of the international covenants on economic, social and cultural rights and on civil and political rights. However, instead of formulating an obligation to "respect obligations arising out of international economic co-operation", the provision formulates the much looser obligation to "promote international economic cooperation".

Furthermore, this economic cooperation does not have to be based on "mutual benefit and international law" as stipulated in the covenants, but must be based on "mutual respect, equitable exchange and the principles of international law".[58] It further provides that the right of peoples to freely dispose of their natural resources must be exercised "by States parties" and "in the exclusive interest of the people". In addition, it provides for a right of lawful recovery and adequate compensation for peoples in case of the spoliation of their natural resources.

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55 UN General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources; UN General Assembly Resolution 3281 (XXIX) of 12 December 1974 on a Charter of Economic Rights and Duties of States. These resolutions will be discussed in more detail in the following section. For the relation between the right to self-determination and permanent sovereignty, see, *inter alia,* Gros Espiell who argues that "the economic content of the right of peoples to self-determination finds its expression in particular […] in their right to permanent sovereignty over natural resources". See Commission on Human Rights, 'The Right to Self-Determination: Implementation of United Nations Resolutions', study prepared by H. Gros Espiell (Uruguay), special rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1980), *UN Doc. E/CN.4/Sub.2/405/Rev.1, para 136*.

56 Declaration on the Granting of Independence to Colonial Countries and Peoples, *UN General Assembly Resolution 1514 (XV)*, 14 December 1960, preamble, para. 8.

57 For the drafting history of the Declaration on Friendly Relations, see M. Šahović, 'Codification des Principes du Droit International des Relations Amicales et de la Coopération entre les Etats', *Recueil des Cours,* Vol. 137 (1972), pp. 243-310.

58 African Charter on Human and Peoples' Rights, Banjul, 27 June 1981, *21 I.L.M. 58 (1982).* Author's emphasis added.

3.3.2 The nature and legal status of the right to self-determination

The concept of self-determination has attained a firm status in international law, both as a principle and as a human right. Since its inclusion in the UN Charter, self-determination has been incorporated in several binding legal instruments, including the 1966 Human Rights Covenants. In addition, several authoritative resolutions of the UN General Assembly refer to self-determination as well, including the authoritative 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.[59] Moreover, in the *East Timor* Case, the International Court of Justice confirmed that self-determination "is one of the essential principles of contemporary international law" and that it "has an *erga omnes* character".[60]

This case also implies that the principle of self-determination applies to the international community of States.[61] States have the obligation both to actively promote the right to self-determination – an obligation which is based on the UN Charter provisions regarding trust territories and, in subsequent State practice, non-self-governing territories – and the obligation not to interfere when a people rightfully exercises its right to self-determination, based, *inter alia*, on the Declaration on Friendly Relations.

When it comes to determining the nature of the concept of self-determination, a distinction must be made between its external and internal dimension. As regards the external dimension, self-determination can first of all be inter-

59 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970. Although the primary aim of the declaration was to elaborate upon the principles laid down in the UN Charter, the International Court of Justice treats the resolution as declaratory of customary international law. In the *Nicaragua* case, the Court determined that the effect of consent to the resolution may be considered as "an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 188.

60 International Court of Justice, East Timor (Portugal v. Australia), Judgment of 30 June 1995, *I.C.J. Reports 1995*, p. 90, para 29. In the *Barcelona Traction* case, the International Court of Justice determined that obligations *erga omnes* are "by their very nature […] the concern of al1 States". International Court of Justice, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment of 5 February 1970, Second phase, *I.C.J. Reports 1970*, p. 3, para 33.

61 As the International Court of Justice held that self-determination has an *erga omnes* character, it can be applied to the international community as a whole. East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports 1995*, p. 90), para 29. For a critical appraisal of this part of the judgment, see D. Thürer & T. Burri, 'Self-Determination', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law (2012), Vol. IX, pp. 113-128, paras. 24-25. Thürer and Burri argue that the legal consequences of the *erga omnes* qualification are unclear.

preted as giving rise to a right for colonial peoples and for peoples under alien subjugation to establish an independent State, to associate with or integrate with another State, or to develop any other political status. In addition, the concept entails a right to exercise control over the natural resources found within the State territory.

Recently, the existence of the right to external self-determination for colonial peoples and peoples under alien subjugation was confirmed in the Advisory Opinion of the International Court of Justice regarding Kosovo. In the relevant part the Court stated: "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".[62] Whether such a right exists for oppressed groups within a State as well, is a matter of considerable controversy. In international law questions about the representativeness of a government must currently be primarily solved within the existing framework of the State.

Once a people has organized itself within an autonomous State, whether through secession, integration or association, it may be argued that the right to external self-determination, including economic self-determination, is mainly assimilated in the principle of State sovereignty and the related principles of territorial integrity and non-intervention, which must be respected by other States. What remains is a right for peoples within the State to internal self-determination.

In this context, the right to self-determination primarily concerns the right of the people of a State to freely choose the State's political and economic system, as well as the right for minorities to govern their local affairs.[63] As Rosalyn Higgins noted: "Self-determination requires the ongoing choice of the people as to their governance, and, in turn, their economic, social and cultural development".[64] In addition, the right to self-determination implies an obligation for the government to exploit the State's natural resources for the benefit of the people. As Antonio Cassese argued,

> "Article 1(2) […] provides that the right to control and benefit from a territory's natural resources lies with the inhabitants of that territory. This right, and the corresponding duty of the central government to use the resources in a manner

62 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 79.

63 Or, as Cassese argues: " [i]nternal self-determination means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime", A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 101.

64 R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press (1994), p. 120.

which coincides with the interests of the people, is the natural consequence of the right to political self-determination".[65]

One of the main ways of achieving the right to internal self-determination is to establish proper procedures for decision-making, which allow for the participation of all the parties concerned. According to the Human Rights Committee, the relevant obligations in the identical Articles 1 of the Covenants include first of all the establishment of constitutional and political processes "which in practice allow the exercise of th[e] right [to self-determination]".[66] The Human Rights Committee's emphasis on "practice" plays a central role in this. It requires States to put in place policies which effectively guarantee the exercise of the right to self-determination. These policies can be examined by the Human Rights Committee as part of its mandate to examine reports submitted by States under the general reporting obligations of the ICCPR.

