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Beyond externalities: human rights as a foundation of entitlements over energy resources

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ABSTRACT

The question of human rights and energy has been traditionally framed as an analysis of limitations on energy transactions arising from substantive and procedural human rights. Whereas the negative externality framing of human rights sets safeguards against the adverse effects of energy transactions and thereby restrains *how* such transactions are conducted, it overlooks a more fundamental dimension, the conferral of entitlements. Indeed, human rights define entitlements over energy resources, setting competing claims that limit not only how energy transactions are conducted but also the very power to conduct them in the first place. The entitlement dimension of human rights also unveils a wider question, namely the competing claims of a variety of collective subjects against the entitlement of the territorial or coastal States. In other words, such reframing opposes two logics of international law, each based on a different conception of the source from which entitlements flow. This article investigates the externality-avoidance and entitlement function of human rights in the context of international energy transactions. It reviews the most relevant judicial and quasi-judicial practice at the international level to illustrate the implications of framing the function of human rights from one or the other perspective.

INTRODUCTION

The prevailing understanding of the allocation of powers over energy resources is based on the idea that entitlements over them are vested in the State.¹ Under this understanding, human rights come into play essentially to define the permissible operating space within which energy resource-related activities must unfold (an ‘externality-avoidance’ prism). The question is therefore about ensuring that their exploitation is conducted in such a way that it does not harm the human rights of the affected populations.² However, international law, particularly human

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¹ See George Elian, *The Principle of Sovereignty over Natural Resources* (Sijthoff & Noordhoff International Publishers 1979); James N. Hyde, ‘Permanent Sovereignty over Natural Wealth and Resources’ (1965) 50 *Am J Int Law* 854, 867; Karol Gess, ‘Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis’ (1964) 13 *Int Comp Law Q* 398, 449.

² See Alice Farmer, ‘Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries’ (2007) 39 *NYU J Int’l L & Pol* 417, 424; Lillian Aponte Miranda, ‘The Role of International Law in Intrastate

rights law, can also provide entitlements over energy resources and hence grounds for a competing legal claim. Such competing claims impose 'entitlement-driven' limitations on the powers of States, limitations that are different from and additional to the 'externality-avoidance' limitations arising from general human rights.³ They limit not only *how* energy transactions are conducted but also the very power to exploit or delegate the exploitation.

The distinction is particularly important with respect to the rights of indigenous peoples. The relationship between indigenous peoples and the energy sector has often been antagonistic.⁴ Energy activities have been the cause of devastating effects on local ecosystems.⁵ They have threatened indigenous peoples' rights, territories, cultures, and livelihoods,⁶ prompting growing resistance from communities worldwide.⁷ This is the case in the traditional sector of fossil fuel extraction but also in relation to modern renewable sources. By way of illustration, a 2019 analysis concluded that five out of the top seven countries associated with future wind power development ranked 'high' or 'extreme risk' for their impact on indigenous rights, land rights, and security indices.⁸ This article investigates the 'externality-avoidance' and 'entitlement-driven' functions of human rights in the context of international energy transactions.

The literature has addressed various aspects related to control over and/or management of natural resources. Some scholars have discussed how the regulation of natural resources is directly connected with the structural allocation of wealth and power.⁹ Another strand of the literature has analysed the link between authoritarianism and control over natural resources,¹⁰ showing that a focus on fossil fuel extraction may shape the entire development trajectory of a

Natural Resource Allocation: Sovereignty, Human Rights, and Peoples- Based Development' (2012) 45 Vand J Transnat'l L 12, 17; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP, Cambridge 2008).

³ On this point, see Ginevra Le Moli, 'President of the Republic et al. v Ali Ayyoub et al' (2019) 113 Am J Int'l L 791, 798; Jorge E. Viñuales, *The International Law of Energy* (CUP, Cambridge 2022) 48, 55.

⁴ Clinton N. Westman and Tara L. Joly, 'Oil Sands Extraction in Alberta, Canada: A Review of Impacts and Processes Concerning Indigenous Peoples' (2019) 47 Hum Ecol 233, 243.

⁵ See, by way of example, David C. Natcher and Nicolas D. Brunet, 'Extractive Resource Industries and Indigenous Community-Based Monitoring: Cooperation or Cooptation?' (2020) 7 Extr Ind Soc 1279, 1282; Leah S. Horowitz and others, 'Indigenous Peoples' Relationships to Large-Scale Mining in Post-Colonial Contexts: Toward Multidisciplinary Comparative Perspectives' (2018) 5 Extr Ind Soc 404, 414; Jon Abbink, 'Dam Controversies: Contested Governance and Developmental Discourse on the Ethiopian Omo River Dam' (2012) 20 Soc Anthropol 125, 144; Natalia Yakovleva, 'Oil Pipeline Construction in Eastern Siberia: Implications for Indigenous People' (2011) 42 Geoforum 708; Rauna Kuokkanen, 'At the Intersection of Arctic Indigenous Governance and Extractive Industries: A Survey of Three Cases' (2019) 6 Extr Ind Soc 15, 21.

⁶ Report of the Special Rapporteur on the rights of indigenous peoples, José Francisco Calí Tzay, Protected areas and indigenous peoples' rights: the obligations of States and international organizations, A/77/238, 19 July 2022, para 26; Business and Human Rights Resource Centre, 'Renewable Energy (In)Justice in Latin America', August 2021; Ranjan Datta, Margot A. Hurlbert and William Marion, 'Indigenous Community Perspectives on Energy Governance' (2022) 136 Environ Sci Policy 555, 563; First Peoples Worldwide, 'Indigenous Rights Risk Report' (2014) <<https://mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf>> accessed 15 October 2023; HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive Industries and Indigenous Peoples, 1 July 2013, A/HRC/24/41 (2013); Permanent Forum on Indigenous Issues, Consolidated Report on Extractive Industries and Their Impact on Indigenous Peoples, 20 February 2013, E/C 19/2013/16 (2013); Alexandra Xanthaki, 'Rights of Indigenous Peoples under the light of Energy Exploitation' (2013) 56 Ger Yearb Int Law 315, 350.

