

STAKEHOLDER APPROACHES TO
HUMAN RIGHTS AND
DEVELOPMENT IN THE
COMMERCIAL CONTEXT

Adam Metzger

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ABSTRACT

Human rights, community development, and commercial development have the potential to be mutually reinforcing at the international, state, and local levels. Stakeholders' approaches to human rights in commercial development contexts are key to unlocking this potential. This thesis analyses commercial energy projects in Bangladesh, Kenya, and Canada, in order to discover how relationships between stakeholders may affect a state's ability to respect, protect, and fulfill human rights obligations. The analysis pays special attention to stakeholders that are most likely to have their rights violated (indigenous and local communities), and stakeholders that tend to abuse human rights in the name of commercial development (corporate developers and the state). Drawing from the case studies, this thesis proposes a tripartite taxonomy of approaches to human rights and development in commercial contexts. This taxonomy describes stakeholder dispositions and actions that have the potential to lead to compatible or conflicting relationships. The third approach within the taxonomy, a Development Based Approach to Human Rights, is a new contribution to the field, proposing human rights fulfillment as a primary objective for all stakeholders in commercial development projects. This thesis comes to the conclusion that compatible stakeholder relations that utilise this approach in commercial contexts, tend to bring about the respect, protection, and fulfillment of human rights alongside community and commercial development.

This thesis is dedicated to the indigenous and local communities around the world
that have been harmed by commercial development.

The work never ends...

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ABBREVIATIONS

CAD: Canadian Dollar

CO₂: Carbon Dioxide

C169: The International Labour Organization's Indigenous and Tribal Peoples Convention 1989

C107: The International Labour Organization's Indigenous and Tribal Peoples Convention 1957

CDM: Clean Development Mechanism

CSR: Corporate Social Responsibility

DRTD: Declaration on the Right to Development

ESG: Environmental Social Governance

EUR: Euro

GBP: Pound Sterling

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic Social and Cultural Rights

IFC: International Finance Corporation

ILO: International Labour Organization

INGO: International Nongovernmental Organisation

MDGs: Millennium Development Goals

NGO: Nongovernmental Organisation

OECD: Organisation for Economic Co-operation and Development

OHCHR: Office of the United Nations High Commissioner for Human Rights

SDGs: Sustainable Development Goals

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNDP: United Nations Development Programme

UNDRIP: Universal Declaration on the Rights of Indigenous Peoples

UNEG: United Nations Evaluation Group

UNFCCC: United Nations Framework Convention on Climate Change

UNGP: United Nations Guiding Principles on Business and Human Rights

UPR: Universal Periodic Review

USD: United States Dollar

INTRODUCTION

This thesis focuses on the ways in which stakeholders can influence a mutually reinforcing relationship between human rights and community development in commercial development contexts. It analyzes how stakeholder approaches to this relationship, and particularly their rights-related dispositions and actions, are critical to this. Grounded in three commercial development examples, this thesis develops a taxonomy of stakeholder approaches to human rights in the context of commercial development projects.

This thesis is predicated on the idea that there is underexplored potential for human rights and commercial development to be mutually reinforcing. This potential stands the best chance of being realised in contexts where stakeholders, engaged in certain types of development, are able and willing to adopt human rights-oriented dispositions. The three case studies in this thesis (Phulbari Coal Mine in Bangladesh, Lake Turkana Wind Power in Kenya, and Okikendawt Hydroelectric Power Plant in Canada) illustrate how different outcomes can be partly determined by these stakeholder dispositions. Commercial development projects may often provide the context for large-scale human rights violations (as in two of the case studies below). While shaped by their own contexts, seen together, the three case studies examined in this thesis present a pattern of human rights and community development actions. Additionally, the recent large-scale adoption of commercial sustainable development practices has begun to further complicate the relationship between rights and development.¹ The goal of creating a taxonomy of stakeholder approaches, derived from recent real-world contexts, is to mitigate the tensions between human rights and

¹ EJOLT, 'Lake Turkana Project in Indigenous Territories, Kenya' (*Environmental Justice Atlas*) <<https://ejatlas.org/conflict/lake-turkana-project-in-indigenous-territories>> accessed 2 February 2019; Government of Canada; Indigenous and Northern Affairs Canada, 'Dokis First Nation Okikendawt Project' (*Indigenous and Northern Affairs Canada*, 31 March 2016) <www.aadnc-aandc.gc.ca/eng/1459449220161/1459449341752>; Human Rights Watch, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Olympics: Host City Contract Requires Human Rights' (*Human Rights Watch*, 28 February 2017) <www.hrw.org/news/2017/02/28/olympics-host-city-contract-requires-human-rights#:~:text=Olympics%3A%20Host%20City%20Contract%20Requires%20Human%20Rights.%20New,move%20by%20the%20International%20Olympic%20Committee%20%28IOC%20>>; Anders Dahlbeck, 'A Human Rights Based Approach to the Means of Implementation of the Sustainable Development Goals' [2020] *The Danish Institute for Human Rights* 74; UNDG, 'UN (Sustainable) Development Group Human Rights Case Studies' (UN Development Operations Coordination Office 2013); United Nations Development Programme, 'Integrating Human Rights with Sustainable Human Development' (1998).

development. This thesis envisions the potential for resolutions that allow for long-term, sustainable development in combination with the full realisation of human rights.

The Problem

Commercial development projects, particularly in cases of large-scale infrastructure projects, tend to result in human rights abuses.² This has been established by analysing hundreds of micro, meso, and macro level infrastructure projects and conducting thousands of interviews with a range of stakeholders.³ The human rights violations brought about by commercial development abuses include: illegal land acquisition and usage;⁴ poor labour conditions;⁵ health, safety, and environmental impacts;⁶ violations of freedom of opinion, expression, association, assembly, and self-determination;⁷ poor consultation and impact assessment activities;⁸ reinforced inequalities for indigenous communities;⁹ and more. As in the case studies described in the following chapters, each of these human rights impacts may be directly or indirectly exacerbated by planning, construction, or implementation of a commercial development project. These impacts tend to occur when community development is prioritised over, and seen as separate from, human rights.¹⁰

² Office of the High Commissioner for Human Rights, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (Office of the High Commissioner for Human Rights 2017).

³ *ibid* 30–47.

⁴ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) Articles 26,27.

⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Article 7; 'ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)'.

⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5) Article 12.

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Articles 1,19,22.

⁸ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 4) Articles 10,11,19,28,29.

⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 7); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 4) Article 46.

¹⁰ Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) 36

<www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199284627.001.0001/acprof-9780199284627> accessed 7 February 2021.

International human rights laws create obligations on states to respect, protect, and fulfill human rights.¹¹ On the commercial development side, there are few legal mechanisms to hold corporate stakeholders accountable for human rights abuses.¹² Corporations are bound by the national laws of the states in which they operate.¹³ However, in many instances, these national laws are heavily influenced by, and in some cases based on, international human rights laws.¹⁴ As a result, in some contexts, commercial developers may be held accountable to nationally ratified, international law.¹⁵

Amnesty International describes a flaw in corporate accountability that is central to this thesis, “Although it is now widely accepted that corporations have a responsibility to respect human rights, too many times profits are built on the back of human rights abuses. Despite laws in many countries that allow companies to be prosecuted, governments rarely even investigate corporate wrongdoing.”¹⁶ These two stakeholders (states and corporations) are the primary drivers of commercial development in the first two case studies considered in this thesis. More often than not (as in the case studies below) it is the actions of the corporate stakeholders (sometimes in concert with the state) that result in human rights abuses. As the analysis of the three case studies will make clear, local communities (in these cases, indigenous communities) tend to bear the brunt of the human rights abuses. This thesis articulates these problems in a new way and suggests potential solutions.

The Hypothesis

This thesis is animated by the question of how stakeholder approaches to rights and development affect the respect, protection, and fulfillment of human rights obligations in

¹¹ Office of the High Commissioner For Human Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations’ (Committee on Economic, Social and Cultural Rights 1990); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5).

¹² Amnesty International, ‘Corporate Accountability’ <www.amnesty.org/en/what-we-do/corporate-accountability/>.

¹³ United Nations Human Rights Office of the High Commissioner, ‘The Corporate Responsibility to Respect Human Rights: An Interpretive Guide’ (2012) 10.

¹⁴ *ibid* 10–11.

¹⁵ United Nations Human Rights Office of the High Commissioner (n 13).

¹⁶ Amnesty International (n 12). The word “responsibility” in the cited quote does not necessarily mean a legal responsibility and may include moral and corporate social responsibilities.

commercial development contexts. Certain stakeholders in commercial development contexts have historically failed to recognise human rights protections as an important component of their processes, regardless of their legal obligations.¹⁷ While this is not a universal statement (as proven by the third case study¹⁸) the problem is pervasive.¹⁹ This thesis analyses three different cases by focusing on the stakeholders in order to illustrate the problem, and then proposes a potential path forward, building on the hypothesis that if stakeholders were to approach commercial development projects with human rights protections as a core component, there is potential to fulfill human rights obligations, and achieve community development goals.

This thesis develops a new taxonomy of stakeholder approaches (Chapter VII), derived from analysing the three case studies:

- (1) A Non-Rights-Based Approach to Development: ignoring any human rights effects in commercial development contexts.
- (2) A Human Rights-Based Approach to Development: a system of checks that attempts to protect the human rights of all stakeholders at each step of commercial development.
- (3) A new contribution to the field, a Development-Based Approach to Human Rights: using human rights fulfillment as the foundational goal of commercial development.

This final approach would ensure that both commercial development itself, and any resulting community development effects, are means of respecting, protecting, and fulfilling human rights.

This thesis has relevance for prevailing concerns in the fields of development (community and commercial), human rights, business and human rights, sustainable development, and corporate social responsibility. One of the primary contributions is the new taxonomy of approaches to rights and development (above). This taxonomy recognises the complexity of the relationship between human rights and commercial development. Businesses have the potential to

¹⁷ *ibid*; 'World Report 2020: Rights Trends in Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties' (*Human Rights Watch*, 8 January 2020) <www.hrw.org/world-report/2020/country-chapters/global-2>; United Nations Human Rights Office of the High Commissioner (n 13).

¹⁸ Government of Canada; Indigenous and Northern Affairs Canada (n 1).

¹⁹ International Accountability Project, 'The Phulbari Coal Project: A Threat To People, Land, And Human Rights In Bangladesh' (International Accountability Project 2012); 'Lake Turkana Wind Power: Renewable Energy & Human Rights Business & Human Rights Resource Centre' <www.business-humanrights.org/en/lake-turkana-wind-power-renewable-energy-human-rights> accessed 18 May 2019.

foster development for communities while simultaneously completing their own commercial development projects. Sustainable development has the potential to aid in the progressive realisation of economic and social rights. Corporate social responsibility can be a tool for community development and human rights fulfillment. Local communities ought to be integral stakeholders in the successful completion of commercial development projects. Integrating human rights into community and commercial development and vice versa can lead to mutual benefits for the fulfillment of both objectives: profit and human rights. The case studies show that these benefits include increased levels of community development as a result of an increased fulfillment of human rights. Using a legal lens, the following pages and chapters guide the field from the current (and some previous) strategies to merge rights and development, to where these strategies may have gone wrong, to new proposals for the betterment of both human rights and commercial development, independent of, and in concert with, each other.

Situating the Thesis in the Existing Literature

As is considered more fully in Chapter II, the current debates in the human rights and development literature focus on the relationship between human rights and community development.²⁰ The existing literature considers human rights along two dimensions: law as the manifestation of human rights obligations, and development policy as a method of fulfilling said

²⁰ Alston and Robinson (n 10); Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755; Mary Robinson, 'Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance' (World Bank Presidential Lecture, Washington DC, 3 December 2001); Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664; Paul Gready, 'Rights-Based Approaches to Development: What Is the Value-Added?' (2008) 18 *Development in Practice* 735; Mac Darrow and Amparo Tomas, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 471; Dahlbeck (n 1); Jessie Jackson, 'Measuring Human Rights and Development By One Yardstick' 15 *California Western International Law Journal* 9; Jack Donnelly, 'Human Rights, Democracy, and Development' [1999] *Human Rights Quarterly* 26; Inga T Winkler and Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21 *The International Journal of Human Rights* 1023; Ignacio Saiz and Kate Donald, 'Tackling Inequality Through the Sustainable Development Goals: Human Rights in Practice' (2017) 21 *The International Journal of Human Rights* 1029; Peter Uvin, *Human Rights and Development* (Lynne Rienner Publishers 2004) <<https://ebookcentral-proquest-com.proxy.library.nyu.edu/lib/nyulibrary-ebooks/detail.action?docID=3328882>>; Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development' (2007) 17 *Development in Practice* 597.

obligations.²¹ It then examines the ways in which law and policy, individually and in concert, have succeeded or failed in achieving intended community development targets.²² Community development entails the social and economic improvement of peoples from local to international levels. This is achieved through the work of international aid, development organisations, development banks, implementing the concept of the welfare state, and more (in more detail below).²³ Some experts see the full realisation of a right to development as the most realistic method for integrating human rights and community development, while others vehemently disagree (as explained further in Chapter II).²⁴ A wide-ranging mix of academic and policy approaches sees the potential for mutual reinforcement between community development and the fulfillment of social and economic rights.²⁵

²¹ Alston and Robinson (n 10); Robinson (n 20); Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 *Human Rights Quarterly* 866; Uvin, *Human Rights and Development* (n 20); Uvin, 'From the Right to Development to the Rights-Based Approach' (n 20); The World Bank and the OECD, 'Integrating Human Rights into Development' (The World Bank and the OECD 2016); S McInerney-Lankford, 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 *Journal of Human Rights Practice* 51.

²² Alston and Robinson (n 10) 5; Eric Posner, 'The Case against Human Rights' *The Guardian* (4 December 2014) <www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 2 October 2018; César Rodríguez-Garavito, 'Against Reductionist Views of Human Rights' (*OpenDemocracy*, 30 July 2013) <www.opendemocracy.net/en/openglobalrights-openpage/against-reductionist-views-of-human-rights/> accessed 14 February 2021; César Rodríguez-Garavito, 'Towards a Human Rights Ecosystem', *Debating the Endtimes of Human Rights* (Amnesty International Netherlands 2014); Robinson (n 20); Darrow and Tomas (n 20).

²³ Donnelly (n 20); 'Human Development Reports' <<http://hdr.undp.org/en/2020-report>> accessed 2 October 2018; Amartya Sen, *Development as Freedom* (1st edn, Knopf 1999); 'United Nations - About Economic and Social Development' <www.un.org/esa/about_esa.html> accessed 18 April 2020.

²⁴ Khalid Abdalla, 'Declaration on the Right to Development (History)' 6; Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36 *Economic and Political Weekly* 11; Karin Arts and Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 *Netherlands International Law Review* 221; Uvin, 'From the Right to Development to the Rights-Based Approach' (n 20); Arjun Sengupta, 'Conceptualizing the Right to Development for the Twenty-First Century' <www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_587738a4-en> accessed 30 September 2018; Arjun Sengupta, 'Realizing the Right to Development' [2000] *Development and Change* 26; AK Shiva Shiva Kumar, 'National Experience with the Right to Development', *Realizing the Right to Development* (United Nations 2013) <www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_cdf8a998-en> accessed 2 October 2018; United Nations (ed), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013).

²⁵ Robinson (n 20); Alston and Robinson (n 10); Robinson (n 21); Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1995); Asbjorn Eide, *Economic Social and Cultural Rights* (Springer Netherlands 2001); Manisuli Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259; Office of the United Nations and High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights' (Office of the United Nations High Commissioner for Human Rights) <www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

While community development has generally been the focus of the scholarship, this thesis is situated at the nexus of human rights and commercial development. Human rights and community development research has already begun to bridge the gap between human rights and commercial development: business and human rights,²⁶ progressive realisation,²⁷ stakeholder capitalism,²⁸ sustainable development,²⁹ corporate social responsibility,³⁰ and so on, are areas in which there is significant relevant work. As is considered in more detail in Chapter II, few of these fields have gone so far as to examine the ways in which multiple stakeholders may alter their approaches to fulfill human rights and achieve community development, while simultaneously completing successful commercial development projects.

As the case studies considered in this thesis make clear, there are opportunities for commercial development to foster community development. At the same time, commercial development has the potential to violate human rights. There is a gap in the research that makes room for an analysis of the relationship between commercial development as a tool for achieving community development, and then, as a tool for human rights fulfillment. In addition to finding a new space by which development and rights may come together, this thesis also reorients the existing literature by focusing on the roles of stakeholders as both contributors and impediments to the mutual reinforcement of human rights and development. It does this by looking in depth at three cases, in three distinct global regions, with three different manifestations of the relationship between human rights and commercial development. This thesis concludes by presenting a new taxonomy of stakeholder approaches to rights and development by drawing on both the existing literature and the three case studies.

²⁶ John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> accessed 25 November 2018.

²⁷ ESCR-Net, 'Progressive Realisation and Non-Regression' (*ESCR-Net*) <www.escr-net.org/resources/progressive-realisation-and-non-regression> accessed 14 February 2021.

²⁸ John Ruggie, Caroline Rees and Rachel Davis, 'Making "Stakeholder Capitalism" Work: Contributions From Business & Human Rights' Working Paper of the Corporate Responsibility Initiative 35.

²⁹ United Nations Department of Economic and Social Affairs, 'Sustainable Development Goals: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/?menu=1300>> accessed 7 June 2020.

³⁰ Denis G Arnold and Andres Valentin, 'Corporate Social Responsibility At The Base Of The Pyramid' (2013) 66 *Journal of Business Research* 1904; Alexander Dahlsrud, 'How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1.

Key Concepts and Terminology

The following prevalent concepts and terms are key to understanding the research and analysis presented in this thesis: stakeholders, approaches, dispositions, actions, human rights, community development, and commercial development. While this list is not exhaustive, for introductory purposes, consideration of these terms is necessary to frame the research.

The research question presents stakeholder approaches as the tool to examine human rights and both forms of development. For the purposes of this thesis, stakeholders are those individuals, entities, or groups that have an interest in a specific community or commercial development project, are touched by human rights abuses as a result of said development, or both. This articulation is based on the 2005 definition of stakeholders in the *Encyclopedia of Evaluation* as “the people who have a stake or a vested interest in the program, policy, or product being evaluated and therefore also have a stake in the evaluation”.³¹ In any given case study, the list of stakeholders may include the international community and United Nations, states (federal and local governments), corporations, civil society including nongovernmental organisations, local communities, and indigenous peoples.

Within this thesis, the concept of a stakeholder approach is understood as the combination of the stakeholder’s disposition and action (fully developed in Chapter II). A stakeholder’s disposition is a mindset, reflected in their preparations, in advance of an action. These include formal and informal plans, attitudes, interpretations and predetermined notions of the situation and any other relevant stakeholders. There are many factors that may contribute to a stakeholder’s disposition, including self-preservation, profit, community development, human rights, or any number of other drivers. The second half of an approach, action, is the way in which a stakeholder manifests these dispositions by actively engaging other stakeholders. The case studies clearly describe stakeholder actions, while the dispositions are more difficult to ascertain from the accounts that contribute to the events. The analytical framework (framing, instruments, and consultation measures utilised in each case study, Chapter II) is used to organise and articulate the actions of each stakeholder and attempts to tease out the disposition side of the approach. It ought

³¹ Sandra Mathison, ‘Stakeholder Involvement’, *Encyclopedia of Evaluation* (SAGE Publications 2004); United Nations Evaluation Group, ‘UNEG Principles for Stakeholder Engagement’ (2017) <www.unevaluation.org/document/download/2790>. This source is also cited by the United Nations Evaluation Group to support their work on stakeholder engagement.

to be noted that these conceptions of disposition and action were derived from the case studies themselves, by categorising each stakeholder, their approaches, actions, and dispositions and drawing out definitions from the results.

Understanding a stakeholder's disposition in advance of their action is necessary to understand the relations between stakeholders. As described in Chapter VI, relations between stakeholders may be compatible or in conflict. This compatibility or conflict is stakeholder approach dependent. A stakeholder's disposition is key to determining (in advance) if a specific relation between two or more stakeholders will be compatible or in conflict. If the approaches (both dispositions and actions) of multiple stakeholders can be determined and reconciled in advance, there is a higher chance of compatibility in any specific stakeholder relation (based on the case studies). This compatibility can lead to a mutually reinforcing relationship between human rights and commercial development.

The human rights considered in this thesis are codified in a series of international treaties and soft law instruments (in detail in Chapter I). The international bill of rights,³² in particular the International Covenant on Economic Social and Cultural Rights,³³ describes the human rights and state obligations that are most prevalent in the case studies. These include the rights to an adequate standard of living, health, education, and culture,³⁴ and the state obligations to respect, protect, and fulfill rights, progressively realise certain rights, and fulfill minimum core obligations.³⁵ However, some of the human rights that are relevant in the case studies are not considered by legally binding treaties, namely land rights and indigenous rights. These are considered in a variety of soft law instruments including the United Nations Declaration on the Rights of Indigenous Peoples and The International Labour Organization's C169 (analysed in detail in Chapter I).³⁶ In all three case studies, land rights and indigenous rights (and, in particular, their interconnected nature) are key

³² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 7).

³³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5).

³⁴ *ibid* Articles 11,12,13,15.

³⁵ Office of the High Commissioner For Human Rights (n 11).

³⁶ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 4); 'ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (n 5). During the timeframes of the case studies, these instruments were nonbinding on the states in which the commercial development occurred.

to understanding the relationship between commercial development, community development, and human rights.

The literature on human rights and development discusses two types of development: community development and commercial development.³⁷ They are not necessarily mutually exclusive, but for the purposes of this thesis, they must be separated out. The first type, community development, looks at assisting individuals or communities in their own development, as an end in and of itself. Funded by states, financial institutions, private enterprises, the United Nations, NGOs, and other grant giving organisations, community development focuses on projects aimed at elevating communities out of poverty.³⁸ These types of projects may include infrastructure such as schools and hospitals, cash infusions or micro-loans, food security initiatives, access to healthcare, inter alia.³⁹

A rights-based approach to community development uses a rights fulfillment framework to decide the types of actions that should be taken to assist communities.⁴⁰ This rights fulfillment framework would historically ask and analyse what the community needs for their human rights to be respected, protected, and fulfilled and then determine how the needs can be efficiently provided for.⁴¹ Some of the case study-specific contexts below take a similar stylistic approach but use commercial development (below) as a means to achieve community development. This relationship between commercial and community development will be addressed throughout the analysis.

³⁷ United Nations, OECD, World Bank, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (United Nations 2003); Damilola S Olawuyi, *The Human Rights Based Approach to Carbon Finance* (Cambridge University Press 2016); Uwe Gneiting and others, 'Setting Higher Goals: Rights and Development Trade-Offs and Challenges in Implementing a Rights-Based Approach to Development' [2009] Monday Developments; Raymond C Offenheiser and Susan H Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 Nonprofit and Voluntary Sector Quarterly 268. Nearly all of the development literature that mentions human rights focuses on the community form of development. This form can be extrapolated and be statewide, regional or global. Looking at commercial development in this way is a unique contribution to the field.

³⁸ 'United Nations - About Economic and Social Development' (n 23).

³⁹ *ibid*; Offenheiser and Holcombe (n 37). The welfare model attempted to identify the goods or knowledge that would be most effective for each community. A government (or group of governments) would traditionally act first and plan for the market to then take over.

⁴⁰ Offenheiser and Holcombe (n 37); Broberg and Sano (n 20); Gready (n 20); United Nations, OECD, World Bank (n 37).

⁴¹ Offenheiser and Holcombe (n 37).

The second type, commercial development, is, for the purposes of this thesis, defined as for-profit enterprise projects that may have various (positive or negative) effects on stakeholders. The commercial development context begins in the ideation phase, and continues through research, financing, impact assessment, construction, maintenance, and in some cases termination. Effects on stakeholders may arise at any or all phases of commercial development. In Chapters IV (Lake Turkana Wind Power) and V (Okikendawt Hydroelectric Power Plant), these positive effects foster community development.⁴² In Chapters III (Phulbari Coal Mine) and IV (Lake Turkana Wind Power), the negative effects result in human rights abuses and state violations of their human rights obligations.⁴³

This thesis makes the case that commercial development may be a means of improving community development, particularly when a stakeholder approaches a context with an eye toward human rights. However, in the case studies below, the success of commercial development projects requires an increase in community development. This may include infrastructure (building or repairing roads and bridges), health and safety (constructing local hospitals), or education (building and staffing local schools or training facilities). The commercial development projects in the case studies below are for-profit infrastructure endeavours that implicate a range of stakeholders (above). In particular, local and indigenous communities are affected (for better or worse) in each of the commercial development projects considered in this thesis. Approaches to commercial development, even with beneficial community development byproducts, are most effective when stakeholders consider human rights. The ways in which this consideration occurs is the content of the taxonomy of stakeholder approaches to commercial development, described in Chapter VII.

⁴² 'Lake Turkana Wind Power Project: The Largest Wind Farm Project in Africa' (*African Development Bank Group*, 17 September 2015) <www.afdb.org/en/projects-and-operations/selected-projects/lake-turkana-wind-power-project-the-largest-wind-farm-project-in-africa-143/> accessed 26 March 2019; Government of Canada; Indigenous and Northern Affairs Canada (n 1).

⁴³ Office of the High Commissioner for Human Rights (n 2); International Accountability Project (n 19); 'Lake Turkana Wind Power: Renewable Energy & Human Rights Business & Human Rights Resource Centre' (n 19).

Analytical Framework

The research question focuses on stakeholder approaches to rights and development (both types). The analytical framework was developed to assist in determining these stakeholder approaches in each of the three case studies. The three case studies are considered across three stable dimensions: framing, instruments, and consultation measures. These dimensions are used to discern and consider stakeholder approaches by (1) examining the actions of stakeholders, and (2) attempting to determine the disposition of each stakeholder. This to understand how, if at all, human rights and commercial development are mutually reinforcing in three different commercial development contexts (the case studies).

Framing is a method of categorising and then interpreting series of “objects, situations, events, experiences, and sequences of actions.”⁴⁴ Described in detail in Chapter II, the framing of a specific relationship between stakeholders helps to interpret whether the relevant stakeholders are approaching the context with a community development or human rights lens. The instrument dimension looks at the laws, policies, and reports that are relevant to the relationship between commercial development and human rights. The consultation measures examine the ways in which each stakeholder actively engages with others to ensure that human rights are respected, protected, and fulfilled by the state. These measures include feedback mechanisms, corporate accountability measures, and international protocols. The analytical framework is used to structure the analysis of each case study. In combination, the components of the analytical framework assist in describing the actions and revealing the dispositions of each stakeholder within the commercial development contexts.

Case Studies

The commercial development projects in this thesis are presented in the form of case studies. As this research is interdisciplinary, and is situated across the fields of law, development, economics, sociology, and political science, case studies allow for real-world applications of the complex systems in which human rights, community development, and commercial development

⁴⁴ David Snow and Robert Benford, ‘Master Frames and Cycles of Protest’ 137
<www.researchgate.net/publication/246773271_Master_Frames_and_Cycles_of_Protest>.

interact.⁴⁵ While the use of case studies, in general, may lead to the conclusion that relationships (between human rights and development) drawn from specific contexts are unique, the case studies in this thesis take a different approach.

As mentioned briefly above, and as will be developed in far greater detail throughout the thesis, the focus is not on the specific events that occurred in each case study, but on the ways in which stakeholders interact and form relationships in different contexts. These relationships then have the potential to be compared and applied in additional contexts and help to inform the taxonomy presented in Chapter VI. The specific events within the case studies below are not meant to be compared to each other. However, the relationships between the stakeholders in each context are compared in great detail.

The three case studies in this thesis focus on commercial energy infrastructure projects. The energy projects focus on power generation (coal, wind, and hydroelectric) and not transportation.⁴⁶ The case studies specifically recognise the differences in types of energy production as they relate to community development. Of particular note, Chapters IV (Lake Turkana Wind Power) and V (Okikendawt Hydroelectric Power Plant) describe sustainable energy projects (wind and hydroelectric) that contribute to (or detract from) the overall sustainable development plans for the country and community.

Historically, these types of energy infrastructure projects can lead to, or be directly responsible for human rights abuses.⁴⁷ These abuses (by corporate stakeholders) tend to lead to violations of the rights to property and land, culture, labour, indigeneity and free prior and informed consent, an adequate standard of living, health, and education.⁴⁸ Each of these rights are considered throughout the case studies. These rights tend to be violated in energy infrastructure

⁴⁵ Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 *Utrecht Law Review* 95, 97.

⁴⁶ Asia Energy PLC, 'The Phulbari Coal Project' (November 2004); Aldwych International, 'Lake Turkana Wind Power Project (LTWP): Seminar on Sustainable Energy Investments in Africa' (Copenhagen, 24 June 2014); 'Okikendawt Hydro Project on the French River Begins Construction' *Anishinabek News* (27 August 2013) <<http://anishinabeknews.ca/2013/08/27/okikendawt-hydro-project-on-the-french-river-begins-construction/>> accessed 8 February 2020.

⁴⁷ Office of the High Commissioner for Human Rights (n 2).

⁴⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 5); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 4); Indigenous and Tribal Peoples Convention, 1989 (No. 169) Adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session (entered into force 5 September 1991).

projects as (1) people are removed from their land, (2) relocation is not always successful, (3) significant construction is usually necessary, (4) this leads to air, water, and land pollution, and (5) local community members may be employed in the process with unfair labour practices.⁴⁹

From a community development perspective, energy infrastructure projects run the gamut. Certain projects produce energy for local communities while others immediately transport it to other areas of the state (Chapter IV, Lake Turkana Wind Power) or over state lines (Chapter III, Phulbari Coal Mine). Development programming for local and indigenous communities sometimes includes increasing access to education and healthcare by way of constructing schools and hospitals (Chapters III, Phulbari Coal Mine and IV, Lake Turkana Wind Power), while other projects do not take local community development into account.⁵⁰

While the specific human rights violations and community development concerns that are addressed throughout the case studies remains relatively consistent, the ways in which they are approached by different stakeholders is not. For this reason, selecting a single type of infrastructure (energy) was important for this thesis to keep certain factors consistent, and have the analysis focus on the stakeholder approaches to human rights and both types of development.

The three case studies take place in Bangladesh (Chapter III), Kenya (Chapter IV), and Canada (Chapter V). In Bangladesh, the Phulbari Coal Mine is a non-sustainable energy project that has direct ramifications on various human rights abuses, including violations of the right to life.⁵¹ In Kenya, the Lake Turkana Wind Power project is a renewable energy project that attempted to develop local communities but ultimately may have failed to protect cultural and land rights.⁵² In Canada, the Okikendawt Hydroelectric Power Plant is an indigenous-driven, sustainable energy project, made possible through a mix of legal human rights protections and development policy initiatives.⁵³ The analysis in this thesis is not focused on comparing the three state contexts, but on the specific stakeholder approaches to human rights and development that

⁴⁹ Office of the High Commissioner for Human Rights (n 2).

⁵⁰ *ibid.*

⁵¹ Phulbari Resistance, 'Phulbari Resistance: Urgent Appeal by World Organization against Torture: Risk of Violent Suppression of Public Opposition to the Phulbari Coal Mine Project' (*Phulbari Resistance*, 22 December 2007) <<http://phulbariresistance.blogspot.com/2007/12/urgent-appeal-by-world-organization.html>> accessed 16 October 2020.

⁵² *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014))).

⁵³ Government of Canada; Indigenous and Northern Affairs Canada (n 1).

arise around the commercial development projects. However, each state context is highly relevant to the stakeholder approaches.

Each of the three states has different human rights records, ratified different international human rights law treaties, have engaged in different types of community and commercial development projects, and have different resources (financial and otherwise) that they can commit to projects such as those described in the case studies.

Bangladesh has a considerable history of grave human rights violations.⁵⁴ There are consistent rights violations (Bangladesh as a repeat offender) recognised by the international community including enforced disappearances and extrajudicial killings, violating the rights to health, labour rights, and indigenous rights.⁵⁵ Each of these rights violations also occurred during the commercial development project in the case study (Chapter III). Bangladesh has ratified the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights.⁵⁶ Bangladesh has not ratified (and abstained from voting on) the Universal Declaration on the Rights of Indigenous Peoples.⁵⁷ In terms of development, Bangladesh is considered a Least Developed Country by the United Nations, however, poverty has declined from 44% of the country in 1991 to 15% in 2016, due to garment exports, stable macroeconomic conditions, a demographic dividend, and 30 billion USD worth of support from the World Bank.⁵⁸ As of 2012, 59.7% of the population had access to electricity and 60% of those customers had low voltage supply.⁵⁹ As of 2014, the majority of Bangladesh's electricity came from natural gas

⁵⁴ 'Bangladesh Human Rights' (*Amnesty International USA*) <<https://www.amnestyusa.org/countries/bangladesh/>> accessed 21 August 2021.

⁵⁵ Working Group on the Universal Periodic Review, 'Bangladesh: Universal Periodic Review' (Office of the High Commissioner for Human Rights 2013) A/HRC/WG.6/16/BGD/2; Human Rights Council, 'Decision 11/104 Outcome of the Universal Periodic Review: Bangladesh' (Universal Periodic Review 2009); Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh' (Human Rights Council 2009) A/HRC/11/18*; Cultural Survival and American Indian Law Clinic, 'Observations on the State of Indigenous Human Rights in Bangladesh' (United Nations, Human Rights Council 2017) Universal Periodic Review 30th Session; Amnesty International, 'Bangladesh Submission to the UN Human Rights Committee' (UN Human Rights Committee 2017) 119th Session; 'Bangladesh Human Rights' (n 54); Human Rights Watch, 'Bangladesh: Events of 2020' (2021) <www.hrw.org/world-report/2021/country-chapters/bangladesh> accessed 21 August 2021.

⁵⁶ Human Rights Forum, 'List of Bangladesh's Ratification of International Treaties' (2012). The ICESCR and ICCPR with declarations and the ICCPR with one reservation.

⁵⁷ 'United Nations Declaration on the Rights of Indigenous Peoples' <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

⁵⁸ 'Bangladesh Development Overview' (*World Bank*) <www.worldbank.org/en/country/bangladesh/overview> accessed 21 August 2021.

⁵⁹ Saiful Islam and Md Ziaur Rahman Khan, 'A Review of Energy Sector of Bangladesh' (2017) 110 *Energy Procedia* 611, 612.

(57%), oil (17%), and coal (3%).⁶⁰ While renewable energy is currently a priority for Bangladesh, as of the time in which the case study occurred, electricity generated from renewable sources was negligible.⁶¹ The human rights and development concerns addressed in the case study are relatively in line with human rights, community development, and energy infrastructure projects across Bangladesh.⁶²

Kenya's human rights violations are primarily in the areas of abuse by security, environmental rights, forced evictions, the right to property, indigenous rights, and women and girls' rights.⁶³ Again, many of these rights violations mirror those that arise in the case study (Chapter IV). Kenya has ratified the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights.⁶⁴ Kenya has not ratified (and has abstained from voting on) the Universal Declaration on the Rights of Indigenous Peoples.⁶⁵ Kenya's development strategy fostered sustained economic growth and social development after the 2010 Constitution came into effect.⁶⁶ The current development plan, Vision 2030, is focused on sustainable development and is aligned with the aims of the Sustainable Development Goals.⁶⁷ Energy production in Kenya is primarily from oil (2094 GWh), hydro (3986 GWh), and geothermal (5186 GWh).⁶⁸ In comparison, wind, the energy type produced by the case study (Chapter IV) accounts for less than 2.5% of energy production (291 GWh).⁶⁹ While the energy production from wind power is not a primary power source for Kenya, the human rights violations

⁶⁰ *ibid* 615.

⁶¹ *ibid* 614.

⁶² International Accountability Project (n 19) 1–2.

⁶³ Human Rights Watch, 'Kenya: Events of 2020' (2020) <www.hrw.org/world-report/2021/country-chapters/kenya> accessed 21 August 2021; 'Indigenous Peoples in Kenya - IWGIA - International Work Group for Indigenous Affairs' <www.iwgia.org/en/kenya/655-indigenous-peoples-in-kenya> accessed 4 July 2019; Minority Rights Group International, 'Alternative Report to the Committee on the Elimination of Racial Discrimination: Review of the Periodic Report of Kenya' (Committee on the Elimination of Racial Discrimination 2017); 'Kenya Human Rights' (*Amnesty International USA*) <www.amnestyusa.org/countries/kenya/> accessed 21 August 2021.

⁶⁴ United Nations Human Rights Office of the High Commissioner, 'Status of Ratification - Interactive Dashboard' <<https://indicators.ohchr.org/>>.

⁶⁵ 'United Nations Declaration on the Rights of Indigenous Peoples' (n 57).

⁶⁶ 'Kenya Development Overview' (*World Bank*) <www.worldbank.org/en/country/kenya/overview> accessed 21 August 2021.

⁶⁷ Kenya Vision 2030, 'Kenya Vision 2030' <<https://vision2030.go.ke/>> accessed 26 May 2019; 'Kenya Vision 2030: The Popular Version' (Government of the Republic of Kenya 2007); 'Sustainable Development Goals: Sustainable Development Knowledge Platform' (n 29).

⁶⁸ 'International Energy Agency - Kenya' (*IEA*) <www.iea.org/countries/kenya> accessed 21 August 2021.

⁶⁹ *ibid*.

and overall development strategy across Kenya as a whole are in line with the rights and community development concerns addressed in the case study.

Human rights abuses in Canada are primarily in the areas of indigenous rights, women's rights, refugees, and corporate accountability.⁷⁰ There has been a significant history of discrimination against indigenous (First Nation) communities across Canada.⁷¹ These include poor water and sanitation conditions, other health concerns, food poverty, and weather-related impacts of climate change, which have largely been ignored.⁷² Canada has ratified the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights.⁷³ Canada had not ratified (at the time of the case study) and voted against the Universal Declaration on the Rights of Indigenous Peoples.⁷⁴ Canada's development strategy focused on sustainable development in advance of the Sustainable Development Goals.⁷⁵ Canada ranks near the top of the Human Development Index and the rates of education, life expectancy and the Gross National Income per capita have all increased by ~10% since 1990, hitting at least 90% across the country.⁷⁶ Energy production in Canada comes from hydro (60%), other renewables (7%), nuclear (15%), oil and gas (11%), and coal (7%).⁷⁷ The case study (Chapter V) considers an indigenous-led hydroelectric power plant. This context focuses on an area of energy production that is prevalent across Canada, but also considers a group of people (First Nations) that have historically been victims of human rights violations.

⁷⁰ 'Canada Human Rights' (*Amnesty International USA*) <www.amnestyusa.org/countries/canada/> accessed 21 August 2021; Human Rights Watch, 'Canada: Events of 2020' (2020) <www.hrw.org/world-report/2021/country-chapters/canada> accessed 21 August 2021; 'World Report 2020: Rights Trends in Canada' (*Human Rights Watch*, 13 December 2019) <www.hrw.org/world-report/2020/country-chapters/canada> accessed 12 June 2021.

⁷¹ 'World Report 2020: Rights Trends in Canada' (n 70).

⁷² *ibid.*

⁷³ United Nations Human Rights Office of the High Commissioner (n 64).

⁷⁴ 'United Nations Declaration on the Rights of Indigenous Peoples' (n 57).

⁷⁵ Indian and Northern Affairs Canada and Affairs Canada, 'Sustainable Development Strategy 2007–2010' (Minister of Public Works and Government Services, Canada 2006); Environment and Climate Change Canada, 'Federal Sustainable Development Strategy' (18 June 2018) <www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html> accessed 8 February 2020; Federal Sustainable Development Act 2008.

⁷⁶ United Nations Development Programme, 'Human Development Report 2020: The Next Frontier - Human Development and the Anthropocene' (United Nations 2020) <www.un-ilibrary.org/content/books/9789210055161> accessed 22 August 2021.

⁷⁷ Canada, 'Canadian Energy Generation' (*Government of Canada*, 6 October 2017) <www.nrcan.gc.ca/science-and-data/data-and-analysis/energy-data-and-analysis/energy-facts/electricity-facts/20068> accessed 22 August 2021.

The analyses of these three country contexts are not comparative. However, this thesis seeks to identify the elements that are important to understanding the relationships between human rights and development (community and commercial) across all of them, in spite of their differences. This breadth of sizes, ranges of human rights fulfillment, levels and styles of development, and locations, creates enough diversity to craft the taxonomy of approaches (Chapter VI) in a way that would make the resulting stakeholder relations relevant across a range of commercial development contexts. In essence, the diversity of the case studies increases the potential for the taxonomy of approaches to become universal across commercial developments.

Structure of the Thesis

Chapter I describes the state of the art through an interdisciplinary scene setting. It begins with an analysis of international human rights and state obligations that are relevant to the case studies. The chapter then focuses on soft law instruments, in particular, those that reference land rights, indigenous rights, the right to development, and development agendas. Since the case studies engage with a mix of hard and soft law as human rights are considered in each commercial development context, this chapter analyses the relationship between the two, describing how one informs the other. Then the chapter describes the current conception, in scholarship and practice, of a human rights-based approach to (community) development that Chapter VI builds upon in the taxonomy of approaches. Next, the chapter looks at the relationship between commercial development and human rights. Namely, previous attempts to foster a relationship between the two using soft law approaches, corporate social responsibility, and accountability mechanisms. Each of these attempts arise in different situations within the case studies. Last, the chapter recognises each of the relevant stakeholders (from the previous sections and the case studies) to look at current conceptions of stakeholder engagement, and propose a new term, stakeholder relations, which will be used to analyse the case studies. The goal of this chapter is to set the scene, provide background information that is necessary to understand the case studies and analysis, and present some of the gaps in the scholarship.

Chapter II develops the analytical framework specifically designed to analyse the case studies. It starts by further defining the term stakeholder. The framework then goes on to describe the nature of approaches, namely a combination of disposition and action by a stakeholder.

Contributing to one of the central aims of this thesis, determining how to identify approaches is important when analysing the case studies. As mentioned briefly above, the analytical framework consists of three stable elements: (1) framing, (2) instruments, and (3) consultation measures. These three elements are used to analyse each case study in the chapters that follow. This framework structures each case study analysis, but ultimately helps to understand the specific stakeholder relations (clarifying the dispositions and actions), and therefore approaches, that are occurring in any given interaction between stakeholders, within a case study.

Chapter III is the first case study. The Phulbari Coal Mine in northern Bangladesh is a multi-stakeholder case: local communities, state politicians, courts, police forces, media, international finance institutions, the United Nations, foreign governments, inter alia. The complexity in this case arose out of rampant human rights violations, propagated by the corporate stakeholders, and then furthered by the state. Violations of the rights to property, land, culture, and life occurred even after peaceful protests were met with force by the federal government.⁷⁸ The relationships between stakeholders revealed commercial development activities that brought about human rights abuses by the corporate stakeholders, and violations by the state.⁷⁹ Corporate approaches to both human rights and community development were well intentioned⁸⁰ but failed to be executed in a way that would contribute to community development or the fulfillment of human rights. The Phulbari Coal Mine is a non-sustainable development case study that caused human rights abuses by multiple stakeholders in the name of commercial development.⁸¹

Chapter IV is the second case study. The Lake Turkana Wind Power project in the Lake Turkana region of northern Kenya is a sustainable development project. The corporate stakeholders used the Sustainable Development Goals as a framework for their impact assessment

⁷⁸ Dhaka Tribune, 'Phulbari Protesters Give Ultimatum to Meet 6-Point Demands' (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 27 October 2018.

⁷⁹ De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food, 'Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts' (*UN Special Rapporteur on Food*, 28 February 2012); Abdullah Nadvi, 'Phulbari Movement of 2006: Where We Stand Now' (*The Daily Star*, 1 September 2017).

⁸⁰ SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (Asia Energy Corporation (Bangladesh) Pty Ltd 2006).

⁸¹ Fariha Karim, 'WikiLeaks Cables: US Pushed for Reopening of Bangladesh Coal Mine' *The Guardian* (21 December 2010) <www.theguardian.com/world/2010/dec/21/wikileaks-cables-us-bangladesh-coal-mine> accessed 27 October 2018.

reports⁸² and community consultation led to a comprehensive relocation plan for those indigenous communities that were to be affected by the project's development.⁸³ While the dispositions were in line with respecting and protecting human rights, stakeholder actions fell short. A widespread misunderstanding of local customs and factions led to a human rights abuse claim against the corporate stakeholders.⁸⁴ The corporate stakeholder approaches to both human rights and community development revealed weak relationships and a lack of consultation (that initially looked robust) with the range of indigenous stakeholders, even with a community development-focused disposition.

Chapter V is the third case study. The Okikendawt Hydroelectric Power Plant is a joint venture, spearheaded by the Dokis First Nation in Ontario.⁸⁵ The Dokis' relationship to the land required that the project be environmentally friendly and help to fulfill economic and social rights for the community. The corporate stakeholders were willing to participate in this specialised arrangement because they saw the potential for replication among other First Nations across Canada.⁸⁶ From a human rights perspective, the Dokis First Nation had a long history of fighting to retain their land use rights, even if it meant losing out on a financial windfall.⁸⁷ However, by setting a standard for stakeholder approaches to human rights and development at the outset, the Dokis First Nation was able to design a commercial development project that led to a mutually reinforcing relationship between sustainable development and human rights fulfillment for all stakeholders.

Chapter VI begins by outlining the three categories of the approach taxonomy, derived from the case studies: a Non-Rights-Based Approach to Development, a Human Rights-Based Approach to Development, and a new contribution to the field, a Development-Based Approach to Human Rights. The taxonomy itself is also a new addition to the field, as well as the application of the first two categories to commercial development projects. The third category is a wholly new

⁸² QBIS, 'Socioeconomic Study of Key Impacts from LTWP Project' (2018) Impact Assessment Report <www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>.

⁸³ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' <<https://ltwp.co.ke/public-consultation-and-engagement/>> accessed 19 May 2019.

⁸⁴ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 52).

⁸⁵ Government of Canada; Indigenous and Northern Affairs Canada (n 1).

⁸⁶ Elizabeth Ingram, 'Ontario Hydropower Project Wins Sustainability Award' *Hydro Review* (3 December 2014) <www.hydroreview.com/2014/12/03/ontario-hydropower-project-wins-sustainability-award/>.

⁸⁷ *Dokis History of the First Nation* <www.youtube.com/watch?v=I9rlyioz-Es> accessed 10 February 2020.

concept. A Development-Based Approach to Human Rights envisions rights fulfillment as the underlying core intention of a commercial development project. A project in which stakeholders took up this approach would utilise commercial development in order to build, and to fulfill human rights aims with community development as either a means or a byproduct. The Human Rights-Based Approach to Development is the most common method of community development, according to the scholarship (Chapter I). This approach attempts to respect, protect, and fulfill human rights throughout a community development process (but the end goal is still development). First, this thesis applies the human rights-based approach to commercial development projects. It then makes the argument that human rights obligations ought to be the priority of commercial development, with community development as the means to fulfill them (human rights), and not human rights as a means to community development. Therefore, the Development-Based Approach to Human Rights is a new, and necessary addition to the field to describe this relationship between human rights, community development, and commercial development. This chapter then goes on to highlight examples of each of the approaches from the case studies. These examples illustrate instances when approaches come into conflict with one another and when they are compatible. Additionally, this analysis helps to determine the type of approach that is utilised in each context based on an examination of the disposition and the action. The analytical framework is applied to each context to tease the disposition from the action or the action from the disposition. Once both are ascertained, the approach (from the taxonomy) can then be determined. Finally, this chapter contextualises the approach taxonomy in real-world legal and policy contexts including various business and human rights frameworks, the Sustainable Development Goals, state duties to protect in commercial development contexts, and victim access to justice.

Chapter VII is the conclusion. This chapter again recognises the need for, and path towards, a mutually reinforcing relationship between human rights and commercial development, and the potential for achieving community development in commercial contexts. The approach taxonomy (Chapter VI) is key to understanding and fostering compatible stakeholder relations. There is still significant work to be done in understanding the complex relationships between these fields of study. In particular, sustainable development and the right to development have the potential to contribute to states' obligations to respect, protect, and fulfill human rights (economic and social rights) while at the same time fostering both types of development. However, understanding that the ends of human rights and community development have the potential to overlap with

commercial development is the first step towards an understanding that community development strategies are necessary for compatible stakeholder relations in commercial development contexts.

