

Mr S. James Anaya, UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People

(to file complaints and request information)

c/o OHCHR-UNOG

8-14 Avenue de la Paix

1211 Genève 10, Switzerland

Tel.: + 41 22 9179647 Fax: + 41 22 9176010 E-mail: indigenous@ohchr.org

Universal Periodic Review (request information)

NGO Liaison Team of the Human Rights Council Secretariat

Tel.: +41 22 9179656 Fax: +41 22 9179011

E-mail: civilsocietyunit@ohchr.org

At the regional level

African Commission on Human and People's Rights

(to file complaints and request information)

N°31 Bijilo Annes Layout

Kombo North District

Western Region, Gambia

Tel.: +220 441 05 05/06 Fax: +220 441 05 04

E-mail: achpr@achpr.org

Website: <http://www.achpr.org>

African Court on Human and Peoples' Rights (to file complaints)

P.O. Box 6274

Arusha, Tanzania

Tel.: +255 732 979 509/551 Fax: +255-732 979 503

E-mail: registrar.office@african-court.org

Website: <http://www.african-court.org>

Inter-American Commission on Human Rights

(to file complaints and request information)

1889 F Street, N.W., Washington, D.C. 20006,

United States of America

Fax: +202 458-3992

E-mail: cidhoea@oas.org

Website: <http://www.cidh.oas.org>

Inter-American Court of Human Rights (to file complaints)

Corte Interamericana de Derechos Humanos

Apartado Postal 6906-1000, San José, Costa Rica

Tel.: +506 25271600 Fax: +506 2234 0584

E-mail: corteidh@corteidh.or.cr

Website: <http://www.corteidh.or.cr>

THE RIGHT OF PEOPLES TO SELF-DETERMINATION

AND TO PERMANENT SOVEREIGNTY OVER THEIR NATURAL RESOURCES SEEN FROM A HUMAN RIGHTS PERSPECTIVE

Brochure prepared by

Melik Özden, Director of the CETIM's Human Rights Programme and permanent representative of the CETIM to the United Nations

Christophe Golay, PhD in International Law, IHEID, Geneva

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Europe-Third World Centre (CETIM)**

VII. ANNEXE

INSTANCES TO WHICH ONE MAY RECUR

At the international level

Committee on Economic, Social and Cultural Rights, CESCR

(to request information)

Ms Susan Mathews, Secretary of the CODESC

Tel.: +41 22 9179154 Fax: +41 22 9179022

E-mail: smathews@ohchr.org

OHCHR - Office 1-025, Palais Wilson

Palais des Nations,

8-14 Avenue de la Paix, 1211 Genève 10, Switzerland

Committee on the Elimination of Racial Discrimination, CERD

(to file complaints and request information)

Petitions Team

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

1211 Genève 10, Switzerland

Fax: + 41 22 9179022 (particularly for urgent matters)

E-mail: tb-petitions@ohchr.org

Human Rights Committee, HRC (to file complaints and request information)

Petitions Team

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

1211 Genève 10, Switzerland

Fax: + 41 22 9179022 (particularly for urgent matters)

E-mail: tb-petitions@ohchr.org

Mr. Olivier de Schutter, UN Special Rapporteur on the Right to Food

(to file complaints and request information)

Special Procedures Division

c/o OHCHR-UNOG

8-14 Avenue de la Paix

1211 Genève 10, Switzerland

Fax: +41 22 9179006

E-mail: SPBInfo@ohchr.org and/or urgent-action@ohchr.org

INTRODUCTION

The right of peoples to self-determination is a pillar of contemporary international law (v. Chapter I). Since the entry into force of the United Nations charter in 1945, it has constituted the legal and political basis of the process of decolonization, which witnessed the birth of over 60 new states in the second half of the twentieth century. This was a historic victory even if it coincided with the will of certain great powers to break up the “exclusive preserve” of colonial (primarily European) empires of the time.

During the later decades, several dozen countries were created on this basis, concretizing the right to self-determination of peoples officially considered colonized or not (v. Chapters II and III).

In practice, the creation of a new country does not always correspond to objective and legal criteria. In fact, the right to self-determination can be manipulated by several powers (regional or international) or by powerful private interests. Thus, a new country can be created and recognized by a single other country¹ or by a group of countries.² A country can even be created against the will of the majority of its people, as was the case with Bosnia.³ In other words, one must treat the “right to self-determination” with great care.

It should be noted, however, that it is not necessarily easy to obtain recognition of such a unilateral creation, even when it is justifiable. To be admitted as a member to the United Nations, a new country must be recognized by other countries; the Security Council (without the veto of one of the five permanent members) must recommend that the General Assembly admit the new country; and a two-thirds majority of the General Assembly must vote for admission.⁴

This brings us to the question: is the creation of a country the only way to allow peoples to exercise their right to self-determination? And does it guarantee a real exercise of that right?

It must be admitted that the current international system allows the emergence of corrupt and totalitarian regimes in a world where democratic principles and human rights are far from being everywhere promoted and implemented with vigor and coherence. Worse, human rights are emptied of their substance with the promotion and establishment of an unjust economic order that entails the privatization and commodification of almost every aspect of life, including the sovereign function of the state that is defense (v. Chapter V).

¹ E.g. the Republic of North Cyprus by Turkey; Abkhazia and South Ossetia by Russia.

² Kosovo, primarily by the Western powers.

³ Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Centre d'Etudes et de Recherche Internationales et Communautaires, University of Aix-Marseille III, Paris, 1999.

⁴ About UN Membership: www.un.org/en/members/about.shtml

In such a context and in the absence of the effective implementation of the right to self-determination of peoples, one cannot overemphasize the responsibility and the role not only of powerful countries, but also of international financial and trade institutions as well as of transnational corporations (v. Chapter IV).

This brochure does not pretend to supply answers to all the questions raised by the right to self-determination, which, it goes without saying, comports a significant political dimension. At a time when the pillaging of the South's natural resources has taken a new turn for the worse – with, for example the highly questionable acquisition of millions of hectares of land by foreign countries or transnational corporations – it is necessary to revitalize the right of peoples to sovereignty over their natural wealth and resources, which is an essential component of the right to self-determination. It is this last aspect – the right of peoples to this sovereignty – that is central to protecting the affected peoples. This will constitute the connecting thread of the discussion presented below.

Conclusion

As has just been discussed, the right to self-determination and the right of peoples to sovereignty over natural resources is a right recognized but rarely respected in all its dimensions. It has a strong international element, whence the necessity of fighting for a democratic (economic and political) order that is just and fair allowing for the respect of all human rights, including the right to self-determination.

This implementation necessitates the participation of the people and a concerted effort of all the peoples within a given country in making decisions, at the national as at the international level. It is moreover the only practical avenue for diffusing tension in complex situations in which the various strata of the populations have conflicting interests.

The United Nations can play a significant role in this area if its member states give it the necessary means and respect its neutrality, by establishing, for example, as suggested by M. and R. Weyl in a recent CETIM publication, a “a permanent good offices commission” which would have as mandate to “keep attention focused on the disputes arising between governments, peoples, or between the peoples of the members states and to offer its good offices to qualified representatives of the protagonists to help them find a negotiated solution to their differences”.¹⁸²

¹⁸² *Sortir le droit international du placard*, Geneva: CETIM, October 2008.

partners have, for example, denounced the violations of these obligations by the governments of Guinea,¹⁷⁷ Equatorial Guinea,¹⁷⁸ Congo-Brazzaville¹⁷⁹ and Ghana.¹⁸⁰

In their communications at the time of the periodic review of these four countries, these NGOs denounced violations of the local populations' right to food, to potable water, to adequate housing and to health resulting from the development of the natural wealth and resources, most often by foreign companies, as well as the use by these governments of only a tiny portion of the income derived from this development to realize the economic, social and cultural rights of their population.

However, it should be emphasized that, as the governments are both the accused and the judge in this procedure, they can totally ignore the communications from the NGOs. Moreover, the country under consideration can even reject the recommendations adopted by its peers.¹⁸¹

¹⁷⁷ CODDH, CECIDE, Global Rights, *Dégradation de la situation des droits de l'homme en Guinée*. Joint report to the Universal Periodic Review, May 2008: www.globalrights.org/site/DocServer/Guinea_UPR_report__Nov_2009.pdf?docID=10703 (French only)

¹⁷⁸ Center for Economic and Social Rights, *Center for Economic and Social Rights individual submission to the Office of the High Commissioner for Human Rights on the occasion of the sixth session of the Universal Periodic Review December 2009. Equatorial Guinea. A selective submission on compliance with economic, social and cultural rights obligations*, www.cesr.org/downloads/CESR-individual%20submission-Equatorial%20Guinea-December%202009.pdf

¹⁷⁹ Rencontre pour la Paix et les Droits de l'Homme, Commission Justice et Paix, Global Rights, *Exploitation du Pétrole et Les Droits Humains au Congo-Brazzaville*. Joint report to the Universal Periodic Review, November 2008: www.globalrights.org/site/DocServer/Rapport_DH_en_Rep_Congo_Final1.pdf?docID=10903

¹⁸⁰ V. note 88.

¹⁸¹ V. note 174.

I. PERTINENT TEXTS

The right of peoples to self-determination and to sovereignty over their natural wealth and resources has been enshrined in a significant number of international and regional instruments.

A. At the International level

The right to self-determination has a central place in the *Charter of the United Nations* and in the two 1966 international covenants on human rights. Many UN declarations and resolutions are also essentially devoted to this right.

The *Charter* begins “We the peoples of the United Nations” and states in its first article, that, among the purposes of the UN, is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.

In Article 55, the *Charter* recalls the same purpose, stating that the UN should promote economic and social development, international cooperation and universal respect for human rights:

“with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.

The *Declaration on the Granting of Independence to Colonial Countries and Peoples*⁵ constitutes the first significant contribution of the United Nations to the definition of the right to self-determination.⁶ It was adopted because the member states were persuaded:

*“that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith”.*⁷

In this declaration, the member states recognized that “all peoples have the right to self-determination” and solemnly proclaimed:

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.”

This declaration served as a legal and political base for the national liberation movements at the origin of the wave of decolonization that began in the 1960s.

⁵ General Assembly resolution 1514 (XV), 14 December 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples*: www.un.org/documents/ga/res/15/ares15.htm

⁶ Daniel Thürer and Thomas Burri, *Self-Determination*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2010, §9.

⁷ Preamble to the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, v. note 5.

With the adoption of the two human rights covenants (discussed below) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, this right was extended to all peoples, colonized or not.

The two covenants adopted in 1966 – the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* – enshrine in the same terms the right of peoples to self-determination. According to Common Article 1:

“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.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.”

It should be emphasized that the states parties to these two covenants⁸ commit themselves to implementing the rights specified therein for every person under their jurisdiction without distinction or discrimination (based, in particular, on sex, language, religion, political opinion, ethnic origin or social status).

The *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* was adopted by consensus by the United Nations General Assembly in 1970. In this document is enshrined the right of all peoples “freely to determine, without external interference, their political status and to pursue their economic, social and cultural development”.⁹

In the same text, the United Nations established the principle that “subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter”. It further proclaimed that:

“States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention”.

⁸ To date, each has been ratified, respectively, by 160 and 166 states parties.

⁹ General Assembly resolution 2625 (XXV), 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*: www.un.org/documents/ga/res/25/ares25.htm

2008, S. James Anaya, professor of international and human rights law at the University of Arizona (United States) was named to succeed him.¹⁷³

To improve the protection and the promotion of the rights of indigenous peoples, Rodolfo Stavenhagen and S. James Anaya have the same tools at their disposal as the Special Rapporteur on the Right to Food: thematic reports, missions to the field, and communications with governments concerning specific violations. For example, in a thematic report submitted to the Commission on Human Rights in 2003, Rodolfo Stavenhagen denounced innumerable cases of violations of the rights of indigenous peoples arising from large scale development of natural resources including mining operations.¹⁷⁴ And in his many mission reports since 2001, the Special Rapporteur has denounced innumerable violations of the right of indigenous peoples to sovereignty over their own resources, including in Guatemala, the Philippines, Mexico, Chili, Colombia, Canada, South Africa, New Zealand, Ecuador and Kenya.¹⁷⁵ A large number of communications from the Special Rapporteur with the governments concern violations of the rights of indigenous peoples to sovereignty over their own resources, especially land.

7. The Human Rights Council's Universal Periodic Review

The Universal Periodic Review is a new mechanism under the purview of the Human Rights Council established by the Council in June 2006.¹⁷⁶ This procedure requires that all United Nations member states be evaluated every four years by their peers, concerning the respect, the protection and the realization of all human rights within the territory under their jurisdiction. The review is conducted on the basis of a report submitted by the government concerned (maximum 20 pages), a report compiled by the Office of the High Commissioner for Human Rights on the basis of information provided by United Nations bodies (10 pages) and a report based on contributions from civil society and also compiled by the Office of the High Commissioner for Human Rights.

Since its first session, in April 2008, the Universal Periodic Review has been used by many NGOs to denounce violations of the obligations relative to the right to self-determination and to freely dispose of natural wealth and resources. Global Rights, the Center of Economic and Social Rights, FIAN International and their

Challenges Rights and Democracy, Document N°118, Copenhagen, 2007:

www.dd-rd.ca/site/publications/index.php?id=2179&page=8&subsection=catalogue

¹⁷³ Information on this mandate at: www2.ohchr.org/english/issues/indigenous/rapporteur

¹⁷⁴ Commission on Human Rights, Human rights and indigenous issues, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, E/CN.4/2003/90, 21 April 2003:

[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2003.90.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.90.En?Opendocument)

¹⁷⁵ The reports of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People are available at: www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm

¹⁷⁶ V. *The Human Rights Council and its Mechanisms*, Critical Report N°1, Geneva: CETIM, 2008: www.cetim.ch/en/publications_cahiers.php#Council

Since the establishment of the mandate in 2000, the Special Rapporteur on the Right to Food has used all the means at his disposal to denounce the violations of the right to food connected to a poor use of natural wealth and resources. In his thematic reports, the Special Rapporteur has several times denounced violations of the rights of indigenous peoples to sovereignty over their own resources, emphasizing the importance of land,¹⁶⁸ and in March 2010, Olivier de Schutter submitted his minimal principles for the wide-scale acquisition and leasing of land to the Human Rights Council¹⁶⁹ as an incentive to the stake holders involved in the land grab to respect the local populations' basic rights (v. Chapter V.G.3).

In their many country visits, both Jean Ziegler and Olivier de Schutter have denounced several times the violations of the local populations' rights arising from the exploitation of natural wealth and resources or poor income management, including in Guatemala, in Bolivia before the arrival of Evo Morales, in India and in Brazil.¹⁷⁰ And the most of the communications of the Special Rapporteur on the Right to Food with governments have dealt with forced evictions or displacements of peasant or indigenous communities to make way corporations to operate mines, produce petroleum and gas and exploit land and forest resources.¹⁷¹

The post of the United Nations Special Rapporteur on the Right to Food is an important mechanism for NGOs and social movements for it is easily accessible (even by e-mail or by post; v. Annex), and it depends to a large extent on the co-operation of the stake holders of civil society to carry out the mandate.

6. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People

The mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People was established by the Commission on Human Rights in 2001. Its first mandate holder, Dr Rodolfo Stavenhagen (Mexico) exercised his mandate until April 2008, after having had it renewed by the Commission in 2004 then by the Human Rights Council in 2007.¹⁷² In May

¹⁶⁸ General Assembly, *Report of the Special Rapporteur of the Commission on Human Rights on the right to food*, Jean Ziegler, A/60/350, 12 September 2005, §§ 17-34: www2.ohchr.org/english/issues/food/annual.htm

Olivier de Schutter submitted a report to the General Assembly, which contains a major section on indigenous peoples' right to land; v. previous link and also: www.srfood.org

¹⁶⁹ Human Rights Council, *Report of the Special Rapporteur on the right to food*, Olivier de Schutter, *Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, A/HRC/13/33/Add.2, 28 December 2009: www.oecd.org/dataoecd/16/19/45285639.pdf

¹⁷⁰ The mission reports of Jean Ziegler to Brazil in 2002, to India in 2005, to Guatemala in 2005 and to Bolivia in 2007 and those of Olivier de Schutter to Guatemala and to Brazil in 2009 are available on their websites mentioned above (notes 165 and 166) as well as on the website of the Office of the High Commissioner for Human Rights: www2.ohchr.org/english/issues/food/visits.htm

¹⁷¹ V. for example Human Rights Council, *Report of the Special Rapporteur on the Right to Food*, Jean Ziegler, *Addendum. Communications sent to Governments and other actors and replies received*, A/HRC/4/30/Add.1, 18 May 2007: www2.ohchr.org/english/issues/food/annual.htm

¹⁷² An evaluation of Dr Stavenhagen's mandate was conducted in collaboration with him, published by Rights and Democracy, *The UN Special Rapporteur Indigenous Peoples Rights - Experiences and*

By virtue of this declaration, governments have the duty to promote the right to self-determination of peoples. While this point is very important, it can perhaps be interpreted differently by different stake-holders, as noted in the introduction.

Adopted one year earlier, the *Declaration on Social Progress and Development*,¹⁰ considered "permanent sovereignty of each nation over its natural wealth and resources" to be among the most important conditions in this area (Art. 3).

The *Declaration on the Right to Development*¹¹ established clear links with the right to self-determination of peoples and their right to freely dispose of their wealth and resources. Articles 1 and 5 are the most explicit.

Article 1 states: "1. *The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.* 2. *The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*"

Article 5 states: "*States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.*"

The *Declaration on the Right to Development* also insists on the right and the duty of each country to:

"formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom." (Article 2 § 3)

As we have pointed out in a publication on the right to development:

*"For the effective realization of the right to development, the two following principles must be scrupulously observed: the right of people to decide their own development policies and the participation of the people in all phases of decision-making concerning all aspects of development policies".*¹²

¹⁰ General Assembly resolution 2542 (XXIV), 11 December 1969, *Declaration on Social Progress and Development*: www.un.org/documents/ga/res/24/ares24.htm.

¹¹ General Assembly resolution A/RES/41/128, 4 December 1986, *Declaration on the Right to Development*: www.un.org/documents/ga/res/41/a41r128.htm

¹² *The Right to Development*, Geneva: CETIM, 2007: www.cetim.ch/en/documents/bro6-develop-A4-an.pdf, p. 22. V. also Tamara Kumanayakam, with contributions by A. Zacharie, W. Bello and R. Herrera, *Quel développement? Quelle coopération internationale?* Geneva: CETIM, 2007.

It should also be noted that the *Vienna Declaration and Program of Action*¹³ states:

“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.

“Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

“In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.” (Chapter I, Article 2)

It should be emphasized the these two last paragraphs, which contradict each other at least to some extent, amply demonstrate the complexity of the question as well as showing that, again, the subject appertains more to politics and power plays than to rights.

In closing this first section, we can conclude that the right to self-determination has been enshrined as a basic human right in international law, as asserted by the United Nations expert Aureliu Cristescu:

“Recognition of the right of peoples to self-determination as one of the fundamental human rights, is bound up with recognition of the human dignity of peoples, for there is a connection between the principle of equal rights and self-determination of peoples, on the one hand, and respect for fundamental human rights and justice on the other. The principle of self-determination is the natural corollary of the principle of individual freedom, and the subjection of peoples to alien domination constitutes a denial of fundamental human rights.”¹⁴

¹³ Adopted in Vienna at the end of the second World Conference on Human Rights, June 1993: [www.unhcr.ch/huridocda/huridocda.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridocda.nsf/(symbol)/a.conf.157.23.en)

¹⁴ *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, 1981, § 221, study prepared by Aureliu Cristescu, special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: http://shr.aaas.org/article15/Reference_Materials/E_CN.4_Sub.2_404_Rev.1_Eng.pdf

Convention, the Committee can also receive individual and collective communications concerning violations of the rights covered by the *Convention*.

In its *General Observation N°23*, the Committee pointed out that Article 5 of the convention implies the obligation of states parties to fight against discrimination – *de jure* and *de facto* – in access to productive resources, especially to land, of vulnerable persons and groups and particularly indigenous peoples.¹⁶² It rendered a similar interpretation in several concluding observations addressed to governments of states parties.¹⁶³ Up until now, the Committee has handed down decisions on some forty cases concerning which it has received complaints for violations of the rights covered by the *Convention*, but none of these cases has dealt with the right of indigenous people to their natural resources. The potential represented by the possibility of filing a complaint before this committee is considerable, but, for the time being, it remains underused.¹⁶⁴

5. The Special Rapporteur on the Right to Food

The mandate of the United Nations Special Rapporteur on the Right to Food was established by the Commission on Human Rights in 2000. Jean Ziegler, sociology professor at the University of Geneva (Switzerland) was named to this position in September 2000. His mandate was renewed for three more years in 2003, then again by the Human Rights Council in 2006.¹⁶⁵ In May 2008, Olivier de Schutter, international law at the Catholic University of Louvain (Belgium) succeeded him.¹⁶⁶

To promote the right to food, the Special Rapporteur has three possibilities at his disposal: 1. the submission of thematic reports to the Human Rights Council and to the General Assembly; 2. conducting missions in the field in order to monitor the respect of the right to food in the countries visited; 3. the sending of communications to governments concerning specific violations of the right to food, very often on the basis of information received by the NGOs or social movements.¹⁶⁷

¹⁶² Committee for the Elimination of Racial Discrimination (CERD), *General Recommendation N° 23: Indigenous Peoples* 18 August 1997: www2.ohchr.org/english/bodies/cerd/comments.htm

¹⁶³ For example, to protect access to resources of the indigenous peoples of Venezuela, the Dalits and the tribal populations of India and the Dalits of Nepal. CERD, *Concluding Observations, Venezuela*, CERD/C/VEN/CO/18, 1 November 2005, § 17: www2.ohchr.org/english/bodies/cerd/cerds67.htm; *Concluding Observations, India*, CERD/C/IND/CO/19, 5 May 2007, § 24: www2.ohchr.org/english/bodies/cerd/cerds70.htm; *Concluding Observations, Nepal*, CERD/C/64/CO/5, 28 April 2004, § 12: www2.ohchr.org/english/bodies/cerd/cerds64.htm

¹⁶⁴ For an explanation of this situation, v. Theo Van Boven, “CERD and Article 14 ; The Unfulfilled Promise” in Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds), *International Human Rights Monitoring Mechanisms. Essays in honour of Jakob Th. Möller*, The Hague: Martinus Nijhoff Publishers, 2001, pp. 153-166.

¹⁶⁵ Jean Ziegler set up a website to make available his reports to the United Nations on the various activities of the Special Rapporteur: www.righttofood.org

¹⁶⁶ Olivier de Schutter set up a website to make available his reports to the United Nations on the various activities of the Special Rapporteur: www.srfood.org

¹⁶⁷ All practical information for submitting information to the Special Rapporteur is available at: www2.ohchr.org/english/issues/food/complaints.htm

Social and Cultural Rights concerning a violation of the right to self-determination and to sovereignty over natural wealth and resources.

The Committee has protected the wealth and natural resources of local communities and indigenous peoples in several of its concluding observations addressed to states parties. In its concluding observations to *Guatemala*, in 2003, it criticized the discrimination suffered by the indigenous peoples in their access to land and the absence of any implementation of any agrarian reform to remedy this, as well as the low tax rate that prevented the government from realizing the economic, social and cultural rights of the population.¹⁶⁰ In its concluding observations addressed to the government of *Madagascar*, in 2009, it criticized a new law allowing foreign companies to acquire immense expanses of land in contempt of the right of the local peasant communities to sovereignty over their natural resources, enshrined in the *Covenant*:

“The Committee is concerned that Law No. 2007-036 of 14 January 2008, relating to investment law which allows land acquisition by foreign investors, including for agricultural purposes, has an adverse impact on the access of peasants and people living in rural areas to cultivable lands, as well as to their natural resources. The Committee is also concerned that such land acquisition leads to a negative impact on the realization by the Malagasy population of the right to food. (art. 1) *The Committee recommends that the State party revise Law No. 2007-037 and facilitate the acquisition of land by peasants and persons living in rural areas, as well as their access to natural resources. It also recommends that the State party carry out a national debate on investment in agriculture and seek, prior to any contracts with foreign companies, the free and informed consent of the persons concerned.*”¹⁶¹

4. The Committee for the Elimination of Racial Discrimination

This committee has as its mandate to monitor compliance with the Convention on the Elimination of All Forms of Racial Discrimination, which protects, in particular, the right of every person to equality before the law, without distinction of race, color, national or ethnic origin, especially in the enjoyment of economic, social and cultural rights (Article 5.e) and the right of every person to property, individually and collectively (Article 5.d.v). The Committee examines periodic reports of the states parties and communicates to them its preoccupations and recommendations in the form of concluding observations. Under Article 14 of the

¹⁵⁹ V. The Case for a Protocol to the ICESCR, Geneva: CETIM, February, 2006: www.cetim.ch/en/publications_pidesc-bro3.php and *The Optional Protocol to the ICESCR*, Critical Report N° 2, Geneva: CETIM, 2008: www.cetim.ch/en/publications_cahiers.php#protocol

¹⁶⁰ CESCR, *Concluding Observations, Guatemala*, E/C.12/1/Add.93, 12 December 2003: www2.ohchr.org/english/bodies/cescr/cescrs31.htm#31st

¹⁶¹ CESCR, *Concluding Observations Madagascar* E/C.12/MDG/CO/2, 16 December 2009, § 12: www2.ohchr.org/english/bodies/cescr/docs/co/E-C12-MDG-CO-2.doc

B. At the Regional Level

There are many regional human rights protection treaties – among which the *European Human Rights Convention* – but only three protect, directly or indirectly, the right of peoples to self-determination and the right to freely dispose of their natural wealth and resources: 1. the *African Charter of Human and Peoples’ Rights*; 2. the *Helsinki Final Act*; and 3. the *American Human Rights Convention*.

1. The African Charter of Human and Peoples’ Rights

The *African Charter of Human and Peoples’ Rights* was adopted in 1981 and has been ratified by the 53 member states of the African Union. It is the treaty that recognizes most explicitly and most completely the right of peoples to self-determination and to freely dispose of their natural wealth and resources. No less than five articles are devoted to this.

In Article 19, the *African Charter* proclaims: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights”, adding: “Nothing shall justify the domination of a people by another.”

Article 20 enshrines the right of the peoples of Africa to self-determination in the following manner:

“All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”

Article 21 recognizes in detail the right of the peoples of Africa to freely dispose of the natural wealth and resources, providing as follows:

“1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

In Article 22, the *African Charter* enshrines the right of the African peoples to economic, social and cultural development and to the equal enjoyment of the common heritage of humankind; in Article 23 their right to peace and to security is enshrined; and in Article 24 it is their right to a general satisfactory environment favorable to their development.

2. The Helsinki Final Act

Adopted on 1 August 1975, the *Helsinki Final Act* constitutes the founding text of the Organization for the Security and Cooperation in Europe (OSCE), which made possible a rapprochement between the countries of eastern and western Europe. Although its ten chapters deal essentially with relations between the states parties (and the territorial sovereignty and integrity of these states in particular),¹⁵ Chapter VIII deals with the right of self-determination, and it does this in a very progressive way. By virtue of this chapter (*Equal rights and self-determination of peoples*):

“The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”

“The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.” [emphasis added]

¹⁵ I. Sovereign equality, respect for the rights inherent in sovereignty; II. Refraining from the threat or use of force; III. Inviolability of frontiers; IV. Territorial integrity of States; V. Peaceful settlement of disputes; VI. Non-intervention in internal affairs; VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; VIII. Equal rights and self-determination of peoples; IX. Cooperation among States; X. Fulfillment in good faith of obligations under international law.

the NGOs and social movements can submit parallel “shadow” reports and invoke all the rights enshrined in the *Covenant* including the right to self-determination and to sovereignty over natural wealth and resources.

Under Article 41 of the *Covenant*, the Committee may also examine intergovernmental communications and, under the optional protocol, communications emanating from individuals or groups. For example, the Committee can be addressed in case of violation of the rights of minorities to their own culture (Article 27). Up until now, in the context of the communication procedure, the Human Rights Committee has been very reluctant to deal with the right to self-determination enshrined in Article 1 of the *Covenant*. However, that could change if the Committee were asked to do so more often.

In its *General Comment N°23*, the Committee pointed out that the rights protected in the *Covenant’s* Article 27 include the rights of minorities and indigenous peoples to the protection of their traditional activities, such as hunting and fishing, and that governments should take measures to guarantee the effective participation of members of these communities in the making of decisions that affect them.¹⁵⁷ The Committee has since confirmed this interpretation in several cases in which indigenous peoples invoked the right of minorities to their own culture in order to protect their right to their own resources, affirming that this right includes their right to maintain their way of life, their economic activities and their means of subsistence. In *Länsman et al. v. Finland*, for example, the Committee concluded that mining activities, if undertaken without consulting the indigenous peoples and if they destroyed their way of life or their means of subsistence, constitute a violation of the rights enshrined in Article 27 of the *Covenant*.¹⁵⁸

3. The Committee on Economic, Social and Cultural Rights

This Committee is entrusted with monitoring compliance with the *International Covenant on Economic, Social and Cultural Rights*. Like the Human Rights Committee, the Committee on Economic, Social and Cultural Rights examines the periodic reports of the states parties and communicates to them its preoccupations and recommendations in the form of concluding observations. Within this framework, and as with the Human Rights Committee, the NGOs and social movements may submit parallel “shadow” reports invoking all the right enshrined in the *Covenant* including the right to self-determination and to sovereignty over natural wealth and resources.

Under the *Covenant’s* optional protocol, adopted on 10 December 2008 and which will enter into force when at least 10 countries have ratified it, the Committee will be able to receive individual and collective communications concerning violations of the rights enshrined in the *Covenant* including the right to self-determination and to sovereignty over natural wealth and resources.¹⁵⁹ In the near future, it will thus be possible to file a complaint with Committee on Economic,

¹⁵⁷ Human Rights Committee, *General Comment N° 23: The rights of minorities (Art. 27)*, 4 April 1994, CCPR/C/21/Rev.1/Add.5, § 7.

¹⁵⁸ Human Rights Committee, *Länsman et al. v. Finland*, 1994, § 9.5.

1. The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial body of the United Nations. All United Nations member states are automatically states parties to its *Statute* (which is annexed to the *Charter of the United Nations*), but the ICJ does not have compulsory jurisdiction. In other words, it can judge only those countries that accept its jurisdiction.¹⁵⁴ The ICJ has two functions: contentious cases and advisory proceedings. Regarding the first, only a country/government can file a complaint with the ICJ. Individuals and peoples can thus have access to the ICJ only through a government initiated action.

Article 38 of the *Statute of the ICJ* provides the sources of international law that the ICJ must enforce. Among these sources are the treaties ratified by governments. Potentially, all the treaties that enshrine the right to self-determination and to sovereignty over natural wealth and resources and to which states in litigation are parties – in so far as these states have accepted the jurisdiction of the ICJ – can thus be invoked before the ICJ.