In addition, these policies can also arguably be judicially scrutinised before international human rights bodies.[67] More specifically, as indicated above, the Guidelines of the Human Rights Committee as well as those of the Committee on Economic, Social and Cultural Rights indicate that a proper implementation of the right to self-determination requires the establishment of procedures which allow for indigenous and local communities to be duly consulted, as well as the adoption of decision-making processes aimed at obtaining the prior informed consent of indigenous peoples and local commun-

65 A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 55.

66 See General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its twenty-first session, 13 March 1984, Office of the High Commissioner for Human Rights, para. 3 and Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1.

67 It should be noted in this regard that the complaint mechanisms of the ICCPR and the ICESCR are only open to individuals, while the right to self-determination is a collective right. Therefore, the Human Rights Committee has consistently stated, both in its General Comments and in relevant cases, that it does not recognise claims by individuals of violations of Article 1 of the ICCPR. It does however accept claims under other provisions of the Charter that are relevant for the realisation of the right of self-determination, in particular Articles 25, 26 and 27 of the ICCPR. See *e.g.* General Comment No. 23: The rights of minorities (Art. 27), *UN Doc. CCPR/C/21/Rev.1/Add.5*, 8 April 1994, para. 3.1, where the Committee explicitly states that "[s]elf-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such […] and is cognizable under the Optional Protocol".

ities regarding matters which affect their rights and interests under the Covenant.[68]

However, the case law of these bodies relating to natural resources policies does not extend beyond the protection of minority rights. In general, human rights bodies do not accept claims regarding the protection of the public interest. For example, under the Optional Protocol of the ICCPR, individuals have to claim to be the "victim" of violations of the ICCPR.[69] The Optional Protocol of the ICESCR that recently entered into force formulates a similar requirement.[70] This requirement forms an obstacle to challenging government decisions regarding the exploitation of natural resources, because it prevents persons who are not directly affected by a particular project from bringing a claim before a human rights body.

3.3.3 Implementation of the right to economic self-determination in the sovereign State

The right to self-determination requires the establishment of constitutional and political processes "which in practice allow the exercise of th[e] right".[71] The question arises if and to what extent international law has recognised this obligation specifically in relation to government decisions on the exploitation of natural resources and, if so, whether international law offers possibilities for redress regarding such decisions that affect the population or distinct groups in society.

In order to answer these questions, it is necessary to first look at the growing body of concluding observations and case law of human rights bodies regarding violations of the rights of indigenous peoples resulting from natural resources projects conducted within their lands and initiated by governments. The Human Rights Committee has been very active in recent years in protect-

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68 Guidelines for the treaty-specific document to be submitted by States parties under Article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1; Guidelines for the treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2008/2* of 24 March 2009.

69 Article 2 of the First Optional Protocol to the ICCPR, *999 U.N.T.S. 302*, states in the relevant part: "individuals who claim that any of *their* rights enumerated in the Covenant have been violated […] may submit a written communication to the Committee for consideration". Author's emphasis added.

70 Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Annex to UN General Assembly Resolution A/RES/63/117, of 10 December 2008.

71 See General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its twenty-first session, 13 March 1984, Office of the High Commissioner for Human Rights, para. 3 and Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1.

ing the rights of indigenous peoples over their lands and resources with the specific aim of preserving their culture and traditional lifestyle. Although the Human Rights Committee can only assess claims regarding the violation of individual human rights under the Optional Protocol, the Committee has opened the door for indigenous peoples and (other) minorities to invoke the individual rights protected under the ICCPR as communities.

It did so with a broad interpretation of Article 27 of the ICCPR regarding the protection of the right of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language, in community with the other members of their group. In this respect, the Human Rights Committee linked the individual right embodied in Article 27 to the collective right embodied in Article 1 of the ICCPR.[72] The Human Rights Committee has consistently interpreted Article 27 as containing a right for indigenous peoples to participate in decisions that affect them, such as those regarding the use of their land, including the exploitation of the natural resources found there.[73]

In addition, the rights of indigenous peoples over their lands were recognised to some extent by the Committee on Economic, Social and Cultural Rights, which, in its General Comment 7 on the right to adequate housing and forced evictions, explicitly refers to the vulnerable position of indigenous peoples.[74] In its General Comment No. 20 on non-discrimination in economic, social and cultural rights, the Committee also raises its concerns about "formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities".[75]

Furthermore, the African Commission on Human and Peoples' Rights decided in its landmark Ogoniland case that the right of a people to freely dispose of its natural resources, as protected under Article 21 of the African Charter on Human and Peoples' Rights, entails an obligation for the government to monitor and regulate the activities of private operators licensed to

72 See also N.J. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in I. Boerefijn & J. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman*, Antwerp/Oxford/Portland: Intersentia (2008), pp. 91-92.

73 See, in particular, the landmark case of Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, 15 November 2000. Also see the concluding observations of the Human Rights Committee with regard to Surinam (UN Doc. CCPR/CO/80/SUR, 4 May 2004, para. 21); Sweden (UN Doc. CCPR/CO/74/SWE, 24 April 2002, para 15); and Guyana (UN Doc. CCPR/C/79/Add.121, 25 April 2000, para. 21). Also see S.J. Anaya, 'The Human Rights of Indigenous Peoples', in F.G. Isa & K. de Feyter (ed.), 'International Protection of Human Rights: Achievements and Challenges', Bilbao: University of Duesto, HumanitarianNet (2006), pp. 604-605.

74 Committee on Economic, Social and Cultural Rights, General Comment 7 on the right to adequate housing (art. 11.1 of the Covenant): forced evictions, 20 May 1997, para. 10.

