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Popular sovereignty over natural resources: A critical reappraisal of Leif Wenar's *Blood Oil* from the perspective of international law and justice

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Abstract: The article discusses the concept of popular sovereignty over natural resources and its possible applicability to a broader account of natural resource justice based on a moral interpretation of international law. Leif Wenar's recent proposal to entrench popular resource sovereignty as a counterclaim to illegitimate uses of natural resources by corrupt and authoritarian regimes serves as the starting point for the discussion of the possible meaning of popular resource sovereignty and its role in an account of natural resource justice. Three key aspects of Wenar's conception are in focus: 1) the framing of popular resource sovereignty within the current system of sovereign territoriality, 2) the notion of collective ownership of natural resources as the content of popular resource sovereignty, and 3) civil and political rights as the key set of norms determining the conditions of legitimate exercise of resource sovereignty. The article argues that collective sovereignty claims over natural resources can neither be framed exclusively through boundaries of current sovereign states, nor understood in terms of full and unlimited property rights. Concerning civil and political rights, I argue we need to move past the liberal conception of legitimacy toward a more comprehensive human rights-based conception of justice serving as a standard for assessment of legitimacy of both sovereign and non-sovereign entities which have rights over natural resources.

Keywords: popular sovereignty; human rights; natural resources; self-determination; ownership and property

Whilst popular sovereignty is a concept which has a long tradition in political thought, the idea of popular sovereignty over natural resources has remained relatively unknown within political theory. The idea does

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not follow immediately from the notion of popular sovereignty that the people are the ultimate source of power and that governments are created by and subject to the will of the people. Despite the existing lack of consensus around the meaning or validity of such a connection, could the idea of popular sovereignty nevertheless be used to account for governments' power over territory and natural resources?

Much like other concepts from liberal and republican traditions of modern political thought, popular sovereignty was introduced to articulate a critique of the rule of hereditary monarchs and their claim to absolute sovereignty, asserting instead the people as the real sovereign and ultimate source of political power. Since natural resources have been used in order to wield power and to sustain unjust forms of rule for much of human history, the notion of popular sovereignty over natural resources might thus be able to articulate a critique of the unlimited use or abuse of natural resources by particular rulers. In his recent book *Blood Oil*, Leif Wenar has introduced the concept of popular sovereignty over natural resources with exactly this purpose – in order to develop a counterclaim against forms of power which use natural resources illegitimately and for unjust purposes.[1]

The book represents a substantial extension of an influential article 'Property Rights and the Resource Curse' in which Wenar criticised the international system for enabling the trading of raw materials to be usurped by illegitimate governments or illegal militias.[2] Already in the article, Wenar argued that a country's natural resources belong to its people and that regimes which are not legitimised by the people's consent have no right to sell these natural resources. In the book *Blood Oil*, the principle of collective ownership of natural resources by a country's people becomes the basis for a conception of popular resource sovereignty.

This conception represents an important and novel contribution to the debate on natural resources and justice. Unlike dominant philosophical approaches which defend purely moral rights to natural resources, Wenar opts for a strictly practice-dependent approach.[3] He starts with a recognition that, in the current world, natural resources are more often than not directly

[1] L Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (Oxford University Press, New York, NY, 2016).

[2] L Wenar, 'Property Rights and the Resource Curse' (2008) 36(1) *Philosophy & Public Affairs* 2.

[3] By 'practice-dependence' I mean a methodological tenet of normative theorising which suggests we take existing institutions as a starting point for moral analysis. See A Sangiovanni, 'Justice and the Priority of Politics to Morality' (2007) 16(2) *The Journal of Political Philosophy* 137.

or indirectly related to the perpetration of injustice – authoritarianism, repression, civil conflict, corruption, poverty, and terrorism. At the same time, Wenar accepts the basic institutional structure of the international society of sovereign states and its governance by international law. Reconstructing the moral underpinnings of international law, he then attempts to develop a conception of the just use of natural resources by states and proposes institutional reforms in order to facilitate its implementation.

In what follows, I will assess Wenar's conception of popular sovereignty over natural resources in an affirmative yet critical dialogue, beginning from a perspective which emphasises the moral interpretation of international law. My analysis is driven by an effort to assess the viability of the concept of popular sovereignty over natural resources in light of its capacity to systematically address a broader set of unjust uses of natural resources by states and other entities which might acquire rights over these resources (corporations, for example). After providing a brief summary of Wenar's argument, I will focus on three key aspects: 1) the framing of popular resource sovereignty within the current system of sovereign territoriality, 2) the notion of collective ownership of natural resources as the fundamental meaning of popular resource sovereignty, and 3) civil and political human rights as the key set of norms determining the permissible scope of resource sovereignty and the conditions of its legitimate exercise.

In relation to the framing of resource sovereignty, I will show that a conception of popular sovereignty over natural resources which is based on the principle of self-determination in international law, and the political geography of sovereign states which has resulted from it, misframes many legitimate and compelling collective claims to sovereignty over natural resources. In relation to the meaning of popular resource sovereignty, I will defend a historicised interpretation of national ownership of natural resources in terms of a) a right of immunity against dispossession and b) the importance of limited collective ownership as a prerequisite of national development; and I will argue for the necessity of distinguishing these senses of ownership from a full bundle of liberal property rights. Lastly, I will focus on Wenar's argument that the protection of civil and political rights by the state represents the appropriate embodiment of popular resource sovereignty. I will argue that instead of a liberal conception of political legitimacy, we should opt for a broader human rights-based conception of justice which can serve as the basis for assessments of the legitimacy of the exercise of resource rights by sovereign and non-sovereign entities. Such a conception, however, renders popular sovereignty over resources a redundant notion.

I. Popular sovereignty over natural resources and the resource curse

The starting point for Wenar's conception of popular sovereignty over natural resources is the international legal principle of sovereignty over natural resources. The dominant legal understanding of sovereignty, Wenar argues, fails to take into account what can perhaps be called the dual nature of modern sovereignty – namely the existence of a state with supreme jurisdictional authority within a territory on the one hand and the people of this state who are the ultimate moral foundation of its authority on the other.[4] In a world in which statehood has become a universal form of political organisation, states have become the prominent legal holders of sovereign rights. Regardless of the constitutionality and legitimacy of their regime, states are endowed with an equal set of powers, prerogatives, and immunities which are recognised and protected by international law – most importantly the right to make and enforce laws within a territorial jurisdiction, the right to territorial integrity and non-intervention in their domestic affairs, and sovereignty over their own natural resources.

In the current world, there are many resource-rich states whose governments are unconstitutional, systematically violate human rights, and use resources for the private benefit of the ruling elite or for the perpetration of injustice, either domestically or across borders. In these states, the people are not only excluded from the benefits of possessing natural resources within their territories, in most cases they are also 'cursed' by authoritarianism, violence, and terrorism funded by these resources.[5] According to Wenar, the key to correcting this type of injustice is to recognise the existence of popular sovereignty over natural resources and its moral primacy over state-level resource sovereignty and, at the same time, to define what kind of relationship there has to be between the people and the government so that popular sovereignty over resources is embodied in decisions about resources made by a state. Consolidating and entrenching the resource sovereignty of the people appears to be especially important in order to change the rules of international trade which have so far enabled illegitimate and injustice-perpetrating sovereigns to sell natural resources (and purchasers to claim valid title to what are in essence 'stolen goods') and thus to continue perpetrating injustice.[6]

In order to develop the concept of popular sovereignty over natural resources, Wenar relies on a moral interpretation of current international law and the fact that it no longer recognises the principle of 'effectiveness' – a

[4] See (n 1) 210–17.

[5] ML Ross, 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases' (2004) 58(1) *International Organization* 35.