In its advisory function, the ICJ can be requested by a government to provide an opinion on any legal question. It can as well as be asked by United Nations bodies or specialized institutions for an opinion on any matter entering into the area of their activities.¹⁵⁵

In the examples of Western Sahara, Namibia and Kosovo, the International Court of Justice several times ruled on the rights of peoples – colonized or not – to self-determination. It also dealt with the attacks on *Nicaragua*'s national sovereignty. In its 27 June 1986 ruling on *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Judgment of 27 June 1986)*, the ICJ ruled, inter alia, “the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State; ...not to use force against another State; ...not to violate the sovereignty of another State.”¹⁵⁶

2. The Human Rights Committee

The Human Rights Committee is entrusted with monitoring compliance with the *International Covenant on Civil and Political Rights*. All states parties are obliged to submit periodic reports to the Committee about their implementation of the rights enshrined in the *Covenant*, including the right to self-determination and to sovereignty over natural wealth and resources. The Committee examines each government's report and communicates to the government its preoccupations and recommendations in the form of concluding observations. Within this framework,

¹⁵⁴ Articles 36, 37, of the *Statute of the ICJ*.

¹⁵⁵ Article 96 of the *Charter of the United Nations* and Articles 65-58 of the *Statute of the ICJ*.

¹⁵⁶ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Judgment of 27 June 1986)*, §§ 292.3, 292.4, 292.5.

3. The American Human Rights Convention

While the American Human Rights Convention does not explicitly recognize the right to self-determination, it does enshrine several rights that can be used to protect the right of peoples to their natural wealth and resources. Among these rights, the most important ones are the right to life (Article 4), the right to the recognition of dignity (Article 11) and the right to private property, whose enjoyment can be subjected by law to social interest (Article 21).

On the other hand, the charter of the Organization of American States affirms in Article 3 that:

“b. *International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law; (...)*

e. *Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems.*”

to recognize their right to their ancestral lands.¹⁵¹ In its conclusions, the Inter-American Court called for significant reparations for the community and its individual members. While recognizing that the members of the indigenous community were individually victims, the Court ruled that the compensation for the benefit of the community should be put at the disposal of its leaders in their capacity of community representatives. To remedy the violations, it determined that the government should take the necessary legislative and administrative measures to guarantee that the members of the community enjoy use of, formally and physically, their ancestral lands within three years. It also judged that the government should set up a development fund for the community in the amount of US\$ 1 million in order to implement projects such as agricultural development, sanitation, access to potable water, education and adequate housing.¹⁵²

C. At the International Level

At present, there is only one judicial control mechanism at the international level to protect the right to self-determination and to sovereignty over natural wealth and resources: the International Court of Justice. The other mechanisms are quasi-judicial or extra-judicial. They are: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee for the Elimination of Racial Discrimination; the Special Rapporteur on the Right to Food; the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People; the Human Rights Council's Universal Periodic Review. The oversight bodies of the International Labor Organization, entrusted with monitoring compliance with the ILO conventions, which include *Convention N° 169* regarding indigenous and tribal peoples, can be resorted to in order to protect the right to self-determination of indigenous peoples. As the mandate and the work of these oversight bodies have been described in detail in a recent CETIM publication, they will not be discussed here.¹⁵³

The great weakness of the United Nations bodies is that they have no means of enforcing their decisions on the member states violating human rights. The only arm that social movements, NGOs and citizens have is campaigning at the national and international levels and using the pressure on governments they thus generate to push the governments to respect their human rights commitments. This constitutes a substantial difference from the Disputes Settlement Board of the World Trade Organization, which has the power to impose economic sanctions on a country judged "guilty" regarding the rules of international trade. This illustrates how much the fight against impunity for violations of human rights is difficult and illustrates how governments may be inclined to favor trade rules to the detriment of human rights whereas human rights take precedence over all trade rules!

¹⁵¹ Ibid., § 164.

¹⁵² Ibid., §§ 204-230.

¹⁵³ V. *The Right to Work*, Geneva: CETIM, 2008: www.cetim.ch/en/publications_droittravail.php

4. The Inter-American Court of Human Rights

The jurisprudence of the Inter-American Court of Human Rights, to which the Inter-American Commission can appeal if it cannot manage to settle a case of violations of one of the rights enshrined in the *American Convention on Human Rights*, has also handled several cases in which the Court interpreted indigenous peoples' rights to life and to property so as to force the government to recognize them, mark off their lands, and protect their right to collectively own land, especially so that they could have access to the own means of subsistence.¹⁴⁴ Two cases are particularly significant: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Sawhoyamaya v. Paraguay*.¹⁴⁵

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court protected the access of more than 100 families of the indigenous community Awas Tingni to their ancestral lands, which was threatened by a concession granted by the government to a Korean company. The Court judged that the government had violated its obligation to abstain from action, direct (by its agents) or indirect (accepting or tolerating others' activities), which negatively affected the existence, the value, the use or the enjoyment of the lands on which the members of community lived and carried on their activities.¹⁴⁶ To remedy the situation, the Court judged that, as reparation for immaterial injury, the government of Nicaragua should invest the sum of US\$ 50,000 for work or service of collective interest for the benefit of the community, in agreement with the community and under the supervision of the Inter-American Commission on Human Rights.¹⁴⁷ It also ruled that the government must take appropriate measures to delimit, mark off and recognize the property of the communities, with their full participation and in accord with their values and customary law.¹⁴⁸

In *Sawhoyamaya v. Paraguay*, the Inter-American Court protected the right to property and the right to life of the members of the Sawhoyamaya indigenous community.¹⁴⁹ The members of the community were living in deplorable conditions because they had lost access to their traditional means of subsistence, in particular their lands, and 31 members had died between 1991 and 2003 of illnesses due to their living conditions.¹⁵⁰ In its 20 March 2009 ruling, the Court recalled the progressive interpretation of the right to life that it had already handed down in a previous ruling. It then pointed out that the primary measure that the government should have taken to protect the right to life of the members of the community was

¹⁴⁴ Regarding these cases, v. Christoph Golay, *The Right to Food and Access to Justice: Examples at the national, regional and international levels*, FAO, 2009; www.fao.org/righttofood/publi09/justiciability_en.pdf

¹⁴⁵ V. also Inter-American Court of Human Rights, *Comunidad Indígena Yakye Axa vs. Paraguay*, 2005.

¹⁴⁶ Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, §§ 153, 164, 173.4.

¹⁴⁷ *Ibid.*, §§ 167, 173.6.

¹⁴⁸ *Ibid.*, §§ 138, 164, 173.3.

¹⁴⁹ Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, 2006.

¹⁵⁰ *Ibid.*, §§ 3, 145.

II. DEFINITION AND CONTENT OF THE RIGHT TO SELF-DETERMINATION

A) Constitutive Elements of the Right to Self-Determination

When one analyzes the main United Nations texts (charter, conventions, General Assembly declarations and resolutions), one notices that the right of peoples to self-determination depends in particular on the following elements:

- the free choice of political status and of economic, social and cultural development;
- peoples' sovereignty over their natural resources;
- equality of peoples;
- non-discrimination;
- sovereign equality of states;
- peaceful settlement of disputes;
- good faith in the accomplishment of obligations and in international relations;
- the non-use of force;
- international cooperation and the respect by states of their international commitments, in particular regarding human rights.

Each of the above-mentioned elements deserves a publication in its own right; unfortunately, we can not treat them all here. Since political independence is dependent on economic sovereignty, within the framework of this brochure, we shall concentrate on the economic aspect of the right to self-determination and, in particular, on the sovereign control by peoples over their natural resources (see below).

B. Beneficiaries of the Right to Self-Determination

People, State, Nation

The beneficiaries of the right to self-determination are the peoples. The state is the instrument of the exercise of this right, in the hands of the people(s) constituting it.

In the international instruments, the term nation is often used instead of state or people(s). In fact, in the *Charter of the United Nations*, the term "peoples" is used "particularly in its Preamble, as a synonym for 'nations' or 'State'".¹⁶

¹⁶ V. note 14, § 268.

The problem is that there is no definition of “people”¹⁷ recognized at the international level. This explains perhaps that the Committee for the Elimination of Racial Discrimination leaves the “individual concerned” the liberty of determining if he/she belongs to particular racial or ethnic group or groups.¹⁸

On the other hand, the UN expert Aureliu Cristescu, on the basis of discussions within the United Nations, suggests the following definition that could be taken into consideration to determine whether or not an entity constitutes a people fit to enjoy and exercise the right of self-determination:

“(a) *The term ‘people’ denotes a social entity possessing a clear identity and its own characteristics;*

(b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;

*(c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights”*¹⁹ (v. below).

By virtue of the **United Nations Declaration on the Rights of Indigenous Peoples**, adopted by the Human Rights Council in June 2006 and by the General Assembly in September 2007, indigenous peoples have the right to self-determination and rights over their land and resources (v. Chapter III). This is not the case for ethnic, religious and linguistic minorities whose right to enjoy their own culture, to profess and practice their own religion and to use their own language is enshrined in Article 27 of the *International Covenant on Civil and Political Rights*. The right of minorities should thus not be confused with the right to self-determination of peoples. Moreover, Article 8.4 of the **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**, adopted by the General Assembly on 18 December 1992, excludes any interpretation along these lines.²⁰

It should be further noted that there is some confusion in this area, given that there is no definition of minorities recognized at the international level. In this regard, practices vary according to the country. Some countries deny the very status of minority to entities that constitute peoples within their country. Yet, as the Human Rights Committee has affirmed, these countries, claiming “that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities”.²¹

¹⁷ Here, we use the term “people” as it is used by the United Nations bodies.

¹⁸ Committee for the Elimination of Racial Discrimination, *General Recommendation VIII concerning the implementation of §§ 1 and 4 of the first article of the International Convention on the Elimination of All Forms of Racial Discrimination*, adopted in 1990.

¹⁹ V. note 14 § 279.

²⁰ “Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States”: www2.ohchr.org/english/law/minorities.htm

²¹ *General Comment N° 23, The rights of minorities (Article 27)*, Fiftieth session, 1994:

[www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument)

In the *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay* case, the Inter-American Commission, for the first time, facilitated an out-of-court agreement so that the indigenous peoples might recover their ancestral lands.¹³⁸ The Lamenxay and Riachito are part of the Enxet people, numbering some 16,000 persons in the Chaco region of Paraguay. Some 6,000 of them were living from fishing, hunting, gathering, agriculture and livestock raising when their ancestral lands were sold by the government to foreigners over a long period starting in 1885. By 1950, their lands had been completely occupied. The members of these two communities tried to recover them but without success, in spite of the adoption of a new constitution in 1992 that recognized the rights of the indigenous communities to their lands.¹³⁹ Paraguay had ratified the *American Convention on Human Rights* in 1989 and the complaint was filed in December 1996, alleging the violation of several rights, among which the right to property, and the parties reached an out-of-court settlement in March 1998. According to the agreement, the government committed itself to buying back the land and redistributing it free to the indigenous communities.¹⁴⁰ As of July 1999, when the Inter-American Commission undertook a field mission to Paraguay, the land had been bought back by the government, but the land titles had not yet been transferred to the communities, which was finally done by the president on the occasion of the Commission’s visit.¹⁴¹

In a case recently brought before the Inter-American Commission on Human Rights, indigenous communities living in the department of San Marcos in Guatemala, who had been fighting for years against the operations of a silver and gold mine – the Marlin mine – by the Canadian company Goldcorp et its subsidiary Montana, secured an initial success. After having exhausted all domestic avenues of redress without success, and after having filed a complaint in 2009 against Goldcorp in Canada, the indigenous peoples went to the Inter-American Commission. On 20 May 2010, the Commission issued precautionary measures to put a stop to the violations. The Commission requested the Guatemalan government to suspend the activities at the Marlin mine, until a final ruling by the commission, and it requested it to take emergency measures to decontaminate the polluted water, to assure access to potable water for the communities and to assure medical care for those members of the communities who had been contaminated by the operation of the mine.¹⁴² On 23 June 2010, the Guatemalan government announced that it intended to abide by the recommendations of the Inter-American Commission.¹⁴³

¹³⁸ For a similar case, in which the government of Chili also committed itself to incorporating the rights of indigenous peoples into the constitution and to no longer undertaking large-scale projects on indigenous peoples’ lands, v. Inter-American Commission, *Mercedes Julia Huenteao Beroiza y otros*, 2004.

¹³⁹ Inter-American Commission, *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*, 1999, §§ 3 and 5.

¹⁴⁰ *Ibid.*, §§ 13-15.

¹⁴¹ *Ibid.*, § 21.

¹⁴² V. www.cidh.org/medidas/2010.eng.htm

¹⁴³ V. www.miningwatch.ca

3. The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights is entrusted with overseeing compliance by its states parties with the *American Convention on Human Rights*. The states parties are required to submit reports to the Commission on the measures that they have taken to realize the human rights enshrined in the *Convention*. In case of a violation of any of these rights – after exhausting all domestic avenues of redress – the victim(s) file a complaint with the Commission, either individually or collectively. As we have seen in Chapter I.B., the right to self-determination and to freely dispose of natural wealth and resources is not explicitly recognized in the *American Convention on Human Rights*, but several of the rights enshrined therein, such as the right to life and the right to property, are used by the indigenous peoples to protect their right to the natural resources.¹³¹

Two cases brought before the Inter-American Commission are particularly interesting:¹³² *Yanomani v. Brazil*¹³³ and *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*.¹³⁴

In the *Yanomani v. Brazil* case, in 1985, the Inter-American Commission, for the first time, sanctioned the violation of collective rights. The petition submitted in the name of the Yanomani sought to protect the rights of the members of the Yanomani community, composed of more than 10,000 persons living in the Amazon region, rights that had been violated by the construction of a highway and by mining extraction operations on the lands of the community. Thousands of indigenous had had to flee, and hundreds were dead or sick. A government agricultural development project was intended to allow access to food for displaced persons, but it was ineffective. The government had committed itself to marking off and protecting the community lands, but these measures were not implemented.¹³⁵ In its ruling, the Inter-American Commission concluded that Brazil had violated several rights enshrined on the continent, and it recommended that the government implement the planned measures to mark off the community's land as well as social assistance and medical programs.¹³⁶ In 1992, the community's territory was marked off, and in 1995, the Inter-American Commission carried out a field mission to monitor that it was properly respected and protected.¹³⁷

www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf

¹³¹ Concerning the use of the right to property to protect the economic and cultural rights of indigenous peoples, v. Christophe Golay and Ioana Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective*, Rights and Democracy, International Centre for Human Rights and Democratic Development: www.dd-rd.ca/site/_PDF/publications/humanright-en.pdf

¹³² Regarding these cases, v. Christoph Golay, *The Right to Food and Access to Justice: Examples at the national, regional and international levels*, FAO, 2009: www.fao.org/righttofood/publi09/justiciability_en.pdf

¹³³ Inter-American Commission, *Brazil, Case 7615, Resolution 12/85*, 5 March 1985.

¹³⁴ Inter-American Commission, *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*, 1999.

¹³⁵ V. note 133, §§ 2, 3.

¹³⁶ *Ibid.*, conclusion § 2.

¹³⁷ Inter-American Commission, *Report on the Situation of Human Rights in Brazil*, 29 September 1997, §§ 63-73.