75 Committee on Economic, Social and Cultural Rights, General Comment 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), *UN Doc. E/C.12/GC/20* of 2 July 2009, para. 18.

exploit the State's natural resources.[76] The complainants also referred to Article 21 of the African Charter and stated that "in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland". Although the African Commission did not specifically address this issue, it came to the general conclusion that the practice of the Nigerian government did not meet the minimum standard of conduct to be expected of a government, and that it therefore constituted a violation of Article 21 of the African Charter.[77]

Finally, the Inter-American Court of Human Rights has developed an extensive case law regarding the rights of indigenous and tribal peoples over their communal lands. It has done so primarily based on the right to property, protected under Article 21 of the Inter-American Convention on Human Rights. In this respect the case of the Saramaka people *v.* Surinam is particularly relevant.[78] In that case, the Court determined first of all that Article 1 of the ICESCR and the ICCPR, to which Surinam was a party, grants a right to indigenous and tribal peoples to freely dispose of their natural wealth and resources so as not to be deprived of their means of subsistence.[79] In the light of these provisions the Court interpreted Article 21 of the Inter-American Convention relating to the protection of property to "call for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development […] grant[ing] to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition".[80]

Moreover, the Court determined that if the State wanted to impose restrictions on the property rights of the members of the Saramaka people by issuing concessions within their territory, the State must abide by the following three conditions: 1) the State must ensure the effective participation of the members of the Saramaka people in the project, including a duty to actively consult the community and to obtain their free, prior and informed consent; 2) the State must guarantee that the Saramakas will receive a reasonable benefit from any such project within their territory; 3) the State must perform an environmental and social impact assessment prior to issuing concessions.[81]

In a recent case regarding the Sarayaku people *v.* Ecuador, the Inter-American Court elaborated on the duty to consult indigenous peoples. The most significant aspect of this is that the Court decided that the duty to consult

76 Decision of the African Commission on Human and Peoples' Rights regarding Communication 155/96, Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria, 30st session, Banjul, October 2001, paras. 55-58.

77 *Ibid*.

78 Inter-American Court of Human Rights, Case of the Saramaka People *v.* Surinam, Judgment of 28 November 2007.

79 *Ibid*., para 93.

80 *Ibid*., para. 95.

81 *Ibid*., para. 129, paras. 133-134.

constitutes a general principle of international law.[82] The Court also considered that the consultation process should entail a "genuine dialogue as part of a participatory process in order to reach an agreement" and that the process must be construed as "a true instrument of participation," carried out in "good faith," with "mutual trust" and with the goal of reaching a consensus.[83]

All of the case law of these international human rights bodies to some extent recognises the obligation for a State to engage people in decisions regarding the use of natural resources situated on their lands. This is a strong argument for interpreting the right of peoples to freely dispose of their natural resources as a right to participate in government decision-making relating to the use of natural resources.

Such a right – or obligation – to public participation has been recognised in several instruments in relation to environmental matters. Principle 10 of the 1992 Rio Declaration, for example, proclaims that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level'.[84] It also determines that individuals must have "appropriate access to information concerning the environment that is held by public authorities […]and the opportunity to participate in decision-making processes".[85] This entails an obligation for the government to make information available and to provide access to justice for their citizens. Recently, the Rio+20 Declaration emphasised that "broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development".[86]

In terms of binding legal instruments, reference can be made to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus in 1998.[87] The Convention entered into force in 2009 and at present 46 parties, mainly European States, are parties to this convention. The Aarhus Convention is the most comprehensive multilateral treaty dealing with the right to public participation. Its objective is "the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[88] Therefore parties to the Convention must "guarantee the

82 Inter-American Court of Human Rights, The Kichwa people of Sarayaku v. Ecuador, Judgment of 26 July 2012, para. 164.

83 *Ibid*., paras. 167, 186 and 200. See also L. Brunner & K. Quintana, 'The Duty to Consult in the Inter-American System: Legal Standards after *Sarayaku*', *ASIL Insight* Vol. 16, Issue 35 (2012).

84 Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, *31 ILM 874 (1992)*.

85 *Ibid*.

86 Rio+20 Declaration: 'The Future We Want', UN General Assembly Resolution 66/288, 11 September 2012, para. 43.

87 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998, *2161 UNTS 447*.

88 *Ibid*., Article 1.

rights of access to information, public participation in decision-making, and access to justice in environmental matters".[89] Relevant obligations for the government include an obligation to provide information to the general public under Article 4 of the Convention, an obligation to provide for the participation of the public concerned in decisions on specific activities, including an obligation to provide information and to be consulted under Article 6 of the Convention, and an obligation to provide access to justice to persons who have not received adequate information under Article 9 of the Convention.

Although the Convention is very ambitious and covers various kinds of industrial activities, including activities relating to the exploitation of natural resources, its geographical scope is limited. The Convention is open to all States, but has mainly been ratified by European States. The objective of the Convention is another limitation. It is not concerned with decisions on the exploitation of natural resources in general, but applies only to natural resource projects that may have an impact on the environment.

Furthermore, reference can be made to two international environmental treaties in terms of binding legal instruments, that include provisions on public participation. Article 14(1)(a) of the 1992 Convention on Biological Diversity provides that States must allow for public participation in the environmental impact assessment procedure. In addition, Article 3(a) of the Anti-Desertification Convention provides that parties "should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities".

Finally, the right to self-determination, interpreted as a right for peoples to participate in decision making, can also be implemented by means of individual rights protected under the Covenants. After all, the collective right to internal self-determination could be said to entail a right for all human beings living in a State to participate in the organization of that State's political and economic system.[90] One of the key provisions in this respect is Article 25 of the ICCPR, which states:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

89 *Ibid*.

90 See, *e.g.*, *The Study of the Historical and Current Development of the Right to Self-Determination*, prepared by A. Cristescu (Romania), Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN publication, Sales No. E.80.XIV.3 (1980).

(c) To have access, on general terms of equality, to public service in his country."

