

Peoples' right to self-determination and self-governance over natural resources: Possible and desirable?

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The article combines Elinor Ostrom's design principles for common-pool resources and human rights provisions, including subsequent clarifications and jurisprudence. It analyses whether stronger local self-governance, embedded in the natural resource dimension of peoples' rights to self-determination is a recommendable approach. Two changes in understanding are noted. First, the universal approval of indigenous peoples' right to self-determination as specified in the UN Declaration on the Rights of Indigenous Peoples. Second, the wide endorsement of the specific principle of free and prior informed consent (FPIC). As the exercise of peoples' rights to self-determination is done on a collective level, it is important to have awareness of whether particularly affected and marginalized households and individuals are included or not included in the decision-making process. The article then reviews a range of new instruments adopted by the OECD and the UN for improved human rights awareness and compliance in the context of economic investments. The article finds that these instruments are still underutilized. Finally, the article identifies the role of human rights in bilateral investment treaties (BITs). It finds that there are less jurisdictional restrictions – as many treaties have a wide understanding of applicable law – than cognitive restrictions – as human rights competence is rarely sought when establishing tribunals mandated to solve investments disputes.

Keywords: bilateral investment treaties, free, prior and informed consent, International Covenant on Economic, Social and Cultural Rights, UN Declaration on the Rights of Indigenous Peoples, UN Guiding Principles on Business and Human Rights

Introduction

When in 1968 Garrett Hardin published his famous article 'Tragedy of the Commons' (Hardin 1968), this led to a disregard of collective rights and collective management in economic thinking and property governance for many decades. Actually, what Hardin described in his article was not a commons, rather he described an open access or free-for-all regime (Weston & Bollier 2013: 147). A commons depends on boundaries, rules and a defined community of persons managing the commons. It was through the efforts of the late Elinor Ostrom that deeper understandings of the many property management

systems between individual property and state property were recognized in wider policy circles. In 2009 she received the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel.

The two main human rights covenants, the International Covenant of Civil and Political Rights (ICCPR; 167 state parties) and the International Covenant on Economic, Social and Cultural Rights (ICESCR; 160 state parties), adopted in 1966, recognized collective rights, including rights over natural resources. Both entered into force ten years later. They share a common article on the right to self-determination: Article 1. In a so-called general comment upon Article 1, the United Nations Human Rights Committee, monitoring the implementation of the ICCPR, said: «Its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.» (UN Human Rights Committee 1984: para. 1) The UN Human Rights Committee has stressed that this right cannot be invoked by individuals.

The article proceeds by clarifying the rights-holders and the scope of the right to self-determination as it applies to control over natural resources. It then asks how this right can be operationalized in actual decision-making, followed by an analysis of the potential problems such decision-making might give rise to. It then asks whether a human rights approach to resource management is adequately convincing when encountering other legal regimes. Finally, it identifies whether human rights are able to influence the international investment regime, as both land investments and other large investments will affect property rights and access to resources – and could even lead to displacement of affected communities. The design principles for common-pool resources elaborated by Elinor Ostrom (1990; see table) will be applied throughout the article to illuminate the challenges and potentials within collective management systems. The author is aware of others' attempts at revising some of these principles (Cox, Arnold & Tomás 2010), and later contributions from Ostrom herself to nuance her approach, specifying attributes of the resource and of the appropriators (Ostrom 2002: 1325) and stressing the need for a varied institutional approach (Ostrom 2006). Nevertheless, Ostrom has never refuted her original design principles, and they are perceived to be appropriate as criteria that enrich the analysis. These design principles will also be discussed in light of human rights treaties and non-binding guidelines and standards embedded in human rights (see table).

Table 1: Ostrom's design principles for common-pool resources (extracts)	Human rights conventions and instruments referred to (year adopted)
Individuals having rights to and boundaries of common-pool resources must be clearly defined	International Covenant on Civil and Political Rights (supervisory body: Human Rights Committee) (1966)
Appropriation rules are related to local conditions	International Covenant on Economic, Social and Cultural Rights (supervisory body: UN Committee on Economic, Social and Cultural Rights) (1966)
Most individuals affected by the operational rules can participate in modifying the operational rules	International Convention on the Elimination of All Forms of Racial Discrimination (supervisory body: Committee on the Elimination of Racial Discrimination) (1965)
Monitors are accountable to the appropriators or are the appropriators	American Convention on Human Rights (establishing the Inter-American Court of Human Rights) (1969)
Appropriators who violate community rules are likely to be assessed graduated sanctions by other appropriators, by officials or by both	International Labour Organization Indigenous and Tribal Peoples Convention 169 (ILO Convention 169) (1989)
Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts	UN Declaration on the Rights of Indigenous Peoples (A/ RES/61/295, 2007)
The rights of appropriators to devise their own institutions are not challenged by external governmental authorities	UN Guiding Principles for Business and Human Rights (endorsed by UN's Human Rights Council; A/HRC/RES/17/4, para.1) (2011)
All activities of common-pool resources are organized in multiple layers of nested enterprises	Guiding principles on human rights impact assessments of trade and investment agreements (welcomed 'with appreciation' by UN's Human Rights Council, A/HRC/19/7, para. 42)(2012)

Ostrom's terms *common-pool resources*, *commons* and *common property resources* essentially refer to the same kind of resources, managed by a collective group of owners. Ownership is defined by *Black's Law Dictionary* as «the bundle of rights allowing one to use, manage and enjoy property, including the right to convey it to others», while property is defined as «the right to possess, use and enjoy a determinate thing [...]» Finally, possession relates to actual dominion over property, or a «right under which one may exercise control over something to the exclusion of all others.» Hence, possession gives

the strongest entitlement, and the term «one» applied in two of the definitions should not be read as to imply that there cannot be more than one owner.