⁷ Debra M. Stokes, Bruce G. Marshall and Marcello M. Veiga, 'Indigenous Participation in Resource Developments: Is It a Choice?' (2019) 6 Extr Ind Soc 50, 57; Arn Keeling and John Sandlos, 'Introduction: Critical Perspectives on Extractive Industries in Northern Canada' (2016) 3 Extr Ind Soc 265, 268; Westman and Joly, above n 4.

⁸ The seven listed countries are China, India, Brazil, Turkey, Mexico, South Korea, and the USA. See Human Rights Outlook 2019, 'Human Rights Cast Shadow Over Green Energy's Clean Image' Figure 3 <<https://www.maplecroft.com/insights/analysis/human-rights-cast-shadow-over-green-energys-clean-image/>> accessed 15 October 2023.

⁹ See Melanie Pichler and others (eds), *Fairness and Justice in Natural Resource Politics* (Routledge 2016); Jeffrey Sachs and Andrew Warner, 'The Curse of Natural Resources' (2001) 45 Eur Econ Rev 827, 838; Sevil Acar, *The Curse of Natural Resources: A Developmental Analysis in a Comparative Context* (Palgrave 2017); Victor Menaldo, *The Institutions Curse: Natural Resources, Politics, and Development* (CUP, Cambridge 2016); Richard Auty, *Sustaining Development in Mineral Economics: The Resource Curse Thesis* (Routledge 1993).

¹⁰ See Leonard Wantchekon, 'Why Do Resource Dependent Countries Have Authoritarian Governments?' (2002) 5 J Afr Finance Econ Dev 57, 77. See also Markus Kröger, *Contentious Agency and Natural Resource Politics* (Routledge 2013); Paul Collier and Anthony Venables (eds), *Plundered Nations? Successes and Failures in Natural Resource Extraction* (Palgrave Macmillan 2011).

State¹¹ and provide fertile ground for conflict.¹² Some scholars have also studied the connection between weak policies and the misappropriation of land¹³ or the rise of natural resources' price and value¹⁴ related to financial returns given by the exploitation of resources.¹⁵ Some legal work has examined the formation and implementation of indigenous-industry agreements, concluded between indigenous peoples and companies involved in the extractive natural resource industry.¹⁶ Moreover, the literature on human rights has predominantly focused on the impact of energy activities on the enjoyment of human rights by affected populations, whether in general¹⁷ or in specific contexts, including some regions,¹⁸ some specific rights (eg the right to public participation, the right to water, the right to food,¹⁹ or the rights of indigenous peoples²⁰) or the broader context of a 'natural resource law'.²¹

In the legal literature, the connection between human rights and energy resources has been framed mainly as an analysis of the limits placed by human rights—substantive and procedural—on the conduct of resource extraction activities by States, either directly or through the conferral of certain rights to third parties, eg multinational corporations.²² However, this framing of the subject has two important shortcomings. First, no attempt has been made at conceptualizing the overall functions that human rights can perform in relation to the development of natural resources,²³ beyond providing procedural or substantive protection against natural resource-related activities. Second, it overlooks the fact that certain constraints on State powers

¹¹ See Michael Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Princeton University Press 2012); Thad Dunning, *Crude Democracy: Natural Resource Wealth and Political Regimes* (CUP, Cambridge 2008); Macartan Humphreys, Jeffrey D. Sachs and Joseph E. Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press 2007).

¹² See Paul Le Billon, *Fuelling War: Natural Resources and Armed Conflicts* (Routledge 2013); Colin Kahl, *States, Scarcity, and Civil Strife in the Developing World* (Princeton University Press 2006); Thomas Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton University Press 1999). See also Carl Bruch, Carroll Muffett and Sandra S. Nichols (eds), *Governance, Natural Resources and Post-Conflict Peacebuilding* (Routledge 2016).

¹³ See Aled Williams and Philippe Le Billon (eds), *Corruption, Natural Resources and Development: From Resource Curse to Political Ecology* (Edward Elgar Publishing 2017).

¹⁴ See Alfred Greiner and Willi Semmler, *The Global Environment, Natural Resources, and Economic Growth* (OUP, Oxford 2008); Edward B. Barbier, *Natural Resources and Economic Development* (CUP, Cambridge 2005).

¹⁵ See Alex Loftus and Hug March, 'Financialising Nature?' (2015) 60 *Geoforum* 172, 175; Sian Sullivan, 'Banking Nature? The Spectacular Financialisation of Environmental Conservation' (2013) 45 *Antipode* 198, 217; Sarah Bracking, 'How Do Investors Value Environmental Harm/Care? Private Equity Funds, Development Finance Institutions and the Partial Financialization of Nature-Based Industries' (2012) 43 *Dev Change* 271, 293.

¹⁶ Ibronke T. Odumosu-Ayanu and Dwight Newman, *Indigenous-Industry Agreements, Natural Resources and the Law* (Routledge 2021). On the connection between global economic development, trade, and investment with indigenous peoples' rights, see also Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (CUP, Cambridge 2021) and John Burrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (CUP, Cambridge 2020).

¹⁷ Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP, Oxford 2018).

¹⁸ See Patricia I. Vasquez, *Oil Sparks in the Amazon: Local Conflicts, Indigenous Populations, and Natural Resources* (University of Georgia Press 2014); Abiodun Alao, *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (University of Rochester Press 2007).

¹⁹ See, for example, James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources' (2005) 22 *Ariz J Int'l & Comp L* 7, 17; Donald M. Zillman, Alastair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP, Oxford 2002); Inga T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2012); Wenche Barth Eide and Uwe Kracht, *Food and Human Rights in Development* (Intersentia 2005).