Thus, according to the interpretation of some, minority rights may concern indigenous peoples (v. Chapter II.A.3) as well as migrant workers. The Human Rights Committee²² goes yet further in its interpretation of minority rights. In its opinion, “Article 27 confers rights on persons belonging to minorities which ‘exist’ in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents.”²³

C. Permanent Sovereignty over Natural Resources

Political independence cannot be dissociated from economic sovereignty. One can even affirm that without economic independence, political sovereignty is reduced to mere form. As Julius Nyerere, former president of Tanzania, declared, with eloquence in 1979:

“Each of our [G77 member countries’] economies has developed as a by-product and a subsidiary of development in the industrialized North, and is externally oriented. We are not the prime movers of our destiny. We are ashamed to admit it; but economically we are dependencies – at best semi-colonies – and not sovereign States.”²⁴

For example, one can mention that certain Latin American countries – Bolivia for instance, (v. Chapter IV.D) but also Ecuador and Venezuela – have recently nationalized their natural wealth and resources and/or renegotiated their contracts with foreign oil companies. The earnings thus obtained have mostly been invested in satisfying the economic, social and cultural rights of the populations of these countries (food, adequate housing, education, health etc.). In Europe, the government of the Russian Federation, in 2005, bought out the oil trust Yukos. Regardless of what one may think of this acquisition, the fact is that it has assured the state the monopoly over Gasprom (until then a semi-nationalized trust) and, consequently, over the country's energy resources.²⁵

Although this sort of action is rare in the “neo-liberal world”, it is not revolutionary. In fact, as early as 1952, the International Court of Justice had already recognized the legality of the nationalization of the Anglo-Iranian Oil Company by

²² Entrusted with overseeing implementation by states parties of the *International Covenant on Civil and Political Rights*.

²³ V. note 21, § 5.2.

²⁴ “Address by His Excellency Mwalima Julius Nyerere, President of the United Republic of Tanzania, to the Fourth Minister Meeting of the Group of 77”, Arusha, 12-16 February 1979 in Karl P. Sauvant, *The Group of 77: Evolution, Structure, Organization*, New York, London, Rome: Oceana Publications, Inc., 1981, p.133.

²⁵ V. inter alia:

www.lexpress.fr/actualite/monde/europe/les-dates-cle-de-l-affaire-ioukos_852976.html#xtor=AL-447
www.continentalnews.fr/actualite/economie,4/energie-le-gaz-l-arme-fatale-des-russes,7495.html

Iran. In its ruling of 22 July 1952, the Court rejected the arguments presented by the United Kingdom against nationalization.²⁶

More recently, in a decision adopted in May 2009, the African Commission of Human and Peoples' Rights attributed to the indigenous communities of Kenya (the Endorois people) the right enshrined in the *African Charter of Human and People's Rights* to dispose freely of their natural wealth and resources, ruling that they had the right to recover their traditional lands and territories whereas the Kenyan government wanted to use them to promote tourism.²⁷

The U.N. bodies, the General Assembly in particular but also UNCTAD and the Security Council have repeatedly reaffirmed this right.

1. The United Nations General Assembly

Since 1952, the United Nations General Assembly has adopted a series of texts (resolutions, declarations, charters, conventions etc.) dealing with the economic aspect of the right to self-determination.²⁸ Among these texts, the first common article of the human rights conventions cited above constitutes a particular reference. In fact, according to this article, peoples have not only the right to:

“freely pursue their economic, social and cultural development” but also to *“freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”* [emphasis added]

The *International Covenant on Economic, Social and Cultural Rights* in Article 25 further provides 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.”

The permanent sovereignty of peoples over their natural resources has been affirmed repeatedly in other United Nations instruments that complete the recognition of the right to self-determination by giving it a more substantive content. Among these instruments, the following are worth mentioning.²⁹

In its resolution on the subject of *permanent sovereignty over natural resources*:³⁰

²⁶ International Court of Justice, *Anglo-Iranian Oil Co.*, ruling of 22 July 1952:

www.icj-cij.org/docket/index.php?sum=82&code=uki&p1=3&p2=3&case=16&k=ba&p3=5

²⁷ African Commission on Human and Peoples' Rights, *Centre for Minority Right Development (Kenya) and Minority Rights Groups International in the name of the Endorois Welfare Council v. Kenya*, N° 276/2003, judgment of May 2009: <http://fr.allafrica.com/download/resource/main/main/00020047cab98db3ac25b55074e4b94db4939697.pdf>

²⁸ The first one adopted on this subject was General Assembly resolution 523 (VI), 12 January 1952, *Integrated Economic Development and Commercial Agreements*: www.un.org/documents/ga/res/6/ares6.htm

²⁹ V. also Chapter I.A.

³⁰ General Assembly resolution 1803 (XVII), 14 December 1962, *Permanent Sovereignty over Natural Resources*: www2.ohchr.org/english/law/resources.htm

harvests, creating a climate of insecurity that made it impossible for the villagers to go to their fields and tend their cattle. This, in turn, resulted in malnutrition and famine within some of the Ogoni communities.

In its ruling, the African Commission recalled that the obligation to respect, to protect and to implement the human rights of the local populations applied universally to all rights.¹²⁵ And it concluded that the Nigerian government had violated its obligation to protect the right to its natural resources of the Ogoni people from the activities of national and transnational oil companies.¹²⁶ To remedy the violations of which the Ogoni people were victims, the African Commission requested the Nigerian government to take concrete measures, including paying compensation and cleaning up the polluted or damaged lands and rivers.¹²⁷ It also requested that an adequate evaluation of the social and environmental impact of the oil production operations be carried out for any future oil development project, and it pointed out that the government should furnish information on the health and environment risks as well as giving effective access to regulatory and decision-making bodies for the communities likely to be affected by oil production operations.¹²⁸

This affair was followed closely by many NGOs, both national and international, and a major media campaign obliged Shell to leave the Ogoni region, which shows that regional control mechanisms can have an effect in concrete cases. But several years after this ruling, the living conditions of the Ogoni on their lands have still not improved in any significant way.¹²⁹

2. The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights is the most recently established mechanism for the protection of human rights at the regional level. It was set up by the 1998 adoption by the African countries of the protocol to the African Charter on Human and Peoples' Rights. This protocol entered into force in January 2004, and the African Court has recently become operational. For the time being, the African Court has received only a small number of complaints, none related to the right to self-determination and to the right to freely dispose of natural wealth and resources, but its role in the protection of this right on the African continent is potentially very significant. As we have seen, the right to self-determination and to freely dispose of natural wealth and resources is explicitly recognized in five articles of the African Charter of Human and Peoples' Rights. After having exhausted all domestic avenues of redress, the victims of violations of this right can thus recur to the African Court and request reparation and compensation. For that, the accused country must be a party to the protocol.¹³⁰

¹²⁵ African Commission on Human and Peoples' Rights, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, § 44.

¹²⁶ *Ibid.*, §§ 65-66.

¹²⁷ *Ibid.*, § 49.

¹²⁸ *Ibid.*, § 1 of the conclusion.

¹²⁹ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Minorities, 11th session, *Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities*, E/CN.4/Sub.2/AC.5/2005/WP.3, 22 April 2005: www2.ohchr.org/english/issues/minorities/group/11session.htm

¹³⁰ The list of states parties is to be found at:

Although the regional mechanisms are effective, they have institutional limits since, generally, the responsibilities of the TNCs and the governments involved in human rights violations are often well covered up.

1. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is entrusted with monitoring compliance with the African human rights treaties, among which are the *African Charter of Human and Peoples' Rights*. All states parties to the *African Charter* submit reports to the Commission on measures that they have taken to realize the rights enshrined in the *Charter* among which are the right to self-determination and to freely dispose of one's natural wealth and resources, recognized in Articles 19 to 24 (v. Chapter I.B).

The African Commission can also receive complaints from individuals or NGOs regarding violations of any of the rights protect by the *African Charter of Human and Peoples' Rights*, which includes the right to self-determination and to freely dispose of one's natural wealth and resources. In case of a violation of this right, the African Commission drafts a report and addresses its recommendations to the government in question.

The great weakness of this mechanism is that its recommendations are not binding for the states parties (whence the establishment of the African Court on Human and Peoples' Rights – v. below). But its great advantages are that the Commission is relatively easy of access by individuals and by NOGs; that its mandate includes the protection of all human rights; and that filing a complaint with it, according to the case, can put pressure on the government concerned to better respect human rights (v. inset).

Illustration n°2

The Ogoni Case (Nigeria)

Regarding the protection of the right of the African peoples to their natural resources, the most significant affair in the jurisprudence of the African Commission on Human and Peoples' Rights is the Ogoni case. This case grew out of the referral of a communication¹²⁴ by two NGOs in 1996 – a Nigerian NGO, The Social and Economic Rights Action Center (SERAC), and a United States NGO, The Center for Economic and Social Rights – regarding the protection of the Ogoni people's right to their natural resources from the activities of an oil consortium set up by the national oil company and the transnational company Shell. The Nigerian government was accused of having destroyed the resources of the Ogoni people by taking part in the development of the oil and in particular by poisoning the soil and the water on which the Ogoni depended for their agriculture and fishing. By having attacked the villages, the Nigerian security forces also stood accused of spreading terror and destroying the

national level are thus often non-existent or paralyzed when violations of these rights occur. In many cases, the victims can thus rapidly recur to control mechanisms at the regional level.

¹²⁴ The original communication is available at: <http://cesr.org/downloads/nigeriapetition.pdf>

“considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination”, the General Assembly declared, in particular:

“The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”

The **Declaration on the Establishment of a New International Economic Order**³¹ emphasizes, among other things that:

“the new international economic order should be founded on full respect for the following principles: (...) e. Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.”

The **Charter of Economic Rights and Duties of States**³² declares in its first article:

“Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”

2. UNCTAD

The *Principles of the United Nations Conference on Trade and Development* (UNCTAD) for managing international trade relations and trade policies likely to favor development stipulate, among other things:

“Every country has the sovereign right freely to dispose of its natural resources in the interest of the economic development and well-being of its own people; any external, political or economic measures or pressure brought to bear on the exercise of this right is a flagrant violation of the principles of self-determination of peoples and non-intervention, as set forth in the Charter of the United Nations and, if pursued, could constitute a threat to international peace and security.”³³

³¹ General Assembly resolution 3201 (S-VI), 1 May 1974, *Declaration on the Establishment of a New International Economic Order*, § 5: www.un-documents.net/s6r3201.htm

³² General Assembly resolution 3281 (XXIX), 12 December 1974, *Charter of Economic Rights and Duties of States*: www.un.org/documents/ga/res/29/ares29.htm

³³ V. UNCTAD Resolution 46 (III) § 1, II, 18 May 1972, Report of the 3d session, Annex point 5, Doc. NU TD/III/RES/46 (1972), 66. NU, 1737 (LIV), Doc. Off. CES NU.

3. *The Security Council*

For its part, in its Resolution 330 (1973) of 21 March dealing with peace and security in Latin America, the Security Council affirmed the principle of the permanent sovereignty of peoples over their wealth and natural resources. In the same resolution, it requested member states, among other things, “to impede the activities of those enterprises which deliberately attempt to coerce Latin American countries”.

to amend its legislation on marine resources in order to assure that their use would benefit local communities of traditional fishers and not the export industry. A law on marine resources (*Marine Living Resources Act*) had been passed in the province of Cape of Good Hope in 1998 that set up a system of quotas stipulating that the entirety of the resources that could be fished in one year was to be divided up according to a system of commercial fishing licenses. The needs of the traditional fishers had not at all been taken into account in the law, and the quota-granting process was complicated and expensive, excluding *de facto* traditional fishers. With the implementation of the law, whole communities of fishers no longer had access to the sea, and their nutritional situation seriously deteriorated.

In December 2004, supported by a development organization, several fishers filed a complaint with the High Court of the Province of Cape of Good Hope, invoking their right to access to the sea in order to realize their right to food. An advisory opinion was also sent to the court by the first United Nations Special Rapporteur on the Right to Food, Jean Ziegler. After several months of negotiations, there was an out-of-court settlement between the fishing communities and the Ministry of Environment and Tourism. According to the terms of this settlement, some 1,000 traditional fishers, who were able to demonstrate that they were historically dependent on marine resources to assure their subsistence, obtained a fishing license and the right to fish and sell the product of their catch.¹²¹ The court agreed to guarantee this agreement, authorizing the fishers to appeal to it if the agreement were not respected.¹²² It also rescinded the law and ordered the government to draft a new legislative and political framework, with the full participation of the traditional fishing communities, to their rights to marine resources be guaranteed.

Although successive South African governments have made considerable progress since the abolition of the apartheid regime, the economic and social situation of much of the population remains difficult (lack of access to land, to adequate housing, deplorable working conditions in the mines etc.).

B. At the Regional Level

At the regional level, there are two judicial control mechanisms – two courts – and two quasi-judicial control mechanisms – two commissions – that are available in case of violation of the right to self-determination and to freely dispose of natural wealth and resources: 1. the African Commission of Human and Peoples’ Rights; 2. the African Court on Human and Peoples’ Rights; 3. the Inter-American Human Rights Commission; and 4. the Inter-American Court of Human Rights. To recur to these instances at the regional level, one must have exhausted all domestic avenues of recourse, in other words one must have filed a complaint – without success – before the instances available at the national level.¹²³

¹²¹ *Ibid.*, §§ 1-7.

¹²² *Ibid.*, § 12.

¹²³ As we have seen, the countries where the right to self-determination and to freely dispose of natural wealth and resources can be invoked are small in number, and the control mechanisms at the

there are procedures allowing recourse to local or national courts – very often a supreme court or a constitutional court – in such cases.

The right to self-determination and to freely dispose of natural wealth and resources is rarely invoked directly in court at the national level. When it is, it is usually the right of indigenous peoples and to their natural wealth and resources that is invoked on the basis of ILO convention 169. This, for example, was the case in *Argentina*, where the indigenous peoples won their case for not having been consulted before the government gave out concessions on their territory to transnational corporations.¹¹⁵ In some countries, such as *Bolivia*, the rights of the indigenous peoples are also enshrined in the constitution. Thus, it is possible for these people to have access to the courts if their rights to their natural resources are violated.¹¹⁶

But in most countries, the governments that do not respect their obligations regarding the right to self-determination and to freely dispose of natural wealth and resources can be taken to law and found guilty only on the basis of other rights enshrined in the constitution. This is the case in India, where the basis is the right to life, and in South Africa, where it is economic, social and cultural rights.

Among the countries that enshrine the right to life in the constitution, *India* certainly offer the best example of the involvement of the judiciary in the protection of the local populations and their resources. To protect the right to life, interpreted as the right to live in dignity, the Indian Supreme Court has protected the rights of traditional fishermen to have access to the shrimp industry.¹¹⁷ It has also protected the right of the tribal populations to their natural resources against mining concessions granted by the government to private companies.¹¹⁸ All the same, in many other cases (inter alia the Bhopal catastrophe, the Narmada dam and trade treaties), the Indian judiciary has not been able – or has not known how – to prevent such egregious violations.

Among constitutions currently in force, that of *South Africa* enshrines economic, social and cultural rights as fundamental rights in the most explicit and thorough way. This has given rise to considerable jurisprudence in which the Constitutional Court has protected the right to health, to water and to adequate housing.¹¹⁹ In the *Kenneth George* case,¹²⁰ in 2007, a South African constitutional court – the High Court of the Province of Cape of Good Hope – forced the government

¹¹⁵ V. Christian Courts, “Socio-Economic Rights before the Courts in Argentina” in Fons Coomans (ed), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*, Antwerp, Oxford: Intersentia, Maastricht Center for Human Rights, 2006, pp. 309-353.

¹¹⁶ V. *Report of the Special Rapporteur on the right to food, Jean Ziegler, Addendum, Mission to Bolivia*, A/HRC/7/5/Add.2, 30 January 2008: www.righttofood.org/new/PDF/Bolivia.pdf

¹¹⁷ Indian Supreme Court, *S. Jagannath Vs. Union of India and Ors*, 1996.

¹¹⁸ Indian Supreme Court, *Samatha Vs. State of Andhra Pradesh and Ors*, 1997

¹¹⁹ V. Sandra Liebenberg, “Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review” in John Squires, Malcolm Langford, Bret Thiele, *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human Rights Centre, 2005, pp. 73-88.

¹²⁰ South Africa, High Court of the Province of Cape of Good Hope, *Kenneth George and Others v. Minister of Environmental Affairs and Tourism*, 2007.