Rights-holders and scope of the right to self-determination

Paragraph 2 of Article 1 of the ICCPR and the ICESCR reads:

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.

Three words are particularly interesting here: «peoples», «their», and «deprived». Each of these will be sought clarified in the following, with the main emphasis on the former.

The Human Rights Committee was initially reluctant to specify who constituted a «peoples» (with «s»), which – unlike a group of people (without «s») – has rights relating to self-determination. In an early decision, it said: «the question whether the Lubicon Lake Band constitutes a ‘people’ is not an issue for the Committee to address [...]» (UN Human Rights Committee 1990: para. 32.1). Subsequently, the Human Rights Committee has recognized that indigenous communities constitute «peoples».

When the UN Declaration on the Rights of Indigenous Peoples was adopted (United Nations 2007), four states voted against it: Australia, Canada, New Zealand and the United States of America. While the arguments of the four states differed, a statement made one year prior to the adoption, by the New Zealand Ambassador, Rosemary Banks, who spoke also on behalf of Australia and the USA, particularly criticized the wording on self-determination, as it «could be misrepresented as conferring a unilateral right of [...] possible secession» (UN News Centre 2006; for Canadian positions and subsequent support by these states; see Hanson 2011).

The wording on self-determination is found in Articles 3 and 4 of the Declaration and reads:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

We see that the natural resource dimension is not explicitly included in these two provisions, but is found in other parts of the Declaration. Article 20, first paragraph recognizes the «right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence [...]» Means of subsistence is also the term applied in common Article 1, paragraph 2 of the ICCPR and ICESCR. Moreover, Article 26, second paragraph of the Declaration recognizes «the right to own, use, develop and control the lands, territories and resources that they possess by

reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired». Hence, also land and resources which are not formally recognized as belonging to indigenous peoples, but which has been used or acquired by them should be considered as belonging to indigenous peoples.

Recognition of rights over territories and resources is more explicit in ILO Convention 169, particularly Articles 13–15. As ILO still has only 22 ratifications and because of the broad scope and growing status of the UN Declaration on the Rights of Indigenous Peoples, it is warranted to focus on also the non-binding Declaration.

While ILO Convention 169 requires free, prior and informed consent (FPIC) only in cases of relocation of peoples, as specified in Article 16.2, the UN Declaration requires FPIC in more circumstances. It says in Article 32, second paragraph, that states shall «obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources [...]». We see that the term «shall» is applied in specifying when states are to obtain the FPIC from the indigenous peoples. The FPIC requirement will be elaborated in the section below. Hence, even if the UN Declaration on Indigenous Peoples is not formally binding, its universal endorsement and the many other standards and court cases referring to it implies that it is fair to say that indigenous peoples are considered to be peoples, having the right to self-determination.

Can also communities which are not recognized as indigenous peoples by their own authorities but which nevertheless share similar lifestyles as indigenous peoples be understood as having right to self-determination as peoples? Two cases from the Inter-American Court of Human Rights (IACHR), established by the 1969 American Convention on Human Rights, indicate a positive answer to this. First, the *Saramaka peoples vs. Surinam* concerned a tribal people. The IACHR found that its jurisprudence on indigenous peoples' right to property was also applicable to tribal peoples, provided a special relationship to a given territory which require special measures (IACHR 2007, para. 86). Moreover, in another case against Surinam, communities of former slaves were recognized as having an «all-encompassing relationship» to their land, with collective rights (IACHR 2005, para. 133). In both cases the IACHR ruled against Surinam. Hence, in the Inter-American system, at least, also communities which are not considered to be indigenous in a strict sense might enjoy collective human rights protection over their traditional land and resources. Moreover, several voluntary schemes for certifying producers, for instance in the realm of biofuels, specify a general FPIC requirement for all affected communities, not only for indigenous peoples.

Arguments for a similar approach to indigenous peoples and other forest-dependent communities have been put forth by the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, provided that these share common characteristics with indigenous peoples (UN REDD 2013: 12).

Turning to an understanding of the term «their», this refers to resources found on lands owned, controlled or used by the indigenous peoples in question. There are different principles concerning who is eligible to harvest mineral sub-soil resources and various kinds of biological resources, as illustrated by the Norwegian Finnmark Act, Section 21–27 (Government of Norway 2005; including a new Section 22a on licensed prospecting).

From the full reading of ICCPR/ICESCR Article 1, paragraph 2, the harvesting of the resources must serve the purpose of maintaining an adequate subsistence. Subsistence goods must be understood as encompassing a wider range of resources than what is directly consumed by the members of these peoples. It must also extend to income-generating possibilities from harvesting and selling resources that cannot be directly consumed by human beings, in order to generate income for diversifying production and improve living conditions.

Finally, the term «deprived» encompasses situations where the resource base is degraded to the extent that it cannot be harvested from. The term «deprived» also implies that an external actor must have been involved; it cannot merely be any pattern of ecological degradation. Rather, it must be a situation where the resources have been depleted on such a scale that their recovery is not likely to take place, so that a continued harvesting is not possible.