²⁰ Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2nd edn, Brill 2016); Ben Saul, *Indigenous Peoples and Human Rights* (Bloomsbury Publishing 2016). On the engagement of indigenous peoples' organizations in energy projects, see Christopher G. Sheldon and others, 'Innovative Approaches for Multi-Stakeholder Engagement in the Extractive Industries' Extractive industries for development series, no. 29 (World Bank 2013).

²¹ See Shawkat Alam, Jahid Hossain Bhuiyan and Jona Razzaque, *International Natural Resources Law, Investment and Sustainability* (Routledge 2017); Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing 2016); Elena Blanco and Jona Razzaque (eds), *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar 2011).

²² See, eg Catherine Redgwell, 'Contractual and Treaty Arrangements Supporting Large European Transboundary Pipeline Projects: Can Adequate Human Rights Be Secured?' in Martha M. Roggenkamp, Lila Barrera-Hernández, Donald N. Zillman and Inigo del Guayo (eds), *Energy Networks and the Law: Innovative Solutions in Changing Markets* (OUP, Oxford 2012), at 102–117.

²³ There is significant, albeit piecemeal, literature on the entitlements over natural resources arising from human rights, see above n 20.

stem from human rights as originary entitlements over energy resources,²⁴ despite the substantial body of jurisprudential practice on this aspect. In brief, there is an important fault line in the case law that requires clear and explicit conceptualization.

In this context, this article introduces the distinction between ‘externality-avoidance’ and ‘entitlement-driven’ limitations arising from human rights in relation to energy resources, and it explores some of its theoretical and practical implications. The article is organized as follows: the ‘The limits of an externality-avoidance approach to human rights’ section clarify the limits of an ‘externality-avoidance’ approach to human rights. The ‘Peoples’ entitlements as ownership over lands and natural resources’ section reviews a relevant body of judicial practice (international and to some extent domestic) to illustrate the implications of framing human rights from an ‘entitlement-driven’ perspective. Lastly, the ‘Concluding observations: two functions of human rights in relation to energy resources’ section points to the implications of the reframing explored in the article for the conceptualization of a human right to energy and concludes.

THE LIMITS OF AN EXTERNALITY-AVOIDANCE APPROACH TO HUMAN RIGHTS

The implications of human rights for energy governance have been predominantly understood as a limit on the negative externalities of energy activities. An illustration of this approach is provided by the case law of international human rights treaty monitoring bodies and, in particular, of the Human Rights Committee (HRC).²⁵

The collective right of peoples to self-determination, recognized under Article 1 of the International Covenant on Civil and Political Rights (ICCPR),²⁶ entails both externality-avoidance and entitlement-driven limitations on the power of States. Indeed, a State is required not only to enable the way of life of the relevant people but also to recognize their entitlement over the resources of the land. However, the Optional Protocol to the ICCPR provides a procedure under which only individuals can submit communications alleging the violations of their individual rights, enshrined in Part III of the Covenant, Articles 6–27 inclusive. Whereas a people cannot submit a communication as such, the Optional Protocol allows a group of individuals, each acting in their individual capacity, to do so.²⁷ Yet, the right to self-determination enshrined in Article 1 of the ICCPR is a right of a collective subject, ie a people, and not of an individual subject, although it is relevant to the interpretation of provisions of the ICCPR recognizing individual rights, particularly the right to the enjoyment of one’s culture of Article 27.²⁸

The legal subtlety was a key aspect of the *Ominayak* case, in which an indigenous people claimed that certain extractive activities authorized by the Canadian government in their lands constituted a breach of their right to self-determination under Article 1 of the ICCPR. The HRC

²⁴ Viñuales, above n 3, at 43.

²⁵ As regards the case law of the HRC, see *Ominayak (on behalf of Lubicon Lake Band) v Canada* (‘*Ominayak Case*’), Merits, Comm. No. 167/1984, UN Doc. Supp. No. 40 (A/45/40) (26 March 1990); *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000) (‘*Apirana Mahuika Case*’). See also Concluding Observations, Canada, UN Doc. CCPR/C/79/Add.105 (1999); Concluding Observations, Norway, UN Doc. CCPR/C/79/Add.112 (1999); Panama, UN Doc. CCPR/C/PAN/CO/3 (2008). The Committee on Economic, Social and Cultural Rights (CESCR) has also maintained a similar approach, see Argentina, UN Doc. E/C.12/ARG/CO/3 (2011); Finland: UN Doc. E/C.12/FIN/CO/6 (2014); Guatemala, UN Doc. E/C.12/GTM/CO/3 (2014); Cambodia, UN Doc. E/C.12/KHM/CO/1 (2009); Paraguay, UN Doc. E/C.12/PRY/CO/4 (2015).

²⁶ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

²⁷ See, by way of example, *Ominayak Case*, para. 32.1.

²⁸ For this approach, *Apirana Mahuika Case*, para 9.2; J.G.A. Diergaardt (*late Captain of the Rehoboth Baster Community*) et al. v *Namibia*, Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000), at para. 10.3; *Ominayak Case*, 32.1 and 32.2. See also HRC, General Comment No. 23: Protection of Minorities (Art. 27), 4 August 1994, CCPR/C/21/Rev.1/Add.5, para 3.1–3.2.

recharacterized a communication as one relating to Article 27.²⁹ Through this recharacterization, the communication was rendered admissible and the Committee gave some measure of protection to the community's culture and customs. But something was also lost. Unlike the right to self-determination, which entailed both a claim to be protected from the adverse effects of the activities (externality-avoidance) and to have the entitlement over the relevant natural resources recognized (entitlement-driven), the focus under Article 27 remained confined to a purely externality-avoidance prism, missing the entitlement dimension of the claim under the collective right to self-determination.

