

From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management

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ABSTRACT

The principle of permanent sovereignty over natural resources (“PSNR”) is now widely recognized as an important principle of international law. It derives its meaning from the instrument that is widely regarded as establishing its status in international law—the United Nations (“U.N.”) General Assembly Resolution 1803 (XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources” (“the 1962 Declaration”). The preamble to the 1962 Declaration defines the principle, asserting that any measure in respect of PSNR “must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States.” However, since its inception in the second half of the twentieth century, PSNR has been increasingly considered as a principle expressive of the right of peoples, not just states. Indeed, there is a discernible trend of extending the principle of PSNR to the interests of indigenous peoples so that they can exercise control over their traditional lands and territories. Indigenous peoples are receiving increasing attention in international instruments. States are now under an obligation to exercise permanent sovereignty on behalf of their indigenous communities, as well as for the benefit of their citizens as a whole. The exercise of three particular rights of indigenous peoples—the right to self-determination, the right to traditionally own land and resources, and the right to prior informed consent—can help indigenous peoples exercise their right to permanent sovereignty within the nation state.

This Article considers indigenous peoples’ rights to and control over natural resources as a significant departure from, and radical extension of, traditional state sovereignty over natural resources. This transformation has been observed through recent regional human rights court decisions,

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through the operation of international conventions, and within legal scholarship. From analyzing these sources, this Article demonstrates that PSNR has gradually evolved from a state-centric natural resources agreement to recognition of the collective rights of indigenous peoples over their resources. The primacy of state sovereignty has been challenged by the emergence of new norms of international law which see the rights of indigenous peoples as intrinsically linked to PSNR. The resulting legitimacy afforded to those rights therefore has the potential to displace the priority originally given to states. This Article seeks to further explore the path leading to that potential outcome and its implications for the current understanding of PSNR.¹

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1. See, Lillian Aponte Miranda, *The Role of International Law in Intrastate Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development*, 45 VAND. J. OF TRANSNAT’L L. 785 (2012); Endalew Lijalem Enyew, *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments*, 8 ARCTIC REV. ON L. & POL. 222 (2017).

INTRODUCTION: PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AS AN
ESTABLISHED MEANS OF ADDRESSING ECONOMIC EXPLOITATION

The emergence of the principle of permanent sovereignty over natural resources (“PSNR”) represents one of the great developments in international law in the second half of the twentieth century. PSNR is now firmly established and based on the widely accepted principle of state sovereignty itself.² PSNR has assumed the character of customary international law, through *opinio juris* of multiple United Nations General Assembly Resolutions and resulting state practice,³ and this status was affirmed by the International Court of Justice in the *Armed Activities on the Congo (Congo v. Uganda)* case in 2005.⁴ The principle of PSNR has now been affirmed in judicial decisions and arbitral awards.⁵

Over the decades of its formulation, the principle of PSNR has become a fundamental principle of international law.⁶ Before it reached this widely-accepted status, however, the principle of PSNR was articulated during the 1950s in response to the growing demand in newly emerged developing countries for claims of ownership over the natural resources found in their territories. PSNR was motivated by the concern among developing states that orthodox international foreign investment law undermined the effective exercise of their sovereignty in the economic realm by favoring the interests of capital-exporting states and their corporations.⁷ The development of PSNR therefore challenged many traditional principles of international law.⁸ The principle’s emergence and increasing status encouraged developing countries to carry out development plans and realize their right to self-determination. During its formative stage, the

2. See generally, STEPHEN HOBE, *EVOLUTION OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: FROM SOFT LAW TO CUSTOMARY LAW PRINCIPLE* (Marc Bungenberg & Stephen Hobe eds., 2015).

3. The International Law Commission refers to “*opinio juris*” as the acceptance of a general practice as law by States and among States. U.N. Int’l Law Comm’n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10 (2018).

4. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 251 (Dec. 19). The International Court of Justice remained vague on the exact formulation of this customary norm; however, they specified General Assembly Resolution 1803 on the Permanent Sovereignty over Natural Resources and General Assembly Resolution 3201 on the Establishment of a New International Economic Order as examples of U.N. resolutions. See also, Alberto Alvarez-Jimenez, *Methods for Identification of Customary International Law in the International Court of Justice’s Jurisprudence 2000–2009*, 60 INT’L AND COMP. L. Q. 681, 706 (2011).

5. *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90 (June 30); *Armed Activities on the Territory of the Congo*, *supra* note 4, at 251–52; *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Compensation for Nationalized Property)*, 17 I.L.M. 1, 28–30 (1978).

6. See generally, NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* (Cambridge University Press, 1997).

7. See, David P. Fidler, *Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT’L L. 29, 32–3 (2003).

8. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 211–13 (Cambridge University Press, 2004).

principle provided a strong basis for developing countries to make a claim for the alteration of “inequitable” legal arrangements, under which foreign investors enjoyed rights to exploit natural resources found within the aggrieved states’ territories. However, struggles exist between private foreign investment and the interests of capital-importing countries,⁹ and these have tempered developing countries’ initial optimism that PSNR could bring about more fundamental reform and address issues of imbalance and inequity in the control and exploitation of their natural resources.¹⁰

The demand for economic sovereignty in developing countries and the formulation of the right to self-determination are two important factors that drove the development of PSNR. Under the principle, developing countries asserted that states had an “inalienable”, “absolute”, and “permanent right” to dispose of their natural resources.¹¹ PSNR derived from the right to self-determination, which brought about the end of the colonial empires after the Second World War.¹² After attaining independence, most developing countries soon realized that such independence was meaningless if foreign control continued to prevail in their economic sectors.¹³ Subsequently, the PSNR principle has undergone many changes to accommodate the reality of international relations. It has been extended beyond the traditional state-centric approach to encompass a people-centric approach, with people in many countries now afforded rights over their country’s natural resources. As outlined in this Article, an example of such change is reflected in how the principle of PSNR has come to recognize and accommodate the rights of indigenous people, including their right to self-determination.

A number of international instruments now recognize distinct rights of indigenous peoples as a separate entity.¹⁴ This has come about largely as a consequence of a more widespread recognition of the historical pre-existence of indigenous societies, the moral desirability of initiatives to address and restore what was lost to indigenous societies following colonization, and the corresponding expression

9. Lawrence Atsegbua, *Principle of Permanent Sovereignty over Natural Resources and its Contribution to Modern Petroleum Development Agreements*, 35 J. OF THE INDIAN L. INST. 115, 116 (1993), citing S.K. Banerjee, *The Concept of Permanent Sovereignty over Natural Resources*, 8 INDIAN J. INT’L L. 515, 515 (1968).

10. *Id.*

11. SCHRIJVER, *supra* note 6, at 2.

12. M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* 120 (Martinus Nijhoff, 1986).

13. See PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW: PRINCIPLE AND PRACTICE x–xi (Kamal Hossain & Subrata Roy Chowdhury, eds. 1984).

14. See, e.g., G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); 46 I.L.M. 1013 (2007), ILO Int’l, *Convention on Indigenous and Tribal Peoples*, (No.C 169), art. 6.1 (1989); U.N. Conference on Environment and Development, Rio Declaration of Environment and Development., U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), annex I (Aug. 12, 1992); U.N. Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1, at 2.37(g) (June 4–14, 1992); U.N. Conference on Environment and Development, Convention on Biological Diversity, art. 8(j), 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (June 4–14, 1992).

of these ideas and aspirations in international instruments. Accordingly, recognition of the rights of indigenous peoples has found philosophical justification in at least some of the following arguments.

