INTERNATIONAL JOURNAL OF HUMAN RIGHTS LAW REVIEW
An International Open Access Double Blind Peer Reviewed, Referred Journal

Volume 4 | Issue 5 | 2025 Art. 06

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Recommended Citation
Jenifer Jamal Chowdhury, *The Role of International Law in Safeguarding Indigenous Rights to Subsurface Minerals in the Energy Transition*, 4 IJHRLR 87-100 (2025).
Available at www.humanrightlawreview.in/archives/.

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Manuscript Received	Manuscript Accepted	Manuscript Published
15 Sep. 2025	24 Sep. 2025	07 Oct. 2025

ABSTRACT

The accelerating energy transition has intensified the global demand for subsurface minerals like lithium and rare earths, which are often found on Indigenous territories. International law recognizes the principle of permanent sovereignty over natural resources; it is traditionally held to belong to States. Nevertheless, with Indigenous peoples, it is increasingly incompatible with their right to land, self-determination, and Free, Prior, and Informed Consent (FPIC). Human rights institutions and regional courts have adopted essential protection mechanisms, though the legal framework is still patchy; investor-state disputes are not only more robustly enforced than Indigenous rights to participatory access. This Article focuses on the legal tensions of Indigenous rights to the administration of subsurface minerals vis-à-vis State sovereignty and corporate power. It contends that no other international body is better placed than the International Court of Justice, via advisory or contentious proceedings, to work towards fulfilling the harmonization of these competing norms by clarifying the limits of sovereignty in the context of Indigenous rights and by entrenching FPIC within the international legal regime. This exposition would remove the discrepancies between human rights law, environmental law, and investment law, hence establishing a sense of harmony that is critical in making climate governance more predicated on mineral extraction. The article concludes that the energy transition must include Indigenous stewardship as a part of managing the resources, where the decarbonization process will not reproduce the historical patterns of dispossession.

KEYWORDS

Indigenous rights, Subsurface minerals, Energy transition, Climate justice

INTRODUCTION

The energy transition to renewable energy sources, such as batteries, wind farms, and solar plants, has led to a significant rise in the mining of energy-transition minerals (ETMs), including lithium, cobalt, and rare earth elements. Peer-reviewed research shows that more than 50 percent of these reserves are found within or close to Indigenous lands and territories.[1] Without adequate legal safeguards, this mineral exploitation risks sustaining structural patterns of dispossession and cultural destruction, all in the name of climate action.

Whereas international law recognizes the rights of Indigenous people regarding territory, culture, and self-determination, it remains vague on sub-surface minerals ownership. The legal grey area provokes one key question: How can the international legal order change to better ensure ecological and social justice, especially regarding the application of Free, Prior, and Informed Consent (FPIC) in this context scenario?

This article explores the following: the normative legal framework; the developing customary law of FPIC; supporting jurisprudence; the conflict between State sovereignty and Indigenous rights; implications of the energy transition; the role of corporate responsibility; and the global enforcer, such as court advisory opinions of the International Court of Justice.

I. INTERNATIONAL LEGAL FRAMEWORK

A. Binding Treaties

1. UNDRIP (The United Nations Declaration on the Rights of Indigenous Peoples)

The United Nations Declaration on the Rights of Indigenous Peoples is a declaration of great normative weight, but it is not binding in nature. Article 26 recognizes the rights of Indigenous peoples to their traditional lands, territories, and resources. Article 19 makes it an obligation on states to seek FPIC before making a measure that impacts Indigenous peoples. Article 32(2) provides that FPIC must be used in

[1] Carole Séré, 'Mapping the Overlap of Indigenous Territories and Energy-Transition Mineral Deposits' (2024) Vol 7 *Nature Sustainability* 45, 47–50.

relation to resource extraction projects.[2] Courts and treaty bodies are increasingly referring to the UNDRIP to interpret binding legal instruments.[3]

Even though the Declaration does not explicitly mention ownership of subsurface minerals, its general allusions to "resources" have been understood by United Nations Special Rapporteurs and treaty bodies to encompass natural resources both above and below the surface. This is corroborated by the practice of the Inter-American Court of Human Rights, as it has used analogous reasoning in granting property rights of Indigenous peoples to the subsoil resources where they are a component of traditional use and survival.