In a subsequent case, *Ilmari Lansman v Finland*,³⁰ this distinction and its implications became clearer. The case concerned a claim by members of the Sámi indigenous people alleging that certain extractive activities (a stone quarry) authorized by the Finnish government in their reindeer herding territory violated Article 27 of the ICCPR. The HRC concluded that, although the reindeer herding was an activity protected by Article 27, the interference with it was not substantial enough to amount to a violation of this right. The externality-avoidance framing that underpins the decision of the Committee is fleshed out in the following excerpt:

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.³¹

Some years later, this statement was expressly recalled in the *Apirana Mahuika* Case, decided by the HRC in 2000. The authors had contended that the Treaty of Waitangi (Fisheries Claims) Settlement Act expropriated their commercial fishing resources in violation of Articles 1, the right to self-determination, and 27, the individual right to enjoy one's culture. The HRC held that Article 1 could be read conjunctively with Article 27 of the ICCPR,³² but it concluded that the facts of the case did not amount to a breach of the ICCPR. Of note, the Committee took into account that the settlement had been reached through a participatory process and that it recognized the entitlement of the Maori over their fisheries. The relevant paragraph reads as follows:

the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System *was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries*. With the Settlement, Maori were given access to a great percentage of quota, and thus *effective possession of fisheries was returned to them*. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, *in an entity in which Maori share not only the role of*

²⁹ See *Kitok v Sweden* (HRC, 27 July 1988, Comm No. 197/1985), paras 9.2–9.3 [concluding that no violation of art 27 of the ICCPR occurred, see paras 9.5–9.8]; *Ominayak Case*, paras 32.2–33 [concluding that a violation of art 27 of the ICCPR occurred], see also the analysis in Dominic McGoldrick, 'Canadian Indians, Cultural Rights and the Human Rights Committee' (1991) 40 ICLQ 658, 669; *Poma Poma v Peru* (HRC, 27 March 2009, Comm No. 1457/2006), paras 7.1–8 [concluding that a violation of art 27 occurred].

³⁰ *Ilmari Lansman and others v Finland*, HRC Communication No. 511/1992 (8 November 1995) [*Ilmari Lansman Case*].

³¹ *Ilmari Lansman Case*, para. 9.4.

³² *Apirana Mahuika Case*, para. 3.

safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.³³

This went further than the *Ominayak* and *Lansman* cases, but on closer inspection, the recognition of the entitlement is not specifically linked to the requirements of Article 27. Indeed, the Committee noted that 'economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community' and that the 'recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture'.³⁴ Thus, the recognition of the entitlement was not based on Article 27 but on the Treaty of Waitangi. The externality-avoidance prism was confirmed later when the Committee noted that:

in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.³⁵

In the previous cases, the entitlement dimension was overlooked possibly because the implications of fleshing it out were not directly relevant in the circumstances of the case. But this dimension is not present either in the general explanation provided in the Committee's General Comment 23: Article 27 (Right of Minorities) in relation to natural resources:

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - *may consist in a way of life which is closely associated with territory and use of its resources.* This may particularly be true of members of indigenous communities constituting a minority [...]

culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. *That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.* The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.³⁶

It is therefore a right of use or to continue exercising certain activities. But as the first sentence of the excerpt makes clear, the conception of Article 27 excludes the possibility of entitlements that may compete with those of the State. However, as the next section shows, the implications of such entitlements can be substantial.

³³ Ibid, para. 9.7 (italics added).

³⁴ Ibid, para. 9.3.

³⁵ Ibid, para. 9.9.

³⁶ CCPR, General Comment No 23: Article 27 (Rights of Minorities), adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994 CCPR/C/21/Rev.1/Add.5, paras. 3.2 and 7 (italics added).

PEOPLES' ENTITLEMENTS AS OWNERSHIP OVER LANDS AND NATURAL RESOURCES

In most legal systems, the State has sovereign powers over natural resources,³⁷ and such entitlement is often defined at the constitutional level.³⁸ In such a context, international law may not offer sufficient grounds to confront duly authorized extractive activities that do not encroach upon general human rights (externality-avoidance prism), even if such activities have an impact on natural resources. Yet, such activities would disregard the entitlement of the right-holders over the relevant resources arising from human rights. As this section discusses, the development of a case law, both at the international and domestic levels, on the correlation between peoples' collective right to property and the right to freely dispose of natural resources is very significant for the purpose of clarifying the meaning and implications of peoples' entitlements over lands and resources.

Entitlements before regional human rights bodies

The case law examined under this section is a selection of relevant decisions of the Inter-American Court of Human Rights (IACtHR), the African Commission on Human and Peoples' Rights (ACommHPR), and the African Court of Human and Peoples' Rights (ACtHPR). Although the matter has also been raised before the European Court of Human Rights,³⁹ the claims have not resulted in any clear articulation of the entitlement function of human rights. By contrast, the practice from Africa and the Americas clarifies that peoples' entitlements over land and resources are ordinary and limit states' powers to freely dispose of them.

The IACtHR has in fact recognized peoples' right to collective ownership over their territories as linked to the protection of, and access to, the resources to be found therein because such resources are necessary for the very survival, development, and continuity of their way of life.⁴⁰ This step is implicit in the discussion by the HRC of Article 27, but it is not effectively taken. By contrast, the case law of the IACtHR is much clearer on this matter. The case *Saramaka People v Suriname*⁴¹ concerned logging and mining concessions awarded by Suriname on the territory of the Saramaka people, without their full and effective consultation. The Court examined the rights of indigenous and tribal communities under international law and explained that property rights must be interpreted so as not to restrict their right to self-determination, by virtue of which

³⁷ See Yinka Omorogbe and Peter Oniemola, 'Property Rights in Oil and Gas Under Domanial Regimes' in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP, Oxford 2010) 118.

³⁸ See, for instance, as regards national constitutions, Article 20(XI), Constitution of the Federative Republic of Brazil, which states that 'those lands traditionally occupied by the Indians' belong to the federal government; similarly, for decisions of national courts, see *Attorney-General of the Federation v Attorney-General of Abia State*, 2002 6 NWLR, S.C.N., 542–905 (Apr. 5) (Nigeria).

