

those illusions sustained only by the concentrated gaze of everyone in the room. Remove your gaze for but an instant, and the mirror falls to the floor and shatters.¹¹

Whether readers of Parfitt's book will be able to keep any respect for the doctrine of sovereign equality is hard to tell. What is certain is that they will have a hard time looking at sovereign equality in the way that has sustained the illusion of sovereign equality for so long.

Fuad Zarbiyev

Associate Professor of International Law,

The Graduate Institute of International and Development Studies, Geneva, Switzerland

Email: fuad.zarbiyev@graduateinstitute.ch

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Jérémie Gilbert. **Natural Resources and Human Rights: An Appraisal**. Oxford: Oxford University Press, 2018. Pp. 224. £70. ISBN: 9780198795667

My interest in the book under review has a lot to do with my core research interests in international investment law. Modern investment treaties owe their origins to concession contracts in the natural resources sector and the need to complement contractual protections with another layer of international safeguards which the concession-holder could invoke in case of a dispute. The statistics from the International Centre for Settlement of Investments Disputes (ICSID), the principal forum for investor–state dispute settlement, invariably identify natural resources as the area responsible for a large share of investor–state disputes. Gilbert's book seeks to draw a bigger picture; a picture where commercial activities in the natural resources sector are examined not through the lens of investment treaties and arbitration but through that of human rights. The book starts on a sombre note. We live in an age of a rapid growth in the exploitation of natural resources, increased pollution, diminishing biodiversity, climate change and, above all, the ever-intensifying pressure to control the planet's remaining resources. In this quest 'for what is left', Gilbert posits that international human rights law (IHRL) can play an important part by facilitating the sustainable management of natural resources. The task he commits himself to in the book is twofold: to make a case for IHRL as a vehicle to address numerous concerns over the human utilization of natural resources, and to document and highlight the negative impact the exploitation of natural resources has on human rights. The book most certainly succeeds in the latter. It is Gilbert's faith in the capacity of IHRL to mitigate and prevent the adverse effects of the

¹¹ Coetzee, *supra* note 1, at 19–20.

exploitation of natural resources on the environment that some readers might find difficult to share.

The book seeks to bring together two discrete areas of law that rarely meet – international natural resources law and IHRL. The former is defined as a legal framework governing the management of natural resources, including mining law, law of the sea, energy law, international environmental law, biodiversity law and intellectual property rights. In recent decades, international treaties and conventions addressing various aspects of natural resource governance have been proliferating, producing a vast and overlapping patchwork of documents seeking to regulate the ways in which natural resources are managed and distributed. Gilbert confidently dissects this complex legal landscape. To set the tone for the rest of the book, the reader is invited to reflect on the question: are natural resources ‘assets (raw materials) occurring in nature that can be used for economic production or consumption’ (at 6)? Or should we rather see them as ‘natural substances that exist in the Earth’ and ‘are valuable for providing ecosystems services that maintain the health of the biosphere’ (*ibid.*)? Gilbert advocates what he describes as ‘a less consumption-based’ definition of natural resources adopted by international human rights bodies and is critical of ‘a restrictive anthropocentric approach to nature, which sees it mainly as a resource for humans’ (*ibid.*). Some readers might find this at odds with Gilbert’s ambition to make a case for a human rights-based approach to natural resources, as human rights themselves are in their essence anthropocentric.

Gilbert reminds us that, historically, IHRL has not been developed to specifically address the exploitation of natural resources. While permanent sovereignty over natural resources is now firmly recognized as an essential attribute of state sovereignty and a principle of international law, it does not translate into corresponding rights for the peoples concerned. This is not, however, to say that IHRL fails to recognize the peoples’ rights over natural resources. Although defined in ambiguous terms, such rights have been expressly recognized in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹ Gilbert highlights the ground-breaking nature of both Covenants as they explicitly acknowledge the peoples’ rights to freely dispose of their natural wealth and resources as part of their right to self-determination. Yet the right to self-determination and its constituent entitlements are not unqualified: owing to the opposition from a number of states, the original drafting was altered to add a qualification that the exercise of a peoples’ right would not impair international treaties that aim to promote international economic cooperation and that such a right may not violate international rules on foreign investment protection (at 22).² The drafting history of international human rights documents reveals so much opposition to vesting a people with the right to freely dispose of its natural

¹ International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights, 1966, 999 UNTS 171.

² Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929, at 15, ¶ 20.

resources that Gilbert concedes any efforts to seek its affirmation in international law might be utopian and idealistic.