Firstly, indigenous peoples' rights are pre-existing rights in the sense that they are not derived from the legal systems of states but arise *sui generis* from the historical conditions of indigenous peoples as distinct societies with the aspiration to survive as such.¹⁵ In other words, indigenous peoples enjoyed nationhood prior to their subjugation by colonial powers or settlers, and their statehood and sovereignty predate the existence of the modern nation states that now assert sovereignty over them.¹⁶

Secondly, indigenous peoples should be given preferential treatment, as compensation for historical suffering and prevailing conditions of inequality.¹⁷ This preferential treatment has been described as a "restorative paradigm," which suggests that despite variations in the specific political and historical circumstances surrounding them, nearly all indigenous groups share a common set of problems and their claims to land, group equality, culture, and development stem from the right to reparations for historical injustices committed against them.¹⁸ Restorative rights should be given to them as a form of reparation for their previous subjugation under European colonization. Indigenous peoples have typically been deprived of their independence, their land, and their right to choose their role in the modern state.¹⁹ An important dimension of the restorative paradigm is that indigenous peoples who have been persecuted should be acknowledged as a group and should be provided with appropriate compensation for the injustice and oppression inflicted upon them.²⁰

In recent decades, the rights of indigenous peoples have gained increasing prominence and strength in international law, culminating in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). In particular, UNDRIP acknowledged indigenous peoples' right to self-determination and their right to the resources "which they have traditionally owned, occupied or

15. See generally H.R. Berman, *Are Indigenous Populations Entitled to International Judicial Personality: Remarks*, 79 AM. SOC'Y INT'L L. PROC. 190, 190 (1985). See also *Caso de la Comunidad Mauagana (Sumo) Awas Tingni*, Sentencia de 31 de agosto de 2001, sec. 3, cl. 26(a), Inter-Am. Ct. H. R. (ser. C) No. 79.

16. See Erica-Irene A. Daes (Special Rapporteur on the Promotion and Protection of Human Rights), *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2001/21, 9 ¶ 2010–11 (June 11, 2001).

17. See Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L.J. 674, 727 (1996).

18. See Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. OF INT'L L. 127, 133 (1991).

19. Andfree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 762 (1990).

20. Carol Weisbrod, *Minorities and Diversities: The "Remarkable Experiment" of the League of Nations* 8 CONN. J. OF INT'L L. 359, 376 (1993).

otherwise used or acquired,” within their existing nation state.²¹ These rights over property and resources have been affirmed in many regional human rights courts and domestic laws, highlighting the growing international acceptance of the need for indigenous peoples to control their own natural resources for their own political and economic self-determination.²² The links between PSNR and the rights of indigenous peoples are thus more pronounced than ever, as exemplified by the increasing number of international instruments that recognize the rights of indigenous peoples.

Against this background, the objectives of this Article are to: (1) examine the evolution of PSNR in terms of its historical context, (2) assess its current position, and (3) situate the emergence of the rights of indigenous peoples in the broader context of the principle of PSNR. This Article argues that the PSNR principle has evolved to recognize the rights of indigenous peoples in ownership and management of natural resources and that this evolution has been reflected in many recent international instruments and regional human rights courts’ decisions.

I. DEVELOPMENT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES

The emergence of PSNR coincided with greater recognition of the rights of indigenous peoples over resources which had previously been under their custodianship for disposal and use prior to colonial economic imperialism. While the introduction to this Article outlined the connection between indigenous self-determination and the growing influence of the principle of PSNR, this section demonstrates that PSNR’s evolution was cemented in important instruments of international law. However, as this section serves to show, the ideals forming the basis of PSNR were later diluted by reactionary conservatism on the part of foreign investors. More recently, this has resulted in an increasing emphasis by states on the protection of foreign investments in disputes involving indigenous claims.

A. EMERGENCE OF PSNR IN INTERNATIONAL LAW

The origin and development of the principle of PSNR can be divided into three historical phases.²³ The first phase took place from 1952 to 1962. The most

21. G.A. Res. 61/295, *supra* note 14, at art. 3, 26(1)3, 26.

22. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), <https://perma.cc/MX54-LXG5>; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], (Feb. 4, 2010), <https://perma.cc/64RE-VGRG>; *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000); *Caso de la Comunidad Mauagana (Sumo) Awas Tingni*, Sentencia de 31 de agosto de 2001, sec. 12, cl. 173(2), Inter-Am. Ct. H.R. (ser. C) No. 79.

23. See, e.g., Sangwani P. Ng’ambi, *Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, 12 LOY. U. CHI. INT’L L. REV. 153 (2015) (detailed discussion on evolution of PSNR).

important resolution passed during this phase was the *Declaration on Permanent Sovereignty over Natural Resources*, adopted on 14 December 1962 (“the 1962 Declaration”), which affirmed the PSNR.²⁴ However, the Declaration stated that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and the well-being of the people of the state concerned.²⁵ Accordingly, the wording of the 1962 Declaration did not necessarily prioritize permanent sovereignty on the part of nation-states over and above the interests of foreign investment. Rather, it suggested that PSNR itself needed to be informed by a recognition that national development and the well-being of a state’s people were seen to hinge on the economic and social benefits that arise from foreign investment in the form of exploitation of that nation’s resources.

The 1962 Declaration on PSNR is widely considered to embody a balance between the interests of capital-exporting and capital-importing countries, and between national permanent sovereignty and international legal duties. It proclaimed that any nationalization and expropriation of foreign property shall be based on public interest and “appropriate compensation” to foreign investors. The 1962 Declaration represents a compromise between the interests of developing countries in protecting their rights to their natural resources and those of developed countries in securing adequate guarantees for protecting their foreign investments.²⁶ A key component of this Declaration was the explicit tie between self-determination and a state’s ability to freely exercise their PSNR. In this way, the 1962 Declaration restricted the absolute notion of state sovereignty and linked PSNR with ensuring the utilization of natural resources for the well-being of the states’ people. The inclusion of self-determination highlighted the inter-relationship between political and economic independence for developing nations, as they believed their ability to exercise their economic right to PSNR was integrally connected to political independence over that right.

In the second phase, from 1962 to 1974, the principle was reaffirmed in a number of other instruments and declarations. During this time, the principle of PSNR was incorporated in the 1974 *U.N. Declaration on the Establishment of a New International Economic Order* (Resolution 3201), the *Programme of Action on the Establishment of a New International Economic Order* (Resolution 3202), and the *Charter of Economic Rights and Duties of States*—adopted by the U.N. General Assembly in a resolution in 1974.²⁷ In this second phase of the principle’s evolution, the scope of PSNR was widened so that it could be connected with the broader goal of establishing a New International Economic Order

24. G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962), [https://undocs.org/en/A/RES/1803\(XVII\)](https://undocs.org/en/A/RES/1803(XVII)).