³⁹ On the different roots of the approaches followed in the Inter-American and African contexts, on the one hand, and the European context, on the other see Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *Eur J Int Law* 165, 202; Gaetano Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos' (2012) 19 *Int J Minor Group Rights* 1, 23.

⁴⁰ See, IACtHR, *Case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v Argentina—Merits, Reparations and Costs Inter-American Court of Human Rights*, Judgment of 6 February 2020, para 154; *Case of the Kaliña and Lokono Peoples v Suriname*. Merits, reparations and costs. Series C No. 309 (2015), para. 173; *Case of Pueblo Indígena Kichwa de Sarayaku v Ecuador*, Series C No. 245 (2012), paras 145 y 231; *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment. Series C No. 172 (2007), paras. 121–122; *Sawhoyamaya Indigenous Community v Paraguay*, Merits, Reparations and Costs, Judgment. Series C No. 146 (2006), paras 118, 121; *Case of the Yakye Axa Indigenous Community v Paraguay*, Merits, Reparations and Costs, Judgment. Series C No. 125 (2005), paras 124, 137; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits and Reparations, Judgment. Series C No. 79 (2001), paras 142–155, para. 173. See also Advisory Opinion on Entitlement of Rights of Legal Persons in the Inter-American Human Rights System (Interpretation and scope of article 1.2, in relation to articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62.3 of the American Convention on Human Rights, as well as Article 8.1 A and B of the Protocol of San Salvador), OC-22/16, para. 75; and Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (2009).

⁴¹ *Saramaka People v Suriname*, above n 40.

indigenous peoples may 'freely pursue their economic, social and cultural development' and may 'freely dispose of their natural wealth and resources'.⁴² The Court also noted that:

due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory [...] is necessary to guarantee their very survival. Accordingly, *the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.*⁴³

As clarified by the Court, the natural resources that fall under the protection of the right to property to land are those 'traditionally used and necessary for the very survival, development and continuation of such people's way of life'.⁴⁴ Accordingly, the natural resources that fall under the right to property enshrined in Article 21 of the American Convention of Human Rights (ACHR)⁴⁵ are only those that fulfil the two above-mentioned conditions, ie 'traditionally used' and 'necessary for the very survival' of the people's way of life.⁴⁶ On the contrary, for natural resources that 'do not satisfy' these two conditions, the allocation of the ownership rights will depend on the domestic national legislation and can be considered as covered by 'the inalienable right of each State to the full exercise of national sovereignty over its natural resources'.⁴⁷ In line with this approach, the Court has expressly established that 'Article 21 of the convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources' within those traditional lands and territories.⁴⁸ Yet, a State may restrict the use and enjoyment of the right to property where the restrictions are (i) previously established by law, (ii) necessary, (iii) proportional, and (iv) with the aim of achieving a legitimate objective in a democratic society.⁴⁹ Moreover, and importantly, such restriction must not lead to a denial of indigenous peoples' traditions and customs in a way that endangers the very survival of the group and its members.⁵⁰ The Court thus considered that, regarding large-scale development or investment projects that would have a major impact within the Saramaka territory, the state had a duty not only to consult with the Saramaka people but also to obtain their free, prior, and informed consent, according to their customs and traditions.⁵¹

⁴² *Saramaka People v Suriname*, above n 40, para. 93; *Case of the Kaliña and Lokono Peoples v Suriname*, Judgment, 25 November 2015 (Merits, Reparations and Costs), para 124. See also Lila Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 *Ann Surv Int'l & Comp* 43.

⁴³ *Saramaka People v Suriname*, above n 40, para 122. See also *Case of the Kaliña and Lokono Peoples v Suriname*, above n 40, para 122 (italics added).

⁴⁴ *Ibid.*

⁴⁵ American Convention on Human Rights, Costa Rica, 22 November 1969.

⁴⁶ See also Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford and Portland, OR 2011) 329, 366.

⁴⁷ See UN General Assembly Res. 3171 (XXVIII), 'Permanent sovereignty over natural resources', 2203rd plenary meeting (1973).

⁴⁸ See *Saramaka People v Suriname*, above n 40, para. 126.

⁴⁹ *Yakye Axa Indigenous Community v Paraguay*, above n 40, paras. 144–145 citing (mutatis mutandi) *Case of Ricardo Canese v Paraguay*, Merits, Reparations and Costs. Judgment of 31 August 2004. Series C No. 111, para. 96; *Case of Herrera Ulloa v Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 July 2004. Series C No. 107, para. 127, and *Case of Ivcher Bronstein v Peru*, Merits, Reparations and Costs. Judgment of 6 February 2001. Series C No. 74. para. 155; *Sawhoyamaya Indigenous Community v Paraguay*, above n 40, para. 137.

⁵⁰ See *Saramaka People v Suriname*, above n 40, para. 128.

⁵¹ *Ibid.*, para 134.

Moreover, even the existence of international obligations of the state towards foreign investors, resulting from the latter's derivative entitlements (eg concessions), would not justify breaching indigenous peoples' entitlements over land, as clarified by the IACtHR in the *Sawhoyamaxa* case.⁵² In this case, the Sawhoyamaxa indigenous community claimed that Paraguay had failed to ensure the ancestral property right of the Sawhoyamaxa Community and its members, as it had barred the community and its members from title to and possession of their lands.⁵³ The Government of Paraguay argued that the territory in question was owned by German investors, whose entitlements were protected under the Germany–Paraguay Bilateral Investment Treaty,⁵⁴ including the expropriation of foreign investors' lands. The Court held, however, that bilateral investment treaties allow for capital investments made by a contracting party to be condemned or nationalized for a 'public purpose or interest', such as land restitution to indigenous people.⁵⁵ Moreover, it added that enforcement of bilateral investment treaties should always be compatible with the human rights obligations of the state.⁵⁶ The Court thus found a violation of Article 21 of the ACHR⁵⁷ and ordered the government to pay compensation and take the necessary actions to return the traditional lands to the Sawhoyamaxa community.⁵⁸ Thus, the Court implicitly articulated a hierarchy between the originary entitlements of indigenous peoples, protected under human rights law, and the derivative ones of foreign investors, protected under investment law.