Article 25 of the ICCPR formulates a right for all citizens, i.e., for all the nationals of a State, to participate in the State's decision-making process, a right which can be enforced against the will of the State itself. In its General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, the Human Rights Committee explicitly stated that

> "the rights under article 25 are related to […] the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol'.[91]

Furthermore, the effectiveness of the right is guaranteed by the requirement of genuine and periodic elections and by the implementation of other human rights, such as the right to freedom of expression formulated in Article 19 of the ICCPR and the right to freedom of association included in Article 22 of the ICCPR and Article 8 of the ICESCR.[92]

In addition, reference can be made to public participation in relation to the right of individuals to an adequate standard of living, as enshrined in Article 11 of the ICESCR. This provision contains an obligation for States to take measures, including specific programmes, which are needed:

> "To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources".

In its General Comment on the Right to Adequate Food, the International Committee on Economic, Social and Cultural Rights emphasised that the right to adequate food includes questions regarding the accessibility of natural resources.[93] Furthermore, the Committee provided that "[t]he formulation and implementation of national strategies for the right to food requires full

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91 Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, *UN Doc. CCPR/C/21/Rev.1/Add.7*, para. 2.

92 *Ibid*, para. 25.

93 International Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food (Art. 11), *UN Doc. E/C.12/1999/5*, 12 May 1999, para. 13.

compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary".[94] In addition, the Committee determined that "appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition".[95]

Although Article 11 of the ICESCR approaches the issue of natural resources exploitation from the perspective of the right to have access to adequate food, the provision may also be relevant for broader issues relating to the use of natural resources. In particular, the provision can be linked to the prohibition on depriving a people of its means of subsistence, as enshrined in Article 1(2) of the ICESCR. In its General Comment relating to the Right to Adequate Food, the Committee on Economic, Social and Cultural Rights unambiguously emphasised the importance of involving citizens in the development of national strategies to promote the right to food, including access to natural resources.

It can be concluded that the right of a people to economic self-determination in the context of a sovereign State is primarily implemented through the modern right of communities, as well as of individual members of the population of a State, to take part in national and local decision-making processes. The State is obliged to establish proper procedures which allow for these rights to be exercised in practice. Furthermore, international human rights bodies can, to a certain extent, assess whether States have met their obligation to provide for public participation.[96]

3.4 THE RIGHT TO DEVELOPMENT

The right to self-determination includes a right for peoples to "freely pursue their economic, social and cultural development". The right to development – as it appears in the Declaration on the Right to Development – constitutes one of the principal means to achieve the right to self-determination, because it formulates a right for peoples and individuals "to participate in, contribute

94 *Ibid*., para. 23.

95 *Ibid*., para. 24.

96 On the role of human rights monitoring mechanisms in achieving State compliance with treaty obligations, see I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties', *Netherlands International Law Review,* Vol. 56(2) (2009), pp. 167-205; and A. Zimmermann, 'Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice', *The Law and Practice of International Courts and Tribunals,* Vol. 12 (2013), pp. 5–29.

to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[97]

Furthermore, the right to development "implies the full realization of the right of peoples to self-determination", which includes sovereignty over natural wealth and resources.[98] In this sense, it can be regarded as a continuation of the right to self-determination for peoples who have organized themselves in independent States. This section traces the evolution, nature and legal status of the right to development and examines its implications for the governance of natural resources within a sovereign State.

3.4.1 Evolution of the right to development

The UN Charter provisions on economic and social cooperation

The right to development is rooted in the UN Charter provisions on international economic and social cooperation. Article 1(3) of the UN Charter determines that the aims of the United Nations include achieving "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[99] This rather broad aim was developed in Chapter IX of the UN Charter on international economic and social cooperation. In this respect, Article 55 specifies *inter alia* that the United Nations shall promote "conditions of economic and social progress and development". To achieve this aim, Article 56 provides that "All Members pledge themselves to take joint and separate action in co-operation with the Organization". Over

97 Article 1(1) of the Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986. On the right to development, see in general, *inter alia,* A. Sengupta, *'On the Theory and Practice of the Right to Development'*, Human Rights Quarterly, Vol. 24 (2002), pp. 837–889; G. Abi-Saab, 'Droits de L'Homme et Développement: Quelques Eléments de Réflexion,' *African Yearbook of International Law,* Vol. 3 (1995), pp. 3-10; I.D. Bunn, 'The Right to Development: Implications for International Economic Law', *American University International Law Review,* Vol. 15 (2000), pp. 1425-1467; N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston: Martinus Nijhoff Publishers (2008), p. 269-274; L. Amede Obiora, 'Beyond the Rhetoric of a Right to Development', *Law and Policy,* Vol. 18, Nos. 3 & 4 (1996), pp. 355-418; A. Pellet, *Le Droit International du Développement*, Collection 'Que sais-je?' deuxième édition, Paris: Presses Universitaires de France (1987); J. Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 473-509.

98 Article 1(2) of the Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986.

99 See O. de Frouville, 'Article 1 Paragraphe 3', in Cot, J-P., Pellet, A., Forteau, M. (ed.), *La Charte des Nations Unies : Commentaire Article par Article*, 3e édition, Paris : Economica (2005), p. 358. De Frouville calls Article 1(3) the second pillar of the positive dimension of peace, together with the principle of equal rights and self-determination of peoples.

the years, these provisions have become the legal foundation for a wide range of UN efforts in the field of international development cooperation.[100]

International Bill of Human Rights

In addition to the provisions of the UN Charter, the human rights instruments which were drawn in the decades after the establishment of the UN also form the legal basis for the right to development. Although neither the Universal Declaration of Human Rights (UDHR) nor the International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR) contains an express reference to a human right to development, constituent elements of such a right, as well as modalities for its realisation can be found in all three instruments. Substantive elements of a right to development comprise first of all the right of peoples to "freely pursue their economic, social and cultural development" and the right not to be deprived of their own means of subsistence, both of which are part of the right to self-determination included in the identical Articles 1 of the ICESCR and the ICCPR.