III. EXERCISE OF THE RIGHT TO SELF-DETERMINATION

In international law, there are two aspects of the right to self-determination: external (international) and internal (national). This division is rather formal since these two aspects cannot exist independently of each other. However, as we shall see below (v. Chapter V), it is obvious that formal political independence does not mean that a people really enjoy the right of self-determination. In this chapter, we shall examine the exercise of the right of self-determination (A) at the international/external level and (B) at the national/domestic level.

A. At the International Level

1. Different Forms of the Exercise of the Right to Self-Determination

A people having the right to self-determination at the international (external) level has the choice of several ways of exercising this right. According to the already cited *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations*:

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

If certain peoples have chosen free association (Switzerland), others have constituted federations (Germany, Brazil, Russia) and yet others have “inherited” diverse forms (centralized state, monarchy etc.).

It is difficult to draw general conclusions, but one notices that the states constituted as federations or confederations offer the most opportunities to the peoples composing them to exercise their right to self-determination. However, being governed by a “formal monarchy” does not mean that the citizens and peoples under the monarchy have fewer possibilities, as illustrated by the United Kingdom.

2. Self-Determination of Colonized Peoples

In the United Nations *Charter* and in the declarations adopted during the 1960s and 1970s (v. above), the right to self-determination was enshrined in order to give a legal base to the self-determination of colonized peoples. Within this framework, the exercise of the right to self-determination has an international/external dimension since it allows for the decolonization and independence of colonized peoples.

In paragraph 4 of its *General Comment N° 21* on the right to self-determination, the Committee for the Elimination of Racial Discrimination stated the following:

*“The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.”*³⁴

In the vast majority of cases, the colonized peoples chose independence, and they constituted themselves into sovereign states within the limits of the colonial borders (according to the principle of *uti possidetis*). The exercise of the right to self-determination has thus not entered into conflict with the territorial integrity of other countries. It was the colonial powers or occupiers that had to leave.³⁵

However, it must be emphasized that the colonial cut up had divided numerous peoples. With decolonization, they found themselves spread out over the territories of several countries. The most flagrant example is the configuration of the African continent, where state borders are delimited with “geometric precision”. It should be noted that the new countries, in general, opted deliberately to keep the colonial borders in order to avoid complicating the situation and wanted, from the outset, to emphasize the African unity they intended to construct. It was a wager, and it is still relevant, as shown by the numerous conflicts designated “ethnic”, aggravated or not by outside forces.

This much said, as the International Court of Justice in the case of Western Sahara recalled, one of the most important elements in the exercise of the right to self-determination is “the free and genuine expression of the will of the peoples of the Territory”³⁶ concerned. The Court had already expressed this opinion in the case of Namibia, occupied at that time by South Africa.³⁷

3. Self-Determination of *All Peoples*

Many international lawyers try to contend that the provisions of the two international human rights covenants do not have general application and that the intention of the drafters of these covenants, in the context of the time, was to give a legal base to decolonization. Whatever may have been the intention of the drafters, it is clear that the first common article to the two documents concerns *all* peoples (v. also Chapter I.A).

Nonetheless, for any given people, the best way to enjoy its right to self-determination is not necessarily to establish an independent state, for it is obvious

³⁴ CERD, *General Recommendation No. 21: Right to self-determination*, 8 March 1996: www.unhcr.ch/tbs/doc.nsf/0/dc598941c9e68a1a8025651e004d31d0?Opendocument

³⁵ V. Ioana Cismas, “Secession in Theory and Practice: the Case of Kosovo and Beyond”, *Goettingen Journal of International Law*, Vol. 2, N° 2, 2010, pp. 531-387.

³⁶ International Court of Justice, *Western Sahara, Advisory Opinion*, 16 October 1975, § 162: www.icj-cij.org/docket/files/61/6195.pdf

³⁷ International Court of Justice, *Namibia, Advisory Opinion*, 21 June 1971: www.mefacts.com/cached.asp?x_id=11654

VI. MONITORING MECHANISMS AVAILABLE IN CASE OF VIOLATION

If a government has not fulfilled any one of its obligations regarding the right to self-determination and the free disposal of natural wealth and resources – for example by developing them while destroying the local and national population’s access to food or water or while using only a minuscule portion of the income from these operations to improve the well-being of the overall population – the persons and peoples thus victimized should have access to a control mechanism in order to be able to claim their rights. All the victims of such violations have the right to adequate reparation/compensation and a guarantee that it will not happen again.

In practice, the possibility of having access to a court to litigate a violation of the right to self-determination and to freely dispose of natural wealth and resources, and the likelihood of obtaining reparation or compensation, depend largely not only on the information and control mechanisms available at the national, regional and international levels¹¹⁴ but also on an interplay of power and national and/or international mobilizations, keeping in mind that, in this highly politicized area, nobody is safe from possible manipulations.

Regarding such a course of action, there are three types of control mechanisms available:

- judicial control mechanisms – a national judge, for example – that hand down binding decisions for the political powers;
- quasi-judicial mechanisms – the UN treaty bodies, for example – that address recommendations to the government after receiving a communication and hearing both parties,
- extrajudicial mechanisms – such as a United Nations special rapporteur – that address recommendations to the government, for example, on the basis of a mission in the field.

This chapter is intended to present these three types of control mechanisms and their availability at the national, regional and international levels.

A. At the National Level

At the national level, the main control mechanism available in case of violations of human rights is the judiciary: the judge. In the vast majority of countries,

¹¹³ V. joint oral NGO statement made by the CETIM to the 13th session of the Human Rights Council (March 2010): www.cetim.ch/fr/interventions_details.php?iid=342

¹¹⁴ The website of the network for economic, social and cultural rights, www.escr-net.org, contains abundant jurisprudence (more than 80 cases) on violations of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights.

in order to arrive at a “win-win” situation.¹¹⁰ The Special Rapporteur on the Right to Food, Olivier de Schutter, in a provocatively entitled text, “Responsibly Destroying the World’s Peasantry” has rejected the approach proposed by these organizations, particularly because they fail to take into account the right to self-determination and to freely dispose of natural wealth and resources:

“The set of principles that have been proposed to discipline the phenomenon remain purely voluntary. But what is required is to insist that governments comply fully with their human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of the means of subsistence. Because the principles ignore human rights, they neglect the essential dimension of accountability.”¹¹¹

To respond to the phenomenon and guarantee that those involved in land acquisition (governments and/or corporations) respect the fundamental rights of the local populations, the special rapporteur on the right to food proposed 11 minimum principles based on existing international law, hence binding. Among them are participation and consent of the local and indigenous populations; protection of their property rights; the requirement that local populations benefit from the jobs created with decent wages; the respect of the environment; the carrying out of impact studies with the local populations before the conclusion of negotiations; the requirement that a certain percentage of the production must remain in the country of investment if this country is dependent on the importing of food products or in case of food insecurity.¹¹²

Although the minimal principles proposed by the special rapporteur constitute a sort of guard rail – and a significant one at that – and although this initiative should be welcomed, many civil society stakeholders are extremely worried by the serious risks for the enjoyment of the right to food of present and future generations that these transactions imply. These measures and principles are not enough in and of themselves to protect the right of local peoples and groups made highly vulnerable by globalization and malnutrition. In fact, the governments of the countries concerned by these land purchases are not often in a position to protect their populations from such situations whether because they are politically and economically fragile or because they are protecting the short-term interests of economic elites.¹¹³

¹¹⁰ *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*: www.donorplatform.org/component/option,com_docman/task,doc_view/gid,1280 The FAO has also launched a draft process of “Voluntary guidelines for good governance in land and natural resource tenure” which should be drafted by member states, with the participation of civil society organizations.

¹¹¹ Published by Project Syndicate, 4 June 2010: www.project-syndicate.org/commentary/deschutter1/ English. V. also the petition launched by Vía Campesina, FIAN, GRAIN and LRAN in April 2010, “Stop Land Grabbing Now! Say NO to the principles of “responsible” agro-enterprise investment promoted by the World Bank!”: www.fian.org/resources/documents/others/stop-land-grabbing-now/pdf

¹¹² Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier de Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, A/HRC/13/33/Add.2, 28 December 2009.

that if each of the peoples speaking one of the 6,000 languages that have been counted in the world³⁸ (in so far as one uses this single criterion to define a people) were to choose this option, the management of international relations would no doubt be extremely complicated. In line with this, one might question the capacity of several mini-states or of heavily indebted states to exercise real sovereignty and to participate in decision-making at the international level. Once again, in the absence of a definition of a “people” in international law, the questions are much more political than legal.

It is appropriate here to deal with another particularly sensitive point. The territorial integrity of any given country can be questioned, and intervention – including armed intervention – by the “international community” can be admitted in two situations: 1. Threats to international peace and security; 2. Serious and systematic violations of human rights.

Threats to International Peace and Security

Threats to international peace and security enable the United Nations to intervene in the domestic affairs of a given country. However, it must be emphasized that there is no guarantee against manipulation of these notions, which are often abused by the great powers of the day (such as in the cases of Afghanistan, Iraq, Haiti...).

Serious Violations of Human Rights

One cannot but notice that many multi-ethnic countries do not respect their human rights obligations in general and the right to self-determination in particular. Thus, it is not uncommon to find the machinery of state taken over by a single ethnic group or a clan practicing nepotism or even by an oligarchy.

The *Vienna Declaration and Program of Action* (v. also Chapter III.A) makes the respect of the territorial integrity of a country to some extent conditional upon “the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind” (Chapter I, Article 2, § 3).

“Remedial Secession”

In such a context, *secession* is legitimate, indeed a right, and can even be authorized (see below) even if the risk of manipulation of certain situations by the great powers of the day is not to be excluded.

Although questioning territorial integrity is a nightmare for most countries and the United Nations Charter is entirely clear on this subject (Article 2.4), this has not prevented United Nations member states (51 at the time of its establishment, including some such as India, which were not yet formally independent) from creating new ones (192 presently, most of which through the process of decolonization).

³⁸ UNESCO statement on International Mother Language Day, 2009: www.unesco.org/en/languages-in-education/advocacy/international-mother-language-day-21-february-2009/

As we have already emphasized above, the creation of new countries is not necessarily in the interest of the peoples concerned. However, there are situations where the peoples are oppressed by the own governments and cannot enjoy their right to self-determination. In such a case, international law provides for the right to secession:

*“The only hypothetical case of recognition of a right to secession envisaged by international law is that of ‘remedial secession’, to wit a secession that corresponds to a flagrant violation of the ‘internal’ right to self-determination.”*³⁹

On the basis of, in particular, flagrant and systematic human rights violations, Professor Christakis classifies East Pakistan’s 1971 accession to independence under the name of Bangladesh as “successful” remedial secession even though this independence was obtained largely through the intervention of the Indian armed forces.⁴⁰

More recently, Kosovo⁴¹ unilaterally proclaimed its independence (February 2008), with the support of the great powers. This proclamation followed NATO’s 1999 military intervention and the placing of this province under United Nations administration,⁴² on the basis of, especially, the following considerations: the need to stop “the violence” perpetrated against the native Albanian Kosovars by the Republic of Serbia and to deal with the “humanitarian catastrophe” in this province (the Security Council’s preoccupation). In its 22 July 2010 ruling, the International Court of Justice concluded that Kosovo’s 17 February 2008 declaration of independence violated neither general international law, nor the pertinent Security Council resolution, nor the constitutional framework.⁴³ This opinion was disputed by the Republic of Serbia, which considered Kosovo one of its provinces, and by many other countries.

In this regard, the political system of Ethiopia constitutes an interesting example meriting attention. This country’s new constitution (1994) recognizes the unilateral right, without restriction, to self-determination of “each nation” (nine states and 80 peoples) that at the time was a part of it.⁴⁴ Meles Zenawi, explained this choice in the following words: “For thirty years, the government tried to create a homogeneous Ethiopia. It tried to eliminate the differences of languages, culture and so on... What we mean is that it is not necessary for us to be homogeneous to be united.”⁴⁵

³⁹ V. note 3.

⁴⁰ Ibid.

⁴¹ A former autonomous region of the People’s Republic of Serbia within the framework of the Federal Socialist Republic of Yugoslavia that in 2000 became the Federal Republic of Yugoslavia (FRY). Upon the independence of Montenegro, the FRY took the name of Serbia, which still considers Kosovo to be one of its provinces.

⁴² V. Security Council resolution 1244, 10 June 1999: www.nato.int/kosovo/docu/u990610a.htm

⁴³ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010: www.icj-cij.org/homepage/pdf/20100722_KOS.pdf

⁴⁴ V. note 3.

⁴⁵ Ibid.

proposal to relocate to other lands. In most cases, it illustrates disastrous management of natural wealth and resources that in no way benefits the populations of the country concerned.

In *Indonesia*, for example, large-scale acquisition of land is intended to allow the planting of African palms from which bio-fuels are made. Thousands of small farming families have been displaced and a substantial part of the country’s forests have been destroyed.¹⁰⁵ In *Colombia*, in the department of Chocó, many indigenous and Afro-Colombian communities were driven from their land when the TNCs arrived to produce palm oil.¹⁰⁶ In *Paraguay*, where the amount of land sown to soja has more than doubled since the 1990s, primarily in the Itapúa, Alto Paraná and Canindeyú regions, many indigenous communities without a land titles have been driven out by force. Houses have been burned, corps and animals burned in the community of Tetaguá Guarani, in the Primero de Marzo peasant camp and in the community of Maria Antonia. Some 350 similar incidents are estimated to have taken place between 1990 and 2004 in Paraguay.¹⁰⁷ In *Argentina*, peasants and indigenous families have been evicted from their land in the provinces of Córdoba, Santiago del Estero, Salta, Mendoza, Misiones and Jujuy. Villagers in the province of Santiago del Estero have been systematically threatened by soybean agribusiness, by the paramilitaries paid to protect it, and by the state police.¹⁰⁸

In June 2008, in the final declaration of the international conference on peasants’ rights, held in Jakarta, Indonesia, the member organizations of Via Campesina denounced the phenomenon in the following words:

*“We are being increasingly and violently expelled from our lands and alienated from our sources of livelihoods. Mega development projects such as big plantations for agro-fuels, large dams, infrastructure projects, industrial expansion, extractive industry and tourism have forcibly displaced our communities, and destroyed our lives.”*¹⁰⁹

The World Bank, the United Nations Food and Agriculture Organization (FOA), the International Fund for Agricultural Development (IFAD), and the United Nations Conference on Trade and Development (UNCTAD) have proposed seven key principles that should be taken into account during future financial negotiations

¹⁰⁵ V. Cédric Gouveneur, “En Indonésie, palmiers à huile contre forêt”, *Le Monde diplomatique*, December 2009.

¹⁰⁶ Fidel Mingorance, *Le flux de l’huile de palme Colombie-Belgique/Europe. Approche sous l’angle des droits humains*, Human Rights Everywhere, Coordination Belge pour la Colombie, 2007, et *Luchas campesinas; propuestas, redes y alianzas*, EHNE/Mundubat, Bilbao, 2010.

¹⁰⁷ General Assembly, *Report of the Special Rapporteur on the Right to Food*, Jean Ziegler, A/62/289, 22 August 2007, § 39: www.righttofood.org/new/PDF/A62289.pdf

¹⁰⁸ Ibid.