The connection between international investment law and entitlements of indigenous peoples has been particularly evident in the context of contracts or agreements of concession over natural resources, which provide for the rights to explore, extract, exploit, manage, and use the resources⁵⁹ and often have an impact on local populations' land and natural resources.⁶⁰ In the context of investment arbitration,⁶¹ indigenous peoples have in fact acted before arbitral tribunals qua foreign investors, alleging that the host state had failed to consider their human rights,⁶² or by intervening in arbitral proceedings as third parties.⁶³ Before human rights bodies, indigenous peoples have similarly challenged governmental action by claiming their entitlements over land and resources. The *Kichwa Indigenous People of Sarayaku v Ecuador*⁶⁴ is a case in point. The case concerned oil operations in the Amazon region where the Kichwa indigenous people held communal land that was subject to oil exploration by a private company authorized

⁵² *Sawhoyamaxa Indigenous Community v Paraguay*, above n 40.

⁵³ *Ibid* para 2.

⁵⁴ *Ibid*, para 115(b).

⁵⁵ *Ibid*, para 140.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*, para 144.

⁵⁸ *Ibid*, paras 204–247.

⁵⁹ See, by way of example, Lorenzo Cotula, 'Land, Property and Sovereignty in International Law' (2017) 25 *Cardozo J Int'l & Comp L* 219, 286, Emmanuel Laryea, 'Contractual Arrangements for Resource Investment' in Francis N. Botchway (ed.), *Natural Resource Investment and Africa's Development* (Edward Elgar 2011) 107, 133.

⁶⁰ See Lila Barrera-Hernández, 'Got Title; Will Sell: Indigenous Rights to Land in Chile and Argentina' in Aileen McHarg et al., above n 37, 185–209; Jose De Gregorio, 'The Role of Foreign Direct Investment and Natural Resources in Economic Development' in Edward M. Graham (ed.), *Multinationals and Foreign Investment in Economic Development* (Palgrave Macmillan, London 2005) 179, 197; Frederick van der Ploeg, 'Rapacious Resource Depletion, Excessive Investment and Insecure Property Rights: A Puzzle' (2011) 48 *Environ Resour Econ* 105, 128. On the impact on water resources, see, by way of example, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Kenya, UN Doc. E/C.12/KEN/CO/1 (2008), para. 30.

⁶¹ See Judith Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in Freya Baetens (ed.), *Investment Law within International Law—Integrationist Perspectives* (CUP, Cambridge 2013), at 107–128; see also Valentina Vadi, 'The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration' in Antonietta Di Blase and Valentina Vadi (eds), *The Inherent Rights of Indigenous Peoples in International Law* (Roma3Press, Rome 2020), at 197–244.

⁶² *Grand River Enterprises Six Nations, Ltd. v United States*, Award, NAFTA Tribunal, 12 January 2011. For commentary, see Valentina Vadi, 'Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration' (2018) 50 *Geo Wash Int'l L Rev* 742, 744.

⁶³ See eg *Border Timbers Ltd. v Zimbabwe*, Procedural Order No. 2, ICSID ARB/10/25, 26 June 2012; *Glamis Gold, Ltd. v United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL, 16 September 2005. For an analysis, see Vadi, above n 62, 761–4.

⁶⁴ IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of 27 June 2012, Merits and Reparations, Series C No. 245.

by the Ecuadorian government. After considering the development of the investment plans, the IACtHR concluded that by authorizing the investment without consulting the Kichwa community, the state had violated their collective right to property. The IACtHR also highlighted that the state must guarantee 'rights to consultation and participation at all stages of the planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people'.⁶⁵

In the African context, the ACommHPR has followed a converging approach.⁶⁶ For example, in *Endorois Welfare Council v Kenya*,⁶⁷ the Commission found that, by evicting the Endorois indigenous community from their land around the Lake Bogoria area to create a game reserve for tourism, the Kenyan government had violated the Endorois' rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21, and 22, respectively). The Commission recognized that 'traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title' and 'traditional possession entitles indigenous people to demand official recognition and registration of property title'.⁶⁸ The Endorois' property rights had been 'encroached upon, in particular by the expropriation and the effective denial of ownership of their land'.⁶⁹

In the same vein, in its 2022 Reparations Judgment in the *Ogiek Case*, the ACtHPR clarified that, under international law, granting indigenous people privileges, such as mere access to land, is 'inadequate to protect their rights to land'⁷⁰ and that 'what is required is to legally and securely recognise their *collective title to the land* in order to guarantee their permanent use and enjoyment of the same'.⁷¹ It is noteworthy that the Court also emphasized that:

[g]iven the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. Ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title. At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands.⁷²

The case law examined in this section evidences the emerging recognition that a people's originary entitlement constitutes not only a protection against encroachment over its—and its members'—human rights by a state or a third party but, more fundamentally, also a ground for competing legal claims over land, resources, and territory. Before moving to the analysis of some relevant domestic judicial practice, one additional point must be stressed. The recognition in the case law of the originary entitlements of indigenous peoples has unfolded in a context different

⁶⁵ Ibid, para. 167.

⁶⁶ On the link between people's collective right to property and resources ex. Article 14 of the African Charter, see also ACommHPR, *Social and Economic Rights Action Center (SERAC) and others v Nigeria*, 27 May 2002, App No. 155/96) para 3 ['Ogoni Case'], para 45, 59–63 and ACtHPR, *African Commission on Human and Peoples' Rights v Kenya, Judgment* (26 May 2017), African Court App No. 006/2012 [Ogiek Case], paras 122–131 and, *ibid*, Judgment (Reparations) 23 June 2022, paras 107–117; ACommHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, Comm No. 279/03–296/05, paras 191–205. See also Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (Brill 2002) 287, 288.