2. ILO Convention NO. 169

The ILO Convention No. 169 (1989) is the single binding multilateral treaty which is devoted to Indigenous peoples. Article 15(2) also establishes that prior consultation and sharing of benefits are required before exploring or exploiting the natural resources on Indigenous lands.[4] Articles 6-7 require the participation of Indigenous people in the making of decisions affecting their environment, culture and institutions.[5] Despite being progressive, Convention No.169 has only been ratified in twenty-four States, most of them in Latin America. However, the treaty-monitoring bodies of the United Nations and regional human rights courts are increasingly citing it as a sign of the development of customary international law.

3. Core Human Rights Treaties

The rights of Indigenous peoples to lands and resources are indirectly but substantially covered by several binding human rights treaties. International protection is also indirectly given through the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Article 1 of both Covenants provides the right of self-determination and freedom to dispose of natural

[2] United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007), arts 19, 26, 32(2).
[3] *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) IACtHR Series C No 245 (27 June 2012*). Saramaka People v Suriname* (Merits) IACtHR Series C No 172 (28 November 2007).
[4] ILO Convention No 169 (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383, art 15(2).
[5] *Ibid* arts 6–7.

wealth and resources of all peoples.[6] The Human Rights Committee has interpreted this to include the Indigenous peoples, as their right to have control of resources as a way of cultural preservation.[7] Together, these treaties provide a binding human rights framework that can be interpreted to extend to subsurface resources, particularly when such exploitation threatens Indigenous survival, culture, or equality.

B. Customary International Law

State practice and *opinio juris* are becoming established regarding Indigenous rights to land and resources as norms of the customary international law of States. Indigenous property rights have been found by the Inter-American Court of Human Rights to be based on customary international law principles of equality and cultural integrity.[8] Free, Prior, and Informed Consent is also becoming a common standard, especially in situations where the Indigenous people were being displaced or where the extractive project had a major impact.

In *Saramaka,* the Inter-American Court explained that consultation is mandatory, but consent can be necessary in the case of large-scale industrial projects involving a high cultural, environmental, or survival risk.[9] This developing standard applies directly to underground mineral projects, the majority of which are irreversible and large in scope.

C. Soft Law and Institutional Guidelines

The World Bank Environmental and Social Framework, the Equator Principles, and the Organization for Economic Co-operation and Development Guidelines of Multinational Businesses are examples of soft law instruments to strengthen the responsibility of corporations and financial institutions to uphold the rights of Indigenous people. These Guidelines are not legally binding, but they set standards of State behavior and corporate practice in transnational mining operations.

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[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[7] Human Rights Committee, *General Comment No 12: Article 1 (Right to Self-Determination of Peoples)* (13 March 1984) [6].

[8] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v Paraguay* (2005) IACHR Series C No 125 [135].

[9] *Saramaka People v Suriname* (Merits) IACtHR Series C No 172 (28 November 2007).