[6] See (n 2) 3.

traditional principle according to which any entity capable of an effective control over the population and the territory is recognised as a sovereign state with all legal powers and prerogatives. In a similar manner to some recent justice-based interpretations of international law,[7] Wenar emphasises human rights as the very core of international law, as they are able to provide a set of principles that define the permissible scope of state power and the conditions for the legitimacy of its exercise. Human rights need to be linked to other foundational norms of international law – the right to collective self-determination and the sovereignty over natural resources which emerges as its corollary. Together, Wenar suggests, these norms give meaning to popular sovereignty over natural resources and to its two key principles – *ownership* and *authorisation*. Ownership means that all of a territory's natural resources are a property originally vested in the people. Following from ownership, authorisation then implies the right to collectively authorise property laws and other decisions over resources.[8]

Both ownership and authorisation are defining features of popular sovereignty over natural resources, determining the permissible scope of state-level sovereign rights in relation to the management of natural resources within territories. According to Wenar, the principles of ownership and authorisation ought to be translated into four political conditions for the legitimate exercise of state power over resources – information (access to information about the use of resources), independence (the autonomy of the people and their freedom from manipulation and propaganda), deliberation (the possibility for free discussion of policies), and dissent (the possibility of expressing opinion in ways that have an impact on state policies). In yet more concrete political terms, these conditions require that citizens must have at least bare-bones civil liberties and political rights. The absence of civil liberties and political rights means no authorisation is given by the people, and hence resource sovereignty is exercised illegally by a state. This special category of human rights is, according to Wenar, non-negotiable and is to be prioritised over other categories of rights.[9]

As is repeatedly articulated throughout Wenar's book, this conception of popular sovereignty over natural resources is meant to serve as a counterclaim against authoritarian and corrupt regimes which use resources for unjust purposes – funding authoritarian rule, violence, and terrorism.

[7] Allen Buchanan has become a vocal advocate of the view that justice, understood essentially as human rights, is the moral foundation of the current international legal order. A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, New York, NY, 2004) 4.

[8] See (n 1) 170–80, 190–207.

[9] See (n 1) 235–8.

I agree with Wenar that this is an issue of justice which is both severe and urgent; and I also hold that the wholesale neglect of this issue within the flourishing debate on natural resources in the philosophy of justice is hardly justifiable. Rather than coming up with a purely moral argument regarding the redistribution of natural resources in an ideal world it is necessary to formulate a plausible counterclaim to grave abuses of natural resources and thereby also to specify the conditions and requirements for the legitimate exercise of state power over natural resources.

However, in an attempt to address the specific issues associated with the resource curse, Wenar defines his conception of popular sovereignty by utilising specific views regarding its frame, its content, and its scope. In order to support these views, he invokes international law, its fundamental principles and the linkages between these principles. First, Wenar assumes the existence of a close, mutually reinforcing link between the right to collective self-determination and the collective ownership of natural resources. Second, he assumes a territorial overlap between these two rights and the current political geography of sovereign states, i.e. that self-determining collectives are the same collectives who 'own' natural resources and that these collectives are defined by state borders. Finally, he assumes a connection between collective self-determination and human rights, as well the priority of civil and political rights over other categories of human rights.

These links might very well exist, and it is definitely plausible to attempt to reconstruct them within international law and to use them for a normative conception of natural resource justice. However, a more elaborate analysis of international law than Wenar provides in his book is necessary. First of all, such an analysis should be sensitive to the political contexts in which these norms were established, carefully reconstructing their meaning and connections. Secondly, an argument about the continuing relevance of these principles is necessary, as well as some reflection on the ways in which circumstances are changing, the impact of this on the content of the principles at stake, and the recognition of possible limits to their applicability within different contexts. In this critical reflection, debates on natural resources in political theory, philosophy of justice and international law ought not to be completely ignored.

Only after such a critical analysis, the preliminary contours of which I will suggest here, can we assess whether the notion of popular resource sovereignty could become a valid conceptual tool instrumental for the systematic critique of broader injustices related to states' abuse of their sovereignty over natural resources. Let me first address Wenar's claim that the natural resources of a country belong to that country's people, in other words his framing of popular resource sovereignty through the system of sovereign territoriality.

II. Whose popular sovereignty and whose resource rights?

In Wenar's conception, the people who are the holders of popular resource sovereignty are unambiguously assumed to be the people of existing countries. Their popular resource sovereignty is derived from their possession of the collective right to self-determination which implies sovereignty over natural resources as its corollary according to current international law. To see whether this collective 'twin right' can ground the conception of popular resource sovereignty as held by a country's people requires a more systematic inquiry into its exact meaning which cannot be made without a historical reconstruction of the specific historical and political context in which it became established. Such a reconstruction reveals, however, that the framing of popular resource sovereignty through the system of sovereign territoriality is contentious.

The system of sovereign territorial rights to natural resources in which collective rights to natural resources belong to states and their people was established in the post-WW II period. It is an outcome of a political process of international law-making that was tied closely to the process of decolonisation. The creation of this system was a key instrument in efforts to end the practice of colonial and contractual dispossession of natural resources and to secure a right to the economic benefits arising from the exploitation of natural resources for the people of developing and newly-independent states. National ownership of natural resources – legalised by international law, institutionalised in sovereign statehood, and subsequently endowed with a redefined set of rights, prerogatives, immunities, and moral duties such as the protection of human rights – was understood unanimously as a bulwark against imperial political and economic powers and against the kind of onerous and inequitable contractual arrangements imposed during the colonial era.[10]

To play this pivotal role in correcting the injustices of colonialism, sovereignty over natural resources was made the corollary of the right to self-determination – the fundamental collective right granted to all peoples, nations, and states equally by international law. There are two main reasons why these two rights have been seen as inextricably connected. First, foreign appropriation and private ownership of land or natural resources as well as the continuous exploitation of natural resources by foreign states or corporations were seen as profoundly unjust and incompatible with the political self-determination of a collective and its independence. Second, there was a shared view that natural resources are

[10] For an account of the emergence of this consensus among states, see N Schrijver, *Sovereignty over Natural Resources* (Cambridge University Press, New York, NY, 1997) 33–81.

a crucial instrumental for economic development and domestic social justice, the achievement of which significantly reinforces political independence.[11]

The right to self-determination has arguably been one of the most important and consequential moral principles of international law as it has been used as a justification for the most profound political realignments of the international order in modern history, bringing about the global standardisation of the system of sovereign states.[12] While its legal validity and moral and political importance in this context are beyond doubt, it needs to be made clear that there have been a number of controversies surrounding this right ever since its introduction into international law. One of the most pressing issues has concerned the question as to who exactly is the subject of self-determination, i.e. who are the people who have the right to self-determination.[13]

In the period during World War I, the moral principle of self-determination was invoked to express the aspirations of ethnically defined groups and minorities for nationhood and statehood. In the process of post-WWI realignment, this ethno-nationalist aspiration to self-determination was subordinated to other concerns and geopolitical interests (peace treaties, recognition of the territorial gains of victorious powers etc.). The notion that ethnically defined nations have the right to self-determination was further undermined by the savagery of Nazi attempts to create an ethnically homogeneous Germany. After 1945, the principle of self-determination had to be fully reconstituted and given a new set of meanings.[14] These meanings were shaped by the process of decolonisation, the key legal and political basis of which was the right to self-determination, in particular, the reinvention of who is the holder of this right.

In all international legal documents relevant to decolonisation, there are references to 'all people' as the holders of the right to self-determination.[15]

[11] N Schrijver, 'Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources' in N Schrijver (ed), *Realizing the Right to Development* (United Nations Publication, New York, NY, 2013).

[12] For this point, see C Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge University Press, Cambridge, 2013) 2.

[13] Other issues concerned what kind of independence satisfies self-determination, whether the principle requires the creation of an independent government and whether the government should be representative and democratic. See A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) 141–58.

[14] See (n 12) 169–70.

[15] These include The Declaration on the Granting of Independence to Colonial Countries and Peoples, The Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, and both human rights Covenants.