From this review it seems reasonable to state that ICCPR/ICESCR Article 1, paragraph 2 does not outline one specific model of resource management. If, however, the provision is read together with Article 1, paragraph 1, specifying that peoples «freely pursue their economic, social and cultural development», it is obvious that a plethora of models are feasible and that it is the collective will of the respective peoples that is to determine which kind of development that is pursued. Elinor Ostrom promoted context-specific and culture-sensitive approaches for resource management, specifying that there is not one solution that is globally replicable.

Moreover, Ostrom's seventh design principle for management of common-pool resources reads: «The rights of appropriators to devise their own institutions are not challenged by external governmental authorities.» (Ostrom 1990: 101) By acknowledging and not interfering with such rules, external authorities are implicitly recognizing the right to self-determination. Under international human rights law, not every community has the right to self-determination, but only those communities that are recognized as peoples. We saw above, however, that also communities which are not understood as being indigenous have been recognized as having collective rights over their resources.

While the collective unit «peoples» is the rights-holder under the human right to self-determination, Article 1 does not, however, specify how individual members of these peoples are to be involved in decision-making regarding these resources. It is to this question that we now turn.

How can the right to self-determination be operationalized?

Only a collective of persons can exercise the right to self-determination, either nations or peoples – or collectives having similar characteristics as peoples. The size of such peoples can vary considerably. Is it desirable and practicable that all members of such peoples are involved in the decision-making process? Turning to another provision of the ICCPR, Article 25a, it is specified that the right to participate in the conduct of public affairs shall be done *either directly or* through freely chosen representatives. Hence, there is no requi-

rement in human rights for direct *and* broad-based participation in decision-making. Many traditional communities tend to give preference in decision-making to older men, and in some instances to only one chief, even if such chiefs formally have advisors in decision-making processes.

The most detailed specifications on the need to comply with procedures for decision-making embedded in local customary law are found in ILO Convention 169, Articles 6–8. We will come back to possible exceptions to this emphasis on custom and tradition in the section below.

Defining who is actually representing the peoples becomes most relevant in a situation where an investment or development project is going to affect the traditional use of and harvesting from the land. Usually, promises of infrastructure, new buildings and a high number of jobs are made – in addition to monetary compensation. Frequently, these are given as oral promises and not written down in the form of agreements. This makes it more difficult to hold the actors behind the project accountable. If the consent – being the decisive step in the FPIC process – is expressed by a limited number of selected representatives, it is difficult to know if and how others have been a part of the internal deliberations.

There is therefore a need for a comprehensive process. For the investor or developer, this might be frustrating. For the cohesion within affected communities and the overall relationships with the external actors, a serious process is an effective guarantee against continuing conflicts. It is, however, difficult to avoid such conflicts altogether, as every community traditionally depending on the harvesting of resources will have members with different interests and orientations. In general, however, members of these communities are interested in maintaining their rights and unimpeded access to their resources, not restrictions and monetary compensation.

The right to self-determination is therefore possible to operationalize as a process where the broadest practicable participation of the peoples concerned is ensured and when everyone is properly informed about the long-term consequences and actual risk, not only the opportunities and benefits. Such broad participation should take place both when managing the resources and in the events where rights are given up in exchange of promises of certain benefits, relating to jobs, technology, infrastructure and revenues. As pointed out by the *Economist*, however, «[n]one of these promises have been fulfilled» (*Economist* 2011: 57). While this might be a too general and broad-sweeping statement, it illustrates the dangers in consenting to what are simply vague phrases, without seeing all likely and unlikely consequences.

In an ideal world, the process of determining the management of resources or giving FPIC should involve everyone in the community, but in many instances this is not possible. This is implicitly also recognized by Ostrom. Her third design principle for managing common-pool resources says: «Most individuals affected by the operational rules can participate in modifying the operational rules.» (Ostrom 1990: 93)

The reason why Ostrom specifies that participation shall be limited to most and not all is explained by referring to some form of game theory in a situation when all are provided with information about what others are doing. As noted by Ostrom, one person's

deviation from the strategy of cooperation will lead to others' discontinuing this cooperation as well. Hence, to ensure that all are satisfied with the rules for cooperation, one should believe that it would be ideal that everyone actually was a part of the process of establishing the rules. It is therefore not easy to understand why Ostrom wrote «most» and not «all».

Communities where a few representatives – or the chief – are making decisions on behalf of the members in these communities have highly varied practices regarding how well the other members are involved in the internal consultations leading up to the decision. There are several examples of chiefs who have been bribed by investors to consent to their plans – without a serious involvement of the rest of the community (Haugen 2013). Internal tensions will obviously be less serious if everyone experiences that their concerns are heard. Therefore, while peoples' right to self-determination and to their resources are collective rights, the collective decision-making resulting in either a consent or a rejection to a certain project should seek to involve all who are legally and mentally able to participate. As the most vulnerable tend to be those persons – often women – who are depending on the continued harvesting of resources, it is particularly important that their voice is heard.

Which potential problems can collective decision-making give rise to?

In the section above I analyzed some of the problems relating to who is actually involved in the decision-making process and how one common position can be expressed by one or a few representatives on behalf of communities or peoples. Now I will analyze likely conflicts that can emerge by free-riders and others who seek to get more out from the resources managed through a commons than what one invests of labor and other forms of input. The opposite situation might also, however, emerge: persons who have invested a lot of work – or inputs – in the management of the common-pool resources get less out from it than they had deserved.

Human rights realization depend both upon the active participation of all rights-holders and give strong protection for the vulnerable persons. This balancing between participation and protection, ensuring that the appropriate strategies are chosen in the appropriate contexts, is essential in an effective human rights strategy.