II. INDIGENOUS PEOPLES' RIGHTS AND ENERGY TRANSITION

The global extractive industries are being transformed through the decarbonization agenda. The overlap of Indigenous lands with energy transition minerals can be seen in the lithium deposits of the Lithium Triangle in South America (Argentina, Bolivia, and Chile), cobalt concessions in the Democratic Republic of Congo, and rare earth mineral deposits in Greenland and Canada. The recent analysis indicates that about 50 percent of all projects of critical energy transition minerals are located on or near Indigenous and peasant lands[10], therefore posing a significant risk of conflict and dispossession without effective protection. As such, without enhanced legal frameworks to protect Indigenous lands, territories can be positioned as a sacrifice zone of global climate policy in the name of sustainability.[11] However, international law more often affirms that human rights must not be violated in the name of climate action. An analogous case on the record, the Inter-American Court of Human Rights found that Free, Prior, and Informed Consent (FPIC) was necessary in large-scale developments with Indigenous lands, thereby connecting environmental governance to Indigenous self-determination.[12] The African Commission on Human and Peoples Rights in the Centre for Minority Rights Development similarly identified Indigenous involvement and dividing the proceeds of resource extraction with Indigenous groups as necessary components of natural resource governance.[13] This mineral exploitation, which is a consequence of the accelerating energy transition, risks reproducing historical patterns of dispossession and cultural destruction for Indigenous peoples.

Furthermore, the need to include Indigenous peoples in resource governance is not only a human rights issue, but also a sustainability issue. Empirical research indicates that biodiversity and sustainable land use in Indigenous territories managed by Indigenous people tend to exhibit greater levels of biodiversity conservation and sustainable land use practices than those in state or corporate-owned projects.[14] Integrating their

[10] Thea Riofrancos et al, *The Political Economy of Energy Transition Minerals* (United States Department of Energy 2023) 17.
[11] Judith Kimerling, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco' (2006) 38 New York University Journal of International Law and Politics 413, 421.
[12] *Saramaka People v Suriname* (Judgment) Inter-American Court of Human Rights Series C No 172 (28 November 2007) ¶134.
[13] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) ¶267–268.
[14] World Bank, *Securing Forest Tenure Rights for Rural Development* (World

right into energy transition policies can thus have both the benefit of protecting Indigenous cultural and territorial integrity and increasing the efficacy of climate mitigation initiatives. Subsurface mineral rights protection through such a framework not only protects cultural integrity; it increases climate justice by not making the most vulnerable pay unfairly higher costs of energy transition, having contributed the least to climate change.

III. JURISPRUDENCE AND STATE PRACTICE

Indigenous rights to natural resources have been steadily increasing in the international and regional courts.

The Inter-American Court of Human Rights: In *Saramaka People v Suriname,* the Court found that, even when consultation is involved, large-scale development projects on Indigenous lands must obtain consent, especially where they could threaten cultural survival.[15] In another case, *Awas Tingni v Nicaragua* (2001), the collective property rights of Indigenous communities were upheld, and the land was ordered to be demarcated.[16] In Sarayaku v Ecuador (2012) determined that extractive activities such as seismic exploration and oil exploration.[17]

African Commission on Human and Peoples' Rights: In Centre for Minority Rights Development v Kenya, the Commission held that there was a violation of the displacement of Indigenous pastoralists without consultation or sharing of benefits in development projects.[18] Ogiek v Kenya (2017) reaffirmed the indigenous land and resource rights as part of cultural survival.[19]

Human Rights Committee: The Committee in the case of Anganas Poma v Peru attributed the abuse of the exploitation of the resources to the abuses of cultural rights and referred to Article 27 of the International Covenant on Economic, Social, and Cultural Rights. All these cases collectively assert the fact that

Bank 2019). Rights and Resources Initiative, *Forest Governance by Indigenous and Local Communities: A Key Contribution to Achieving Global Forest Goals* (2017). Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Global Assessment Report on Biodiversity and Ecosystem Services* (2019).

[15] Inter-American Court of Human Rights, *Saramaka People v Suriname* (2007) IACHR Series C No 172 [134]

[16] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits) IACtHR Series C No 79 (31 August 2001).

[17] *Sarayaku v Ecuador* (Merits and Reparations) IACtHR Series C No 245 (27 June 2012) [129-136]

[18] African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009).

[19] *African Commission on Human and Peoples' Rights v Kenya (Ogiek)* AfCtHPR App No 006/2012 (26 May 2017).