Furthermore, Article 25 of the UDHR and Article 11 of the ICESCR formulate a right for all human beings to an adequate standard of living, which includes a right to "adequate food, clothing and housing, and to the continuous improvement of living conditions". In addition, there is also the right to education incorporated in Article 26 of the UDHR and Article 13 of the ICESCR. In a general statement on the importance and relevance of the right to development, the Committee on Economic, Social and Cultural Rights emphasised the complementary character of the rights included in the Covenant and the right to development.[101]

As regards the modalities, Article 22 of the UDHR formulates a right for everyone to "the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". In addition, Article 28 of the UDHR

100 See the Repertory of the Practice of United Nations Organs, in particular with regard to Article 55, available at <http://www.un.org/law/repertory/>. From the early beginnings of the world organization, practice of UN organs relating to the promotion of development under Article 55 has covered a broad range of issues, including technical and financial assistance of developing countries, international trade and finance, natural resources and the protection of the environment. As Pellet noted, from the very start, the UN adopted an integrated approach to development issues. A. Pellet, 'Article 55, alinéas a et b', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies: Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 1464.

101 Committee on Economic, Social and Cultural Rights, Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development, 12 July 2011, *UN Doc. E/C.12/2011/2*, para. 5.

formulates a right for everyone to a conducive social and international order.[102] Article 2(1) of the ICESCR also formulates an obligation for parties "to take steps, individually and through international assistance and co-operation […] with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means", including the above-mentioned right to an adequate standard of living.[103]

Towards the formulation of a right to development

In the years following the adoption of the 1966 human rights covenants, the right to development started to materialise, notably through resolutions of the UN General Assembly and the work of the Commission on Human Rights. First, the UN General Assembly adopted a substantive Declaration on Social Progress and Development in 1969, which identified development as one of the "common concerns of the international community".[104] This reference to the notion of "common concern" is significant. In international environmental law, the notion of "common concern" has gained currency as a principle which forms the basis for imposing binding obligations for States in specific cases. These obligations not only concern affected States, but the international community as a whole (*erga omnes* obligations). It is one of the guiding principles of the 1992 UN Framework Convention on Climate Change and the 1992 Convention on Biological Diversity.[105] Therefore by referring to the notion of "common concern", the Declaration not only emphasises the fundamental importance of development for the international community as

102 Universal Declaration of Human Rights, *UN General Assembly Resolution 217 (III)* on an International Bill of Human Rights, adopted on 10 December 1948. In Alston's view, Article 28 of the UDHR must be seen as "a fact of fundamental importance in establishing the principle that respect for human rights is not a narrowly focused obligation applying only within strict limits to relations between individuals and their States, but rather is an open-ended obligation applying to all societal relations whether at the local, national or international level". P. Alston, 'The Shortcomings of a ''Garfield the Cat'' Approach to the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), p. 515.

103 In this respect, the Committee on Economic, Social and Cultural Rights has issued a general comment in which it emphasised that "in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States". General Comment 3 of the Committee on Economic, Social and Cultural Rights on the nature of States parties obligations (Art. 2, para. 1 of the Covenant), para. 14, Report of the Fifth Session, *UN Doc. E/1991/23*, 14 December 1990.

104 Declaration on Social Progress and Development, *UN General Assembly Resolution 2542 (XXIV)*, adopted on 11 December 1969, Article 9.

105 For an analysis of the notion of 'common concern', see D. Shelton, 'Common Concern of Humanity', *Environmental Policy and Law*, Vol. 39, issue 2 (2009), pp. 83-90; and J. Brunnée, 'Common Areas, Heritage, Concern', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 564-567.

a whole, but also, arguably, lays the foundation for imposing binding obligations upon States.

The Declaration also incorporates some basic elements for a right to development. It formulates a right for all peoples and human beings to "live in dignity and freedom and to enjoy the fruits of social progress".[106] In addition, it includes a list of elements that are considered "primary conditions of social progress and development", including permanent sovereignty over natural wealth and resources.[107]

The promotion of development is also the underlying rationale for the resolutions related to the call for a New International Economic Order (NIEO). One of the principal aims of the proposed new international economic order was to "ensure steadily accelerating economic and social development […] for present and future generations".[108] The Charter of Economic Rights and Duties of States, adopted in the same year, lists "[i]nternational cooperation for development" among the fundamental principles of international economic relations.[109] In addition, Article 17 of the Charter formulates an obligation for States to cooperate for development, while Article 7 assigns the primary responsibility "to promote the economic, social and cultural development of its people" to the national State.

Although these resolutions can be said to pave the way for the right to development, they approach development as an objective rather than as a right. In fact, development was not mentioned as a human right until 1977, when the Commission on Human Rights adopted a resolution in which it requested the UN Secretary-General to carry out a study on

> "the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs".[110]

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106 Declaration on Social Progress and Development, *UN General Assembly Resolution 2542 (XXIV)*, adopted on 11 December 1969, Article 1.

107 *Ibid*., Article 3.

108 Declaration on the Establishment of a New International Economic Order, *UN General Assembly Resolution 3201 (S-VI)*, adopted on 1 May 1974, third paragraph of the preamble.

109 Charter of Economic Rights and Duties of States, *UN General Assembly Resolution 3281 (XXIV)*, adopted on 12 December 1974, Chapter I, under (n).

110 Resolution 4 (XXX-III) of the UN Commission on Human Rights, *UN Doc. E/CN.4/SR.1389 (1977)*, 21 February 1971. The report on the international dimensions of the right to development, published in 1979, was complemented with a report on the regional and national dimensions of the right to development as a human right in 1981. However, neither of these reports, although both affirming the existence of a right to development, sheds any light on the contents of such a right. See Report of the Secretary-General on the International Dimensions of the Right to Development, *UN Doc. E/CN.4/1334 (1979)*; Report of the Secretary-General on the Regional and National Dimensions of the Right to Development, *UN Doc. E/CN.4/1421(Part I)* and *E/CN.4/1488 (PART II and III) (1981)*.

This Resolution has served as a catalyst for successive efforts to determine the contents of the right to development as part of the so-called "structural approach to human rights" which emerged in the late 1970s.[111] These efforts resulted in the 1986 Declaration on the Right to Development.

The 1986 Declaration on the Right to Development

The 1986 Declaration on the Right to Development, adopted with 146 votes in favour, eight abstentions and one negative vote from the United States, defines the human right to development as an "inalienable human right" that entitles "every human person and all peoples to participate in, contribute to, and enjoy economic, social and political development, in which all human rights and fundamental freedoms can be fully recognized".[112] In this respect, "development" is defined as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".[113] Thus, the right to development may be defined as a collective and individual right to participate in the process of development and to enjoy the benefits resulting from it.