25. *Id.*

26. SORNARAJAH, *supra* note 12, at 121.

27. G.A. Res. 3201 (S-VI) (May 1, 1974); G.A. Res. 3202 (S-VI) (May 1, 1974); G.A. Res. 3281 (XXIX) (Dec. 12, 1974).

(“NIEO”). The creation of the NIEO represented a powerful political campaign that sought to fight neocolonialism and to transform the international economic system towards a just world order.²⁸ One commentator has observed that “by 1974 the concept of PSNR was transferred into the political demand for a new international economic order and no longer formally connected with the limited aim to terminate colonial arrangements.”²⁹ Developing countries also advocated for the NIEO to recognize international law as crucial to the broader campaign of decolonization and as an instrument to accelerate their economic development.³⁰ Indeed, the claims for NIEO and PSNR were all attempts to have economic justice reflected in international law.³¹

The third phase, from the late 1970s to the 1990s, was characterized by the renegotiation and revision of natural resource development agreements and the continued incorporation of the principle of PSNR in international instruments. During this period, the international community recognized that many natural resource development agreements executed during the colonial period were exploitative and inequitable. The principle of PSNR provided a normative basis for the renegotiation of natural resource development agreements in light of developing countries’ desire to restructure existing legal arrangements.³²

However, the evolution of PSNR was marked by pragmatism, as many developing countries rejected a strict version of PSNR based on nationalism, in favor of an interpretation more closely aligned with the 1962 Declaration—a compromise that was intended not to deter foreign investment. The consideration of PSNR was gradually subsumed into the priority afforded to the protection of foreign investors. The conclusion of a large number of bilateral investment treaties between developed and developing countries reflected this conservative reaction.³³ The more pragmatic approach to foreign investment over any claim to PSNR is evident in the increasing number of dispute settlement clauses in bilateral investment treaties (“BITs”) that require host states to settle investment disputes through neutral third-party arbitration.³⁴

28. See Margot Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT’L & COMP. L. Q. 31, 36–37 (2013) (on development of relationship between PSNR and the NIEO).

29. Rudolf Dolzer, *Permanent Sovereignty over Natural Resources and Economic Decolonisation*, 7 HUM. RTS. L. J. 222 (1986).

30. SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 49 (Cambridge University Press 2011).

31. Salomon, *supra* note 28, at 33.

32. Abdullah Al Faruque, *Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability*, 9 J. OF WORLD INV. & TRADE 113, 146 (2008); *see also*, Sangwani P. Ng’ambi, *Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, 12 LOY. U. CHI. INT’L L. REV. 153 (2015).

33. PAHUJA, *supra* note 30, at 95–100.

34. North American Free Trade Agreement, 32 I.L.M. 296 (1993), <https://perma.cc/F72G-A7KQ>; *see Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (Aug.16, 2007) (involving a dispute arising out of breach of a Germany-Philippines BIT), <https://perma.cc/F64A-QXR2>.

B. CURRENT STATE OF PSNR

The principle of PSNR was considered by the full court of the International Court of Justice (“ICJ”) for the first time in the *Armed Activities on the Territory of the Congo* case in which the Democratic Republic of the Congo (“DRC”) claimed that acts of looting, plundering, and exploitation of the DRC’s natural resources by officers and soldiers of the Ugandan People’s Defence Force and the failure of the Ugandan authorities to take adequate measures to protect those resources constituted a breach of the principle of PSNR. In this case, the ICJ decided that there was no violation of PSNR because there was nothing within either the PSNR or the NIEO resolutions that referred to “looting, pillage or exploitation” by certain members of the army when intervening in another state.³⁵ A normative implication of this judgment is that PSNR vests in people, not armed groups. Such interpretation is consistent with the changing nature of PSNR throughout the 20th century.

PSNR has now evolved to strike a reasonable balance between the rights and duties of states in a number of ways. These aspects are explored in further detail in subsequent sections. However, the balancing exercise may be explained succinctly in terms that the duties of states—to exercise good faith in asserting PSNR, to act in the interests of their peoples, and to manage their natural resources responsibly—are circumscribed by their obligation to also act in the spirit of international cooperation, and make concessions to foreign investors within a fiercely competitive economic climate. This compromise derives very much from the expression of PSNR in the 1962 Declaration.

C. PSNR AND THE BALANCING EXERCISE UNDERTAKEN BY STATES

In asserting its claim to PSNR, the host state has a duty to observe international agreements, to respect the rights of other states, and to satisfy international obligations in the exercise of permanent sovereignty. Thus, the principle of good faith explicitly referenced in the 1962 Declaration continues to constitute an important limitation on arbitrary action by the host state towards foreign investors.³⁶

Secondly, the state has a duty to exercise the right to permanent sovereignty in the interest of national development and to ensure that the whole population benefits from the exploitation of resources.³⁷ The 1962 Declaration emphasized that states must utilize their resources in the best interests of the people of the state.

35. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 251–52 (Dec. 2005).

36. G.A. Res. 1803 (XVII), ¶ 8 (Dec. 14, 1962), [https://undocs.org/en/A/RES/1803\(XVII\)](https://undocs.org/en/A/RES/1803(XVII)).

37. Schrijver, *supra* note 6, at 391–92. As per the 1962 Declaration, the right of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development and of the well-being of the people of state concerned. G.A. Res. 1803 (XVII), ¶ 1 (Dec. 14, 1962), [https://undocs.org/en/A/RES/1803\(XVII\)](https://undocs.org/en/A/RES/1803(XVII)).

Therefore, PSNR carries obligations to states and rights to the people within the state.

Thirdly, states, as holders of the right to permanent sovereignty, have increasingly been charged with the duty to manage the natural resources within their jurisdiction in an environmentally sustainable way. Since the execution of the *Stockholm Conference on Human Environment* in 1972, the concept of PSNR has become associated with environmental concerns. In light of resource scarcity, many legal instruments impose obligations upon states to ensure optimal use of their natural resources. For instance, Article 193 of the 1982 *Law of the Sea Convention* provides that a states' right to exploit their natural resources must be carried out pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.³⁸

Fourthly, PSNR has expanded the traditional scope of state sovereignty due to globalization and increasing efforts to achieve regional economic cooperation. Economic globalization demands that a strong emphasis on national sovereignty give way to law informed by principles of international cooperation and interdependence.³⁹ This can lead to historically marginalized communities such as indigenous peoples having their voice in resource allocation further diminished as states increasingly adopt standards and procedures.

Finally, the original interpretation of PSNR has lost much of its attraction in light of competition amongst developing countries to attract foreign investment. While the 1970s were seen as the age of confrontation between developing countries and foreign investors, the 1980s witnessed a decline in the hostile attitude towards foreign investment and governments of developing countries reemphasized attraction, instead of restriction of foreign investment.⁴⁰ While they continue to maintain the principle of PSNR in domestic laws and contractual arrangements of natural resource development, many developing countries now provide financial incentives for foreign investment, foreign exchange guarantees, the acceptance of international arbitration, and other guarantees, such as non-discriminatory treatment, and fair and equitable compensation in the nationalization of foreign property and in investment treaties.⁴¹

38. Convention on the Law of the Sea art. 193, Dec. 10, 1982, 1833 U.N.T.S. 387.

39. See e.g., Petra Gümplová, *Restraining Permanent Sovereignty Over Natural Resources*, 53 ENRAHONAR. QUADERNS DE FILOSOFIA 93, 93 (2014), <https://perma.cc/MSK4-PT4C>.

40. Thomas Walde, *Investment Policies in the International Petroleum Industry—Responses to the Current Crisis*, in PETROLEUM INVESTMENT IN DEVELOPING COUNTRIES 7–27 (Nicky Beredjicke & Thomas Walde, eds., 1988).

41. See Thomas Walde, *Third World Mineral Development: Recent Issues and Literature*, 2 J. ENERGY & NAT. RESOURCES L. 282, 283, 296 (1984).