The goal of this thesis is to explore the potential for human rights and development to be mutually reinforcing. By looking at stakeholders in overlapping commercial and community development scenarios, it is clear that this potential exists, particularly in situations where the stakeholders adopt rights-oriented approaches. These approaches, which consist of dispositions and actions that utilise a human rights framing, tend to lead to compatible relationships (described in Chapter I) between stakeholders. These claims are derived from the three case studies which provide context for the entire analysis.

As the case studies make clear, in addition to leading to potential solutions, commercial development is known to provide context for large-scale human rights violations.⁸⁸ These violations are problematised and addressed through the taxonomy of approaches: a Non-Rights-Based Approach to Development, a Human Rights-Based Approach to Development, and a Development-Based Approach to Human Rights. These three approaches, drawn from the case studies, show that compatible stakeholder relations are key to successful commercial development projects that recognise both community development and human rights as ends in and of themselves. While continuously problematising and complicating the issues of, and relationships between, human rights, commercial development, community development, sustainable development, stakeholder approaches, and stakeholder relations, this thesis envisions the mutual reinforcement of human rights and development as a goal that requires compatible stakeholder relations, with multilateral approaches that value both human rights and development.

⁸⁸ Office of the High Commissioner for Human Rights (n 2); International Accountability Project (n 19); Business & Human Rights Resource Centre, 'Kenya: Report by Danwatch Reveals Negative Impacts of Lake Turkana Wind Project on Indigenous Community Rights' <www.business-humanrights.org/en/kenya-report-by-danwatch-reveals-negative-impacts-of-lake-turkana-wind-project-on-indigenous-community-rights> accessed 18 May 2019.

CHAPTER I

Human Rights, Development, and Stakeholders: The State of the Art

This thesis analyses the relationships between stakeholders, human rights, community development, and commercial development. This engagement happens in a range of contexts (countries, communities, and institutions) using a variety of tools (law, policy, and advocacy). This chapter sets the scene by examining theoretical and real-world attempts to bridge the gaps between human rights, community development, and commercial development, as well as problematising the current approaches to do the same.

The goal of this chapter is to lay the groundwork for this thesis to further analyse the relationship between rights and development. This is done throughout by (1) reviewing the law, literature, and current approaches to human rights and development, (2) recognising the gaps in the literature, and (3) setting the stage for the case studies and analysis below.

First, this chapter will look at state obligations under international human rights laws that are relevant to development. These obligations are contained in treaties (those relevant to the case studies), and include the respect, protect, fulfill framework, minimum core obligations, and progressive realisation. This first section will also pay special attention to the specific human rights that are pertinent to the case studies. Second, the chapter will look at soft law instruments relevant to rights and development, indigenous rights, land rights, the right to development, and international development agendas. Third, this chapter will examine the current conception of a Human Rights-Based Approach to Development, setting the scene for alternative approaches to human rights and development presented in Chapter VI. Fourth, this chapter will look at attempts to foster a relationship between commercial development and rights maximisation, focusing on business and human rights, the UN Guiding Principles, corporate social responsibility, and accountability mechanisms. Last, this chapter will look (in more detail) at the relevant stakeholders from the previous sections: international organisations, states, businesses, indigenous and local communities, and individuals. This, to look at current conceptions of stakeholder engagement and ultimately propose a more comprehensive articulation, stakeholder relations, which will be utilised throughout this thesis.

Human Rights and State Obligations

In each of the three case studies considered in this thesis, the state plays a significant role as a stakeholder with international and domestic legal obligations. These obligations are articulated in international treaties and domestic laws. At the international level, the obligations most relevant to this thesis are enshrined in three sources of human rights law: The Universal Declaration of Human Rights (UDHR),¹ The International Covenant on Economic Social and Cultural Rights (ICESCR),² and The International Covenant on Civil and Political Rights (ICCPR).³ These three documents, often referred to as the international bill of rights,⁴ are legally binding on state parties.⁵ According to most scholars, the international bill of rights is binding even on those states that have failed to ratify the treaties, as the content reflects customary international law.⁶

During the commercial development of the Phulbari Coal Mine, the Lake Turkana Wind Power project, and the Okikendawt Hydroelectric Power Plant, many of the human rights that were violated are protected by the ICESCR: an adequate standard of living (Article 11), health (Article 12), education (Article 13), and culture (Article 15).⁷ In one of the case studies (Phulbari Coal

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); Ionel Zamfir, 'The Universal Declaration of Human Rights and Its Relevance for the European Union' (European Parliamentary Research Service 2018) PE 628.295 1; Michèle Olivier, 'The Relevance of "soft Law" as a Source of International Human Rights' [2021] *The Comparative and International Law Journal of Southern Africa* 20, 299; 'The United Nations Human Rights Treaty System' 3. Many of the rights included in the Universal Declaration of Human Rights are considered hard law based on their inclusion in the International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights, and various constitutions. For those rights enshrined in the UDHR that are not considered in either of the conventions or other legally binding instruments, many of them are still considered hard law, by their inclusion in customary international law.

² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴ 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights' (Office of the High Commissioner for Human Rights).

⁵ *ibid.* See note 1 on the UDHR reflecting customary international law.

⁶ Simmons, 'Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights"' (2009) 16 *Indiana Journal of Global Legal Studies* 437, 3; Eleanor D Kinney, 'The International Human Right to Health: What Does This Mean for Our Nation and World?' [2002] *SSRN Electronic Journal* 1464 <www.ssrn.com/abstract=296394> accessed 7 August 2021. See note 1 on the UDHR as customary international law.

⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Articles 11,12,13,15.

Mine), the state violated the right to life, protected by the ICCPR (Article 6).⁸ However, the rights most frequently violated by the states and abused by the corporate stakeholders throughout the three case studies are rights related to land. While land is not explicitly protected in the international bill of rights, a section of this chapter (below, under Soft Law) is dedicated to international and domestic law that addresses land-related rights.

Broadly speaking, the rights contained in the international instruments above are meant to be realised and enjoyed by way of certain state obligations, including in Article 2 of the ICCPR⁹ and Article 2 of the ICESCR.¹⁰ The following sections will examine some of these obligations in detail, namely the respect, protect, and fulfill framework, minimum core obligations, and progressive realisation.

Respect, Protect, Fulfill

The research question asks about the ways in which stakeholders may affect states' abilities to respect, protect, and fulfill human rights obligations. Respect, protect, and fulfill is a framework for ensuring that human rights are enjoyed, based on states' obligations under international human rights law.¹¹ Respecting rights ensures that states do not infringe on rights that have already been realised.¹² Protecting rights ensures that rightsholders are shielded, by states, from potential violations (or abuses).¹³ Fulfilling rights ensures that states will aim toward the full realisation of rights using necessary measures.¹⁴ Commercial development (discussed further in the Commercial

⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 3) Article 6.

⁹ *ibid* Article 2.

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Article 2.

¹¹ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980); Inga T Winkler, 'Respect, Protect, Fulfill: The Implementation of the Human Right to Water in South Africa' in Philippe Cullet and others (eds), *Water Governance in Motion* (Foundation Books 2010) 423; Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet #33'. Shue uses different terminology for the same framework, but the respect, protect, fulfill language is used across the human rights literature. OHCHR Fact Sheet #33 recognizes that the respect, protect, fulfill framework is not directly included in the ICESCR, but often used "in order to clarify the meaning of States' obligations."

¹² Winkler (n 11) 423.

¹³ *ibid* 424.

¹⁴ *ibid* 425; Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1995); Asbjorn Eide, *Economic Social and Cultural Rights* (Springer Netherlands 2001).

Development section below) and actions by other participating stakeholders, can contribute to, or hinder, the respect, protection, and fulfillment of human rights, but ultimately, the duty bearer is the state, as they are bound by legal human rights instruments.¹⁵

While the cases studies below and numerous other examples around the world¹⁶ describe human rights abuses brought about by commercial development, and therefore states' failure to fulfill their obligations to respect, protect, and fulfill these rights, this thesis recognises potential ways to mitigate the abuses, and therefore violations. Much in the same way that this thesis will argue that commercial development can lead to community development (under Commercial Development below), it will also argue that commercial development may contribute to states' actions to respect, protect, and fulfill human rights.

Human rights are at the core of this thesis. In general, the human rights that tend to be violated as a result of commercial development practices are economic and social rights.¹⁷ The human rights scholarship supports the notion that the obligation to respect, protect, and fulfill is a comprehensive framework for the full realisation and enjoyment of (primarily) economic and social rights, and can therefore help to mitigate the range of abuses caused by commercial development practices.¹⁸ Minimum core obligations¹⁹ and progressive realisation²⁰ are some of the legal obligations (among others²¹) that states must satisfy in order to respect, protect, and fulfill certain economic and social rights.

¹⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 3); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (n 1). While the UDHR is not legally binding in and of itself, many of its provisions have been incorporated into customary international law.

¹⁶ Office of the High Commissioner for Human Rights, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (Office of the High Commissioner for Human Rights 2017).

¹⁷ *ibid.* The case studies in this thesis, in the large majority, describe economic and social rights violations. However, this does not preclude a civil or political rights violation in commercial development projects, as in the Phulbari Coal Mine.

¹⁸ Winkler (n 11); Eide (n 14); Craven (n 14); Office of the United Nations High Commissioner for Human Rights (n 11); Chris Jochnick, 'The Human Rights Challenge to Global Poverty' [1999] Center for Economic and Social Rights <www.cesr.org/publications.html>; Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 Human Rights Quarterly 866.

¹⁹ Office of the United Nations High Commissioner for Human Rights (n 11) 15.

²⁰ *ibid.* 13.

²¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2); 'OHCHR | What Are the Obligations of States on Economic, Social and Cultural Rights?' <www.ohchr.org/en/issues/escr/pages/whataretheobligationsofstatesonescr.aspx> accessed 5 August 2021. With respect to economic social and cultural rights, these other obligations include non-discrimination, the obligation to "take steps", and non-retrogression.

Minimum Core Obligations

The Committee on Economic Social and Cultural Rights interpreted The International Covenant on Economic Social and Cultural Rights in General Comment 3 such that states have certain immediate obligations:²² “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”²³

While there is an abundance of conflicting literature as to a single definition (interpretation) of minimum core obligations²⁴ there are certain characteristics of these obligations that are consistent across the scholarship: (1) Immediacy: the rights subject to minimum core obligations must be satisfied immediately. (2) Special content: the content of the rights that are subject to minimum core obligations are related to basic human dignity or survival. (3) Non-derogability: no context or other consideration (including lack of resources) justifies a failure to comply with minimum core obligations. (4) Justiciability: the rights are enforceable by law in domestic and international courts.²⁵

General Comment 3 describes selected specific rights that the Committee on Economic Social and Cultural Rights deem to be minimum core obligations:

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.²⁶

²² Office of the High Commissioner For Human Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations’ (Committee on Economic, Social and Cultural Rights 1990); Angelina Fisher, ‘Minimum Core and the Right to Education’ (The World Bank 2017) 2 <<http://hdl.handle.net/10986/29142>> accessed 8 August 2021.

²³ Office of the High Commissioner For Human Rights (n 22) 10.

²⁴ Professor John Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’ (The World Bank 2017); Fisher (n 22); Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale International Law Journal* 64; Dr Kirsteen Shields, ‘The Minimum Core Obligations of Economic, Social and Cultural Rights: The Rights to Health and Education’ The Nordic Trust Fund and The World Bank 40.

²⁵ Tasioulas (n 24) 12; Fisher (n 22) 2.

²⁶ Office of the High Commissioner For Human Rights (n 22) 10.

These four rights constitute basic needs and therefore fulfill at least one of the four characteristics that assist in determining which rights are subject to minimum core obligations. Which additional rights are subject to minimum core obligations (aside from the four rights included in General Comment 3) is still up for debate.²⁷

The goal of minimum core obligations is to compel states to fulfill, at the very least, “a quantitative and qualitative floor of socio-economic and cultural rights.”²⁸ Determining this “floor” has posed political problems for the universal applicability of the rights.²⁹ Notwithstanding the four characteristics (immediacy, special content, non-derogability, and justiciability) and four rights (food, health, shelter, education) considered above, legal scholars question how to measure this floor: ought it to be consistent for all states or vary based on state resources and capabilities?³⁰ The notion of varying obligations based on state resources is analysed in more detail in the following section as it comes close to a defining characteristic of progressive realisation (below). Additionally, the debate over methods of measuring a quantitative floor is also picked up in the following section in the context of indicators as measures of human rights fulfillment.

Despite the conflicting views on which additional rights ought to be considered for minimum core obligations, and the floor at which they ought to be said to be fulfilled, the case studies analysed in this thesis describe contexts in which certain states fail to fulfill their minimum core obligations, in particular, the rights to health and housing (Phulbari Coal Mine and Lake Turkana Wind Power). The other economic, social, and cultural rights considered in the case studies are not necessarily subject to the doctrine of minimum core obligations, and therefore may not be subject to immediate fulfillment, but are rights in respect of which states are under an immediate obligation to “take steps” toward their fulfillment³¹ (in more detail below).

While there are numerous other areas of debate over minimum core obligations with varying consensus as to their legal interpretations,³² an element of the human rights literature

²⁷ Fisher (n 22); Tasioulas (n 24); Young (n 24).

²⁸ Fisher (n 22) 1.

²⁹ Phillip Alston, ‘Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 332, 352; Fisher (n 22) 4; Tasioulas (n 24) 23. Some scholars, including Fisher argue that the floor could be determined by consensus.

³⁰ Tasioulas (n 24) 23.

³¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Article 2(1).

³² Tasioulas (n 24).

that the minimum core obligations does help to clarify is prioritisation.³³ The immediacy characteristic of fulfilling minimum core obligations creates contexts in which the fulfillment of certain rights may be prioritised over taking steps toward the fulfillment of others, such as those described in the case studies. This immediacy contrasts with a characteristic of another legal obligation type, progressive realisation.

Progressive Realisation

Progressively realised rights may be fulfilled over time, according to state specific policies.³⁴ However, states must immediately “take steps”³⁵ to ensure the enjoyment of rights enumerated in the International Covenant on Economic and Social Rights.³⁶ Article 2(1) describes the nature of the legal obligation for states to take steps and progressively realise rights:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³⁷

Progressive realisation is a legal obligation that requires states to fulfill economic, social, and cultural rights over time, according to the resources available, using all means including (but not limited to) the judiciary, administrative action, economic policy, social policy, and educational

³³ *ibid* 14. There are other elements of minimum core obligations that require analysis, such as the fact that they are not subject to maximum available resources. However, the description above is sufficient for the scope of this thesis.

³⁴ United Nations (ed), *Economic, Social, and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations 2005) 9.

³⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Article 2(1).

³⁶ Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156, 166.

³⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Article 2(1).

initiatives.³⁸ This is to say that these additional state functions may be necessary for rightsholders to fully enjoy economic, social, and cultural rights in that “the law alone is rarely enough.”³⁹

The rate of progressive realisation for any state ought to be directly related to the amount of available resources. These resources, unlike for minimum core obligations, determine how and over what period certain rights may be fulfilled. However, the “take steps” provision obliges states to take immediate action and any failure to take these steps toward fulfillment constitutes a violation of the ICESCR.⁴⁰

(Progressive Realisation) is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁴¹

General Comment 3 (above) clarifies that the flexibility surrounding progressively realisable rights does not weaken the obligation to the point where the rights may lose their efficacy.⁴² This clarification recognises that the progressive realisation of economic and social rights would look different among state parties: developing states with limited resources may have a longer timeline for fulfillment than developed countries with greater resources.⁴³ Fundamental to this concept is that progressive realisation could vary from state to state using different types (and amounts of) resources.

This thesis pays special attention to human rights that are subject to the state obligation of progressive realisation, with the assistance of community development (including by way of

³⁸ United Nations, *Economic, Social, and Cultural Rights* (n 34) 9.

³⁹ *ibid.*

⁴⁰ Office of the High Commissioner For Human Rights (n 22) 9; United Nations, *Economic, Social, and Cultural Rights* (n 34) 10.

⁴¹ Office of the High Commissioner For Human Rights (n 22) 9.

⁴² *ibid.*

⁴³ Alston and Quinn (n 36) 174.

economic policy, social policy and educational initiatives, above⁴⁴). The relationship between the legal obligation of progressive realisation and community development is described in greater detail in The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1986.⁴⁵ The Limburg Principles clarify the “nature and scope”⁴⁶ of the obligations of states parties to the ICESCR and were influential in the formulation of General Comment 3.⁴⁷ The “scope” of the progressive realisation obligation, as described in principles 11, 14, 23, and 24, focuses on stakeholder roles and community development objectives that are most relevant to the case studies below.⁴⁸

The research question begins by asking about stakeholder approaches to rights and development. Principle 11 emphasises the importance (by way of a requirement) of multi-stakeholder participation in the realisation of human rights, in particular, participation in the “formulation, application and review” of national policies that will contribute to the fulfillment of said rights.⁴⁹ In each of the three case studies considered in this thesis, the indigenous communities play various roles as stakeholders: there are some instances in which indigenous communities are forcibly evicted from their homes and land (Phulbari Coal Mine, Lake Turkana Wind Power), an instance in which certain factions of the indigenous communities sue the corporate stakeholders over cultural rights abuses (Lake Turkana Wind Power), and an instance in which the indigenous community is also a corporate stakeholder (Okikendawt Hydroelectric Power Plant). Regardless of their role as stakeholder, Principle 14 is the most explicit reference to indigenous development across the Limburg Principles, General Comment 3, and the ICESCR. It provides:

Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard

⁴⁴ United Nations, *Economic, Social, and Cultural Rights* (n 34) 9.

⁴⁵ ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1986).

⁴⁶ Fons Coomans, ‘The Limburg Principles Turned 30 Maastricht University - Blog’ (15 December 2016) <www.maastrichtuniversity.nl/blog/2016/12/limburg-principles-turned-30> accessed 16 June 2021.

⁴⁷ ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (n 45); Coomans (n 46).

⁴⁸ ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (n 45).

⁴⁹ *ibid* Principle 11.

of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.⁵⁰

While there are special measures in place to protect indigenous communities, they are considered under the Soft Law section (below) and were not included in General Comment 3. Principle 14 directly connects the goals of progressive realisation with the goals of community development.⁵¹

Principles 23 and 24, in concert, provide that, in the course of progressive realisation, states must use their available resources as well as “the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.”⁵² This second reference to development is particularly relevant as it lays the groundwork for community development, in both name and action, as a means to progressively realise rights.

Progressive realisation is fundamental to this thesis as it provides opportunities for states to use additional tools (economic policy, social policy, and educational initiatives) to fulfill their human rights obligations. This thesis proposes commercial development as an addition to the list of tools that states may utilize (this proposal, and commercial development itself is analysed below). However, independent of the tools that contribute to states fulfilling their rights obligations, in order to determine the efficacy of rights fulfillment, there are domestic and international mechanisms for monitoring and measuring the progressive realisation of rights.

Measuring State Obligations

The progressive realisation of economic, social, and cultural rights by states has two means of monitoring: (1) the continuous assessment by states as to the efficacy of their “programmes, legislations and policies”,⁵³ and (2) a mix of self-monitoring by states and independent monitoring systems to “ensure transparency and accountability.”⁵⁴ At the national level, monitoring is taken on by national human rights institutions, civil society, media, activist and advocacy groups,

⁵⁰ *ibid* Principle 14.

⁵¹ *ibid*.

⁵² *ibid* Principles 23,24.

⁵³ United Nations, ‘Report of the United Nations High Commissioner for Human Rights’ (Economic and Social Council 2007) E/2007/82 45 <www.un-ilibrary.org/content/books/9789210573863> accessed 9 August 2021.

⁵⁴ *ibid*.

academic institutions, and parliamentary committees.⁵⁵ At the international level, there are three forms of monitoring according to the Office of the High Commissioner for Human Rights: (1) periodic assessments using specific statistical indicators, (2) monitoring national budget processes to determine appropriate use of available resources, and (3) judicial reviews of violations of progressive realisation.⁵⁶

The first form of monitoring, periodic assessments (since 2007 in the form of Universal Periodic Reviews⁵⁷), is the most pertinent to this thesis as it is referenced in Chapter III and informs the international response to the human rights violations at the Phulbari Coal Mine. To set the indicators for periodic assessments, the United Nations gathers a wealth of statistical data from across UN agencies and from Special Rapporteurs: for example, data on food, health, and housing comes from the Food and Agriculture Organization of the United Nations and UN-Habitat.⁵⁸ (Data gathered and analysed in much the same way also comes from country reporting under the ICESCR. This requires countries to produce an initial report two years after ratification and every five years thereafter.⁵⁹) This data is then categorised by the Office of the United Nations High Commissioner for Human Rights, into “structure”, “process”, and “outcome” indicators.⁶⁰ However, “when indicators and benchmarks are used to assess the progressive realization of rights, the question inevitably arises of how to determine what would be a realistic and reasonable pace of progress in the light of the available resources.”⁶¹ Progressive realisation uses specific benchmarks and indicators that seek to strike a balance between “sufficiently ambitious and reasonably objective.”⁶²

The critiques of this methodology include the problem of disaggregated statistical data from a range of countries, the limited capacity of state measuring tools, and the inability to capture the complexity of human rights using manageable data.⁶³ It also ought to be noted that the

⁵⁵ *ibid* 46.

⁵⁶ *ibid*.

⁵⁷ ‘OHCHR | UPR’ <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>> accessed 14 February 2021.

⁵⁸ United Nations, ‘Report of the United Nations High Commissioner for Human Rights’ (n 53) 48.

⁵⁹ ‘Reporting Compliance by State Parties to the Human Rights Treaty Bodies’ (United Nations Human Rights Office of the High Commissioner 2020) 2.

⁶⁰ United Nations, ‘Report of the United Nations High Commissioner for Human Rights’ (n 53) 51.

⁶¹ *ibid* 53.

⁶² *ibid*.

⁶³ *ibid* 55–56.

Economic and Social Council report⁶⁴ (in detail above) that explains these methodologies for measurement, and sources for developing indicators, was submitted to the UN General Assembly in 2007, just before the Universal Periodic Review system came into effect. Many of these same methodologies and sources (among others) were later used to develop a series of global development agendas: the Millennium Development Goals and the Sustainable Development Goals.⁶⁵ The relationship between human rights indicators and development indicators will be analysed in more detail below. However, the conceptual differences between rights and community development have not necessarily prevented scholars from using the same indicators to measure both.⁶⁶

Measuring human rights obligations are key to this thesis for two reasons: (1) in the country specific contexts of the case studies (Chapters III, IV, and V), human rights fulfillment is measured by a range of stakeholders; international, state, and otherwise; and (2) in the proposals for new approaches to human rights and development (community and commercial) contained in Chapter VI, there are key indicators that demonstrate the compatibility of an approach, some of which build on the measurement systems already in practice to measure human rights fulfillment.

In addition to the hard law described in this, and the previous sections, the stakeholders in this thesis (states and others) engage with a wide range of nonbinding international, regional, and local instruments (soft law) that inform human rights and community development across the case studies.

Soft Law: Human Rights and Development

The following sections describe soft law that is relevant to the case studies below. Soft law generally refers to nonbinding international instruments.⁶⁷ This type of law, as distinct from hard law, “expresses a preference and not an obligation that state should act, or should refrain from

⁶⁴ ‘OHCHR | UPR’ (n 57); United Nations, ‘Report of the United Nations High Commissioner for Human Rights’ (n 53).

⁶⁵ United Nations Department of Economic and Social Affairs, ‘Sustainable Development Goals: Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/?menu=1300>> accessed 7 June 2020; The Danish Institute for Human Rights, ‘The Human Rights Guide to the Sustainable Development Goals’ <<http://sdg.humanrights.dk/>> accessed 1 October 2018.

⁶⁶ Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, ‘Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment’ [2008] *Economics Working Papers* 41, 2.

⁶⁷ Dinah Shelton, ‘Soft Law’, *Handbook of International Law* (Routledge Press 2008) 3.

acting, in a specified manner.”⁶⁸ One of the goals of soft law is to achieve cooperation among parties without a legal obligation.⁶⁹ Alternatively, soft law may engender political, economic, or moral obligations. Traditionally, declarations, resolutions, and programmes of action are all considered soft law,⁷⁰ except in instances where they obtain legal status through treaties or become customary international law, such as with the Universal Declaration of Human Rights.⁷¹ Additionally, in the instance that an instrument containing soft law is ratified by a state, the soft law hardens in that jurisdiction but remains soft at the international level.⁷²

Considering there is no universally agreed upon definition of soft law, there are still debates over its nature.⁷³ However, one characteristic of soft law that is particularly relevant to this thesis, is the ability to address (and in some cases oblige compliance from) nonstate actors.⁷⁴ The case study analysis undertaken in this thesis considers a wide range of instruments (Chapter II) in each of the commercial development contexts studied, with those instruments comprising, among other things, both hard and soft law, giving rise to a complex web of legal, political, economic, and moral obligations among different stakeholders, including many nonstate actors. The examples of types of soft law below are those that arise most frequently throughout the case studies. This includes soft law that relates to indigenous communities, land rights, the right to development, and the Millennium and Sustainable Development Goals.

⁶⁸ Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 301.

⁶⁹ Cynthia Crawford Lichtenstein, ‘Hard Law v. Soft Law: Unnecessary Dichotomy?’ (2021) 35 *The International Lawyer* 10; Shelton (n 67).

⁷⁰ Shelton (n 67) 1; Olivier (n 1) 295. As Olivier notes, there are instances where resolutions are legally binding, and not considered soft law, such as in Security Council decisions made under Article 25 of the United Nations Charter.

⁷¹ Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 *Georgia Journal of International and Comparative Law* 112, 289; Olivier (n 1) 296. As noted above and herein, the rights enumerated in the UDHR have legal enforceability either by way of their inclusion in other treaties, or through customary international law.

⁷² Shelton (n 67) 1–2.

⁷³ Shelton (n 67); Lichtenstein (n 69); Gold (n 68); Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 957; Andrew Guzman and Timothy Meyer, ‘International Soft Law’ (2010) 2 *Journal of Legal Analysis* 171. One of the most prevalent debates that arise in these sources is if soft and hard law are mutually exclusive or sit on either side of a continuum.

⁷⁴ Shelton (n 67) 4, 16.

Soft Law on the Rights of Indigenous Communities

In each of the three case studies, indigenous communities play a central role. Inclusion or exclusion of indigenous stakeholders in the commercial development processes, in many instances, has human rights and community development repercussions.⁷⁵ The protections for indigenous communities that are most often referenced in this thesis are enshrined in soft law. This is to say, the instruments analysed below do not create binding legal obligations on the states in the case studies.⁷⁶

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) is a nonbinding resolution that addresses many of the rights relevant to this thesis: free prior and informed consent (Article 10), individual and collective development (Articles 20, 32), progressive realisation (Article 21(2)) (above), land rights (Articles 25–28, 29, 32) (below), environmental rights (Article 29), land occupation (Article 30), cultural rights (Article 31), and adherence to treaties between states and peoples (Article 37).⁷⁷ In particular, free prior and informed consent (Article 10) is relevant to all three case studies in this thesis.

In each case study, compatible or conflicting relationships between the indigenous communities and the corporate stakeholder are highly informed by whether the corporate stakeholders secure (or fail to secure) free prior and informed consent. Article 10 is the first and

⁷⁵ J Kleinfeld, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* <<https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/>> accessed 8 August 2021; Office of the High Commissioner for Human Rights (n 16); Barelli (n 73).

⁷⁶ Canada, 'ARCHIVED - Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (29 June 2011) <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 15 April 2020; Department of Justice Government of Canada, 'Proposed Legislation: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples (TBC)' (12 April 2021) <www.justice.gc.ca/eng/declaration/about-apropos.html> accessed 3 August 2021; International Labour Organization, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ratifications of ILO Conventions: Ratifications by Convention' <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 4 June 2021; 'United Nations Declaration on the Rights of Indigenous Peoples' <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. Canada voted against adoption of UNDRIP in 2007 but ratified it in 2021, after the Okikendawt Hydroelectric Power Plant was completed. Bangladesh and Kenya both abstained from voting.

⁷⁷ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) Articles 20, 21(2), 25-28, 29, 30, 32, 37.

most comprehensive of the six references to free prior and informed consent in the UNDRIP.⁷⁸ It provides that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”⁷⁹

From a practical perspective, the requirements for free prior and informed consent encourage states, commercial developers as required by states, and in some cases commercial developers without state provocation (Lake Turkana Wind Power), to engage with local communities that may be affected (adversely or beneficially) by commercial development processes.⁸⁰ The *free* requirement (of free prior and informed consent) ensures that communities can grant or withhold consent to commercial development projects without fear of coercion or intimidation, in ways that are culturally sensitive, and in line with the right to self-determination.⁸¹ The *prior* requirement ensures that fair warning is given to communities to allow preparation for a potential transition, in advance of a project beginning, with a timeline that is culturally sensitive.⁸² The *informed* requirement allows the local communities to make their decision from a place of full knowledge, ostensibly understanding the entirety of the project, and shared with even the most remote members of the community, in order to illuminate any potential intended or unintended effects of the project.⁸³

In one of the case studies considered in this thesis, indigenous knowledge provided additional insight, unforeseen by developers (Okikendawt Hydroelectric Power Plant).⁸⁴ This insight helps to either alleviate or exacerbate conflict in stakeholder relations, depending on the situation. The *consent* requirement mandates that local communities either give their permission,

⁷⁸ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77).

⁷⁹ *ibid* Article 10.

⁸⁰ Barelli (n 73) 959–965; Tara Ward, ‘The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law’ (2011) 10 *Northwestern Journal of International Human Rights* 32, 54.

⁸¹ Food and Agriculture Organization of the United Nations, ‘Free Prior and Informed Consent: An Indigenous Peoples’ Right and a Good Practice for Local Communities’ (FAO 2016) Section 1.3, Free.

⁸² *ibid* Section 1.3 Prior.

⁸³ *ibid* Section 1.3 Informed.

⁸⁴ Public Works and Government Services Canada, ‘Environmental Assessment Screening Report: Okikendawt Hydroelectric Project’ (Public Works and Government Services Canada 2011); Intercontinental.Cry, ‘A New Day for Indigenous Rights in Kenya’ (*Intercontinental Cry*, 11 August 2010) <<https://intercontinentalcry.org/a-new-day-for-indigenous-rights-in-kenya/>> accessed 28 January 2020.

or formally oppose the project.⁸⁵ The community may give their consent with conditions and a consenting verdict may be countermanded at any time by the community itself.⁸⁶ Free prior and informed consent is a multifaceted, time-consuming process that occurs, and necessarily changes, over the course of a commercial development project. In Chapter III, forced eviction (described under land rights, below) of the local communities by corporate stakeholders failed to achieve free prior and informed consent.⁸⁷ In Chapter IV, a lawsuit brought by the indigenous communities against the corporate stakeholder is built on the argument that free prior and informed consent was not obtained.⁸⁸ Even without a legal obligation, the UNDRIP, as soft law, has “important legal effects and generates reasonable expectations of complying behaviour.”⁸⁹ The stakeholder actions in the case studies support this notion.

However, none of the three countries in which the case studies occur originally supported the UNDRIP (through ratification or otherwise).⁹⁰ Canada originally voted against the UNDRIP on the grounds that free prior and informed consent ought not to be a legal requirement for commercial development.⁹¹ Canada has now signed up to the UNDRIP after significant public backlash and has passed domestic legislation incorporating the UNDRIP into domestic law (after the completion of the commercial development project described in Chapter V).⁹² Both Bangladesh and Kenya abstained from voting in support of the UNDRIP.⁹³ Kenya has since

⁸⁵ Food and Agriculture Organization of the United Nations (n 81).

⁸⁶ *ibid* Section 1.3 Consent.

⁸⁷ Sadid Nuremowla, ‘Land, Place and Resistance to Displacement in Phulbari’ (2016) 1 South Asia Multidisciplinary Academic Journal.

⁸⁸ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014))).

⁸⁹ Barelli (n 73) 960.

⁹⁰ ‘United Nations Declaration on the Rights of Indigenous Peoples’ (n 76).

⁹¹ Maham Abedi, ‘Why a UN Declaration on Indigenous Rights Has Struggled to Become Canadian Law’ (*Global News*, 2 November 2019) <<https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>> accessed 10 February 2020. Free prior and informed consent (FPIC) will be addressed in the Consultation category of stakeholder relations.

⁹² Canada (n 76); Sophie Woodrooffe, ‘Canada Is Being Sued By Indigenous People For 150 Years of Back Rent’ (*Vice*, 2 November 2017) <www.vice.com/en_ca/article/wjgg3x/canada-is-being-sued-by-indigenous-people-for-150-years-of-back-rent> accessed 9 February 2020; Richard Zussman, ‘B.C. Becomes First Province to Implement UN Indigenous Rights Declaration’ (*Global News*, 24 October 2019) <<https://globalnews.ca/news/6077339/b-c-becomes-first-province-to-implement-un-indigenous-rights-declaration/>> accessed 15 April 2020; Government of Canada (n 76); An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples [C-15 (43–2)].

⁹³ ‘United Nations Declaration on the Rights of Indigenous Peoples’ (n 76).

incorporated elements of the UNDRIP into its 2010 Constitution.⁹⁴ Bangladesh has not signed up to the UNDRIP and has fallen short of its own constitutional indigenous protections.⁹⁵

Even still, the UNDRIP as soft law has provided two distinct advantages that highlight its importance in the case studies. First, its soft law nature granted the UNDRIP “universal scope” by way of which all indigenous communities may demand their rights without relying on state ratification.⁹⁶ Second, the soft law nature allows indigenous communities to engage nonstate actors to help the state to respect, protect, and fulfill rights. This paved the way for the types of engagements between the indigenous communities and corporate stakeholders that were evident in the case studies considered in this thesis.

The second legal instrument relevant to the rights of indigenous communities that arises in the case studies is the International Labour Organization (ILO) C169 Indigenous and Tribal Peoples Convention 1989.⁹⁷ While ILO conventions are considered hard law after ratification, none of the three countries in the case studies below have ratified the C169 Indigenous and Tribal Peoples Convention 1989.⁹⁸ It is for this reason that it is considered under the Soft Law section in this thesis, as it doesn’t create legal obligations for the states in question. However, even without ratification, it is considered to contain an aspirational standard for indigenous worker’s rights⁹⁹ and was relied on or referred to by indigenous populations, NGOs, and Special Rapporteurs in the case studies considered in this thesis.

⁹⁴ Intercontinental.Cry (n 84). To be analyzed in greater detail in the chapter on the Lake Turkana Wind Farm (Kenya).

⁹⁵ ‘Indigenous Peoples Need Land Rights’ *Dhaka Tribune* (26 November 2016); ‘Fight for Indigenous Rights in Bangladesh Continues’ *The Daily Star* (9 August 2017); ‘Twenty Years after Peace Accord, Indigenous Bangladeshis Still Attacked over Land’ *Reuters* (18 September 2017) <www.reuters.com/article/us-bangladesh-landrights-idUSKCN1BT1K0> accessed 2 February 2019.

⁹⁶ Barelli (n 73) 965.

⁹⁷ ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107); ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).

⁹⁸ International Labour Organization, ‘Countries That Have Not Ratified This Convention’ <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO> accessed 7 June 2020; International Labour Organization (n 76); International Labour Organization, ‘Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) Ratifications of ILO Conventions: Ratifications by Convention’ <www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252> accessed 4 June 2021. Bangladesh (Chapter III) adopted an earlier version of the Indigenous and Tribal People’s Convention 1989, the Indigenous and Tribal Populations Convention 1957 but failed to incorporate it into domestic law.

⁹⁹ ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97) Preamble.

While the C169 Indigenous and Tribal Peoples Convention 1989 considers many of the rights enshrined in the ICESCR,¹⁰⁰ the section most relevant to this thesis is Part II: Land. Analysed in greater detail below, C169 Indigenous and Tribal Peoples Convention 1989, Articles 13 to 19 describe land rights for indigenous communities, including the cultural value of land (Article 13), ownership and occupation (Article 14), natural resource management and conservation (Article 15), protection against forced eviction and relocation (Article 16), transmission of land rights (Article 17), protection against intrusion (Article 18), and inclusion in national agrarian programmes (Article 19).¹⁰¹

The cases studies considered in this thesis, as well as numerous other examples,¹⁰² indicate that in many cases, commercial development projects interfere with indigenous rights.¹⁰³ These soft law protections for indigenous communities (UNDRIP and the ILO conventions) do provide the benefits of engaging with nonstate actors (above), but they lack legal obligations that bind states (those states that have not ratified). This thesis engages with indigenous stakeholders in case studies that show the importance of soft law that respects, protects, and fulfills (in some contexts without state obligations) indigenous rights.

Land

While there is no universal right to land in binding international human rights law per se, it is considered a relevant issue in human rights, as owning and making use of land has the potential to facilitate the enjoyment of multiple economic, social, and cultural rights.¹⁰⁴ There are hard laws

¹⁰⁰ ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2).

¹⁰¹ ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97) Articles 13,14,15,16,17,18,19.

¹⁰² Kleinfeld (n 75); Office of the High Commissioner for Human Rights (n 16).

¹⁰³ Kleinfeld (n 75) 4.

¹⁰⁴ 'OHCHR | Land and Human Rights'

<www.ohchr.org/EN/Issues/LandAndHR/Pages/LandandHumanRightsIndex.aspx> accessed 3 January 2021; 'State of the World's Indigenous Peoples: Rights to Lands, Territories and Resources.' (United Nations Department of Economic and Social Affairs 2021) ST/ESA/375 11; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 3); ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97) 1. The legal rights to non-discrimination and self-determination are directly linked to property ownership, and as a result, land: Articles 2(1) 24(1) and 26 of the ICCPR. There are soft law instruments, that if ratified, create legal obligations on states for

that govern land-related rights in the international bill of rights, but not a right to land itself (ICESCR, more specifically in the following paragraphs). As exemplified by the UNDRIP and the ILO C169 (above), land rights are considered in international agreements that must be ratified domestically for the laws to enter into force in a jurisdiction.¹⁰⁵ However, during the commercial development projects in the case studies, Bangladesh, Kenya, and Canada had not ratified the UNDRIP or ILO C169.¹⁰⁶ The notion of land rights is still relevant to this thesis as the indigenous communities in two case studies (Phulbari Coal Mine and Lake Turkana Wind Power) advocate for their own land rights in their campaigns (activist, legal, and public relations) against the commercial development projects, even though the instruments referenced are not legally binding on the states in question.¹⁰⁷ A soft law consideration of land rights is appropriate for this thesis based on the contexts in which the case studies occur.¹⁰⁸

In the case studies below, land ownership is often linked to multiple rights in the ICESCR: livelihood (Article 6(1)), family protection (Article 10(1)), standard of living including food, housing, and the improvement of living conditions (Article 11(1)), health (Article 12), and culture (Article 15).¹⁰⁹ For the indigenous stakeholders in each of the three case studies, land is fundamentally connected to their cultural practices.

General Comment 21 of the Committee on Economic, Social and Cultural Rights expands the interpretation of Article 15, paragraph 1(a) of the ICESCR.¹¹⁰ General Comment 21, paragraph

land rights, such as ILO C169 (above). It should also be noted that there are regional and local instruments with land rights provisions, however, this thesis focuses on the instruments most relevant to the case studies.

¹⁰⁵ 'OHCHR | Land and Human Rights' (n 104); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77) 169; ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97).

¹⁰⁶ International Labour Organization (n 76); 'United Nations Declaration on the Rights of Indigenous Peoples' (n 76).

¹⁰⁷ Nuremowla (n 87); International Accountability Project, 'The Phulbari Coal Project: A Threat To People, Land, And Human Rights In Bangladesh' (International Accountability Project 2012); Gargule Achiba, 'Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya' (2019) 8 Land 7; *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 88).

¹⁰⁸ 'OHCHR | Land and Human Rights' (n 104); Shelton (n 67); Guzman and Meyer (n 73). This is not a universally agreed upon notion, as some of the rights directly related to land are included in the ICESCR. For the purposes of this thesis, land falls somewhere between hard and soft law as the states in the case studies have not ratified any of the international instruments (above) governing land itself. The soft law section of this chapter is the most appropriate place to describe land related rights (more broadly) as it comes directly after indigenous rights, and land is mentioned in that section, above.

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2) Articles 6(1),10(1),11(1),12,15.

¹¹⁰ 'General Comment No. 21, Right of Everyone to Take Part in Cultural Life' (UN Committee on Economic Social and Cultural Rights 2009) E/C.12/GC/21.

36, under the heading of Indigenous Peoples, describes culture as being “indispensable to their existence, well-being and full development” including “the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”¹¹¹ The citation attached to this claim is to UNDRIP Article 26(a), which is copied verbatim into General Comment 21.¹¹² This type of reference is not unique. General Comment 21 uses both the UNDRIP and ILO C169 to assist in interpreting the cultural provisions of the ICESCR, thereby using soft law to expand the interpretation of hard law. Another example of this hardening of soft law is around free prior and informed consent. Referencing both UNDRIP Article 19 and ILO C169 6(a), General Comment 21, paragraph 37 states that “State parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.”¹¹³ Additionally, of particular relevance to the commercial development projects in the case studies, General Comment 21 also states that “States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.”¹¹⁴ Based on these expanded interpretations of Article 15, paragraph 1(a) of the ICESCR, removal from their land without free prior and informed consent, violates indigenous communities’ rights¹¹⁵ and is considered forced eviction.¹¹⁶

Forced eviction is “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”¹¹⁷ General Comment 7, the right to adequate housing further interprets Article 11(1) of the ICESCR and recognises forced eviction under the context present in the case studies: “Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights,

¹¹¹ *ibid* 36.

¹¹² United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77) 26(1); ‘General Comment No. 21, Right of Everyone to Take Part in Cultural Life’ (n 110) 36.

¹¹³ ‘General Comment No. 21, Right of Everyone to Take Part in Cultural Life’ (n 110) 37.

¹¹⁴ *ibid* 36.

¹¹⁵ *ibid* 36–37.

¹¹⁶ ‘General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions’ (Committee on Economic, Social and Cultural Rights 1997); ‘OHCHR | Forced Evictions’ <www.ohchr.org/en/issues/forcedevictions/pages/index.aspx> accessed 7 August 2021.

¹¹⁷ ‘General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions’ (n 116).

development and infrastructure projects, such as the construction of dams or other large-scale energy projects...”¹¹⁸

Land rights are of primary importance in the case studies, as the indigenous and local populations in Bangladesh and Kenya were forcibly removed from their homes and land, harming cultural practices and interrupting social and economic norms, all in the name of large-scale energy projects.¹¹⁹ The land rights enshrined in the UNDRIP and ILO C169 provide the basis for the indigenous and international outcry against the commercial developers and the state at the Phulbari Coal Mine and Lake Turkana Wind Power project.¹²⁰ The Lake Turkana Wind Power project in Kenya (Chapter IV) is a prime example of a situation in which free prior and informed consent was not necessarily a state obligation. However, the context, stakeholders, and events still compelled the corporate developers to take action toward protecting indigenous land rights.¹²¹ The soft law nature of land rights allowed the indigenous populations to engage the law in their campaigns against nonstate actors, namely commercial developers. However, the hardening of land rights, as illustrated in General Comment 21, places these rights somewhere between completely soft and completely hard law.¹²²

The Right to (Community) Development¹²³

This thesis analyses and proposes a range of approaches that aim at achieving a mutually reinforcing relationship between human rights and community development. The United Nations attempted one such approach by further “rightsifying” development in the Declaration on the Right to Development 1986 (DRTD).¹²⁴ This is to say, that while the ICESCR contains nine references

¹¹⁸ *ibid* 7.

¹¹⁹ International Accountability Project (n 107); International Rivers, *Community Voices of Lake Turkana* <www.youtube.com/watch?v=wireovN1L0k> accessed 10 May 2019.

¹²⁰ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77); ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (n 97).

¹²¹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 88). These actions had limited success.

¹²² ‘General Comment No. 21, Right of Everyone to Take Part in Cultural Life’ (n 110); Shelton (n 67) 7. Shelton proposes that hard and soft law exist on a continuum as opposed to as a binary construction.

¹²³ Surya P Subedi, ‘Introductory Note: Declaration on the Right to Development’ [2021] Audiovisual Library of International Law 9.

¹²⁴ Declaration on the Right to Development (4 December 1986) A/RES/41/128 (DRTD).

to development¹²⁵ and the ICCPR contains one,¹²⁶ the DRTD draws on both (in addition to development language used in a range of other human rights instruments and conferences)¹²⁷ to create a comprehensive soft law approach to requiring states to respect, protect, and fulfill the right to development, using the language of human rights.

The DRTD is a nonbinding international instrument that aims to realise human rights by way of development “structures, processes and outcomes”¹²⁸ at the international and domestic levels. The DRTD defines development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹²⁹ Making full use of the soft law nature of the DRTD instrument, the framers targeted this definition and approach to a wide range of stakeholders, including nonstate actors.¹³⁰

Framed using the following themes, the DRTD helped to expand the interpretation of the term development (community development in the context of this thesis), as included in the international bill of rights: (1) A comprehensive approach that includes social, cultural, and political development alongside economic development. (2) Equal attention ought to be given to economic, social, and cultural rights as is given to civil and political rights. (3) Human beings ought to be at the centre of development policymaking. (4) Social justice. (5) International cooperation toward development. (6) Self-determination and the right of minority groups to participate in development policymaking.¹³¹ According to Philip Alston and Mary Robinson, this rightsification of development led to a major international push from developing countries toward

¹²⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2).

¹²⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 3).

¹²⁷ Subedi (n 123). These include the UN Charter, the 1968 Tehran Conference on Human Rights, The UN General Assembly resolution on Permanent Sovereignty over Natural Resources 1962, and various local and regional instruments including the African Charter on Human and Peoples’ Rights.

¹²⁸ *ibid* 1.

¹²⁹ Declaration on the Right to Development (4 December 1986) A/RES/41/128 (DRTD) (n 124) 1.

¹³⁰ Khalid Abdalla, ‘Declaration on the Right to Development (History)’ 6; Subedi (n 123); Arjun Sengupta, ‘Realizing the Right to Development’ [2000] *Development and Change* 26; United Nations (ed), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013).

¹³¹ Subedi (n 123) 3.

a renewed focus on fulfilling economic and social rights.¹³² However, misunderstandings of rights and development terminology, and a lack of enforcement and accountability mechanisms led to substantial critiques of the DRTD.

A particularly vitriolic criticism by Peter Uvin characterised the DRTD as “bad law: vague, internally contradictory, duplicating other already codified rights, and devoid of identifiable parties bearing clear obligations.”¹³³ While the lack of obligations may be due to the soft law nature of the DRTD, the vagueness did lead to a struggle over the terminology itself, creating a hierarchy between human rights and development. Instead of the intended rightsification of development, nonstate actors incorporated human rights language into development agendas.¹³⁴ The United Nations Development Programme addressed human rights by referring to it as one of the many aspects of development and claiming that its human rights work is in applying the right to development.¹³⁵ The 1998 report *Integrating Human Rights with Sustainable Human Development* articulated that the “UNDP should develop a human rights-based framework in its antipoverty, pro-sustainable human development work.”¹³⁶ Redefining human rights as a subset of development fails to capture the complexity of the relationship between the two.¹³⁷ The relationship between rights and development will be analysed in greater detail below (under Approaches to Rights and Development).

This thesis proposes a series of new approaches to rights and development in the commercial context. The themes included in the DRTD (above) gave rise to some of the proposed approaches (Chapter VI). The DRTD did succeed in placing development at the forefront of the international human rights conversation and had a substantial impact on later human rights

¹³² Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) 1

<www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199284627.001.0001/acprof-9780199284627> accessed 7 February 2021; Vienna Declaration and Programme of Action - A/CONF.157/23. Including the reaffirmation of the right to development as part of the Vienna Declaration and Programme of Action in 1993.