⁶⁷ ACommHPR, *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, (ACommHPR, 25 November 2009, Comm No. 276/2003), para 199, 209, 250–51 and 268.

⁶⁸ Ibid, para 209.

⁶⁹ Ibid, para 199.

⁷⁰ *Ogiek Case*, above n 66, Judgment (Reparations) 23 June 2022, para 110. See also, *Saramaka People v Suriname*, above n 40, paras 110 and 115; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, above n 40, para 153; *Indigenous Community Yakyé Axa v Paraguay*, above n 40, paras 143 and 215; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 15 June 2005. Series C No. 124, para 209.

⁷¹ Ibid, para 110 (italics added).

⁷² Ibid, para 111.

from that of decolonization. It is therefore of general relevance to self-determination as a right. The International Court of Justice has noted in its *Advisory Opinion on Chagos* that it was 'conscious that the right to self-determination, as a fundamental human right, has a broad scope of application',⁷³ which reaches beyond decolonization. Its entitlement dimension can therefore have profound implications in a variety of contexts.

The domestic case law on entitlements

Similar to the approach followed by regional courts, several national courts have also developed a rich case law recognizing peoples' entitlements over lands and natural resources. The body of case law of direct or indirect relevance is vast and its examination would clearly exceed the bounds set for this article. For this reason, I focus here on the practice in three specific states, from three different continents, as a means to illustrate the domestic recognition of originary entitlements. Rulings from courts in Norway, South Africa, and Malaysia suggest, indeed, that such legal entitlements are not merely rights of usage granted by the State but originary entitlements which compete with the ownership claims of the state itself.

As regards Norway, a few relevant cases deserve attention. The 2001 *Svartskog case* concerned ownership rights over a land in the Manndalen valley, which the local community, mostly Sámi, used as commonage.⁷⁴ The Supreme Court of Norway upheld the demands made by the local population and declared that the State was 'not the owner of land in Manndalen with adjacent mountain stretches'.⁷⁵ According to the Court, instead, the Sámi have a tradition of collective ownership and natural resource use, and their use of the area had created ownership rights through immemorial usage.⁷⁶ Thus, 'the State's title to Svartskogen is not compatible with the rights that the population of Manndalen have acquired'.⁷⁷ The Court also stated that such outcome was in accordance with Article 14(1) of the International Labour Organization Convention no. 169 of 1989 on indigenous and tribal peoples in independent countries and on the rights of ownership and possession of peoples over traditional lands.⁷⁸

The Sámi reindeer herding community also acted against the authorization of two windfarms, Storheia (Åfjord) and Roan (Fosen), of *Fosen Vind*, the largest Norwegian onshore mega wind project with six wind farms. The Sámi community claimed that such projects violated their rights to cultural practice. In 2020, the Court of Appeal ruled that winter grazing areas at Storheia and Roan have in practice been lost to reindeer husbandry and that the development will therefore threaten the reindeer husbandry industry's existence at Fosen if no compensatory measures are taken.⁷⁹ However, due to the monetary compensation that had considered the economic loss as well as the implementation of the procedural obligations to consult the Sámi, the Court of Appeal concluded that there was no breach of the ICCPR.⁸⁰ The Supreme Court admitted the appeal and handled it in its Grand Chamber.⁸¹ In October 2021, it unanimously ruled that the Sámi reindeer herders' rights had been violated and that the decisions on granting operating licenses and expropriation ordinances were therefore invalid.⁸² Importantly, these cases illustrate that Sámi have not only the right of usage but actual entitlements over lands and that the

⁷³ International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, at 35 para 144.

⁷⁴ *Erik Anderson v The Norwegian State*, No. 5B/2001 (5 October 2001) ('Svartskogen' case), Supreme Court: Appeal case 340/1999, at 29, <<https://elaw.org/system/files/svartskogdommen.pdf>> accessed 15 October 2023.

⁷⁵ *Ibid.*, at 1252.

⁷⁶ *Ibid.*, at 1252–1253.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at 1252.

⁷⁹ *Statnett SF and Fosen Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen* [2020] LFSIV 150,314 at 17, 26.

⁸⁰ *Ibid.*, at 25, 26 and 33.

⁸¹ *Statnett SF and Fosen Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen* [2020] HRU 2268 U.

⁸² *Statnett SF and Fosen Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen* [2021] HRU 15 J.

development of renewable energy projects (wind parks, in the case examined) can be revoked as a result. In other words, here, the entitlement function of the Sámi's right to cultural reindeer practices over their lands was the basis for the invalidation of the licenses. Rather than polishing the 'externalities' of a 'transaction' that is not questioned at its core, the rights of the Sámi were recognized as an entitlement founding a different and competing transaction.⁸³

In South Africa, the case *Alexkor v Richtersveld Community* is particularly relevant in this debate. In this case, the Richtersveld community claimed that when their dispossession started in the 1920s, they had a right to land based on aboriginal title.⁸⁴ They argued that this title survived annexation and existed as a burden on the Crown's title. The case eventually reached the Supreme Court of Appeal (SCA), which unanimously overturned all of the adverse findings made by the Land Claims Court.⁸⁵ The SCA reasoned that, at the time of annexation, the Richtersveld people had a communal 'customary law interest' whose source was 'the traditional laws and customs of the Richtersveld people.'⁸⁶ The SCA thus concluded on the similarity between this 'customary law interest' and an aboriginal title right.⁸⁷ Subsequently, Alexkor Ltd appealed the SCA's decision before the Constitutional Court. On 14 October 2003, the Constitutional Court confirmed the SCA ruling.⁸⁸ The Court agreed with the SCA's characterization of the Richtersveld people's right in land as a 'customary law interest' whose content had to be defined in accordance with 'the history and the usages of the community of Richtersveld.'⁸⁹ In the words of the Court: '[t]he undisputed evidence shows a history of prospecting in minerals by the Community and conduct that is consistent only with ownership of the minerals being vested in the Community.'⁹⁰ It thus concluded:

under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.⁹¹

The Court also confirmed the rule, already endorsed by the SCA, that customary law rights in land survive the acquisition of sovereignty by a colonial power.⁹² Along these lines of practice, in subsequent case law, South African courts have supported the claim that, in instances where land is held on a communal basis, affected parties, such as local communities, must be given sufficient notice of and be afforded a reasonable opportunity to participate,⁹³ which constitutes a central aspect of local custom.⁹⁴