Article 1 also provides that the right to development "implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both 1966 human rights Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". Thus, the realisation of the right to self-determination is regarded as an essential precondition for exercising the right to development. After all, how can the right to development be realised if people do not control their own economic means or have the political power to shape their own developmental policies?

Conversely, it could be argued that the right to self-determination can only be realised by exercising the right to development. It should be remembered that the right to self-determination is defined in the identical Articles 1(1) of the 1966 Covenants as a right for peoples to "freely determine their political status and freely pursue their economic, social and cultural development".

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111 On the structural approach to human rights, see *e.g.* M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford: Oxford University Press (2007).

112 Declaration on the right to development, *UN General Assembly Resolution 41/128*, adopted on 4 December 1986, Article 1. For voting information, see the 1986 Yearbook of the United Nations, pp. 717-721. On the declaration, see R.N. Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development', *Netherlands International Law Review,* Vol. XXXV (1988), pp. 257-272. On the United States position towards the right to development, see S. Marks, 'The Human Right to Development: Between Rhetoric and Reality', *Harvard Human Rights Journal,* Vol. 17 (2004), pp. 141-160.

113 Declaration on the Right to Development, preamble, second paragraph.

In order to be able to freely pursue their economic, social and cultural development, peoples must have a right to shape their development process, and, both as individuals and communities, participate in this process and enjoy its benefits. This is precisely what the right to development seeks to achieve.[114] Therefore the right to development and the right to self-determination must be regarded as being mutually reinforcing.

The Declaration also defines the subjects of the right to development. According to Article 1 of the Declaration, the right to development accrues to individuals and peoples. In this respect, Article 2(1) of the Declaration emphasises that the human person is both the "central subject of development" and "the active participant and beneficiary of the right to development". As such, the human person is also responsible for the implementation of the right to development, both individually and collectively. However, primary responsibility for the implementation of the right to development is assigned to States. According to Article 3(1) of the Declaration, "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development".

At the international level, States have an obligation, *inter alia,* to take steps to formulate international development policies and must cooperate to promote, encourage and strengthen universal respect for and observance of human rights.[115] At the national level, Article 8 of the Declaration provides that States should take all necessary measures for the realisation of the right to development and that they have an obligation to ensure, *inter alia,* equality of opportunity for all in their access to basic resources and the fair distribution of income. In addition, it provides that "States should encourage public participation in all spheres as an important factor in development and in the full realization of all human rights".

From the 1986 Declaration to the 1993 Vienna Declaration and beyond

The 1993 World Conference on Human Rights, which produced the Vienna Declaration and Programme of Action, was the next benchmark in the evolu-

114 Declaration on the Right to Development, Article 1: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled *to participate in, contribute to, and enjoy* economic, social and political development…", and Article 2(3): "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, *on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom*". Author's emphasis added. Also see M. Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Paris: UNESCO (1991), p. 1188: "There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize at the same time a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination".

115 Articles 4 and 6 of the Declaration.

tion of the right to development.[116] Like the Declaration on the Right to Development, the Vienna Declaration points to the human person as the central subject of development and assigns responsibility for the realisation of the right to States, both at the national and international level.[117]

The Declaration also designates the right to development "as a universal and inalienable right and an integral part of fundamental human rights" and underlines the interrelationship between human rights and development by stipulating that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights".[118]

In addition, the Declaration establishes a direct link between the right to development on the one hand, and the protection of the environment on the other. In this respect, paragraph 11 of the Vienna Declaration reiterates principle 3 of the 1992 Rio Declaration on Environment and Development which determines that "[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations".

In the years following the adoption of the Vienna Declaration, the right to development was confirmed in several important outcome documents, such as the Millennium Declaration, the Monterrey Consensus, the 2005 World Summit Outcome and the 2012 Outcome Document of the United Nations Conference on Sustainable Development.[119] Moreover, it served as a stimulus to the formulation of new development strategies, such as the Millennium Development Goals (MDGs), which are aimed at integrating all the aspects of the development process.[120] Nevertheless, it seems as though the idea of

116 Vienna Declaration and Programme of Action, *UN Doc. A/CONF.157/23*, adopted on 12 July 1993.

117 Paragraph 10 of the declaration determines that "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development". In addition, it stipulates that "lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level".

118 *Ibid.*

119 See paragraph 11 of the Millennium Declaration, *UN General Assembly Resolution 55/2 (2000)*, adopted on 18 September 2000; paragraph 11 of the Monterrey Consensus, Report of the International Conference on Financing for Development, *UN Doc. A/CONF.198/11*, adopted on 22 March 2002; paragraph 24(b) of the 2005 World Summit Outcome, *UN General Assembly Resolution 60/1*, adopted on 24 October 2005; and paragraph 8 of the Outcome Document of the 2012 United Nations Conference on Sustainable Development, 'The Future We Want', *UN General Assembly Resolution 66/288*, adopted on 11 September 2012.

120 On the relationship between the MDGs and human rights, including the right to development, see P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', in *Human Rights Quarterly*, 27 (2005), pp. 755-829.

development as a human right has shifted to the background to some extent in favour of development as an all-encompassing objective.

3.4.2 The nature and legal status of the right to development

The right to development has evolved in particular in the resolutions of the UN General Assembly and other UN organs. The only legally binding instrument which formulates a right to development is the African Charter on Human and Peoples' Rights.[121] The lack of recognition of the right to development in legally binding instruments has led to a fierce debate in the legal literature on the status of the right to development as an autonomous legal right. As Nico Schrijver noted, advocates of the right to development have sometimes elevated it "to lofty heights", while opponents regard it as "a dangerous smokescreen".[122] Moreover, some authors, such as Arjun Sengupta, try to avoid the issue altogether by making a distinction between human rights and legal rights. In Arjun Sengupta's opinion, it is perfectly possible for a right to be a human right without being a legal right.[123] However, in the present author's opinion, the significance of a moral right devoid of legal meaning is questionable.