Starting with the conventions, ILO Convention 169 Article 4, paragraph 1 and 2 read (extracts):

Special measures shall be adopted as appropriate for safeguarding the persons [...] of the peoples concerned.

Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

The term «safeguarding the persons» must be understood as relating to discriminatory or harmful practice. The first paragraph is, however, effectively weakened by the second

paragraph. If the peoples do not want their practices challenged – even if they can be understood as being harmful – ILO Convention 169 does not give much assistance.

ILO Convention 169 Article 8, paragraph 2 does, however, modify this impression of the limited possibilities for protecting vulnerable persons within indigenous peoples. It reads:

These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Hence, the local customs and traditions shall be respected, but only to the extent that they are *not incompatible with* fundamental rights and internationally recognized human rights. Challenging and changing such customs should not be done in an intrusive manner, but through dialogue and broad involvement between representatives of the national authorities and representatives of the peoples concerned.

In the Declaration on the Rights of Indigenous Peoples, there are three provisions which relate to the individuals within the indigenous peoples. Article 35 is the most explicit, saying that: «Indigenous peoples have the right to determine the responsibilities of individuals to their communities.»

This wording gives the indigenous peoples a relatively wide margin to allow indigenous peoples' authorities to exercise control over their members. In principle, this can have the content of making women work as servants for men or young persons' work for the elders. The provision is, however, modified by other provisions of the Declaration which emphasizes the overall human rights obligations. For instance, Article 34 says:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices [...] in accordance with international human rights standards.

By requiring that these customs and practices are to be *in accordance with* international human rights standards, this sets a rather high standard for which customs and practices that are acceptable, similar to what was found under ILO Convention 169 above.

Another relevant provision of the Declaration is Article 22.2 which says:

States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

This is essentially saying the same as Article 8.2 of ILO Convention 169, namely that any modification of customary practices which might be to the detriment of women and children should be done in an inclusive process. Such processes, however, might be difficult, as many indigenous peoples might not have a positive relationship to the state authorities, as a result of previous forced or non-sensitive assimilation policies.

If we then move to the practice by the UN bodies responsible for monitoring the implementation of the respective treaties, we will only give one small illustration. Similar to the Human Rights Committee, CERD, mandated to monitor the 1965 UN convention, issues interpretative comments. CERD says in its General Recommendation on indigenous peoples that states are to «ensure that members of indigenous peoples *have equal rights* in respect of effective participation [...]» (CERD 1997: para. 4(d) (emphasis added)). This emphasis on everyone's equal rights to participate, irrespective of what the traditional custom says, is representative for the positions of the other so-called treaty bodies of the United Nations.

The human rights treaties and the clarifications made by the respective treaty body are, however, not specifying how to solve internal conflicts within the community. This is primarily because the treaties regulate the relationship between the state as the obligation-holder and the individual, family (ICCPR Article 23), minority (ICCPR Article 27), and peoples as the rights-holders. Individual duties are recognized through the common preamble to the ICCPR and the ICESCR, specifying «duties to other individuals and to the community to which he belongs [...]» This preambular paragraph has the individual at its centre and is different from Article 35 in the UN Declaration of the Rights of Indigenous Peoples, which specifies the rights of the collective.

Two of Ostrom's design principles are most relevant in order to solve conflicts, both being more specific than what can be found under human rights treaties. These are design principles five and six, the former reading (extracts): «Appropriators who violate community rules are likely to be assessed graduated sanctions [...] by other appropriators, by officials [...] or by both.» (Ostrom 1990: 94) The sixth design principle reads (extract): «Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts [...]» (Ostrom 1990: 100).

Both are interesting for the purpose of this article. Community rules have developed over generations, and have allowed indigenous peoples to maintain their community cohesion and continue to harvest from nature – resulting in more sustainable management than strict conservation (Nelson & Chomitz 2011; Porter-Bolland et al. 2012). Respect of customary traditions, also in the realm of sanctions and penalties, is therefore crucial, but there are limits to such respect, namely if these rules are contrary to human rights.

Management of land which builds on local custom law is also addressed in the Voluntary Guidelines on the Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO [Food and Agriculture Organization of the United Nations] Voluntary Guidelines), which were negotiated by states. The most relevant provision reads: «States should respect and promote customary approaches [...] to resolving tenure conflicts within communities consistent with their existing obligations under national and international law» (FAO 2012: guideline 9.11 (extracts)). The emphasis is on local customs, but only to the extent that they are consistent with states' international human rights obligations.

Regarding the sixth design principle, the access to conflict-resolution arenas, which are to solve conflicts based on objective standards and the relevant facts, are most rele-

vant. By such mechanisms a situation could emerge where right prevails over might. The FAO Voluntary Guidelines says that states should provide access to «impartial and competent judicial and administrative bodies [...]» for «resolving disputes over tenure rights» (FAO 2012: guideline 21.1 (extracts)).

The FAO Voluntary Guidelines also encourage alternative forms of dispute resolution, including customary forms of dispute settlement, specifying that these should operate non-discriminatorily (FAO 2012: guideline 21.3). Hence, while the human rights treaties are not very specific on procedures for dispute settlement, there are non-binding standards that are embedded in human rights (FAO 2012: guidelines 1, 3 and 4) that specify the requirements for such procedures.

Can a human rights approach to resource management have strong convincing force?

When discussing human rights and environmental conservation in general and natural resources preservations in particular, it is relevant to take note of the fact that most human rights treaties were negotiated before the environmental awakening took place. What must be acknowledged in a human rights approach to resource management is that natural resource preservation is crucial for the realization of a wide range of rights, for instance the right to health, food, water and culture. The first three are obvious, but the relationship between natural resources conservation and preservation of culture is not automatically thought of.