II. IMPLICATIONS OF THE EVOLUTION OF PSNR—RECOGNITION OF THE RIGHT OF PEOPLES, USE OF NATURAL RESOURCES FOR THE BENEFIT OF PEOPLES OF A STATE, AND THE DUTY TO PROTECT INDIGENOUS PEOPLES' INTERESTS IN NATURAL RESOURCES

One practical implication of the changing notion of PSNR is that the principle is now viewed not only as state sovereignty over resources, but also as the right of peoples. Once used as a sword by nations, it is now a shield against oppressive state action.⁴² The traditional Westphalian notion of state sovereignty has changed profoundly to recognize the rights of people and non-state actors. States have a duty to utilize natural resources for the benefit of their people.⁴³ Sovereignty must be understood in relational terms and must take into account the non-state actors that shape access to and control over natural resources.⁴⁴ Therefore, people within a state have a key role to play in exercising PSNR.

In fact, there are many justifications for the extension of this principle to the people within a state. Firstly, under the notion of the public trust doctrine, governments are bound to utilize natural resources to the benefit of its people.⁴⁵ Secondly, the text of the 1962 Declaration explicitly says that states should enter into foreign investment agreements in good faith and respect the “sovereignty of peoples and nations over their natural wealth and resources.”⁴⁶ Adherence to this idea is reflected in some national constitutions, which require that states use natural resources for the benefit of the people. For example, the Constitution of Kenya (2010) requires the state to “utilise the environment and natural resources for the benefit of the people.”⁴⁷

As PSNR has changed, the role and extent of self-determination in international law has also considerably expanded. Initially utilized as a tool for economic and political control over natural resources, self-determination has gained increasing acceptance as providing rights to many groups of people around the world, most prominently indigenous peoples. UNDRIP began recognizing self-determination as a fundamental right and expressed it in the following terms: “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁸ Articles 4 and 5 of UNDRIP elaborate on the right of self-determination in regard to the right to autonomy or self-government in matters relating to their internal and local affairs and the right to maintain their

42. Miranda, *supra* note 1, at 801–04.

43. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 486 (1970).

44. See Jody Emel, Matthew T. Huber & Madoshi H. Makane, *Extracting Sovereignty: Capital, Territory, and Gold Mining in Tanzania*, 30 POL. GEOGRAPHY 70, 70 (2011).

45. See Sax, *supra* note 43, at 486.

46. G.A. Res. 1803 (XVII), ¶ 8 (Dec. 14, 1962), [https://undocs.org/en/A/RES/1803\(XVII\)](https://undocs.org/en/A/RES/1803(XVII)).

47. See CONSTITUTION art. 69(1)(h) (2010) (Kenya), <https://perma.cc/9B9Q-UCJF>.

48. G.A. Res. 61/295, *supra* note 14, at art. 3.

distinct political, legal, cultural, economic and social institutions.⁴⁹ Although UNDRIP does not mention PSNR in relation to the rights of indigenous peoples, it implicitly incorporates indigenous rights into PSNR by recognizing their right to self-determination in regard to autonomy and rights to natural resources. According to UNDRIP, indigenous peoples have the right to determine their priorities and strategies for development and use of their lands, territories, and resources.⁵⁰ In general, indigenous peoples' rights to land, territories, and resources must be understood in the broader context of their right to self-determination.⁵¹ UNDRIP further develops the indigenous peoples' right to control and dispose of their natural resources and confirms the shift in emphasis when exercising sovereignty over natural resources. It imposes and clarifies a state duty to respect, protect, and promote the interests of indigenous peoples in natural resource exploitation.⁵²

III. CONCEPTUAL RELATIONSHIP BETWEEN PSNR AND RIGHT TO SELF-DETERMINATION

The right to self-determination has evolved from “the simple and elementary principle that a nation or people should be a master of [their] own natural wealth or resource,” to encompass a more general civic right, such as “the right to participate in the governance of the state as well as the right to various forms of autonomy and self-governance.”⁵³ The right to self-determination is affirmed in Article 1 of the 1966 *International Covenant on Civil and Political Rights* (“ICCPR”) and Article 1 of the *International Covenant on Economic Social and Cultural Rights* (“ICESCR”).⁵⁴ These articles assert that people have a right to freely participate in the governance of their polity and to decide their own economic, social, and cultural policies.⁵⁵ Feasibly, an indigenous peoples'

49. *Id.* at art. 4–5.

50. *Id.* at art. 32(1).

51. See BIRGITTE FEIRING, *INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES, AND RESOURCES* 18 (2013), <https://perma.cc/H5CR-6XTP>.

52. See Dorothee Cambou & Stefaan Smis, *Permanent Sovereignty Over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic*, 22 *MICH. ST. INT'L L. REV.* 347, 361 (2013), <https://perma.cc/Q5VL-R7FX>.

53. See Erica-Irene A. Daes (Special Rapporteur on the Prevention of Discrimination) *Indigenous Peoples' Permanent Sovereignty of Natural Resources*, ¶ 7, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004), <https://perma.cc/2RBH-BRTQ>.

54. See *International Covenant on Civil and Political Rights*, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3, <https://perma.cc/D496-E748>.

55. *Id.* Common Article 1, which is identically phrased in the two covenants, holds that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

governance of their polity would include governance over land and natural resources. The intrinsic connection to PSNR appears to be clear. However, there remains some debate as to whether PSNR can be considered an extension of the right to self-determination when self-determination has the potential to threaten state sovereignty.

Although the common articles do not explicitly mention the principle of PSNR, states nevertheless agree on the inclusion of a paragraph in Articles 1 of the ICCPR and the ICESCR, recognizing the right of peoples to freely dispose of their natural wealth and resources and their right to not be deprived of their means of subsistence. Again, Article 47 of the ICCPR and Article 25 of the ICESCR both stipulate that: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” Article 21(1) of the *African Charter on Human and Peoples’ Rights* also affirms that all peoples shall freely dispose of their wealth and natural resources. Thus, under international human rights law, peoples’ right to dispose of natural resources is firmly established. Articles 1 of the ICCPR and the ICESCR are very similar to Article 1 of UNDRIP, which establishes common ground for indigenous peoples to exercise control over their resources. The ability of indigenous communities to freely dispose of their natural wealth and resources directly challenges the proposition that the state has ultimate sovereignty over its territorial resources by qualifying the state’s claim to recognize the economic dimensions of indigenous communities’ right to self-determination.⁵⁶

However, this extension of PSNR to indigenous communities as persons entitled to self-determination is by no means a settled position. Scholars have argued extensively as to whether the right for indigenous populations to freely dispose of their natural wealth and resources naturally correlates to an extension of the right to PSNR.⁵⁷ The disagreement stems from the fact that the norm of PSNR was initially articulated from a state-centered approach. Since then, it has significantly shifted towards a right to self-determination of specific groups of people such as indigenous peoples; nevertheless, such a shift has been criticized. The arguments against an extension of PSNR to indigenous communities lie in the fact that PSNR was originally intended to be held by all people, not just a specific portion of the population.⁵⁸ According to Professor Emeka Duruigbo, a specialist in natural resources law and international law, an application of PSNR to specific portions of the population could serve as “a launching pad for secession.”⁵⁹

56. Enyew, *supra* note 1, at 231.

57. Jérémie Gilbert, *The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?*, 31(2) NETH. Q. HUM. RTS. 314, 314–341 (2013).