But not all peoples have had the right to self-determination. The term 'peoples' did not refer to ethnic minorities within existing states or within decolonising territories or to indigenous peoples. The post-1945 right to self-determination was granted specifically to 'colonised peoples', who were mostly multiethnic or multi-religious entities defined essentially by their subjection to territorial domination by a foreign colonising power. Territorial domination rather than substantive collective identity determined both boundaries and political identity. These 'peoples' became prominent holders of the right to self-determination which, moreover, was understood to be uniquely fulfilled by independence and sovereign statehood.

An approach to the definition of groups entitled to self-determination based on patterns of territorial domination was justified on instrumental grounds and with reference to peace as the ultimate goal of the newly established international order. It resulted from a shared opposition to border revisionism and the insight that border disputes are the major cause of armed conflict and are associated with an increased frequency and intensity of war.[16] This is one of the reasons why decolonisation relied on the principle of *uti possidetis juris* which required that newly formed states accept the boundaries inherited from the previous governing power over and above any aspirations of ethnic groups within those boundaries. Although an outcome of political consensus and negotiation, the post-war process of decolonisation, underpinned by the universalisation of the equal right to self-determination, thus resulted in a political geography in which the borders of sovereign states fail to map onto people's substantive collective identities but nevertheless frame collective rights to self-determination and sovereignty over natural resources.

The right to self-determination after colonisation and within states

In the current international system, sovereign states and their territories circumscribe the right to self-determination and sovereignty over natural resources. The citizens of individual countries are therefore the main groups in possession of these two fundamental collective rights. This sovereign territorial approach to self-determination has always had critics – even amongst the international legal community – who have pointed out necessary inconsistencies in its application and various troubling consequences, most importantly its failure to deal with the situation of minorities trapped in both old and newly created states.[17] Political theorists

[16] See M Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55(2) *International Organization* 215.

[17] H Hannum, 'Rethinking Self-Determination' (1993) 34(1) *Virginia Journal of International Law* 1.

have, of course, long questioned whether sovereign territoriality is an appropriate frame for the legitimation of claims to collective self-determination and rights over territory and resources. While some have defended, on various moral grounds, the rights of collectives and other non-state groups to self-determination and secession,[18] or to self-determination and resource rights,[19] others have rejected sovereign territoriality outright as a principle which fundamentally undermines the demands of global or international distributive justice.[20]

I do not intend to argue here that all substantive collective identities are entitled to self-determination and hence to territorial and resource rights. Nor do I mean to suggest that the boundaries of sovereign states in the contemporary international system are unjust or that they have no role to play in a system of natural resource justice. The international system of sovereign states is justifiable on both moral and instrumental grounds and the borders of sovereign states are valid determinants of collective rights. I argue, however, that self-determination and especially sovereignty over natural resources cannot be understood to be held by a country's people in an exclusive, monistic, or territorially continuous sense. Their self-determination and sovereignty over resources can be challenged by the valid claims of other groups (either within or beyond territorial borders) to sovereignty over natural resources which may or may not result from their claims to self-determination. The misrecognition of these claims results in an exercise of state sovereignty over natural resources which is as unjust as the exclusion of the whole population from the benefits of resource use and which undermines the goals used to justify the institution of collective resource sovereignty in the first place – self-determination, poverty alleviation, and economic development.

Indigenous groups are an obvious case in point. Indigenous peoples constitute approximately 5 per cent of the world's population but are spread across 90 countries around the world. They make up 15 per cent of its poor and one third of its extremely poor rural people. Moreover, they occupy 20 per cent of the earth's territory, much of which is crucial for

[18] CH Wellman, *A Theory of Secession: The Case for Political Self-Determination* (Cambridge University Press, Cambridge, 2005).

[19] The most prominent recent defenders of a moral right of self-determination (and resource rights as its corollary) for groups which are not sovereign nations include M Moore, *A Political Theory of Territory* (Oxford University Press, New York, NY, 2015) and C Nine, *Global Justice and Territory* (Oxford University Press, New York, NY, 2012).

[20] Beitz argued that the location and framing of collectives vis-à-vis unequally distributed and undeserved natural resources is arbitrary from a moral point of view. Therefore, natural resource endowments should be redistributed according to a global redistribution principle which would give each society a fair share of natural resources. C Beitz, *Political Theory and International Relations* (Princeton University Press, Princeton, NJ, 1979) 141, 292.

biodiversity conservation, climate change adaptation, and ecosystem management.[21] Their plight – poverty and long-term discrimination, dispossession, and exclusion – is not dissimilar to the plight of the people of Equatorial Guinea that Wenar places at the centre of his critique of the abuse of natural resources by corrupt and dictatorial states. At the same time, the solution to their problem requires more than democracy and human rights and depends crucially on the recognition of these sub-state collective claims to resources and hence on the disestablishment of a monistic popular sovereignty claim by a country's people as a whole.

As has been widely recognised, indigenous groups' collective identity is not only derived from substantive cultural features (language, ethnicity, or religion) as in the case of conventional minorities, but also from particular spiritual, physical or economic relationships with a specific territory and with the natural world in general. Indigenous people are defined, first and foremost, by specific economic and social practices and customs (customary land tenure regimes, forest rights, subsistence practices, and long-term possession of ancestral territories) the pursuit of which depends on their territorial and ownership rights to natural resources and the natural environment. They depend on almost the complete bundle of rights inherent in sovereignty over natural resources such as the right to own, use, manage, develop, and control these resources and regulate their uses by others.[22] These powers and immunities are crucial for the maintenance of their identity and self-understanding as distinct peoples and a prerequisite of their survival as a group. They have to be granted to indigenous people on the basis of their importance for indigenous identity and because their exercise had been severely limited by the arbitrary distribution of territorial sovereignty initiated by colonisation.[23]

[21] B Feiring, *Indigenous Peoples' Rights to Lands, Territories, and Resources* (International Land Coalition, Rome, 2013) 11, available at <http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf>.

[22] See E-I Daes, 'Indigenous Peoples' Permanent Sovereignty over Natural Resources' Final report of the Special Rapporteur to the Commission on Human Rights, E/CN.4/Sub.2/2004/30 (13 July 2004) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/149/26/PDF/G0414926.pdf?OpenElement>.

[23] Macklem argues that indigenous rights have to be internationally legally recognised by international law as distinct from more generic human rights (minority rights and rights to cultural protection as well as civil, political, and social rights) because they mitigate adverse consequences of the arbitrary distribution of territorial sovereignty initiated by colonisation – the distribution which not only excluded indigenous groups from participating in the distribution of sovereign power, but which also authorised legal actors to whom it distributed sovereign power – states – to exercise such power over indigenous peoples to their detriment. P Macklem, *The Sovereignty of Human Rights* (Oxford University Press, New York, NY, 2015) 161.

Indigenous rights and resource claims have been increasingly recognised in international law and in the courts.[24] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) lists a number of rights – it declares explicitly that indigenous peoples have the right to self-determination, to autonomy and self-government, and to maintaining their distinct social and cultural institutions and religious practices. It also places states under a duty to obtain free, prior, and informed consent from indigenous groups in relation to any action which might affect their lands, territories, and resources.[25] The Inter-American Court of Human Rights has recently adjudicated cases which explicitly recognised the rights of indigenous communities to ownership of natural resources traditionally used within their territories and the unequivocal duty of the state to acquire the free, prior and informed consent of these populations concerning projects on their lands.[26]

Despite this progress in international law, states continue to disrespect indigenous peoples' rights to own, use, control, and manage their lands, territories, and resources, either by manipulating their consent, by claiming subsoil rights to mineral resources, or by exercising their powers of eminent domain to take natural resources for public use. In many cases, states' use of resources relies on their claim to popular sovereignty – appealing either to the authority of a democratically elected government, the majority's economic interest, or to national economic development and the alleviation of debt or poverty. The decision to route the Dakota Access Pipeline through the treaty lands and ancestral territories of the Standing Rock Sioux Reservation or the setting up of renewable energy projects and mineral extraction sites in territories belonging to the Sami people in Northern Europe are just a few recent examples of the misrecognition of indigenous resource sovereignty by democratic and, by-and-large, human rights-respecting regimes.