The UN Committee on Economic, Social and Cultural Rights' General Comment on the right of everyone to take part in cultural life emphasized the obligation of states to «recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources [...]» (UN Committee on Economic, Social and Cultural Rights 2009: para. 36). Hence, the resource basis is crucial for maintaining indigenous peoples' culture.

Such acknowledgement of the relationship between the resource base and the maintenance of the culture is important, but the question remains as to which role human rights actually have in influencing decisions on the use of land and resources – for investment or infrastructure projects. This question has several answers, depending on which sources that are used.

There is an increasing number of standards and guidelines that explicitly refer to human rights responsibilities for companies. Most notable are the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises (OECD 2011), the UN Guiding Principles for Business and Human Rights (United Nations 2011), and the International Finance Corporation's (IFC) Performance Standards (IFC 2011). All these refer to the responsibility to exercise due diligence, which is defined by the OECD as «the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts [...]» (OECD 2011: 23) This requires a pro-active approach by companies.

The emphasis in the IFC Performance Standards is still on how to reduce *environmental* and *social* risks, and includes few references to human rights. It sets a rather high standard for when risk assessments are to be complemented by a human rights due diligence process:

In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business (IFC 2011: Performance standard 1, para. 7n12; see also Equator Principles Association 2013: 5).

This understanding by the IFC and the Equator Principles – which is an environmental and social risk tool for project finance – saying that such human rights due diligence is to be undertaken only in «limited high risk circumstances» is also reflected in the jurisprudence by international human rights courts. As an example, when the Surinamese authorities asked the Inter-American Court of Human Rights to clarify its 2007 Saramaka judgment, the Saramaka representatives themselves asked that a human rights impact assessment was conducted as a part of the ESIA (environmental and social impact assessment) process (IACHR 2008: para. 30). This, however, was not specified in the IACHR's 2008 judgment.

The link between social impacts and human rights impacts is, however, made clear in another OECD standard. The so-called «Common Approaches» on due diligence when granting export credit says in its definitions that «social impacts encompass relevant adverse project-related human rights impacts» (OECD 2012: 5). Therefore, any negative human rights impacts of projects where one of the entrepreneurs is receiving export credits are to be identified and prevented – and mitigated and accounted for when they occur.

The concluding observations from the CESCR when examining Norway in November 2013 specified that a requirement to undertake a human rights impact assessment also applied for Norway as a minority owner in foreign companies, asking Norway to:

ensure that investments by the Norges Bank Investment Management in foreign companies operating in third countries are subject to a comprehensive human rights impact assessment (prior to and during the investment). (UN Committee on Economic, Social and Cultural Rights 2013: 2)

Similar requirements for minority owners have also been specified by the OECD several times during 2013. Hence, also the share owners – and financiers – have an independent duty to undertake due diligence before buying shares in, or lending money to, companies that undertake projects that are harmful for indigenous peoples and other local communities.

On the national level, several states are either in the process of formulating action plans for how to implement the UN Guiding Principles on business and human rights, or have already published such plans. Legislative amendments recently proposed specify companies' «liability for [...] activities [...] which infringe fundamental rights» (Government of France 2013, Section 2; unofficial translation). There are few examples of references to the due diligence requirement by domestic courts, although it was required in a

case where communities were displaced to give way for a German-funded coffee plantation in Uganda (Uganda High Court 2013).

While we see that there are different emphases, the development is towards more specific requirements for companies so that they become accountable for the human rights impacts of their activities. The intergovernmental body that seems the hardest to convince of the need to specify human rights requirements for companies also is the World Bank, but the private sector arm of the World Bank, the IFC, is ahead of the rest of the World Bank. The World Bank does not recognize FPIC, only free, prior and informed consultation, while the IFC specifies FPIC in the context of indigenous peoples (IFC 2011: Performance Standard 7, paras. 13–17). The difference between an FPIC and a prior, free and informed consultation is that the latter does not include the option to say no to a given project.

In order for an FPIC process to be adequate, it cannot take place merely between the investor and the affected communities. This will lead to power asymmetries and possibilities that the negative impacts are under-communicated and the positive impacts are over-communicated. Article 6.2 of ILO Convention 169 says that consultation is to be undertaken in «with the objective of achieving agreement or consent to the proposed measures» and Article 6.1 says that it is the governments that must consult the indigenous peoples concerned. Rather than emphasizing the role of the government, the UN-REDD FPIC Guidelines say that information to the affected communities should be given by «culturally appropriate personnel», specifying that there should be «capacity building of indigenous or local trainers» (UN-REDD 2013: 19).

Therefore, the non-binding FPIC Guidelines bring in an additional requirement, namely the involvement of «personnel» or «trainers», but without specifying whether these have to be public employees. There are no specifications on recruitment or approval of such persons. The overall requirements of Article 6.1 and 6.2 ILO Convention 169 imply, however, that the governments could have the role of approving the participation of such persons – which could include some form of certification. As the state authorities are not always eager to protect the rights and interests of indigenous peoples, it would have been even better if a representative body of indigenous peoples was given the mandate to certify those persons who were to assist them in any consultation process leading either to the affected community's consent or rejection of a proposed project. The shift from governmental representatives to culturally appropriate personnel in the consultation process can be explained by the fact that government representatives might be very eager to see any projects initiated, and therefore take the side of the external actor rather than ensure adequate protection of the rights and interests of the affected communities.