58. Emeka Duruigbo, *Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT’L L. REV. 33, 54 (2006).

59. *Id.* at 56.

However, this view isolates PSNR from the political and historical context in which it has developed and ignored its co-dependency with the right to self-determination. The relationship between PSNR and the right to self-determination is recognized in United Nations General Assembly (“UNGA”) Resolution 1314 (XIII) which states that “the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes permanent sovereignty over their natural wealth and resources.”⁶⁰ Since the early emergence of self-determination and PSNR as principles of international law, there has been continued acceptance of co-dependence between PSNR and economic, social and cultural self-determination. This view has also been reflected in instruments such as UNGA Resolution 1314 (XIII) and in important instruments of human rights law such as the ICCPR and the ICESCR.

In addition, any restriction of PSNR by indigenous communities ignores the power imbalances that those communities experience. PSNR has the potential to enable indigenous communities to freely determine their own lives and participate in decision-making concerning the natural resources that are vital to the expression of their cultural identity. The former Special Rapporteur of the United Nations Work Group, Dr. Erica-Irene Daes, notes that “indigenous peoples are colonized peoples in the economic, political and historical sense; and . . . they suffer from unequal economic arrangements in the same way as other colonized peoples.”⁶¹ Justice Weeramantry, dissenting in the *East Timor Case (Portugal v. Australia)*, outlined that sovereignty over economic resources is important for any non-self-governing territory’s peoples to ensure that they can have a degree of self-governance. Thus, in light of the post-colonial inequalities that exist between indigenous communities and the state, there is a strong restorative justice basis in ensuring that indigenous communities can exercise PSNR over their natural resources.

IV. RIGHTS OF INDIGENOUS PEOPLES

Indigenous peoples possess core rights that distinguish them from mainstream society. They have the right to traditionally owned land and resources, the right to self-determination, and the right to free prior informed consent. The following analysis demonstrates that each of these rights concern goals that were historically at the heart of PSNR and that prompted PSNR’s emergence. They call for a more equitable re-balancing of access to, and use of, natural resources. Thus, if the application of PSNR were explicitly extended to include the fulfilment and exercise of these rights, the scope and meaning of PSNR as originally understood

60. G.A. Res. 1314 (XIII), Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination, at 27 (Dec. 12, 1958).

61. Erica-Irene A. Daes (Special Rapporteur on Prevention of Discrimination and Protection of Minorities), *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, ¶ 32, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004).

would shift little. However, the wellbeing of indigenous communities within states would be significantly enhanced. If, for example, an understanding of PSNR were extended to accommodate the right of indigenous peoples to self-determination, the automatic consequence would not be increased support for secession. Rather, extending PSNR in this way would provide the mechanism for states to better recognize and accommodate indigenous interests in natural resources, without compromising the duty of states to use natural resources for the benefit of their peoples.

A. RIGHT TO TRADITIONALLY OWNED LAND AND RESOURCES

The emerging human rights discourse on collective land ownership integrates all the social, cultural, and spiritual facets of indigenous peoples' relationship with their territories.⁶² Indigenous peoples are still deprived of their land and access to life-sustaining resources in many countries. Governments are often reluctant to formally recognize indigenous rights to land.⁶³ Land has deep cultural and spiritual meaning in most indigenous societies and in their social organization. An important dimension in affirming indigenous rights requires allowing communities to exercise a measure of control over their lands. Indigenous peoples should be able to manage their territories and resources through their own institutions. One author succinctly stated this idea in the following terms:

The close link of their physical and cultural survival with the lands they inhabit calls for extra measures to guarantee their preservation and development in the future. This is especially of concern due to the fact that their lands and territories often coincide with such regions which are considered susceptible to development, i.e. natural resource extraction, construction and operation of industrial plants and facilities.⁶⁴

Therefore, indigenous peoples' right to land, in the form of control and decision-making, as well as their use, management and conservation of natural resources, is an essential aspect of their exercise of internal self-determination.⁶⁵ Land rights should be interpreted in a broader sense to include the right to demarcation, ownership, development, control, and use of indigenous lands by traditional methods. The importance of lands and resources to the survival of indigenous cultures is also widely acknowledged in UNDRIP. Article 25 of UNDRIP provides that indigenous peoples are entitled to maintain and strengthen

62. Gilbert, *supra* note 57, 140.

63. Beth Ganz, *Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection*, 9 GEO. INT'L ENVTL. L. REV. 173, 173 (1996).

64. Jane A. Hofbauer, *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications 1* (Aug. 2009) (unpublished LL.M. thesis, University of Iceland).

65. Erica-Irene A. Daes, *Human Rights of Indigenous Peoples*, Second Progress Report of the Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1999/18, 11, ¶ 21.

their distinctive spiritual relationship with their traditionally-owned and used lands, territories, waters, and coastal seas, and to uphold their responsibilities to future generations in this regard.⁶⁶ According to Article 26, indigenous peoples have the right to own, use, develop, and control the land and resources that they possess by reason of traditional ownership.⁶⁷ Governments are not only under the obligation to respect these rights, but also to protect them. In the *Saramaka* case, the Inter-American Court of Human Rights concluded that the members of the *Saramaka* people make up a tribal community protected by international human rights law that secures the right to the communal territory that they have traditionally used and occupied. The Court also held that the state has an obligation to adopt special measures to recognize, respect, protect, and guarantee the *Saramaka's* communal property right to said territory.⁶⁸ A similar analogy has been drawn in the *Endorois* case,⁶⁹ where the African Commission of Human Rights affirmed the right to self-determination of indigenous people.

B. RIGHT TO SELF-DETERMINATION

The right to self-determination, as an irreducible minimum, encompasses the right of all ethnic and indigenous communities to continue to exist.⁷⁰ The right to self-determination refers to political, economic, and social self-determination—all of which are necessary for both internal autonomy and external sovereignty. Implicit in the right to self-determination, then, is a potential challenge to the notion of state sovereignty. However, the following paragraphs suggest that self-determination can generally co-exist with state sovereignty and can be exercised by people within the borders of the state. The right to self-determination provides a framework within which indigenous peoples can be heard and their rights can be realized.⁷¹ While most states are willing to concede some degree of control over indigenous affairs, such as the power to administer special programs designed by the state, states will not generally recognize self-determination claims involving secession.⁷² Therefore, instead of independence, the prevailing trend is towards granting autonomy to indigenous peoples in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities,

66. G.A. Res. 61/295, *supra* note 14, at art. 25.

67. *Id.*, at art. 26.

68. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 96 (Nov. 28, 2007), <https://perma.cc/MX54-LXG5>.

69. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003, African Commission on Human and Peoples Rights, ¶ 157 (Feb. 4, 2010).

70. Naqvi, *supra* note 17, at 726.

71. JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* 249 (2006).

72. Torres, *supra* note 18, at 162.

land and resources administration, and the environment.⁷³ The African Commission on Human Rights in the *Endorois* case endorsed the right to self-determination for a community of indigenous peoples.⁷⁴ It has also accepted the existence of indigenous peoples in Africa through the adoption of its *Advisory Opinion on the U.N. Declaration on the Rights of Indigenous Peoples*.⁷⁵ The African Commission's advisory opinion on UNDRIP reaffirmed the rights of indigenous peoples to self-determination as mentioned in Articles 3 and 4 of UNDRIP. However, the African Commission also stated that these articles should be read in light of Article 46 of UNDRIP, which guarantees the inviolability of the integrity of nation states and respect for their territories.⁷⁶ Thus, the right to self-determination for indigenous peoples is currently understood to be their internal autonomy to exist as a separate entity.