¹³³ Peter Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ (2007) 17 *Development in Practice* 597, 598.

¹³⁴ S McInerney-Lankford, ‘Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective’ (2009) 1 *Journal of Human Rights Practice* 51, 57–58.

¹³⁵ United Nations Development Programme, ‘Integrating Human Rights with Sustainable Human Development’ (1998) 10.

¹³⁶ *ibid.*

¹³⁷ Jack Donnelly, ‘Human Rights, Democracy, and Development’ [1999] *Human Rights Quarterly* 26, 625.

instruments and development agendas (and the analysis in this thesis).¹³⁸ Of particular note, the Millennium Development Goals, and subsequently the Sustainable Development Goals, borrowed heavily from the DRTD in their framing and substance.¹³⁹ The Millennium Declaration states, “we are committed to making the right to development a reality for everyone and to freeing the entire human race from want.”¹⁴⁰ These development agendas continue the soft law legacy of the right to development.¹⁴¹

Sustainable Development Goals and Millennium Development Goals

Social and economic community development during the time periods in which the case studies occurred was highly informed by the Millennium Development Goals (MDGs) starting in the year 2000, and then, the Sustainable Development Goals (SDGs) starting in 2015.¹⁴² The nonbinding Millennium Declaration (the basis for the MDGs)¹⁴³ and the 2030 Agenda for Sustainable Development (the basis for the SDGs)¹⁴⁴ gave rise to and influenced domestic policy initiatives in Kenya and Canada (among others).¹⁴⁵ Additionally, commercial developers in the case studies (at the Lake Turkana Wind Power project in particular) integrated the SDGs into their projects to guide the social and environmental impact assessments (impact assessments are

¹³⁸ Subedi (n 123) 5; Human Rights Council, Working Group on the Right to Development, ‘Draft Convention on the Right to Development A/HRC/WG.2/21/2’ (2020). These additional instruments include The Rio Declaration on Environment and Development, The Addis Ababa Action Agenda, The Paris Agreement on Climate Change, and the Sustainable Development Goals. The UN Human Rights Council is currently working on a Draft Convention on the Right to Development. The drafting of this convention began after the conclusion of the case studies. The Draft Convention is examined in detail in the conclusion of this thesis, in the context of next steps for the human rights and development agenda.

¹³⁹ Subedi (n 123) 5; United Nations, ‘The 2030 Agenda for Sustainable Development’ (United Nations) A/RES/70/1.

¹⁴⁰ ‘The United Nations Millennium Declaration’ A/RES/55/2 11.

¹⁴¹ Human Rights Council, Working Group on the Right to Development, ‘Draft Convention on the Right to Development, with Commentaries A/HRC/WG.2/21/2/Add.1’ (2020).

¹⁴² ‘United Nations - About Economic and Social Development’ <www.un.org/esa/about_esa.html> accessed 18 April 2020.

¹⁴³ ‘The United Nations Millennium Declaration’ (n 140).

¹⁴⁴ United Nations, ‘The 2030 Agenda for Sustainable Development’ (n 139).

¹⁴⁵ Kenya Vision 2030, ‘Kenya Vision 2030’ <<https://vision2030.go.ke/>> accessed 26 May 2019; ‘Kenya Vision 2030: The Popular Version’ (Government of the Republic of Kenya 2007); British Columbia Council for International Cooperation, ‘Where Canada Stands Volume II: A Sustainable Development Goals Shadow Report’ (British Columbia Council for International Cooperation 2018); Environment and Climate Change Canada, ‘Federal Sustainable Development Strategy’ (18 June 2018) <www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html> accessed 8 February 2020.

discussed in detail in Chapter II). The soft law nature of the SDGs (and formerly the MDGs) allows for state and nonstate actors to collaborate toward their achievement without the same types of legal obligations as in the international bill of rights.

These development agendas include measurable targets and indicators for achievement by 2015 (MDGs) and 2030 (SDGs), respectively. Ultimately unachieved, the MDGs, which were directed toward the least developed countries¹⁴⁶ were replaced by the SDGs. The SDGs were agreed upon by all 193 member states of the United Nations.¹⁴⁷ As a universal development agenda, the SDGs provide a global development lexicon (for state and nonstate actors alike), and a target-based standard for community development.

This thesis covers a range of commercial and community development types across the case studies including infrastructure (goal 9), agriculture (goal 2), education (goal 4), health (goal 3), and inequality (goal 10). By way of example, the SDGs' development language on infrastructure in target 9.1 is to "Develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all", while a corresponding indicator for the target is 9.1.1: "Proportion of the rural population who live within 2 km of an all-season road".¹⁴⁸ This indicator is a numerical measurement, taken over time, on a country by country basis. According to the Danish Institute for Human Rights, completing the actions measured by the indicator will contribute to a state's obligation to fulfill the adequate standard of living rights as articulated by both the UDHR Article 25(1) and the ICESCR Article 11(1) as well as the UNDRIP's free prior and informed consent, Article 32(2).¹⁴⁹ The achievement of SDG target

¹⁴⁶ 'United Nations Millennium Development Goals' <www.un.org/millenniumgoals/> accessed 9 June 2020. The MDGs focused on eight categories (1) eradicating extreme poverty and hunger; (2) achieving universal primary education; (3) promoting gender equality and empowering women; (4) reducing child mortality; (5) improving maternal health; (6) combating HIV/AIDS, malaria and other diseases; (7) ensuring environmental sustainability; and (8) partnerships for development.

¹⁴⁷ 'Sustainable Development Goals: Sustainable Development Knowledge Platform' (n 65); United Nations, 'The 2030 Agenda for Sustainable Development' (n 139).

¹⁴⁸ United Nations, 'The 2030 Agenda for Sustainable Development' (n 139).

¹⁴⁹ The Danish Institute of Human Rights, 'Goal 9. Build Resilient Infrastructure, Promote Inclusive and Sustainable Industrialization, and Foster Innovation' (The Danish Institute of Human Rights) <www.humanrights.dk/sites/humanrights.dk/files/media/migrated/sdg-goal-9.pdf> accessed 9 June 2020; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (n 1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77).

9.1, using the 9.1.1 indicator, has the potential to assist a state in progressively realising the right to an adequate standard of living. This progressive realisation by the state may occur regardless of whether it is the state, a nonstate actor, or a combination of both contributing to achieving a related development goal.

By way of a second example, SDG 4, Quality Education, maps similarly onto human rights instruments. Target 4.1 says “By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes”, while indicator 4.1.1 measures the “Proportion of children and young people: (a) in grades 2/3; (b) at the end of primary; and (c) at the end of lower secondary achieving at least a minimum proficiency level in (i) reading and (ii) mathematics, by sex.”¹⁵⁰ The corresponding rights include the education provision of the UDHR 26(1,2), the ICESCR 13(1,2,4) and the rights of indigenous peoples to establish and control their own education system, without discrimination, with state assistance if needed, in UNDRIP 14(1,2,3).¹⁵¹ Again, nonstate actors (such as commercial developers) can help a state to achieve certain SDG targets, thereby contributing to a state’s fulfillment of their human rights obligations. As the case studies make clear, the nature of the SDGs invite collaborations between states, local communities, commercial developers, and the international community, in order to achieve the goals by 2030.

The nature of soft law and the range of instruments that can be categorised as such assists in setting the scene for the case studies that are considered in this thesis. The rights of indigenous communities, land rights, the right to development, and sustainable development are all interconnected and interdependent. The instruments described in this section each rely on the other to interpret and expand upon both rights and community development. In addition, the relevant hard law (the ICESCR in particular, above) is also interpreted and expanded upon using soft law instruments. The difference between the two forms (hard and soft law) is not as simple as binding versus nonbinding.¹⁵² Human rights and community development, in practice, rely on this complex web of legal, political, economic, social, cultural, and moral obligations, stemming from both hard

¹⁵⁰ United Nations, ‘The 2030 Agenda for Sustainable Development’ (n 139).

¹⁵¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (n 1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 2); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 77).

¹⁵² Lichtenstein (n 69).

and soft law.¹⁵³ These relationships between human rights and community development (in both law and practice) are further explored in the following sections.

Approaching Human Rights and Community Development

This thesis builds on scholarship and practitioner descriptions of human rights and community development in order to apply them to commercial development contexts, ultimately proposing a new taxonomy of approaches to human rights and commercial development (Chapter VI). The following sub-sections will (1) describe the Human Rights-Based Approach to (community) Development, and (2) identify the core critiques of this approach, highlighting conceptual and practical differences between human rights and community development.

A Human Rights-Based Approach to Development

A Human Rights-Based Approach to Development is the standard approach (in both the scholarship and in practice) for articulating and applying law, policy, and programs¹⁵⁴ in situations that touch rights and development.¹⁵⁵ In Chapter VI, this approach is directly applied to the commercial context, building on the following analysis and drawing on specific examples from the case studies. This analysis will present the common conceptions and concerns of the Human Rights-Based Approach to Development, setting the parameters for applying it to localised, stakeholder-specific contexts in the case studies considered in Chapters III, IV, and V.

Across the scholarship, there are numerous definitions of a Human Rights-Based Approach to Development that all consider the same three steps: (1) integrating human rights standards into

¹⁵³ Olivier (n 1).

¹⁵⁴ United Nations, OECD, World Bank, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (United Nations 2003) 1.

¹⁵⁵ Uvin (n 133) 602–605; Damilola S Olawuyi, *The Human Rights Based Approach to Carbon Finance* (Cambridge University Press 2016); Anders Dahlbeck, 'A Human Rights Based Approach to the Means of Implementation of the Sustainable Development Goals' [2020] *The Danish Institute for Human Rights* 74; Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664; Alston and Robinson (n 132); Paul J Nelson and Ellen Dorsey, 'At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs' (2003) 31 *World Development* 2013, 2017–2019; Paul Gready, 'Rights-Based Approaches to Development: What Is the Value-Added?' (2008) 18 *Development in Practice* 735.

the “plans, policies and processes”¹⁵⁶ of development, (2) building capacity within international, regional, and local community development, (3) using tools (human rights standards) that are anchored in the legal character of the international treaties that oblige states to respect, protect, and fulfill rights and duties.¹⁵⁷ While these three steps are high level and vague, there has been a significant amount of work done to expand upon these ideas, and then apply them locally. Some of the literature (below) specifically distinguishes between the role of development (and development practitioners) in the approach, and the role of human rights (and human rights practitioners).

The United Nations developed a set of programming practices for a Human Rights-Based Approach to Development during their 2003 Interagency Workshop on a Human Rights Based Approach in the Context of UN Reform.¹⁵⁸ This first set of practices focuses on methods of integrating a human rights framework into community development to encourage rightsholders to claim their rights, and duty bearers to respect, protect, and fulfill them. These are considered (by the UN) “necessary specific and unique”¹⁵⁹ to a human rights-based approach to community development:

- a) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights.
- b) Programmes assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfill their obligations. They then develop strategies to build these capacities.
- c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.

¹⁵⁶ Mary Robinson, ‘Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance’ (World Bank Presidential Lecture, Washington DC, 3 December 2001).

¹⁵⁷ *ibid*; Uvin (n 133); Peter Uvin, *Human Rights and Development* (Lynne Rienner Publishers 2004) <<https://ebookcentral-proquest-com.proxy.library.nyu.edu/lib/nyulibrary-ebooks/detail.action?docID=3328882>>; Dahlbeck (n 155); United Nations, OECD, World Bank (n 154); Nelson and Dorsey (n 155).

¹⁵⁸ United Nations, OECD, World Bank (n 154).

¹⁵⁹ *ibid* 3.

- d) Programming is informed by the recommendations of international human rights bodies and mechanisms.¹⁶⁰

These four practices direct the human rights aspects of the approach (as opposed to the development aspects) and can be simplified to: (1) identify the rights at stake and duty bearers, (2) build capacity for rightsholders and duty bearers, (3) measure the human rights outcomes, and (4) utilise international law and standards. The second set of practices focus on the specific, local, and programmatic tools on the community development side of the approach.

1. People are recognized as key actors in their own development, rather than passive recipients of commodities and services.
2. Participation is both a means and a goal.
3. Strategies are empowering, not disempowering.
4. Both outcomes and processes are monitored and evaluated.
5. Analysis includes all stakeholders.
6. Programmes focus on marginalized, disadvantaged, and excluded groups.
7. The development process is locally owned.
8. Programmes aim to reduce disparity.
9. Both top-down and bottom-up approaches are used in synergy.
10. Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
11. Measurable goals and targets are important in programming.
12. Strategic partnerships are developed and sustained.
13. Programmes support accountability to all stakeholders.¹⁶¹

¹⁶⁰ *ibid.* While it would have been simple to only include the summaries of these practices, the direct use of language by the United Nations, OECD and The World Bank is important as it helps to inform the framing of the document. Framing is analyzed in more detail in Chapter II.

¹⁶¹ United Nations, OECD, World Bank (n 154). The Interagency Workshop occurred in 2003 and therefore the human rights community already had an international legal framework to specify and clarify the practices (a through d). These practices were designed before the SDGs, and therefore, before a global development agenda as robust as Agenda 2030. Therefore, more specificity on the human rights side may have been necessary to guide this new approach to development.

While designed for UN agencies to incorporate into their community development programming, these 13 practices provide a checklist for community or commercial development projects at any level that aim to use a human rights-based approach. Many of the 13 practices focus on the roles, and engagement of, stakeholders. Stakeholder roles in community and commercial development projects will be analysed in greater detail at the end of this chapter. The similarities and differences between the two types of practices above are part of the core similarities and differences between rights and community development. This, as well as the differences in measurable outcomes (also differentiated in the two sets of practices above) for rights and community development were addressed in the previous two sections.

Throughout the case studies considered in this thesis, a Human Rights-Based Approach to Development is applied locally by states, indigenous communities, civil society, corporations, and other stakeholders. The scholarship on local applications of a human rights-based approach describes a human rights ecosystem.¹⁶² This ecosystem is an integration of Human Rights (upper case), signifying international law, and human rights (lower case), signifying local interpretations and applications of rights.¹⁶³ César Rodríguez-Garavito argues for expanding the boundaries of the field of human rights to incorporate both types (upper and lower case).¹⁶⁴ The last two decades have called for more localisation, and engaging more stakeholders, outside of the human rights law community.¹⁶⁵ In many instances (in this thesis and otherwise)¹⁶⁶, this requires engaging with community development practices and development practitioners, as their experience with local activism, movement building, domestic NGOs, and policymakers can help to identify the ways in

¹⁶² César Rodríguez-Garavito, 'Towards a Human Rights Ecosystem', *Debating the Endtimes of Human Rights* (Amnesty International Netherlands 2014); Olawuyi (n 155); Stephen Hopgood (ed), 'The Endtimes of Human Rights', *Debating The Endtimes of Human Rights* (Amnesty International Netherlands 2014); Broberg and Sano (n 155); Uvin (n 133); Dahlbeck (n 155). There are scholars that disagree with the human rights ecosystem articulation (Hopgood); however it is an articulation and recommendation that this thesis builds on through the taxonomy of stakeholder approaches (Chapter VI).

¹⁶³ Rodríguez-Garavito, 'Towards a Human Rights Ecosystem' (n 162) 41. While the upper and lower case distinction is important for scene setting, this distinction is not carried through the rest of the thesis.

¹⁶⁴ César Rodríguez-Garavito, 'Against Reductionist Views of Human Rights' (*OpenDemocracy*, 30 July 2013) <www.opendemocracy.net/en/openglobalrights-openpage/against-reductionist-views-of-human-rights/> accessed 14 February 2021; Rodríguez-Garavito, 'Towards a Human Rights Ecosystem' (n 162) 41.

¹⁶⁵ Rodríguez-Garavito, 'Towards a Human Rights Ecosystem' (n 162) 43.

¹⁶⁶ UNDG, 'UN (Sustainable) Development Group Human Rights Case Studies' (UN Development Operations Coordination Office 2013).

which rights can be localised in different contexts.¹⁶⁷ The case studies in Chapters III, IV, and V are examples of this ecosystem model, as the stakeholders involved span the human rights and development communities. However, as the case studies make clear, expanding the boundaries of a field does not always lead to successful collaborations and positive results.

Critiques of Approaching Human Rights and Development Together

There are risks associated with integrating human rights obligations and community development policies in the way described above. Mary Robinson recognises five of these risks: (1) Human rights are political, and therefore make the state the focus of development, as they are the duty bearers for the fulfillment of rights.¹⁶⁸ (2) Human rights are unrealistic in that they cannot cope with the significant policy and programming failures which are sometimes part of the development process.¹⁶⁹ (3) Human rights are abstract, in that their practical application sometimes requires choosing between rights, since not every human right can be fulfilled simultaneously (prioritising certain rights is part of the ecosystem model, above).¹⁷⁰ (4) Human rights have problems with time, in that progressive realisation has the obligation of non-retrogression, and development agendas sometimes may have to move backwards in order to move forwards at a later point.¹⁷¹ (5) “Law and Poor Don’t Mix”,¹⁷² in that human rights fulfillment is most successful in well-resourced states and communities (in terms of health, education, and equality).¹⁷³ Development programming tries to guide resources to these communities in order to bring about better health, education, and equality.¹⁷⁴ Robinson’s list of critiques of a Human Rights-Based Approach to Development is from a top-down perspective, namely coming from development and human rights organisations,¹⁷⁵ aimed at recipients of development programming,

¹⁶⁷ Alston and Robinson (n 132) 30; Robinson, ‘Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance’ (n 156); Robinson, ‘Advancing Economic, Social, and Cultural Rights’ (n 18).

¹⁶⁸ Alston and Robinson (n 132) 32.

¹⁶⁹ *ibid* 33.

¹⁷⁰ *ibid* 34.

¹⁷¹ *ibid* 35.

¹⁷² *ibid* 36.

¹⁷³ *ibid*.

¹⁷⁴ *ibid* 37.

¹⁷⁵ *ibid* 32.

suggesting that their work may run into roadblocks. However, these critiques do not address the recipients of community development programming or rightsholders under a Human Rights-Based Approach to Development.

A second critique of a human rights-based approach questions its usefulness:¹⁷⁶ “A number of more progressive NGOs are trying to think through what it concretely means to apply a rights-based approach, but the jury is still out on whether this makes any difference in either programming or impact on the people for whom and with whom they work.”¹⁷⁷ Essentially, this critique claims that more work must be done to determine the effectiveness of a rights-based approach to development. The case studies below describe examples in which states or civil society organisations apply human rights-based approaches to development. Even within the specific country contexts (Bangladesh, Kenya, and Canada) it is seemingly impossible to measure the efficacy of the approach without a controlled experiment. This is to say, the success of a Human Rights-Based Approach to Development can only be determined by comparing it to the same circumstances without using a human rights-based approach. Testing the approach on two identical sets of circumstances is impossible, so aggregating results across similar case studies must suffice in measuring the effects (another critique, below) of the approach. While it may not be possible to answer outright, the case studies and taxonomy of approaches (Chapter VI) pick up on this question: does applying a Human Rights-Based Approach to Development provide a better experience (than community development without the rights base) for the recipients of community development programming?¹⁷⁸

A third critique of a Human Rights-Based Approach to Development questions the tools used to measure success. When attempting to fulfill human rights obligations and achieve development goals, the tools used to measure each individually may prove insufficient. Measuring state obligations¹⁷⁹ as described above sometimes gathers disaggregated statistical data, uses faulty

¹⁷⁶ Uvin (n 133).

¹⁷⁷ *ibid* 603; Raymond C Offenheiser and Susan H Holcombe, ‘Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective’ (2003) 32 *Nonprofit and Voluntary Sector Quarterly* 268. Oxfam as an example of an NGO thinking through this approach.

¹⁷⁸ Uvin (n 133); Arjun Sengupta, ‘Right to Development as a Human Right’ (2001) 36 *Economic and Political Weekly* 11. This thesis does not gather data on this question. The case study chapters merely recognize that this question has not yet been answered in the scholarship and the taxonomy of approaches does not assume that a human rights based approach (for community development) is necessarily effective for recipients of development programming.

¹⁷⁹ Office of the High Commissioner For Human Rights (n 22) 1.

measuring tools, and is unable to capture the complexity of human rights.¹⁸⁰ The Sustainable Development Goals, as described above, use targets and indicators to measure success in specific contexts.¹⁸¹ However, in the scholarship and in practice, the measurement tools for each are not always different from each other.¹⁸²

Sakiko Fukuda-Parr and Susan Randolph recognise the need for development indicators as measures of human rights fulfillment, while also problematising them. The Economic and Social Rights Fulfillment Index: Country Scores and Rankings are sets of data that specifically focus on the rights to food, education, health, housing, and work.¹⁸³ This data shows that achieving certain development targets (as of 2008) does not fully map onto the progressive realisation of the corresponding economic, social, and cultural rights.¹⁸⁴ Even still, development targets and indicators are used to measure rights fulfillment.

These conceptual differences imply that the evaluation of human rights fulfillment cannot necessarily use the same measurement tools as the evaluation of “development”. However, in the absence of a measure specifically designed to evaluate human rights fulfillment, conventional development outcome indicators are invariably used in academic research and in assessments of state conduct and accountability.¹⁸⁵

At the Lake Turkana Wind Power project (discussed in Chapter IV) the corporate stakeholders continue to use development indicators, while the indigenous communities push to use human rights. At the Okikendawt Hydroelectric Power Plant (considered in Chapter V), Canada’s impact assessment report uses development indicators, even when measuring human rights. As this thesis explores, expanding the roles (and education) of a wider range of stakeholders may bring the

¹⁸⁰ United Nations, ‘Report of the United Nations High Commissioner for Human Rights’ (n 53).

¹⁸¹ The Danish Institute for Human Rights (n 65).

¹⁸² Fukuda-Parr, Lawson-Remer and Randolph (n 66).

¹⁸³ Susan Randolph, Sakiko Fukuda-Parr and Terra Lawson-Remer, ‘Economic and Social Rights Fulfillment Index: Country Scores and Rankings’ (2010) 9 *Journal of Human Rights* 230. Tables 1,2

¹⁸⁴ *ibid* 11; The Danish Institute for Human Rights (n 65). The data gathered shows that specific development targets may be reached, but those thresholds, set by indicators, fall far short of fulfilling the related rights. For instance, a state is not able to fulfill the right to health by solely focusing on increasing the percent of births assisted by skilled healthcare workers. Fulfilling the right to health requires a more holistic approach with a large number (impossible to determine) of development initiatives. However, hitting certain development indicators can move a state towards its human rights goals. They just ought not be measured by the same yardstick.

¹⁸⁵ Fukuda-Parr, Lawson-Remer and Randolph (n 66) 2.

achievement of certain development targets and indicators closer to respecting, protecting, and fulfilling certain economic, social, and cultural rights.

The Human Rights-Based Approach to Development is the standard (in scholarship and practice)¹⁸⁶ aspirational approach to community development. This thesis takes this approach and applies it in commercial contexts (Chapter VI), drawing on strategies from the United Nations and the international community, the ecosystem model, and by recognising potential pitfalls of human rights and development attempting to achieve the same ends. The following section describes the current relationship (in scholarship and practice) between human rights and commercial development, setting the stage for the approaches described in Chapter VI.

Commercial Development

There have been attempts over the last few decades to encourage corporate stakeholders to understand and act with respect toward human rights, particularly in commercial development contexts. The corporate stakeholders play primary roles in each of the three case studies analysed in this thesis. It is therefore relevant to situate the corporate actions taken within the case studies in the currently recognised scope of the human rights impacts of corporate activity, and current set of proposals (at the international and local levels) that encourage corporations to act in a manner consistent with state human rights obligations.

Commercial development and human rights is a subset of the business and human rights field. While the previous sections focused on the ways in which community development and rights could work toward mutual reinforcement (through the Human Rights-Based Approach to Development and the SDGs), much of the business and human rights work has been focused on determining methods to ensure that human rights are not abused in the name of enterprise.¹⁸⁷ There

¹⁸⁶ United Nations Development Programme (n 135); Robinson, 'Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance' (n 156); Alston and Robinson (n 132); Uvin (n 133); Nelson and Dorsey (n 155); Olawuyi (n 155); Dahlbeck (n 155).

¹⁸⁷ John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> accessed 25 November 2018; Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Pub 2006); César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of The Beginning* (Cambridge University Press 2017); Rodríguez-Garavito, 'Towards a Human Rights Ecosystem' (n 162); Chris Jochnick,

have also been attempts to create systems of accountability for businesses to ensure that their activities do not hinder the enjoyment of rights.¹⁸⁸ This section outlines (1) the United Nations Guiding Principles on Business and Human Rights, (2) corporate social responsibility strategies, and (3) corporate accountability mechanisms.

The Guiding Principles on Business and Human Rights

Widely considered the most prevalent set of business and human rights standards, John Ruggie's United Nations Guiding Principles on Business and Human Rights was commissioned by the United Nations Human Rights Council in 2006 and published in 2011.¹⁸⁹ This project was commissioned in response to the rise in multinational corporate enterprises and international economic activity starting in the 1990s. According to Ruggie, this economic activity increased public awareness about the relationship between business practices and human rights violations.¹⁹⁰ The Guiding Principles is a set of standards and practices made of three pillars: (1) the state responsibility to protect its peoples from human rights abuses caused by business, (2) the corporate responsibility to respect human rights in the normal course of business, including due-diligence measures to prevent potential negative impacts on rights, and (3) the need for access to judicial and other remedies for victims of human rights abuses.¹⁹¹ These three pillars make up what is known as the protect, respect, remedy framework for business and human rights.

'Challenging Corporate Power Through Human Rights' in César Rodríguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2015); Chris Jochnick and Nina Rabaeus, 'Business And Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon' [2010] *Suffolk Law Review* 19.

¹⁸⁸ Equator Principles, 'The Equator Principles' (2020) <<https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>>; United Nations, 'An Implementation Guide to the Clean Development Mechanism' (UN Conference on Trade and Development 2003); McKinsey & Company, 'ESG Framework' <www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value> accessed 18 February 2021.

¹⁸⁹ Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187); OECD, 'OECD Guidelines for Multinational Enterprises' (OECD 2011) <www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en> accessed 10 October 2020. The other industry standard is the OECD Guidelines for Multinational Enterprises. The OECD Guidelines 2011 include "A new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework." For this reason, this thesis focuses on the Guiding Principles as a primary source of the Protect, Respect, Remedy framework.

¹⁹⁰ Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187) Introduction 1.

¹⁹¹ *ibid* Introduction 6.

Ruggie’s Guiding Principles are particularly attentive to the state-business nexus,¹⁹² which refers to any businesses that are state owned in full or in part, do significant business with the state, or utilise support and services from the state. The power that the state wields within this nexus ought to create a stronger influence on the business than if the state were not involved. States may actively encourage businesses to abide by legal human rights obligations in their practices, as opposed to the business potentially (but not necessarily) abiding by state implemented human rights policies. This nexus acts similarly to certain community development agendas (SDGs in particular): a nonbinding mutually reinforcing relationship between the state and businesses to, at the minimum, respect human rights.

Outside of this nexus, John Ruggie’s Guiding Principles go on to outline the responsibility of business to respect human rights, considering they have no legal obligations to abide by the relevant international treaties.¹⁹³ Principle 12 describes the scope of the human rights that businesses ought to, at a minimum, respect: the international bill of rights, and the ILO’s Declaration on Fundamental Principles and Rights at Work.¹⁹⁴ Principle 15 articulates three policies for ensuring that businesses are prepared to respect these rights:

15. ...

- a) A policy commitment to meet their responsibility to respect human rights;
- b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.¹⁹⁵

Principles 12 and 15, in combination, describe a framework for creating a non-enforceable set of business and human rights policies. These policies are set internally by the businesses themselves but, as the title suggests, are guided by the Guiding Principles. The policy commitments and processes described in Principle 15 run parallel to community development policy commitments

¹⁹² *ibid* I, B, 4–10.

¹⁹³ *ibid* II.

¹⁹⁴ *ibid* II, 12.

¹⁹⁵ *ibid* II, 15.

that states may make (as described in the previous sections) in order to respect, protect, and fulfill human rights using localised approaches.

After publication, Ruggie and others questioned the benefits and drawbacks of developing a legally binding treaty for business and human rights.¹⁹⁶ A treaty such as this would turn a set of internationally recognised suggestions into legal obligations. While a legal obligation may allow for more enforcement, the methods for enforcement (particularly on businesses) may prove to be problematic. John Ruggie and Chris Jochnick believe that in order for enough countries to ratify a treaty that binds corporations, the Guiding Principles would need to become so high level and abstract, that they may ultimately have no effect at all on those that need the most protection from human rights abuses.¹⁹⁷

Indigenous communities, as some of the core stakeholders in each of the case studies considered in this thesis, may not see the human rights or community development benefits unless the process is transparent and implemented across all steps of commercial development. It is for this reason that César Rodríguez-Garavito's work on the human rights ecosystem (above) focuses on applying human rights (lowercase) at the local level.¹⁹⁸ For Rodríguez-Garavito, the Guiding Principles are a set of voluntary commitments, but they ought to also be understood "in their dynamic dimension (such as their capacity to push the development of new norms and practices that go beyond the initial content of the UN GPs and improve companies' compliance with human rights standards)."¹⁹⁹ The same project by the same company in different local contexts may require a vastly different set of approaches to business and human rights, and any mechanism binding on corporations would be difficult for the United Nations to enforce.²⁰⁰

¹⁹⁶ John Ruggie, 'A UN Business and Human Rights Treaty?' (Harvard Kennedy School 2014); Elodie Aba and others, 'Expert Round Table on Elements of a Possible Nonbinding International Instrument on Business and Human Rights' (University of Notre Dame London Gateway 2017); 'Commentary: Challenges to Hold Corporations Accountable for Human Rights Abuses Abroad' (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/latest-news/commentary-challenges-to-hold-corporations-accountable-for-human-rights-abuses-abroad/> accessed 22 June 2021.

¹⁹⁷ John Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' [2015] SSRN Electronic Journal <www.ssrn.com/abstract=2554726> accessed 15 February 2021; Jochnick (n 187).

¹⁹⁸ Rodríguez-Garavito, *Business and Human Rights: Beyond the End of The Beginning* (n 187); Jochnick (n 187); Rodríguez-Garavito, 'Towards a Human Rights Ecosystem' (n 162).

¹⁹⁹ Rodríguez-Garavito, *Business and Human Rights: Beyond the End of The Beginning* (n 187).

²⁰⁰ Aba and others (n 196); 'Commentary: Challenges to Hold Corporations Accountable for Human Rights Abuses Abroad' (n 196).

Any binding mechanisms for corporate accountability have failed to secure footing in the multinational corporate community.²⁰¹ The Business and Human Rights Resource Center articulates three of the main reasons why this is so: (1) local laws were not constructed with an eye toward multinational corporations, (2) national courts may not have jurisdiction over foreign corporations, and (3) thus far, corporations are not bound by international human rights law.²⁰² State accountability for human rights is formalised in international law, and yet, there is no international body to hold corporations accountable. Amnesty International explains the accountability gap between state obligations and corporate interests: “Companies have lobbied governments to create international investment, trade and tax laws that protect corporate interests. But the same companies frequently argue against any development in international law and standards to protect human rights in the context of business operations.”²⁰³

Corporations take advantage of developing countries by targeting the weakest regulatory systems. This tends to affect the “poorest people who are most at risk of exploitation.”²⁰⁴ State obligations include protection for all people, even those that are abused by corporations. Amnesty International argues that “All companies must be regulated to prevent the pursuit of profit at the expense of human rights.”²⁰⁵

However, regardless of the regulatory loopholes and nonbinding nature of the Guiding Principles, human rights due diligence practices are beginning to see wide-spread implementation by governments and corporate stakeholders alike. Principle 17 describes human rights due diligence:

17...

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

²⁰¹ Daniel Aguirre, ‘Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation’ (2011) 42 California Western International Law Journal 26, 127–128; Ruggie, ‘A UN Business and Human Rights Treaty?’ (n 196); ‘Commentary: Challenges to Hold Corporations Accountable for Human Rights Abuses Abroad’ (n 196); Ruggie, ‘Life in the Global Public Domain’ (n 197).

²⁰² ‘Commentary: Challenges to Hold Corporations Accountable for Human Rights Abuses Abroad’ (n 196).

²⁰³ Amnesty International, ‘Corporate Accountability’ <www.amnesty.org/en/what-we-do/corporate-accountability/>.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.²⁰⁶

On the commercial development front, human rights due diligence practices are seen in the form of human rights impact assessments, social impact assessments that integrate human rights, and/or human rights risk assessments.²⁰⁷ These types of assessments are identified and problematised throughout this thesis. In terms of state implementation of human rights due diligence practices, one study for the European Commission focuses on identification, prevention, mitigation, and account for human rights abuses.²⁰⁸ This study identifies that European Union Member States are increasingly introducing or proposing regulations in line with due diligence practices. This conclusion is measured by categorising the states by one of four results: (1) no change, (2) new voluntary guidelines, (3) new reporting requirements, and (4) mandatory due diligence as a legal standard of care.²⁰⁹ This final category is seeing increasing state participation and institutes a formal accountability mechanism (addressed in Chapters II and VI). Identification of such due diligence practices assists in categorising commercial development projects based on the taxonomy presented in Chapter VI. At the United Nations, there are various reports, working groups, and issue papers that emphasise the importance of human rights due diligence practices,²¹⁰ but it seems that state level implementation is having more success than a global treaty on business and human rights, for the reasons presented above.

²⁰⁶ Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187) II, 17.

²⁰⁷ 'Due Diligence Examples & Case Studies, Incl. HRIA' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/due-diligence-examples--case-studies-incl-hria/>> accessed 6 March 2022.

²⁰⁸ European Commission, Directorate General for Justice and Consumers and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report.' (Publications Office 2020) <<https://data.europa.eu/doi/10.2838/39830>> accessed 26 February 2022.

²⁰⁹ *ibid* 460.

²¹⁰ 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (United Nations General Assembly 2018) A/73/163; 'UN Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies' (Office of the High Commissioner for Human Rights 2020); United Nations Human Rights Office of the High Commissioner, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012).

Lastly, the Guiding Principles address victims' rights to access remedy in the context of human rights violations associated with commercial development projects:²¹¹

25.

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.²¹²

The state-based mechanisms (judicial, administrative, and legislative) to ensure access to effective remedies are described in Principles 26-31,²¹³ and are relevant throughout the case studies. However, this thesis recognises the state as just one of the many stakeholders involved in commercial development projects. Throughout Chapters III-VI, this thesis proposes and critiques due diligence practices implemented (or failed to be implemented) by additional stakeholders, primarily corporations.

Even without formal mechanisms for accountability, corporations have started to recognise the necessity (or at least the appearance of necessity) of accountability for their actions, particularly in the fields of human rights and community development. Human Rights due diligence in particular is folded into certain corporate social responsibility practices (below) and is identified throughout the case studies.

Corporate Social Responsibility

The Guiding Principles are voluntary (and nonbinding) international guidelines and practices, developed by a series of independent experts. Conversely, corporate social responsibility is an internal (to businesses) set of standards, traditionally developed and implemented by businesses themselves.²¹⁴ Alexander Dahlsrud finds that there are five dimensions of corporate social responsibility that arise in the majority of cases: (1) the environmental dimension, namely

²¹¹ Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187) 22.

²¹² *ibid.*

²¹³ *ibid* 23–27.

²¹⁴ Aguirre (n 201) 132–133.

protecting the planet, (2) the social dimension, focusing on the relationship between society and business, (3) the economic dimension, the ways in which the financials of a company may be modified, (4) the stakeholder dimension, primarily interaction with all relevant communities including employees, suppliers, customers, and locals, and (5) voluntariness dimension, actions taken above and beyond what is required by law.²¹⁵ These five dimensions, environmental, social, economic, stakeholder, and voluntary, are all interdependent, and arise in each of the three case studies considered in this thesis.

This thesis argues that these five dimensions of corporate social responsibility can only be successful if they place stakeholders (the fourth dimension) at the centre.²¹⁶ This is to say that each of these dimensions must integrate all relevant stakeholders in order to achieve any one of them. Since corporate social responsibility initiatives are generally set for corporations as a whole, the initiatives would require a bespoke set of socially responsible stakeholder approaches for each situation, thereby relying on widespread stakeholder participation.

The case studies provide examples of commercial development practices fostering (or attempting to foster) community development. There is scholarship on corporate social responsibility and its potential to foster certain types of community development.²¹⁷ Denis Arnold and Andres Valentin argue that corporations have the ability to target impoverished communities, and commercially develop there, in ways that help the local communities to develop, thereby bringing them out of poverty: “socially responsible... (corporations) can simultaneously improve their profitability while benefitting the global poor. But, as will be argued, the validity of this claim depends on the specific... business venture, the ethical framework that is utilized to analyze the venture, and the theory of corporate social responsibility that is employed.”²¹⁸ The three categories that Arnold and Valentin identify are the (1) specific business venture, (2) ethical framework (moral obligations), and (3) corporate social responsibility policies. These three categories may assist in determining the relationship between commercial and community development.

While corporate commitments to be socially responsible may bring benefits to a range of stakeholders, the scholarship and case studies also recognise their aspirational nature and potential

²¹⁵ Alexander Dahlsrud, ‘How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions’ (2008) 15 *Corporate Social Responsibility and Environmental Management* 1, Table 1.

²¹⁶ Dahlsrud (n 215).

²¹⁷ Denis G Arnold and Andres Valentin, ‘Corporate Social Responsibility At The Base Of The Pyramid’ (2013) 66 *Journal of Business Research* 1904.

²¹⁸ *ibid* 1.

shortcomings.²¹⁹ The case studies that this thesis undertakes engage with elements of corporate social responsibility (and accountability mechanisms, described in the following section) that in some instances lead to greenwashing (Phulbari Coal Mine) and in other instances are considered signaling (Lake Turkana Wind Power). Signaling and greenwashing are two problematic results of a growing socially responsible culture within the corporate world. Signaling occurs when businesses voluntarily publish their intentions around social and environmental action to indicate that they are superior to other, similar businesses.²²⁰ Greenwashing is a type of “legitimation strategy” in which companies publish CSR reports and marketing initiatives in order to promote positive social and environmental action which are not necessarily verified.²²¹

Similar to the critiques of a Human Rights-Based Approach to (community) Development (above), the difference between state obligations and corporate initiatives is that businesses determine their own goals while states have legal obligations. Businesses may decide to set their goals as intentionally unambitious, merely so they can achieve them and signal success. This form of corporate self-determination can be beneficial in the case of ambitious goals when businesses have the resources to achieve them. They can also be detrimental, particularly when corporations set a low bar for themselves, signaling that the goals themselves are enough without follow-through: another form of greenwashing. The accountability mechanisms (below), some of which bring about these potentially unsubstantiated legitimation strategies (greenwashing and signaling) are utilised by corporate stakeholders in Chapters III (Phulbari Coal Mine) and IV (Lake Turkana Wind Power project).

Accountability Mechanisms

Stakeholders can hold corporations accountable for human rights abuses in multiple ways. The first is a set of frameworks that business can use to guide their own human rights agendas. These frameworks could be developed by businesses themselves or by independent authorities, the latter of which tends to lead to greater accountability. While not legally binding, in many instances

²¹⁹ Lee Burke and Jeanne M Logsdon, ‘How Corporate Social Responsibility Pays Off’ (1996) 29 Long Range Planning 495; Lois S Mahoney and others, ‘A Research Note on Standalone Corporate Social Responsibility Reports: Signaling or Greenwashing?’ (2013) 24 Critical Perspectives on Accounting 350; Adam Lindgreen and Valérie Swaen, ‘Corporate Social Responsibility’ (2010) 12 International Journal of Management Reviews 1.

²²⁰ Mahoney and others (n 219) 351.

²²¹ *ibid* 352.

the frameworks are incorporated into corporate governance policies, creating another level of corporate accountability. The second method, while not mutually exclusive from the first, entails nonstate actors attempting to hold corporations responsible for their actions: “If international conventions have set benchmarks for the state’s role in human rights, there is no consensus yet about the responsibilities of nonstate actors. Citizens and the groups they form need to be able to hold states and nonstate actors accountable for respecting rights.”²²² In the examples of this second type of accountability, below, nonstate actors attempt to hold businesses reputationally (by amplifying corporate reputational risk) and legally (through lawsuits) responsible for human rights abuses.

Businesses have started to engage with different types of accountability mechanisms to integrate corporate social responsibility into their workstreams. The Sustainable Development Goals are one such framework that incorporates a wide scope of actions and are utilised by the corporate stakeholders in Chapter IV.²²³ Other frameworks such as Environmental, Social, and Governance (ESG) are sometimes considered when determining the value of a business, and more recently, these factors are carefully considered by investors.²²⁴ The Clean Development Mechanism is another framework, defined by Article 12 of the 1998 Kyoto Protocol to The United Nations Framework Convention on Climate Change, again utilised by corporate stakeholders, in Chapter IV.²²⁵ Unlike the Sustainable Development Goals and Environmental, Social, and Governance, the Clean Development Mechanism is awarded by an independent authority. “The clean development mechanism shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Protocol and be supervised by an executive board of the clean development mechanism.”²²⁶

The Equator Principles, utilised by the corporate stakeholder in Chapter III, are another framework focused on corporate financial decision making that guides businesses through localised approaches to human rights.²²⁷ With the goal of minimising the social and environmental impact of a project, this framework tends to be implemented end to end, throughout the lifespan

²²² Offenheiser and Holcombe (n 177) 287.

²²³ ‘Sustainable Development Goals: Sustainable Development Knowledge Platform’ (n 65).

²²⁴ McKinsey & Company (n 188).

²²⁵ ‘Kyoto Protocol To The United Nations Framework Convention On Climate Change’ (United Nations 1998) Article 12.

²²⁶ *ibid* Article 12(4); United Nations, ‘An Implementation Guide to the Clean Development Mechanism’ (n 188).

²²⁷ Equator Principles (n 188).

of a commercial development project. The Equator Principles focus on human rights, climate change, development, and effects on indigenous and local communities.²²⁸ Businesses, in advance of starting a commercial development project, may elect to publicly state that they are engaging the Equator Principles to guide their decisions and actions, creating greater accountability.

Each of these mechanisms are part of a movement away from shareholder primacy and toward stakeholder capitalism. In the late 2010s, the concept of stakeholder capitalism began to take root in the business world.²²⁹ However, some corporations that use the mechanisms above have still been criticised for signaling and greenwashing. In 2020, the World Economic Forum published their definition of stakeholder capitalism, drawing from a wide range of global business leaders and business associations, and failing to combat the criticisms (of signaling and greenwashing):

The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities, and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.²³⁰

Put simply, stakeholder capitalism engages with a range of stakeholders in order to further the purely capitalist ends of a commercial enterprise, as opposed to actively fostering community development, or contributing to states' respect, protection, and fulfillment of human rights.

The second method of accountability involves external (to a business) stakeholders attempting to force businesses into answering for human rights abuses by (1) amplifying the reputational risk, or (2) pursuing legal action.

²²⁸ 'The Equator Principles – Environmental and Social Risk Management for Projects' <<https://equator-principles.com/>> accessed 18 October 2020.

²²⁹ John Ruggie, Caroline Rees and Rachel Davis, 'Making "Stakeholder Capitalism" Work: Contributions From Business & Human Rights' Working Paper of the Corporate Responsibility Initiative 35.

²³⁰ Klaus Schwab, 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' (*World Economic Forum*, 2 December 2019) <www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/> accessed 16 February 2021.

The state and corporate actions surrounding the Phulbari Coal Mine project (Chapter III) left the company open to significant reputational risk, ultimately leading to local and international protests and years of stagnation. This is not always the result of campaigns that spread awareness about unethical business practices. Some advocacy organisations “base their name and shame campaigns on... fear of reputational loss, and indeed, the... (corporations) themselves indicate that reputation is a key factor in sustainability reporting. But there are major gaps in how effective these campaigns have been – in part, because consumers’ claims about ethical sourcing do not always match their actions.”²³¹ The ILO and international advocacy organisations have spent decades revealing, and campaigning against, fashion labour practices, to little avail.²³² On the other hand (similar to the Phulbari Coal Mine example) the coffee industry has developed a consumer base that is willing to pay more for a fair trade-certified product, resulting from an activist campaign that spread awareness about poor working conditions on coffee farms.²³³ There is extensive scholarship on advocacy that has inflicted reputational risk on corporations,²³⁴ however, it is just one tool in the toolbox to hold corporations accountable for human rights abuses.

In terms of legal accountability, domestic courts have issued rulings that set precedents as to how international corporate human rights abuses are to be treated domestically. In 2018, the United States Supreme Court ruled in *Jesner v Arab Bank* that corporations cannot be sued in US court for international human rights abuses committed abroad.²³⁵ Conversely, courts in the United

²³¹ Marcia L Narine, ‘Living in a Material World – From Naming and Shaming to Knowing and Showing: Will New Disclosure Regimes Finally Drive Corporate Accountability for Human Rights?’ in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape* (Cambridge University Press 2015) 230 <www.cambridge.org/core/product/identifier/9781316155219%23CN-bp-8/type/book_part> accessed 17 February 2021.

²³² *ibid*; Lisa Genasci, ‘Environmentalists Name and Shame Global Fashion Brands’ (*China Water Risk*) <www.chinawaterrisk.org/opinions/environmentalists-name-and-shame-global-fashion-brands/> accessed 15 August 2021; Faradj Koliev, ‘Naming and Shaming: The Politics and Effectiveness of Social Pressure in the ILO’ (Stockholm University 2018).

²³³ Stephan Manning, ‘The Fashion Trap: Why Fairtrade Works in Coffee but Not in Clothing’ (*Organizations and Social Change*, 2 May 2013) <<https://organizationsandsocialchange.wordpress.com/2013/05/02/the-fashion-trap-why-fairtrade-works-in-coffee-but-not-in-clothing/>> accessed 15 August 2021.

²³⁴ Neier Aryeh, ‘“Naming and Shaming”: Still the Human Rights Movement’s Best Weapon’ (*Open Global Rights*, 11 July 2018) <www.openglobalrights.org/Naming-and-shaming-still-the-human-rights-movements-best-weapon/> accessed 15 August 2021; Emilie M Hafner-Burton, ‘Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem’ (2008) 62 *International Organization* 689; Koliev (n 232); Narine (n 231); Jernej Letnar Cernic, ‘Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ (2009) 6 *Miskolc Journal of International Law* 24; Mary Robinson, ‘Business and Human Rights: A Progress Report’ (Office of the High Commissioner for Human Rights 2000).

²³⁵ *Jesner v Arab Bank, PLC* [2018] SCUS 16-499.

Kingdom and The Netherlands have permitted lawsuits against domestically headquartered international companies accused of violating international human rights laws in *Vedanta Resources PLC and Another v Lungowe and Others*²³⁶ (UK) and *Kiobel v Shell*²³⁷ (*The Netherlands*). In Canada, the Supreme Court ruled that Canadian corporations may be sued in civil action for human rights violations in *Nevsun Resources Ltd v Araya*.²³⁸

In a high-profile attempt to hold a corporation accountable for abuses, human rights lawyer Steven Donziger mounted a post hoc lawsuit against Chevron on behalf of indigenous communities in Ecuador.²³⁹ In 1993, Donziger, alongside Frente de Defensa de la Amazonia, represented 30,000 victims of Chevron's toxic waste pollution.²⁴⁰ The pollution contaminated local water sources, land, and resulted in severe birth defects in children. In what Greenpeace calls the "largest court judgement in history for human rights and environmental violations", Donziger secured a \$9.5 billion verdict against Chevron, hoping to set a new standard for corporate accountability.²⁴¹ Donziger initially held the corporate stakeholders accountable, however, Chevron launched a years-long retaliatory smear campaign against the human rights lawyer resulting in disbarment, house arrest, and no payments to the victims.²⁴² These various legal successes and failures continue to support the notion that stakeholders have the ability to hold corporations accountable for human

²³⁶ *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20.