Indigenous rights over land and resources are part and parcel of human rights and that projects that have significant implications should be introduced through consent rather than consultation.[20]

IV. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

International Court of Justice (ICJ) is yet to make any direct provision on the ownership of subsurface minerals in Indigenous territories. Nonetheless, its jurisprudence proves that the Court is ready to broaden the interpretation of sovereignty and the right to natural resources in a way that may add Indigenous opinions to its interpretation. In Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago (2019), the ICJ made it clear that sovereignty over territory is indelibly linked to the rights of the people whose territory it is.[21] This meant that the sovereignty exercised without regard to Indigenous consent would be flawed. Although the precept of permanent sovereignty over natural resources has traditionally been vested in States,[22] modern experiences represent a transition to the devolution of the rights of collective peoples. The fact that the sovereignty over resources is continuously reaffirmed as a people-oriented right by the General Assembly[23] indicates that Indigenous peoples, as peoples under international law,[24] have a legitimate claim to enjoy the benefits, as well as to give consent, to the mineral exploitation occurring underground. The ICJ, either under its contentious or advisory jurisdiction, could elaborate on the extent of these rights, uphold the binding nature of Free, Prior, and Informed Consent (FPIC) as part of international law, and provide a balance with State sovereignty.[25] It would also assist in resolving a fragmentation issue between human rights law, environmental law, and investment law through an opinion of the ICJ. Today, corporations have increasingly resorted to investor-State arbitration to shelter extractive plans,[26] but Indigenous rights are

[20] Human Rights Committee, *Ángela Poma Poma v Peru* (2009) CCPR/C/95/D/1457/2006 [7.6].
[21] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, ¶ 160.
[22] UN General Assembly Resolution 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/RES/1803(XVII).
[23] UN General Assembly Resolution 3201 (S-VI) 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) UN Doc A/RES/S-6/3201.
[24] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1.
[25] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295, arts 26–32.
[26] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford

not backed by equally authoritative enforcement. A statement by the ICJ that the principle of FPIC and participatory rights forms part of the international legal order would offer interpretive guidance to arbitral tribunals, as well as treaty bodies and courts at the domestic level. In that sense, the ICJ could become a central pillar in the guarantee that the world energy transition is characterized by both ecological necessity and Indigenous rights.

V. CHALLENGES AND GAPS

Despite the steadily increasing awareness of respecting Indigenous rights in international and regional law, there are still some structural challenges that have not been addressed yet.

A. Fragmentation of International Law

International law that regulates the rights of Indigenous peoples to subsurface minerals is incomplete and inconsistent through human rights law, environmental agreements, and investment law. Although Free, Prior, and Informed Consent (FPIC) has been established by human rights institutions to be core to Indigenous self-determination, the investor-State dispute settlement processes continue to prioritize corporate rights against states and seldom incorporate Indigenous interests.[27] This gap creates a state of legal irregularity that encourages extractive corporations to pursue claims through binding arbitration as opposed to Indigenous peoples, who are left to ply soft standards or non-binding processes.

B. Weak Ratification and Implementation of Binding Norms

ILO Convention No. 169 is the sole legally binding multilateral instrument specifically on Indigenous peoples, but has been ratified by just 24 States, four of which are in Latin America. Key resource-rich States like Canada, the United States, and Australia,[28] which house many Indigenous peoples and where many of the energy-transition minerals are located, have refused to ratify it.

C. Ambiguity in Defining "Peoples" under International Law

The concept of self-determination covering all peoples under Article 1 of the ICCPR and ICESCR has been challenged by States,

University Press 2007) 74–76.

[27] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Comparative Commentary to the UNCITRAL, ICSID, and ICC Arbitration Rules' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013).

[28] Benedict Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414, 432.

who often question whether Indigenous people constitute "people" in the legal meaning of this term.[29] This uncertainty, in turn, hinders the acknowledgement of Indigenous control over underground resources, as sovereignty and ownership rights are usually restricted to the States. This ambiguity creates space for restrictive State interpretations that reduce FPIC to mere consultation rather than binding consent.