The right to self-determination for indigenous communities recognizes the importance of their continuing existence as distinct units within larger societies.⁷⁷ According to James Anaya, former United Nations Special Rapporteur on the Rights of Indigenous Peoples, the provisions relating to the right to self-determination under the two covenants on human rights, the aforementioned ICCPR and the ICESCR, require states to act affirmatively to protect the cultural matrix of indigenous groups and not simply refrain from policies encouraging assimilation or the abandonment of cultural practices.⁷⁸ The right to self-determination for indigenous peoples has two dimensions. The first is internal self-determination, which requires some appropriate form of autonomy that allows for the protection and self-control over their life. Second, self-determination encompasses the external aspect in regard to the capacity of indigenous peoples to be able to form networks of solidarity with other indigenous groups and with organizations representing indigenous peoples on an international and transnational level.⁷⁹ Thus, the external aspect of self-determination should not to be considered secession from the state.

C. RIGHT TO FREE PRIOR INFORMED CONSENT

The right to free prior informed consent is an important modality by which indigenous peoples can exercise the right to self-determination by participating in

73. See also Lawrey, *supra* note 19, 756–66.

74. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights, ¶ 157 (Feb. 4, 2010).

75. African Commission on Human and Peoples' Rights, *Advisory Opinion on the U.N. Declaration on the Rights of Indigenous Peoples*, ¶ 159 (May 2007), available at <https://perma.cc/KJQ4-7DQ6>.

76. *Id.*

77. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191, 219 (1989).

78. S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 17 (1991).

79. Richard Falk, *The Rights of Peoples (In particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES 34–35 (James Crawford ed., 1988).

the decision-making process. UNDRIP requires states to consult and cooperate in good faith with indigenous peoples through their own representative institutions. States must obtain the indigenous peoples' free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁸⁰ This includes undertaking projects that affect indigenous peoples' rights to land, territory, and resources, such as mining and other activities that utilize or exploit resources.⁸¹ UNDRIP also extends to states the obligation to ensure that the right of indigenous peoples to free, prior, and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources. Indeed, a lack of free, prior, and informed consent inhibits the capacity of indigenous peoples to exercise their self-determination effectively and participate in decision-making processes that affect them. In three important cases—the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, *Mary and Carrie Dann v. United States*, and *Maya Communities of Southern Belize v. Belize*—the Inter-American Court of Human Rights (“IACHR”) and the Inter-American Commission on Human Rights developed the conceptual underpinnings for indigenous peoples' right to free prior informed consent pertaining to the right to property, self-determination, and culture. In *Awas Tingni*, the Court held that the Community's right to its own property prevented the Nicaraguan Government from unilaterally exploiting the community's natural resources.⁸² To fulfill its obligations under the *Inter-American Convention on Human Rights*, the Commission found that Nicaragua was required to officially delimit, demarcate, and title the lands belonging to the Awas Tingni community with the community's full participation and consideration of customary law, values, usage, and customs.⁸³ The court concluded that demarcation could proceed only with the participation of the Awas Tingni community, which meant that they must give consent to such demarcation.⁸⁴

In *Mary and Carrie Dann*, the Commission held that the provisions in the *American Declaration on Rights and Duties of Man* on fair trial and property require that any determination of indigenous land rights be based on the fully informed consent of the whole community, meaning that all members must be fully and accurately informed and have the chance to participate.⁸⁵ In *Maya Indigenous Communities of the Toledo District v. Belize*, the Commission concluded that consultation and consent are required for the protection of indigenous property rights. The Commission held that “the duty to consult is a fundamental

80. G.A. Res. 61/295, *supra* note 14, at art. 1932.

81. *Id.* at art. 32(2).

82. Caso de la Comunidad Mauagana (Sumo) Awas Tingni, Sentencia de 31 de agosto de 2001, sec. 9, cl. 148–153, Inter-Am. Ct. H.R. (ser. C) No. 79.

83. *Id.*

84. *Id.*

85. *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860, ¶ 139 (2002).

component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied."⁸⁶ These rulings from the Inter-American Commission and IACHR on indigenous peoples' right to free, prior informed consent support the linkage between PSNR and self-determination of the indigenous people. They articulate the need for consultation with indigenous peoples in matters which concern lands and natural resources traditionally held and occupied by them and sought after by states and foreign investors for their economic benefit. The decisions suggest that indigenous sovereignty over natural resources is permanent and enduring and must be recognized by a state relying upon PSNR to support the use of traditional lands and resources by the state.

V. INTERSECTION BETWEEN PSNR AND THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES

There is a discernible trend of extending the principle of PSNR to the interests of indigenous peoples so that they can exercise control over their land and territories. One aspect of the changing notion of this principle is that states are obligated to exercise permanent sovereignty on behalf of peoples including indigenous communities.⁸⁷ To put it another way, shifting sovereignty to indigenous peoples means devolution of state power in allocation, management, and use of natural resources, rather than granting complete independence. The rationale for including indigenous peoples' concerns within the ambit of the principle of PSNR lies in the generally vulnerable position of indigenous peoples. Many indigenous communities have had their rights violated in the course of natural resource exploration and exploitation by state enterprises or multinational corporations. Additionally, indigenous peoples are similarly situated to the colonial peoples to whom the principle originally applied. As such, indigenous peoples bear the sovereign rights over the land and natural resources that they have traditionally used and occupied.⁸⁸ This development reflects that PSNR was extended to the "people" of a state, with indigenous peoples representing an important group of peoples within such a state.⁸⁹

A. REGIONAL HUMAN RIGHTS COURTS' DECISIONS

Indigenous peoples' rights over natural resources are receiving increasing attention in international instruments, including UNDRIP, and regional human

86. *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5, rev. 1 at 727 (2004).

87. See Enyew, *supra* note 1, at 228–29 (providing historical account of how PSNR came to be applied to "peoples" and has been extended to indigenous groups).

88. Miranda, *supra* note 1, at 807–09.

89. *Id.*

rights institutions, such as the IACHR in the *Saramaka* case⁹⁰ and the African Commission on Human and Peoples' Rights in the *Endorois* case.⁹¹ In both cases, the regional courts protected indigenous peoples from eviction from their traditional land by the state. In *Endorois*, the Commission found that the Kenyan government had violated the Endorois' rights to religious practice, property, culture, free disposition of natural resources, and development under the *African Charter on Human Rights* by evicting hundreds of *Endorois* families from their land to create a game reserve for tourism.⁹² The Commission adopted a flexible approach to define "indigenous peoples." The Commission stated that lack of consultation with the community, subsequent restrictions on access to the land, and inadequate involvement in the process of developing the region for use as a tourist game reserve, had violated the community's right to development under the *U.N. Declaration on the Right to Development*.⁹³ For these violations, the Commission recommended that the Government recognize rights of ownership, provide the Endorois peoples with their ancestral lands in restitution, compensate for their losses, and ensure they benefit from the royalties and employment opportunities within the game reserve.⁹⁴ *Endorois* is one of the first judicial considerations of indigenous rights following UNDRIP's entry into force. The judgment in *Endorois* recognized that, under Article 21 of the *African Charter of Human and Peoples' Rights*, indigenous peoples have the right to enjoy PSNR in consultation with the state as a whole.⁹⁵ The African Commission recognized PSNR to a significant extent and emphasized the African Charter's protection for collective claims to land rights by indigenous communities.