²³⁷ *Kiobel v Shell* [2019] Court of The Hague C/09/540872 / HA ZA 17-1048; Bart H Meijer, 'Widows of Hanged Nigeria Activists Can Continue Case vs Shell: Dutch Court' *Reuters* (1 May 2019) <www.reuters.com/article/us-shell-widows-lawsuit-idUSKCN1S73CY> accessed 22 June 2021; 'Dutch Court to Hear Case vs. Shell Brought by Widows of Hanged Nigeria Activists' (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/es/%C3%BAltimas-noticias/dutch-court-to-hear-case-vs-shell-brought-by-widows-of-hanged-nigeria-activists/> accessed 22 June 2021.

²³⁸ *Nevsun Resources Ltd v Araya* [2020] SCC 5 37919.

²³⁹ Marco Simons, 'What You Think You Know About Chevron and Steven Donziger Is Wrong' (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/latest-news/what-you-think-you-know-about-chevron-and-steven-donziger-is-wrong/> accessed 22 June 2021.

²⁴⁰ Rex Weyler, 'Steven Donziger: The Man Who Stood up to an Oil Giant, and Paid the Price' (*Greenpeace International*, 26 February 2020) <www.greenpeace.org/international/story/28741/steven-donziger-chevron-oil-amazon-contamination-injustice> accessed 22 June 2021.

²⁴¹ *ibid.*

²⁴² *UNITED STATES OF AMERICA v STEVEN DONZIGER* [2021] UNITED STATES DISTRICT COURT SDNY No. 19-CR-561 (LAP); Sebastien Malo, 'Lawyer Who Sued Chevron over Ecuador Pollution Faces N.Y. Contempt Trial' (*Reuters*, 10 May 2021) <www.reuters.com/world/us/lawyer-who-sued-chevron-over-ecuador-pollution-faces-ny-contempt-trial-2021-05-10/> accessed 22 June 2021; Debra Cassens Weiss, 'In Closing Brief, Disbarred Environmental Lawyer Claims His Prosecution Is "Run by an Oil Company"' (*ABA Journal*, 11 June 2021) <www.abajournal.com/news/article/in-closing-brief-disbarred-environmental-lawyer-claims-his-prosecution-is-run-by-an-oil-company> accessed 22 June 2021; Oliver Milman, 'The Lawyer Who Took on Chevron – and Now Marks His 600th Day under House Arrest' (*The Guardian*, 28 March 2021) <www.theguardian.com/us-news/2021/mar/28/chevron-lawyer-steven-donziger-ecuador-house-arrest> accessed 22 June 2021.

rights abuses. As of now, these lawsuits tend to happen in domestic courts (the same as *Mohamud v Lake Turkana Wind Power Ltd*²⁴³ in Chapter IV) as there is no international legal standard for corporate human rights accountability.

Placing the subject of corporate accountability in the context of the research question, these mechanisms bridge the human rights law and community development fields, but, in the case studies below, are all considered within the commercial context. This context gives rise to a question about the positive obligations of commercial developers. According to Daniel Aguirre,

Transnational corporations have legal personality and have rights and obligations under international law. Yet, possession of legal personality does not entail a full range of international legal duties. Certainly, private actors have legal duties not to directly violate human rights. The quandary concerns positive duties of transnational corporations to fulfil economic social and cultural rights.²⁴⁴

While this thesis does not make a judgement on whether corporations ought to have an obligation to fulfill human rights,²⁴⁵ it does describe the potential for corporations (as one of many stakeholders) to contribute to the state obligation of respecting, protecting, and fulfilling human rights.

The Guiding Principles, corporate social responsibility, and accountability mechanisms assist in defining the relationship between human rights and commercial development in the three case studies. Each also informs the framing, instruments, and consultation sections of the analytical framework (Chapter II). These methods of engaging corporations around human rights and development, both community and commercial (in the scholarship above), sets a standard that this thesis expands upon through the taxonomy of approaches in Chapter VI.

²⁴³ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 88).

²⁴⁴ Aguirre (n 201) 129–130.

²⁴⁵ *ibid* 148. Aguirre believes that corporations “do not, and perhaps should not, have a legal responsibility to progressively realise these rights by themselves.”

Stakeholders

Each section in this chapter focuses on an aspect of human rights and development, but also reveals the plethora of stakeholders that participate in the case studies' commercial development projects. While the sections above (and the case studies) clarify how and when certain stakeholders are central to human rights and development (community and commercial) work, this section will (1) list the relevant stakeholders, (2) examine the scholarship around stakeholder engagement, and (3) propose that the way in which stakeholders interact in commercial development contexts should be understood as 'stakeholder relations'.

Participating Stakeholders

The groups and individuals below are all considered stakeholders because of their roles (either direct or adjacent) in commercial development projects. In this thesis, the international community, states, civil society, corporations, and indigenous and local communities, all play significant roles in each of the case studies. The specifics of these roles vary from context to context, but these categories are consistent across the three case studies. Each of the stakeholders in this (non-exhaustive) list are valuable to the analysis as they either contribute to, or hinder (1) the commercial development project, (2) community development related to the project, or (3) human rights fulfillment, abuses, or violations related to the project.

The international community includes the United Nations, other states (outside of the state in which the case study takes place), international non-governmental organisations, regional organisations, and international advocacy groups. States include federal, regional, and local governments, including legislative, executive, and judicial bodies, as well as state representatives. Civil society includes non-governmental organisations, advocacy groups, schools and universities, cultural and religious institutions, and professional associations. Civil society can (1) engage in policy advocacy and monitoring to hold governments accountable for their actions, (2) deliver services to combat inequality, or (3) protect citizens by upholding or changing social norms.²⁴⁶

²⁴⁶ George Ingram, 'Civil Society: An Essential Ingredient of Development' (*Brookings*, 6 April 2020) <www.brookings.edu/blog/up-front/2020/04/06/civil-society-an-essential-ingredient-of-development/> accessed 17 August 2021.

Corporations, or corporate stakeholders include commercial developers, parent or subsidiary companies, engineering and construction teams, corporate consultants, financial backers, development banks, and business partners. Indigenous and local communities include groups (tribes, bands, First Nations, community groups) or individuals (community representatives or otherwise).

Stakeholder Engagement

The standard term in the scholarship to describe interactions and relationships between stakeholders is stakeholder engagement.²⁴⁷ Engagement is used primarily when analysing how businesses work with communities that may be affected by a commercial development project.²⁴⁸ The literature about engaging with indigenous communities in particular, much like in the three case studies considered in this thesis, has historically focused on corporate policies.²⁴⁹ Corporate initiated stakeholder engagement is a top-down approach, in which the commercial developers can institute, or signal that they are instituting, protections for indigenous communities that are affected by commercial development. Much of the stakeholder engagement literature puts the (non-legal)

²⁴⁷ Shift, 'Bringing a Human Rights Lens to Stakeholder Engagement' (Shift 2013) <<[www.globalcompact.de/migrated_files/wAssets/docs/Menschenrechte/stakeholder_engagement_in_humanrights_due_diligence.pdf](https://shiftproject.org/wp-content/uploads/2013/08/Shift_stakeholderengagement2013.pdf#:~:text=Applying%20the%20human%20rights%20lens%20to%20stakeholder%20engagement,engagement%20systems%20re%EF%AC%82ected%3A%20%E2%80%9CWe%E2%80%99re%20still%20approaching%20these%20issues>>; Gwendolyn Remmert, Madeleine Koalick and Luke Wilde, 'Stakeholder Engagement in Human Rights Due Diligence' (Global Compact Network, Germany, twentyfifty Ltd 2014) <; 'Local Stakeholder Engagement on Human Rights - 5 Tips to Get It Right' (*Ksapa - en*, 18 February 2020) <<https://ksapa.org/local-stakeholder-engagement-on-human-rights-5-tips-to-get-it-right/>> accessed 5 June 2020; 'Stakeholder Engagement: UN Guiding Principles Reporting Framework' <www.ungpreporting.org/reporting-framework/management-of-salient-human-rights-issues/stakeholder-engagement/> accessed 5 June 2020.

²⁴⁸ 'Stakeholder Engagement: UN Guiding Principles Reporting Framework' (n 247); Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187).

²⁴⁹ Brendan O'Dwyer and Jeffrey Unerman, 'Enhancing the Role of Accountability in Promoting the Rights of Beneficiaries of Development NGOs' (2010) 40 *Accounting and Business Research*; Jochnick (n 187); Jochnick and Rabaeus (n 187); Kenya National Commission on Human Rights, 'Business And Human Rights' <www.knchr.org/Our-Work/Business-and-Human-Rights>; M Omar Faruque, 'The Politics of Extractive Industry Corporate Practices: An Anatomy of a Company-Community Conflict in Bangladesh' (2018) 5 *The Extractive Industries and Society* 177; Remmert, Koalick and Wilde (n 247); 'Local Stakeholder Engagement on Human Rights - 5 Tips to Get It Right' (n 247); Tom Griffiths, 'Seeing "REDD"? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' (Forest People's Programme 2009) <<https://unfccc.int/resource/docs/2012/smsn/ngo/242.pdf>>; Olawuyi (n 155); Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 187).

obligation on the commercial developer to engage with indigenous and local communities in ways that respect and protect human rights, while providing opportunities for remediation in cases of abuse.²⁵⁰ While corporate stakeholder roles are important, the commercial developer is not the only party that may engage with other stakeholders.

John Ruggie’s Guiding Principles on Business and Human Rights utilise this top-down approach of stakeholder engagement, putting the primary responsibility on states and developers to engage with local communities.²⁵¹ The three primary responsibilities for businesses to respect human rights are included in Principle 15 (described in detail above): (1) a policy commitment to respect rights, (2) a human rights due-diligence process to address impacts, and (3) processes to mitigate human rights impacts.²⁵² According to the Guiding Principles, these responsibilities (nonbinding) ought to sit with businesses and states.

The UN Evaluations Group’s Principles for Stakeholder Engagement cites the definition of stakeholder involvement in the Encyclopedia of Evaluation: “Stakeholder involvement refers to the participation of stakeholders in one or more components of the evaluation process. Involvement implies a role beyond providing information or responding to data-gathering instruments. Stakeholders who are involved in an evaluation process contribute to important decisions regarding evaluation planning implementation and use.”²⁵³ Evaluation, planning, implementation, and use are four steps that map onto the commercial development projects in the case studies below. Stakeholder engagement occurs (to some extent) at each of these steps. In Bangladesh, Kenya, and Canada, the extent of the stakeholder engagement is reflected in the impact assessment reports (in greater detail under Instruments in Chapter II).²⁵⁴

²⁵⁰ Shift (n 247); Rimmert, Koalick and Wilde (n 247); United Nations Evaluation Group, ‘UNEG Principles for Stakeholder Engagement’ (2017) <www.unevaluation.org/document/download/2790>; ‘Local Stakeholder Engagement on Human Rights - 5 Tips to Get It Right’ (n 247).

²⁵¹ Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (n 187).

²⁵² *ibid* 15.

²⁵³ United Nations Evaluation Group (n 250); Sandra Mathison, ‘Stakeholder Involvement’, *Encyclopedia of Evaluation* (SAGE Publications 2004). This evaluation process, as described in Chapter II, overlaps significantly with the consultation measures section of the analytical framework. Mathison also designates four categories of stakeholders: authority, responsibility, beneficiaries, and disadvantaged. These categories are not utilized in this thesis, however the stakeholders analyzed throughout the case studies can fit into one or more.

²⁵⁴ Asia Energy Corporation, ‘Summary Environmental Impact Assessment’ (2006) 39933; QBIS, ‘Socioeconomic Study of Key Impacts from LTWP Project’ (2018) Impact Assessment Report <www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>; Public Works and Government Services Canada (n 84).

The United Nations Evaluations Group defines stakeholders as “the people who have a stake or a vested interest in the program, policy, or product being evaluated and therefore also have a stake in the evaluation.”²⁵⁵ They consider seven principles of stakeholder engagement:

Principle 1. Identify the stakeholders and the role these will play in the evaluation

Principle 2: Promote an inclusive and diverse stakeholder engagement with a tailored approach by stakeholder

Principle 3. Engage stakeholders early on and throughout the evaluation process

Principle 4. Seek opportunities to engage with stakeholders in order promote an evaluation culture

Principle 5. Ensure communication with stakeholders is clear and tailored to their specific needs

Principle 6. Abide to the highest ethical standards in engaging with evaluation stakeholders, ensuring respect and sensitivity to stakeholders’ diversity and human rights

Principle 7. Seek and use stakeholders’ feedback on the evaluation process for effective learning and continuous improvement of evaluation practice.²⁵⁶

These seven principles can be simplified into the following approach: Stakeholders must include a diverse coalition that is continuously engaged and communicated with throughout an evaluation process, to ensure human rights are protected and needs are met. While these principles and “evaluation planning implementation and use”²⁵⁷ structures are important parts of stakeholder engagement, they still articulate a top-down approach: the international community, states, and corporations setting the terms and style of engagement.

Returning to the idea of stakeholder capitalism, the World Economic Forum definition²⁵⁸ (above) is an example of stakeholder engagement: working with local communities to ensure, above all, the success of the project, not considering the range of needs from all stakeholders. As this thesis will demonstrate, in Bangladesh, Kenya, and Canada, this style of stakeholder

²⁵⁵ United Nations Evaluation Group (n 250) 4.

²⁵⁶ United Nations Evaluation Group (n 250).

²⁵⁷ Mathison (n 253).

²⁵⁸ Schwab (n 230).

engagement fails to capture some complexities and necessary interdependence of the relationships between all types of stakeholders.

Stakeholder Relations: A New Term

This thesis prefers to consider “stakeholder relations” not as a replacement for stakeholder engagement, but to capture the complex ways in which stakeholders interact in commercial development contexts. Stakeholder relations is a tool for analysis that envisions a web in which each stakeholder connects to every other either directly, or indirectly (through another stakeholder). Analysing stakeholder relations in the case studies looks beyond the traditional top-down relationship between commercial developer and local community, described in the scholarship above. It also looks beyond the corporate policy-based solutions and government policies (at the state and international level) that set out how all stakeholders ought to be treated. Much in the same way that there are minimum core obligations for the fulfillment of rights, there must be minimum standards for engaging with stakeholders. However, as the human rights ecosystem approach dictates, each context is unique and requires a localised set of approaches. An analysis of stakeholder relations recognises that specific contexts require a specific type of approach.

As a general matter, it is important to look at stakeholders as having more nuanced roles, not defined solely by a commercial development context, but in terms of the specific relationships between any two or more stakeholders. Each of these relationships contributes to the analysis of how human rights and community development interact in commercial development contexts. In each of the case studies considered in this thesis, the stakeholders are unique and cannot be pinned down as having a single set of rights and community development needs, independent of all other stakeholders. It is precisely the existence of all relevant stakeholders in a context that informs the interactions across the entire web (above) of stakeholder relations. In Chapter III, the corporate stakeholders in the Phulbari Coal Mine project set up a stakeholder engagement plan that involved anthropological research, direct surveys, and interviews with local communities.²⁵⁹ The engagement plan, the results of which were included in the impact assessment report, described a

²⁵⁹ SMEC Australia Pty Ltd, ‘Environmental and Social Impact Assessment Report (Volume 4) Social’ (Asia Energy Corporation (Bangladesh) Pty Ltd 2006).

diverse coalition of stakeholders answering the questions put forth by the corporation (the top-down approach). This type of engagement failed to capture the complete set of needs of every stakeholder, especially in the context of indigenous community relocation.²⁶⁰ In Chapter IV, the corporate stakeholders in charge of the Lake Turkana Wind Power project engaged with the indigenous community but failed to see the diversity within the community itself.²⁶¹ Again, a top-down approach was used instead of attempting to fully understand the diverse needs of the community. In Chapter V, the analysis demonstrates compatible stakeholder relations. Each stakeholder working on the Okikendawt Hydroelectric Power Plant (including the indigenous community) had a clearly communicated agenda and a web-style approach was used to collaborate. This included each stakeholder working with every other for mutual benefit, ultimately ascertaining all human rights and community development needs throughout the project.

Chapter II begins by further analysing the notion of stakeholder relations, namely the components, and how the relations may be identified in a commercial development context. The analytical framework (in Chapter II) is a tool that will then be used to analyse the stakeholder relations in each of the case studies.

Conclusion

This chapter provides an overview of the baseline of the relationships between human rights, community development, commercial development, and stakeholders. It describes where each concept returns throughout the case studies and analysis, giving a grounding in law and policy, by which the stakeholders build their relations. This chapter also presents the gaps in the scholarship and in practice that this thesis takes up and problematises.

As described above, the relationships between hard and soft law in the context of commercial development have significant and wide-ranging effects on many stakeholders. Of particular relevance to this thesis are the indigenous communities in Bangladesh, Kenya, and Canada. The case studies below pick up on the localised approaches to human rights and

²⁶⁰ TOOMEGANE, *The Blood-Soaked Banner of Phulbari*(1/2)

<www.youtube.com/watch?time_continue=431&v=PnpEJAZiwf0> accessed 13 October 2018.

²⁶¹ QBIS (n 254); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 88).

commercial development, analysing the ways in which indigenous and local communities are able (or unable) to fully realise their rights and participate in community development programming.

The analytical framework, described in the next chapter, builds on the law, policy (both governmental and corporate), and complex stakeholder relations described above. It provides a roadmap to organise each case study, by way of which events are described, categorised, and analysed.

CHAPTER II

Framing, Instruments, and Consultation: The Analytical Framework

This chapter outlines the analytical framework that has been developed for, and is deployed in consideration of, the three case studies in this thesis. The goal of the analytical framework is to explain the standard set of parameters that were deployed to analyse the case studies, building on the insights from the state of the art outlined in Chapter I. First, this chapter will present the elements of stakeholder relations (building on Chapter I) and describe why an analytical framework is necessary to tease out these elements from each case study. Second, this chapter will present and describe the three dimensions of the analytical framework: framing, instruments, and consultation. Last, the chapter will briefly describe the way in which the analytical framework, as a whole, is applied to the case studies, including the organisational structures utilised in the chapters that follow.

Stakeholder Relations and Approaches

This thesis seeks to understand stakeholder relations and their influence on human rights and community development in the three commercial development case studies by considering them across three dimensions: framing, instruments, and consultation. In each of the case studies, stakeholder relations are made up of the interactions between different stakeholders' approaches to human rights and development (community and commercial). In order to discern these interactions and seek to understand their effects, the analysis undertaken in this thesis is attentive to both *the disposition* and *the action* of the relevant stakeholders, which combined, are understood as comprising the "stakeholder approach" to rights and commercial development in the particular context being studied. In keeping with the concern with stakeholder relations and the human rights ecosystem, the case studies consider both (1) specific stakeholders' approaches (i.e. disposition *plus* action), and (2) the relationships between stakeholders. As disposition is rarely expressly articulated, the thesis seeks to construct or understand it by considering stakeholders' actions under the three headings of framing, instruments, and consultation.

Two or more stakeholder approaches, when they come into contact with one another, foster a relationship between stakeholders (a stakeholder relation). Each approach individually has an effect on the respect, protection, and fulfillment of human rights, as does each stakeholder relation. These effects come from the combinations of actions that stakeholders take. The actions can either contribute to human rights fulfillment, be neutral, or result in violations of human rights. Specific contexts of stakeholder approaches leading to actions that violate human rights will be presented in the case studies. After the case studies, each of the stakeholders, and their approaches throughout the case studies, are analysed together (Chapter VI). This is done in order to develop the taxonomy of approaches to human rights and commercial development.

It is important to recognise that dispositions and actions do not exist in a vacuum. Each stakeholder's dispositions and actions may be influenced by any number of factors: political, social, economic, or cultural (discussed further in Chapter VI). The case studies are not exhaustive in this respect; they do not describe all the factors that might influence stakeholders' approaches. However, the analytical framework helps to bring to light those influences most likely to affect human rights and development (community and commercial), including (1) legal constraints and/or obligations, (2) the available resources (financial or otherwise), (3) accountability mechanisms, and (4) relationships with other stakeholders (stakeholder relations). The framing, instruments, and consultation measures described below, when overlaid onto the case studies, reveal each of these influences that affect both disposition and action, and therefore stakeholder approaches, and stakeholder relations.¹

The taxonomy of approaches to rights and commercial development described in Chapter VI is built from examples of stakeholder approaches throughout the case studies. These approaches, when brought into contact with other stakeholder approaches, create stakeholder relations that may be compatible, or create conflict (compatibility and conflict is described in detail in Chapter VI).

In summary:

¹ Shift, 'Bringing a Human Rights Lens to Stakeholder Engagement' (Shift 2013) <<[78](https://shiftproject.org/wp-content/uploads/2013/08/Shift_stakeholderengagement2013.pdf#:~:text=Applying%20the%20human%20rights%20lens%20to%20stakeholder%20engagement,engagement%20systems%20re%EF%AC%82ected%3A%20%E2%80%9CWe%E2%80%99re%20still%20approaching%20these%20issues>>. Since stakeholder relations affect the influences on disposition and action, which in turn affect stakeholder approaches and therefore stakeholder relations, a feedback loop may arise where certain stakeholders are purely taking their cues from other stakeholders. This occurs in Chapter III.</p></div><div data-bbox=)

1. Stakeholders are influenced by a variety of factors;
2. These influences affect both dispositions and actions;
3. Disposition and action together constitute the stakeholder's approach to human rights and development (community and commercial);
4. When stakeholders interact, their approaches come together, creating a stakeholder relation;
5. These relations can either be compatible or create conflict.

Analytical Framework

The analytical framework includes three stable dimensions:

1. Framing
2. Instruments
3. Consultation

These dimensions are described in detail below. The descriptions (1) list and analyse the stable content for each dimension (the components that are consistent across all of the case studies), and (2) clarify why each is necessary to analyse the case studies.

Framing

The framing dimension is used to analyse how stakeholders frame their dispositions and actions, and therefore, the resulting approach. For the purposes of this thesis, a frame, as defined by Snow and Benford, is “an interpretive schemata that simplifies and condenses the ‘world out there’ by selectively punctuating and encoding objects, situations, events, experiences, and sequences of actions within one’s present or past.”² In other words, framing is a system of categorising. In this thesis, framing involves categorising stakeholder actions and dispositions. The

² David Snow and Robert Benford, ‘Master Frames and Cycles of Protest’ 137
<www.researchgate.net/publication/246773271_Master_Frames_and_Cycles_of_Protest>.

case studies, in general, have two distinct, and in some cases overlapping (categories of) frames: human rights and development.

Some stakeholders use a human rights framing, some use a development framing, and some use a hybrid of the two, depending on the circumstance. These framings are indicated, primarily, by language and actions. This language is included in instruments (below): written documents by and about stakeholders, and verbal (and other nonwritten) communication between stakeholders. Actions indicate framing as well but the ways in which they do are context dependent.³

A human rights framing is evident when stakeholders refer to human rights instruments and include human rights language in their reports and other documentation. A development framing, in this thesis, denotes community development and is evident when stakeholders refer to development goals or initiatives and include this language in policies, reports, and other documentation. The actions that stem from this language, and the dispositions that are reflected by the language, could have a human rights or development framing (or both).

For example, a stakeholder that engages with the respect, protect, fulfill framework would in all likelihood, be using a human rights framing. With respect to a specific human right such as the right to education, a stakeholder that frames their disposition or action utilising language from Article 13 of the ICESCR⁴ is most likely using a human rights frame. In the same instance, if a stakeholder mentions Sustainable Development Goal 4⁵ and uses the targets and indicators to measure success, they are most likely using a development frame.

Stakeholders may also utilise different framings depending on the specific relation. For example, in an instance where a commercial developer is working with a civil society organisation that has a human rights focus, the developer may utilise a human rights framing in order to effectively communicate and achieve mutual success. In the case that a commercial developer is engaging with a state that has implemented robust community development initiatives, the developer may utilise a development framing for the same reasons (communication and mutual benefit). Much like an approach, identifying the framing of a relation is dependent on both

³ Patrick H Mooney and Scott A Hunt, 'A Repertoire of Interpretations: Master Frames and Ideological Continuity in U.S. Agrarian Mobilization' (2020) 1996 *The Sociological Quarterly* 22, 178. In as much as actions may indicate a certain framing, a framing may also lead to certain actions.

⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Article 13.

⁵ United Nations, 'The 2030 Agenda for Sustainable Development' (United Nations) A/RES/70/1 4. The relationship between human rights and their corresponding development goals is described in detail in Chapter I.

instruments and consultation (below) to contextualise the circumstances in which the stakeholders are engaging with each other. The case studies below acknowledge these circumstances in order to build out the web of stakeholder relations. Framing is vital to this process as it indicates which stakeholders are engaging with human rights and which are engaging with community development in each context.

Instruments

Commercial development projects are conducted pursuant to, and themselves produce, a number of instruments ranging from national legislation and international treaties, to contracts, agreements, terms of reference, and impact assessments, inter alia. Which instruments a commercial development is shaped by and produces, and the content and terms of those instruments, can indicate much about stakeholder relations and about the relationship between rights and community development within the particular commercial development project. Building on the hard law/soft law distinction in Chapter I, the instruments in the case studies can also be categorised as hard or soft. For the purposes of this thesis, hard instruments are obligations between (or on) stakeholders in the form of an executed, written document, with different levels of enforceability. Soft instruments are written documents that guide and inform stakeholder approaches. The hard instruments in this thesis include (but are not limited to) hard law (Chapter I), contracts between stakeholders, and any tools used to compel stakeholder actions. Soft instruments include (but are not limited to) soft law (including the UNDRIP and the SDGs, Chapter I), special rapporteur reports, universal periodic reviews, NGO reports, and impact assessment reports. In other words, hard instruments constrain stakeholders and soft instruments reflect preferences. Much like hard and soft law (Chapter I), hard and soft instruments give additional colour to each other. This occurs most often when soft instruments further explain a hard instrument or situate it in a local context.

The examples of instruments below are not exhaustive. The more prevalent instruments that arise in the case studies (but were not covered by the state of the art, Chapter I) include contracts (and other agreements) between stakeholders, impact assessment reports, NGO reports, and United Nations reports (by Special Rapporteurs and UN organs).

Contracts (or other agreements) between stakeholders reflect many of the economic, social, and political relationships between commercial developers and the state. These relationships include land leases, land use agreements, tax policies, export agreements, and any number of other agreements that define the scope of the relationship. The language in these contracts contributes (somewhat) to identifying stakeholder approaches, but mainly contributes to further understanding which stakeholders are relevant to the commercial context, and in what capacity. For example, in each of the case studies, the state plays a different role (landowner, contract dispute mediator, impact assessor). These roles are indicated by contractual agreements.

Impact assessment reports are another instrument that helps to identify the approach that certain stakeholders intend to use. Impact assessment reports are investigative reports put together by the businesses, states, consultants, NGOs, or any number of other stakeholders.⁶ The reports may be collaborative or individually produced, and any number may be published with conflicting opinions. In each of the three cases below, the impact assessment report is completed by a different stakeholder, using a different organisational structure.⁷ The reports generally include potential environmental impacts from all stages of the project: ideation, research, design, financing, impact assessment, construction, maintenance, and termination. The impact assessment reports also include recommendations for remedies, particularly in instances where harmful environmental effects may occur. Impact assessment reports generally focus on the environmental impact of commercial development projects. However, the impact assessment reports for all three case studies touch on economic, social, and cultural repercussions of commercial development.⁸ The language (human rights or development) concerning potential economic, social, and cultural repercussions is useful in determining the framing and dispositions of the relevant stakeholders.

Civil society and UN reports reflect the opinions, recommendations, and preferences of stakeholders (in contrast to the legally binding UN mechanisms, described in Chapter I). These reports are analysed in the case studies in order to tease out these reflections (opinions,

⁶ Office of the High Commissioner for Human Rights, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (Office of the High Commissioner for Human Rights 2017).

⁷ Asia Energy Corporation, 'Summary Environmental Impact Assessment' (2006) 39933; QBIS, 'Socioeconomic Study of Key Impacts from LTWP Project' (2018) Impact Assessment Report <www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>; Public Works and Government Services Canada, 'Environmental Assessment Screening Report: Okikendawt Hydroelectric Project' (Public Works and Government Services Canada 2011).

⁸ Asia Energy Corporation (n 7); QBIS (n 7); Public Works and Government Services Canada (n 7).

recommendations, and preferences) from all stakeholders, not only states and corporate developers. In the case studies, civil society organisations act in partnership with some stakeholders, but also hold others accountable through their reports.⁹ The United Nations reports (referenced in the case studies below) are researched and written by Special Rapporteurs, UN organs, and civil society organisations.¹⁰ The language in the reports published by both groups (civil society and the UN) tends to indicate instances of abuse and violations of human rights. These reports are useful in understanding the repercussions of corporate and state actions on both human rights and community development, and corresponding reactions by other stakeholders.

The instruments described here are in addition to the range of legally binding and nonbinding mechanisms described in Chapter I. The mix of hard and soft instruments in each of the case studies gives colour to the framing in each context. In some instances, instruments describe legal relationships between stakeholders. In other instances, instruments describe social, economic, political, and cultural relationships between stakeholders. In combination, the instruments in the case studies help to reconstruct the contexts in which the events took place: setting boundaries, defining relationships, and articulating concerns about human rights and development (community and commercial).

⁹ 'Bangladesh Human Rights' (*Amnesty International USA*) <<https://www.amnestyusa.org/countries/bangladesh/>> accessed 21 August 2021; 'Kenya Human Rights' (*Amnesty International USA*) <www.amnestyusa.org/countries/kenya/> accessed 21 August 2021; 'Canada Human Rights' (*Amnesty International USA*) <www.amnestyusa.org/countries/canada/> accessed 21 August 2021; Human Rights Watch, 'Bangladesh: Events of 2020' (2021) <www.hrw.org/world-report/2021/country-chapters/bangladesh> accessed 21 August 2021; Human Rights Watch, 'Kenya: Events of 2020' (2020) <www.hrw.org/world-report/2021/country-chapters/kenya> accessed 21 August 2021; Human Rights Watch, 'Canada: Events of 2020' (2020) <www.hrw.org/world-report/2021/country-chapters/canada> accessed 21 August 2021.

¹⁰ Jean Ziegler, 'The Right to Food Report of the Special Rapporteur, Jean Ziegler Addendum Mission to Bangladesh*' (United Nations Committee on Economic, Social and Cultural Rights 2003) E/CN.4/2004/10/Add.1; Association for Land Reforms and Development (ALRD), 'An Alternative Report of the Civil Society On the International Covenant on Economic, Social and Cultural Rights' (United Nations Committee on Economic, Social and Cultural Rights 2018); Magdalena Sepúlveda Cardona and Catarina de Albuquerque, 'Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (UN General Assembly 2010) A/HRC/15/55; Miloon Kothari, 'Economic, Social and Cultural Rights. Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari Addendum' (Economic and Social Council 2005) E/CN.4/2005/48/Add.1; Mary Robinson, 'Business and Human Rights: A Progress Report' (Office of the High Commissioner for Human Rights 2000).

Consultation

As mentioned above, each of the three elements of the analytical framework are interconnected and interdependent. Consultation is important for the analysis as it is the manifestation of (and the actions derived from) certain obligations and recommendations included in both hard and soft instruments. The existence of, extent of, and types of consultation contribute to identifying stakeholder approaches to human rights and development (community and commercial). The case studies considered in this thesis describe two types of consultation: formal and alternative mechanisms. The most relevant formal mechanisms (enshrined in law, state policy, or corporate policy) include free prior and informed consent (Phulbari Coal Mine, Lake Turkana Wind Power) and feedback or grievance policies (Phulbari Coal Mine, Lake Turkana Wind Power, Okikendawt Hydroelectric Power Plant). The alternative (to the formal category) consultation mechanisms that arise in the case studies include academic and NGO research, press and media, and protests.

Requesting and granting free prior and informed consent is the most prevalent example of the interconnectivity between the stable elements of the analytical framework. As discussed in Chapter I, free prior and informed consent is a fundamental element of the UNDRIP, a soft law instrument to ensure indigenous protections.¹¹ It is also a consultative process, championed by UN organs, states, and businesses.¹² In the case studies considered in this thesis, there are commercial development processes that fall short, and processes that go above and beyond the UNDRIP requirements.¹³ However, the case studies below describe instances of indigenous stakeholder relations that go beyond traditional (UNDRIP) free prior and informed consent (in particular, the Okikendawt Hydroelectric Power Plant).

¹¹ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP).

¹² 'Federal Government Introduces UNDRIP Legislation' (*Fasken*, 10 December 2020)

<www.fasken.com/en/knowledge/2020/12/9-federal-government-introduces-undrip-legislation> accessed 12 June 2021; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957; Food and Agriculture Organization of the United Nations, 'Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities' (FAO 2016).

¹³ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 11); Food and Agriculture Organization of the United Nations (n 12). The Food and Agriculture Organization of the United Nations describes additional, and more stringent components of free prior and informed consent, above and beyond those described in the UNDRIP.

Consultation also includes mechanisms for feedback and grievance over the course of commercial development projects. The three case studies considered in Chapters III, IV, and V describe channels by which communities may express their dissatisfaction with, or make recommendations about, the commercial development projects. These channels range from violent protests, to digital forms that must be submitted to local assemblies or through business websites, to regularly scheduled in-person meetings with development representatives who actively search out ways in which they can improve the consultative processes.¹⁴ Grievance and feedback mechanisms and policies are sometimes included in impact assessment reports in instances when commercial development projects are anticipated to affect social, economic, and cultural rights.

As indicated by the list of alternative consultation mechanisms above, NGOs, academic institutions, the media, and protests provide additional ways for stakeholders to make their grievances heard. Local NGOs and academic research help to provide feedback beyond the scope of the impact assessment reports in two of the case studies (Phulbari Coal Mine, Lake Turkana Wind Power).¹⁵ This type of research may be incorporated into the impact assessment itself (Phulbari Coal Mine).¹⁶ In the first two case studies (Phulbari Coal Mine, Lake Turkana Wind Power), the media helped bring attention to local and indigenous communities that were in conflict with other stakeholders.¹⁷ In the third case study (Okikendawt Hydroelectric Power Plant), the media provided an outlet to celebrate the success of the project, in addition to highlighting the

¹⁴ Dhaka Tribune, 'Phulbari Protesters Give Ultimatum to Meet 6-Point Demands' (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 27 October 2018; *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014))); 'FEEDBACK MECHANISM – Lake Turkana Wind Power' <<https://ltwp.co.ke/feedback-mechanism/>> accessed 18 May 2019; 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' <<https://ltwp.co.ke/public-consultation-and-engagement/>> accessed 19 May 2019; 'New Chief of Dokis Looks to a Bright Future' <<http://anishinabeknews.ca/2016/06/06/new-chief-of-dokis-looks-to-a-bright-future/>> accessed 9 February 2020.

¹⁵ Shiree, 'Khasland for the Poorest - Simplify the Process' (UK Aid and The Government of Bangladesh 2011); Business & Human Rights Resource Centre, 'Kenya: Report by Danwatch Reveals Negative Impacts of Lake Turkana Wind Project on Indigenous Community Rights' <www.business-humanrights.org/en/kenya-report-by-danwatch-reveals-negative-impacts-of-lake-turkana-wind-project-on-indigenous-community-rights> accessed 18 May 2019.

¹⁶ Asia Energy Corporation (n 7).

¹⁷ Dhaka Tribune (n 14); Phulbari Resistance, 'Phulbari Resistance: Urgent Appeal by World Organization against Torture: Risk of Violent Suppression of Public Opposition to the Phulbari Coal Mine Project' (*Phulbari Resistance*, 22 December 2007) <<http://phulbariresistance.blogspot.com/2007/12/urgent-appeal-by-world-organization.html>> accessed 16 October 2020; 'Kenya: Video on Pastoralist Communities' Mobilization in the Face of Extractive Industries' (*IWGIA*) <www.iwgia.org/en/kenya/2128-kenya-video-on-pastoralist-communities-mobilizatio> accessed 18 May 2019.

positive stakeholder relations as a model that may be used in other similar contexts.¹⁸ In Chapter III (Phulbari Coal Mine), local, national, and international protests resulted in drastic changes to the commercial development project.¹⁹

These formal and alternative consultation mechanisms including free prior and informed consent, grievance and feedback, and the media are only some of the measures used to engage stakeholders and build stakeholder relations. There are other case study-based tools that will arise throughout the following three chapters. Regardless of how comprehensive a stakeholder's impact assessment, there are inevitable social, economic, or environmental consequences of commercial development. Consultation mechanisms allow for a continuous system of checks in order to mitigate as many conflicting stakeholder relations as possible. However, as with framing and instruments, there are situations in the contexts below in which the consultation mechanisms are insufficient to address the concerns of every stakeholder. These insufficiencies are addressed case by case.

Consultation provides insight into the actions taken by stakeholders, based on the concerns brought about by framing and instruments. Consultation is the element of the analytical framework (in most instances) that allows additional stakeholders (other than the state and commercial developer) to participate directly in the commercial development process. Teasing the consultation measures and mechanism out of the case studies helps to identify those additional stakeholders, their approaches to rights and development (community and commercial), and the relations (in most instances) between them and the state or commercial developer.

Applying the Analytical Framework to the Case Studies

In order to understand what the case studies can tell us about the relationship between rights and development (community and commercial) and, in particular, the potential for stakeholder relations to shape that relationship in commercial development contexts, the chapters all adopt a

¹⁸ 'Okikendawt Hydro Project on the French River Begins Construction' *Anishinabek News* (27 August 2013) <<http://anishinabeknews.ca/2013/08/27/okikendawt-hydro-project-on-the-french-river-begins-construction/>> accessed 8 February 2020; Elizabeth Ingram, 'Ontario Hydropower Project Wins Sustainability Award' *Hydro Review* (3 December 2014) <www.hydroreview.com/2014/12/03/ontario-hydropower-project-wins-sustainability-award/>.

¹⁹ Dhaka Tribune (n 14); 'Protests at GCM Resources AGM over Bangladesh Coal Mine' (*Global Justice Now*, 4 December 2013) <www.globaljustice.org.uk/news/protests-at-gcm-resources-agm-over-bangladesh-coal-mine/> accessed 5 June 2021.

similar structure. After a brief introduction, a description and timeline of the case is necessary to understand the human rights and commercial development concerns at play. The chapters then focus on the instruments used in the commercial development projects. These are both soft and hard, and range from law, to policy, to indigenous to corporate instruments. In some instances, the case study chapters contextualise how a certain stakeholder arrived at their current approach to a certain instrument, describing the influences on their dispositions and actions. For example, the Dokis First Nation in Canada (Chapter V) has a long history of First Nation agreements with the Canadian government that help to set the stage for the project.²⁰ Each case study then analyses the impact assessment report (although the relevant documents were not always called “impact assessment reports” in the respective projects). At this point, some of the case studies refer to a specific instrument that requires additional analysis. For example, select indigenous communities in Kenya (Chapter IV) sued the commercial developer in the case of *Mohamud v. Lake Turkana Wind Power Ltd.*²¹ The consultation measures generally make up the final substantive section, but in some cases, these measures are divided into multiple parts (formal and alternative). There is no specific section that solely describes the framing in any chapter. This is because the instruments, consultation measures, and actions, in this thesis, tend to use either a rights or development framing. The framing analysis is spread throughout the case studies instead of being articulated in isolation.

The case studies describe approaches by relevant stakeholders. For some stakeholders, the available information about the approach is in the form of an action, for other stakeholders (although much more infrequently) it is in the form of a disposition. Throughout the case studies, the analytical framework will be applied to help determine the disposition or action of each stakeholder in any given relation, and from there, identify an approach. These approaches are later held up to a magnifying glass in order to develop the taxonomy of approaches (Chapter VI). The analytical framework, approach components (disposition and action), and the taxonomy are by no means universal. The framework is merely designed and used to begin this categorisation process and potentially determine which approaches, in combination with each other, provide the most

²⁰ Dokis First Nation, ‘Dokis First Nation Land Code Executive Summary’ (2013); ‘Dokis First Nations Land Management Resource Centre (RC)’ (*First Nations Land Management Resource Centre (RC)*) <<https://labrc.com/first-nation/dokis/>> accessed 9 February 2020.

²¹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 14).

compatible relations (as defined above and in Chapter VI) for human rights fulfillment and development (community and commercial) achievement.

CHAPTER III

Phulbari Coal Mine, Bangladesh

This first case study presents a considerable range of competing agendas among stakeholders. The stakeholders below aimed for compatible relations and approached the commercial development context with an eye towards human rights and community development. As time progressed, state violations of human rights caused certain stakeholders to alter their approaches based on international and local pressure. Stakeholder relations, approaches to rights and development (community and commercial), dispositions, and actions were all highly inconsistent, and yet this inconsistency is key to this case study. The framing, instruments, and consultation measures described below paint a picture of a large-scale commercial development project with stakeholders that intended to approach relations compatibly, but constantly shifting agendas led to conflicts between nearly every stakeholder. This case study is a clear example of how differing and inconsistent approaches to stakeholder relations can lead to conflict in a commercial development context.

The Phulbari Upazila in northern Bangladesh is the site of a complex, decades long, highly contested commercial development project with myriad, constantly shifting stakeholders and multiple human rights violations.¹ The Phulbari Coal Mine project drew local, national, and international attention from the media, local and foreign officials, indigenous communities, advocacy groups, multinational investors, and the public at large.² The stakeholder relations in the

¹ Abdullah Nadvi, 'Phulbari Movement of 2006: Where We Stand Now' (*The Daily Star*, 1 September 2017); Asia Energy PLC, 'The Phulbari Coal Project' (November 2004); 'Deal with Asia Energy on Phulbari Coalmine Invalid' (*London Mining Network*, 27 January 2013) <<https://londonminingnetwork.org/2013/01/deal-with-asia-energy-on-phulbari-coalmine-invalid/>> accessed 26 November 2018; Dhaka Tribune, 'Phulbari Protesters Give Ultimatum to Meet 6-Point Demands' (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 27 October 2018; Rahnema Ahmed, "'You Cannot Eat Coal': Resistance in Phulbari' (*BanglaPraxis*, 18 August 2008) <<https://banglapraxis.wordpress.com/2008/08/19/%e2%80%98you-cannot-eat-coal%e2%80%99-resistance-in-phulbari/>> accessed 29 October 2018.

² Asia Energy PLC (n 1); Dhaka Tribune (n 1); De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food, 'Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts' (*UN Special Rapporteur on Food*, 28 February 2012); Graham Taggart, Finance Director, 'GCM Response to UN Statement on Phulbari' (20 March 2012); Shamim Jahangir, 'Govt Backtracks on Open-Pit Mining in Barapukuria, Phulbari' *Daily Sun* (23 September 2016); 'Phulbari Tragedy's 13th Anniv Today, Govt Ignores Pact' *New Age* (26 August 2019) <www.newagebd.net/article/82578/phulbari-tragedys-13th-anniv-today-govt-ignores-pact> accessed 25 August 2019; Nadvi (n 1); Alliance News, 'GCM Resources Inks Consultancy Deal To Advance Phulbari Coal Project' (*MorningstarUK*, 4 September 2019)

context of the Phulbari Coal Mine shifted multiple times over the life of the project. Therefore, this analysis relies heavily on framing, instruments, and consultation processes to tease out (primarily) the corporate, indigenous, and governmental approaches to both human rights and community development as they pertain to commercial development. The failures to achieve compatible stakeholder relations led to violations of economic, social, cultural, civil, and political rights.³ This chapter touches on each of these rights categories but will primarily focus on failures to respect, protect, and fulfill the rights to land, property, and cultural practices in (1) the development of the coal mine, and (2) the associated relocation of indigenous persons, in order to tease out the most relevant stakeholder relations.

This chapter will examine these stakeholder relations that led to the rights violations above by (1) recounting a history of the Phulbari Coal Mine, including the participating stakeholders, (2) looking at the relevant hard and soft instruments, (3) looking at the various impact assessment reports and their recommendations, (4) compiling the local and international consultation practices, both planned and executed, and (5) examining throughout the framing of the approaches to human rights and development (community and commercial) for the Phulbari Coal Mine, Bangladesh, and the indigenous communities. These steps will tease out the causal relationships between the unique stakeholder relations in the context of the Phulbari Coal Mine and the human rights violations that occurred over the course of the project.

Summary, History, and Stakeholders

As a brief overview, the Phulbari Coal Mine is a large, non-sustainable, commercial development project that brought together corporate, governmental, indigenous, and international

<http://www.morningstar.co.uk/virtual/SolrNews%2fAllianceNews.aspx?Site%3duk%26DocId%3dAN_1567602924380139500> accessed 4 September 2019; Yes to Life no to Mining, 'Bangladesh Government Says NO to Phulbari Coal Mine' (*Yes to Life no to Mining*, 26 August 2015); 'Deal with Asia Energy on Phulbari Coalmine Invalid' (n 1); Fariha Karim, 'WikiLeaks Cables: US Pushed for Reopening of Bangladesh Coal Mine' *The Guardian* (21 December 2010) <www.theguardian.com/world/2010/dec/21/wikileaks-cables-us-bangladesh-coal-mine> accessed 27 October 2018.

³ Bangladesh Dalit and Excluded Rights Movement (BDERM), Network of Non-mainstreamed and Marginalized Communities (NNMC), and International Dalit Solidarity Network (IDSN), Nagorik Uddyog, 'Social, Economic, and Cultural Status of Dalit Community in Bangladesh' (United Nations Committee on Economic, Social and Cultural Rights 2018); JAMAKON (National Human Rights Commission of Bangladesh), 'JAMAKON Report to the UN Human Rights Committee' (UN Human Rights Commission 2016); De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food (n 2).

stakeholders. The coal mine started construction with backing from multinational financial corporations.⁴ Through a partnership with the Bangladesh Government, the mine was set to produce energy for the local community, Bangladesh as a whole, and as a resource for export.⁵ The project intended to support communities (through both rights and development) by stimulating the local economy and providing jobs. However, the corporate consultation measures failed to recognise the needs of the local communities which resulted in human rights violations. Resultantly, indigenous communities in the Phulbari Upazila experienced displacement from land, forced resettlement, poor labour practices, loss and destruction of land, loss of usable natural resources for food and water, debilitating pollution, violations of cultural and community practices, and impacts on health and safety.⁶ Additional rights violations resulted from the poor government handling of public reaction to the project, specifically protests against the Phulbari Coal Mine and the Bangladesh Government. These included violations of the right to free speech and assembly.⁷ The peaceful protests and non-peaceful government responses led to further rights violations through extrajudicial killings and violence by the Rapid Action Battalion.⁸ The local negotiations that stemmed from finding a resolution to the protests included various stakeholders: the indigenous communities, NGOs, the federal government, international representation, inter alia.⁹

⁴ 'Asia Energy Submits \$2 Billion Phulbari Coalmine Development Project' *BD News 24* (Bangladesh, 1 October 2005).

⁵ Asia Energy PLC (n 1).

⁶ International Accountability Project, 'Phulbari Coal Project: An Assessment of the Draft Resettlement Plan Prepared by Global Coal Management/Asia Energy Corporation' (International Accountability Project 2008); Sadid Nuremowla, 'Land, Place and Resistance to Displacement in Phulbari' (2016) 1 *South Asia Multidisciplinary Academic Journal*; Saikat Biswas, 'State of Indigenous Peoples Rights In Bangladesh' (BRAC University 2008); International Accountability Project and Kate Hoshour, 'Analysis of The Indigenous People's Development Plan' (2012); UN News, 'Open-Pit Coal Mine Project in Bangladesh Threatens Human Rights – UN Experts' (*UN News*, 28 February 2012) <<https://news.un.org/en/story/2012/02/404922-open-pit-coal-mine-project-bangladesh-threatens-human-rights-un-experts>> accessed 27 October 2018; Ahmed (n 1).

⁷ Dhaka Tribune (n 1); 'Phulbari Tragedy's 13th Anniv Today, Govt Ignores Pact' (n 2); TOOMEGANE, *The Blood-Soaked Banner of Phulbari(1/2)* <www.youtube.com/watch?time_continue=431&v=PnpEJAZiWf0> accessed 13 October 2018; International Accountability Project, 'The Phulbari Coal Project: A Threat To People, Land, And Human Rights In Bangladesh' (International Accountability Project 2012).

⁸ TOOMEGANE (n 7); 'Phulbari Tragedy's 13th Anniv Today, Govt Ignores Pact' (n 2).