These concerns relate to the fourth design principle defined by Ostrom (extracts): «Monitors [...] are accountable to the appropriators or are the appropriators.» (Ostrom 1990: 94) The main purpose of such monitors is that they must have the rights and interests of the affected communities as their primary concern. This must therefore also be central for everyone supervising any consultation process where rights over land and resources are to be relinquished. Even if a deal is only about leasing community-owned

land, the outcome in many countries is that the land by this process becomes state land, and hence no longer owned by the community.

Human rights in investment decision-making processes

There are many impediments if human rights – and their corresponding obligations – are to be taken fully into account in decisions relating to land and resources. While the more recent investment treaties do have human rights language, this applies primarily to children's rights and labor rights (Haugen 2014: notes 88–93 and accompanying text). While these are legitimate concerns, they are higher on the agenda of actors in the North, while access to food, water and land are higher on the agenda of actors in the South.

In general, investment treaties do not include human rights concerns. This is also reflected in judgments arising under such treaties, when a company brings a case before an international investment tribunal. These tribunals rarely bring up human rights concerns, but some of these tribunals have a mandate that is wide enough to do so. As an example, the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID), which constitutes the basis for most of the investment tribunals, says in Article 42(1): «The tribunal shall apply [...] such rules of international law as may be applicable.» Similar wording is found in the United States Model Bilateral Investment Treaty, Article 30.1 and in the North America Free Trade Agreement (NAFTA), Article 1131.

Such rules include states' human rights treaty obligations. A recent ICSID panel decision will be used as an illustration to show that human rights are not easily applied by international investment tribunals. This case addressed an investment which affects the rights of four indigenous communities in South-Eastern Zimbabwe, who «have rights under international law in relation to lands on which the [companies'] properties are located» (ICSID 2012: para. 25). The two companies in question apply the term *indigenous peoples* when addressing the affected communities and recognize that these «have some interest in the land over which the [companies] assert full legal title and [the companies] therefore have historically granted them access [...]» to a part of this land (ICSID 2012: para. 62). As a part of its reasoning, the tribunal found that the term «international law as may be applicable [...] does not incorporate the universe of international law» (ICSID 2012: para. 57). Therefore, even when there is an acknowledgement that an investment dispute affects human rights, human rights in general and collective human rights in particular have not often been applied by these tribunals.

In general, the concerns over investment agreements are that they make it more difficult for states to adopt measures to regulate in the public interests. Such regulations might be understood as impacting on the companies' business opportunities, and claims for compensation for lost profit (termed expropriations) have been presented to states. While it must be acknowledged that the states have won more cases than have been won by companies (UNCTAD 2011: 12; states have won 78 and lost 59 cases), the fact that a company

can sue a state for adopting regulations that apply equally to both domestic and foreign companies has led the UN member states to express their concerns that:

The emergence of rules-based regimes for international economic relations have meant that the space for national economic policy [...] is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. (United Nations 2010: para. 37)

This concern for the loss of policy space can explain the fact that the number of new investment treaties entered into between states is currently much lower than in the 1990s, but the total number of such treaties is presently close to 3100 (UNCTAD 2013: 101; 2857 bilateral investment agreements (BITs) and 339 other international investment agreements (IIAs)). While for instance the agreements to which Australia is a part of do not include provisions that allow for investor-state dispute resolutions, most investment agreements have such provisions.

The Human Rights Council in 2012 approved unanimously a report containing Guiding Principles on human rights impact assessments of trade and investment agreements (UN Special Rapporteur on the right to food 2011; see also United States Mission to Geneva 2012). The purpose is for states to «ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfill human rights» (UN Special Rapporteur on the right to food 2011: 6, principle 2). A central premise for these Guiding Principles is that there shall be transparency and adequate competence in order to assess the likely impacts of complying with investment agreement. It is crucial that the respective parliaments have access to the results of such impact assessments before they make any decisions whether or not to ratify an investment (or trade) agreement.

When elaborating on the content of the first principle, the Special Rapporteur states:

Where an inconsistency between the human rights obligations of a State and its obligations under a trade or investment agreement becomes apparent [...] the pre-existing human rights obligations must prevail. (UN Special Rapporteur on the right to food 2011: 5)

That human rights obligations prevail over investment treaty obligations is an understanding that the investment tribunals, which are the primary actors in interpreting investment treaties, are not explicitly recognizing. This is also a reflection of the composition of the members of such panels. The Convention establishing ICSID says in Article 14(1): «Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance [...]». The term «or» implies that competence in for instance finance is in itself a required qualification – but in reality the persons serving on such panels are recognized experts in commercial law, but not necessarily in public international law.

Whether the Guiding Principles on human rights impact assessments of trade and investment agreements will be used by states which are in the process of negotiating or

ratifying investment treaties is up to the states – and the non-governmental organizations (NGOs) seeking to influence the outcomes of negotiations of investment agreements between states – to decide. The underlying principles of transparency and participation have, however, not been observed more cautiously in the different negotiation processes in the two years since the adoption of the Guiding Principles.

There is no doubt that complying with principles outlining minimum standards of a good conduct will increase the quality of any decision-making process. By observing these principles, the decision-making process might take longer, but the likelihood of internal tensions within the community and between the community and any external actors are considerably reduced. Are such concerns also addressed by Ostrom? The second design principle for managing common-pool resources reads (extracts): «Appropriation rules [...] are related to local conditions [...]» (Ostrom 1990: 92). This must be understood as rules that are culture-sensitive.