Despite these reservations, Gilbert's optimism about the role of IHRL as a vehicle for reclaiming peoples' sovereignty over natural resources is buoyed by the emergence of a set of norms that bestow what he considers to be tangible rights over natural resources upon indigenous communities. For instance, he commends the fact that a strong connection between the right to self-determination and the right to natural resources has been expressly acknowledged in the UN Declaration on the Rights of Indigenous People (UNDRIP).³ For most indigenous peoples, the notion of territory is inextricably intertwined with collective access to, and disposal and use of, natural resources. However, the book methodically reveals that the burgeoning protections remain limited in their scope. For instance, in one of its landmark decisions the IACtHR limited the land-based property entitlements of indigenous people to only 'those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life' (at 40–41).⁴ Gilbert admits that not all resources might classify as such. In a manner that belies his faith in human rights, he concludes that IHRL as a whole 'still remains underdeveloped when it comes to collective rights over natural resources' (at 44).

While at least some progress has been achieved with the rights of indigenous peoples over natural resources, this does not always extend to other local communities – a theme that consistently emerges throughout the book (so much so that the title of the book could perhaps have included a reference to 'local communities'). Take, for instance, the right of local communities to participate in natural resources governance. One of the most significant contributions of IHRL to resources governance has been the recognition of the right to free, prior and informed consent (FPIC): a cornerstone of the ILO's Indigenous and Tribal Peoples Convention,⁵ which affirmed in 1989 that, among other things, indigenous people have the right to 'exercise control, to the extent possible, over their own economic, social and cultural development'. It also requires in Article 15 that 'the rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded'. For its part, UNDRIP too places states under an obligation to consult indigenous peoples in any decisions that may affect them and to ensure their participation in decision-making. Yet the scope of this right is debated. For instance, there is a question of whether and to what extent the right to FPIC could be extended to non-indigenous local communities. Gilbert admits that it might be too early to assert non-indigenous communities' rights to FPIC. A similar picture emerges from the book's analysis of the intersection between natural resources and cultural rights (limited rights for

³ United Nations Declaration on the Rights of Indigenous Peoples, General Assembly, A/RES/61/295, Adopted on 13 September 2007.

⁴ Here Gilbert is referring to *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C No. 172 (2007), para 121.

⁵ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, reprinted in 28 ILM. 1382 (1989).

non-indigenous people) and the principle of benefit-sharing (currently not extended to other local communities).

While tentative in its recognition of group rights, international law has been firm in its endorsement of corporate entitlements. Gilbert points out that ‘many resource-rich developing countries are not able to exploit their natural resources without the help of foreign direct investment’ (at 57). While observing that IHRL and international investment law have often operated like ships passing in the night, Gilbert highlights two fundamental and increasingly important features of foreign investor involvement in natural resources. First, investors’ rights are affirmed in a vast network of international investment agreements. Of note here are concessions, property and contractual rights that form part of ‘protected investments’ under these agreements. Second, as investors have increasingly invoked those agreements to challenge governmental measures concerning investment projects in the natural resources sector, arbitral tribunals deciding on these claims have been compelled to integrate human rights concerns in their analysis. Still, Gilbert concedes, despite this recent convergence, there is a lack of systemic integration of human rights arguments in investment arbitration jurisprudence (at 60). Gilbert believes the solution lies in establishing stronger human rights protections for collective property rights over natural resources (at 61). Yet had he examined investment arbitration jurisprudence in more detail, his argument might well have been different. Already in the early years of investment arbitration practice, numerous concerns were raised over the fragmentation of international law whereby norms and practice in one area (e.g. IHRL) exert little or no influence on the reasoning of adjudicators dealing with cases in another area (e.g. international investment law). What is currently missing – and could have been discussed in this chapter – are the concrete mechanisms for translating the rights of local communities into concrete entitlements enforceable in the same manner as the investment treaty protections investors enjoy in exploiting natural resources.

Even where some progress has been achieved in recognizing certain entitlements as human rights, Gilbert painstakingly reveals the often-insurmountable burden of proof international and regional human rights courts have imposed on those asserting such rights before them. Consider, for instance, the connection between the human right to life and the right to natural resources. The concrete entitlements that connect the right to life with access to natural resources are the right to water, the right to health and the right to food. As far as the latter is concerned, international human rights bodies have increasingly acknowledged that famines and malnutrition are caused not so much by lack of food but by lack of access to resources, including cultivable land. Gilbert’s conclusion, again, raises more questions about the prospects of IHRL as a game changer. His overview of the jurisprudence of regional human rights courts reveals that although the connection between access to natural resources and livelihoods is increasingly recognized, the emerging judgments establish a very high threshold for showing a breach of human rights by insisting on the need to show a direct connection between the loss of life and a lack of access to natural resources. Likewise, while identifying the potential to use IHRL to address pollution, Gilbert observes that human rights courts, including notably the ECtHR, require victims to

prove the direct impact of pollution on the enjoyment of their human rights. This burden of proof renders it extremely difficult to establish a breach and casts doubt on the broader usefulness of IHRL, with its anthropocentric ethos, in safeguarding the protection and conservation of natural resources. Some of Gilbert's observations in fact point to other areas of international law as perhaps more effective in providing the necessary impetus for change. For instance, Gilbert highlights that the principle of fair and equitable benefit sharing has its roots not in IHRL but in international environmental agreements such as the 1992 Convention on Biological Diversity.