⁹ Dhaka Tribune (n 1); '7 Point Demands' (*NCBD - National Committee of Bangladesh*) <http://ncbd.org/?page_id=69> accessed 22 November 2018; International Accountability Project and World Development Movement, 'Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises Concerning GCM Resources (UK)' (2012); International Accountability Project and The World Development Movement, 'Initial Assessment By The UK National Contact Point For The OECD Guidelines For Multinational Enterprises: Complaint From The International Accountability Project And The World Development Movement Against GCM Resources Plc In Bangladesh' (2013); International Accountability Project (n 7); TOOMEGANE (n 7).

These negotiations anticipated a peaceful resolution.¹⁰ However (as of this thesis' publication) the work at the Phulbari Coal Mine is still in flux due to financial barriers and consistent international outcry against the project.

The Phulbari Coal Mine commercial development project is located in the Phulbari Upazila, in the Dinajpur district of northern Bangladesh, near the Indian border.¹¹ Over 14,600 acres of land were licensed by the developer, Global Coal Management Resources, 80% of which was fertile farmland.¹² The projected lifespan of the Phulbari Coal Mine was 36 years with an anticipated extraction total of 572 million tonnes of coal.¹³ The investment agreement estimated that 20% would be used domestically while the remainder would be exported.¹⁴

The primary stakeholders, or those that were touched directly by the commercial development of the Phulbari Coal Mine, include the indigenous communities of the Phulbari Upazila, Global Coal Management Resources (including all subsidiaries and previous mining licence holders), the Bangladesh Government including the ministries, courts, and police forces (in detail below) and various Bangladesh NGOs (and local divisions of INGOs) including the National Committee to Protect Oil, Gas, Mineral Resources, Power and Ports. The secondary stakeholders are Phulbari Coal Mine's financial backers (banks and corporate partners), assessment organisations including The International Accountability Project, international governments and officials, and the United Nations, including its organs and various Special Rapporteurs. These stakeholders contributed to (and in some cases helped to remedy) an environment that failed to respect, protect, and fulfill the rights to land, property, cultural practices, food and water, fair labour, and ultimately, life.

The Phulbari Coal Mine's development began in 1994 when the Billiton Mitsubishi Alliance, an Australian company, was awarded a contract to mine coal in the Phulbari region.¹⁵ Four years later, Asia Energy Corporation Pty Ltd acquired the mining contract from Billiton

¹⁰ Dhaka Tribune (n 1); Bipul Sarker Sunny Dinajpur, 'Phulbari Protesters Give Ultimatum to Meet 6-Point Demands' (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 14 October 2018; '7 Point Demands' (n 9).

¹¹ Banglapedia, 'Phulbari Upazila, Dinajpur District', *Banglapedia - The National Encyclopedia of Bangladesh* (rev 2nd edn, 2012).

¹² International Accountability Project (n 7) 1.

¹³ *ibid.*

¹⁴ *ibid* 1–2.

¹⁵ Asia Energy PLC (n 1).

Mitsubishi Alliance.¹⁶ In September of 2003, Asia Energy acquired Asia Energy Corporation Pty Ltd and all its contracts including the mining rights, and Global Coal Management (Global Coal Management Resources) purchased Asia Energy as a wholly owned subsidiary.¹⁷ The Bangladesh Government awarded a 2-year licence to Asia Energy Corporation starting on 28 January 2004 to perform a feasibility study on the site. Less than two months later, the State Minister of Power and Energy, Mosharraf Hossain, a federal official, approved a 10-year exploration licence for Asia Energy Corporation. In addition to providing a local power source in the Dinajpur district, the terms of the grant of the licence included a 6% fixed sales royalty, no export duties, and a nine-year tax holiday.¹⁸ When construction began on the Phulbari Coal Mine, the potential for human rights violations became apparent: forced removal of property and forced displacement from land for at least 50,000 people (with a plan to resettle), contamination of food and water supplies by pollution from the mine causing the potential for 220,000 additional displaced people, violations of cultural and community practices through displacements and relocations, and impacts on health and safety from pollution and other forms of contamination.¹⁹ After the term of the initial feasibility study expired, protests against the Phulbari Coal Mine began across Bangladesh, culminating in a 50,000-person protest on 26 August 2006.²⁰ Four days later, the Rapid Action Battalion, a federal police force, shot and killed three peaceful protesters and injured over 200 others in Phulbari.²¹

The following day, the Six Point Demands were released to the public. These demands were developed by the National Committee to Protect Oil, Gas, Mineral Resources, Power and Ports, an NGO working on behalf of the protesters.²² These six points were: (1) cancelling the

¹⁶ 'Asia Energy Submits \$2 Billion Phulbari Coalmine Development Project' (n 4).

¹⁷ The Center for Media and Democracy, 'Phulbari Coal Project - SourceWatch' (*The Center for Media and Democracy*).

¹⁸ International Accountability Project (n 7) 1.

¹⁹ *ibid* 2; International Accountability Project (n 6). A pre-feasibility study was conducted in advance of the study that commenced in 2004, to determine the amount of coal on the site. This study did not address any human rights or environmental concerns.

²⁰ The Center for Media and Democracy (n 17).

²¹ *ibid*; Ahmed (n 1); TOOMEGANE (n 7). A pre-feasibility study was conducted in advance of the one that commenced in 2004, to determine the amount of coal on the site. This study did not address any human rights or environmental concerns.

²² 'Who We Are' (NCBD - National Committee of Bangladesh) <http://ncbd.org/?page_id=65> accessed 22 November 2018; 'What We Do' (NCBD - National Committee of Bangladesh) <http://ncbd.org/?page_id=67> accessed 22 November 2018; '7 Point Demands' (n 9). The National Committee of Bangladesh is an organisation comprised of politicians, experts, and influential citizens. The seven main goals of the Committee are to ensure

agreement between the national government and Asia Energy Corporation, and a commitment to prohibit coal mining projects in the area. (2) Compensation for the extrajudicial killings of protesters. (3) Full investigation of the Rapid Action Battalion members responsible for the extrajudicial killings. (4) Returning the deceased protesters to their families. (5) Construction of a monument memorialising those killed in the protest. (6) Compensation for shopkeepers and rickshaw owners for damages caused by law enforcement officials.²³

There are conflicting sources as to when (and if) the Bangladesh Government formally agreed to the Six Point Demands, but various members of the government are on record as being in support of doing so, including Sheikh Hasina, then leader of the opposition party (now Prime Minister).²⁴ On 31 August 2006, the same day the Six Point Demands were released, Asia Energy Corporation suspended trading based on rumors that the project may be stalled or cancelled.²⁵ Trading resumed on October 6th without word from the Bangladesh Government as to the state of the project, and the stock price plummeted. Bangladesh officially halted the project in January of 2007.²⁶ Since 2007, the Phulbari Coal Mine has restarted and halted multiple times leading to global protests against Global Coal Management Resources and the project.²⁷ The commercial development of the Phulbari Coal Mine also triggered responses from a range of countries including the US, which appears to have pushed for the reopening of the project (more under consultation, below).²⁸ Conversely, the UK Government urged Global Coal Management

100% citizen ownership of natural resources, repeal all immunity laws and other private sector protections, implement various demands including the 6 points demands for Phulbari Coal Mine, and eliminate corruption through various measures. There is also consistent advocacy for moving to renewable resources and away from coal and oil.

²³ Dhaka Tribune (n 1); Yes to Life no to Mining (n 2); 'Phulbari Tragedy's 13th Anniv Today, Govt Ignores Pact' (n 2); Nadvi (n 1).

²⁴ Dinajpur (n 10); Dhaka Tribune (n 1); Yes to Life no to Mining (n 2); Staff Correspondent, 'Govt Says "No" to Open-Pit Mine' (*New Age*, 24 August 2015); 'Phulbari Tragedy's 13th Anniv Today, Govt Ignores Pact' (n 2).

²⁵ International Accountability Project (n 7) 4.

²⁶ The Center for Media and Democracy (n 17); International Accountability Project (n 7). At this point, press and the public started referring to GCM Resources as the responsible party for the Phulbari Coal Mine, even though the acquisition of Asia Energy Corp occurred four years previously. It is possible that the company started using the GCM moniker to attempt to escape the association of the extrajudicial killings.

²⁷ Phulbari Resistance, 'Phulbari Resistance: Urgent Appeal by World Organization against Torture: Risk of Violent Suppression of Public Opposition to the Phulbari Coal Mine Project' (*Phulbari Resistance*, 22 December 2007) <<http://phulbariresistance.blogspot.com/2007/12/urgent-appeal-by-world-organization.html>> accessed 16 October 2020.

²⁸ Karim (n 2); Ambassador James F. Moriarty, 'Ambassador Urges Prime Minister's Adviser to Accelerate Energy Sector Development' (Bangladesh Dhaka 2009) Wikileaks Public Library of US Diplomacy 09DHAKA741_a <https://wikileaks.org/plusd/cables/09DHAKA741_a.html> accessed 27 October 2018.

Resources to evaluate the additional potential human rights violations that may be caused by resuming work on the Phulbari Coal Mine.²⁹ Additionally, reports were compiled by (and for) the United Nations on the human rights violations associated with the Phulbari Coal Mine.³⁰ Led by Olivier De Schutter, The UN Special Rapporteur on the Right to Food, a group of UN Special Rapporteurs formally reprimanded Global Coal Management Resources for failing to respect and protect the rights to food and water, the rights to culture and indigenous practices, the rights to assembly, opinion, expression, and association, and the rights to be free from arbitrary displacement and property acquisition.³¹ Global Coal Management Resources responded by pointing to their extensive impact assessment reports.³² These reports addressed the potential economic, social, cultural, civil, and political human rights violations and outlined the consultation measures that ought to have been undertaken to mitigate said violations.³³

While little of this history focuses on the Phulbari Upazila's indigenous communities, their participation in the consultation measures is imperative to understanding the efficacy of the impact assessment reports, the proposed consultative measures, and the overall approaches to stakeholder relations. Through their actions surrounding the Phulbari Coal Mine, each of the stakeholders above contribute in different ways to the framing, instruments, and consultation measures, and therefore, the state's the ability (and inability) to respect, protect and fulfill the various human rights obligations.

²⁹ IAP, 'Press Release on the Phulbari Coal Mine' (*Medium*, 24 November 2014)

<<https://medium.com/@accountability/press-release-on-the-phulbari-coal-mine-347a52c525a4>> accessed 10 October 2020; International Accountability Project and World Development Movement (n 9).

³⁰ UN News (n 6); Cultural Survival, 'Violations of Indigenous Peoples' Rights in Bangladesh' (United Nations 2017) International Covenant on Civil and Political Rights Alternative Report Submission; De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food (n 2).

³¹ De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food (n 2). The Special Rapporteurs quoted or mentioned in the report are for the rights to food, adequate housing, indigenous peoples, opinion and expression, peaceful assembly and association, and extreme poverty.

³² Graham Taggart, Finance Director (n 2).

³³ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (SMEC 2006); Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 2) The Mine' (Mine Consult Pty Ltd 2005); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 3) Environment' (Asia Energy Corporation (Bangladesh) Pty Ltd 2005); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (Asia Energy Corporation (Bangladesh) Pty Ltd 2006).

Instruments: Human Rights and Indigenous Protections, Local and International

As a general matter, Bangladesh has a mixed record on the protection of human rights, and the state's adherence to the relevant law is constantly in flux.³⁴ There are many instances of contradiction: constitutional law in conflict with ratified international agreements, officials supporting different interpretations when speaking on behalf of the government, public officials contradicting themselves through the press, and a stark difference between the framing of rights on the international and domestic stages.³⁵

Even though Bangladesh did not become a member of the United Nations until 1974, the Constitution of Bangladesh, ratified in 1972, was influenced by the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.³⁶ By way of example, Part II (Fundamental Principles of State Policy) and Part III (Fundamental Rights) of the Constitution, list some of the enumerated rights relevant to this case study: health, culture, life, equality, and religious nondiscrimination.³⁷ These constitutional rights all have parallels within the International Bill of Rights.³⁸ It ought to be noted that different parts of the Constitution have different judicial enforceability: the rights enumerated in Part II are non-justiciable, while the rights enumerated in

³⁴ Faizunnessa Taru, 'Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments' (2016) 46 *Journal of Law, Policy and Globalization* 9; International Accountability Project (n 7); Arif Ahmed and Jahid Mustofa, 'Mechanisms for Implementation of Human Rights: A Critical Analysis in Bangladesh Perspective' (2016) 10 *Prime University Journal* 24; Human Rights Forum, 'List of Bangladesh's Ratification of International Treaties' (2012); Human Rights Watch, 'Bangladesh: Events of 2020' (2021) <www.hrw.org/world-report/2021/country-chapters/bangladesh> accessed 21 August 2021.

³⁵ Law Help Bangladesh, 'Fundamental Rights in the Constitution of Bangladesh' (*Law Help BD*, 12 February 2017) <<https://lawhelpbd.com/constitution/fundamental-rights-constitution-bangladesh/>> accessed 14 October 2018; Shahjahan Mondol and Reba Mondol, 'Constitution of Bangladesh and Human Rights: A Comparative Study' (2017) 22 *IOSR Journal of Humanities and Social Science* 10; Taru (n 34); Constitution of the People's Republic of Bangladesh 1972; Yes to Life no to Mining (n 2); Amnesty International, 'Bangladesh Submission to the UN Human Rights Committee' (UN Human Rights Committee 2017) 119th Session; 'Bangladesh Human Rights' (*Amnesty International USA*) <<https://www.amnestyusa.org/countries/bangladesh/>> accessed 21 August 2021; Working Group on the Universal Periodic Review, 'Bangladesh: Universal Periodic Review' (Office of the High Commissioner for Human Rights 2013) A/HRC/WG.6/16/BGD/2; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh' (Human Rights Council 2009) A/HRC/11/18*.

³⁶ Ahmed and Mustofa (n 34); Constitution of the People's Republic of Bangladesh (n 35); Taru (n 34).

³⁷ Constitution of the People's Republic of Bangladesh (n 35) Parts II, III.

³⁸ Mondol and Mondol (n 35).

Part III are justiciable.³⁹ The following descriptions of selected (relevant) rights will clarify their enforceability. This distinction suggests a hierarchy of human rights, something not envisioned by the international obligations.⁴⁰

Article 47 (Part III) of the Constitution directly touches on mining operations and the ability for the government to prioritise mining over enumerated rights. It states that:

Article 47 Saving for Certain Laws

(1) No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridge, any of the rights guaranteed by this Part

.....

(d) the extinction, modification, restriction or regulation of rights of search for or win minerals or mineral oil.⁴¹

The Phulbari Coal Mine and other mining examples including Barapukuria, provide evidence of the Bangladesh Government's use of Article 47(1d) to prioritise mining operations over the respect, protection, and fulfillment of rights enumerated in the Constitution, regardless of their judicial enforceability.⁴²

With an eye towards indigenous communities, Bangladesh abstained from voting for the United Nations Declaration on the Rights of Indigenous Peoples in 2007, but indigenous rights protections are included within the Constitution.⁴³ Article 23A, The Culture Of Tribes, Minor Races, Ethnic Sects And Communities, provides that "The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities."⁴⁴ This protection is included in Part II and is therefore non-justiciable. However,

³⁹ Constitution of the People's Republic of Bangladesh (n 35) Articles 8, 44, 102.

⁴⁰ Vienna Declaration and Programme of Action - A/CONF.157/23; Mondol and Mondol (n 35); Ahmed and Mustofa (n 34); Taru (n 34).

⁴¹ Constitution of the People's Republic of Bangladesh (n 35) Article 47.

⁴² The Center for Media and Democracy, 'Barapukuria Coal Mine - SourceWatch'; The Center for Media and Democracy (n 17).

⁴³ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP).

⁴⁴ Constitution of the People's Republic of Bangladesh (n 35) Article 23A. Article 23A was inserted into the Constitution of Bangladesh by The Constitution Act 2011 (Act XIV of 2011) section 14.

the general nondiscrimination clauses of the Constitution, contained in Articles 28(1) and 28(4), are included in Part III and are therefore enforceable in court.⁴⁵

Property and land rights are highly relevant to this case study. Customary land rights are not enumerated in the Constitution, but are included in the Transfer of Property Act 1882,⁴⁶ the Land Registration Act 2016,⁴⁷ and the Land Reforms Ordinance 1984.⁴⁸ However, the laws surrounding transfer of land ownership have changed multiple times and seem to have different applications based on the indigeneity of the communities involved.⁴⁹ *Kagojer jomi* is understood as land where the owner has a deed (or ownership document) in his or her possession, and *Khas jomi* is land where the inhabitants have established ownership through long-term transformation from a forested area into agriculturally viable land.⁵⁰ The applicable law depends on which of these categories a piece of land falls into, and in the case of the Phulbari Coal Mine, this was a matter of some dispute. The term *Khas* formally denotes land that is owned by the government.⁵¹ The same terminology is used to refer to rivers and parks. The Ministry of Land has the authority to manage pieces of land with the *Khas* designation.⁵² In the 1980s, *Khas* land was meant to be used by the most impoverished communities, including people that were forced from their homes due

⁴⁵ *ibid* Articles 28(1), 28(4).

⁴⁶ Transfer of Property Act 1882 (Act No. IV of 1882).

⁴⁷ Land Registration Act 2016.

⁴⁸ Land Reforms Ordinance 1984 (Ordinance No. X of 1984).

⁴⁹ Transfer of Property Act 1882 (Act No. IV of 1882); Registration Act 1908 (Act No. XVI of 1908); Land Reforms Ordinance 1984 (Ordinance No. X of 1984); Shahidul Islam, Golam Moula and Mominul Islam, 'Land Rights, Land Disputes and Land Administration in Bangladesh—A Critical Study' (2015) 06 Beijing Law Review 193; 'Indigenous Peoples Need Land Rights' *Dhaka Tribune* (26 November 2016); 'Fight for Indigenous Rights in Bangladesh Continues' *The Daily Star* (9 August 2017); 'Twenty Years after Peace Accord, Indigenous Bangladeshis Still Attacked over Land' *Reuters* (18 September 2017) <www.reuters.com/article/us-bangladesh-landrights-idUSKCN1BT1K0> accessed 2 February 2019; The International Federation of Red Cross and Red Crescent Societies, 'Housing, Land and Property Law in Bangladesh' (2017) lxdp A0138585882v8 120641715; Manusher Jonno Foundation, 'Rights of the Ethnic People (Indigenous Peoples)' (2018). The Phulbari Coal Mine is not located within the Chittagong Hill Tracts and is therefore not party to the indigenous protections provided by the Chittagong Hill Tracts Peace Accord of 1997. Customary land is recognised in the Chittagong Hills Tract and the status of the indigenous land surrounding Phulbari is in conflict based on the sources above.

⁵⁰ Nuremowla (n 6); Bangladesh Housing Land and Property (HLP) Rights Initiative, 'Land Acquisition for Climate Displaced Communities of Bangladesh' (Young Power in Social Action (YPSA) 2013).

⁵¹ Shiree, 'Khasland for the Poorest - Simplify the Process' (UK Aid and The Government of Bangladesh 2011); HELVETAS Swiss Intercooperation, 'Support to Landless People to Apply for Formal Access to State-Owned "khas" Land - Learn' (2005) <<https://learn.landcoalition.org/fr/good-practices/support-landless-people-apply-formal-access-state-owned-khas-land/>> accessed 17 October 2020.

⁵² Ministry of Land, 'Ministry of Land (Bangladesh)' <<https://minland.portal.gov.bd/>> accessed 17 October 2020.

to flooding and erosion.⁵³ This land was allocated in the Land Reforms Action Programme of 1987.⁵⁴

While this type of relocation to *Khas* land was government sanctioned, it still fell under the category of *Khas jomi* for those relocated persons.⁵⁵ The lack of a deed prevented those that inhabited and cultivated the land from having a formal legal right to it, however, a different notion of ownership developed.⁵⁶ Rather than framing the land in terms of rights and ownership, *Khas* land seems to be framed as a community development programme (providing housing and relocations services), helping to progressively realise the right to property and housing. The federal government went so far as to incentivise relocation by providing housing, while NGOs helped to facilitate the transition.⁵⁷ The Phulbari region was particularly attractive to people affected by land degradation and landlessness. Even still, the Phulbari Coal Mine project failed to acknowledge the inhabitants of the land as owners, even though this was the common understanding in Phulbari.

In addition to the land rights associated with these customary norms, there are cultural, financial and property norms attached to the terms above. The concept of *Samman*, or respect, denotes a non-quantifiable entity and cannot be compensated for in a relocation package provided by the government or a corporation.⁵⁸ Any loss of a home assumes a loss of *Samman*, which may be more valuable than any physical property. In a study of surrounding areas of the Phulbari Coal Mine construction zone, Sadid Nuremowla conducted first-hand interviews with Phulbari community members that were set to be displaced and relocated, due to the commercial development. An interview with a shopkeeper on the relationship between *Samaj* (*Samman*) and property said “say they will give us a new house [...] but how will they give us our *Samaj* that we

⁵³ Nuremowla (n 6) 5.

⁵⁴ Nuremowla (n 6); Shiree (n 51); MA Jabbar, ‘Land Reform in Bangladeshi’ <www.researchgate.net/publication/264442160_LAND_REFORM_IN_BANGLADISH>; Food and Agriculture Organization of the United Nations, ‘National Legal Framework | Gender and Land Rights Database’ <www.fao.org/gender-landrights-database/country-profiles/countries-list/national-legal-framework/en/?country_iso3=BGD> accessed 4 June 2021; Bangladesh Housing Land and Property (HLP) Rights Initiative (n 50) 17.

⁵⁵ Bangladesh Housing Land and Property (HLP) Rights Initiative (n 50) 15.

⁵⁶ The International Federation of Red Cross and Red Crescent Societies (n 49) 15–18; Nuremowla (n 6); Registration Act 1908 (Act No. XVI of 1908); Land Reforms Ordinance 1984 (Ordinance No. X of 1984).; Shiree (n 51). Again, customary land is recognised in the Chittagong Hills Tract, however the Phulbari region may or may not contain any land formally recognised by the Bangladesh government, as customary. Also, sources differ as to the terminology of customary land as some refer to it as a 99-year lease, while others refer to it as permanent title.

⁵⁷ Shiree (n 51).

⁵⁸ Nuremowla (n 6).

have built here?”⁵⁹ *Samman* is not only a sense of pride for individuals and families. It also provides a level of trustworthiness that allows for additional credit and moneylending. Nuremowla’s research found that the financial success of a village relies on the *Samman*: the physical, emotional, and cultural relationships between neighbours, associates, and friends. The coal mine protesters were not only fighting against their relocation because of their land, but because of the social, economic, and political ramifications of starting a new life, and a new community.⁶⁰ For the purposes of this thesis, these customary norms are considered instruments. While the process of interviewing affected community members would traditionally fall under consultation (below), it is necessary to understand these norms as soft law, and from the perspective of the local communities, on par with any hard law instruments. As Nuremowla discovered through her interviews, the communities in Phulbari function on a combination of legal instruments (as recognised by the state and international communities) and customary instruments (in some cases only recognised by indigenous communities).⁶¹

Bangladesh has ratified a number of international human rights treaties including the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Rights of the Child.⁶² However, even after ratification, the United Nations has repeatedly criticised Bangladesh’s human rights record through Universal Periodic Reviews and reports by Special Rapporteurs.⁶³ While the majority of the claims

⁵⁹ *ibid.*

⁶⁰ Dinajpur (n 10); ‘Rights of Indigenous Peoples in Bangladesh’ *The Daily Star* (9 August 2016); ‘Fight for Indigenous Rights in Bangladesh Continues’ (n 49); Nuremowla (n 6).

⁶¹ Nuremowla (n 6).

⁶² Human Rights Forum (n 34); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention on the Rights of the Child (adopted 20 November 1989 entry in to force 2 September 1990) UNGA Res 44/25 (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 entry in to force 3 September 1981) UNGA Res 34/180 (CEDAW); *Hussain Muhammad Ershad v Bangladesh and others II ADC (2005) 271 16 August 2000*; *BNWLA v Government of Bangladesh and others, 2001, 40 CLC (HCD)*; *Bangladesh and another v Hasina and another, 2008, 37 CLC (AD)*; *Tayazuddin and another v Bangladesh, Criminal appeal, 21 BLD (HCD) 2001*. It should be noted that Bangladesh ratified the ICESCR with declarations on Articles 1, 2, 3, 7, 8, 10, and 13. Bangladesh ratified the ICCPR with declarations on Articles 10,11, and 14, and a reservation on Article 14. Additionally, Bangladesh is a dualist state as noted by the court cases cited in this footnote.

⁶³ Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh’ (n 35); Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum’ (Human Rights Council 2009) A/HRC/11/18/Add.1; Bangladesh Dalit and Excluded Rights Movement (BDERM), Network of Non-mainstreamed and Marginalized Communities (NNMC), and International Dalit Solidarity Network (IDSN), Nagorik Uddyog (n 3); Jean Ziegler, ‘The Right to Food Report of the Special Rapporteur, Jean Ziegler

against Bangladesh have been focused on the country's failure to respect, protect, and fulfill economic, social, and cultural rights, nearly all these reports (at least in part) address rights violations against indigenous communities.⁶⁴ Bangladesh's response to the 2009 Universal Periodic Review included self-accolades of their accomplishments in respecting, protecting, and fulfilling civil and political rights, with goals to progressively realise certain economic, social, and cultural rights.⁶⁵ Bangladesh used a community development framing in these progressive realisation plans. When discussing poverty alleviation, they used terms such as "poverty-reduction activities" and "social safety nets".⁶⁶ When talking about agriculture and food, Bangladesh highlighted a food price reduction strategy to "ensure greater access to agricultural inputs that would improve farmers' productivity and income."⁶⁷ In the same Universal Periodic Review, Bangladesh commented on the role of civil society and NGOs, claiming that they are fundamental to the national "socio-economic development and the promotion and protection of human rights".⁶⁸ Accordingly, "Government-NGO partnership was a hallmark of Bangladesh's development

Addendum Mission to Bangladesh*' (United Nations Committee on Economic, Social and Cultural Rights 2003) E/CN.4/2004/10/Add.1; Miloon Kothari, 'Economic, Social and Cultural Rights. Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari Addendum' (Economic and Social Council 2005) E/CN.4/2005/48/Add.1; Raquel Rolnik, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context' (Human Rights Council 2012) A/HRC/22/46; Rodolfo Stavenhagen, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (Human Rights Council, UN General Assembly 2007) A/HRC/4/32/Add.3; Rodolfo Stavenhagen, 'Human Rights and Indigenous Issues Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen Addendum' (Economic and Social Council 2005) E/CN.4/2005/88/Add.1; Rodolfo Stavenhagen, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen' (UN General Assembly 2007) A/HRC/4/32/Add.1; Magdalena Sepúlveda Cardona and Catarina de Albuquerque, 'Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (UN General Assembly 2010) A/HRC/15/55.

⁶⁴ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh' (n 35); Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum' (n 63); Ziegler (n 63); Human Rights Council, 'Decision 11/104 Outcome of the Universal Periodic Review: Bangladesh' (Universal Periodic Review 2009); Working Group on the Universal Periodic Review (n 35); Working Group on the Universal Periodic Review, 'Brazil: Universal Periodic Review' (Office of the United Nations High Commissioner for Human Rights 2017) A/HRC/WG.6/27/BRA/2.

⁶⁵ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh' (n 35) para 6,8,9,12.

⁶⁶ *ibid* 12.

⁶⁷ *ibid* 13.

⁶⁸ *ibid* 22.

scene.”⁶⁹ From a framing perspective, Bangladesh’s comments on their 2009 Universal Periodic Review used a community development framing to articulate the plan to progressively realise certain economic, social, and cultural rights.⁷⁰

Returning to the Phulbari Upazila and the Phulbari Coal Mine, the International Labour Organization’s conventions C169 and C107 became relevant as the local indigenous communities began to work at the coal mine and were relocated as a result of the commercial development project.⁷¹ Bangladesh is not party to C169, The International Labour Organization’s Indigenous and Tribal Peoples Convention 1989, (the most recent version of the convention).⁷² However, Bangladesh has ratified the C107, The International Labour Organization’s Indigenous and Tribal Peoples Convention 1957 and it is still in force today.⁷³ This rights-based treaty defines the indigenous populations as being “on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs.”⁷⁴ From a social and economic rights perspective, the agreement further clarifies that the population must “live more in conformity with the social, economic and cultural institutions of that time [time of conquest or colonisation] than with the institutions of the nation to which they belong.”⁷⁵ Articles 6 and 7 specifically address indigenous rights and community development projects:

6. The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic

⁶⁹ *ibid*; also supported by Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum’ (n 61).

⁷⁰ Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh’ (n 35); Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum’ (n 63); Human Rights Council, ‘Decision 11/104 Outcome of the Universal Periodic Review: Bangladesh’ (n 64).

⁷¹ ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107); ‘ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)’.

⁷² International Labour Organization, ‘Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ratifications of ILO Conventions: Ratifications by Convention’ <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 4 June 2021.

⁷³ International Labour Organization, ‘Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) Ratifications of ILO Conventions: Ratifications by Convention’ <www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252> accessed 4 June 2021.

⁷⁴ ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) Article 1(1).

⁷⁵ *ibid*.

development of the areas in question shall also be so designed as to promote such improvement.⁷⁶

7.

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.
2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.
3. The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.⁷⁷

The land use provisions cover respect (Article 11), traditional ownership (Article 13(2)), transmission of land (Article 13(1)), natural resources (Article 14), and state sponsored land development (Article 14(b)).⁷⁸ Article 12 protects against forced displacement.⁷⁹ As articulated in Article 12(2), when relocation becomes necessary as an “exceptional measure”, it may take place but without the “free consent” of the peoples.⁸⁰ However, in cases where consent cannot be obtained, “they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.”⁸¹ When displacement occurs and return is not possible, the peoples should be supplied with “alternative employment... and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees. Persons thus removed shall be fully compensated for any resulting loss or injury.”⁸² Regardless of the fact that Bangladesh is not

⁷⁶ *ibid* Article 6.

⁷⁷ *ibid* Article 7.

⁷⁸ *ibid* Articles 11,13,14.

⁷⁹ *ibid* Article 12.

⁸⁰ *ibid* Article 12(2).

⁸¹ *ibid*.

⁸² *ibid* Article 12(2,3).

a party to the UNDRIP⁸³ or C169,⁸⁴ C107 is the most comprehensive, legally binding set of land and property protections for the indigenous communities in the Phulbari Upazila and therefore, it ought to have governed the labour practices for the Phulbari Coal Mine.

Instruments in the commercial context of the Phulbari Coal mine are a mix of hard and soft, legal and non-legal, national and international. They provide a context for each stakeholder's framing of the project. There is a clear division between the stakeholder approaches to land rights based on differing local, customary interpretations of ownership. The indigenous communities recognise their own cultural practices above the corporate or governmental stakeholders' approaches to ownership. Additionally, the nonratification of certain international instruments did not inhibit the international outcry (consultation section, below) after the violations of the rights to land, and life. Thus far, the noted instruments set up the potential for conflicting stakeholder relations and conflicting approaches to human rights. When stakeholders are building their human rights-based approaches from different underlying factors (in this instance, different core instruments) this potential for conflicting stakeholder relations is exacerbated (more on this in Chapter VI). It ought to be noted that certain instruments and their institutions (including the International Labour Organization) use a rights-based framing in order to ensure community development. While this thesis does not consider the International Labour Organization to be a relevant stakeholder in the context of this specific commercial development project, the ILO's framings of rights and development become more relevant as other stakeholders look to international institutions for guidance on human rights and development standards (below). Another set of soft law instruments, and one that will help to clarify the corporate framing of the Phulbari Coal Mine, is the impact assessment report.

Impact Assessment Reports: Main Report, The Mine, Social and Environmental

The four volumes of the impact assessment report, The Main Report, The Mine, The Social Impacts, and The Environmental Impacts (totaling over 10,000 pages) create a narrative for stakeholder relations between the corporate partners, indigenous communities, local and national

⁸³ 'United Nations Declaration on the Rights of Indigenous Peoples'
<www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

⁸⁴ 'ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (n 71).

governments, and the international community.⁸⁵ Together, the four volumes constitute a roadmap for connecting the specific community development processes in Bangladesh to specific human rights violations at the Phulbari Coal Mine. From the reports, we can identify the framing, instruments, and consultation measures used to determine the efficacy of the project, and the approaches to human rights and development (community and commercial) from the viewpoints of specific stakeholders. These include potential environmental and social impacts, namely commercial development practices benefitting from, and in spite of, the indigenous communities, and the processes for, and impact of, resettling said communities. Sections of the reports address a great number of other concerns that are unrelated to this analysis. These reports attracted a range of critical responses by international nongovernmental organisations which are also considered below.⁸⁶

The report (all four volumes) was compiled by Snowy Mountain Engineering Corporation International on behalf of Asia Energy Corporation (Bangladesh) Pty Ltd.⁸⁷ Snowy Mountain Engineering Corporation is a consulting firm that was hired to investigate, research, and compile the potential social and environmental impacts of the Phulbari Coal Mine.⁸⁸ The process in Phulbari was undertaken from a regional office in Dhaka, and Snowy Mountain Engineering Corporation brought in senior technical experts from around the world to complete the reports on behalf of Asia Energy Corporation. Snowy Mountain Engineering Corporation follows best practices for the Equator Principles in providing consulting services and has consulted on projects for the World Development Bank and the Asian Development Bank.⁸⁹ The Equator Principles (Chapter I) are a finance framework, implemented through the entire lifespan of a commercial development project, to minimise the amount of social and environmental impact. They focus on human rights, climate

⁸⁵ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (n 33); Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 2) The Mine' (n 33); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 3) Environment' (n 33); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33).

⁸⁶ International Accountability Project (n 7); International Accountability Project (n 6); International Accountability Project and Hoshour (n 6).

⁸⁷ SMEC, 'SMEC | Professional Engineering and Development Consultants' <www.smec.com/en_au> accessed 18 October 2020.

⁸⁸ *ibid*; 'Investegate | Asia Energy PLC Announcements | Asia Energy PLC: Economic Parameters' <www.investegate.co.uk/article.aspx?id=200409301234065328D> accessed 17 October 2020.

⁸⁹ 'The Equator Principles – Environmental and Social Risk Management for Projects' <<https://equator-principles.com/>> accessed 18 October 2020; 'Investegate | Asia Energy PLC Announcements | Asia Energy PLC: Economic Parameters' (n 88).

change, and development, with an eye toward effects on indigenous and local communities.⁹⁰ In the cases where social and environmental precautions cannot be observed, the Equator Principles lay out plans for maximum mitigation and reduction of impact.⁹¹

Equator Principle 5, Stakeholder Engagement, requires free prior and informed consent from the affected communities by the corporations.⁹² This clearly echoes, but goes beyond, Bangladesh's legal obligations as agreed to in C107.⁹³ According to the Equator Principles, the commercial developers at the Phulbari Coal Mine project ought to add additional requirements to the UNDRIP articulation of free prior and informed consent due to the fact that (1) the land is under customary use by indigenous communities, (2) the project requires the relocation of indigenous peoples from land under customary use, and (3) the project will impact cultural heritage, essential to indigenous identity.⁹⁴ This additional level of due diligence requires an independent consultant to evaluate the consultation processes and compare them to laws of the host country and International Finance Corporation Performance Standard 7.⁹⁵ The four volumes of impact assessment reports used these principles, standards, consultation firms, and independent experts to develop the assessment of the potential adverse effects by the Phulbari Coal Mine on the indigenous communities and surrounding lands.

The Main Report (Volume 1 of 4) introduces the project, lays out the laws and policies, methodology, potential project alternatives, management plan, project justification, risks, and recommendations.⁹⁶ The Main Report's sections on Consultation (Chapter 4), the Existing Socio-Economic Environment (Chapter 8), and the Socio-Economic Impact (Chapter 10), are the most relevant to this case study.⁹⁷ The Consultation section outlines the stakeholders to be consulted

⁹⁰ 'The Equator Principles – Environmental and Social Risk Management for Projects' (n 89).

⁹¹ *ibid.*

⁹² Equator Principles, 'The Equator Principles' (2020) <<https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>>.

⁹³ ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107); International Labour Organization (n 73). This also echoes the UNDRIP free prior and informed consent requirement. To note, Bangladesh is not party to the UNDRIP.

⁹⁴ Equator Principles (n 92).

⁹⁵ *ibid.*; International Finance Corporation, 'Performance Standard 7: Indigenous Peoples' (1 January 2012). The IFC Performance Standards are another set of protections for communities during development projects including environmental and social, labour, pollution prevention, health safety and security, land acquisition and resettlement, biodiversity, indigeneity, and cultural heritage.

⁹⁶ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (n 33) Sections 1, 2, 3, 5, 6, 7, 9, 11-18.

⁹⁷ *ibid* Sections 4,8,10.

(some of whom had already been consulted by the time of the impact assessment report's completion). The report includes recorded meetings with unions, village leaders, focus groups with predetermined breakout topics, representatives from different indigenous groups including Munda, Sental, and Mahili households, and religious groups. These discussions led to a narrowing of the issues to be addressed, including land acquisition and compensation, resettlement, livelihood restoration, employment, religious and archeological sites, community relations, indigenous protections, environmental protections, social and economic benefits, and community attitude. Specifically, on the topics of land acquisition, compensation and resettlement, the report lists the solutions proposed by these stakeholder engagements. All of the suggestions listed are general in nature and, at this point in the report, fail to recognise the diverse needs of specific local communities. In addition to advance notice, advance planning, and maintaining closeness (both physical and social), one of the most prevalent suggestions from those consulted, was for the relocation process to be overseen by the Phulbari Coal Mine team, as opposed to the Bangladesh Government. This section of the report fails to mention dissenting opinions within the consultation meetings and presents a spirit of collaboration in moving forward with the Phulbari Coal Mine.⁹⁸ This notwithstanding the fact that local and national protests were continuing as the report was being researched and written.⁹⁹

The Main Report (Chapter 10) contains more detail about the socioeconomic impacts of the Phulbari Coal Mine. Each section of Chapter 10 is divided into an issue, the current situation, potential for impact, mitigation and management of impact, and potential residual impacts. The sections of most interest to this case study (and analysed below) focus on Land Acquisition (10.2), Population Displacement (10.3), Cultural Heritage (10.8), and Vulnerable Groups, specifically Indigenous Groups and Land Uses Without Formal Rights (10.9.2 and 10.9.3).¹⁰⁰ While the potential for impact and the resultant mitigation measures do suggest due diligence on the part of Asia Energy Corporation, the residual impact sections for each of these categories do point to human rights violations and negligence by moving forward with the Phulbari Coal Mine. Residual impacts for land acquisition were high. There was a lack of available cultivatable land in the area and the report notes that some households may fail to re-establish livelihoods. This would cause

⁹⁸ *ibid* Section 4.

⁹⁹ Dhaka Tribune (n 1).

¹⁰⁰ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (n 33) Sections 10.2, 10.3, 10.8, 10.9.2, 10.9.3.

harm to income generation and lead to a permanent loss of cultivatable land. While population displacement is addressed through relocation protocols, the impacts in this section are also categorised as high. The report recognises that changes in population density due to urbanisation and the relocation of individual villages into larger relocation sites could potentially harm cultural bonds and practices. There are no expected residual impacts to cultural heritage. Vulnerable groups, namely the indigenous communities, and those without formal land rights were reported as seeing very high potential for residual impacts. “The negative residual impacts that may result for these vulnerable groups are in livelihood and splitting of communities. The likelihood of these residual impacts being experienced amongst this group is likely.”¹⁰¹ The report goes on to say that this could prove to be severe for these communities, but does not present additional solutions.¹⁰² Across all of the relevant sections of the Main Report, there is no single reference to human rights. All of the mitigation language is framed by community development.

The Mine Report (Volume 2 of 4) is not wholly relevant to this case study, and focuses on the geology, geotechnical infrastructure, design, transport and shipping processes.¹⁰³ The Environment Report (Volume 3 of 4) is relevant to this case study as it focuses on air and water quality, in addition to biodiversity, agriculture, and irrigation.¹⁰⁴ Cumulative impacts on the air quality as a result of the Phulbari Coal Mine (Section 1) would lead to higher-than-normal levels of emissions. These come from other surrounding mines (including Barapukuria), the potential for additional coal mine projects stemming from Phulbari Coal Mine, the influx of coal to the local markets, expanding the use of kilns, construction of a new section of the township, and long-term economic development in the region due to the Phulbari Coal Mine. In addition to the Phulbari Coal Mine’s monitoring system for airborne pollution, the report mentions the Bangladesh Government’s role in curbing emissions through new policy.¹⁰⁵ Impacts on the water supplies (Section 9) include surface water, groundwater, and sediment load. While Asia Energy Corporation put forth dozens of mechanisms to monitor water contamination, unlike the previous sections, it did not outline additional potential impacts. The water quality management measures come across as comprehensive, however, some of them still do rely on the Bangladesh

¹⁰¹ *ibid* Section 10, 100.

¹⁰² *ibid* Section 10.

¹⁰³ Asia Energy Corporation (Bangladesh) Pty Ltd, ‘Environmental and Social Impact Assessment Report (Volume 2) The Mine’ (n 33).

¹⁰⁴ SMEC Australia Pty Ltd, ‘Environmental and Social Impact Assessment Report (Volume 3) Environment’ (n 33).

¹⁰⁵ *ibid* Section 1.

Government to regulate the levels. Again, the language in Sections 1 and 9 of the Environment Report use a community development framing and do not mention the potential impacts of air or water quality on human rights.¹⁰⁶

The Social Report (Volume 4 of 4), encompasses the most relevant sections to this case study: (1) Public Consultation and Disclosure Plan, (2) Resettlement Report, (3) Indigenous People's Development Plan, (7) Health Impact Assessment, (8a) Economic Benefits Report, and (8b) Impact of Mining Activities on Agriculture.¹⁰⁷ These sections outline the plans for community development practices by the Asia Energy Corporation to help mitigate potential social and economic issues (that map onto human rights), and, for the first time, the report refers to human rights a handful of times.¹⁰⁸

The Public Consultation and Disclosure Plan (Section 1) makes references to human rights five times: twice in reference to rights and democracy in the Bangladesh Constitution, once in reference to the Universal Declaration of Human Rights, once in reference to multinational corporations' intellectual property, and once in reference to the Voluntary Principles on Rights and Security.¹⁰⁹ It also lists the international and domestic guidelines and procedures by which the assessment is conducted, including the Universal Declaration of Human Rights, The Convention on the Elimination of All Forms of Discrimination Against Women, C169 The Indigenous and Tribal Peoples Convention 1989, the International Finance Corporation, the Equator Principles, inter alia. The report makes it clear that even though Bangladesh is not party to every one of these instruments, since Global Coal Management Resources and the majority of the financing is coming from the UK, there are additional guidelines and procedures to take into account, above and beyond domestic law in Bangladesh. The Consultation Programme is expansive and touches every stakeholder mentioned in this case study. According to the report, Asia Energy Corporation's goal was to establish a "sustainable relationship with communities. Affected communities are assets, not liabilities."¹¹⁰ The Programme makes it clear that all people ought to be fully informed of their

¹⁰⁶ *ibid* Sections 1, 9.

¹⁰⁷ SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33) Sections 1, 2, 3, 7, 8(a), 8(b).

¹⁰⁸ *ibid* Section 1 pp.13,14,19,20.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid* Section 4.

rights through access to information, with the understanding that different strata of the communities have different levels of access.¹¹¹

Affected communities are not a homogenous group, but are made up of individuals and interest groups who define the terms of their own existence, and who primarily respond to planning as such. The consultation process is therefore informed by (and designed around) a good understanding of local social dynamics. The success of the consultation effort thus depends on securing the interactive participation of all stakeholders and representatives.¹¹²

This was completed through an information centre, distribution of papers, brochures, a documentary film, news updates, in-person meetings with stakeholders at every level (with indigenous participation), and site-specific surveys. The key issues raised by these consultation sessions, and the mitigation solutions proposed by stakeholders, are the same as those included in the Main Report (above).¹¹³ In this instance, it seems as if human rights are mentioned to show an awareness of their existence and importance, not to ensure the relevant rights are protected. Even with the specific references to international rights-based instruments, every mitigation solution focused on social or economic development-based action and therefore, used a community development framing.

A survey conducted to measure the attitudes toward the project presented mixed results. Nearly 80% of participants, and those that would be most directly affected by the Phulbari Coal Mine, believed that the project was necessary to the development of the country. Albeit still a majority, only 74% said they would support the project as long as fair compensation was paid for affected assets. The report fails to disclose the remainder of the questions in the Resettlement Survey. It does acknowledge what was then growing discontent surrounding the project. The discontented stakeholders include local Phulbari interest groups and protesters from the local

¹¹¹ *ibid*; Alliance News (n 2); ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 entry in to force 3 September 1981) UNGA Res 34/180 (CEDAW) (n 62); International Finance Corporation (n 95); Equator Principles (n 92).

¹¹² SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33).

¹¹³ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (n 33); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33).

communities. They expressed their opposition through demonstrations, pamphlet distribution, public meetings, a human chain, and refusal to respond to surveys. The report does claim that “Most of the potentially affected people have, however, continued to cooperate with the project” and that government officials continued to support the Phulbari Coal Mine.¹¹⁴

The Resettlement Report (Section 2) is a 400-page, comprehensive study on the current land uses of those that may be displaced and plans for mitigating stress on the communities once relocated.¹¹⁵ There is no specific mention of human rights or constitutional rights. There are selected references to land rights, but only in explanation of customary land rights (described above).¹¹⁶ The report acknowledges the potential for resettlement problems and welcomes additional consultation measures to ensure a smooth transition.¹¹⁷

The Indigenous People’s Development Plan (Section 3) uses the same international conventions, declarations, guidelines, and procedures as in Section 1.¹¹⁸ Utilising a mix of human rights and community development framing, this section takes an anthropological approach to the indigenous communities of the Phulbari region, giving a detailed analysis of their social and cultural bonds, livelihoods, and socioeconomic characteristics, offering ways to maintain them after resettlement. These mitigation plans, which are in essence community development practices, include HIV/AIDS and other disease reduction, gender equality and participation, household rehabilitation including temporary basic income, a social investment fund for agricultural development, starting new businesses and expanding current ones, and funding schools and cultural events.¹¹⁹ There are extensive strategies for continued consultation with local communities through direct participation, NGOs, and the formation of new steering and liaison committees.¹²⁰ The grievance procedures are split into national and international and provided for a range of systems available to indigenous communities before taking a legal approach.¹²¹ A series of NGOs and the aforementioned liaison committees were in place to address grievances on behalf of the resettled communities, but if that proved insufficient, the case could move to the Bangladeshi

¹¹⁴ SMEC Australia Pty Ltd, ‘Environmental and Social Impact Assessment Report (Volume 4) Social’ (n 33).

¹¹⁵ *ibid* Section 2.

¹¹⁶ *ibid* Section 2 pp. 26,32,33,41,105,129,145,146,147.

¹¹⁷ *ibid* Section 2.

¹¹⁸ *ibid* Section 3.

¹¹⁹ SMEC Australia Pty Ltd, ‘Indigenous People’s Development Plan for Asia Energy’s Phulbari Coal Project Area’ (Asia Energy Corporation (Bangladesh) Pty Ltd 2005) Section 5 pp. 60-66.

¹²⁰ *ibid* Section 5 p. 66.

¹²¹ *ibid* Section 7 pp.71-75.

courts. On the international level, the International Finance Corporation provided a system of redress for complaints by affected communities.¹²² Finally, the report noted that there would be continuous impact monitoring throughout the life of the Phulbari Coal Mine, of both the communities surrounding the project and the resettled communities.¹²³ The impact assessment report clearly outlined the intention to implement (and the partial completion of) a robust consultation programme. While it is true that the report is an instrument, the consultation measures, as put forth by the corporate stakeholder in this case, are an element of the instrument.