¹⁰⁹ Final Declaration of International Conference on Peasants’ Rights Jakarta, 24 June 2008, Via Campesina www.viacampesina.org/en/index.php?option=com_content&view=article&id=572:final-declaration-of-international-conference-on-peasants-rights&catid=19:human-rights&Itemid=40

On the need to reinforce peasants’ rights in international law, v. Christophe Golay, *The Rights of Peasants*, Critical Report N° 5, Geneva: CETIM, 2009.

respond to the triple food-energy-financial crisis, governments – by using a part of sovereign investments funds – and transnational corporations have been making large-scale investments in cheap land in the countries of the South.¹⁰⁰

In his report on the acquisition of land, submitted in March 2010 to the Human Rights Council, the United Nations Special Rapporteur on the Right to Food, Olivier de Schutter, defined the magnitude of the phenomenon as follows:

“Over the past three to four years, private investors and governments have shown a growing interest in the acquisition or long-term lease of large portions of arable land (above 1,000 ha) in a number of countries, mostly in the developing world. According to an estimate from the International Food Policy Research Institute (IFPRI), between 15 and 20 million hectares of farmland in developing countries have been the subject of transactions or negotiations involving foreign investors since 2006. This figure is equal to the total area of farmland in France and to a fifth of all the farmland of the European Union. The land which has been most in demand is that which is close to water resources and can therefore be irrigated at a relatively low cost in terms of infrastructure, and land which is closest to markets and from which produce can be easily exported. Among the main target countries in sub-Saharan Africa are Cameroon, Ethiopia, the Democratic Republic of the Congo, Ghana, Madagascar, Mali, Somalia, Sudan, United Republic of Tanzania and Zambia. But target countries are also in Central Europe, in Asia and in Latin America; among them are Brazil, Cambodia, Indonesia, Kazakhstan, Pakistan, the Philippines, Russia and Ukraine.”¹⁰¹

Most worrying is that countries where the land is bought or leased on a large scale have almost all, already, very high levels of food insecurity.¹⁰² This, for example, is the case with **Ethiopia**, where 7 million persons depend upon food aid¹⁰³ and where the government has already leased out 600,000 hectares of land to more than 2,000 companies from China, India, Saudi Arabia and other countries.¹⁰⁴

More generally, large scale land acquisition results in serious violations of the human rights of the local population, who are often expelled from their lands without being consulted and without obtaining adequate compensation or a

of the Special Rapporteur on the right to food, Jean Ziegler, Addendum, Mission to Bolivia: A/HRC/7/5/Add.2, 30, January 2008: www.righttofood.org/new/PDF/Bolivia.pdf

¹⁰⁰ V. HRC, *Report of the Special Rapporteur on the right to food, Olivier de Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, A/HRC/13/33/Add.2, 28 December 2009, §12: www.oecd.org/dataoecd/16/19/45285639.pdf; v. also Carin Smaller and Howard Mann, *A Thirst for Distant Lands: Foreign investment in agricultural land and water*, International Institute for Sustainable Development, 2009.

¹⁰¹ *Ibid.*, § 11.

¹⁰² Pain pour le prochain, Action de Carême, *L'accapement des terres: La course aux terres aggrave la faim dans le monde*, Collection Repères, 1/2010.

¹⁰³ Human Rights Council, *Report of the Special Rapporteur on the right to food, Jean Ziegler, Addendum, Mission to Ethiopia*, E/CN.4/2005/47/Add.1, 8 February 2005: www.righttofood.org/new/PDF/Ethiopia.pdf

¹⁰⁴ Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard and James Keeley, *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, FAO, IIED, IFAD, 2009.

B. At the National Level

1. The Right to Free Participation in Public Affairs

In the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations* cited several times in this brochure, the General Assembly stipulated that within the framework of the right of peoples to self-determination, all countries have the duty to favor the universal and effective respect of fundamental human rights and liberties, in keeping with the *Charter of the United Nations* and the *Universal Declaration of Human Rights*.

Article 21 of the *Universal Declaration* provides for the participation of everybody in public affairs:

“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. “2. Everyone has the right to equal access to public service in his country. “3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

The *International Covenant on Civil and Political Rights* stipulates the same right in Article 25.

For the Committee on the Elimination of Racial Discrimination:

“The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level... In consequence, Governments are to represent the whole population without distinction as to race, color, descent or national or ethnic origin.”⁴⁶

In view of these considerations, all the peoples present on a country's territory should be able to participate in public affairs, both national and international (negotiations of trade treaties, for example).

Taking into account that less than 10% of all the world's countries are “homogeneous”⁴⁷, the task would seem arduous. But the solution resides in the respect and effective implementation of human rights everywhere in the world – understood not only as individual but also as collective rights, at both the national and international level, as well as the respect by governments of their obligations under the instruments cited in this brochure.

⁴⁶ *General Comment N° 21, The Right to Self-Determination*, 8 March 1996, §4: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/dc598941c9e68a1a8025651e004d31d0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument)

⁴⁷ V. note 3.

2. Self-Determination of Indigenous Peoples

Until recently, the only international instrument offering specific protection of the rights of indigenous peoples was the International Labor Organization's 1989 *Convention No 169 on the rights of indigenous and tribal peoples*, ratified so far by 22 countries. This ILO convention is important for it protects several fundamental rights of indigenous peoples. Articles 13 to 17, in particular, enshrine the right of indigenous peoples to their lands and to their territories and their right to participate in the use, the management and the conservation of their resources. They also enshrine the right of indigenous peoples to consultation before any use of the resources situated on their lands and the prohibition of forcibly displacing them from their lands and territories.

The adoption of the United Nations *Declaration on the Rights of Indigenous Peoples* by the Human Rights Council in June 2006 and by the General Assembly in September 2007 has meant a reinforcement of the protection of the rights of indigenous peoples, going further than the ILO convention.⁴⁸ The *Declaration* begins by recognizing that indigenous peoples have the right to enjoy fully, both collectively and individually, all the human rights and fundamental freedoms recognized in the *Charter of the United Nations*, in the *Universal Declaration of Human Rights* and in international human rights law. It continues, recognizing the right of indigenous peoples to self-determination and their right to their lands and resources. The *Declaration* lists the injustices committed under colonization and evokes the threats that globalization currently poses. It protects traditional knowledge, biodiversity and genetic resources and imposes limits on activities that third parties can carry on within the territories of indigenous peoples.

Although the *Declaration* enshrines indigenous peoples' right to self-determination, one must emphasize that it does not define "indigenous peoples". Further, although Article 3 of the *Declaration* unequivocally affirms the right of indigenous peoples to self-determination,⁴⁹ its Article 4 evokes only autonomy within the framework of the state in which the indigenous peoples live.⁵⁰

The right to self-determination of indigenous peoples and that of the states within which they live are potential sources of conflict, especially if there is no harmonization of the divergent interests of the parties involved and scant respect of human rights and democratic principles. As positive examples, however, we might note that several Latin American countries seem to be moving in the right direction. The new constitutions adopted by Bolivia, Ecuador and Venezuela grant broad autonomy to indigenous peoples (regarding Bolivia, v. Chapter IV.D).

⁴⁸ V. General Assembly, *The right to food, Report of the Special Rapporteur on the right to food*, A/61/306, 1 September 2006, §§ 41-44: www.righttofood.org/new/PDF/A61306.pdf

⁴⁹ "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."

⁵⁰ "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."

ernment committed itself to allocating 40% of its petroleum revenue to the development of social policies. But more than a decade later, this commitment has not been kept, and more the 60% of the Equatorial Guinea population continues to live in dire poverty, with less than US\$ 1.00 per day.⁹⁵ The Center for Economic and Social Rights has denounced the corruption that reigns within the management of the country's petroleum revenues:

*"The lack of transparency in government expenditure and revenue generation heightens concern that corruption is diverting resources away from economic and social rights fulfillment. Distribution of oil wealth is reportedly considered a 'state secret,' but numerous studies and several corruption investigations outside the country have alleged misappropriation and secret diversions of billions of dollars in oil and gas revenues by government officials, with the collusion of foreign banks and oil companies."*⁹⁶

As in the case of mining operations, the source of serious violations of the right to self-determination and the right to freely dispose of natural wealth and resources, the human rights violations committed by the companies involved in the petroleum and gas production must be exposed. By the same token so must the violations committed by the governments that allow these oil companies to produce oil and gas with total disregard for the rights of the local populations and without using the revenues drawn from these operations to improve the well-being of their population. The countries in which the oil companies have their headquarters must also be exposed for they, too, must be held accountable just as must the producing countries, given their international human rights commitments.

3. Development of Agricultural Resources

Since the dawn of time, the conquest of land (especially fertile land) has been the main objective of those in power (emperors, kings, princes...) in order to amass wealth. Since the outbreak of the world food crisis at the beginning of 2008⁹⁷, a new phenomenon has emerged and has brutally accelerated: the acquisition of millions of hectares of land by governments and foreign companies in order to produce food or bio-fuels that are then exported by those who have taken over the land.⁹⁸ The land grab by foreigners phenomenon has always existed – during the colonial period, the method used was simple force, and since then, it is control – but what is new now is the magnitude and motivation behind the phenomenon.⁹⁹ Since 2008, in order to

⁹⁵ This situation was denounced by the United Nations Committee on the Rights of the Child. V: Committee on the Rights of the Child, *Concluding Observations, Equatorial Guinea*, CRC/C/15/Add.245, 3 November 2004, §§ 13, 14: [www.unhcr.ch/tbs/doc.nsf/0/d53df7529775b260c1256f2000565994/\\$FILE/G0444306.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/d53df7529775b260c1256f2000565994/$FILE/G0444306.pdf)

⁹⁶ Center for Economic and Social Rights, *Equatorial Guinea*, Country Fact Sheet No 9, 2009.

⁹⁷ *The Global Food Crisis and the Right to Food*, Geneva: CETIM, Critical Report No 3, 2008.

⁹⁸ The NGO GRAIN was among the first organizations to denounce this phenomenon in 2008. In 2010, they set up a website on which are to be found more than 800 studies, reports and articles on the world-wide land grab: <http://farmlandgrab.org>

⁹⁹ Transnational corporations such as United Fruit owned up to 42% of the land in one country – Guatemala – in the 1940s, but this was not typical of the situation on all continents. V. the *Report*

of the protected forested zone.⁹⁰ In 2006, a law on mining operations was passed providing for adequate compensation and access to alternative lands for displaced local communities, but it has not been consistently enforced.⁹¹

In each of these examples, and in thousands of others throughout the world,⁹² the corporations involved in mining operations are responsible for human rights violations, and they must be held accountable.⁹³ Parallel with that, the governments that allow these corporations to exploit mining resources in full contempt of the rights of their populations are equally responsible for violations of the rights enshrined in the two 1966 United Nations covenants, including the right of peoples to freely dispose of their natural wealth and natural resources.

The countries where TNCs are headquartered, which encourage the harmful activities of these corporations (by representing them, by including them in mixed governmental/corporate delegations, by negotiating free trade treaties etc.) must also be held accountable as well as the countries where the operations are being carried out, given their international human rights commitments and the obligations they have agreed to regarding international cooperation.

2. Development of Petroleum and Gas Deposits

Even more recently than the development of the planet's mineral resources, the development of petroleum and gas has brought in its wake the same sorts of violations of the right to self-determination and to freely dispose of natural wealth and resources. In many cases, the development of petroleum and gas has dramatic consequences for local populations' access to resources, resulting in serious violations of their right to food, water and health. And in most cases, only a tiny portion of the income from the development of petroleum and gas is used to improve the well-being of the population and favor the realization of its economic, social and cultural rights. We shall examine the example of Equatorial Guinea.

Equatorial Guinea is a case study in the use of only a tiny portion of petroleum and gas revenues to realize the economic and social rights of the population.⁹⁴ In this country of some 633,000 inhabitants, significant quantities of petroleum and gas were discovered in the mid-1990s. In less than 15 years, the gross domestic product (GDP) of the country increased by more than 5,000%, and the country today has a per capita GDP of US\$ 26,000, which places it first in sub-Saharan Africa, with a level comparable to high-income countries such as Italy and Spain. However, since the discovery of petroleum and gas and the phenomenal enrichment of the country, there has been a regression in the realization of the population's right to education, right to health and right to food. In 1997, the gov-

⁹⁰ V. www.publiceye.ch

⁹¹ V. note 88.

⁹² V. Gilles Labarthe and François-Xavier Vershave, *L'or africain: Pillages, trafic et commerce international*, Marseille: Agone, 2005.

⁹³ V. *Transnational Corporations and Human Rights*, Geneva: CETIM, 2005.

⁹⁴ Human Rights Watch, *Well Oiled: Oil and Human Rights in Equatorial Guinea*, New York, 2009; Center of Economic and Social Rights, *Equatorial Guinea*, Country Fact Sheet N° 9, 2009.

IV. STATE OBLIGATIONS AND IMPLEMENTATION AT THE NATIONAL LEVEL

As just noted, the right to self-determination and to permanent sovereignty over natural resources is a fundamental right recognized in numerous international and regional instruments but rarely respected fully in practice and in all its ramifications. Although most countries have not explicitly included it in their national legislation, the overwhelming majority of countries have ratified the two international human rights covenants, and all United Nations member states are expected to observe the *Charter of the United Nations*. In this regard, they have the obligation to *respect*, to *protect* and the *implement* peoples' right to self-determination and to freely dispose of their natural resources.

A. Obligations of States

International law establishes obligations on the part of governments regarding the right of peoples to self-determination at the international level. Under the two 1966 international human rights covenants, and the above cited *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, these obligations are both negative and positive.

First, every country has the duty to *respect* the right to self-determination in keeping with the *Charter of the United Nations*. Second, every country has the obligation to favor *the realization* of the right of peoples to self-determination and to help the United Nations to carry out its responsibilities in the application of this principle, in order to:

- favor friendly relations and cooperation among countries;
- rapidly put an end to colonialism, taking duly into account the freely expressed will of the peoples concerned.⁵¹

The right to freely dispose of natural wealth and resources also implies obligations for countries. As provided for in the resolution on permanent sovereignty over natural resources, adopted in 1962, the right to freely dispose of natural wealth and resources must always "be exercised in the interest of national development and the well-being of the population of the state concerned". The most important obligation is thus to use the natural wealth and resources to improve the well-being of the entire population of a given country and of each of its constituent groups, taking into account that the needs and interests of one may conflict with those of another (v. Chapter V).

⁵¹ Cf. General Assembly resolution 2625 (XXV), V. note 9.

According to the two 1966 United Nations human rights covenants, the right to freely dispose of natural wealth and resources should be exercised with an aim to allow the realization of the other rights enshrined in the covenants; it should favor the realization of the civil and political as well as economic, social and cultural rights of peoples. In using this wealth, a government must make sure to *respect, protect and realize* the human rights of all the country's constituent groups. In many cases, this implies simply *respecting* the traditional use of natural wealth and resources by the local population. In other cases, this necessitates *protecting* the local population from powerful third parties such as transnational corporations, which pillage or destroy natural wealth and resources. When natural wealth and resources are unexploited and the local population cannot exercise their fundamental rights, for example because of poverty, *realizing* these rights implies that the government will use the natural wealth and resources to improve the well-being of the population.

B. Obligations of Other Entities

By “other entities”, we mean non-state entities which have a significant, indeed decisive, influence over the exercise of the right to self-determination. Such entities include the international financial and trade institutions (the International Monetary Fund, the World Bank and the World Trade Organization) as well as transnational corporations (TNCs). Although the first two are intergovernmental institutions and, thus, constrained to respect the *Charter of the United Nations* and the rights enshrined in the international human rights instruments, including the right to self-determination, they very often defend the interests of the commercial (private) sector by favoring the control by TNCs over all economic activity, which undeniably thwarts the exercise of many countries' sovereignty. In many areas, both the intergovernmental organizations and the TNCs ignore their human rights obligations, and many of their activities result in violations of the right to self-determination (v. also Chapter V.C).