D. Extraterritorial Dimensions of Resource Governance

Critical minerals are more often mined in a single jurisdiction and integrated into supply chains that arrive in other parts of the world to support trade in other industries. As one example, the Democratic Republic of Congo cobalt is used within European and North American battery industries.[30] But extraterritorial obligations of the consumer States or companies that extract those minerals have not been clearly formulated under international law. Without enhanced regulations of transnational accountability, the rights of Indigenous peoples are exposed to the pressure of the global markets.

E. Climate Justice versus Resource Justice

The decarbonization agenda has created a paradox: On the one hand, climate action is urgent, and, on the other hand, it can reproduce extractive injustices when implemented without Indigenous involvement. The downward trend today is the domination of funding flows using current climate finance instruments through states, leaving behind Indigenous forms of governance. This poses the risk that the transition cost of the energy shift will be transferred to Indigenous territories, as happened before with sacrifice zones. With the lack of institutionalization of FPIC in climate finance systems, energy transition policies can continue to cause dispossession under the guise of sustainability.

VI. PATHWAYS TO REFORM

To bridge the gaps, the path towards coherence in the normative framework might be made:

i. **Free, Prior, and Informed Consent codification**: Free prior and informed consent is currently a soft law, and codification of this instrument to become binding international law, which can take the form of a General Assembly declaration as an

[29] James Crawford, *The Right of Self-Determination in Internranational Law: Its Development and Future* (CUP 2021) 146–49.
[30] Amnesty International, *This Is What We Die For: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* (2016).

instrument to recognize that FPIC forms a part of customary law or a protocol to an existing human rights convention.

ii. **Incorporation into Investment Law:** Linking investor protection to respect of Indigenous rights, and FPIC in bilateral and multilateral investment treaties.

iii. **Climate Finance Reform:** Ensuring Indigenous peoples have direct access to international climate finance and the incorporation of requirements on participation into the approval of renewable energy projects.

iv. **Enhanced Enforcement Mechanism:** Increasing the jurisdiction of regional courts or the creation of a monitoring arm to hear Indigenous claims in the extractive governance.

v. **Corporate Human Rights Obligations:** Promoting binding due diligence systems at the corporate level in critical mineral supply chains, based on the United Nations treaty process on business and human rights.

These reforms would rebalance sovereignty to put Indigenous peoples in the rightful position as co-stewards of subsurface resources so that the energy transition is as much a move toward justice as it is a move toward decarbonization.

VII. CONCLUSION

The energy transition on a global scale is an enormous opportunity and a massive legal challenge. Renewable energy technologies depend on critical minerals, the extraction of which is increasingly often occurring on Indigenous land. That begs a question of justice, sovereignty, and accountability. Although the rights of Indigenous peoples to land, culture, and self-determination have gained greater weight in international law in recent decades, the fact that the rights of Indigenous peoples with respect to subsurface minerals remain subject to uncertainties still leaves Indigenous peoples at risk of being marginalized on a wide scale. Free, Prior and Informed Consent has emerged as one of the safeguarding mechanisms, yet the flexible application of the doctrine has made it easy to bend in the face of conflicting corporate and State interests.

Therefore, there is a strong need to have a harmonized legal framework that would combine human rights law, environmental law, and investment law. Giving Indigenous people the right to be partners in the governance of subsurface resources would legitimize their rights and cultural and land-based practices, and it would not overburden them with the responsibility of decarbonization. The International Court of Justice and regional human rights tribunals both present an opportunity to take a commanding role in institutionalizing the ideas and providing a source of authority to states and corporations. In the end, an

equitable and just energy transition must entail the consideration of the fact that ecological needs and Indigenous rights are not perceived as conflicting aspects but rather seen as complementary under international law.

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