The extensive impact assessment reports continuously mention the importance of accessibility while in their entirety, the reports add up to over 10,000 pages. It is evident that extensive research was completed in order to compile the reports and make recommendations. The framing of these instruments changed based on the section. When reporting on standards and mechanisms, the reports tended to gravitate toward human rights language and rely on a rights-based framing. While suggesting solutions to potential stakeholder problems, the reports used a community development framing.¹²⁴ This duality mirrored Bangladesh's approach to their 2009 Universal Periodic Review: a community development-based framing to articulate solutions that may help them to fulfill human rights obligations.¹²⁵ However, it should be noted that no matter the scope of Asia Energy Corporation's mitigation practices, and regardless of the framing and consultation measures, these reports did not provide enough confidence to quell the local and national protests against the Phulbari Coal Mine.

The Phulbari Coal Mine's thematic volumes of the impact assessment report are a key instrument in providing information about stakeholder approaches. Both actions and dispositions can be inferred from these volumes. By conducting interviews and surveys of indigenous and local communities, the commercial developer attempted to gain an understanding of the community

¹²² *ibid* Appendix 1 p. 89.

¹²³ SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33) Section 3. Sections 7, 8(a) and 8(b) reference the same consultative practices and the same international and national standards as the sections already included in the analysis.

¹²⁴ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (n 33); Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 2) The Mine' (n 33); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 3) Environment' (n 33); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (n 33).

¹²⁵ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh' (n 35); Human Rights Council, 'Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum' (n 63).

approaches to the development project. However, it ought to be noted that the impact assessment report, and the data gathered therein, is the most comprehensive published material that aims to convey local opinions on the commercial development project. As the report was published by Snowy Mountain Engineering Corporation International on behalf of Asia Energy Corporation (Bangladesh) Pty Ltd., there is strong potential for bias. Assuming that the impact assessment report presented a somewhat accurate representation of the situation, it seems clear that there is division among the local community members as to the viability of the project. Indigenous stakeholders, unlike the corporate stakeholder, cannot be categorised as a single entity.

It should also be recognised that the research undertaken by Snowy Mountain Engineering Corporation failed to go far enough as to recognise the indigenous stakeholders' responses to the resettlement plan, a core component of the larger community development plan. As the cultural effects of relocation are highly relevant, this seems to present an incomplete picture of indigenous reactions. With a full understanding of the shortcomings of the report, the comprehensive nature of the research and publication presents a clear intention to engage with a range of stakeholders. Yet, the report was produced by a third party, not the commercial developer itself. The following sections make clear that while the impact assessment report was robust, it failed to bind Global Coal Management Resources to the impact assessment findings in terms of community development and human rights protections. The introduction of a third-party consultant in order to complete the impact assessment report presented an issue of divergent stakeholder approaches to both rights and development (community and commercial), even considering that the consulting stakeholder (Snowy Mountain Engineering Corporation) is funded by the primary stakeholder (Asia Energy Corporation). This type of occurrence may not be uncommon, namely a stakeholder producing materials that may foster an appearance of a certain disposition. The disposition toward a mix of community development and human rights framings, as in the case with Asia Energy Corporation, is seemingly divergent from the actions that follow (below). It is possible that Asia Energy Corporation's disposition is different from that in their published impact assessment report, specifically a prioritisation of commercial development at the expense of both human rights and community development.

The goal of the impact assessment report, as an instrument, was to determine the potential effects of the commercial development project on the various stakeholders. In some ways, this report succeeded as it provided new information about indigenous reactions to the project.

However, the information required for the corporate stakeholder to make informed decisions about how to move forward with compatible stakeholder relations, was incomplete. Additionally, it provided evidence (in combination with the events described in the following section) that the corporate stakeholders are also comprised of multiple entities (consultants, financial backers, and the primary corporation) with differing stakeholder approaches, much the same as the indigenous communities.

Alternative Consultation: Domestic and International Protests and Responses

The intentions to implement consultation measures were described in the impact assessment report. This included interviews, meetings, explaining the commercial development project, flyers, and a documentary, as well as mechanisms for local feedback and grievances. This case study contains some alternative consultation and feedback mechanisms provided by, and to, a range of stakeholders.

Protests against the Phulbari Coal Mine began locally but soon spread across the country and the world. On 30 August 2006, Bangladesh's Rapid Action Battalion fired into a crowd of peaceful protesters, killing 3 people, and injuring over 200, violating both international and domestic human rights laws, including the rights to life, free speech, and assembly.¹²⁶ This was the event that brought international media attention to the Phulbari Coal Mine and even still, some countries continued to support their vested interests in the Phulbari Coal Mine's success.

This international outcry against Global Coal Management Resources and the Phulbari Coal Mine caused the project to be halted. At the time of completing this thesis, the development project is still on pause.¹²⁷ Bangladesh's responses to the public outcry included a reversal of their position on the Phulbari Coal Mine. Initially this reversal came in the form of a notice that halted production. As time passed, the Bangladesh Government became more vocal about the project:

Bangladesh's State Minister for Power, Energy and Mineral Resources, Nasrul Hamid, on Sunday said that the government was not interested to extract coal from the deposits in

¹²⁶ Dhaka Tribune (n 1); Phulbari Resistance (n 27); TOOMEGANE (n 7); Constitution of the People's Republic of Bangladesh (n 35); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 62).

¹²⁷ 'Deal with Asia Energy on Phulbari Coalmine Invalid' (n 1).

the north Bengal region using open-pit method. “We have decided not to extract coal right now... We must consider high density of population and the agro-based economy of the mining area,” he said while addressing as the chief guest a seminar on ‘Energy Challenges to Vision 2030’.¹²⁸

This announcement came just shy of the nine-year anniversary of the 2006 protests as sustainable development started to become a national priority.¹²⁹

Global Coal Management Resources is headquartered in the UK and received considerable backlash for the circumstances surrounding the extrajudicial killing of peaceful protesters.¹³⁰ Although Global Coal Management Resources was not involved in the violence itself, the protesters were asking for changes to the Phulbari Coal Mine project. The International Accountability Project and the World Development Movement lodged a formal complaint with the UK National Contact Point against Global Coal Management Resources for their practices according to the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises.¹³¹ Using a human rights framing, the complaint claimed that

The open cast mine planned by Global Coal Management will necessarily adversely affect human rights by displacing large numbers of people, including indigenous communities, destroying the basis of their subsistence and livelihoods, and having widespread, severe and lasting impacts on the local environment, food security and water supply for the population in a large area surrounding the mine.¹³²

¹²⁸ Yes to Life no to Mining (n 2).

¹²⁹ ‘Bangladesh: Sustainable Development Knowledge Platform’
<<https://sustainabledevelopment.un.org/memberstates/bangladesh>> accessed 7 June 2020.

¹³⁰ ‘Protests at GCM Resources AGM over Bangladesh Coal Mine’ (*Global Justice Now*, 4 December 2013)
<www.globaljustice.org.uk/news/protests-at-gcm-resources-agm-over-bangladesh-coal-mine/> accessed 5 June 2021.

¹³¹ International Accountability Project and The World Development Movement (n 9); ‘UK NCP Complaint Handling Process’ (*GOV.UK*) <www.gov.uk/guidance/uk-ncp-complaint-handling-process> accessed 22 August 2021. The UK National Contact Point receives, assesses, and mediates complaints on the OECD guidelines for multinational enterprises.

¹³² International Accountability Project and The World Development Movement (n 9) 3.

The result of the UK National Contact Point's investigation revealed that human rights were in fact violated, and that there was potential for further rights violations over the life of the mining project.¹³³ These violations were outlined with evidence in Sections 21 and 22 of the UK National Contact Point's investigation and included injury and death as a result of protests, and potential adverse community impacts.¹³⁴ However, the report claimed that there is need for further examination as it was not clear that these additional impacts were unavoidable.¹³⁵ Mediation was recommended between the complainants and Global Coal Management Resources.¹³⁶ Over 6,000 km from the site of the Phulbari Coal Mine, secondary stakeholders were able to influence the approaches taken by primary stakeholders on any future actions surrounding the development project. Global protesters had a strong enough effect to trigger formal review processes. The UK's system of accountability for domestically headquartered multinational corporations helped to foster a human rights framing and resulting disposition for Global Coal Management Resources. Even considering a ruling that recognised the lack of clarity on how unavoidable additional impacts may be, the ruling makes certain that moving forward, human rights would be at the core of any impact assessment.

While certain alternative consultation measures activated accountability mechanisms for Global Coal Management Resources, other forms of consultation revealed different stakeholder relations and approaches. In the US, an unclassified Wikileaks cable revealed that the US Ambassador to Bangladesh, James Moriarty, was quietly lobbying Bangladesh's Energy Adviser, Tawfiq Elahi Chowdhury, in 2009 for the Phulbari Coal Mine, as US business interests would benefit from the commercial development.¹³⁷

The Adviser (to the Bangladeshi PM) remarked that the proposed coal mine in Phulbari was politically sensitive, in light of the impoverished, historically oppressed tribal community residing on the land. (Comment: Just as important, the Awami League vigorously opposed the project when it was in opposition. End comment.) He said the government would seek to ensure the rights of the local community and build support for

¹³³ *ibid* Section 21.

¹³⁴ *ibid* Sections 21,22.

¹³⁵ *ibid* Section 22.

¹³⁶ *ibid* Section 11.

¹³⁷ Karim (n 2); Ambassador James F. Moriarty (n 28).

the project through the parliamentary process. (Note: Asia Energy, the company behind the Phulbari project, has sixty percent U.S. investment... The Ambassador promised that the USG would look for ways to help the GOB and added that open pit mining seemed the best way forward, if the rehabilitation of lands could be done properly.¹³⁸

Moriarty's comments are consistent across the cable, advocating for a range of energy development projects, and failing to recognise potential human rights consequences.¹³⁹ Minister Chowdhury's response included a request for recommendation of specific individuals and companies to consult with the Bangladesh Government, and outright admits Bangladesh's lack of expertise on these energy issues.¹⁴⁰ While this type of international encouragement surrounding a potentially lucrative project may not be revelatory, it is important to note that Bangladesh's responses (in Section 5 of the cable), even in seemingly private conversations, made clear the potential oppression towards the indigenous communities, in effect showing hesitancy toward the Phulbari Coal Mine as a result of the human rights consequences.¹⁴¹ With such a financial upside for the US-based companies (Section 7 of the cable makes clear that Asia Energy Corporation is 60% funded by US companies), Ambassador Moriarty approached the conversation with a purely development (community and commercial) framing while the Adviser used a rights framing in his response.¹⁴² The US entered the web of stakeholders without regard for (or even a complete understanding of) the community development and human rights implications of the project. This approach was not mirrored by Tawfiq Elahi Chowdhury, indicating Bangladesh's change of both disposition and action as compared to their earlier actions, namely a mix between a sustainable development framing and a human rights framing with a specific focus on indigenous

¹³⁸ Ambassador James F. Moriarty (n 28) Section 5,7. The following sustainable development comment from Section 4 proves relevant for the thesis as a whole (in particular, with reference to the sustainable nature of the following case studies): Chowdhury replied that because of global concerns about greenhouse gas emissions and air pollution, multilateral financial institutions had become reluctant to finance coal mining projects. He pointed out however, that the international community should focus on clean coal technology. He asked for technical assistance from the U.S. to determine what type of mining would work best in Bangladesh and how the environmental impact could be mitigated;

¹³⁹ Ambassador James F. Moriarty (n 28).

¹⁴⁰ *ibid* Section 8.

¹⁴¹ *ibid* Section 5.

¹⁴² *ibid* Section 7.

communities. This change was triggered by the international outcry, corporate pressure, and media attention surrounding the project.¹⁴³

At the international level, additional stakeholders weighed in on the project, specifically after the Rapid Action Battalion's extrajudicial killings and Bangladesh's human rights violations. The United Nations' comments on the Phulbari Coal Mine used a rights-based framing.¹⁴⁴ In February of 2012, Special Rapporteurs addressed the project, focusing on violations of the rights to food, water, housing, property, indigenous rights, and civil rights. Olivier De Schutter, UN Special Rapporteur on the Right to Food, published a combined statement along with other Special Rapporteurs: Catarina de Albuquerque (safe drinking water and sanitation), Raquel Rolnik (adequate housing), James Anaya (indigenous peoples), Frank La Rue (freedom of opinion and expression) Maina Kiai (freedom of peaceful assembly and of association), and Magdalena Sepúlveda Cardona (extreme poverty and human rights). This joint statement called on the Bangladesh Government to protect human rights in the face of open-pit coal mining, specifically in the Phulbari region. This statement also echoed the mixed messages from the Bangladesh Government, claiming that Prime Minister Hasina acknowledged the threats caused by coal extraction in densely populated areas, but had failed to respect, protect, and fulfill human rights obligations. The UN experts warned that "The Phulbari coal mine may entice developers. But for many Bangladeshis the wholesale environmental degradation of the Phulbari region will exacerbate food insecurity, poverty, and vulnerability to climate events for generations to come."¹⁴⁵ In other words, the UN experts recognised that the stakeholder approaches which failed to use a community development or human rights framing or disposition would cause significant development (community and commercial) setbacks.

Global Coal Management Resources responded to the UN statement the following month.¹⁴⁶ The letter affirmed that Global Coal Management Resources' operations and strategies align with the UN Global Compact and include human rights as a core value in all their projects.¹⁴⁷ They also claimed that the many volumes of the impact assessment report (discussed above) ensure human rights protections and mitigations of any potential impacts. The letter came from Global

¹⁴³ TOOMEGANE (n 7); Dhaka Tribune (n 1); Phulbari Resistance (n 27).

¹⁴⁴ De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food (n 2).

¹⁴⁵ *ibid.*

¹⁴⁶ Graham Taggart, Finance Director (n 2) 1.

¹⁴⁷ *ibid.*

Coal Management Resources' finance director and went on to accuse the UN of factual inaccuracies in the Special Rapporteurs' letter, as well as outline the comprehensive plans to protect human rights, the benefits of the project, and the plans for further community engagement.¹⁴⁸ Global Coal Management Resources continued to stand by the impact assessment work and report as sufficient to protect human rights, going so far as to use both human rights and community development framings in their response letter to the United Nations.¹⁴⁹ The letter specifically addressed Global Coal Management Resources' commitment to indigenous and cultural rights, land rights, water rights, and rights of expression and protest.¹⁵⁰ It also addressed a long-term development agenda for communities surrounding the Phulbari Coal Mine, specifically how the project could increase social and economic development through job opportunities, new infrastructure, and energy access.¹⁵¹ Using a dual framing, Global Coal Management Resources requested additional consultation measures from local communities in order to arrive at a resolution to resume construction on the Phulbari Coal Mine. Noting the recipients of the letter (UN Special Rapporteurs), Global Coal Management Resources contextualized these various commitments in human rights and community development-framed international agreements and policy by mentioning that they are a signatory to the UN Global Compact and referencing the Millennium Development Goals.¹⁵²

The international institutional outcry against the Phulbari Coal Mine was mirrored by protests across Bangladesh and around the world.¹⁵³ While formal consultation and feedback mechanisms were described by the various impact assessment reports, alternative forms of consultation such as UN Special Rapporteurs, the US Government, and the UK National Contact Point have fostered extended inaction around the commercial development project. The global attention on the project further encouraged strict compliance with all human rights obligations and corporate social responsibility measures, should the Phulbari Coal Mine move forward. Violations of civil and political rights, including the rights to life and assembly, triggered the international

¹⁴⁸ *ibid* 2–5.

¹⁴⁹ Graham Taggart, Finance Director (n 2).

¹⁵⁰ *ibid* 3–4.

¹⁵¹ *ibid* 4.

¹⁵² Graham Taggart, Finance Director (n 2).

¹⁵³ Banktrack, 'UBS Alerted over Phulbari Coal Mine' (*Banktrack*, 17 December 2007)

<www.banktrack.org/show/news/ubs_alerted_over_phulbari_coal_mine> accessed 27 October 2018; Dinajpur (n 10); Phulbari Resistance (n 27); TOOMEGANE (n 7); The Center for Media and Democracy (n 17).

outry. Resultantly, potential violations of economic, social, and cultural rights, including property, land, health, culture, inter alia became part of the global conversation surrounding Phulbari.

These alternative forms of consultation were forced on the corporate stakeholders, as a result of the government's blatant disregard for their human rights obligations. The Rapid Action Battalion's actions were the catalyst that may allow for different stakeholder approaches to both human rights and development (community and commercial), should the Phulbari Coal Mine move forward.

Conclusion: Stakeholder Relations and Human Rights

At the Phulbari Coal Mine, stakeholder relations were complex and (are still) constantly shifting. The monetary relationships between Global Coal Management Resources/Asia Energy Corporation, the Bangladesh Government, other interested countries, Snowy Mountain Engineering Corporation, and the financial institutions created a context in which most stakeholders incentivised others to continue developing, ignoring a series of human rights and community development-framed recommendations published in the impact assessment report. Regardless of the national public outcry about human rights abuses before the extrajudicial killings, the results of the Rapid Action Battalion's actions (loss of life) caused the commercial developers to pause the project. The indigenous communities were divided on the Phulbari Coal Mine, as was made clear by the corporate-published impact assessment report. Global Coal Management Resources completed years of interviews and research to determine the consultative measures that would potentially allow for the project to move forward. Based on the impact assessment report, it is clear that the indigenous communities were not consulted in full, due to the lack of diversity in the response, and the low number of responses to questions about the resettlement plan. It is also possible that the indigenous communities were intentionally not made aware of the secondary effects of the Phulbari Coal Mine on their communities, namely pollution, modifications to cultural norms based on relocation, and new land ownership policies.

This case study focuses on how stakeholder approaches to human rights and community development affected the respect, protection, and fulfillment of the rights holders in the Phulbari Upazila. In particular, the stakeholder relations illuminated issues between the corporate

dispositions and the indigenous communities' rights to land, property, and culture. The impact assessment reports and the range of other stakeholder responses to public outcry continue to push a fierce human rights agenda onto Global Coal Management Resources. This would, in theory, come from a formal commitment to their extensive consultation mechanisms, adherence to instruments from local laws to international norms, abiding by the research published by their own impact assessment report, and using a human rights framing in their correspondence and consultations with other stakeholders. On the side of the Bangladesh Government, their commitment to human rights in Phulbari became far stronger after international public outcry against the Rapid Action Battalion's extrajudicial killings. Bangladesh's shifting uses of development (community and commercial) and rights framings, depending on the time and place, may be indicative of the shifting policies, and the stakeholders that the state wished to please. The indigenous communities spoke by way of local NGOs and the Six Point Demands, using a mix of community development and rights-based framings. The local communities (including indigenous peoples) used a development framing when articulating their opposition to the Phulbari Coal Mine. Their frustrations lay in the fact that the government was bringing in millions of dollars from the revenue share and tax holiday, while the community was impoverished and unable to participate in the financial windfall.¹⁵⁴ This inequality was the spark that ignited the protests, in advance of the additional human rights violations. According to interviews with the local communities, the Bangladesh Government and Global Coal Management Resources/Asia Energy Corporation, were considered one and the same, harming their land and daily lives.¹⁵⁵ Yet, the impact assessment report claimed significant input from the local and indigenous communities. The first hand interviews failed to show that the consultative measures, laid out in the impact assessment reports, had succeeded by any metric.¹⁵⁶ This furthers the line of reasoning that the impact assessment report's consultation measures were signals (a corporate social responsibility tactic, Chapter I), not meant to be acted upon. Conversely, the impact assessment report suggested that the consultation measures were already successful and would continue to be so.

The breakdown in communication between stakeholders, and competing financial agendas led to various human rights violations. This communication breakdown occurred between the

¹⁵⁴ TOOMEGANE (n 7).

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

government and local communities, between Global Coal Management Resources/Asia Energy Corporation and the government, and Global Coal Management Resources/Asia Energy Corporation and the local communities. This type of large-scale commercial development project required a firm commitment to compatible stakeholder relations in order to respect, protect, and fulfill human rights obligations on behalf of states, and self-imposed human rights policies by corporate partners. The Phulbari Coal Mine is a complex project with a long history and many stakeholders. Even this chapter's detailed analysis may fail to capture the full scope of stakeholder relations. However, it is clear that the relations between stakeholders, at the very minimum, played a fundamental role in the ability (and failure) to respect, protect, and fulfill human rights obligations as well as foster community development, in the midst of a large-scale commercial development project. While the specific themes of communication breakdown, ill-defined communities, and opposing dispositions and actions continue on through the remainder of this thesis, the next two cases present very different examples of stakeholder relations, and their resulting approaches to development (community and commercial) and human rights.

CHAPTER IV

Lake Turkana Wind Power, Kenya

The Lake Turkana Wind Power project is a medium-scale renewable energy endeavour, contributing to Kenya's sustainable development aims while simultaneously raising questions about the stakeholder approaches to human rights obligations in Kenya. The Lake Turkana Wind Power project is the largest private investment in Kenya's history as well as its largest wind farm. It aims to produce over 20% of the country's electricity and to power one million new Kenyan homes by means of sustainable production.¹

The stakeholders' approaches in this case study have illuminated the complexities of sustainable development and human rights in the Lake Turkana region and Kenya as a whole.² At a large scale, corporate and governmental stakeholders use the framing of sustainable development to claim human rights protections for the local communities. This approach may have fallen short of international legal human rights obligations.³ The framing, instruments, and consultation measures surrounding the Lake Turkana Wind Power project seem to imply a necessary tradeoff between protecting human rights and achieving commercial development. This is exemplified by the actions taken by, and on, the indigenous communities in the Lake Turkana region (below). More specifically, in this case, land, property, and cultural rights protections come into conflict with community and commercial development practices where various stakeholders

¹ Lake Turkana Wind Power, 'Statement by Lake Turkana Wind Power Limited on Concerns Raised in the IWGIA Report Titled "Renewable Energy Projects and the Rights of Marginalized/Indigenous Communities in Kenya"' (2016); 'Lake Turkana Wind Power: Renewable Energy & Human Rights | Business & Human Rights Resource Centre' <<https://www.business-humanrights.org/en/lake-turkana-wind-power-renewable-energy-human-rights>> accessed 18 May 2019; Aldwych International, 'Lake Turkana Wind Power Project (Lake Turkana Wind Power Project): Seminar on Sustainable Energy Investments in Africa' (Copenhagen, 24 June 2014); 'Lake Turkana Wind Power Project: The Largest Wind Farm Project in Africa' (*African Development Bank*) <<https://www.afdb.org/en/projects-and-operations/selected-projects/lake-turkana-wind-power-project-the-largest-wind-farm-project-in-africa-143/>> accessed 26 March 2019; 'Lake Turkana Wind Farm Opens up Dry Marsabit - Business Daily' <<https://www.businessdailyafrica.com/news/Lake-Turkana-wind-farm-opens-up-dry-Marsabit/539546-4979078-639k7p/index.html>> accessed 19 May 2019.

² *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014))).

³ United Nations Human Rights Office of the High Commissioner, 'UN Treaty Body Database: Kenya' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN> accessed 5 June 2021; Aldwych International (n 1). The SDGs and other sustainable development instruments are non-binding on the state and corporations, and do not provide the individual legal protections outlined in the human rights treaties that Kenya has adopted.

misunderstand the local notion of community, indigenous or otherwise. This is not a simple case study. Yet, failures to respect, protect, and fulfill human rights, in multiple instances, come to rest on this often misunderstood, multidimensional notion of community.

As will become clear from the material in this chapter, claims that the Lake Turkana Wind Power project violated land and cultural rights are most clearly articulated in the testimonies of indigenous communities that live and work on the land where the wind turbines were constructed. A selection of these communities claimed to have been prevented from accessing their land without sufficient free prior and informed consent in violation of both property and indigenous cultural rights.⁴ These claims exist in a larger context of consistent violations (of economic, social, and cultural as well as civil and political rights) in the Lake Turkana region.⁵ Of primary importance to this case is the following question: Of whom was free prior and informed consent required in order to construct the wind farm, and was this consent in fact received?

In this case study, the instruments helped to determine the community development framing as well as the consultation processes. Stemming from free prior and informed consent, the SDGs, the impact assessment report and the case of *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others*, this case study presents a set of stakeholder relations that incorporate sustainable development in both the community and commercial forms of development.⁶ These relations resulted in a complex and nuanced project that provides a significant contribution to the taxonomy of approaches (Chapter VI).

⁴ Business & Human Rights Resource Centre, 'Kenya: Report by Danwatch Reveals Negative Impacts of Lake Turkana Wind Project on Indigenous Community Rights' <www.business-humanrights.org/en/kenya-report-by-danwatch-reveals-negative-impacts-of-lake-turkana-wind-project-on-indigenous-community-rights> accessed 18 May 2019. EJOLT, 'Lake Turkana Project in Indigenous Territories, Kenya' (*Environmental Justice Atlas*) <<https://ejatlas.org/conflict/lake-turkana-project-in-indigenous-territories>> accessed 2 February 2019.

⁵ Adow Mohamed, 'Kenya: Ethiopia Dam Draining Out Lake Turkana' (*ZeHabesha – Latest Ethiopian News Provider*, 16 October 2015) <www.zehabesha.com/kenya-ethiopia-dam-draining-out-lake-turkana/> accessed 26 May 2019; Kenya, 'Fourth Periodic Report Submitted by Kenya under Article 40 of the Covenant, Due in 2015' (Human Rights Committee 2018) CCPR/C/KEN/4 <www.cambridge.org/core/product/identifier/S0002930000101204/type/journal_article> accessed 4 July 2019; Kenya National Commission on Human Rights, 'Business And Human Rights' <www.knchr.org/Our-Work/Business-and-Human-Rights>.

⁶ United Nations, 'The 2030 Agenda for Sustainable Development' (United Nations) A/RES/70/1; QBIS, 'Socioeconomic Study of Key Impacts from LTWP Project' (2018) Impact Assessment Report <www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>; *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

This chapter will (1) introduce the wind farm, surrounding communities, and relevant stakeholders, (2) look at the relevant hard and soft instruments, (3) examine the framing of the project by corporate stakeholders by way of the impact assessment report, (4) analyse the pivotal court case, *Mohamud v Lake Turkana Wind Power Ltd*, and (5) engage with the varied consultation and feedback mechanisms.

The stakeholders involved are many and diverse including the Kenyan Government, corporate developers, financial actors, multiple indigenous and pastoral communities, consultants, and advocacy focused civil society organisations. The complexity of this case study lays with (1) the problematic notion of identifying all relevant indigenous peoples as a single community, thereby triggering a series of approaches (both dispositions and actions) which lead to conflicting stakeholder relations, and (2) understanding that sustainable development and human rights fulfillment, in concert, are a tool for both commercial and community development. These two areas of complexity are derived from the instruments, and resultantly affect the framing and consultation measures surrounding the Lake Turkana Wind Power project.

Summary, History, and Stakeholders

The benefits of the Lake Turkana Wind Power project were significant, bringing renewable electricity to millions of Kenyan homes, formerly without power.⁷ An abundance of community consultation led to a comprehensive relocation plan for those indigenous communities that were to be affected by the new wind farm.⁸ However, even with significant consultation, the corporate stakeholders failed to fully understand the dynamics of the local indigenous communities. Numerous nomadic tribes utilised the land that was set aside for the wind farm, some of which were not occupying the land during the commercial developer's impact assessment.⁹ There was an apparent failure to consult the entire scope of the indigenous communities. A court case was brought by a coalition of indigenous communities that indicated a failure of free prior and informed consent on the part of the corporate stakeholders.¹⁰ After a drawn-out procedure, the case was

⁷ 'Lake Turkana Wind Power Project: The Largest Wind Farm Project in Africa' (n 1).

⁸ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' <<https://ltwp.co.ke/public-consultation-and-engagement/>> accessed 19 May 2019.

⁹ EJOLT (n 4).

¹⁰ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

returned to the local jurisdiction and the wind farm moved forward with construction.¹¹ The corporate stakeholders claimed that they completed their due diligence and impact assessment. From the perspective of this thesis, the pre-determined consultation measures and feedback mechanisms were robust in and of themselves, however, the corporate stakeholders did not alter the approach after being made aware of the new circumstances. A misunderstanding of local customs and factions led to a human rights abuse claim against the corporate stakeholders. The goal for the wind farm, which ultimately fell short of complete success, was a mutually beneficial sustainable development project for the local communities, and Kenya as a whole.

The Lake Turkana Wind Power project is a 365-turbine, 310 MW wind farm covering 40,000 acres (150,000 acres including surrounding infrastructure), in the Loiyangalani District of Marsabit, approximately 450 km north of Nairobi.¹² The 622 million GBP project stretches from Lake Turkana to the top of Mount Kulal, from 450 m to 2300 m above sea level. The valley between the surrounding mountains acts as a funnel for the wind which blows consistently throughout the year in a southeasterly direction. The transmission line to connect the project to the national grid is 428 km long. Since 2007, data collected in the project's location has proved it to contain some of the best wind resources on the continent with wind speeds of at least 11 m/s. The capacity of the farm is 62%; this is considered world-class by global wind farm standards.¹³

The project includes 204 km of upgrades to existing roads and new access roads to surrounding villages. While necessary for the commercial development itself, the upgrades (as well as other byproducts of the commercial development below) can be considered community development projects as well. The road replacements and construction were funded by both the Kenyan and Spanish governments.¹⁴

The funding for the wind farm itself was arranged by the African Development Bank, Nedbank, and Standard Bank. Aldwych International oversaw the construction of, and later the day-to-day operations of, the wind farm. The major financial contributors, in descending order of level of commitment, are Aldwych International Limited, KP&P BV Africa (original sponsors),

¹¹ *ibid.*

¹² Aldwych International (n 1); EJOLT (n 4). These sizes are taken from Aldwych International, a primary financial backer and primary corporate stakeholder. The size of the wind farm itself falls under question as part of the complexity of the stakeholder relations and court case below.

¹³ Aldwych International (n 1).

¹⁴ *ibid.*; 'Lake Turkana Wind Power Project: The Largest Wind Farm Project in Africa' (n 1).

Wind Power A.S. (Vestas), the Norwegian Investment Fund for Developing Countries (Norfund), the Danish Investment Fund for Developing Countries (IFU), the Finnish Fund for Industrial Cooperation Ltd (Finnfund), and Sandpiper.¹⁵

The financial and operational benefits to Kenya (as a whole) include a 120 million GBP reduction on importing fuel, a tax contribution of 22.7 million GBP per year and 450 million GBP over the life of the project.¹⁶ The 32-month long construction period planned to create 2,500 short-term jobs and over 200 full-time, local jobs during the farm's operational life.¹⁷ The community development benefits (more below) were presented in advance of the project. However, this public-private partnership did not come without significant community pushback (in the consultation section below).¹⁸

According to the commercial developers, income from accrued carbon credits was to be shared with the Kenyan Government and reinvested in the community.¹⁹ Since Marsabit and more specifically, Loiyangalani District are among the poorest areas of Kenya, a share of profits and carbon credits would form, and fund, a trust over the course of the project. Aldwych International claimed that extensive corporate social responsibility plans were formed with input from the nomadic and pastoralist communities.²⁰ This input is key to understanding the relationship between sustainable development and human rights for this project. Poor relationships between indigenous communities, between the various indigenous communities and developers, and claims of poor commercial development planning all contributed to various conflicts in stakeholder relations over the course of the project, as this chapter will elucidate.²¹ A primary issue throughout the case study is that some stakeholders in the Lake Turkana region refer to the indigenous people as a single community, failing to understand the diversity in the region. The framing, instruments, and consultation measures below all point to a misrepresentation of the local indigenous

¹⁵ Aldwych International (n 1).

¹⁶ *ibid*; EJOLT (n 4).

¹⁷ QBIS (n 6).

¹⁸ 'Mass Negativity Dimming Shine of Africa's Largest Wind Farm - Daily Nation'

<<https://mobile.nation.co.ke/blogs/Mass-negativity-dimming-shine-of-Africa-largest-wind-farm/1949942-4855416-hnwjb1/index.html>> accessed 20 May 2019; Aldwych International (n 1); QBIS, 'Socioeconomic Impact Study of Key Impacts from the Lake Turkana Wind Power Project Project' (2018) Impact Assessment Report.

¹⁹ Aldwych International (n 1) 7.

²⁰ *ibid*.

²¹ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 8); 'Lake Turkana Wind Power: Renewable Energy & Human Rights Business & Human Rights Resource Centre' (n 1); Aldwych International (n 1).

communities as a single entity. Both preventative and as a remedy, the Lake Turkana Wind Power project attempted to institute a variety of consultative measures (below) to improve these conflicting stakeholder relations, particularly with indigenous communities, to varying degrees of success.

The Lake Turkana Wind Power project must be contextualised within the large northern Kenyan community that surrounds Lake Turkana. There is more than one humanitarian crisis in the region. The lake and its surrounding areas are plagued by poverty, sickness, scarcity of work, a crumbling infrastructure, and the effects of climate change.²² The nomadic tribes and pastoralists (with some overlap between the groups) are two of the categories of communities most directly affected by the wind farm and its construction, but there are widespread wind farm effects that stretch to the lake itself and even over the border into Ethiopia. The migratory pastoralist peoples in the area include the Rendile, Samburu, El Molo, and Turkana people. Their participation in Lake Turkana Wind Power project's consultation process, or lack thereof (depending on each of the stakeholder's perspective), is fundamental to understanding the role that human rights play in stakeholder approaches, specifically surrounding land, property, and cultural practices.²³ These three categories of human rights, land, and property and cultural practices form the core of the indigenous concerns about the wind farm, and are the basis for the court case brought against the corporate developers.²⁴

The terrain in dispute is ideal for pastoralist communities, as the grasslands provide consistent feed for grazing livestock. The surrounding mountains form a valley with consistent, year-round wind, ideal conditions for a wind farm.²⁵ There is a vitally important narrow strip of land that connects the grazing lands to Lake Turkana. The use of this land strip is necessary for the nomadic communities' social, economic, and cultural purposes. The wind farm's construction calls into question whether this particular land can have multiple uses: commercial development, community (in particular economic) development, and cultural practices.

²² Mohamed (n 5); EJOLT (n 4); 'Kenya' (n 4); 'Lake Turkana Wind Power: Renewable Energy & Human Rights Business & Human Rights Resource Centre' (n 1).

²³ EJOLT (n 4); 'Kenya' (n 4); Mohamed (n 5); 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 8).

²⁴ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

²⁵ Business & Human Rights Resource Centre and others, 'Mapping the Renewable Energy Sector to the Sustainable Development Goals: An Atlas (Consultative Draft)' (2018).

Lake Turkana is one of the area's most valuable natural resources. It is a significant income generator, particularly for those in the fishing industry.²⁶ The lake's recent overfishing and decreasing water levels have led to social and economic difficulties in the area.²⁷ The local communities that use the land and water to make their livings are frequent victims of large-scale commercial development projects affecting their ways of life. One contributor to the lake's ecological and economic downturn is the Gilgel Gibe III Dam, across the northern Kenyan border, in Ethiopia.²⁸ This dam rerouted the water that traditionally fed the lake and has caused water levels to decrease. Simultaneously, the various impoverished indigenous communities have turned to the lake as a form of income, drastically increasing the number of people that fish on the lake. The overfishing and decreasing water levels have hurt not only the people on the lake itself, but also the surrounding indigenous communities. Certain of these communities travel to the lake (through the narrow strip of land that connects to grazing lands) for cultural rituals and to gather water for their nomadic travels.²⁹

While the primary stakeholders include the varied indigenous communities and corporate partners (above), other stakeholders include the local and federal Kenyan governments (including the courts), private financial and banking institutions, and the international community. The footprint of the windmills themselves are a small part of the commercial development project. The wider implications of the stakeholder relations, namely environmental impacts, political power struggles, economic downturns, and inhibited cultural practices, are all important to recognise when aiming for compatible stakeholder approaches to both human rights and community development in the Lake Turkana region. The corporate Lake Turkana Wind Power project stakeholders claim to have done their due diligence on each of these fronts, in partnership with other stakeholders, but unforeseen conflicts arose.

²⁶ 'Kenya' (n 4).

²⁷ 'Climate Change Environmental Threats and Human Rights in Turkana County Kenya' 3 <<https://primarysources.brillonline.com/browse/climate-change-and-law-collection/climate-change-environmental-threats-and-human-rights-in-turkana-county-kenya;cccc014720150147002>> accessed 26 May 2019.

²⁸ Mohamed (n 5); 'Kenya: Video on Pastoralist Communities' Mobilization in the Face of Extractive Industries' (IWGIA) <www.iwgia.org/en/kenya/2128-kenya-video-on-pastoralist-communities-mobilizatio> accessed 18 May 2019.

²⁹ Mohamed (n 5); 'Kenya' (n 4).

Instruments: Human Rights, Sustainability Policy, and Development in Kenya

The instruments relevant to the Lake Turkana Wind Power project include (1) national and local legal instruments, including the Constitution of Kenya 2010,³⁰ and the Trust Land Act 2009,³¹ (2) international legal instruments, including primarily, the not-ratified United Nations Declaration on the Rights of Indigenous Peoples,³² and the International Labour Organization's C169 Indigenous and Tribal People's Convention 1989,³³ and (3) Vision 2030, Kenya's sustainable development policy initiative.³⁴ The foci of these instruments are property rights, indigenous rights, environmental rights, and the relationship between rights and community development in Kenya as dictated by both legal obligations (some to which Kenya is party) and policy initiatives. Additionally, some of these instruments rely on the ill-defined conception of community and contribute to confusion (and potential rights violations and abuses) by stakeholders.

The Constitution of Kenya 2010 includes various environmental and property laws relevant to this case study.³⁵ Article 40 of the Constitution 2010, Protection of Rights to Property, reflects the international property rights as articulated in the Universal Declaration of Human Rights, and the African Charter on Human and People's Rights.³⁶ Article 40 provides that the state will not arbitrarily remove or deprive rights holders' rights to own property individually or in association.³⁷ Article 40(3) makes clear that deprivation or removal will not be arbitrary where it

³⁰ Constitution of Kenya 2010.

³¹ Trust Land Act 2009.

³² United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP).

³³ 'ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)'.

³⁴ Kenya Vision 2030, 'Kenya Vision 2030' <<https://vision2030.go.ke/>> accessed 26 May 2019.

³⁵ Constitution of Kenya 2010 (n 30). The current Constitution was introduced in 2010, and although the initial impact assessment license for Lake Turkana Wind Power Project was granted in 2009, this Chapter focuses on the provisions of the 2010 Constitution. The Clean Development Mechanism license, Vision 2030, the SDG focused impact assessment, and *Mohamud v Lake Turkana Wind Power Ltd.* were all introduced since the introduction of the 2010 Constitution.

³⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Article 17; Constitution of Kenya 2010 (n 30) Article 40; African Charter on Human and People's Rights (Banjul Charter), Organization of African Unity (OAU), (adopted 27 June 1981, entered into Force 21 October 1986) Article 14. Property rights in particular are not included in the binding international legal instruments to which Kenya is party, namely the ICESCR and ICCPR.

³⁷ Constitution of Kenya 2010 (n 30) Article 40.

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.³⁸

There are three classifications of land in Kenya: public, community, and private.³⁹ The land in question as part of the Lake Turkana Wind Power project is community land. Article 63(2d) of the Constitution of Kenya 2010 lays out the definition of community land and Article 63(3) lays out the protocol for unregistered community land.⁴⁰ This consists of land (as relevant to this case) that is managed by communities for grazing, shrines, or ancestral lands occupied by hunter-gatherers. For the communities in the Lake Turkana region, the land is occupied for all three uses. The protocol, as outlined in Article 63(3), dictates that county governments, in this case the Marsabit County Government, shall hold the land in trust on behalf of the community.⁴¹ There are two key points here. First, it is problematic, as a general matter, to tease out the definition of the word community. This, particularly in local contexts such as the Lake Turkana Wind Power project, where a variety of indigenous communities with competing agendas are treated as a single community by various stakeholders (local officials and corporate partners as the evidence below will demonstrate). Second, the phrase “on behalf of” seems to allow the county government to act in ways that it deems in the best interest of the community. The best interest of a community is difficult to ascertain in contexts where the scope of the community is ill defined. While the recommended disposition (of the county government) is to respect, protect, and fulfill the right to property as clearly articulated in the Constitution of Kenya 2010, in practice, fulfillment becomes more complex because of the number of local tribes.

³⁸ *ibid* Article 40(3a,b).

³⁹ Land Act 2018; Land Registration Act 2016; Trust Land Act.

⁴⁰ Constitution of Kenya 2010 (n 30) Article 63(2d) 63(3).

⁴¹ *ibid* Article 63(3).

Both the Kenyan Government and the wind farm's corporate partners have responsibilities in line with UN treaties and standards. Kenya is party to the International Covenant on Civil and Political Rights,⁴² the International Covenant on Economic, Social and Cultural Rights,⁴³ the Convention on the Rights of the Child,⁴⁴ the Convention on the Elimination of All Forms of Discrimination Against Women,⁴⁵ inter alia. Kenya's abstention from voting for, and failure to ratify, The United Nations Declaration on the Rights of Indigenous People, and resultantly, the free prior and informed consent requirement, are central to the indigenous communities' legal claims in this case study.⁴⁶ Additionally, Kenya has failed to ratify the International Labour Organization's C017 Indigenous and Tribal Populations Convention 1957 and C169 Indigenous and Tribal Peoples Convention 1989.⁴⁷ Even though Kenya has not ratified these instruments, they are considered the strongest international obligations on behalf of indigenous communities in force today (Chapter I).

Indigenous rights are protected in a number of provisions of the Constitution of Kenya 2010 including those relating to self-determination, language and cultural protections, and the recognition of indigenous technologies.⁴⁸ While many of these codified rights (as of 2010) mirror those in the non-ratified United Nations Declaration on the Rights of Indigenous Peoples,⁴⁹ Article 66(1) of the Constitution 2010 goes against the spirit of the international agreement. This article states that "The State may regulate the use of any land, or any interest in or right over any land, in

⁴² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁴⁴ Convention on the Rights of the Child (adopted 20 November 1989 entry in to force 2 September 1990) UNGA Res 44/25 (CRC).

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 entry in to force 3 September 1981) UNGA Res 34/180 (CEDAW).

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32); EJOLT (n 4); 'United Nations Declaration on the Rights of Indigenous Peoples' <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

⁴⁷ International Labour Organization, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ratifications of ILO Conventions: Ratifications by Convention' <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 4 June 2021; *ibid.* These instruments, even though they have not been ratified by Kenya, are referred to as part of the indigenous legal claims, below.

⁴⁸ Constitution of Kenya 2010 (n 30) Articles 7(3b), 11(1), 11(2b).

⁴⁹ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32).

the interest of defence, public safety, public order, public morality, public health, or land use planning.”⁵⁰ Land is protected prominently in the United Nations Declaration on the Rights of Indigenous Peoples, spanning many articles: Article 8(2b), protection against dispossession; Article 10, protection against forced relocation and the requirement of free prior and informed consent; Article 25, traditional ownership practices; Article 26, legal recognition of ownership; Article 27, customary recognition; Article 28, restitution in case of displacement; Article 29(1), protect the productive capacity of the land; Article 30, not using indigenous land for military activities; Article 32, self-determination for development strategies; inter alia.⁵¹ These protections for indigenous communities are wide ranging, and yet not included in the Constitution 2010.

Any ratification by Kenya of an international treaty automatically incorporates said treaty into national law.⁵² On top of this, the Constitution 2010 incorporated much of the language from the rights-based treaties that Kenya has ratified into its own robust Bill of Rights.⁵³ This includes but is not limited to social, economic, and cultural rights such as the highest attainable standard of health, education, housing, water, sanitation, and food. These rights were not only to be progressively realised as articulated in the ICESCR, but are enforceable legal rights enshrined in the Constitution 2010.⁵⁴ However, the integration of these rights into national policy is, and has been, the focus of local and national human rights organisations, including the Kenya National Commission on Human Rights.⁵⁵ The new wave of sustainable development policymaking provided just the opportunity to further cement the human rights agenda in the policy space.

⁵⁰ Constitution of Kenya 2010 (n 30) Article 66(1).

⁵¹ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32) Articles 8(2b),10,25,26,37,28,29(1),30,32.

⁵² Constitution of Kenya 2010 (n 30) Article 2(6); UNDG, ‘UN (Sustainable) Development Group Human Rights Case Studies’ (UN Development Operations Coordination Office 2013).

⁵³ Manisuli Ssenyonjo, ‘The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa’ (2017) 64 *Netherlands International Law Review* 259, 269–270; Morris Kiwinda Mbondenyei and Osogo Ambani, *New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing 2013) 217; Charles Hornsby, *Kenya: A History since Independence* (I B Tauris 2012) 591,670; Constitution of Kenya 2010 (n 30) Article 2.6.

⁵⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 43); Constitution of Kenya 2010 (n 30).

⁵⁵ Kenya National Commission on Human Rights (ed), *Compendium on Submissions to ICESCR 2016: Committee on Economic, Social and Cultural Rights* (Kenya National Commission on Human Rights 2016). In a series of recommendations, The Kenya National Commission on Human Rights’ 2016 Compendium on submissions to ICESCR has over 80 mentions of indigenous rights including recommendations to ratify UNDRIP, ILO 169, a range of land protections, and free, prior and informed consent.

In terms of indigenous protections, Article 4(6) of the Kenyan Justice Department's National Human Rights Policy and Action Plan 2014 focuses on the constitutional protections and the international treaties protecting minorities and marginalised groups.⁵⁶ These protections are limited and are severely hindered by social exclusion, particularly those with limited access to infrastructure and those that live at a distance from Nairobi (the communities at Lake Turkana Wind Power project fall into both these categories). As a result of this, the National Human Rights Policy and Action Plan states

Therefore, the State shall adopt measures including putting in place affirmative actions to ensure that minorities and marginalized groups realise all the rights and fundamental freedoms set out in the Bill of Rights, on a basis of equality, taking into account their identity, way of life, special circumstances and needs” and “The Government shall... Take measures to ensure the protection of ancestral land and other rights of these groups in line with the National Land Policy.⁵⁷

This did not happen for the indigenous communities in the Lake Turkana region. The Kenyan Government's inaction from a rights-based perspective for the Lake Turkana Wind Power project seems to be a result of prioritising the policy initiatives surrounding sustainable development.

Kenya is considered one of the most progressive African countries in terms of pursuing sustainable development.⁵⁸ Kenya's long-term community development plan comprises economic, social, and political development with human rights as a “core component”.⁵⁹ The country's long-term plan, Vision 2030, was adopted before the SDGs and helped to ensure a smooth transition between the MDGs, the SDGs and beyond.⁶⁰ Vision 2030 is a national, regional, and local project. The project now encourages leaders at all levels, from ministers to local governments, to use the

⁵⁶ Office of the Attorney General and Department of Justice, 'National Human Rights Policy and Action Plan' (2014) SESSIONAL PAPER NO 3 OF 2014.

⁵⁷ *ibid.* National Land Policies will be analyzed below as a limited number are relevant to the pivotal court case, *Mohamud v Lake Turkana*.

⁵⁸ Permanent Missions of Denmark and Chile to the United Nations at Geneva, 'Human Rights and the SDGs Pursuing Synergies' (The Danish Institute of Human Rights 2017); UNDG (n 52).

⁵⁹ Permanent Missions of Denmark and Chile to the United Nations at Geneva (n 58).

⁶⁰ UNDG (n 52); Permanent Missions of Denmark and Chile to the United Nations at Geneva (n 58).

SDGs to streamline and inform their mandates.⁶¹ A strong emphasis of Vision 2030 was physical infrastructure.⁶² However, the approach to this infrastructure needed a human rights framework to determine where, when, and how the projects ought to be prioritised. The Office of the Prime Minister had a goal to transform the rights-based approach (as present in the Constitution 2010) into a rights-based community development plan.⁶³ One of the main concerns was that Vision 2030 was too focused on economic development and would lead to an increase in economic and social inequality.⁶⁴ Much the same as with the infrastructure, a Human Rights-Based Approach to Development was necessary to sidestep the imminent inequality problems. Kenya invited the United Nations to assist in this process on two fronts “i) developing a common understanding on a human rights-based approach to development in the country; and ii) supporting efforts to develop tools to facilitate the mainstreaming of human rights into Vision 2030.”⁶⁵ Kenya took a policy instrument and framed it using both rights and community development in tandem. To achieve Vision 2030, both rights and community development would be necessary, pinning the policy’s success on a dual framing and a range of instruments.