Finally, Gilbert argues that human rights can catalyse the most dynamic and promising changes towards better protection of natural resources. While inspired by the recent uptake in climate litigation, he is uneasy about commodification and marketization of clean development mechanisms. Commodification is a theme that runs throughout the book. Gilbert draws attention to the dangers of framing certain human rights entitlements concerning natural resources in monetary terms. For example, he is alarmed by the fact that the principle of benefit sharing is interpreted exclusively in terms of the monetary value of natural resources. This, in turn, feeds the increasing drive for marketization, thus overshadowing other benefits, both material and immaterial, that local communities can derive from natural resources. This is manifested in the recent jurisprudence of human rights courts whereby benefit sharing has been equated with reparations and compensation for lost lands and territories. Gilbert argues that although originally benefit sharing indeed primarily denoted the distribution of financial benefits, it has evolved to encompass wider aspects of participation and social accountability. While chapter 6 begins with an expression of faith in the catalysing effect of human rights for protecting natural resources, Gilbert's hope appears to give way to a sense of resignation.

This tension between optimism and resignation in Gilbert's vision of the potential role of IHRL helps to neatly bring together his forays into discrete areas of international law governing the management and use of natural resources. The book contains a number of pithy observations which, if elaborated in greater depth and length, might have added to its analytical strength and supported Gilbert's case for a human rights-based approach to natural resources. For example, while documenting the limited progress in recognizing collective rights over natural resources, Gilbert points to a burgeoning acknowledgement that the conservation of forests might be better achieved with the involvement of the local forest communities. Similarly, he draws attention to an emerging consensus among social economists who have argued that better protections of property rights of small-scale fishing communities are likely to foster stable and more sustainable fishing practices. There is, it seems, some scope to argue that community-based solutions have a strong potential to address the increasingly urgent issues of depletion and degradation of natural resources.

The overall impression this reader is left with is that IHRL might play a role in shifting the existing approaches to natural resources management, but in most areas its capacity to catalyse change remains limited. This, in turn, raises the question as to whether other international rules and mechanisms are likely to be more effective – particularly given the urgent need to address climate change and pollution. With the exception of his

chapter on investment and natural resources (which this reader would have liked to be more detailed), Gilbert meticulously catalogues the promises and failings of the existing human rights instruments and bodies in addressing the human rights impacts of commercial activities in the natural resources sector. For its modest size the thematic span of the book is impressive as Gilbert charts the developments of IHRL in relation to various facets of natural resources management: from governance to the protection of life, cultural rights, local community entitlements and protecting the environment. The book is not just a succinct and useful primer on human rights and natural resources but also a timely and thought-provoking exposition prompting the reader to ask bigger overarching questions about the lessons to be drawn from both the historical and ongoing engagement of IHRL with natural resources.

Mavluda Sattorova

Reader, School of Law and Social Justice, University of Liverpool, UK

Email: M.Sattorova@liverpool.ac.uk

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Markus Krajewski and Rhea Tamara Hoffman (eds). ***Research Handbook on Foreign Direct Investment***. Cheltenham: Edward Elgar, 2019. Pp. 744. £235. ISBN: 9781785369841

I Introduction

Even as research handbooks have been proliferating in English-speaking academic circles, only a handful have addressed the subject of international investment law. This new volume, for this reason, is a welcome addition to burgeoning investment law scholarship. Handbooks are intended to provide a survey of the literature and guide future research in any given field. The editors similarly describe their task as not only achieving these ends but suggesting ‘new ways forward . . . raising fundamental conceptual questions as well as addressing practical problems and challenges by engaging different schools of thought and preconceptions’ (at xiii). They have recruited ‘28 leading scholars and junior scholars from six continents’ (at 3) to complete this task. The volume is structured to deliver chapters on a number of themes, including foreign direct investment (FDI) ‘foundations’, investment agreements, country and regional studies and a section on ‘challenges and contentious issues’. Aside from the chapters on political economy, services and investment contracts, the bulk of the volume does not move much beyond the traditional confines of the legal regime for the protection of foreign investment. But there is still much here for readers to chew on.

A volume this large, and with these outsized ambitions, undoubtedly was an enormous editorial task. Inevitably, there will be an unevenness in tone, style and quality