The plight of indigenous peoples is structurally equivalent to the plight of the people of Saudi Arabia, Nigeria, or Equatorial Guinea – as collectives

[24] The key international instruments that define indigenous peoples' rights are the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries from 1989 (ILO Convention No 169) and the United Nations Declaration of Rights of Indigenous People from 2007. For an account of the process of international recognition of indigenous rights see (n 23) 133–62.

[25] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295, 46 ILM 1013 (13 September 2007). Available at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[26] The case of *Saramaka People v Suriname* (2007) is crucial in this respect. For a detailed analysis of this case from the perspective of the relationship between indigenous rights and the changed scope of state sovereignty, see E Fox-Decent and I Dahlman, 'Sovereignty as Trusteeship and Indigenous People' (2005) 16(2) *Theoretical Inquiries in Law* 507.

they are unjustly harmed by state misuse of natural resources. Whereas in the case of these countries the remedy is the implementation of representative government and politically legitimate processes of decision-making about natural resources, in the case of indigenous peoples the remedy is the recognition of and respect for their territorial and resource rights and the devolution of resource sovereignty from the state. A parallel can then be made between the claims of indigenous groups to territory and resources and the distributive claims of groups sharing a trans-boundary resource domain or the claims upon humanity to preserve biodiversity and other ecological services provided by resource domains located on state territory. All of these claims represent compelling demands for justice in the contemporary world – demands for equitable distribution, for inclusion within the pool of users, for equal opportunity to use resources, for access to basic resources, for fairness of burden-distribution, for sustainable use of environmentally valuable resources – and all of them have to be brought to bear when conceptualising the just exercise of sovereign power over natural resources or the permissible scope of state rights. A failure to recognise these intrastate resource sovereignties and other resource claims opens a space for the unjust use of natural resources by states even when they are otherwise democratic and respect human rights.

If such a conception is a goal – and it ought to be – we need to problematise the framing of popular resource sovereignty in contemporary systems of sovereign territoriality as well as the notion that resource sovereignty belongs exclusively to a country's people. The people, as framed in current systems of countryhood and sovereign statehood, are not substantively unified collectives with a unitary interest in using resources in a certain way. While it is possible to consider a country's people as a single collective sovereign which is the moral foundation and ultimate source of the state's power, it is far from clear whether we can confer from this notion that this collective is privileged to hold an exclusive and monistic territorial popular sovereignty over natural resources which excludes other claimants from asserting their legitimate claims. The state's authority over persons has a moral foundation in self-government, democratic approval and the protection of human rights. However, legitimate authority over natural resources does not have to have the same moral foundations. As indigenous rights demonstrate, it might be derived from collective attachment, the role it plays in subsistence practices, or from the necessity of correcting historical injustice of territorial domination and dispossession. Sovereignty over natural resources cannot be seen as fully homologous with the popular sovereignty of a pluralistic citizen body. Such a view undermines the possibility of conceptualising and critiquing a broader range of injustices perpetrated by states.

III. Collective ownership of natural resources versus liberal property rights

Let me now turn to the definition of popular sovereignty over resources which Wenar identifies with the collective *ownership* of natural resources by the people. In the book, Wenar repeatedly asserts that all of a territory's natural resources are 'the property originally vested in the people' and that a sovereign people have 'original property rights' over natural resources.[27] In his view, it is a 'natural assumption' that a sovereign people have original ownership of their country's resources, that these resources are the people's 'birthright', and that the people's government ought to manage those resources for them.[28] What follows from such original ownership, according to Wenar, is that the people have jurisdictional rights over themselves, territory, and resources. The core tenet of these jurisdictional rights over resources is that the people can freely dispose of these resources, utilise them fully and freely, create 'any property rights they choose' over the resources or authorise property laws and other decisions over resources.[29]

Let me first point out that Wenar's discussion regarding popular ownership of resources mistakenly lumps together property, ownership, and jurisdictional rights. There are important conceptual and institutional differences between these categories. While ownership and property are terms often used interchangeably, ownership rights and jurisdictional rights over natural resources need to be clearly distinguished from one another. In the current system of international law, both are general collective rights over resources in a broad sense of the term – natural space and territory. However, they reflect the duality of sovereignty over natural resources which stems from the fact that international law accords sovereignty over natural resources both to states and to peoples and nations.[30] This duality can be translated into the following distinction: the *ownership* right to natural resources is held by the peoples and the *jurisdictional* right to natural resources is held by the state.[31]

[27] See (n 1) 203.

[28] See (n 1) 203–4.

[29] See (n 1) 202–3, 206.

[30] The Declaration on Permanent Sovereignty recognises that it is 'the inalienable right of all states to freely dispose of their natural wealth and resources' in the preamble and that '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 wellbeing of the people of the State concerned' in the first article. Permanent Sovereignty over Natural Resources, GA Res 1803 UN Doc A/5217 (14 December 1962). Available at <http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf>.

[31] This distinction can be considered akin to the distinction between legal ownership and beneficial ownership known in common trust law. In common law of trust, the legal owner is not the true owner of the property and holds the legal title for the beneficial owner who is the 'real' property owner entitled to receive benefits from the property and make decisions with respect to all aspects of the property.

This difference, I argue, is a meaningful way to capture two facets of collective rights over natural resources in the current system of international law. The jurisdictional rights of states are a bundle of powers, privileges, and immunities which are relatively clearly defined in international law. According to Nico Schrijver's summary, they include the right to freely determine and control the use of natural resources (which include exploration, exploitation, and use), the right to enter into agreements with other states and non-state entities, and the right to regulate foreign investment (the right to regulate foreign investment, to exercise authority over it, and, most importantly, the right to expropriate or nationalise foreign investment).[32] This set of legal powers, which comprises the jurisdictional rights of states to natural resources, reflects the core tenet of the system, namely that states have the right to use freely and fully their natural resources within their territorial boundaries. This fundamental tenet can be seen as being implied in the right to self-determination and it can be referred to as the ownership of natural resources by a self-determining people.

To be clear, there is no mention of ownership of natural resources by the people in any of the relevant international law documents legalising resource rights, except, curiously, in the Declaration on the Rights of Indigenous Peoples (UNDRIP) which recognises the collective ownership rights of these specific groups.[33] As I suggested, it is nevertheless possible to derive collective ownership of natural resources from the right to self-determination. However, this ownership right cannot easily be defined as a set of legal powers or prerogatives. It can be interpreted as providing access to the moral foundation and justification of jurisdictional rights of states to natural resources. While ownership rights to natural resources express the identity of the ultimate holder of this right and on what grounds, jurisdictional rights belonging to states represent an actionable embodiment and institutionalised bundle of this right. A state's jurisdictional rights to natural resources, in other words, 'translate' the collective ownership

[32] See (n 10) 260–305.

[33] Art 26 of UNDRIP states that 'indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and that 'indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use'. The United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 UN Doc A/RES/61/295, 46 ILM 1013 (13 September 2007) available at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. Relying on the art 21 of the American Convention on Human Rights (which establishes a right to use and enjoy property), the Inter-American Court of Human Rights has in its several decisions recognised that indigenous communities have the right to ownership of natural resources within their territories. For an overview, see (n 26) 523–6.

right held by a self-determining people into a set of legal powers, immunities, and prerogatives which are protected by international law.

It is beyond doubt that the jurisdictional rights of states to natural resources have this explicit moral foundation in the collective rights of the people to self-determination and ownership of natural resources. The question remains as to whether it is meaningful to refer to this moral foundation in terms of ownership and whether it is plausible to interpret it, as Wenar does, in the sense of original property rights vested in a country's people with relatively few imposed limits. Moreover, the question is whether (and in what way) ownership can be a prerequisite for the authorisation of the decisions about resources made by the state. In what follows, I will suggest that ownership remains an important moral principle protecting the integrity of territorial natural resources and the limited decisional autonomy of a collective over them. However, collective ownership of natural resources ought to be distinguished from a liberal model of property and carefully structured so as to be able to accommodate a range of legitimate entitlements to resources. In this way it can thus become a part of a comprehensive conception of natural resource justice.