C. Obligations of Third-Party States

In the case of human rights violations in a given country, accusations are often made against the government of the country concerned, occasionally against a TNC, but rarely against the governments of dominant third-party countries. Yet the exercise of the right to self-determination and the ability to freely dispose of natural wealth and resources comports a major international element. In the *International Covenant on Economic, Social and Cultural Rights*, the states parties commit themselves to cooperating with a view to assuring the full exercise of the rights enshrined therein, proclaiming that “in no case can a people be deprived of its means of subsistence”. Consequently, third-party governments have the obligation to *respect* the right to freely dispose of natural wealth and resources, especially by refraining from taking measures that would deprive a people of its means of subsistence, and they have the obligation to *favor* the exercise of this right in

Illustration n°1

In the San Marcos department of **Guatemala**, indigenous communities have been fighting for years against human rights violations arising from the operation of a silver and gold mine – the Marlin mine – by the Canadian company Goldcorp and its subsidiary Montana.⁸⁵ The company obtained a concession to operate the Marlin mine in 2003, without having consulted the indigenous communities. Since the start of operations in 2005, these communities' rights to food, to water, to adequate housing and to health have been threatened. Besides these violations of the human rights of the local indigenous peoples, NGOs have denounced the tiny share of income drawn from the development of this wealth ultimately used to improve the population's well-being. In the mining sector, foreign companies are required to pay only one percent of their income to the government⁸⁶. And with the taxes in other economic sectors being about the same, the government invests virtually nothing to realize the economic, social and cultural rights of the populations. The first United Nations special rapporteur on the right to food, Jean Ziegler, and the Center for Economic and Social Rights have denounced this situation, pointing out that in Guatemala, in spite of substantial natural wealth and resources and a high gross domestic product, 50% of the children continue to suffer from malnutrition – the highest level in Latin America and the fifth highest in the world.⁸⁷

In **Ghana**, for more than ten years, the NGO FIAN has been denouncing human rights violations linked to gold, diamond, bauxite and manganese mines.⁸⁸ Gold represents one-third of Ghana's exports, and its extraction – in most cases through open-pit mines operated by foreign companies – threatens the local populations' right to water, food and health. Spreading out across ever greater expanses of land, these gold mines are the cause of forced expulsions of small farming communities, without adequate compensation, and the destruction of natural resources.⁸⁹ In 2009, the United States company Newmont received the “worst company of the year” Public Eye Award given by Greenpeace and the Berne Declaration in parallel with the Davos World Economic Forum for its plan to operate the Akiem gold mine in the protected forested zone of Ajenua Bepo, in eastern Ghana. This mining operation had resulted in the expulsion 9,000 persons from their lands and the destruction of a part

⁸⁵ V. in particular, Peace Brigade International, *Metal Mining and Human Rights in Guatemala: The Marlin Mine in San Marcos*, 2006. V. also the independent study carried out in cooperation with the Goldcorp company, *Human Rights Assessment of Goldcorp's Marlin Mine*, May 2010: www.hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_Marlin_Mine_May_17.pdf

⁸⁶ The one-percent rate was set by the 1997 mining law.

⁸⁷ With comparable GDPs, Jamaica and Ecuador have a percentage of malnourished children respectively ten and two times lower than Guatemala. V. Center for Economic and Social Rights, *Guatemala, Country Fact Sheet N° 3*, 2008, www.cesr.org. V. also *The right to food: Report of the Special Rapporteur on the right to food, Jean Ziegler, Addendum, Mission to Guatemala*, E/CN.4/2006/44/Add.1, 18 January 2006: www.righttofood.org/new/PDF/Guatemala%20PDF.pdf

⁸⁸ FIAN International, *Human Rights violations in the context of large-scale mining operations*, submission presented to the United Nations Human Rights Council on the occasion of the Universal Periodic Review of Ghana in May 2008: www.fian.org/news/resources/documents/others/mining-related-human-rights-violations-ghana/pdf

⁸⁹ FIAN has denounced, in particular, the case of the open-pit Iduapriem gold mine run by the South African company AngloGold Ashanti. V. Ute Hausmann and Mike Anan, “Turning land and water into poisonous gold in Ghana”, in FIAN International, *Right to Food Quarterly*, Vol. 3, No 1, 2008, p. 9.

development of natural resources. The governments of certain powerful countries, home to TNC headquarters, act as advocates for these TNCs to obtain concessions in their favor from target countries. And certain TNCs recur to all sorts of methods, including the use of paramilitaries, to pursue their exploitation.

However, beyond the problems involving TNCs or third-party governments, the development of natural resources (petroleum, mineral deposits, water power etc.) can give rise to inextricable problems among the various constituent groups of a given country. Mining operations, for example, can turn out to be in conflict with beliefs or with the will of a part of the population of a country (the indigenous peoples) or can cause irreparable damage while depriving the overall population of a relatively significant income. Once again, the solution is to be found in a coordinated effort in consultation with the peoples/populations concerned and in the respect of everybody's human rights.

In this part, we shall describe the problems arising from the appropriation and development of 1. mineral resources; 2. petroleum and gas deposits; 3. agricultural resources, these last having taken on a new dimension since the 2008 food crisis.

1. Mining Operations

Mining operations were one of the driving forces of colonization. For centuries, the Spanish Empire amassed wealth and exploited the mineral resources of Latin America in total contempt of the local populations, who were forced to work in conditions of slavery side by side with slaves brought in from Africa, in gold, silver or tin mines.⁸³ In other regions of the world, it was primarily France, England and Portugal that pillaged the mineral resources of the colonized peoples.⁸⁴

The exploitation of mineral resources by governments or foreign corporations did not end with colonization. Throughout the world, TNCs continue to extract metals and minerals while violating the fundamental rights of the local populations. We shall give two illustrative examples, Guatemala and Ghana.

other countries, particularly through international cooperation and assistance. In this regard, countries must act in solidarity with a country lacking the means to honor its economic, social and cultural commitments.

The obligations of third-party governments can, in practice, result in the obligation to respect the development model adopted by a given people or country, to refrain from imposing trade treaties harmful to human rights (v. below), to refrain from encouraging TNC activities harmful to the environment and to the exercise of human rights etc.

D. Examples of Implementation at the National Level

In the decades subsequent to the formalization of the right to self-determination by the *Charter of the United Nations* in 1945, colonized peoples became independent and constituted sovereign states. In so doing, they followed the lead of the formerly colonized peoples of Latin America, the majority of whom became independent in the nineteenth century.

But although they acquired their political independence decades ago, most of these countries long remained – or still remain – economically dependent on their former colonial powers, and many are still not able to pursue their economic, social and cultural development in full freedom and without outside interference. Just as problematic is that, within many countries, many peoples continue to be oppressed or kept in subjugation and are thus not able to exercise their rights over their natural wealth and resources.

Bolivia and Norway can be cited among those countries that implement the right to self-determination and to freely dispose of natural wealth and resources at the national level by using them to improve the well-being of their populations.

Bolivia

Bolivia possesses substantial natural wealth and resources and is particularly rich in metals (silver, gold, iron, zinc, tin and lithium), in natural gas and in petroleum. During the colonial period, these metals were extracted by the Spanish, and, since independence, a major part of Bolivia's economy has continued to be based on exporting silver and tin. But since the 1990s, vast reserves of natural gas and petroleum have been discovered in Bolivia (the biggest natural gas reserves in Latin America after Venezuela), and today, natural gas is Bolivia's primary export product. With the increase in the price of gas and petroleum on the international market, income has increased significantly. But the privatization of the gas and petroleum reserves in the middle of the 1990s under the Sánchez de Lozada government brought in its wake an increase in the profits of the foreign transnational corporations at the expense of the government's revenues.

After the "water war" that forced the Sánchez de Lozada government to rescind the privatization of the water company at the end of the 1990s, the plan to export natural gas to the United States and Mexico set off a "gas war" in September and October 2003, pitting indigenous organizations, small holder farmers and trade

as our research shows, have all benefited from financing from one of the major Swiss banks (UBS or Crédit Suisse). The Berne Declaration [a Swiss NGO] has revealed situations where the projects financed in the South by the major Swiss banks threaten the life of local populations, workers and activists. The Berne Declaration has also shown that companies using forced labor, contemptuous of the right to health of their employees and planning projects that violate the rights of minorities, carry on business relations with the Swiss banks, without the banks being unduly worried about their fees." V. also *Grandes banques suisses: les droits humains à crédit*, Déclaration de Berne, June 2010 and also <http://bankenundmenschenrechte.ch/en>

⁸³ V. Eduardo Galeano, *Les veines ouvertes de l'Amérique latine*, Paris: Pocket, 1971.

⁸⁴ Montesquieu, in the *Persian Letters*, published in 1721, denounced the absurdity of this situation: "There is nothing as extravagant as making innumerable men perish to extract silver or gold from the depths of the earth; these metals in and of themselves are absolutely useless, and are wealth only because they have been designated as the signs of wealth."

unions against the government. After weeks of confrontation and 53 deaths among the opposition, the gas war took its toll on President Sánchez de Losada, who was forced to resign. The vice-president, Carlos Mesa, then assumed the presidency. He accepted the demands of the people among which were the drafting of a new constitution and the nationalization of the country's natural resources. Although he assented the passage of a law on hydrocarbons, providing for a 50% tax on gas and petroleum profits, he never carried through on his promise on the nationalization of the natural resources, and he, too, was forced to resign.

The election of Evo Morales to the presidency in December 2005 marked a turning point in Bolivia's history. After 500 years of exploitation of both natural resources and the indigenous population, the first indigenous president in the history of Bolivia promised to put an end to *de facto* colonization and to re-establish national sovereignty over the country's natural resources. In a country in which a third of the population, of which a majority are indigenous peoples, still lives in dire poverty, with rates of malnutrition and inequality among the worst in the world, the new president tried to protect the most vulnerable while ending the political, economic and cultural dependence on foreign powers. On 1 May 2006, he announced the nationalization of the gas and petroleum deposits.

The state once again became owner of the country's resources, and private companies were allowed to develop them under state oversight, turning over between 60% and 82% of their earnings to the state. The foreign companies present in Bolivia – among which are Petrobras (Brazil), Repsol (Spain), Total (France) and British Gas (United Kingdom) – have accepted the new conditions for they continue to earn substantial profits. Even if this nationalization does not translate into a complete recovery of national sovereignty nor a sustainable development model (for the Bolivian economy remains dependent on income from non-renewable resources), this new deal has brought about a spectacular rise in the budgets of the central and provincial governments, which have been able to undertake wide-scale investment in education,⁵² health and food sovereignty. In 2007, Bolivia incorporated the United Nations *Declaration on the Rights of Indigenous Peoples* into its national legislation, and in 2009, it adopted a new constitution enshrining the right of the Bolivian nation to self-determination and to freely dispose of its natural wealth and resources while confirming the rights of the indigenous peoples and small holder farmers over their own resources.⁵³

Norway

Norway, like Bolivia, has substantial natural wealth and resources, in particular in minerals, petroleum and gas. After the discovery of immense deposits of off-shore petroleum in the North Sea – the biggest in the world – at the end of the 1960s, the

⁵² In 2008, Bolivia declared itself “illiteracy free”, v. “Bolivia declares literacy success”, *BBC*, 21 December 2008: <http://news.bbc.co.uk/2/hi/americas/7794293.stm>

⁵³ V. *Report of the Special Rapporteur on the right to food, Jean Ziegler, Mission to Bolivia, A/HRC/7/5/Add.2*, 30 January 2008 (www.righttofood.org/new/PDF/Bolivia.pdf) as well as all his other reports as special rapporteur. V. also Jean Ziegler, *La Haine de l'Occident*, Paris: Livre de poche, 2010.

such a dimension that the most powerful army in the world (United States) can no longer dispense with their “services”. The influence of these companies is not without danger, as a member of the United States Congress emphasized when referring to BlackWater, described as “an army capable of overthrowing most of the world's governments”.⁷⁹ In fact, BlackWater has at its disposal “one of the biggest private stocks of heavy arms, a fleet of aircraft, Blackhawk helicopters, ships, armored vehicles and firing ranges, while its bases train some 30,000 police and military every year”.⁸⁰

This situation is all the more worrying that not only do these companies benefit from a national policy of legal “clemency” but they also escape from any control at the international level – for example, most of them carry on their operations in armed conflicts without being subjected to the rules governing a regular national army – international humanitarian law. With this in mind, and given the insufficiency of the 1989 convention cited above, to deal with this new form of mercenaries, the former United Nations Commission on Human Rights (replaced by the Human Rights Council) set up in 2005 a working group on the use of mercenaries as a source of human rights violations and the prevention of the exercise of the right to self-determination. This working group has just submitted (2010) to the Human Rights Council a draft convention on private security military corporations.⁸¹

G. Exploitation of Natural Resources

In most cases, the development of natural wealth and resources – especially mineral, petroleum, gas and agricultural resources – leads to wide-scale violations of the fundamental rights of the local populations, particularly in violation of the *International Covenant on Economic, Social and Cultural Rights*. It is not exaggerated to say that the history of the development of natural resources is for the most part one with the history of the exploitation of the peoples that hold claim to them.

Under the right to self-determination, governments have the obligation to use wealth and natural resources to improve the well-being of the population. However, in most cases, the development of such resources brings in its wake multiple violations of the fundamental rights of the local populations, very often threatening their right to food, to water, to adequate housing, to health and to a healthy environment. The income that it generates is only rarely used to further the realization of their economic, social and cultural rights.

With this in mind, there should be a very strong emphasis on the responsibilities of governments and TNCs – including those in the financial sector⁸² – in the

⁷⁹ V. *Le Nouvel Observateur*, 6-12 May 2010.

⁸⁰ *Ibid.*

⁸¹ This subject will be treated in a CETIM publication which will be available in December 2010.

⁸² “The operations of the Porgera gold mine in Papua-New Guinea, the cotton trade in Uzbekistan, military infrastructure management in Iraq by the KBR or the elimination of toxic waste by Trafigura in Ivory Coast: as many activities that have given rise to documented violations of human rights and,

For Jean Ziegler,⁷⁵ the privatization of the government means the death of the state:

*“The privatization of the world weakens the normative capacity of governments. It reduces governments and parliaments to a subordinate role of dependence. It empties of meaning most elections and almost all voting by the people. It deprives public institutions of their regulatory power. It kills the law. In the republic, such as we have inherited it from the French Revolution, it subsists now only as a shadow of itself.”*⁷⁶

F. Use of Mercenaries

The term “mercenaries” is used to describe those persons who sell their services to governments or to the private sector to carry out various tasks ordinarily associated with or entrusted to the military (training, logistics, protection, direct participation in armed conflict etc.). Hired in return for a relatively high pay, mercenaries can be sent anywhere in the world.

The use of mercenaries has always existed, but it has taken different forms over time. For example, while, mercenaries were frequently used in the Middle Ages by monarchs for their conquests or to assure their defense, they were also used during the process of decolonization (in the 1960s) against national liberation movements fighting for their right to self-determination, as well as to destabilize newly independent countries⁷⁷. Whence the adoption in 1989 by the United Nations General Assembly of resolution 44/34 of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*.

Over the course of the past two decades, mercenaries have taken on a new form. Mercenary companies, mostly based legally in the United States, the United Kingdom and South Africa, offer their services to governments. They have the capacity to intervene anywhere in the world and have already taken part in numerous conflicts in Africa, Latin America and Asia. Afghanistan and Iraq, where the United States army out-sources ever more tasks to mercenary companies, constitute two of the most telling examples.

Of course, in recent years, most Western countries have gone over to voluntary professional armed services. However, authorizing the setting up of mercenary companies, especially those quoted on the stock exchange and used in armed conflicts, poses serious problems for the exercise of democracy and the sovereignty of governments, not to mention the serious violations of human rights and international law committed by these “new stakeholders”.⁷⁸ Mercenaries have taken on

⁷⁵ Current member of the Human Rights Council Advisory Committee; former special rapporteur on the right to food; University of Geneva, professor emeritus; an eighteen-year member of the lower house (National Council) of the Swiss parliament.