Lastly, the case law from Malaysian courts has followed a converging trend. In the 1997 case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor and Anor* ('Adong HC'),⁹⁵ the Malaysian High Court recognized pre-existing customary land rights of the Orang Asli.⁹⁶ Subsequent cases have

⁸³ See Viñuales, above n 3, at 29–34.

⁸⁴ *Richtersveld Community v Alexkor Ltd and Anor*, 2001 (3) SA 1293 (LCC), 30–31.

⁸⁵ *Richtersveld Community v Alexkor Ltd & Anor*, Supreme Court of Appeal, 24 March 2003.

⁸⁶ *Ibid.*, at 28.

⁸⁷ *Ibid.*, at 37.

⁸⁸ *Alexkor Ltd v Richtersveld Community*, 2003 CCT 19/03, CCSA.

⁸⁹ *Ibid.*, at 60.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, at 64.

⁹² *Ibid.*, at 69.

⁹³ *Maledu and Others v Itereleng Bagatla Mineral Resources (Pty) Ltd and Another*, 2019 (2) SA 1 (CC), para 97.

⁹⁴ See *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZACMKHC 55; [2022] 4 All SA 533 (ECG) (1 September 2022), para 97–105 and 139. See also *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(4) SA 113 (CC), paras 66–67.

⁹⁵ *Adong bin Kuwau & Ors v Kerajaan Negeri Johor and Anor* [1997] 1 MLJ 418.

⁹⁶ Pursuant to ss 6 and 7 the Aboriginal Peoples Act 1954 (APA) or, more broadly, s 62 of the National Land Code 1965.

considered the common law recognition of their pre-existing rights applicable to native customary rights in the states of Sabah⁹⁷ and Sarawak,⁹⁸ located in Eastern Malaysia. Importantly, by way of example, in the *Sagong bin Tasi* case, the High Court and the Court of Appeal recognized that indigenous customary land rights have the same legal value as full ownership or title to the land.⁹⁹ According to both courts, the indigenous community had ownership of the lands in question under a customary community title of a permanent nature.

These illustrations suggest that sovereignty over the land and natural resources belongs to the people as an originary entitlement holder and that, in turn, peoples have the right to be consulted in case state or private companies' activities may encroach upon them. This is a trend that fully endorses the recognition of peoples' entitlements challenging the very State sovereign powers over lands and the natural resources. The examples taken from domestic case law shed light on an important question of international law, namely the locus of sovereignty in international law. The decisions suggest that the original holder of the territorial entitlement is and remains the people and that the sovereignty of the people can be operationalized through collective rights, including—but not limited to—participatory rights, which are recognized in international human rights law. It is only when procedural limitations are connected to the deeper entitlement of a people to its land and resources, that such limitations bring into question not only the manner but to the very power of the government to make use of them.

CONCLUDING OBSERVATIONS: TWO FUNCTIONS OF HUMAN RIGHTS IN RELATION TO ENERGY RESOURCES

As discussed in this article, an entitlement-driven prism can challenge the very core of decision-making power over resources, namely how extractive or other resource-related activities are conducted, but also the very *entitlement* to do so. An externality-avoidance prism of human rights, instead, only limits the *manner* in which activities relating to natural resources are conducted, without challenging the entitlement of the State as the backdrop of such activities.

Each of these two functions of human rights rests on a substantial body of practice, some of which has been reviewed for illustrative purposes in this article. What is missing is a clear conceptualization of these two different functions of human rights and an analysis of their implications. The distinction between the externality-avoidance and the entitlement-driven limitations arising from human rights is an attempt at providing such conceptualization.

The implications of framing the function of human rights from the externality-avoidance prism are that the state entitlement over natural resources is not as such challenged and nor is the delegation of such powers to another entity such as a company. The limitations are therefore confined to bringing the encroachment within acceptable bounds through a range of procedural and mitigation measures, without fundamentally invalidating or interfering with the energy transaction. By contrast, from an entitlement-driven prism, the entitlement of the right-holder is originary and limits the very state power to exploit or delegate the exploitation of the resource.

⁹⁷ See, for example, *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* ('Nor Nyawai HC') [2001] 6 MLJ 241; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai and another appeal* ('Nor Nyawai CA') [2006] 1 MLJ 256 (Court of Appeal, Malaysia).

⁹⁸ See, for example, *Rambilin binti Ambit v Assistant Collector for Land Revenues, Pitas* (Kota Kinabalu High Court Judicial Review Application for Judicial Review Nos. K 25-02-2002 and K24- 240-9 July 2002, 2007).

⁹⁹ See *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor and Ors* ('Sagong HC') [2002] 2 MLJ 591; *Kerajaan Negeri Selangor and Ors v Sagong bin Tasi and Ors* ('Sagong CA') [2005] 6 MLJ 289. Similarly, see also *Nor Anak Nyawai HC and CA*, where the High Court (and Court of Appeal) recognized the native customary rights; and *Andawan bin Ansapi and Ors v PP* (Kota Kinabalu High Court Criminal Appeal K41-128, where the Court ruled that the claimants had native customary rights to the land.

The legal and judicial developments discussed in this article shed light on this subtle but important distinction. Peoples' entitlements over energy resources are recognized as an ordinary entitlement, in any context in which human rights apply. Such entitlements are thus part of the foundations over which energy transactions are organized.