Critique of property

Ownership, as Waldron rightly points out, is a notion beset with definitional difficulties.[34] There is no widely-accepted distinction between property and ownership and there is no accepted definition of the ownership of natural resources. I propose that we speak about ownership with regard to natural resources and distinguish between the following general types of ownership – private ownership, common ownership, and collective ownership. While private ownership is a regime in which particular resources are assigned to particular individuals who have decisional authority over them, common ownership is a regime, the purpose of which is to make resources available for use by all or any members of the society or, as Risse has put it, which makes it possible for co-owners to have equal opportunity to use the resources.[35] A collective ownership regime is different from common ownership and shares important features with a private ownership regime. Even if the collective is large, it

[34] J Waldron, 'Property and Ownership' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016 edn) available at <https://plato.stanford.edu/archives/win2016/entries/property/>.

[35] Risse distinguishes no ownership, joint ownership, common ownership, and private ownership. Common ownership is a right to use something without a right to exclude other co-owners. Its core idea is that all co-owners have equal status and ought to have an equal opportunity to use collectively owned resources to satisfy their basic needs. M Risse, *On Global Justice* (Princeton University Press, Princeton, NJ, 2012) 112.

still exists as a particular collective clearly distinguishable from other collectives and it can permissibly exclude other collectives from ownership. Moreover, it is a key demand of its collective autonomy that the collective decides on the use of resources in its own particular self-interest. Collective ownership might thus ascribe collective agents rights structurally similar to private property rights – the free use of resources for the sole benefit of the owner, decisional autonomy in the name of individual or collective self-interest, and the right to exclude others from the use, the right to transfer the title of, contract out, or derive income from the owned good.

The collective right to natural resources held by self-determining peoples as it exists in current international law – and which Wenar interprets as a property right held by the country's people – falls under the category of collective ownership. The particular features of this type of regime are the reason why egalitarian philosophy of justice repudiated this type of regime over natural resources.[36] At the heart of the critique is a legitimate objection that a collective ownership regime over natural resources can approximate a liberal private property regime and its typical features – the autonomy to decide in narrow self-interest, the right to exclude others from the use, and the unlimited right to use and control a given good, including the right to sell or otherwise gain income from it – in other words, to commodify it.[37] Since the full bundle of rights associated with liberal private property is usually not regulated by or reshaped for distributive purposes, this model is rightfully considered to conflict with the goals of justice and equality.

Wenar is right to refuse 'speculative proposals to further global justice', especially when they categorically reject the current international system of states and the international laws governing it.[38] But his defence of 'the people's original property rights' still needs to respond to queries about potentially unjust implications of an ownership regime akin to liberal private property and he ought to suggest how it meets the distributive demands inherent in a broader notion of natural resource justice. If a more comprehensive notion of natural resource justice aiming to subject states to more stringent limits and conditions regarding exercise of their sovereign powers over resources is the goal, then the notion of collective ownership

[36] For the most recent argument against framing resource rights within the current system of sovereign territoriality and on the basis of claims to self-determination, see C Armstrong, *Justice and Natural Resources* (Oxford University Press, New York, NY, 2017) 132–49. Armstrong argues that sovereign territoriality as a way of framing of rights to natural resources undermines the egalitarian distribution of benefits and burdens flowing from natural resources.

[37] John Christman called it 'private liberal ownership' or 'sovereignty model of ownership'. J Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (Oxford University Press, New York, NY, 1994) 7.

[38] See (n 1) 207.

of natural resources needs to be structured in such a way so as to be able to accommodate the legitimate claims of outsiders to natural resources. In other words, it needs to specify carefully its structure with regard to the rights, liberties, powers, and immunities it confers. To arrive at a plausible notion of collective ownership of natural resources, let me explore two meanings of ownership which can be derived from international law – ownership as the immunity right against forms of dispossession or unjust appropriation of resources and ownership as a prerequisite for the fulfilment of substantive distributive aims.

Ownership as immunity right against dispossession

The interpretation of collective ownership of natural resources as a right of immunity against dispossession and legal protection against fraudulent or inequitable contracts can be traced back to the very inception of the principle of permanent sovereignty over natural resources. As Schrijver shows, the context in which the claim to permanent sovereignty over natural resources was most strongly asserted concerned the system of foreign investment and contractual and private property rights to natural resources established during colonialism. New and developing countries campaigned for the annulment or the alteration of inequitable contractual arrangements imposed (often under the threat of force) by companies or colonial states prior to the process of decolonisation. Companies and colonial states insisted that their contractual rights to natural resources acquired during the colonial period continued after the independence of formerly colonised nations.[39]

Claims to national ownership of natural resources and their legalisation as the international legal principle of permanent sovereignty over natural resources gave states a legal tool to disestablish these contracts and the property rights they conferred. As a result, a set of very concrete rights emerged in the context of the regulation of foreign investment, most importantly the right to regulate foreign investment according to domestic law and the right to expropriate or nationalise foreign investment. From this point on, the right to enter into agreements and contracts with other states or non-state entities has been underpinned by a shared view that states can never lose their legal capacity to reacquire natural resources whatever arrangements have been made. As Schrijver put it, the inalienable and permanent character of sovereignty over natural resources has meant

[39] The colonial system of foreign investment had in essence been a system of non-reciprocal, ex-territorial rights and privileges granted to 'investors' who made natural resources private property and required that they and their property would remain under the jurisdiction of their home state. See (n 10) 174.

that the right to dispose freely of natural wealth and resources can always be regained – unilaterally if necessary – notwithstanding contractual obligations.[40]

In this context, sovereignty over natural resources can be interpreted in terms of the public ownership of natural resources by a collective. But rather than implying the full bundle of rights commonly associated with private or collective property regime – free use for the sole benefit of the owner, absolute decisional autonomy, the right to exclude others from the use, the right to transfer title, contract out, or derive income from the owned good – it means, first and foremost, that there can be no more extraterritorial permanent private property rights with exactly these kinds of powers over natural resources, and that contracts granting such unlimited powers can be revoked. In other words, ownership of natural resources is an immunity right against dispossession, inequitable exploitation, unilateral appropriation, and property claims based on fraudulent or manipulative contracts. This is precisely the reason why natural resources have been entrenched in many national constitutions, most of which explicitly state that natural resources are under the ownership of the country's people.[41]

The continuous relevance of the availability of a legal instrument against dispossession can hardly be disputed. In the current context of growing scarcity of resources, their depletability, the technological ability to increase profit, and pressures to liberalise the foreign investment regime, dispossession of natural resources via inequitable contracts is as great a risk as ever. The risk of contractual dispossession does not arise prominently in the relation between the people and their illegitimate and corrupt governments and does not relate exclusively to a government's usurpation of resources for the private benefit of the ruling elite – the issue Wenar puts at the centre of his critique. It arises more frequently in relations between developing countries and multinational corporations, private investors, or state-owned companies and refers to cases when a government surrenders control over its natural resources to another state or foreign company without ensuring that the country where the resources are located is the beneficiary of such arrangements. The natural resources deals put in place between African countries and China as well as with other developed countries (in many cases rightfully criticised as neo-imperialist resource grabs) are cases in point.

This understanding of public ownership of natural resources by a collective imposes limits on state power over natural resources. However, Wenar's emphasis on authorisation and consent regarding governments'

[40] See (n 10) 263.