Hence, the *substance* of the rules must be appropriate to the local conditions. This is fully in compliance with human rights (Weston & Bollier 2013: 181). If substantive rules are adapted to local conditions, providing for management in accordance with these rules, both the resources and the local culture will be better preserved. These concerns are central in their proposal for a «Universal Covenant Affirming a Human Right to Commons- and Rights-Based Governance of Earth's Natural Wealth and Resources» (Weston & Bollier 2013: 269–283). Their motivation for proposing this covenant is that the state-market nexus has led to environmental destruction, and that there is a need to strengthen self-organized community governance based on internal mechanisms for control.

Human rights principles will provide strong guarantees for inclusive processes in any governance system. By observing certain general principles that should be observed in all decision-making *processes*, like dignity, non-discrimination, rule of law, accountability, transparency, participation and empowerment (FAO 2013: 3), this will provide for less tensions and more cohesion. Observing these principles will be most crucial in any process involving local communities and external actors assisted by the state authorities, as these processes might be highly asymmetrical to the detriment of the communities.

Conclusion

This article has sought to identify whether a human rights approach to natural conservation is practical and desirable. It has analyzed this by also including six of Ostrom's design principles for common-pool resources. (The first on clear boundaries and last on multiple organizational layers were not considered equally relevant.)

I have found that right to self-determination has an explicit natural resource dimension, but generally human rights treaties are not regulating natural resource issues in any great detail. Non-binding standards and guidelines embedded in human rights, and the practice of the UN human rights treaty bodies have, however, clarified the relationship between the natural resource dimension of peoples' rights to self-determination and other human rights. Moreover, such non-binding documents have specified the indivi-

dual human right to participation when peoples are exercising the collective right over their natural resources.

It has been found that a peoples' right to self-determination applying to natural resources can be operationalized by the FPIC requirement. The Declaration on the Rights of Indigenous Peoples include FPIC requirements that go beyond ILO Convention 169, as the latter only specifies that FPIC is required in situations of relocation. While international law still might specify a FPIC requirement for indigenous peoples only – with an exception for the jurisprudence of the Inter-American Court of Human Rights – the certification schemes that have been developed in cooperation between producer associations and NGOs, extend this requirement to all affected communities.

This article acknowledges the ambiguous role of the state. The state should ideally ensure adequate human rights protection, including facilitating broad participation by any affected communities. In reality, many states have a negative view of indigenous peoples, as these are not «modern» or «civilized». In practice therefore, the states have in many situations tended to side more with the foreign company presenting an investment proposal.

Such asymmetrical processes can best be rejected altogether – or the asymmetries can be mitigated by the external actors and the states carefully observing the human rights principles. To be effective, these principles must be applied together with the substantive human rights.

The human rights impact assessment is a tool for assessing the likely outcome of any proposed activity on the substantive human rights, including rights over natural resources which can be integrated with other risk assessments as a part of a due diligence process.

As human rights must be understood as minimum standards of what constitutes a dignified life that all states have agreed to – and most states consented to be bound by – human rights has a underutilized potential in influencing the management of natural resources. Gradually, the business actors become aware of their human rights responsibilities, and mechanisms are in place to facilitate a shift from corporate social responsibility to corporate accountability for the overall impacts of a company's activities.

References

- CERD (1997) *General recommendation XXIII, indigenous peoples*. Retrieved March 28th 2014 from: <http://www1.umn.edu/humanrts/gencomm/genrexxiii.htm>
- Cox, M., Arnold, G. & Tomás, S.V. (2010) A review of design principles for community-based natural resource management. *Ecology & Society*, 15 (4): 38.
- Economist* (2011) When others are grabbing your land, 399 (8732), 57–58.
- Equator Principles Association (2013) *Equator principles III*. Retrieved March 28th 2014 from: <http://www.equator-principles.com/index.php/ep3/ep3>
- FAO (2012) *Voluntary guidelines on the governance of tenure of land, fisheries and forests in the context of national food security*. Retrieved March 28th 2014 from: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