On the corporate stakeholder side, Lake Turkana Wind Power project and its financial partners seemed to engage very selectively with the SDGs (not Vision 2030) in their attempts to frame the project as one of sustainable development.⁶⁶ The sustainable development aims in this case study are primarily focused on SDGs 1, 4, 7, 8, 9, 10, 11, and 13⁶⁷: No Poverty, Quality Education, Affordable and Clean Energy, Decent Work and Economic Growth, Industry Innovation and Infrastructure, Reduced Inequalities, Sustainable Cities and Communities, and Climate Action.⁶⁸ Building a strong community around the wind farm, including schools and hospitals purportedly in pursuit of some of the SDGs, may have simultaneously made progress toward progressively realising human rights obligations in the area, particularly around education,

⁶¹ Permanent Missions of Denmark and Chile to the United Nations at Geneva (n 58).

⁶² ‘Kenya Vision 2030’ (n 34).

⁶³ UNDG (n 52) 26.

⁶⁴ *ibid* 27.

⁶⁵ *ibid* 26.

⁶⁶ QBIS (n 6); ‘Kenya’ (n 4).

⁶⁷ QBIS (n 6).

⁶⁸ United Nations (n 6) 20.

health, and access to work.⁶⁹ The corporate and governmental stakeholders viewed the Lake Turkana Wind Power project as a community development project as opposed to a rights-based project, but used different community development frameworks (SDGs vs Vision 2030).

However, Chapter Five, Part 2 (Environment and Natural Resources) of the Constitution 2010 embeds sustainable development into the law.⁷⁰ This creates legal mandates for certain SDG-based targets as well as Vision 2030. Article 69(1) addresses sustainable exploitation; maintaining 10% tree cover; protecting indigenous knowledge of biodiversity; public participation in environmental protections; formalising impact assessment, audits and monitoring; and utilising the environment to benefit the Kenyan people.⁷¹ These efforts touch on SDGs 9, 11, 12, 13, 15, 16, and 17.⁷² Since the Constitution 2010 uses progressive realisation language, Article 69(1) is a particularly strong example of Kenya embedding sustainable development into legal human rights obligations.⁷³ This relationship is also key as rights both come into conflict with, and support, sustainable development surrounding the Lake Turkana Wind Power project. As Kenya provided legal mandates for sustainable development, it became clear that instruments (both ratified and not) in this context are at the very least, partially responsible for informing the federal government's framing vision:⁷⁴ namely, that rights may be respected, protected, and fulfilled by way of sustainable development.⁷⁵ The hybrid rights and community development framing at the

⁶⁹ Lake Turkana Wind Power (n 1); Aldwych International (n 1); Ignacio Saiz and Kate Donald, 'Tackling Inequality Through the Sustainable Development Goals: Human Rights in Practice' (2017) 21 *The International Journal of Human Rights* 1029.

⁷⁰ Constitution of Kenya 2010 (n 30) Chapter 5, Section 2.

⁷¹ *ibid* Article 69(1).

⁷² United Nations (n 6). Industry Innovation and Infrastructure; Sustainable Cities and Communities, Responsible Consumption and Production, Climate Action, Life on Land, Peace Justice and Strong Institutions, and Partnerships.

⁷³ *ibid*.

⁷⁴ 'Kenya Vision 2030: The Popular Version' (Government of the Republic of Kenya 2007). Kenya took on three workstreams for improvement. The first is one of the core tenets of the SDGs: ensuring no one is left behind when instituting policy. This is a far cry from building a single school or hospital and focused on policy-based human rights protections for individuals, implemented with the help of human rights organisations such as the Kenya National Commission on Human Rights. The second comes from Kenya's 2017 High Level Political Forum where it was made it clear that Kenya must do a better job of integrating national human rights institutions into the conversations and actions around Vision 2030. This would assist in implementing both sustainable development initiatives and human rights obligations on local levels. The third is proposing an amendment to the Voluntary National Reviews to include human rights reporting. This would entail assisting local and national human rights organisations in monitoring the SDGs alongside human rights. Mainstreaming human rights in both law and policy, side by side with Vision 2030 has put Kenya's human rights-based approach to sustainable development at the forefront of national policy.

⁷⁵ UWE GNEITING and others, 'Setting Higher Goals: Rights and Development Trade-Offs and Challenges in Implementing a Rights-Based Approach to Development.' [2009] *Monday Developments*. Even after the mandate,

national level, alongside the framing of the Lake Turkana Wind Power project (described above) makes this case study context a unique example within this thesis. By comparing this framing with that of the other case studies, as the analysis will show in Chapter VI, this rights and community development hybrid approach (as informed by the instruments in particular) may still be problematic.

The conflicts between property and indigenous rights claims and sustainable development arise in *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (in detail below).⁷⁶ The court's analysis and judgement paid special attention to Section 13 of Kenya's domestic Trust Land Act 2009 and Article 117 of the repealed Constitution of Kenya 1963, the contents of which will be analysed below.⁷⁷ The judgement of the court case offers support for the wind project's development, as well as certain specific human rights obligations but does not make a definitive ruling. The court case strikes a delicate balance between Kenya's clean energy priorities, as articulated in Vision 2030, and human rights obligations, specifically the respect, protection, and fulfillment of rights for indigenous communities.⁷⁸ This case study as a whole, in combination with Vision 2030 reveals clear gaps in human rights protections that have potential remedies, some of which were suggested and (supposedly) implemented according to the Lake Turkana Wind Power project's impact assessment report, another instrument pivotal to the case (also analysed below).

The instruments relevant to the Lake Turkana Wind Power project (1) focus on human rights protections for indigenous communities related to land, property, and culture, (2) focus on domestic and international sustainable development practices, and (3) continuously refer to an ill-

Kenya was the first to recognize the human rights shortcomings in Vision 2030. From the beginning, the plan looked like a model for progressive realisation of particular economic and social rights, with a strong emphasis on infrastructure development. Much the same as the SDGs, achieving education, health, and gender targets are vital but are not human rights protections in and of themselves. They fall along the development/rights boundary in that they may be remedies to alleviate human rights violations but are not legal protections in and of themselves. However, Kenya has complicated the issues (for better or worse) by blending rights and development initiatives in their policy mandates. As in the Lake Turkana Wind Power project case, providing a school or hospital may help Kenya to achieve their development targets but it is important to recognise the means and framing of these types of projects. This is to say, the framing that the corporate partners may use to achieve their ends: whether they see the Lake Turkana Wind Power project as a rights project or a development project, no matter what the instruments dictate.

⁷⁶ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

⁷⁷ Trust Land Act; The Constitution of Kenya, Defunct 1963.

⁷⁸ 'Kenya Vision 2030' (n 34); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

defined community that causes human rights-related conflicts for multiple stakeholders, as the case study illustrates. The framing of the instruments are a hybrid of sustainable community development and human rights. This is to say that human rights also ought to be protected independently from development (community and commercial), as the instruments above make clear. However, Vision 2030 and the sustainable development Constitution 2010 provisions lay the groundwork for the Lake Turkana Wind Power project and create a conflicting framing problem for the many stakeholders.

Impact Assessment Report: Framing the Lake Turkana Wind Power Project using the Sustainable Development Goals and Human Rights

The impact assessment licence was granted for the Lake Turkana Wind Power project on 24 July 2009.⁷⁹ In 2011, the United Nations Framework Convention on Climate Change (UNFCCC) accredited the project with a Clean Development Mechanism Gold Standard rating.⁸⁰ The compliance was in line with local and international agreements including the Equator Principles and International Finance Corporation (IFC) Performance Standards.⁸¹ The farm is estimated to reduce Kenya's annual CO₂ emissions by over 700,000 metric tons during the first crediting period.⁸² According to the various reports and accreditations above, environmental impact audits will happen annually throughout the life of the project's licence.⁸³ The UNFCCC

⁷⁹ Aldwych International (n 1) 6.

⁸⁰ 'CLEAN DEVELOPMENT MECHANISM PROJECT DESIGN DOCUMENT FORM (CDM-PDD) - Lake Turkana Wind Power Project'; 'CDM Projects in Kenya – Clean Development Mechanism' <<http://webcache.googleusercontent.com/search?q=cache:http://meas.nema.go.ke/cdm/cdm-projects-in-kenya/>> accessed 29 January 2020. This formal recognition of a project as a sustainable development project by the UNFCCC is important to note. Formalizing sustainable development, even though both Clean Development Mechanisms and the SDGs are voluntary and non-binding, lays out a clear procedural difference between human rights and sustainable development. One is a legal obligation, the other is a voluntary, and yet a formally recognized and lauded, policy initiative.

⁸¹ Equator Principles, 'The Equator Principles' (2020) <<https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>>; International Finance Corporation, 'Performance Standard 7: Indigenous Peoples' (1 January 2012); International Finance Corporation, 'Performance Standard 8: Cultural Heritage' (1 January 2012).

⁸² Aldwych International (n 1) 6.

⁸³ Aldwych International (n 1); 'CDM Projects in Kenya – Clean Development Mechanism' (n 80); Kelly Sheldrick, 'CDM Project Activity Registration Form: LTWP' (1011); 'CDM: Lake Turkana 310 MW Wind Power Project' <<https://cdm.unfccc.int/Projects/DB/SGS-UKL1298369167.94/view>> accessed 27 October 2019; 'CLEAN DEVELOPMENT MECHANISM PROJECT DESIGN DOCUMENT FORM (CDM-PDD) - LTWP' (n 80); 'CDM: LTWP Emissions Reduction Calculations'. These certifications (in particular CDM) are key to understanding the current

certification confirms that Kenya is party to the Kyoto Protocol and that the Lake Turkana Wind Power project contributes to Kenya's sustainable development.⁸⁴

The impact assessment report, published by an external consulting group, Quantifying Business Impact on Society, was an impact study that focused on the social and economic factors of the wind farm.⁸⁵ The report was published after the wind farm was in operation (2018) and was therefore able to use the SDGs as a framework, rather than Vision 2030. Additionally, since the report assessed the impact after the conclusion of the construction phase of the commercial development project, the report had the ability to acknowledge both dispositions and actions on the part of certain stakeholders, but only in retrospect. These characteristics of an impact assessment report is unique among the three case studies in this thesis. This type of mid-project impact assessment report allows for a revisiting of both dispositions and actions for potential revisions.

This case study's impact assessment report acknowledges community development successes and failures and presents solutions to conflicts that arose during construction. Much like in the Phulbari Coal Mine case study, the impact assessment report here was produced by an external consultant on behalf of the corporate stakeholder. While the report ought to accurately reflect both the disposition and intended actions of the corporate stakeholder, due to the consultant's position in the middle of the project, there is a level of distance (between stakeholders) and introduces this new stakeholder into the web of relations (the consultant).

The impact assessment report does briefly refer to rights, but the majority of the report uses the SDGs as a way of evaluating potential successes and failures of the Lake Turkana Wind Power project. Based on the language in the report (below), these successes and failures seem to be setting a standard for future renewable energy projects in Kenya. This sets up the report with a community development framing, thereby assuming that the corporate stakeholders (by way of an external consultant) will be using the same language. The report divides the commercial development project into three categories for evaluation: Lake Turkana Wind Power project Farm, Lake

failures to integrate human rights protections into sustainable development projects. They are addressed in various sections throughout the chapter.

⁸⁴ National Environment Management Authority, Dr. A. Mwinzi, EBS, Director General, 'Letter of Approval and Authorization for the Lake Turkana Wind Power Project, Kenya' (24 June 2010).

⁸⁵ QBIS (n 6) 1.

Turkana Wind Power project Access Road, and Local Capacity Building.⁸⁶ This third category is the one that focuses on the indigenous communities and their property, and is a fundamental part of the consultation (analysed in detail in the consultation section below). The summary of this section focuses on the achievements of Winds of Change, an organisation set up by the Lake Turkana Wind Power project to address local community relations (the core stakeholder of the Lake Turkana Wind Power project responsible for consultative measures with the local communities).⁸⁷ They used three metrics to measure their proposed community development:

1. Improved local access to health and education facilities given the upgraded road infrastructure. This is listed as an improvement. The metrics show increases in literacy and life expectancy.
2. Strengthened governance and security, again from the upgraded road infrastructure. This is listed as an improvement. Recorded changes to rural income, consumption, and decreased poverty levels.
3. Changing community values including economic and dietary. It does note the consistency in community conflict both before and after the Lake Turkana Wind Power project's construction. This is listed as both an improvement and a deterioration. There are marked positive and negative changes to community cohesion and governance.⁸⁸

There are 10 SDGs used to categorise these activities, and no single reference to human rights. The SDGs referenced are No Poverty (1), Zero Hunger (2), Good Health and Well-Being (3), Quality Education (4), Affordable and Clean Energy (7), Decent Work and Economic Growth (8), Responsible Consumption and Production (12), Climate Action (13), Peace Justice and Strong Institutions (16), and Partnerships for the Goals (17). The report focuses on Goals 1, 7, 8, and 13, with the remaining goals contributing to these primary four. The research, done in advance of the report, contains the only mention of rights in the entire report (below).⁸⁹ The report's analysis effectively separates out community development benefits and the rights-based shortcomings of

⁸⁶ QBIS (n 6).

⁸⁷ *ibid* 4,40,41.

⁸⁸ *ibid* 4. The community conflicts are detailed more fully in Mohamud v. Lake Turkana and in the analysis of the consultation and feedback mechanisms (below).

⁸⁹ *ibid* 8.

the project. To be clear, a community development framing is used to measure the potential and realised successes while a human rights framing is used to articulate the potential harm brought upon the communities.

Again, this analysis is divided into three categories. The first, developmental impacts, highlights the benefits of new revenue sources and job creation, capacity building and community involvement. It then questions the aesthetic impacts, cultural impacts (rights based), health and well-being, “marginalized communities and rights”, workplace incidents, and a risk of inequitable benefit distribution.⁹⁰ The second, impact from renewable energy, highlights the energy security and environmental sustainability, economic growth, and rural electricity access. It questions the costs and challenges related to integrating the new energy into the national grid and again refers to potential inequalities. The third, rural road access, highlights lowering transportation costs, overall economic development, and education, health, and finance. The drawbacks are traffic accidents, environmental degradation and migration concerns, and again, inequality.⁹¹ The report acknowledges that social impacts are long term and far reaching but does not go far beyond this assertion. As mentioned above, the social and cultural implications of relocation present significant difficulties for indigenous communities, particularly acknowledging the complexities surrounding land ownership in Kenya. The report does not acknowledge these complexities, however, they are addressed in part in the Winds of Change considerations, as part of the community consultation measures (below).

From a framing perspective, the impact assessment report uses a community development framing, even when briefly referring to rights. Even when the references to potential rights concerns are made, they still trigger development solutions, in particular, commercial development solutions. To be clear, the reference to marginalised communities and the potential abuse of related rights is considered an impact of the wind farm’s development. This recognition of human rights concerns is of particular note, as Quantifying Business Impact on Society, the consultant, does not take part in the court case that brings the indigenous communities’ concerns to the forefront of the conflict between stakeholders.⁹² As mentioned above, the web of stakeholder relations continued to grow.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

From a sustainable development perspective, the impact assessment considered Lake Turkana Wind Power project to be a success on most fronts.⁹³ The drawbacks listed above targeted specific goals that would have required a longer-term analysis than was permitted for this report. The issue of inequality, which has its own SDG and was not addressed in the report, is a result of focusing on Decent Work and Economic Growth, independent of Reducing Inequalities. However, the report does recognise the potential for “risk of inequitable benefit distribution”, independent of its SDG framing.⁹⁴ Peace Justice and Strong Institutions was addressed in terms of security for the region but solely as it relates to the wind farm’s infrastructure. Finally, partnerships were achieved partly with the local communities (addressed below as part of consultation mechanisms) but primarily with the local, and non-indigenous governments.

The financial backers of the Lake Turkana Wind Power project, as stated above, are primarily based in European countries. Using the SDGs to frame the report is consistent with global north sustainable development language⁹⁵ and fails to incorporate Kenya’s own aims, even though many of them overlap for the same ends, with different framings. Kenya’s Vision 2030 supports indigenous development above and beyond the selected Sustainable Development Goals.⁹⁶ This development is included in the Political Pillar, namely through Capacity Building in Local Authorities.⁹⁷

Kenya intentionally attempts to incorporate human rights into its community development projects, as is made clear by the 2010 Constitution, the Attorney General and Justice Department’s National Human Rights Policy and Action Plan 2014, and the International Work Group for Indigenous Affairs’ report, ‘Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya’.⁹⁸ Drawing on data gathered on a mission to Kenya for the UN Human Rights Council, the Report of the Special Rapporteur on the Situation

⁹³ QBIS (n 6).

⁹⁴ *ibid* 8.

⁹⁵ Gillian MacNaughton, ‘Vertical Inequalities: Are the SDGs and Human Rights up to the Challenges?’ (2017) 21 *The International Journal of Human Rights* 1050.

⁹⁶ ‘Kenya Vision 2030: The Popular Version’ (n 74).

⁹⁷ *ibid* pp.22-26; ‘Kenya Vision 2030’ (n 34).

⁹⁸ Constitution of Kenya 2010 (n 30); Office of the Attorney General and Department of Justice (n 56); International Work Group for Indigenous Affairs, ‘Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya’ <<https://primarysources.brillonline.com/browse/human-rights-documents-online/renewable-energy-projects-and-the-rights-of-marginalisedindigenous-communities-in-kenya;hrdhrd10312015001>> accessed 19 May 2019.

of Human Rights and Fundamental Freedoms of Indigenous People 2007⁹⁹ names and shames commercial development projects as a cause of human rights violations. The report specifically mentions the damming of rivers, pollution, gem mining, and flower farms. The report does not mention any rights that are intentionally respected, protected, or fulfilled as a result of these commercial development projects.¹⁰⁰

As the court cases and stakeholder consultation mechanisms will demonstrate (below), it is nearly impossible to make an objective claim about the human rights violations on the indigenous community (as a single entity) surrounding Lake Turkana. This is because the customs, politics, and access to information for the indigenous peoples runs the gamut. The impact assessment report, in this case study is meant both to address potential pitfalls and provide potential solutions. This is another place where human rights and development (community and commercial) come into conflict.

The impact assessment report's producers and funders failed to make the distinction between aiming to achieve specific SDG targets and indicators and contributing toward the progressive realisation of certain economic, social, and cultural rights. This is a problem of framing and inadequate use of instruments. The framing problem is clear: the report uses SDG language to address health, education, and infrastructure access, not progressive realisation of rights language. The instrument problem is also clear: the report addresses the need to protect marginalised communities and their rights, but does not provide any recommended solutions. By equating the gravity of failing to achieve an SDG target with failing to uphold both Kenyan and international law, the report confuses the two framings. Additionally, an SDG utilises a standard set of targets and indicators. Acknowledging the need to respect, protect, and fulfill certain rights does not (necessarily) lead to a single set of measurable standards (Chapter I), thereby making it more difficult to quantify and plan for in the impact assessment report.

Framing specific elements of the Lake Turkana Wind Power project, such as the impact assessment report, is doubly problematic. The Lake Turkana Wind Power project is a capitalist endeavour. The actions that the corporation and its funders take are for financial ends. The financing stakeholders ought to have abided by the many domestic and international laws, but in

⁹⁹ Rodolfo Stavenhagen, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen' (UN General Assembly 2007) A/HRC/4/32/Add.1.

¹⁰⁰ *ibid.*

many instances, corruption, money, or lack of due diligence had the potential to cause human rights abuses.¹⁰¹ Many of the SDGs referenced in the Quantifying Business Impact on Society report are goals with incentives for the Lake Turkana Wind Power project's financiers.

These goals and incentives cut across community development, commercial development, and human rights. Building educational and health facilities in the region provides a pipeline of skilled workers to run both the administrative and technical sides of the facility, while increasing access to education and health care. Installing roads and other infrastructure is far less expensive than continuously flying in equipment and machinery, while decreasing inequality and increasing access to services. Increasing the security protects the investment as well as the people. Capacity building and consultation with the local communities decreases the likelihood of them speaking out against the project and could help secure an indigenous workforce, while simultaneously increasing the chance of mutual benefits. All these actions do help Kenya to achieve the SDGs and their Vision 2030 commitments. However, the actions have additional capitalist benefits as part of the Lake Turkana Wind Power project. The SDGs allow for this multidimensional framing within the impact assessment report. The capitalist nature of Lake Turkana Wind Power project assumes a commercial development framing while sidelining the potential of progressive realisation, in favour of a community development approach. Commercial development and community development, in this case, seem to have mutual benefits. The solutions that the impact assessment report proposes use a community development framing, even in response to the rights-related concerns.

This impact assessment report puts the framing question at the centre of the relationship between rights and commercial development for the Lake Turkana Wind Power project. Therefore, selecting the most compatible approaches to rights and community development are key to mitigating conflict between stakeholders. The corporate stakeholders have no legal obligation to ensure that all property and culture of the various indigenous communities around Lake Turkana is protected, above and beyond the commercial development project. The corporate obligation is to not abuse human rights by way of the commercial development processes.

¹⁰¹ Megan Manion and others, 'Budget Analysis as a Tool to Monitor Economic and Social Rights: Where the Rubber of International Commitment Meets the Road of Government Policy' (2017) 9 *Journal of Human Rights Practice* 146; Office of the High Commissioner for Human Rights, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (Office of the High Commissioner for Human Rights 2017).

Progressively realising rights such as education and health were contributed to through government policy changes, and in contexts such as the Lake Turkana Wind Power project, through partnerships with the private sector. This being said, it could easily be argued that the (potential for) community development (and to a lesser extent rights fulfillment) results of the Lake Turkana Wind Power project, could assist in accomplishing the government policies surrounding education, infrastructure, and healthcare. It is possible (and likely) that the Kenyan Government would not have the finances and resources to build the roads, schools, and hospitals independent of the commercial development and community development assistance of the Lake Turkana Wind Power project.

Ultimately, from the point of view of the corporate stakeholders, commercial and community development converge at the Lake Turkana Wind Power project, with mutual benefits for all stakeholders. Also, from the same point of view (based on the framing of the impact assessment report), human rights are a series of obligations that ought not be violated, not a set of goals, aiming to be achieved. These dispositions toward rights and community development by the corporate stakeholders, and the resulting actions toward the indigenous communities, show a clear difference between the rights and community development framings of the project.

Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others

Sustainable development and human rights compete against each other for primacy in the Lake Turkana Wind Power project. This pivotal lawsuit (below) brings this competition to the forefront of the conflicts between stakeholders. A selection of indigenous stakeholders sued the corporate stakeholders over the failure to respect and protect human rights in the name of sustainable development. For the indigenous communities, Section 13 of Kenya's domestic Trust Land Act 2009¹⁰² and Article 117 of the Constitution of Kenya 1963¹⁰³ (now replaced by the Constitution 2010) provide legal human rights backing and framing. Vision 2030¹⁰⁴ as well as the completed impact assessment report¹⁰⁵ and consultation measures¹⁰⁶ provide the community

¹⁰² Trust Land Act Section 13.

¹⁰³ The Constitution of Kenya, Defunct (n 77) Article 117.

¹⁰⁴ 'Kenya Vision 2030' (n 34) 20.

¹⁰⁵ QBIS (n 6).

¹⁰⁶ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 8).

development framing. Conflict over a specific area of land on which the Lake Turkana Wind Power project was constructed provides the backdrop for this case, but the relevance to the case study as a whole comes from the human rights and community development arguments that seem to speak past each other in both the verbal and written arguments. The judgement recognises the value in both human rights and community development and ends up returning the case to a local community council for a final decision.

In Civil Suit 163 of 2014, *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others*,¹⁰⁷ a selection of the indigenous communities surrounding Lake Turkana sued the corporate stakeholders and a selection of state offices. The Plaintiffs were six applicants suing on behalf of the residents of Laisamis Constituency and Karare Ward of Marsabit County: Kochale, Chale, Gambare, Arakhole, Lengoyiap, and Seye.¹⁰⁸ The Defendants were Lake Turkana Wind Power Ltd., Marsabit County Government, The Kenyan Attorney General, The Chief Land Registrar, and the National Land Commission.¹⁰⁹

The Plaintiffs defined themselves as nomadic pastoralists and the legitimate owners and occupants of Laisamis Constituency and Karare Ward. The land in question forms a triangle between the shores of Lake Turkana, Mount Kulal, and South Horr. According to the Plaintiffs, this triangle is the only reasonable path between the grasslands, which a variety of tribes use to graze their livestock, as well as the sole method of accessing water from Lake Turkana. The Plaintiffs claimed that the land in question is ancestral and used for livestock, cultural, ceremonial, and spiritual purposes. Specifically, it is used for livestock during dry spells and as “a traditional site for performing a rite of passage ceremony and for confirmation of the warriors one year after circumcision in a ceremony known as Galgulame.”¹¹⁰ The ceremony takes place approximately every 14 years and the most recent one (2008) was not held due to hostility among the indigenous communities. The Plaintiff’s claims of a culturally relevant grazing land are supported by Articles 40, 63, 69, and 71 of the Constitution 2010.¹¹¹ These articles are a mix of property rights and environmental rights, specifically those protecting natural resources.¹¹²

¹⁰⁷ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

¹⁰⁸ *ibid.* Of particular note here is the range of indigenous communities that participated in the lawsuit.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid* 2.

¹¹¹ Constitution of Kenya 2010 (n 30) Articles 40,63,69,71.

¹¹² *ibid.*

The Plaintiffs also claimed land protection under the Banjul Charter, ICCPR, ICESCR, ILO Convention C169, and IFC Performance Standards 1, 7, and 8.¹¹³ Each of these instruments speak to the rights of indigenous communities to maintain control over their land, both as rights to property and cultural preservation.¹¹⁴ The Banjul Charter, ICCPR, ICESCR, inter alia, oblige Kenya to respect, protect, and fulfill the relevant property and cultural rights. The IFC Performance Standards encourage the responsibility of corporations, in this case, the corporate stakeholders of the Lake Turkana Wind Power project.¹¹⁵

The Trust Land Act 2009, originally envisioned by Section 117 of the Constitution of Kenya 1963, provides a set of instructions for trust land management.¹¹⁶ Article 13 details the ways in which a council, holding an area of land in trust, may set the land apart for use and occupation, as in the case of the Lake Turkana Wind Power project: “by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.”¹¹⁷ According to the Plaintiff, the improper adherence to Article 13 is what failed to constitute free prior and informed consent. Article 13 provides specific instructions for notification (the prior and informed requirements of free prior and informed consent): the informing of a Divisional Board Chairman, a time line, required board meetings, a requirement to bring the proposal to the people of the concerned area, and informing said people of the date and time of the meeting.¹¹⁸ The consent requirement is also included in the same article: the board shall hear all persons and

¹¹³ African Charter on Human and People’s Rights (Banjul Charter), Organization of African Unity (OAU), (adopted 27 June 1981, entered into Force 21 October 1986) (n 36); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 42); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 43); ‘ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (n 33); International Finance Corporation, ‘Performance Standard 7: Indigenous Peoples’ (n 81); International Finance Corporation, ‘Performance Standard 8: Cultural Heritage’ (n 81).

¹¹⁴ ‘United Nations Treaty Collection - ICESCR’; ‘United Nations Treaty Collection - ICCPR’; ‘ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (n 33); International Finance Corporation, ‘Performance Standard 7: Indigenous Peoples’ (n 81); International Finance Corporation, ‘Performance Standard 8: Cultural Heritage’ (n 81).

¹¹⁵ International Finance Corporation, ‘Performance Standard 7: Indigenous Peoples’ (n 81); International Finance Corporation, ‘Performance Standard 8: Cultural Heritage’ (n 81).

¹¹⁶ The Constitution of Kenya, Defunct (n 77) Section 117; Trust Land Act.

¹¹⁷ Trust Land Act Article 13.

¹¹⁸ *ibid* Article 13(1c).

representatives of the affected communities and subsequently submit the recommendation to a council.¹¹⁹ These are the clearly defined measures, dictated by specific instruments, with a framework for consultation. The Plaintiffs take issue with the prior, informed, and consent elements of free prior and informed consent, as they claim it did not follow the steps of Article 13 of Trust Land Act 2009. These issues include failure to be represented at various steps, no formation of a Divisional Board, and the inability to access the *Gazette* (local newspaper) due to political turmoil at the time.¹²⁰

Aside from the methods used to reallocate the land, the Plaintiffs take issue with the changing number of acres and length of lease. Different documentation accounts for 100,000 acres, 150,000 acres, and 75,000 acres at different points while the wind farm plan requires only 40,000 acres. The timeframe for the project spans from 27 years to 99 years, depending on the document.¹²¹ These are all failures of consultation.

The economic and social hardships induced as a result of the failure to adhere to the human rights instruments and in particular free prior and informed consent, are as follows: failure to access seasonal pastures, jeopardising the pastoral way of life, inhibiting the survival of livestock and livelihood, blocking the land corridor to Lake Turkana, inhibiting cultural activities such as Galgulame, failure to compensate, failure to complete proper environment and social impact assessments, and potential dereliction of the land.¹²²

Procedurally, the Defendants reiterated that every measure and precaution was taken to ensure free prior and informed consent, and that every human rights concern surrounding cultural preservation and property rights was addressed in advance of construction.¹²³ In summary, the Defendants claimed:

1. Extensive public consultation in advance of construction (Consultation)
2. Three Environmental and Social Impact Assessments (Framing/Instruments)

¹¹⁹ *ibid* 13(2b,c).

¹²⁰ Trusts of Land Act 2012; *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2). The council may pass the Board's recommendation by a majority. In the case that the Divisional Board does not recommend a new use and occupation of the land, the council requires a three-quarters majority to pass. In the case that it passes the council, the decision must be published in The Gazette and compensation will then be paid.

¹²¹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

¹²² *ibid* Section 32.

¹²³ *ibid* Respondents' Defence.

3. The land title ownership was attained in a constitutional manner (Instruments)
4. Independent bodies completed assessments.¹²⁴ (Consultation/Instruments)

The Plaintiff's claim regarding the area of land needed for the project was addressed as well. According to the Defence, 40,000 acres were used for the construction of wind turbines. The additional 110,000 acres were considered a buffer zone to prevent any commercial development projects from being built that could inhibit wind flow. These acres were not to be fenced off and would still allow for unlimited access for grazing and pastoral community migration, including access to Lake Turkana. Even the initial 40,000 acres would not be blocked off in its entirety and only specific buildings would be enclosed by fencing. The corridor to Lake Turkana would house small community development projects including schools, hospitals, and banking facilities but not inhibit passage. As a point of framing, the Plaintiffs seemed to understand the results of these community development projects and were still pursuing legal action as a result of the human rights violations. This is to say, that potential contributions to the progressive realisation of the rights to health and education, by way of a commercial development project, were not considered as vital (to the Plaintiffs in this case) as the other human rights claims regarding culture, land, and free prior and informed consent. It is difficult to discern from the case whether the Plaintiffs were admitting to a hierarchy of rights or saw achieving community development as sufficiently separate from human rights obligations, or a third indeterminable reason.

The most relevant rebuttal to the Plaintiff addresses the problematic notion of community (as mentioned above in reference to the Constitution 2010). This problem resulted from the Defence's (alleged) insufficient understanding of the makeup of the local communities. As the consultation measures indicate, indigenous communities were consulted in advance of the project, but due to the pastoral nature and diversity of these communities, some groups were not consulted. In a letter incorporated into the Defence's response, 14 other indigenous community leaders claim that the Plaintiffs are incorrect in many of their claims:

1. The Plaintiffs have not been appointed as representatives of the Laisamis Constituency and Karare Ward in Marsabit County (Instrument/Consultation)

¹²⁴ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2); Trust Land Act; Constitution of Kenya 2010 (n 30); *Aldwych International* (n 1); *QBIS* (n 6); 'Kenya' (n 4).

2. It is the cultural elders, in consultation with the other indigenous leaders that determine the migration patterns. It is not a unilateral decision by each individual community as the initial claims imply (Consultation)
3. Lake Turkana Wind Power project followed all processes and procedures for acquiring the land for the said use (Instruments)
4. The [Galgulame] ceremony has not taken place for 50 years and it is held in a different location from the one reported by the Plaintiff (Consultation)
5. “Yes, the land is not privately owned by an individual but commercial. However, try to get a clear definition of the term community that you are fond [of] using. To our understanding the community is a group of people living in one location with the same common goals, problems and aspirations. The whole of Laisamis Constituency is not one community.”¹²⁵ (Framing/Consultation)

According to the Defence, as a matter of consultation, the drafters of this letter had no issue with the Lake Turkana Wind Power project but do have issues with the Plaintiff and believe their purpose in this suit are for individual benefits due to politics and political realignment of the indigenous communities.

The problematic nature of identifying the various indigenous populations as a single community was addressed directly; the Defence cited this letter in their responses which contradicted many of the Plaintiffs’ original claims, particularly the ones regarding free prior and informed consent. A community with a single identity is a rarity especially with the complex cultural interactions between the indigenous groups in Marsabit. It is doubly rare for a single individual, or even a set of individuals to appropriately represent multiple conflicting indigenous communities. The letter attached to the Defence’s response is fingerprinted and signed by 14 representatives from 4 different indigenous groups, spanning the local area.¹²⁶ The duty bearer, to attain free prior and informed consent, according to international law, was the government; in addition, the government was responsible for protecting the property rights and cultural human

¹²⁵ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2) This quote is taken directly from the Respondent’s Defence and is included (as opposed to summarized) as not to misconstrue any local meanings.

¹²⁶ *ibid* Defence’s Response 13-14.

rights of each of the indigenous groups.¹²⁷ The duty of free prior and informed consent was then assigned by the bearer to the Lake Turkana Wind Power project according to the IFC Standards.¹²⁸ The Defence claims that both the primary and secondary duty bearers fulfilled their obligations.¹²⁹

The Defence twice emphasised the importance of Vision 2030 as a sustainable development initiative and the Lake Turkana Wind Power project as a contributor to Vision 2030's achievement.¹³⁰ However, the judgement also acknowledges the corresponding human rights concerns, and refers to ancestral and cultural rights, emphasising the Plaintiff's claim that these may not have been respected or protected.¹³¹ After ordering additional (and inconclusive) site visits, the judge decided to recommend an out of court resolution and return the case to Marsabit County. The judge believed there to be too many political undertones and disputes over the facts. However, the judge recognised the Trust Land Act 2009 in combination with the Constitution of Kenya 1963, thereby affirming the need to respect, protect, and fulfill the right to property and land in cases where it is held in trust:

It is, however, clear that where land is set apart in accordance with Section 117 of the defunct Constitution of Kenya, rights, interest or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under customary [practice] are recognized and although they are extinguished by the setting apart of the land in Question, prompt payment of full Compensation shall be paid to any resident who:

- (a) under the African customary law for the time being in force and applicable to the land was a resident.

¹²⁷ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32); ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107). This is regardless of the fact that Kenya is not party to these instruments.

¹²⁸ ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32); International Finance Corporation, 'Performance Standard 7: Indigenous Peoples' (n 81); International Finance Corporation, 'Performance Standard 8: Cultural Heritage' (n 81) 8.

¹²⁹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2) Defence's Response.

¹³⁰ *ibid* 9,40.; 'Kenya Vision 2030' (n 34).

¹³¹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2) 2,viii.

(b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart [of] a resident.¹³²

The judgement went on to reiterate the mandate for the formation of a deciding council (as yet to be formed at the time of writing this thesis): the council is not permitted to contain any members of the Plaintiff or Defence teams. In the meantime, the judgement required the Defendants to permit access to Lake Turkana for all indigenous communities in the area and to maintain ownership of only 87,500 acres until the case was decided.¹³³ The court's decision to return the claim to the most local level includes mentions of both rights (in the case of the Trust Land Act 2009) and community development (in the case of Vision 2030) as deciding factors but fails to draw any strong connections between them.¹³⁴ Resting on precedent, the judge ruled "The correct approach in dealing with an application for an injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each sides propositions."¹³⁵ The judge believed that a localised resolution, by the County Assembly of Marsabit, would better recognise and understand the political overtones and disputed facts.

The importance of this case for this thesis is not in the outcome, but in the treatment of human rights and sustainable development within the language of the case. Not a single mention of sustainable development nor the SDGs exists in the arguments or judgement of the case. Vision 2030 was mentioned by the Defence as an important piece of policy and Lake Turkana Wind Power project qualified as an important manifestation of said policy, according to national and international labeling systems.¹³⁶ Human rights, conversely, was a centrepiece of the Plaintiff's claims, the Defence's responses, and the judge's ruling.¹³⁷ In the judgement, human rights and sustainable development are considered distinct and yet, both national priorities. Ultimately, the judge framed the case using both community development and human rights, independently of one another. He did not go so far as to draw connections between the two, regardless of the fact that

¹³² *ibid* Judgement 96.b.

¹³³ *ibid* 109.

¹³⁴ *ibid* Judgement; Trust Land Act; 'Kenya Vision 2030' (n 34).

¹³⁵ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2) 105.

¹³⁶ 'CDM: Lake Turkana 310 MW Wind Power Project' (n 83); 'Kenya Vision 2030' (n 34).

¹³⁷ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

this connection is vital to the understanding of stakeholder relations at Lake Turkana Wind Power project.

In addition to muddying the waters with regards to human rights and sustainable development, the inclusion of *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* as part of this case study is meant to highlight the complex relationships between stakeholders, regardless of the outcome of the court case. It highlights that there are conflicts between a select number of the indigenous community members and the corporate stakeholders. Simultaneously, the corporate stakeholders have compatible relations with members of select other indigenous communities. The case study also serves to clarify the approaches to human rights and development (community and commercial) by different stakeholders, namely as a result of their actions rather than dispositions. The conflict in the court case seems to be a failure of consultation, however, based on the indigenous communities that sided with the Defence, the stakeholder relations in the region are far more complex.

Consultation: Community Engagement and Feedback Mechanisms

Stakeholder relations in this case study are informed by framing, instruments, and robust consultation programming. The Lake Turkana Wind Power project continuously published documents, photographs and maps that aim to prove that the corporate stakeholder both protected human rights and used sustainable development to do so.¹³⁸ Local media publications have differing views on the successes and failures on human rights in the region, resulting from the windfarm.¹³⁹ Framing is not a factor of interest to these publications and the attempts to protect communities could have used rights or development-based approaches.

The Lake Turkana Wind Power project has produced six documents that emphasise the commitment to the community.¹⁴⁰ This commitment has been spearheaded by Lake Turkana Wind

¹³⁸ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 8).

¹³⁹ Deutsche Welle (www.dw.com), 'Kenya's Lake Turkana Wind Park Goes on the Grid | DW | 13.03.2019' (DW.COM) <<https://www.dw.com/en/kenyas-lake-turkana-wind-park-goes-on-the-grid/av-47886815>> accessed 19 May 2019; 'Lake Turkana Wind Farm Opens up Dry Marsabit' (n 1); 'Mass Negativity Dimming Shine of Africa's Largest Wind Farm' (n 18).

¹⁴⁰ 'Sarima Village Resettlement Process Information Document' (Lake Turkana Wind Power 2017); African Development Bank, 'SUMMARY OF THE SIRIMA VILLAGE RESETTLEMENT ACTION PLAN' (Lake Turkana Wind Power 2015); Lake Turkana Wind Power (n 1); 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 8); 'VIDEOS – Lake Turkana Wind Power' <<https://ltwp.co.ke/videos/>> accessed 19 May 2019; 'FEEDBACK

Power project's corporate social responsibility foundation, Winds of Change.¹⁴¹ Winds of Change committed 1 million EUR for 2015 in four categories: education, health, water, and community.¹⁴² The specific goals were to improve literacy rates, increase access to potable water, reduce the distance to the nearest water source, reduce infant mortality rates, address HIV/AIDS prevalence, increase immunisation, improve local roads, support electricity access for schools and health centres, increase household income, and enhance food security.¹⁴³ Much the same as in the impact assessment report, many of these goals are self-serving to the wind farm and the financial backers, in addition to having community development benefits. Winds of Change uses a community development framing, based on the four categories of their philanthropic goals. This approach to community development would be in line with Lake Turkana Wind Power Ltd's approach to commercial development (as Winds of Change is their philanthropic and advocacy arm), focusing primarily on infrastructure, health, and education.

These documents detail different previous and ongoing methods of community engagement, a subcategory of consultation. The Sarima Village Resettlement Action Plan was probably the most ambitious community partnership project.¹⁴⁴ According to the African Development Bank, during the environmental and social impact assessment, the Lake Turkana Wind Power project had extensive meetings and discussions with the Sarima community.¹⁴⁵ This specific subset of the local indigenous community had established a permanent village directly adjacent to a planned commercial development site. There were a number of health and safety concerns which, once resolved, helped both sides to arrive at the resettlement agreement. Construction, traffic, dust, and noise would all have contributed to unintentional hardships for the community and their livestock. This consultation process started in 2012, in advance of

MECHANISM – Lake Turkana Wind Power' <<https://ltwp.co.ke/feedback-mechanism/>> accessed 18 May 2019. It ought to be noted that Sarima is continuously spelled incorrectly in this plan. It is spelled Sirima. This complaint is registered as part of the plaintiff's case in Mohamud V. Lake Turkana.

¹⁴¹ Lake Turkana Wind Power (n 1).

¹⁴² Pamela Cookson, Jessica Kuna and Emily Golla, 'Benefits of Low Emission Development Strategies' (LEDs Global Partnership, USAID 2017) <<https://ltwp.co.ke/newsite/wp-content/uploads/20170203-Kenya-Benefits-Case-Study-FINAL.pdf>>.

¹⁴³ *ibid* 6–8.

¹⁴⁴ 'Sarima Village Resettlement Process Information Document' (n 140).

¹⁴⁵ African Development Bank (n 140). It ought to be noted that Sarima is continuously spelled incorrectly in this plan. It is spelled Sirima. This complaint is registered as part of the plaintiff's case in Mohamud V. Lake Turkana. The judgement as part of Mohamud v Lake Turkana also includes the spelling as Serima.

construction.¹⁴⁶ It involved a series of community member interviews and profiles regarding household structure, literacy status, cultural ceremonies, occupation, community wealth, access to water, food, health and sanitation, security, conditions, and vulnerable groups.¹⁴⁷ This research also included a full legal analysis. However, this analysis was purely focused on minimum legal requirements for relocation and did not touch human rights or rights-based national laws.¹⁴⁸

After a variety of negotiations and numerous changes to the number of resettled dwellings and persons, Lake Turkana Wind Power Ltd realised that the migratory nature of many of the Sarima people continuously changed the number of people that they anticipated for their relocation plans. For this reason, Lake Turkana Wind Power Ltd amended their plans to allow for grazing in and around the turbines, mitigating a significant loss of land, and when possible, avoiding all hindrance to the Sarima peoples' cultural way of life. The settlement relocation still occurred and according to Lake Turkana Wind Power Ltd, was not a major inconvenience for the community, as relocation was part of their culture and lifestyle.¹⁴⁹ Even so, Lake Turkana Wind Power Ltd supported this relocation logistically and financially.¹⁵⁰

The African Development Bank outlined the positive impacts, negative impacts, mitigation measures, and organisational responsibilities of the relocation process. These impacts and responsibilities resulted in a list of community engagement projects:

- a) Prioritise employment for the local community;
- b) Compensation to be paid promptly;
- c) Project to involve community members in the selection of the relocation area;
- d) Project to build a shade for the elders;
- e) Project to pay the community cash for their salvaged materials;
- f) Project to build a school class room;
- g) Project to assist with water provision;
- h) Project to assist with health facility.¹⁵¹

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid* 11,13,14.

¹⁴⁹ 'Sarima Village Resettlement Process Information Document' (n 140).

¹⁵⁰ *ibid*; African Development Bank (n 140).

¹⁵¹ African Development Bank (n 140) 6–7.

It should be noted that these were all specific asks by the community and nearly all of them are requests for community development assistance, using community development language, and not framed using human rights (although the asks for employment, safety, water, education, and health could have potentially used a rights framing). With a signed memorandum of understanding, Lake Turkana Wind Power Ltd started the relocation process and has continued to report on the successes and needs for improvement.¹⁵² In the reporting process, there was one mention of human rights: “The RAP (Resettlement Action Plan) objective was to reflect the MoU (Memorandum of Understanding) commitments by providing an implementation roadmap to ensure that the resettlement process fully respected the dignity, human rights, economies, and cultures of the Sarima community.”¹⁵³ There are no other references to human rights in the consultation mechanisms and reporting. However, there are numerous references to commercial development projects.

Two additional resettlement processes were put into effect and then expanded to the entirety of the Lake Turkana Wind Power project: Feedback Mechanisms and Public Consultation.¹⁵⁴ Feedback Mechanisms were set up by internet, mail, or phone and allowed for grievances to be filed. The definition of grievance, according to the Lake Turkana Wind Power project website is “typically a complaint (is) about something that you believe to be wrong or unfair. By submitting a grievance, you can express your concern or dissatisfaction if you believe that Lake Turkana Wind Power project (or its contractors) has treated you (or anyone else) unfairly or unjustly.”¹⁵⁵ Grievance mechanisms exist in international human rights agreements and provide a place to attempt a remedy before legal action may be taken.¹⁵⁶ The Lake Turkana Wind Power project went through an expensive and lengthy process to engage the community before, during, and after the wind farm was constructed.¹⁵⁷ A formal grievance mechanism, built out of the

¹⁵² ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 8).

¹⁵³ ‘Sarima Village Resettlement Process Information Document’ (n 140) 2.

¹⁵⁴ ‘FEEDBACK MECHANISM – Lake Turkana Wind Power’ (n 140); ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 8).

¹⁵⁵ ‘FEEDBACK MECHANISM – Lake Turkana Wind Power’ (n 140).

¹⁵⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 43); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 32).

¹⁵⁷ ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 8).

comprehensive research, allowed corporate stakeholders such as Lake Turkana Wind Power Ltd to address problems quickly and efficiently, while remaining out of the public eye.

The second resettlement process involved public consultation and engagement. The first step in this process was publishing a map of the wind turbine locations, other administrative and technical buildings, and commercial development projects in the affected areas.¹⁵⁸ Awareness was key for the commercial development project, as the publications gave local communities the knowledge they needed in order to develop in concert with the wind farm. This information included visual representations, brochures, hazard signage, site displays, press, interviews, surveys, public meetings with community leaders and other local stakeholders including NGOs, and open site days.¹⁵⁹ There is a constant refreshing of these processes to make sure the most vulnerable subgroups are taken care of. A spokesperson for the Sarima community shared, “We are appreciating the effort of Lake Turkana Wind Power project because our lives have been transformed in many different ways. We are looking forward to support the project and stand with it because the fruits we are getting are much juicy too. The state of peace is positive by now, people are integrating and living together. Our happiness is harmonious existence!”¹⁶⁰

Much the same as the other case studies in this thesis, there were negative stakeholder responses to the relocation settlement and the commercial development project. Over time, it became clear to the various stakeholders that the ill-defined notion of community had caused extensive human rights and community development concerns in the Lake Turkana region. The wide ranging and diverse indigenous communities in the region were repeatedly treated as a single entity by Lake Turkana Wind Power Ltd. This approach to indigeneity failed to recognise potential differences, and in some cases, competing interests, between communities. The groups of indigenous peoples that brought the court case against Lake Turkana Wind Power Ltd formed an action group, the Sarima Indigenous Peoples’ Land Forum.¹⁶¹ They continued to protest the legal claims that Lake Turkana Wind Power Ltd had to the property in question. They also organised community meetings, protests to block roads, and continuously spoke out against the relocation of

¹⁵⁸ ‘Community Projects Map – Lake Turkana Wind Power’ <<https://ltwp.co.ke/community-projects-map/>> accessed 29 January 2020.

¹⁵⁹ ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 8); ‘Community Projects Map – Lake Turkana Wind Power’ (n 158).

¹⁶⁰ ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 8).

¹⁶¹ ‘Support Our Demands – SIPLF’ <<http://siplf.org/support-our-demands/>> accessed 2 February 2019.

the Sarima people.¹⁶² Even under the single Sarima title, people from the same community had differing responses and opinions of the wind farm, leading to additional concerns over the resettlement operation.