[41] Constitutions with these provisions include Angola, Vietnam, Iraq and many more. See (n 1) 194.

decisions about natural resources is not the core of this notion. Rather, it articulates a standing demand on states to respect collective ownership, to make sure the population enjoys the benefits arising from the resource use or its sale and that the people are the beneficiaries of resource deals with other states or companies. Rather than putting authorisation and consent at the centre of a conception of what it means to have legitimate, public ownership regarding decisions over resources by a state, it calls for the specification of natural resource governance principles which correspond to the principle of public collective ownership. These principles do include the accountability and transparency of governmental decisions but also involve strict regulatory rules regarding exploration, licensing, bidding, tax regimes, royalties, rules of extraction and the mitigation of environmental and social costs.[42]

Ownership as a precondition of national development and domestic distributive justice

There is another meaning of collective ownership of natural resources which can plausibly be extracted from within international law. This meaning follows from the justification of collective sovereignty over natural resources as a necessary prerequisite for the fulfilment of certain important substantive ends – national development and social and economic welfare. The interpretation of collective rights to natural resources in terms of collective ownership is thus derived from the recognition of the important contribution that the institution of ownership makes to the fulfilment of these important social ends.

As in the previous case, this interpretation can be traced to the origins of the system of sovereign territorial rights to natural resources and its justification in its ability to reinforce the economic development of newly emerging and developing states, based on the view that economic development and domestic social justice boost political independence. The existence of these goals can be demonstrated with reference to international legal documents which include demands that states exploit their natural resources for national social and economic development, economic independence, and the benefit and well-being of their people.[43] Considering the common origins of the right to self-determination, sovereignty over

[42] *Natural Resource Charter* (2nd edn, Natural Resource Governance Institute, 2014) available at <https://resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf>.

[43] The Resolution on Permanent Sovereignty recognises in its very first article that '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'.

natural resources, and the emerging international legal system of human rights, it is also possible to interpret these aims and goals in terms of the fulfilment of human rights, especially social and economic human rights.

The basic needs thesis held by some philosophers can be invoked in defence of this interpretation of collective ownership of natural resources and its inherency in sovereignty over natural resources. Cara Nine, for example, has argued that resource rights are to be understood as a comprehensive set of jurisdictional and ownership rights held by a collective within a territory, including both the right to make rules concerning property rights over resources and rights concerning the management of resources such as the right to extract or sell.[44] These rights are justified by the importance that a group's geographical surroundings, territory, and resources have for most aspects of their members' lives; and they can be said to have a coherent normative foundation in being an indispensable condition for the establishment of justice for geographically situated groups. The most important element of the establishment of justice is to secure the basic needs of group members.

Recognising both jurisdictional and ownership rights as two fundamental facets of collective rights to resources, Nine at the same time asserts that while jurisdictional rights over resources cannot be subject to global redistribution, collective ownership rights can be subject to global or international redistribution, especially when full ownership rights are not necessary for a collective to meet the basic needs of its members. Collective ownership rights to resources cannot be full and absolute; they are subject to global circumstances and the needs of individuals worldwide, especially persons who do not have secure access to resources for the satisfaction of their basic needs.[45]

In another rendition of the basic needs approach, Mathias Risse has also framed resource rights in the language of collective ownership. In his view, it follows from an inalienable right to basic resources that each human being has an indefeasible moral right to use parts of the earth's original resources and spaces to satisfy her basic needs. Invoking Grotius, Risse has proposed a thesis that all original resources and spaces of the earth which exist independently of human activity are collectively owned by all human living beings (and possibly also by all future individuals) in common. This moral right comprises the immunity from living under political and economic arrangements that interfere with individuals' opportunities and

[44] C Nine, *Global Justice and Territory* (Oxford University Press, New York, NY, 2012) 9–12, 116–20.

[45] See (n 44) 143.

rights to access resources and the equal opportunity for resources usage whether or not they are located within one's own sovereign territory.[46]

The basic needs thesis helps to justify the interpretation of sovereignty over natural resources in terms of the collective ownership of resources which is a necessary precondition for the fulfilment of a set of substantive ends, such as using natural resources for the development and social and economic benefits of the populations. The substantive ends associated with the institution of collective ownership imply that states are obliged to refrain from abuses of natural resources and are prescribed actions aimed at the promotion and realisation of these outcomes. At the same time, this approach alerts us to the universality of human dependence on natural resources to satisfy their most basic needs and hence to the necessity of accepting restrictions on collectives' full ownership of resources in the name of urgent demands for the redistribution of natural resources crucial for human survival.

In the debate about the institutional implications of these substantive goals, the fulfilment of which justifies collective ownership of natural resources, human rights should feature prominently, especially social welfare rights – protection against severe poverty, the right to education and health care etc.[47] The employment of human rights to not only determine the conditions of legitimacy for the exercise of rights to natural resources but also to define substantive goals which justify the exploitation of natural resources in the first place is warranted by the close connection between human rights and the twin rights of self-determination and collective ownership of natural resources in international law, as well as by the prominent role human rights play in limiting state sovereignty by their insistence that states provide their citizens with the goods and services characteristic of the modern welfare state.

Before I discuss human rights in greater detail, let me conclude the discussion about ownership by stating that collective territorial ownership of natural resources is an important institution protecting rightful holders of resource rights against dispossession of their resources, not only by

[46] See (n 35) 111–15.

[47] Another example is the human right to water. While water has not been explicitly recognised as a self-standing human right in international treaties, international human rights law entails specific obligations related to access to safe drinking water (e.g. The Convention on the Elimination of All Forms of Discrimination against Women or The Convention on the Rights of the Child). Chris Armstrong proposes the treatment of freshwater supplies as a common resource and the levying of a small charge on the use of water as global resource tax, with the proceeds going to enhance water-harvesting technology in developing countries. C Armstrong, *Global Distributive Justice: An Introduction* (Cambridge University Press, Cambridge, 2012) 158–61.

illegitimate political powers but also predatory economic powers and inequitable contracts. The collective ownership right is also instrumental for the satisfaction of basic human needs or, better, for the fulfilment of a broad range of human rights. Neither the immunity against dispossession, nor the duty to fulfil human rights justify full, unlimited, and permanent liberal property rights – free use for the sole benefit of the owner, absolute decisional autonomy, the right to exclude others from the use, the right to transfer the title, contract out, or derive income from the owned good. The exact structure of the collective ownership of natural resources, i.e. the exact scope of rights, liberties, powers and immunities it confers, has to be determined and re-determined by the changing circumstances of justice. Minimally, the claim to an unlimited and exclusive use of natural resources by a particular collective is invalidated by the claims of groups or individuals lacking resources to satisfy their basic needs – the extremely poor, dispossessed, or climate change refugees. The failure to recognise and respond to their claims – which are by no means generated by speculative philosophy but arise in the real world – potentially turns the institution of collective ownership of natural resources into an instrument of injustice.[48]

IV. From popular sovereignty to a human rights based conception of international political legitimacy

In Wenar's conception of popular resource sovereignty, the ownership of natural resources by the people implies the right to collectively authorise property laws and other decisions over resources. The realisation of the right to authorisation depends on the institutionalisation of human rights, especially political rights and civil liberties. Their protection determines the legitimacy of the exercise of sovereign rights of states to natural

[48] One such prominent example is global poverty. As Thomas Pogge has argued convincingly, global poverty is the cumulative result of centuries in which the more affluent societies and groups have used their advantages at the cost of the less privileged. To reform this unjust status quo, Pogge suggests that those who make more extensive use of our planet's valuable natural resources should compensate those who, involuntarily, use very little. According to Pogge, this idea does not require that we conceive of global resources as the common property of humankind or to be shared equally. It requires recognition that states do not have full libertarian property rights over their territorial resources and are required to share a small part of the value of any resources they decide to use or sell. The payment is called *Global Resources Dividend* and it is to be levied at the point of extraction at the modest rate of one per cent of market value of the resource. Payments from GRD would be made to poorest countries conditional on progress in poverty alleviation. T Pogge, 'Eradicating Systemic Poverty: Brief for a Global Resources Dividend' (2001) 2(1) *Journal of Human Development* 59.

resources within their territories. It is the link between popular resource sovereignty and human rights that I want to examine in the last section of this article.