In the *Saramaka* case, the Commission took a similar interpretation to the IACHR. Thus, the trajectory of indigenous rights in Africa, particularly to their land and property, changed drastically after the "landmark" decision in *Endorois*.⁹⁶ However, despite the connection of indigenous rights to property under Article 21, the Commission missed an essential opportunity to locate this right in the context of UNDRIP, thereby ignoring a powerful legal tool to achieve a more universal application.⁹⁷ The judicial trend of increased protection for indigenous peoples continued in subsequent decisions.

90. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 96 (Nov. 28, 2007), <https://perma.cc/MX54-LXG5>.

91. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, Afr. Comm'n H.P.R., (Feb. 4, 2010), <https://perma.cc/64RE-VGRG>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights, 60 INT'L & COMP. L. Q. 245, 258–263 (2011).

97. Korir Sing Oei A. & Jared Shepherd, "In Land We Trust": The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa, 16 BUFF. HUM. L. REV., 57 (2010).

In *African Commission on Human Rights v. Kenya*, the African Court on Human and Peoples' Rights agreed with the African Commission that the African Charter created a right to PSNR for indigenous groups which Kenya had violated by removing the Ogiek peoples from their traditional lands.⁹⁸ The court, utilizing flexibility in defining the term "peoples," stated that indigenous peoples are entitled to the right to freely dispose wealth and natural resources.⁹⁹ The court found, therefore, that by denying access to the Ogiek people's traditional lands, Kenya had violated their rights to freely dispose of their wealth and natural resources.¹⁰⁰ The African Court of Human Rights chose to situate indigenous peoples' right to land within the context of UNDRIP when it held that Kenya had violated the Ogiek's right to property under Article 26 of UNDRIP by forcibly removing them from their ancestral lands.¹⁰¹ Although the court did not consider the situation of natural resources in their judgment, Article 26 of UNDRIP similarly protects indigenous peoples' rights to the resources on their land. Therefore, this judgment represents a stepping stone to greater recognition of the right to permanent sovereignty over natural resources for indigenous peoples through regional human rights courts.¹⁰²

Similarly, in the *Case of the Kaliña and Lokono Peoples v. Suriname*, the IACHR situated indigenous peoples' special right to be involved in the decision-making process in projects that affected them as a collective entity within UNDRIP, as well as the *American Convention on Human Rights*.¹⁰³ In this case, citing UNDRIP, the court decided that in order to delimit, demarcate, and grant title to traditional territory, other factors relevant to the rights of indigenous and tribal peoples must also be taken into account.¹⁰⁴ Accordingly, the court perceived that indigenous and tribal peoples' right to property includes full guarantees over the territories that they have traditionally owned, occupied, and used.¹⁰⁵ Such an interpretation ensures protection of indigenous and tribal peoples' particular way of life, including their means of subsistence, traditions, culture, and development as peoples. The court also noted that there may be other traditional activities to which indigenous and tribal peoples have had access, and to which they should be ensured the necessary continued access and use.¹⁰⁶

In the case of the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, the IACHR, while interpreting the right to property under Article 21 of the

98. African Comm'n on Human & Peoples' Rights v. Republic of Kenya, 006/202, African Commission on Human and Peoples' Rights, Afr. Comm'n H.P.R., 8 (May 26, 2017).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 128.

103. *Case of the Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 196, 202 (Nov. 25, 2015).

104. *Id.*

105. *Id.*

106. *Id.* at ¶ 139.

American Convention on Human Rights, held that indigenous peoples' rights to their lands include rights to, and ownership over, the resources thereon, and that these rights of ownership are held by the community collectively and according to their own customary law, values, and customs.¹⁰⁷ This decision is an important pronouncement on the recognition of the collective right of the indigenous community to their land and resources. In the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, the IACHR found that Paraguay violated the *American Convention on Human Rights* by displacing indigenous peoples from their traditional territory.¹⁰⁸ Examining Article 21 of the *American Convention on Human Rights* relating to the right to property, the court used an innovative argument to state that indigenous peoples conceive "property" differently, as it is more communal than in many other societies.¹⁰⁹ According to the court, this worldview reflects more than just an economic conception. Rather, it is often the basis of cultures, religions and indigenous societies. Therefore, states cannot discriminate in their application of the right to own property and must recognize the different conceptions of indigenous peoples' property rights, including their right to sovereignty over the natural resources on their land.¹¹⁰ This judgment is significant because the court recognized that traditional indigenous possession of lands is equally legitimate to state-granted full property title. Furthermore, the court recognized that traditional possession entitles indigenous peoples to demand official recognition and registration of property title.¹¹¹

There are some judicial decisions at the national level that also support the increasing recognition of indigenous peoples' rights to natural resources and traditional territories. For example, in *Maya v. Belize*, the Supreme Court of Belize found that principles of customary international law and general principles required Belize to respect the rights of indigenous peoples to their lands and resources.¹¹² In this case, the Supreme Court of Belize referred to *Awias v. Nicaragua*, the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Charter of the Organization of American States*, and UNDRIP as sources imposing on Belize the duty to recognize the land and resource rights of indigenous peoples in their land. It held that the 1989 International Labour Organization's *Indigenous and Tribal Peoples Convention*

107. Caso de la Comunidad Mauagana (Sumo) Awias Tingni, Sentencia de 31 de agosto de 2001, sec. 9, cl. 148–153, Inter-Am. Ct. H.R. (ser. C) No. 79.

108. *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations, Costs, Inter-Am. Ct. H. R. (ser. C) No 146 (Mar. 29, 2006).

109. *Id.*, at ¶ 117–122.

110. *Id.*, at ¶ 128.

111. *Id.*

112. Supreme Court of Belize (Conteh CJ) 28 June 2010 Claim No. 366 of 2008.

and UNDRIP, in conjunction, reflected a general principle of international law in favor of the resource rights of indigenous peoples.¹¹³

B. INTERNATIONAL INSTRUMENTS

The principle of PSNR has also been found in other soft law and hard law norms that deal with the rights of indigenous peoples. For example, Principle 5 of the 1992 *Statement of the Principles of Management of Forests* provides that national forest policies should recognize and duly support the identity, culture, and rights of indigenous peoples, their communities, and other communities such as forest dwellers.¹¹⁴ It also asserts that states should promote appropriate conditions for these groups to enable them to have an economic stake in forest use and to achieve and maintain cultural identity and social organization. The Statement of Principles also ensures adequate levels of livelihood and well-being for indigenous communities by securing land tenure arrangements.¹¹⁵

The 1989 International Labour Organization's *Indigenous and Tribal Peoples Convention* ("Convention") contains important provisions for control over natural resources by indigenous peoples, in their collective capacity as peoples.¹¹⁶ In particular, Article 15 of the Convention provides for the rights of "peoples" to access and use their natural resources.¹¹⁷

International law has now recognized a number of substantive and procedural rights for indigenous peoples, including: the right to ownership over natural resources, the right to participate in decision-making and to prior and informed consent in the context of natural resources extraction projects, and sharing benefits arising from exploration and commercial exploitation of natural resources on indigenous lands. The principle of PSNR complements and further refines the right of self-determination of "peoples" under international law while establishing important parameters for the allocation of property rights in natural resources.¹¹⁸ The modern interpretation of PSNR also imposes obligations on states for sustainable natural resource management. Sustainable natural resource management remains an environmental aspect of PSNR while natural resource ownership by the indigenous or local people facilitates the economic aspect of their self-determination. The principle of PSNR also dictates that local peoples' rights over resource

113. *Id.*

114. U.N. Conference on Environment and Development, Rio Forest Principles, art. 5 (1992).

115. *Id.*

116. Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 15 ¶ 1, General Conference of the International Labour Organization (June 27, 1989) ("1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources").