⁷⁶ *Les nouveaux maîtres du monde*, Fayard, September 2002.

⁷⁷ *The Impact of Mercenary Activities on the Right of Peoples to Self-Determination*. Fact Sheet N° 28, Geneva: Office of the United Nations High Commissioner for Human Rights, October 2002: www.ohchr.org/Documents/Publications/FactSheet28en.pdf

⁷⁸ Ibid.

Norwegian government set up the Norwegian oil company Statoil to exploit them. Even though the oil company has been partially privatized since then, the Norwegian government still has control over the petroleum sector for it holds 70% of Statoil's shares. Today, Norway is the world's sixth biggest producer and the third biggest exporter of petroleum, with petroleum accounting for one-third of the country's exports.

Since the 1970s, a major part of the petroleum profits have been used to finance the country's social policies, which has meant that this country of just under five million inhabitants has been classified for the past ten years as first in human development by the United Nations Development Program.⁵⁴ Norway is also the country in which freedom of the press is deemed the most unfettered,⁵⁵ and it ranks eleventh among the countries where corruption is least,⁵⁶ according to the most cited indicators.

To invest the profits from the oil and gas production in a way that also benefits future generations (for such a time as when the reserves give out), the Norwegian government followed the example of other countries by setting up a sovereign wealth investment fund in 1990.⁵⁷ Initially called the Petroleum Fund, in 2006 it became the Norwegian Government Pension Fund Global. The second biggest sovereign wealth fund in the world, it today holds some US\$ 400 billion in capital. In 2004, the Norwegian government made the decision to invest these immense hydrocarbon profits in conformity with ethical criteria. It then adopted investment directives and created an independent Council on Ethics that is specifically entrusted with overseeing that the thousands of business enterprises in which the Norwegian funds are invested are not implicated in any of the following activities:

- serious or systematic human rights violations such as murder, torture, privation of liberty, forced labor, the worst forms of child labor and other forms of child exploitation;
- serious attacks on individuals in situations of war or armed conflict;
- severe environmental degradation;
- wide-scale corruption;
- other particularly serious violations of basic ethics.⁵⁸

⁵⁴ Human Development Report 2010, New York: UNDP: <http://hdr.undp.org/en/reports/global/hdr2010>

⁵⁵ Reporters without Borders, *Annual Report*, Paris, 2008.

⁵⁶ Transparency International, *Annual Report 2009*, Berlin, 2010.

⁵⁷ The first sovereign wealth fund was set up by Kuwait in 1953 to invest the immense profits from its oil production. In 2009, the accumulated value of the various countries' sovereign wealth funds was estimated at US\$ 3,000 billion – two-thirds of which has come from petroleum exports.

⁵⁸ Norwegian Ministry of Finance, *Government Pension Fund Global. Responsible Investment*, 2010: www.regjeringen.no/upload/FIN/brosjyre/2010/spu/english_2010/index.htm
V. also Cédric Paulin, *La stratégie d'investissement éthique du fonds pétrolier norvégien et les entreprises d'armement*, Notes de la Fondation pour la Recherche Stratégique, 2006: www.frstrategie.org/barreCompetences/DEFind/fond_norvegien.pdf

The companies in which the Norwegian fund invests are also requested to promote the rights of the child, to limit their negative effects on climate change and to use water resources in a sustainable way.⁵⁹

Through the exemplary and transparent use of its wealth and natural resources, Norway favors the realization of the economic and social rights of its population while also favoring the respect of human rights in many countries where the companies that it finances carry on their activities. It is interesting to note for example that mining companies that pollute the environment and endanger the health of the populations living near the areas where the extracting is carried on have been excluded from the Norwegian investment fund, as have been two Israeli companies implicated in the construction of settlements in the Occupied Palestinian Territory.⁶⁰

Of course, none of this necessarily has any effect on other aspects of Norwegian politics, which could go contrary to the government's human rights obligations.

⁵⁹ Ibid.

⁶⁰ Norway, Ministry of Finance, "Exclusion of metallurgical and mining company": www.regjeringen.no/en/dep/fin/aktuelt/nyheter/2009/utelukkelse-av-metall-og-gruveselskap.html?id=586655, "Three companies excluded from the Government Pension Fund Global": www.regjeringen.no/en/dep/fin/press-center/Press-releases/2010/three-companies-excluded-from-the-govern.html?id=612790

have begun to ratify it. The convention accords wide latitude for the patenting of plants and exposes farmers, in order to continue to sow and cultivate, to paying ever greater fees to huge transnational corporations involved in genetic engineering and bio-piracy.

As traditional law concerning patents implies that the object of the patent should be an invention (which excludes living organisms found in nature), the UPOV has developed what have been called "obtainer rights" to refer to new vegetal varieties obtained by various means, including crossing or genetic manipulation. Thus, with bilateral treaties, which for the most part also require ratification of the UPOV, farmers find they have lost their fundamental right to keep their seeds or exchange them with other farmers for the next year's crop, if these seeds are protected by registered "obtainers rights".⁷³

E. Privatization of Public Services

The state is the favorite target of the neo-liberal policies implemented just about everywhere in the world over the past three decades and promoted by the international financial institutions (IMF and World Bank). More exactly, what is targeted are prerogatives that until recently were considered sovereign. In fact, according to these two institutions, the state is an obstacle to economic development; hence, it must be "reformed". It is not by chance that, when these institutions impose their conditions (through structural adjustment programs) upon a government, they always aim at weakening it (v. below). Thus, the obsessive slogan of these institutions is "less government". Among these conditions are privatization of public services and the reduction of social expenditures (water, food, health, education, adequate housing, transportation...), the laying off of civil servants, lowering of taxes etc. – in short a drastic shrinking of everything that is necessary for a government to honor its economic, social and cultural obligations. Only one sector is left unscathed: "security". As the UN expert Danilo Türk pointed out in his study on structural adjustments programs:

*"It is noteworthy that one element of national expenditure which is almost invariably not affected by programs of adjustment is military spending. This is in spite of the fact that per capita military expenditure in developing countries is greater than combined expenditure on health and education."*⁷⁴

⁷³ Currently, these agreements are also abused to establish intellectual property rights over essential medicines, which results in violations of the right to health. V. *International, Regional, Subregional and Bilateral Free Trade Agreements, Critical Report N° 7*, Geneva: CETIM, July 2010: www.cetim.ch/en/documents/report-7a.pdf; *The Right to Health*, Geneva: CETIM, September 2006: www.cetim.ch/en/publications_sante-bro4.php; *Développement et santé dans les pays pauvres: le rôle des organisations internationales et de la Suisse*, Centrale Sanitaire Suisse Romande, May 2010.

⁷⁴ V. *Debt and Human Rights*, note 62 and Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Realization of economic, social and cultural rights: Second progress report prepared by Mr. Danilo Türk, Special Rapporteur*, E/CN.4/Sub.2/1991/17, 18 July 1991, § 87, (hard copy only).

Yet, already in 1974, the United Nations General Assembly envisioned the regulation and oversight of the TNCs' activities in these terms:

“All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations: “To prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations; “To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements; “To bring about assistance, transfer of technology and management skills to developing countries on equitable and favorable terms; “To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned; “To promote reinvestment of their profits in developing countries.”⁷⁰

Need one recall that, today, we still do not have a legally binding framework at the international level able to control the activities of transnational corporations that are harmful for human rights? The “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” adopted in 2003 by the former Sub-Commission on the Promotion and Protection of Human Rights are moldering away somewhere in a drawer at the United Nations.⁷¹

D. Intellectual Property⁷²

The World Trade Organization's trade-related aspects of intellectual property rights agreement (TRIPS) is, rightly, much criticized. But there is a series of bilateral agreements on this same issue with provisions that are even more constraining than those of the TRIPS, for which reason they are referred to as “TRIPS-plus”. The TRIPS agreement is criticized for several reasons. For example, it theoretically allows the possibility of excluding living beings from the patent system, yet, although Article 27 § 3, b stipulates that “members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof”, it does not offer any definition of what “an effective sui generis system” might be. This leaves the door open to an extension of the patenting of vegetable varieties.

Most of the bilateral intellectual property agreements oblige ratifying governments to accept the International Union for the Protection of New Varieties of Plants (UPOV), which is not mentioned in the TRIPS. The UPOV was set up under a convention adopted in 1961 whose states parties were, until 1994, only the countries of the North and South Africa. But, since then, the countries of the South

⁷⁰ General Assembly Resolution 3202 (S-VI). *Program of Action on the Establishment of a New International Economic Order*, 1 May 1974, Chapter V, “Regulation and Control over the Activities of Transnational Corporations”: www.un-documents.net/s6r3202.htm

⁷¹ V. note 69.

⁷² V. note 68.

V. CURRENT ISSUES/OBSTACLES TO THE EXERCISE OF THE RIGHT TO SELF-DETERMINATION

As we have already emphasized, it is not possible to dissociate political sovereignty from economic sovereignty. Moreover, “the sovereign equality” of countries at the international level is still not a reality. One notices in this regard a gigantic gap in the exercise of the sovereignty between certain countries. For example, can one compare the ability and means of the United States with those of Haiti or Burkina Faso?

This is why within the framework of this chapter we shall examine the effect of international or transnational corporate economic policies and decisions on the exercise of the right to self-determination. Among these, the most important, in our opinion, are: foreign debt and structural adjustment programs (A); foreign trade and investment (B); the activities of transnational corporations (C); intellectual property rights (D); the privatization of public services (E); the use of mercenaries (F); the exploitation of natural resources, inter alia by land grabbing on a grand scale (G).

The areas mentioned are intimately linked and are part of a conscious policy (called the Washington Consensus or neo-liberal globalization) progressively implemented since the end of the Second World War by certain international powers, with a single goal: the perpetuation of relations of domination between countries and within any given country. In this context, the warning of the UN expert Cristescu, in 1981, is as relevant as ever:

“Whereas colonialism in its traditional meaning is drawing to a close, imperialism, the politics of power and diktats continue to exist and can be maintained in the future under the mask of power relations amounting to neo-colonialism. The exploitation by the colonial powers of the difficulties and the problems that developing or recently decolonized countries affront, the interference in the domestic affairs of these states and the attempts to maintain relations of inequality, especially in the economic sector, constitute serious dangers for the new states. Colonialism, neo-colonialism and imperialism use various procedures to impose their will on independent nations. Pressure and economic domination, interference, racial discrimination, subversion, intervention and the threat of force are the neo-colonial procedures against which the newly independent nations must defend themselves.”⁶¹

⁶¹ V. note 14, § 687.

Most of the seven elements just cited having already been – or are in the process of becoming – the subject of CETIM publications, and given the lack of space, we shall make only brief summaries for some of them.

A. Debt and Structural Adjustment Programs⁶²

The foreign debt of countries, especially in the South, is a real burden and has a major negative effect on almost all aspects of the life of these countries' populations and thus on the exercise of their right to self-determination.

Structural adjustment programs/policies (SAPs) are intimately connected to the question of debt for they were conceived and imposed by the World Bank and the International Monetary Fund upon the countries of the Third World, officially "as a response to imbalances in the economy, particularly deficits in a country's balance of payments",⁶³ following the debt repayment crisis of the beginning of the 1980s.

The contents of the SAPs have never changed, even though their name has been changed repeatedly,⁶⁴ and apply indiscriminately to indebted countries whatever their economic, and social conditions: local currency devaluation, reduction of public expenditures for public services, suppression of price controls, imposition of wage controls, reduction of trade regulation measures and currency controls, privatizations, restrictions on domestic credit, decrease of state intervention in the economy, increase of the export sector, reduction of imports.

Although these last few years the FMI and World Bank have lost their biggest "clients" (Argentina, Brazil and Russia, in particular) and although certain Latin American countries are trying to break their dependence on this pair by creating the Bank of the South,⁶⁵ the role of these financial institutions has been preserved (in keeping with the will of the current great powers and in spite of the recent financial crisis that has shaken the world), and their influence continues to ravage many countries.

For example, Kenya and Zambia devote 40% of their annual budget to service (interest) on their foreign debt.⁶⁶ Leaving aside the political will of the leaders of these countries, how can these states be expected to satisfy the elementary needs of their populations (food, water, adequate housing, health...)? How can they be expected to carry out endogenous development policies? Thus it is today in

⁶² The analyses in this sub-chapter are drawn from *Debt and Human Rights*, Geneva: CETIM, 2007, and *Let's Launch an Enquiry into the Debt! A Manual on How to Organise Audits on Third World Debts*, Geneva: CETIM/CADTM, 2006.

⁶³ *Preliminary set of basic policy guidelines on structural adjustment programs and economic, social and cultural rights, report of the Secretary-General*, E/CN.4/Sub.2/1995/10, 4 July 1995, § 11: [www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1995.10.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1995.10.En?Opendocument)

⁶⁴ E.g. enhanced structural adjustment facility (ESAF), heavily indebted poor countries initiative (HIPC), Strategic Framework for the Fight against Poverty (CSLP – Cadre stratégique de lutte contre la pauvreté) etc.

⁶⁵ Cf. *Banque du Sud et nouvelle crise internationale*, Bruxelles: CADTM/Syllepse, 2008.

⁶⁶ V. CADTM, "Bank of the South. An Alternative to IMF-World Bank", 24 April 2008: www.cadtm.org/Bank-of-the-South-An-Alternative

Greece, too (notwithstanding that Greece is one of the countries of the North!), subjected to the same conditions following its recent financial crisis.⁶⁷

Under such conditions, to speak of national sovereignty, when peoples have no voice in the decisions shaping their future, is nonsense.

B. Foreign Trade and Investment⁶⁸

Currently, a dense web of economic and financial agreements and treaties – international, regional, sub-regional and bilateral – has been put into place. These instruments have supplanted the basic instruments of regional and international human rights law, including the right to self-determination of peoples, and subordinated national constitutions and domestic law intended to promote harmonious national development as well as political, economic, social, cultural and environmental rights.

Relying on the enforcement of provisions such as "most favored nation treatment" and "national treatment", which are incorporated into almost all these treaties, this web of agreements functions like a system of tightly interwoven threads, allowing neo-liberal policies to be imposed at the world-wide level and to penetrate to the heart of countries where they wreck the national economy and generate serious social damage.

In the name of protecting investors from "indirect expropriation" or the loss of "expected earnings", these accords are in the process of subverting the sovereign right of the states parties to establish secondary, wage or social protection policies that investors might consider affecting their "expected earnings", thus constituting "indirect expropriations". In the same vein, with these treaties, governments lose the sovereign right to settle in their national courts any dispute that might occur.

C. Transnational Corporations

For several decades now, transnational corporations (TNCs) have been tightening their hold on the natural resources of the planet, dictating their will to the weakest governments and exploiting peoples. Directly or indirectly, they bear an enormous responsibility for the deterioration of the environment and for the systematic increase in human rights violations, among which violations of the right to self-determination and to sovereignty over natural resources. Able to be everywhere and nowhere, they escape from any democratic and judicial oversight and control.⁶⁹

⁶⁷ V. inter alia: www.cadtm.org/Grece-le-CADTM-condamne-le-plan-d, <http://bruxelles.blogs.liberation.fr/couillisses/2010/05/gr%C3%A8ce-leurozone-et-le-fmi-signe-un-ch%C3%A8que-de-110-milliards-deuros.html>, www.france.attac.org/spip.php?article11325 et www.cadtm.org/Tragedy-popular-explosion

⁶⁸ The analyses of this sub-chapter are drawn from *International, Regional, Sub-Regional and Bilateral Free Trade Agreements*, Critical Report N° 7, Geneva: CETIM, July 2010: www.cetim.ch/en/documents/report-7a.pdf

⁶⁹ V. *Transnational Corporations and Human Rights*, Geneva: CETIM, 2005: www.cetim.ch/en/publications_stn-bro2.php