Wenar's assertion of the central role of human rights in accounting for the legitimate use of natural resources by states depends on the interpretation of human rights and their ability to define the 'internal' dimension of the right to self-determination. If the internal content of collective self-determination can be defined by human rights, then human rights provide a comprehensive set of principles determining the scope of rights to natural resources and the conditions for the legitimacy of their exercise. To the extent to which self-determination is uniquely fulfilled by independent statehood and state sovereignty, human rights define the conditions for the legitimate exercise of sovereignty over natural resources by states – if state sovereignty is to embody the principle of the ownership of natural resources by the self-determining collective. Since authorisation and consent are, according to Wenar, the key to legitimacy, he emphasises a specific subset of human rights – political rights and civil liberties – which secure citizens' access to information, the possibility of deliberation, and enable citizens to express dissent.[49]

Wenar is right to connect the twin rights to self-determination and collective ownership of natural resources with international human rights law. Although subject to various interpretations, this link does exist.[50] The twin rights to self-determination and national ownership of natural resources are named as the very first of all human rights in human rights Covenants, the binding international legal documents defining civil and political liberties and social and economic rights.[51] It can thus be argued that the right to self-determination, sovereign territorial rights to natural

[49] In a similar vein, Cassese argued that the internal self-determination is best explained as a manifestation of the totality of rights embodied in the Human Rights Covenants, with particular emphasis being given to the freedom of expression, the right to peaceful assembly, freedom of association, the right to vote, and the right to take part in the conduct of public affairs. See (n 13) 15.

[50] Reus-Smit argues that the reinvention of the right to self-determination and its anticolonial normative foundations occurred in the context of the negotiation about human rights Covenants in the Commission on Human Rights. See (n 12) 169–70, 187. Samuel Moyn, on the other hand, insisted that decolonisation was not a struggle for individual rights. S Moyn, *The Last Utopia* (Belknap Press, Cambridge, MA, 2010) 85–9.

[51] Art 1 of Pt I of both Covenant states that 'all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development'. Furthermore, 'all peoples may, for their own ends, freely dispose of their natural wealth and resources …' International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> and <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

resources, and human rights together represent a coherent internationally negotiated and accepted notion of justice for the plurality of territorially situated self-determining collectives.

Collective territorial ownership of natural resources is an inherent element of this notion of justice because it is a condition of collective political self-determination – both because in the absence of control over natural resources political independence is incomplete, and because the economic development for which natural resources are instrumental significantly reinforces independence. Human rights specify the internal content of collective self-determination and hence the content of rights over natural resources or, as I put it, they determine the legitimacy of the exercise of these rights. Moreover, national ownership of natural resources and the requirement to use them for national development help to fulfil demands implied in social and economic human rights.[52]

Let me accentuate that I consider the linking of resource rights and human rights to be the key achievement of Wenar's work. Human rights do not figure prominently in any available conception of natural resource justice despite the fact that this connection exists in international law and despite the fact that the interpretation of this connection has several advantages over existing moral conceptions of natural resource justice. First, international human rights law is based on a robustly egalitarian and welfarist conception of human well-being which trumps the minimal well-being or basic needs approaches in being far more concrete and comprehensive.[53] Second, the appeal to international law has a great practical advantage over direct appeals to morality as it represents a politically negotiated conception of justice accepted by a plurality of actors.[54] Thirdly, as the international legal system of human rights represents a set of norms realisable and attainable by reformist means, it is more likely to be successful in influencing the behaviour of states or relevant actors.[55]

It is the human rights element that needs to be strengthened in conceptions of natural resource justice which aim to define the permissible

[52] On the connection between self-determination, human rights, and rights to natural resources, see P Gümplová, 'Rights to Natural Resources and Human Rights' in M Oksanen, A Dodsworth and S O'Doherty (eds), *Environmental Human Rights: A Political Theory Perspective* (Routledge, Abingdon, 2017) 85–104.

[53] For this point, see A Buchanan, *The Heart of Human Rights* (Oxford University Press, New York, NY, 2014) 27–36.

[54] See (n 53) 8. On the universality of human rights, see J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca, NY, 2013) 93–105.

[55] According to Buchanan, unlike moral rights, legal rights involve mechanisms of interpretation, compliance, and enforcement. See (n 53) 7–9.

scope of sovereign rights over natural resources and the conditions for their legitimate exercise. The question remains as to the best conceptual strategy for the reinforcement of human rights when accounting for the legitimate exercise of rights over natural resources. Two claims made by Wenar undermine this effort to enhance human rights in my view. First, he prioritises particular types of human rights. Second, he insists on a notion of popular sovereignty rather than on political legitimacy even though the compatibility of popular sovereignty with human rights has persistently been questioned.

Let me discuss the issue of the prioritisation of civil and political rights first. Echoing the emphasis on the consent of the people to sales of natural resources by the state in his article about resource curse, Wenar puts special emphasis on civil and political rights, giving them clear priority over social and economic rights and insisting that they represent core, non-negotiable conditions for the exercise of popular resource sovereignty.[56] This is a controversial argument, for at least two reasons.

First, the emphasis on civil and political rights invokes a classical liberal notion of legitimacy and its emphasis on consent. In liberal thought, legitimacy has traditionally been associated with consent because liberal accounts of coercive systems of law and power have always involved an account of the moral authority of these systems and hence of the moral obligation to obey them. Many liberals have maintained that political obligation requires a voluntary, consent-based subjection to rule. Certain minimal conditions such as freedom of speech, association, universal suffrage, and majority rule have been identified as preconditions for the expression of consent. Recently, some thinkers have rejected the principle of consent altogether as insufficient justification for the exercise of political power.[57] Others have pointed out that political rights and civil liberties can no longer be considered as sufficient for citizens' ability to express consent if their consent is to count as an outcome of equal participation in decision making. When people are severely discriminated against or denied access to basic goods they are hardly able to participate as equals.[58] The example of indigenous groups can again be illustrative. The robust protection of non-discrimination, social and economic equality, access to basic goods and services needs to be guaranteed if indigenous people are to participate in decision making and express their views.

[56] See (n 1) 225–33.

[57] Buchanan argued that consent is ill-suited to the political world not only because there are no existing entities that enjoy consent of most of their citizens, but also because politics is concerned with how to get along when consent is lacking. See (n 7) 243.

[58] L Valentini, 'Assessing the Global Order: Justice, Legitimacy, or Political Justice?' (2012) 15(5) *Critical Review of International Social and Political Philosophy* 593.

Secondly, the emphasis on consent and hence on the civil liberties and political rights which are at the core of liberal notion of legitimacy misconstrues the nature and scope of human rights. Human rights are a much more comprehensive set of norms which protect larger set of fundamental human interests. As Buchanan rightly insists, human rights do not just provide conditions for the expression of consent or protect a minimally decent life or satisfy basic needs as philosophers have so often asserted. They robustly protect individuals' equal moral status and their socio-economic and cultural well-being. This becomes apparent when we simply consider the full list of human rights, especially those which prohibit various forms and practices of discrimination and those which prescribe the provision by states for their citizens of the goods and services which are characteristic of the modern welfare state – health care, education, protection against poverty, unemployment, medical insurance etc.[59]

As a totality, human rights thus represent a negotiated, accepted, and comprehensive standard of domestic and international justice for the international system of sovereign states. And only human rights in their totality, as a comprehensive conception of justice for individuals and societies of the world, have the unique capacity of being able to supply a universal international standard for the assessment of the legitimacy of sovereign rights and prerogatives including sovereignty over natural resources. This corresponds to the prevailing view in international legal scholarship and international human rights practice that human rights are interdependent and indivisible and that the realisation of each human right requires other human rights.[60] Consent by itself is insufficient without substantive preconditions of equality which are epistemologically demanding, and empirically unattainable and is unfit to account for the international legitimacy of the plurality of states.

I agree with Wenar that the compliance of a state with human rights norms determines whether and to what extent this state exercises its rights to natural resources rightfully. Not only do human rights provide clear criteria for the political legitimacy of governmental power and hence the conditions for the rightful exercise of resource rights; they also provide an exhaustive set of duties and limits on state power with regard to natural resources. However, human rights need to be taken as a totality. Civil and political rights imply that there has to be transparency and responsiveness in a government's dealing with natural resources and mechanisms through which citizens can express their views and preferences regarding natural

[59] See (n 53) 28–32.