- FAO (2013) *A right to food based approach to enhance the contribution of non-wood forest products to food security and nutrition. Background paper for the international conference on forests for food security and nutrition*, no. 3. Retrieved March 28th 2014 from: <http://www.fao.org/docrep/018/mg490e/mg490e.pdf>
- Government of France (2013) *N°1524 – Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, enregistré à la présidence de l'assemblée nationale le 6 novembre 2013*. Retrieved April 29th 2014 from: <http://www.assemblee-nationale.fr/14/pdf/propositions/pion1524.pdf>
- Government of Norway (2005) *Act of 17 June 2005 no. 85 relating to legal relations and management of land and natural resources in the county of Finnmark* (as amended). Retrieved March 28th 2014 from: <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-085-eng.pdf>
- Hanson, E. (2011) *UN declaration on the rights of indigenous peoples*. Retrieved March 28th 2014 from: <http://indigenousfoundations.arts.ubc.ca/?id=1097>
- Hardin, G. (1968) The Tragedy of the Commons. *Science*, 162 (3859), 1243–1248.
- Haugen, H.M. (2013) Deciding on land and resources: Can the influence of the most affected within communities be increased? *Human Rights and International Legal Discourse*, 7 (2), 260–288.
- Haugen, H.M. (2014) Trade and investment agreements: What role for human rights in international economic law? In *Economic, social, and cultural rights. Contemporary issues and challenges*, eds. E. Riedel, G. Giacca & C. Golay, p. 227–259. Oxford & New York: Oxford University Press.
- IACHR (2005) *Moiwana Community v. Suriname, Preliminary Objections, Merits, Judgment of June 15, 2005 (Series C No. 124)*.
- IACHR (2007) *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2007 (Series C No. 172)*.
- IACHR (2008) *Saramaka People v. Suriname, Interpretation of the Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 12, 2008 (Series C No. 185)*.
- ICSID (2012) *Pezold vs. Zimbabwe, ARB/10/15 and Border Timbers Ltd. V. Zimbabwe, ARB/10/25, Procedural Order No. 2 (26 June)*.
- IFC (2011) *IFC Performance Standards*. Washington D.C.: International Finance Corporation.
- Nelson, A. & Chomitz, K.M. (2011) Effectiveness of strict vs. multiple use protected areas in reducing tropical forest fires: A global analysis using matching methods. *PLoS ONE* 6(8), 1–14.
- OECD (2011) *Guidelines for multinational enterprises*. Paris: OECD.
- OECD (2012) *Recommendation of the council on common approaches for officially supported export credits and environmental and social due diligence (the «Common Approaches») TAD/ECCG(2012)5*. Paris: OECD.
- Ostrom, E. (1990) *Governing the commons: The evolution of institutions for collective action*. Cambridge & New York: Cambridge University Press.
- Ostrom, E. (2002) Common-pool resources and institutions: toward a revised theory. In *Agricultural economics, Volume 2, Agriculture and its external linkages*, eds. B.C. Gardner and G.C. Rausser, p. 1315–1339. Amsterdam: Elsevier.
- Ostrom, E. (2006) Not just one best system: The diversity of institutions for coping with the commons. In *Researching the culture in agri-culture: social research for international agricultural development*, eds. Michael Cernea and Amir Kassam, p. 329–360. Cambridge, MA: CABI Publishing.
- Porter-Bolland, L., Ellis, E.A., Guariguata, M.R, Ruiz-Mallén, I., Negrete-Yankelevich, S. & Reyes-García, V. (2012) Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics. *Forest Ecology and Management*, 268 (15 March), 6–17.

- Uganda High Court (2013) *Baleke & others v Attorney General & others, Civil Suit No 179 of 2002, [2013] UGHC 52*. Retrieved March 28th 2014 from: <http://www.ulii.org/ug/judgment/high-court/2013/52>
- UN Committee on Economic, Social and Cultural Rights (2009) *General comment no. 21, right of everyone to take part in cultural life, E/C.12/GC/21*. Retrieved March 28th 2014 from: www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc
- UN Committee on Economic, Social and Cultural Rights (2013) *Norway – Concluding observations, E/C.12/NOR/CO/5*. Retrieved March 28th 2014 from: <http://www.regjeringen.no/upload/UD/Vedlegg/Menneskerettigheter/G1349679.pdf>
- UN Human Rights Committee (1984) *General Comment No. 12: The right to self-determination of peoples (Art. 1)*. Retrieved March 28th 2014 from: <http://www1.umn.edu/humanrts/gencomm/hrcom12.htm>
- UN Human Rights Committee (1990) *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada, Communication No. 167/1984, CCPR/C/38/D/167/1984*. Retrieved March 28th 2014 from: <http://www1.umn.edu/humanrts/undocs/session38/167-1984.html>
- UN News Centre (2006) UN expert calls on Assembly to adopt declaration on the rights of indigenous peoples (17 October). Retrieved March 28th 2014 from: <http://www.un.org/apps/news/story.asp?NewsID=20287&Cr=Indigenous&Cr1=people>
- UN-REDD (2013) *Guidelines on free, prior and informed consent*. Retrieved March 28th 2014 from: www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx
- UN Special Rapporteur on the right to food (2011) *A/HRC/19/59/Add.5, Appendix: Guiding principles on human rights impact assessments of trade and investment agreements*. Retrieved March 28th 2014 from: <http://www.ohchr.org/EN/Issues/Food/Pages/Annual.aspx>
- UNCTAD (2011) *World Investment Report 2011 (Overview)*. Retrieved March 28th 2014 from: <http://unctad-docs.org/files/UNCTAD-WIR2011-Overview-en.pdf>
- UNCTAD (2013) *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*. New York and Geneva: UNCTAD.
- United Nations (2007) *A/RES/61/295, Declaration on the Rights of Indigenous Peoples*. Retrieved March 28th 2014 from: <http://www.un-documents.net/a61r295.htm>
- United Nations (2010) *A/65/RES/1, Keeping the promise: united to achieve the Millennium Development Goals*. Retrieved March 28th 2014 from: http://www.un.org/depts/dhl/resguide/r65_en.shtml
- United Nations (2011) *A/HRC/17/31, Annex, UN Guiding Principles for Business and Human Rights*. Retrieved March 28th 2014 from: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf
- United States Mission to Geneva (2012) U.S. Joins Consensus on HRC Resolution on the Right to Food. Retrieved March 28th 2014 from [http://www.humanrights.gov/2012/03/23/us-joins-consensus-on-hrc-resolution-on-the-right-to-food/](http://www.humanrights.gov/2012/03/23/us-joins-consensus-on-hrc-resolution-on-the-right-to-food/?utm_source=rss&utm_medium=rss&utm_campaign=us-joins-consensus-on-hrc-resolution-on-the-right-to-food)
- Weston, B. & Bollier, D. (2013) *Green Governance. Ecological survival, human rights and the law of commons*. Cambridge & New York: Cambridge University Press.