117. *Id.*

118. Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law*, 14 MELB. J. OF INT'L L., 451, 451–52 (2013).

management should be established through decentralization of ownership—for this purpose, responsive and accountable local governance processes are needed. The principle also warrants local community or indigenous peoples participation in decision-making relating to natural resource management.¹¹⁹ The recognition of procedural rights that hinge on consultation rather than consent in natural resources management are more commensurate with good governance and transparency in allocating such resources.¹²⁰

C. INDIGENOUS PEOPLES' PSNR HAS BEEN LONG RECOGNIZED

A 2004 report on “[i]ndigenous peoples’ permanent sovereignty over natural resources,” submitted to the U.N. Economic and Social Council by Dr. Daes as the Special Rapporteur for the U.N. Working Group on Indigenous Populations, investigates “the growing and positive trend in international law and practice to extend the concept and principle of self-determination to peoples and groups within existing States.”¹²¹ PSNR is the logical and legal extension of the exercise of self-determination, allowing indigenous peoples to have a role in the management of, and authority over, natural resources within a state.¹²² The report states that, “in modern times, no state enjoys unfettered sovereignty, and . . . in legal principle there is no objection to using the term sovereignty in reference to indigenous peoples acting in their governmental capacity, although that capacity might be limited in various ways.”¹²³ The report additionally articulates indigenous peoples’ right to permanent sovereignty over natural resources by stating, “[i]t is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.”¹²⁴

Similarly, according to the 2004 Final Report of the Special Rapporteur, indigenous peoples’ relationship to land can include, “timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories.”¹²⁵ Thus, not only the cutting of timber, but even oil and gas production or mineral or metal extraction may deprive indigenous peoples of their natural resources and their unique relationship to their traditional lands.¹²⁶ The same Special Rapporteur described many of the UNDRIP principles as already

119. George Pring & Susan Y. Noe, *The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development*, in HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT 22 (Oxford University Press, 2002).

120. Miranda, *supra* note 1, at 832–33.

121. Daes, *supra* note 53, at 7.

122. *See id.* at 8.

123. *Id.* at 8.

124. *Id.* at 17.

125. *Id.* at 13.

126. Hans-Georg Dederer, *Extraterritorial Possibilities of Enforcement in Cases of Human Rights Violations*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES 191 (Marc Bungenberg & Stephan Hobe, eds., 2015).

assuming the status of general principles of international law or customary norms.¹²⁷ However, the Special Rapporteur was silent as to the status of property rights for indigenous peoples under customary international law. Despite this, the International Law Association has stated that regardless of each individual provision's status as a customary norm, the international community should view all articles of UNDRIP as the standard to uphold the necessary rights for indigenous peoples.¹²⁸ These authoritative reports further illustrate the growing recognition of indigenous peoples' right to property. The right to property would be an ultimate manifestation of the principle of PSNR.

VI. FUTURE DIRECTIONS

According to current international law, rather than granting independence or external self-determination, the prevailing trend has been to grant autonomy to indigenous peoples in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration, and the environment.¹²⁹ Whilst international law reserves a cardinal position to state sovereignty in the governance of natural resources, it also recognizes the peoples' right to self-determination.¹³⁰ In fact, permanent sovereignty over natural resources was referred to as a "basic constituent of the right to self-determination" in U.N.G.A. Resolution 1803 espousing PSNR.¹³¹ While that resolution referred solely to nation states, it highlighted the international community's recognition of the interrelationship between self-determination and capacity to exercise economic rights over resources, which has now been extended to indigenous peoples due to the changing nature of PSNR.

Indigenous peoples in developing countries are among the poorest, most vulnerable, and most powerless groups in the world. PSNR has evolved to recognize indigenous and local communities as important stakeholders in natural resources management. The expanded scope of PSNR also posits that indigenous peoples are sovereign right-bearers in the sense that their rights to land and natural resources are protected by the observance of PSNR.¹³² There is, therefore, an opportunity for the international community to invoke PSNR to address the widespread

127. James Anaya (Special Rapporteur on Rights of Indigenous Peoples), Rights of Indigenous People, U.N. Doc. A/HRC/21/47 (Aug. 2012).

128. Int'l Law Ass'n, *Rights of Indigenous Peoples*, Res. 5/2012, 26–30, 75th Conference of the International Law Association (August 2012).

129. See G.A. Res. 61/295, *supra* note 14, at art. 14, 15, 21, 23, 29, 31, 32. See also, Lawrey, *supra* note 19.

130. See Dorothee Cambou & Stefaan Smis, *Permanent Sovereignty Over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic*, 22 MICH. ST. INT'L L. REV. 347, 350 (2013), <https://perma.cc/Q5VL-R7FX>.

131. G.A. Res. 1803 (XVII), 15 (Dec. 14, 1962), <https://perma.cc/D6XJ-7FSY>.

132. Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 43 (2006).

economic and social disadvantage affecting the worlds' indigenous peoples. Indeed, in asserting PSNR, states are under an obligation to incorporate models—on a national, regional or international level—that strengthen the role of indigenous peoples, especially concerning their lands, territories, and natural resources.¹³³ Policy, institutional, and legal reforms are needed to realize internal self-determination. The reforms must establish and protect the rights of indigenous peoples in relation to natural resources management.

CONCLUSION

These emerging rights of the indigenous peoples envisaged under international instruments strongly affirm the view that states are obligated to protect and preserve natural resources and manage these resources for the benefit of the wider community, including indigenous peoples. Indigenous peoples' rights to PSNR and self-determination under international law define their degree of autonomy and provide an essential legal basis upon which forced assimilation may be challenged.¹³⁴ State sovereignty under PSNR has been increasingly circumscribed in the interest of the wellbeing of the people, a development which signifies that the sovereignty of developing countries over their natural resources and indigenous self-determination share a common foundation.¹³⁵ In particular, indigenous peoples' right to self-determination is based on control over natural resources and the right to participate in decisions affecting their resources and lands. The right of indigenous peoples to PSNR is the next significant stage in their continuing struggle against dispossession, forced integration and assimilation, and their efforts to gain recognition as actors with a legitimate interest in the protection, and use of, natural resources. As this Article has demonstrated, the principle of PSNR has enabled this recognition under international law and has facilitated its articulation in instruments dealing with both state exploitation of natural resources and indigenous peoples' rights to these resources.

133. JANE A. HOFBAUER, SOVEREIGNTY IN THE EXERCISE OF THE RIGHT TO SELF-DETERMINATION 231–32 (Brill, 2016).

134. Pereira & Gough, *supra* note 118, at 475.

135. Nico J. Schrijver, *Fifty Years Permanent Sovereignty over Natural Resources: The 1962 U.N. Declaration as the Opinio Iuris Communis*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, 23 (Marc Bungenberg & Stephan Hobe eds., 2015).