[60] T Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12(5) *European Journal of International Law* 917.

resources and participate in decision making. Social and economic rights help to specify the collective and individual well-being requirement and oblige states to use natural resources for the social and economic benefit of its own (and possibly other) people – to provide education, health care, economic opportunities, regional development etc.

The emphasis on the totality of human rights points to a broader, justice-based conception of the politically legitimate exercise of sovereign rights over natural resources in which justice, understood as respect for human rights, serves as a vantage point for the evaluation of the legitimacy of state power including power over natural resources. The question remains as to whether we need popular sovereignty for this human-rights-based notion of political legitimacy and whether the concept of popular sovereignty can actually reinforce the notion of human rights.

The problem with popular sovereignty lies in its profound incommensurability with human rights. Rousseau, the author of the first modern conception of popular sovereignty, challenged the claim to the absolute and indivisible power of the sovereign monarch with the idea of a general will of the people. While sovereignty changed hands, so to speak, its form remained the same – the general will was conceptualised by Rousseau as indivisible, unified, and unlimited. Rousseau's conception of popular sovereignty then gave rise to a radical, revolutionary democratic notion of popular sovereignty, the most important feature of which is the emphasis on the people as a unified entity existing prior to the constitutionalised polity and capable of an unmediated expression of their unlimitable collective will. One particular feature of this conception which has become the main reference for popular sovereignty is that it maintained an incompatibility with constitutional limits on collective will, most importantly with the division of powers, checks and balances, and with constitutionally entrenched individual rights.[61]

In the liberal tradition represented by Locke and the Federalists, popular sovereignty has acquired a very different meaning. Here, too, popular sovereignty had been enlisted to account for the normative goal of the existence of the state power and to answer the question about the origins of power and the authorship of laws. The people, however, have been conceived of not as a pre-constitutional body capable of the expression of a unified will but rather as a body originating with the constitution which institutionalises and limits their sovereignty as well as the sovereignty of the ruler. As János Kis puts it, 'the people' are made to be the ultimate source of political authority not in the sense of an actually authorising

[61] See A Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations* 223.

collective agent but as a regulative idea, a moral principle that furnishes us with a criterion to judge whether the totality of citizens and voters is a legitimate source of public authority.[62] The body of the people is defined by citizenship; and the people's will is limited by constitutionally entrenched individual rights, judicial review of legislative power, and the proceduralised expression of political will in elections, deliberation within the public sphere, and other forms of democratic participation.

The critics of the liberal model of popular sovereignty have asked what if anything remains of popular sovereignty in a modern, complex, pluralistic constitutional state. Recently, there have been two ambitious attempts to develop a robust notion of popular sovereignty for modern liberal constitutional democracy – a two-track model of politics developed by Bruce Ackerman and the discursive model developed by Jürgen Habermas. In Ackerman's model, popular sovereignty comes to the forefront in one of the two tracks which make up democratic politics – the extraordinary constitutional politics of higher law-making which produces new constitutional norms via mass mobilisation and robust participation.[63] In Habermas's model, popular sovereignty is identified with a discursive procedure whose very possibility of application hinges on the prior legalisation of basic rights.[64] The first conception locates popular sovereignty in extraordinary moments of mobilisation and protest, the second has been criticised largely for its failure to turn deliberation into something genuinely democratic and participatory within a larger system of constitutionalised democratic politics.[65]

Given an emphasis on severe forms of natural resource abuse by illegitimate, corrupt, and injustice-perpetrating regimes, it would be plausible for Wenar to consider more radical or extraordinary exercises of popular sovereignty over resources rather than to insist on a standard liberal-democratic model of normal politics as *the* counterpower to abuse. Such interpretation of popular sovereignty is not envisioned. Wenar's most original contribution to the debate on natural resource justice thus remains his emphasis on human rights as the most important set of principles defining the legitimate exercise of resource rights. Putting human rights in the centre, he thus renders popular sovereignty redundant for articulating a human-rights-based conception of the politically legitimate exercise of sovereign rights to natural resources. Human rights alone can accomplish

[62] J Kis, *Constitutional Democracy* (CEU Press, New York, NY, 2003) 133–40.

[63] B Ackerman, *We The People* (Belknap Press, Cambridge, MA, 2000).

[64] J Habermas, *Between Facts and Norms* (MIT Press, Cambridge, MA, 1998).

[65] WE Scheuerman, 'Between Radicalism and Resignation: Democratic Theory' in R von Schomberg and K Baynes (eds), *Discourse and Democracy: Essays on Habermas's* Between Facts and Norms (SUNY Press, Albany, NY, 2002) 61.

the goal of circumscribing and limiting the permissible scope of state power over natural resources and defining the conditions for its legitimate exercise.

V. Conclusion

Sovereignty over natural resources is arguably one of the most prized sovereign rights according to current international law. It creates an enormous privilege for states, not only because of the very high value of some natural resources but also because this right can legally be exercised as a 'despotic dominion', that is, without effective international regulation and without paying heed to either domestic or international distributive demands. Regardless of the constitutionality of its political regime, every state is entitled to a full set of powers, prerogatives, and immunities inherent in this sovereign right and can use them without much restriction. To turn sovereignty over natural resources into an institution facilitating important social and economic goals requires subjecting it to stringent limitations. It is a task for international political theory to contribute to develop such limitations by fostering a discourse about principles of justice which circumscribe its permissible scope and define the conditions of its legitimate exercise. I agree with Wenar that these principles ought not to be 'practice-independent' or in conflict with the most fundamental moral principles of the current system of international law.

Popular sovereignty over natural resources could play a role in this enterprise as a counterclaim to specific types of natural resource abuses by authoritarian states. It is doubtful, however, whether popular sovereignty over natural resources could be instrumental in developing a broader, systematic account of natural resource justice centred around a limited sovereignty over the natural resources held by states. Both the concept and the claim to popular sovereignty in general have come under tremendous pressure lately. Regardless of how we interpret its nature, form, and content, two core elements give this concept a distinct meaning. On the one hand, the people are conceived of as an entity with a collective will and agency. On the other hand, the people have been assumed to be a self-contained body politic occupying a distinct and exclusive territorial sphere where collective autonomy is to be exercised and justice created.

The possibility of finding and exercising a collective will is thwarted by the rapidly growing pluralisation of contemporary societies and pressure to deliver on the promises of both individual and group autonomy, non-discrimination, and recognition. The result is a continual expansion in the scope of individual and group rights which make it impossible to

understand the people as a unified body with a collective will and agency. The second feature – the people as a self-contained body politic representing its own distinct sphere of justice – is collapsing under the pressure of globalisation. Climate change, immigration, economic interdependence, a global economy and the risks and challenges they pose require that we see the political realm not through the lens of territorially exclusive political units but as multilayered spaces of overlapping memberships and intersecting contexts of justice which cut across the existing political boundaries of sovereign peoples and their states. This appears especially important if we want to address pressing distributive and environmental issues concerning natural resources.

Even if a viable conception of popular sovereignty for the contemporary globalised world could be found, the important question remains as to whether popular sovereignty over resources is derivable from popular sovereignty. It is by no means obvious that legitimate power over persons and the legitimate power of humans over nature and its resources have the same normative foundation. If resource rights are to be derived from popular sovereignty, in other words, legitimate political authority over persons, then authority over resources is legitimised by what we conventionally consider to be the most prominent sources of legitimation for power over people – democracy and human rights. These cannot be considered the only legitimising principles of human power over nature, however. Natural resources have different fundamental values for different groups and give rise to various rights, claims, and entitlements. Democratic majoritarian decisions cannot easily trump these claims. In times of climate change and in our current environmental predicament, natural resources also pose demands on their own – e.g. to be protected from human use if their life-supporting functions are to be preserved. Natural resource justice thus requires that we include a broader set of moral principles within it, as well as that we envision alternative political arrangements for its approximation.