Arguably it would be going too far to consider the right to development to be a fully-fledged human right, but that is not to say that the right is without legal relevance. In Kiwanuka's words: "[e]ven if the Declaration [on the Right to Development] cannot be endowed with legal authority, in positivist terms, that would not necessarily mean that it is stripped of all relevance and

121 Article 22 of the African Charter determines that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" and that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development".

122 N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston, Martinus Nijhoff Publishers (2008), p. 271. Proponents of a right to development include P. Alston, 'The Shortcomings of a ''Garfield the Cat'' Approach to the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 510-518; A. Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly,* Vol. 24 (2002), pp. 837–889, and M. Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), International Law: Achievements and Prospects, Paris, UNESCO (1991), pp. 1177-1203. Opponents include Y. Ghai, 'Whose Human Right to Development?', Human Rights Unit Occasion Paper, Commonwealth Secretariat (1989); and J. Donnelly, 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 473-509.

123 A. Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly*, Vol. 24 (2002), pp. 859-860.

utility in international law".[124] On the contrary, in the present author's view, the right to development has two dimensions which add to the existing core of human rights and which give the right some legal significance.

First of all, at the very least, the right to development can be characterized as "the sum of existing human rights", which include the right to life, to an adequate standard of living and to education.[125] By extension, the right to development may be defined as an umbrella right which integrates these individual economic, social and cultural rights, as well as some dimensions of civil and political rights, most notably empowerment rights such as the rights to freedom of opinion and association. The added value of the right to development would then primarily be its emphasis on the interrelated and indivisible qualities of these individual rights. In this sense, the right to development can first be characterised as a "participatory right" aimed at the realisation of human rights pertaining to development.[126] At the national level, the right to development would then give rise to a right for all individuals to participate in the realisation of economic, social and cultural rights, as well as a corresponding obligation for the State to implement economic, social and cultural rights in such a way as to give due weight to the interests of all individuals in a State, and not only to a small segment of society.[127]

The legal basis for this obligation is found, in the first place, in Article 2 of the ICESCR concerning the obligations of States parties to the ICESCR and in

124 R.N. Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development', *Netherlands International Law Review,* Vol. XXXV (1988), p. 271. Bunn even argues that "the prevailing view is that the right to development is, at the very least, on the threshold of acceptance as a principle of positive international law", but she does not sufficiently elaborate her argument. I.D. Bunn, 'The Right to Development: Implications for International Economic Law', *American University International Law Review,* Vol. 15 (2000), p. 1436.

125 N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des cours*, Vol. 329 (2007), Leiden/Boston, Martinus Nijhoff Publishers (2008), p. 271.

126 For the idea of the right to development as a participatory right, see A. Orford, 'Globalization and the Right to Development', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), p. 138.

127 Compare Georges Abi-Saab, who argues that "si la réalisation du droit collectif est une condition nécessaire pour garantir la pleine jouissance des droits individuels qui s'y rattachent, elle n'en est pas une condition suffisante. Ainsi, la plupart des pays ayant accédé à l'indépendance après la seconde guerre mondiale, le respect des droits civils et politiques laisse beaucoup à désirer. Et le même danger guette le droit au développement, si les élites coercitives et exploitantes qui ont confisqué le pouvoir politique une fois l'indépendance acquise, réussissent à détourner à leur bénéfice exclusif les fruits du droit au développement ainsi conçu (c'est-à-dire les bienfaits d'un environnement économique plus favorable), plutôt que de les laisser se répandre à toutes les couches de la population". G. Abi-Saab, 'Droits de L'Homme et Développement: Quelques Eléments de Réflexion', *African Yearbook of International Law,* Vol. 3 (1995), pp. 6-7.

Article 25 of the ICCPR concerning public participation in decision-making.[128] At the international level, it can be argued that the right to development is reflected in the collective obligation of States to cooperate for the realisation of economic, social and cultural rights as incorporated in Article 2(1) and Article 23 of the ICESCR.

Furthermore, the right to development develops the principle of permanent sovereignty over natural resources, as well as the right to self-determination, in more detail. For the purposes of this book one of the essential aspects is that the right to development not only entails a right to participate in the development process, but also entails a right to enjoy the fruits of development.[129] In this way, it extends the obligation of a government to exercise the right of permanent sovereignty over natural resources for national development and the well-being of the people, as well as the right to "pursue economic, social and cultural development" as part of the right to self-determination. The principle of permanent sovereignty over natural resources and the right to self-determination should then be interpreted as entailing a right for peoples to enjoy the fruits of development.

Therefore it may be concluded that despite the present uncertainties regarding its precise content and legal implications, the right to development can play an important role in realising development. It can do so in four different ways. First, by means of its integrating function. As an umbrella right, the right to development can play an important role in connecting different human rights with the aim of realising economic, social and cultural development. Secondly, the collective dimension of the right to development emphasises the inclusive approach that is necessary to realise development. It clearly shows that the right to development can only be realised if all sectors of society are included in the development process. Thirdly, the dual nature of the right to development as a collective as well as an individual right can be instrumental

128 In this respect, see General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the nature of States parties' obligations (Art. 2, par.1), Report of the Fifth Session, *UN Doc. E/1991/23*, para. 8: "The Committee notes that the undertaking 'to take steps ... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, *provided only that it is democratic and that all human rights are thereby respected*". Author's emphasis added. Also see General Comment No. 20 on Non-discrimination in economic, social and cultural rights (Art. 2, para. 2), UN Doc. *E/C.12/GC/20*, 2 July 2009, which explains the different forms of and grounds for discrimination and which contains guidelines to assess the legitimacy of differential treatment.

129 See the Declaration on the Right to Development. Article 1 of the Declaration formulates a right "to participate in, contribute to, and *enjoy* economic, social, cultural and political development", while Article 2(3) formulates a duty for States "to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development *and in the fair distribution of the benefits resulting therefrom*". Author's emphasis added.

in facilitating interaction between collective and individual rights. Finally, the right to development can be instrumental in shaping the contents of other human rights related to development, such as the right to education. This was also recognised by the chairs of different UN treaty bodies, when they resolved in a joint statement "to make a concerted effort to promote a development-informed and interdependence-based reading of all human rights treaties, so as to highlight and emphasize the relevance and importance of the right to development in interpreting and applying human rights treaty provisions".[130]

3.4.3 The implementation of the right to development within the sovereign State

The right to development implies that States should implement procedures in their domestic legislation which permit individuals and communities to participate in the development process, while ensuring a fair distribution of the benefits of development in society. Nevertheless, there is rarely any practice or case law at the international level that develop these basic obligations.

As stated above, the African Charter on Human and Peoples' Rights is the only legally binding instrument that recognises a right to development. Some practice relating to the right to development can be found within the framework of this Convention. The most notable example is the case of the Endorois people *v.* Kenya before the African Commission on Human Rights. The Endorois people, an indigenous people living in Kenya, alleged that their right to development had been violated as a result of the State's creation of a Game Reserve in Endorois lands and its failure to adequately involve the Endorois in the development process. The African Commission stated that "recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and [freedom of] choice as important, over-arching themes in the right to development".[131]

It also noted that consultation is an important element of the right to development. In this respect, consultation should be interpreted in terms of participation in government policies that concern those involved, rather than a mere right to be informed of such policies.[132] If a project carried out by a government on indigenous lands were to have a major impact on the

130 United Nations Office of the High Commissioner for Human Rights, *Joint Statement of Chairpersons of the UN Treaty Bodies*, 1 July 2011.

131 African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, para. 277.

132 *Ibid*., para. 281.

territory, consultation should even be interpreted as implying a requirement to obtain the free, prior and informed consent of the indigenous people.[133]

The Commission also touched on the issue of sharing benefits, which it linked to the right of property and compensation for the loss of property, rather than directly to the right to development.[134] In relation to the right to development, the Commission merely stated that "the right to development will be violated when the development in question decreases the well-being of the community".[135] Although it is unfortunate that the Commission did not expressly state that the issue of sharing benefits is a constituent element of the right to development, the Commission's statement does have an interesting implication for the purposes of the present book. Arguably, it implies that a government that decreases the well-being of the population as a result of its governance of natural resources violates the right to development.

3.4 APPRAISAL

The current chapter has examined "peoples" as subjects and beneficiaries of the principle of permanent sovereignty over natural resources. It addressed this issue from the perspective of peoples' rights, in particular from the perspective of the right to self-determination, which incorporates the principle of permanent sovereignty over natural resources, and from the perspective of the closely related right to development.

In relations between States the right to self-determination entails first of all a right for peoples to choose their political organization, including – under exceptional circumstances –secession. In view of the major implications of this right, it accrues to very narrowly defined categories of peoples, mainly colonial peoples and peoples under foreign domination. In this sense, the right is addressed to "other" States, in the sense that other States have to respect a people's right of self-determination. As soon as a people has organized itself in an independent State, the right to external self-determination becomes vested in the State. As such, it falls under State sovereignty and becomes subject to the principle of non-intervention. This sovereign dimension includes the State's right to freely dispose of its natural resources, excluding other States. The right to development is a logical continuation of the right to self-determination. Arguably, it entails an obligation for other States to assist each other with the development process. However, this right does not yet have a firm basis in international law.

Furthermore, this chapter has argued that the right to self-determination and the right to development have an internal dimension as well. In the context

133 *Ibid*., para. 291.
134 *Ibid*., para. 294.
135 *Ibid*.

of the sovereign State, the right to self-determination refers first of all to the right of the population of a State, as the sum of the peoples of the State, to freely choose the State's political and economic system. It also includes the right for minorities and indigenous peoples to govern their local affairs.

In addition, the right to internal self-determination includes a right to freely pursue economic, social and cultural development. This right is expressed in the right to economic self-determination, which includes a right to have access to the economic means to achieve development. The right to freely pursue economic, social and cultural development can become effective based on the right to development, understood as a right for peoples and individuals to participate in, contribute to, and enjoy economic, social, cultural and political development.

As regards implementing the right to internal self-determination and the right to development, it is argued that the main way to give effect to these rights is by means of public participation in decision-making. This implies, for example, that a government should consult local communities that may be affected by particular resource projects. However, it is striking that the relevant case law of human rights bodies on public participation focuses in particular on the protection of indigenous peoples. Those communities are given a right to participate in decision-making with the specific aim of preserving the culture and traditional lifestyle.

One important drawback of most complaint mechanisms of human rights bodies is that they are open only to individuals who claim to be directly affected by government decisions. This requirement stands in the way of claims that serve a more general interest. For example, if concessions are issued in areas that are remote from human habitation, it is not possible to file a complaint before a human rights body, even if the concessions have a serious impact on the environment. Furthermore, on the same grounds, it is not possible to challenge a government's failure to provide for public participation regarding decisions on the expenditure of resource revenues.

The realisation of the right to self-determination and the right to development therefore depends largely on whether or not individual States implement the ensuing obligations in national law. According to the Human Rights Committee, the implementation of the right to self-determination requires States to put in place procedures that permit this right to be exercised in practice. The Human Rights Committee, as well as the Committee on Economic, Social and Cultural Rights, has the formal mandate to oversee the implementation of the identical Articles 1 of the 1966 Covenants. Both committees have devoted a great deal of attention to securing the right of indigenous peoples to self-determination through a combined reading of Article 1 and Article 27 of the ICCPR.

It would therefore be laudable if these – and other – human rights bodies were to adopt a more active approach to ensuring the proper implementation of the right to internal self-determination for other communities as well, most

notably by emphasising the importance of public participation for the realisation of the right in their reports and comments. One possible avenue for these human rights bodies would be to interpret treaty provisions that have a bearing on participation of citizens in decisions affecting their well-being in the light of identical Articles 1 of the ICESCR and the ICCPR. Relevant provisions include the right to an adequate standard of living enshrined in Article 11 of the ICESCR and the right to participate in a State's decision-making processes, enshrined in Article 25 of the ICCPR.