On top of the proposed illegal land acquisition, the slower speed at which the project was moving was said to have caused social problems in the resettled Sarima village. The Danwatch report from the Business & Human Rights Resource Centre summarised the community outrage:

- 1Most communities approve of the wind power project, but claims of no public consultations...have been raised...¹⁶³

Again, the lack of sufficient consultation on the part of the corporate stakeholder led to both dispositions and actions that were based on an ill-defined notion of community. There are extensive reports of public and private consultations in advance of construction and land use allotment. However, the reports may have been insufficient and lacked the depth of consultation required of the diverse indigenous communities with conflicting opinions on the wind farm and resettlement.

- 2 Prostitution, violence and alcoholism have now come to the resettled community Sarima, because of expectations of jobs, which the project has not been able to fulfill...¹⁶⁴

A conflict of both instruments and consultation, there was a change in the timeline which reflected a lower number of jobs for the Sarima community than was originally promised. However, the jobs were allocated as they became available.

- 3 The consortium does not recognize 3 out of 4 tribes as indigenous people, and therefore they are not given rights as such in the project. The tribes in question... are recognized...by The African Commission of Human and Peoples Rights...¹⁶⁵

¹⁶² 'Background – SIPLF' <<http://siplf.org/background/>> accessed 2 February 2019. To note, the organization uses the Samira, not the Simira title for the organization. The purpose is unclear.

¹⁶³ 'Kenya' (n 4).

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

Again, these are both instrument and consultation conflicts. All four tribes were recognised as indigenous peoples and therefore, rightsholders of both cultural and property rights. Infighting and political instability within the communities have caused certain factions to speak out and claim a failure of free prior and informed consent, as well as other human rights violations.

- 4 Experts in IFC Standards... say... that the wind power project is not in compliance with...IFC Performance Standards...¹⁶⁶

The IFC Standards as mentioned in *Mohamud v Lake Turkana Wind Power Ltd*, specifically focused on Standard 7, Indigenous Peoples and Standard 8, Cultural Heritage. These are corporate social responsibility standards, not human rights obligations, but in this instance are used as a commercial development tool with community development framing.¹⁶⁷

Community engagement surrounding the Lake Turkana Wind Power project was just extensive enough to build sustainable development programming, but only for a majority of the indigenous communities. The social and economic results, namely education, work, and health are contested because of the methods of achievement, however, the majority of the community members seem to have been satisfied with the Lake Turkana Wind Power project's community engagement, and corresponding actions taken therein. Sustainable development and human rights were both contributors, albeit in different ways, to partially successful community engagement programming for the Lake Turkana Wind Power project.

Conclusion: Community, Sustainable Development, Stakeholder Relations, and Human Rights

The complexities surrounding the Lake Turkana Wind Power project rested on (1) the poorly defined notions of community, namely a failure by the corporate stakeholders to understand the breadth of the indigenous peoples in the area and their conflicting needs, and (2) the potential

¹⁶⁶ *ibid.*

¹⁶⁷ International Finance Corporation, 'Performance Standard 7: Indigenous Peoples' (n 81); International Finance Corporation, 'Performance Standard 8: Cultural Heritage' (n 81); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

for human rights and sustainable development to be mutually reinforcing, as in the resettlement plans and court case, but they continuously failed to reinforce each other.¹⁶⁸ The framing, instruments, and consultation measures surrounding the Lake Turkana Wind Power commercial development project helped to identify the approaches (dispositions and actions) taken by each of the stakeholders.

From a corporate stakeholder perspective, a disposition toward community development drove the responses to the Plaintiffs in *Mohamud v Lake Turkana Wind Power Ltd*, and the resettlement plans for the local communities. The corporate actions were in line with their dispositions; all except for the impact assessment's recommendation for additional research regarding the indigenous communities. From a governmental perspective, the time period of the case study required a push toward sustainable community development, with a focus on Vision 2030. *Mohamud v Lake Turkana Wind Power Ltd* did not ignore the notion of human rights, but the judgement failed to take a rights-based framing approach. The indigenous stakeholders took on a range of approaches to rights and community development depending on the specific tribes and members. Certain subgroups of the community used a community development approach, particularly during Lake Turkana Wind Power Ltd's consultation research. In *Mohamud v Lake Turkana Wind Power Ltd*, the Plaintiffs used a human rights framing and a human rights disposition, however, their corresponding actions were difficult to pinpoint after the judgement was handed down. The differing approaches to stakeholder relations within the indigenous communities led to the majority of the conflicts between stakeholders.

The problematic nature of the term community arises in a range of instruments including the Constitution of Kenya 2010, the impact assessment report, and *Mohamud v Lake Turkana Wind Power Ltd*. In relation to each of these instruments, the corporate and governmental stakeholders failed to recognise (1) the pastoral nature of the indigenous peoples in the area and (2) that the size and nature of the community was constantly in flux. The consultation measures illustrated the corporate stakeholders' disposition toward a successful resettlement, meeting all the social, economic, and cultural needs of the community. However, the compatibility of approaches to community development, in this instance, were not fully realised.

¹⁶⁸ Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 Human Rights Quarterly 755; African Development Bank (n 140); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 2).

Throughout the case study, human rights and community development framings failed to reinforce each other. The impact assessment report had the potential to fully incorporate both, but relied on an SDG-oriented framework, falling short of recognising the potential for human rights abuses and violations. It is possible that the corporate stakeholders set human rights as the framing mandate for the consultation measures, thereby leaving the impact assessment (as developed by a third-party consultant) with a community development framing. Even still, the consultation measures focused on achieving concrete community development measures, with implications for progressively realising the rights to education, land, and health.

The complexities of human rights and sustainable development throughout the case study illustrate a set of stakeholder relations and approaches to human rights and development (community and commercial) that are useful to this thesis. The complexity of the case study does not immediately present concrete solutions to the conflicting dispositions and actions described above. However, the human rights and community development successes and failures surrounding the Lake Turkana Wind Power project contribute to the larger narrative of this thesis: one of three case studies that aim to tease out the relationship between stakeholder approaches to rights and development (community and commercial), and the concrete ability to respect, protect, and fulfill human rights.

CHAPTER V

The Okikendawt Hydroelectric Power Plant, Dokis First Nation, Canada

This third case study is structurally different from the previous two. The order of events, relations between stakeholders, and types of consultation measures are fundamentally different from the Lake Turkana Wind Power project and the Phulbari Coal Mine. This chapter pays special attention to the multiple stakeholder roles of the indigenous community. In the previous two case studies, these roles were assumed by the corporate and government stakeholders. The indigenous community, in this commercial development context, was personally responsible for selecting many of the other stakeholders, immediately setting a precedent that is unique in this thesis. This precedent contributes significantly to the indigenous and corporate stakeholder approaches to both human rights and development (community and commercial).

The Okikendawt Hydroelectric Power Plant is a sustainable development initiative spearheaded by the Dokis First Nation of Ontario.¹ The Dokis Nation was the main developer, partial owner, and the primary decision maker for the entirety of the project.² The Dokis Nation used an education-first policy to select the other stakeholders and partners for the project.³ As a result of this, there is a blurring of the lines between the community development and commercial development aspects of the project. Following a number of years of discussion and education, a limited partnership was officially formed in 2009. Construction began in 2013 and ended in 2016.⁴ The circumstances surrounding Okikendawt Hydroelectric Power Plant allowed for near total agreement among stakeholders over the framing of the project as well as the consultative measures that took place before, during, and after construction.⁵ Instruments played a pivotal role as well but provided more of an historical stage setting that allowed for the specific framing and consultation measures.

¹ Government of Canada; Indigenous and Northern Affairs Canada, 'Dokis First Nation Okikendawt Project' (*Indigenous and Northern Affairs Canada*, 31 March 2016) <www.aadnc-aandc.gc.ca/eng/1459449220161/1459449341752>.

² 'Okikendawt Hydroelectric Power Plant' (*CIMA +*) <www.cima.ca/en/project/okikendawt-hydroelectric-power-plant/>; Government of Canada; Indigenous and Northern Affairs Canada (n 1).

³ *Dokis First Nation Okikendawt Project* <www.youtube.com/watch?v=yhvY2700N5w> accessed 8 February 2020.

⁴ Government of Canada; Indigenous and Northern Affairs Canada (n 1); *Dokis First Nation Okikendawt Project* (n 3).

⁵ *Dokis First Nation Okikendawt Project* (n 3).

This analysis of the Okikendawt Hydroelectric Power Plant's use of framing, instruments, and consultation measures will look at (1) the Dokis people, the decision-making structure, the discursive history, and the purpose of the plant, which goes beyond a financial endeavour, (2) the rights-based and community development-based instruments that were utilised by the stakeholders, (3) the framing and consultation measures used to educate and engage the community as well as commercial developers, (4) the impact assessment report, (5) alternative consultation measures and stakeholder collaborations, and (6) results from the project and future models for indigenous-led development (community and commercial).

The stakeholders in this case study address community development by maintaining dispositions and actions that assist in respecting, protecting, and fulfilling human rights obligations. The specific human rights touched by Okikendawt Hydroelectric Power Plant are the rights to property, land, development, water, indigenous rights and cultural rights.⁶ Each of these are inextricably intertwined with sustainable development initiatives for the Dokis people, and Canada as a whole.⁷ In this case study, rights fulfillment is the backbone of the commercial development project. Human rights, for the stakeholders in the Okikendawt Hydroelectric Power Plant, are both the means and ends of development (community and commercial). This is to say that the Dokis First Nation and other stakeholders seem to believe that contributing to the progressive realisation of their human rights is key to a successful commercial development project. This difference in disposition toward human rights as part of commercial development resulted from a different model of stakeholder relations and contributed to a successful, lucrative, environmentally sustainable, and human rights-focused, commercial development project.

The Dokis First Nation and Their History

The Dokis is a Canadian First Nation, primarily based in northern Ontario. The community is on the French River, southwest of Lake Nipissing and only accessible by a 25 km gravel road.

⁶ Dokis First Nation Land Management Code 2014; Canadian Charter of Rights and Freedoms 1982; Fisheries Act 1985; First Nations Land Management Act 1999; The James Bay Treaty (Treaty No 9) 1905-1906 1929-1930; Robinson Huron Treaty 1850; Canadian Human Rights Act 1985; Ontario Human Rights Code 1990 (Chapter H 19).

⁷ *Dokis First Nation Okikendawt Project* (n 3); Environment and Climate Change Canada, 'Federal Sustainable Development Strategy' (18 June 2018)

<www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html> accessed 8 February 2020.

The First Nation is over 120 km from the nearest urban communities, Sudbury and North Bay.⁸ The community is made of two islands. Okikendawt Island is to the north and houses most of the day-to-day community living while the southern island is used primarily for traditional and cultural activities. In total, the Dokis' land area is 39,000 acres. The tribe has over 1,000 members with 200 of them living year-round on the reserve. The summer months see a significant increase in on-reserve residents. The Dokis are committed to supporting their members both on and off the reserve. They offer health, employment, and administrative services and practice what they call a sustainable lifestyle which emphasises caring for natural resources.⁹

From the beginning of the European invasions into Canada, the Dokis made strategic decisions about land ownership and usage.¹⁰ They did not sell nor license their land for roads or industry and continued to offer their own logging and hunter-gatherer services. While other tribes may have sold or licensed their land to the government or private investors, the Dokis invested in their own community, fiscally and socially.¹¹ When the Robinson Huron Treaty was signed in 1850¹², the Dokis chief at the time promised that the tribe would never surrender to the Crown.¹³ This promise has been a central tenet of the Dokis' decision-making processes, particularly in terms of land management. At the turn of the 19th century, the Dokis sold a portion of their lumber and set up a trust fund overseen by the local government. This fund paid allowances to each member of the tribe. As a whole, the Dokis Nation was considered wealthy, however, the individual members were still living in poverty. The lack of western technology and schools made it more difficult to build their own industries. The first step was developing schools that would teach western industrial techniques, but the reserve's lack of infrastructure (roads in particular) prevented qualified teachers from being procured. This caused tribe members to leave the reserve in search of better education in industry, science, and in particular, medicine. Living in urban areas was more expensive, and many tribe members in the off-reserve group needed to take up external jobs to fund their lifestyles, diminishing the size of the on-reserve community.¹⁴

⁸ 'Dokis First Nation - Homepage' <www.dokis.ca/default.aspx> accessed 9 February 2020.

⁹ *ibid.*

¹⁰ *Dokis History of the First Nation* <www.youtube.com/watch?v=I9rllyioz-Es> accessed 10 February 2020.

¹¹ *ibid.*

¹² Robinson Huron Treaty 1850.

¹³ *Dokis History of the First Nation* (n 10).

¹⁴ *ibid.*

The chief of the Dokis in the 1930s, and again in the 1940s and 1950s, John C Restoule, developed a solution to their diminishing population and lack of modern education. In the 1950s they invested 170,000 CAD of the trust-held funds to build a hydroelectric power line and a road that connected to the nearest highway. This allowed children to attend off-reserve schools while continuing to live with their families. The logging industry boomed and was wholly owned by the Dokis themselves. However, they cut down too many trees too fast, not giving time for new ones to mature. They then expanded their economy by appealing to tourists through new hospitality offerings and a marina. This diversification of industry inspired significant growth across their community and the new job opportunities brought band members back home.¹⁵ Industry growth did not stop there. Many of these industrious philosophies were what paved the way for the Okikendawt Hydroelectric Power Plant and other sustainable development projects.

The Okikendawt Hydroelectric Power Plant is a project that, nearly every step of the way, embodies the Dokis' history of responsibly respecting, protecting, and fulfilling their own rights while achieving environmental and financial sustainability. Their use of framing, instruments, and consultation measures (more below) created a series of dispositions and actions that would eventually lend themselves to compatible stakeholder relations.

Instruments: Human Rights, Sustainability, and Development for First Nations in Canada

Canada's rights-based relationship to First Nations arises from nearly two centuries of treaties, conventions, and verbal agreements.¹⁶ At the time of conceptualising the Okikendawt Hydroelectric Power Plant, the Dokis' rights were protected by a myriad of instruments, which were then codified by local treaties that interpret federal agreements.¹⁷ The First Nations ratify these local treaties through strict community voting guidelines. This is to say that if an agreement is made between the Canadian Government and First Nation representatives at the national level, First Nations will then develop their own relative, localised interpretations.¹⁸ These interpretations

¹⁵ *ibid*; 'Dokis First Nation - Homepage' (n 8).

¹⁶ Indian Act 1985; The James Bay Treaty (Treaty No 9) 1905-1906 1929-1930; Robinson Huron Treaty 1850. Et al.

¹⁷ 'Dokis First Nation, Lands Department, Lands and Estates Department' <<https://centraleastontario.cioc.ca/record/CIR0640>> accessed 17 April 2020; Dokis First Nation, 'Dokis First Nation Land Code Executive Summary' (2013).

¹⁸ Indian Act 1985; First Nations Land Management Act 1999. The Dokis have a clear pattern of collective self-determination: starting with the Robinson Huron Treaty in 1850, continuing into the 1900s with sole ownership of

are then formalised in a local, tribal agreement between band members based on cultural customs, and only come into effect if the band votes in affirmation.¹⁹ The specific guidelines surrounding land, land rights, and rights to natural resources form the core instruments for looking at (sustainable) development within the Dokis band.²⁰ As exemplified by the Dokis, First Nations may embed environmental protections and initiatives into these instruments.²¹ Additionally, they live by cultural and custom-based belief systems that prioritise protection of the natural world.²² Canada's sustainability policy initiatives as well as the Federal Sustainable Development Act 2008 both recognise indigenous communities as "sources of traditional knowledge and their unique understanding of, and connection to, Canada's lands and waters."²³ The analysis in this thesis will be limited to those rights, community development requirements, and sustainability initiatives that are relevant to the Okikendawt Hydroelectric Power Plant.

At a high level, the Canadian human rights instruments that touch indigenous rights are the Canadian Human Rights Act 1985,²⁴ the Canadian Charter of Rights and Freedoms 1982,²⁵ and the Indian Act 1985.²⁶ While these instruments do cover land rights, those will be addressed in much greater detail below as the rights to land and land development are the cornerstone of the Okikendawt Hydroelectric Power Plant's successes. These three instruments help to shape a larger picture of the human rights relationship between First Nations and the Federal Canadian Government. The Canadian Human Rights Act 1985 repeatedly refers to Section 67 (repealed in

roads and industry, and arriving in the early 2000s by way of solidifying their own responsibilities and rights through the Dokis First Nation Land Code. Free prior and informed consent, as laid out in UNDRIP, fails to become a necessary measure in the Dokis' case due to the land ownership structure and requirements for development. This is not indicative of all First Nations or of Canada as a whole.

¹⁹ First Nations Land Management Act 1999 Section II.

²⁰ Fisheries Act 1985; Dokis First Nation (n 17); 'Dokis First Nations Land Management Resource Centre (RC)' (*First Nations Land Management Resource Centre (RC)*) <<https://labrc.com/first-nation/dokis/>> accessed 9 February 2020; Framework Agreement on First Nation Land Management 1996; Dominion Water Power Regulations 1603; Indian Act 1985.

²¹ Federal Sustainable Development Act 2008; Fisheries Act 1985; First Nations Land Management Act 1999.

²² 'Dokis First Nations Land Management Resource Centre (RC)' (n 20); 'New Chief of Dokis Looks to a Bright Future' <<http://anishinabeknews.ca/2016/06/06/new-chief-of-dokis-looks-to-a-bright-future/>> accessed 9 February 2020; *Dokis History of the First Nation* (n 10).

²³ Environment and Climate Change Canada (n 7); Federal Sustainable Development Act 2008; British Columbia Council for International Cooperation, 'Where Canada Stands Volume II: A Sustainable Development Goals Shadow Report' (British Columbia Council for International Cooperation 2018).

²⁴ Canadian Human Rights Act 1985.

²⁵ Canadian Charter of Rights and Freedoms 1982.

²⁶ Indian Act 1985.

2008) which stated that “Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.”²⁷ Section 67 prevented the full realisation of the human rights of indigenous communities, Aboriginal peoples and First Nations by allowing the Indian Act 1985 and other agreements made directly between councils and the federal government to supersede the Canadian Human Rights Act 1985.²⁸ Its repeal in 2008 gave First Nations and other groups access to a complaint mechanism (a form of consultation) for human rights-based discrimination and failures to uphold human rights-based provisions. Additionally, the Canadian Human Rights Act 1985 ensures the continued protections, recognitions, and affirmations of local and national treaties under Article 1(1) of the Aboriginal Rights section.²⁹ Article 1(2) of the same section mandates an interpretation of the Indian Act 1985, and states that “this Act shall be interpreted and applied in a manner that gives due regard to First Nations’ legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.”³⁰ Cultural rights, customary laws and traditions, and the relationship between individual and collective rights all play roles in the history, development, and construction of the Okikendawt Hydroelectric Power Plant.

For the purposes of this case study, the relevant sections of the Canadian Charter of Rights and Freedoms 1982 (1) defines Aboriginal peoples, (2) formally recognises the validity of treaties between First Nations, (3) formally recognises treaties between First Nations and the federal government, and (4) grants indigenous peoples the rights to participate in discussions surrounding the applicability of their treaties.³¹ The Indian Act 1985, at a high level, addresses land ownership on reserves, particularly the rights of the federal government to acquire land owned by First Nations; Article 35(1) claims that,

Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the

²⁷ Canadian Human Rights Act 1985 Section 67.

²⁸ *ibid*; Indian Act 1985.

²⁹ Canadian Human Rights Act 1985 1.1, Aboriginal Rights.

³⁰ *ibid* 1.2, Aboriginal Rights.

³¹ Canadian Charter of Rights and Freedoms 1982 Article 25.

consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.³²

While this Article may set a precedent for the seizing of indigenous lands, this did not occur during the development of the Okikendawt Hydroelectric Power Plant. However, Article 35(1) does draw a larger, and more comprehensive picture of Canadian and indigenous relations.³³ Lastly, the Indian Act 1985 sets out numerous provisions for relationships within bands, between bands and with the federal government.³⁴ Of particular relevance to the Okikendawt Hydroelectric Power Plant, it clarifies ownership of land improvements in Article 22: any improvements made by a landowner on a reserve is not sufficient to affect the ownership.³⁵ There are numerous interrelated mentions of indigenous rights among these instruments, however, the more relevant legal rights in this case study are those related to land development.

On a practical level, the central document for determining the rights and practices of the Dokis people surrounding the Okikendawt Hydroelectric Power Plant is the Dokis First Nation Land Management Code 2014.³⁶ The Dokis First Nation Land Management Code 2014 came into effect a year after construction began on the Okikendawt Hydroelectric Power Plant.³⁷ Even though the dates overlap, the precedents established by the Dokis First Nation Land Management Code 2014 were written, and used in practice, in advance of the Okikendawt Hydroelectric Power Plant. It seems clear that many of the strategies used in developing the Okikendawt Hydroelectric Power Plant were codified in the Dokis First Nation Land Management Code 2014 and are now used as a precedent for indigenous commercial development projects in Canada.³⁸ The Dokis First

³² Indian Act 1985 Article 35.1.

³³ *ibid* 35.1. Canada's relationship with First Nations is as diverse as the First Nations themselves. The tumultuous histories are briefly described throughout this chapter, but the Okikendawt Hydroelectric Power Plant and the Dokis' relationship with the federal government is not indicative of every First Nation in Canada.

³⁴ Indian Act 1985.

³⁵ *ibid* Article 22.

³⁶ Dokis First Nation Land Management Code 2014.

³⁷ *ibid*; Dokis First Nation (n 17); 'Dokis First Nation, Lands Department, Lands and Estates Department' (n 17). Even though the Dokis First Nation Land Code is an instrument, it is described in this section in order to give color to the tribe, their approaches to rights, and their cultural practices. It will be put into context with other instruments, under Instruments, below.

³⁸ Dokis First Nation Land Management Code 2014; Public Works and Government Services Canada, 'Environmental Assessment Screening Report: Okikendawt Hydroelectric Project' (Public Works and Government Services Canada 2011); Elizabeth Ingram, 'Ontario Hydropower Project Wins Sustainability Award' *Hydro Review* (3 December 2014) <www.hydroreview.com/2014/12/03/ontario-hydropower-project-wins-sustainability-award/>;

Nation Land Management Code 2014 uses rights language but does not address sustainability directly. It continuously uses phrases such as “duty to protect and respect the land... and resources”.³⁹ From a rights perspective, the instrument addresses riparian rights,⁴⁰ the acknowledgment of previous Aboriginal and treaty rights,⁴¹ land and resource ownership rights,⁴² the rights to lease and sell land,⁴³ expropriation rights,⁴⁴ residential rights,⁴⁵ the right of self-government,⁴⁶ voting rights,⁴⁷ right to land access,⁴⁸ right to dispute resolutions,⁴⁹ inter alia.⁵⁰ Community consultation is a recurring theme in Dokis history.⁵¹ The Dokis First Nation Land Management Code 2014 requires community consultation on community plans, anything that may affect a heritage site, anything that may affect environmentally sensitive land, environmental assessments, leasing or expropriating land, inter alia.⁵² This notion of community emphasises the collective ownership over the land and requires every member to understand the land-based operations in their community. Sometimes, as with the Okikendawt Hydroelectric Power Plant, the ability to make an informed voting decision requires an education process. This education process using both rights and community development-based framings and a variety of instruments, would be considered a consultative measure at its core (more on consultation measures below).

Land and resource ownership are again based on the collective, or community rights and responsibilities, to care for the land and its natural resources. The Dokis First Nation Land Management Code 2014 emphasises this collective right as one embedded in cultural traditions. It

Business & Human Rights Resource Centre and others, ‘Mapping the Renewable Energy Sector to the Sustainable Development Goals: An Atlas (Consultative Draft)’ (2018).

³⁹ Dokis First Nation Land Management Code 2014 Preamble, Section 63, 78, 132.

⁴⁰ ibid Section 1.hh,kk.

⁴¹ ibid Section 4, 5.

⁴² ibid Preamble, Section 12.

⁴³ ibid Section 100.

⁴⁴ ibid Sections 82-84.

⁴⁵ ibid Section 111.

⁴⁶ ibid Preamble, Sections 1, 110.

⁴⁷ ibid Section 46.

⁴⁸ ibid Section 112.

⁴⁹ ibid Part XI.

⁵⁰ ibid Preamble, Sections 63, 78, 132.

⁵¹ *Dokis First Nation Okikendawt Project* (n 3); *Dokis History of the First Nation* (n 10). Will be addressed in detail under Consultation, below.

⁵² Dokis First Nation Land Management Code 2014 Section 41.

is for this reason that community approval, a step beyond community consultation, is required for any modifications related to heritage sites as well as any initial land use plan.⁵³

The Dokis First Nation Land Management Code 2014 used a series of federal guidelines to clarify and limit the scope of said code; these guidelines are listed in the First Nations Land Management Act 1999.⁵⁴ The First Nations Land Management Act 1999 references the Constitution Act of 1867 and ensures that title and ownership over land by First Nations is not arbitrarily affected.⁵⁵ For this case study, the relevant regulations are those surrounding community development, environmental and wildlife protections, licence granting, trading and selling, and the legal powers to enact new laws regarding land.⁵⁶ A First Nation land management regime that acts in accordance with the First Nations Land Management Act 1999 must adhere to a series of administrative matters, not wholly relevant to this case study except to point out that the Dokis First Nation Land Management Code 2014 is fully adherent.⁵⁷ It fulfilled all of the submission and voting requirements outlined in Articles 6 through 10 of the First Nations Land Management Act 1999, and the Dokis have taken on the Power To Manage rights and responsibilities as outlined in Article 18.⁵⁸ These management rights and responsibilities include ownership, the granting of additional rights and licences, natural resource management, and financial management. These four Powers to Manage provided the Dokis with their unique (among the three case studies) legal protections and responsibilities to fulfill the rights granted to them.⁵⁹

The Okikendawt Hydroelectric Power Plant began with rights as the framing. Community development was only able to occur because of the Dokis' legal rights to the land and the built-in consultation mechanisms. Article 20 of the First Nations Land Management Act 1999, The Power to Enact Laws, doubled down on these rights by allowing the Dokis First Nation Land Management Code 2014 (and other First Nations land codes) to create new laws that would offer licences in relation to the land and to develop, conserve, protect, manage, and possess said land.⁶⁰

⁵³ *ibid* Section 43.

⁵⁴ First Nations Land Management Act 1999; Dokis First Nation Land Management Code 2014. The Dokis First Nation Land Code is described in detail above.

⁵⁵ First Nations Land Management Act 1999 Title To First Nation Land, 5; Consolidation of The Constitution Acts 1867-1982.

⁵⁶ First Nations Land Management Act 1999; 'Dokis First Nations Land Management Resource Centre (RC)' (n 20).

⁵⁷ First Nations Land Management Act 1999; Dokis First Nation Land Management Code 2014.

⁵⁸ Dokis First Nation Land Management Code 2014; First Nations Land Management Act 1999 Sections 6-10, 18.

⁵⁹ Dokis First Nation Land Management Code 2014 Section 18.

⁶⁰ First Nations Land Management Act 1999 Section 20.

Articles 21 and 40 of the First Nations Land Management Act 1999 focus on environmental standards and protections.⁶¹ When the First Nations Land Management Act 1999 comes into force for a First Nation through their own land code (such as the Dokis First Nation Land Management Code 2014) they are required to implement an environmental protection regime.⁶² This includes setting minimum standards for environmental protections as well as punishments for failing to meet said standards. These standards must, at minimum, align with the environmental protection laws of the province. The environmental protection regime, along with the minimum standards, once ratified, are then legally binding on the First Nation for all commercial development projects on owned land, approved, funded by, or undertaken by said First Nation.⁶³ However, any conflict between a First Nation land code, or law and federal environmental regulations, results in the federal regulation prevailing. Additionally, the First Nations Land Management Act 1999's environmental provisions do not extend any rights in relation to migratory birds, endangered species, or fisheries, as is made clear in Article 40.⁶⁴ Since the Okikendawt Hydroelectric Power Plant is a water-based commercial development project, and fisheries are not protected by the First Nations Land Management Act 1999, the Fisheries Act 1985 becomes relevant and is therefore included as part of the impact assessment process, below.⁶⁵ While these interrelated instruments were necessary for the function of the Okikendawt Hydroelectric Power Plant's commercial development, framing and consultation are key to understanding the style of the successful stakeholder relations for the Okikendawt Hydroelectric Power Plant.

Both environmental regulations and sustainable development strategies in Canada reflect the value of First Nation input and suggest formal consultation from indigenous peoples.⁶⁶ It should be noted from the outset, that the timeline of the Okikendawt Hydroelectric Power Plant's development is 2007 to 2016 and therefore, the Sustainable Development Goals (2015) did not

⁶¹ *ibid* Sections 21, 40.

⁶² *ibid* Section 21.

⁶³ 'Dokis First Nations Land Management Resource Centre (RC)' (n 20); First Nations Land Management Act 1999; Dokis First Nation (n 17); Framework Agreement on First Nation Land Management 1996.

⁶⁴ First Nations Land Management Act 1999 Section 40.

⁶⁵ Fisheries Act 1985.

⁶⁶ Indian Act 1985; First Nations Land Management Act 1999; Fisheries Act 1985; Canadian Charter of Rights and Freedoms 1982; Federal Sustainable Development Act 2008.

initially play a framing role in the project.⁶⁷ However, the notion of sustainable development predates the SDGs. Canada's initial sustainable development strategies (using this terminology) harken back to pre-2007, before construction began on the Okikendawt Hydroelectric Power Plant and before the impact assessment report for this project was generated. The 2007–2010 Federal Sustainable Development Strategy is fundamental to understanding the Okikendawt Hydroelectric Power Plant's sustainable development.⁶⁸ The Indian and Northern Affairs Sustainable Development Strategy 2007–2010 from the same period incorporates the respect, protection, and fulfillment of human rights into the long-term vision for sustainable development.⁶⁹ The Canadian Government outlined its own six Sustainable Development Goals in the 2007–2010 agenda.⁷⁰ These were clean air, clean water, reducing greenhouse gas emissions, sustainable development and use of natural resources, sustainable communities, and governance for sustainable development. The Indigenous Affairs Strategy built on these six and then developed eight specific goals for sustainable development that, among other things, touch civil, political, economic, social, and cultural rights, but do not use human rights language, namely:

1. Full consideration of economic viability, social implications, and cultural and environmental values in decision making and policy and program development; (framing/consultation)
2. Open, inclusive and accountable decision making; (consultation)
3. Honouring treaty and fiduciary obligations, as well as land claim, self-government and international agreements; (instruments/consultation)
4. Engagement of interested local communities and organizations when planning and implementing federal programs; (consultation)
5. Respect for diverse cultures and traditional values, as well as the land and its diversity as the foundation for healthy communities; (consultation)

⁶⁷ Indian and Northern Affairs Canada and Affairs Canada, 'Sustainable Development Strategy 2007–2010' (Minister of Public Works and Government Services, Canada 2006). The Millennium Development Goals did not play a role either given that the project was in Canada, and not a developing country.

⁶⁸ *ibid.*

⁶⁹ *ibid.* 29.

⁷⁰ Environment and Climate Change Canada (n 7).

6. Fair and equitable opportunities for First Nations, Inuit, Métis and northern peoples to share in the benefits, risks and drawbacks of development; (consultation/framing)
7. Decisions based on the best available scientific, traditional, and local knowledge; (consultation/framing)
8. Efficient use of natural resources and minimization of pollution in INAC's internal operations.⁷¹ (instruments)

These goals use targets and indicators (much the same as the SDGs) to measure results. Although these goals do not use human rights language, they can clearly be related to the protection and fulfillment of human rights. As mentioned above (Chapter I) the UN Office of the High Commissioner for Human Rights explicitly connects the importance of land rights with economic, social and cultural rights. “Land is a cross-cutting issue that impacts directly on the enjoyment of a number of human rights. For many people, land is a source of livelihood, and is central to economic rights. Land is also often linked to peoples’ identities, and so is tied to social and cultural rights.”⁷² These goals (above) touch land, property, and indigeneity as it relates to community development. Goal 1 (above) generally has the same aims as the International Covenant on Economic, Social and Cultural Rights, respecting and protecting economic and social rights, with the addition of environmental protections.⁷³ Goal 3 explicitly references international instruments as well as land claims, both central to this case and both relating to human rights treaties to which Canada is party.⁷⁴ Goal 4 touches on the idea of localisation and implementing federal programmes (such as the Federal Sustainable Development Strategy) in ways that make strategic sense for individual communities.⁷⁵ Goal 5 focuses on cultural and traditional rights which are protected

⁷¹ Indian and Northern Affairs Canada and Affairs Canada (n 67) 12.

⁷² ‘OHCHR | Land and Human Rights’

<www.ohchr.org/EN/Issues/LandAndHR/Pages/LandandHumanRightsIndex.aspx> accessed 3 January 2021; Office of the United Nations High Commissioner for Human Rights, ‘Land and Human Rights: Standards and Applications’ (2015).

⁷³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁷⁴ *ibid*; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); First Nations Land Management Act 1999; Framework Agreement on First Nation Land Management 1996; Indian Act 1985; Robinson Huron Treaty 1850. These international human rights law covenants and domestic treaties show the relationships between international social and economic rights, and resultantly respecting, protecting, and fulfilling them for First Nation communities.

⁷⁵ Environment and Climate Change Canada (n 7); Federal Sustainable Development Act 2008; Government of Canada, ‘2017–2020 Departmental Sustainable Development Strategy’ (4 October 2017) <[173](http://www.aadnc-</p></div><div data-bbox=)

internationally and nationally.⁷⁶ Goal 6 tackles the inequality of indigenous peoples and nondiscrimination.⁷⁷ Goal 7 ensures indigenous participation in development decisions through knowledge contribution.⁷⁸ These goals, while helping to progressively realise rights, also map onto the SDGs. Having them already in practice (to some extent) is more support for the indigenous Canadian development framework and another clear example of human rights as a bedrock for community development. The range of treaties (national and international) underpinning the goals above, support indigeneity, indigenous participation, indigenous land rights, and indigenous land development, all as ways to respect, protect, and fulfill human rights obligations.

There is only one express mention of rights in the Indian and Northern Affairs Sustainable Development Strategy 2007–2010 and it relates to the land rights agreements that are relevant to the Okikendawt Hydroelectric Power Plant. The Indian and Northern Affairs Sustainable Development Strategy 2007–2010 claims that these types of land agreements that build upon constitutional rights are fundamental for indigenous communities to develop sustainably.⁷⁹ More specifically, it asserts that sustainable development will improve social and economic conditions, in addition to protecting the environment and natural resources.⁸⁰ Thematically, the Indian and Northern Affairs Sustainable Development Strategy 2007–2010 presents a positive feedback loop between sustainable development initiatives and human rights protections and fulfillment.⁸¹ It is an instrument with a dual framing of both rights and community development, which is steeped in consultative measures. This Strategy foretells the Okikendawt Hydroelectric Power Plant's success as it respects, protects, and fulfills rights for all stakeholders.

aandc.gc.ca/eng/1507123239042/1507123348499> accessed 10 February 2020; Indian and Northern Affairs Canada and Affairs Canada (n 67) 10,11,15,33. Six seats on the Sustainable Development Advisory Council are reserved for members of Canada's Aboriginal communities. From a human rights perspective, these Acts and Strategies echo the economic and social rights (above) and the land claims as they relate to human rights according to the OHCHR.

⁷⁶ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP); Office of the United Nations High Commissioner for Human Rights (n 72) 68.

⁷⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (n 74) Article 26; United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 76) Articles 2,8,9,14,15,16,21,22,24,29,46.

⁷⁸ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 76) Article 5.

⁷⁹ Indian and Northern Affairs Canada and Affairs Canada (n 67) 29.

⁸⁰ *ibid* 24, 29.

⁸¹ Indian and Northern Affairs Canada and Affairs Canada (n 67).

The Canadian Sustainable Development Act 2008 incorporates three mentions of Aboriginal communities, two of which require their participation on councils and committees.⁸² The third, and most relevant mention, is Article 5(d) which outlines the principles for developing the sustainable development strategies (above) and the consultation of Aboriginal knowledge based on their unique understanding of Canada's lands and waters.⁸³ The Canadian Sustainable Development Act 2008 sets a precedent for additional policy strategies in partnership with Aboriginal communities, much in the same way that the Canadian Human Rights Act 1985 opened the door to First Nation participation. From a rights perspective, these various land management acts contain few Aboriginal mentions, outside of consultative obligations. While much of Canada's federal sustainable development policy pre-2010 was awareness and education based, the Doki saw sustainable development as a potential for a comprehensive economic, social, cultural, and natural protection plan for both human and environmental rights.⁸⁴

While relevant in the other two case studies, it is important to mention that the United Nations Declaration on the Rights of Indigenous Peoples became international law in 2007 but was not endorsed by Canada until 2010.⁸⁵ Even so, it has since been incorporated into Canadian law as of the writing of this thesis, although it was not at the time of the case study itself.⁸⁶ There are differing claims for why Canada took a lengthy period to endorse the Declaration, however, multiple sources refer to free prior and informed consent as the reason for non-incorporation.⁸⁷

Natural resource extraction by the federal government on indigenous lands would require free prior and informed consent, which the Canadian Government saw as a potential hindrance to commercial development projects. While free prior and informed consent is highly relevant for the previous two case studies, as a result of the deal structure for Okikendawt Hydroelectric Power Plant, it is not nearly as relevant here. As elucidated by the relevant instruments above,

⁸² Federal Sustainable Development Act 2008 8, Amendments not In Force.

⁸³ *ibid* 5.d.

⁸⁴ Indian and Northern Affairs Canada and Affairs Canada (n 67); Doki First Nation Land Management Code 2014.

⁸⁵ Department of Justice Government of Canada, 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada' (12 April 2021) <www.justice.gc.ca/eng/declaration/index.html> accessed 12 June 2021.

⁸⁶ 'Federal Government Introduces UNDRIP Legislation' (*Fasken*, 10 December 2020) <www.fasken.com/en/knowledge/2020/12/9-federal-government-introduces-undrip-legislation> accessed 12 June 2021; Government of Canada (n 85).

⁸⁷ Maham Abedi, 'Why a UN Declaration on Indigenous Rights Has Struggled to Become Canadian Law' (*Global News*, 2 November 2019) <<https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>> accessed 10 February 2020.

international rights protections for the Dokis First Nation during the course of the project were not of primary concern since it was the Dokis themselves (alongside their carefully chosen corporate partners) that were responsible for the completion of the project. This responsibility included the timeline, process, management, and regulatory compliance.

In developing the Okikendawt Hydroelectric Power Plant, the Dokis Nation took full advantage of both the legal rights and community development policies (above). These policies are now used as a model in Canada's current sustainable development strategy.⁸⁸ The SDG Shadow Report 2018 addresses the 2007 project as an exemplar for achieving the 2015 SDGs, noting that it was a project ahead of its time: "the Dokis' Okikendawt project provides a pathway towards reconciliation and decolonization in unison with climate objectives."⁸⁹ Reconciliation and decolonisation refers to improving relationships with the federal Canadian Government, allowing for collective self-determination and realisation of civil, political, economic, social, and cultural rights. The interpretations of the instruments in this case were synonymous across stakeholders. This agreement over policy and law allowed for the framing and consultation measures to continue with near-complete stakeholder agreement.

As a general matter across Canada, from an approach perspective, the Canadian Government proved to utilise dispositions (as described above) that were drastically different from their associated actions.⁹⁰ The above instruments and the dispositions derived therefrom seem to imply a collaborative relationship between the federal government and local First Nations. As the larger scope of Canadian indigenous relations makes clear, this is not the case.⁹¹ However, looking at the Okikendawt Hydroelectric Power Plant project in isolation, the disposition and actions of the federal government aligns with the mix of human rights and community development-centric approaches as described in the instruments above.

⁸⁸ Environment and Climate Change Canada (n 7); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 76); Canada, 'ARCHIVED - Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (29 June 2011) <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 15 April 2020.

⁸⁹ British Columbia Council for International Cooperation (n 23).

⁹⁰ Sophie Woodrooffe, 'Canada Is Being Sued By Indigenous People For 150 Years of Back Rent' (*Vice*, 2 November 2017) <www.vice.com/en_ca/article/wjgg3x/canada-is-being-sued-by-indigenous-people-for-150-years-of-back-rent> accessed 9 February 2020.

⁹¹ 'World Report 2020: Rights Trends in Canada' (*Human Rights Watch*, 13 December 2019) <www.hrw.org/world-report/2020/country-chapters/canada> accessed 12 June 2021.

Framing and Consultation: Community, Education, Construction, and Operation

The framing and consultative measures for the Okikendawt Hydroelectric Power Plant are inextricably intertwined. Due to the ownership and policy standards, the Dokis were able to dictate the framing for all stakeholders and require robust consultative measures. Chief Martin Restoule, the grandson of former Chief John C Restoule, had the idea for the Okikendawt Hydroelectric Power Plant as a way to engage younger generations with community development, fostering security for the Dokis people. At first there was very little interest. Chief Denise Restoule, Martin's wife and later a Chief of the Dokis First Nation, took over the project and continued to emphasise the importance at each community band meeting, putting the onus on the attendees. The land council was in agreement to move forward, but they needed community approval which eventually rose to 97%.⁹² Prior to the First Nation Land Management Act 1999 and the Dokis First Nation Land Management Code 2014, the Dokis spent nearly 8 million CAD attempting to obtain governmental approvals for the project. The First Nation Land Management Act 1999 was instrumental to the success of the project and after it came into effect, the project moved quickly, with far fewer financial commitments.⁹³

The next step was education. The ability for the community to make unilateral commercial development decisions did not preclude an understanding of how sustainable development worked in practice. Before a corporate partner was selected to build the plant, the council hired Lumos Energy from Ottawa to explain the development terminology, specifically surrounding hydroelectricity.⁹⁴ A crash course covering permits, environmental assessments, and other relevant topics gave the council a wide-ranging knowledge base, vital for interviewing and ultimately selecting a company to build the project. Hydromega Services was selected because they “understood the community and understood what their values were”.⁹⁵ Daniel Gillenwater, the project manager for Hydromega affirmed this, saying “We provided the technical expertise, but of course they are the local partner, and they had the knowledge about how to make this project

⁹² ‘New Chief of Dokis Looks to a Bright Future’ (n 22).

⁹³ *Dokis First Nation Okikendawt Project* (n 3); ‘New Chief of Dokis Looks to a Bright Future’ (n 22).

⁹⁴ ‘Okikendawt Hydro Project on the French River Begins Construction’ *Anishinabek News* (27 August 2013) <<http://anishinabeknews.ca/2013/08/27/okikendawt-hydro-project-on-the-french-river-begins-construction/>> accessed 8 February 2020.

⁹⁵ *Dokis First Nation Okikendawt Project* (n 3).

widely accepted through the community.”⁹⁶ The Okikendawt Hydroelectric Power Plant goes beyond traditional consultation in the commercial development sense, and would best be described as a collaborative partnership. This partnership mirrors the dispositions described by the instruments above. There are two prime examples of this collaborative partnership. First, the Dokis First Nation counted the local turtles, which they set as a culturally protected species (among others). Any time a turtle was found near a construction site, all activity would cease until the turtle was moved to a safe distance. The second was setting restrictions around sites that were traditional burial grounds. A secondary bridge was built near a burial ground which was roped off and the Hydromega staff was not permitted to enter the protected area. All accounts report full respect and collaboration between the Dokis First Nation and Hydromega.⁹⁷

Other relevant stakeholders included financing companies, law firms, the Ontario Waterpower Association, Hydro One, the Ontario Ministry of Natural Resources, local municipalities, and the federal departments of Aboriginal Affairs and Northern Development and Public Works and Government Services Canada.⁹⁸ To echo the seemingly flawless relationship and commercial development process, Paul Norris, the President of the Ontario Waterpower Association added, “Building capacity in Aboriginal Communities is of significant importance to our Association and this project is an example of the positive and productive partnerships that are possible in waterpower.”⁹⁹

Chief Denise Restoule inherited the project, and along with the council, set up a trust to administer the profits from Okikendawt Hydroelectric Power Plant which among other things, would be reinvested in economic development, community infrastructure, and membership services.¹⁰⁰ The profits taken in by the Dokis First Nation fostered community development as well. This pipeline of funds from commercial development to community development is unique

⁹⁶ *ibid.*

⁹⁷ *ibid*; Government of Canada; Indigenous and Northern Affairs Canada (n 1); ‘Okikendawt Hydro Project on the French River Begins Construction’ (n 94).

⁹⁸ ‘Construction of Ontarios 10-MW Okikendawt Small Hydropower Project under Way’ (*Hydro Review*, 29 August 2013) <www.hydroreview.com/2013/08/29/construction-of-ontarios-10-mw-okikendawt-small-hydropower-project-under-way/> accessed 8 February 2020; Ingram (n 38); ‘Okikendawt Hydro LP Financing’ (*Stonebridge*) <<https://stonebridge.ca/okikendawt-hydro-lp-2/>> accessed 8 February 2020; ‘Okikendawt Hydro Project on the French River Begins Construction’ (n 94).

⁹⁹ ‘Okikendawt Hydro Project on the French River Begins Construction’ (n 94); ‘Construction of Ontarios 10-MW Okikendawt Small Hydropower Project under Way’ (n 98).

¹⁰⁰ ‘New Chief of Dokis Looks to a Bright Future’ (n 22).

among the three case studies, as those that required the community development (the Dokis) were in control of how the funds were allocated. This as opposed to relying on other stakeholders to decide on the most appropriate forms of community development (and direct the funding) as in the other two case studies. Additionally, Chief Denise claimed that “Dokis was proud to contribute to creating green energy and assisting in climate change while world leaders were discussing this topic and challenged Canadians to recognize the importance of environmental stewardship.”¹⁰¹

While sustainability was important to the Dokis for reasons of climate and biodiversity, additional elements of sustainable development proved to be lucrative. The Okikendawt Hydroelectric Power Plant provided more employment for band members and the council believed the project may help members return to the reserve. The idea of ownership was difficult to reconcile for the Dokis people. The land is something that they believe is shared by all, but Chief Denise believed that, especially for younger generations, Dokis ownership of the Okikendawt Hydroelectric Power Plant would be a point of pride and give them an example of commercial and community development to live up to, build upon, and hopefully surpass.¹⁰²

The two-turbine plant takes advantage of the already flowing water through a man-made channel. It is located adjacent to an already existing Portage Dam. Each day, Okikendawt Hydroelectric Power Plant will produce between 1.3 and 1.5 MW of power. As agreed in a 40-year contract, the facility will sell 100% of its power to the Ontario Power Authority. Ownership of the project is through Okikendawt Hydro LP of which 60% ownership is held by Hydromega Services Inc. and 40% ownership is held by the Dokis First Nation. The funding for the project is provided entirely by local Canadian banks and a group of Canadian pension funds. The Okikendawt Hydroelectric Power Plant brings in up to 4 million CAD in annual revenue. This is above and beyond the government-provided funds. Chief Denise added, “You feel now that you're not restricted to try to run a First Nation on just the funding from the federal government, which is never sufficient.”¹⁰³ For the Dokis First Nation, developing the Okikendawt Hydroelectric Power Plant was more than a traditional construction project. It was the first of its kind and created

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ ‘Construction of Ontario’s 10-MW Okikendawt Small Hydropower Project under Way’ (n 98); ‘Okikendawt Hydro Project on the French River Begins Construction’ (n 94); ‘Okikendawt Hydro LP Financing’ (n 98); Hina Farooqi, ‘Energizing the Nation to Nation Relationship: The Rise of Indigenous Participation in the Energy Industry (York University, Environmental Justice and Sustainability Clinic)’ (19 February 2018) <<https://ejclinic.info.yorku.ca/2018/02/indigenous-participation-in-energy-industry/>> accessed 8 February 2020.

a set of blueprints for their own continued sustainable development and for other First Nations to follow in their footsteps. Through the project, the Dokis were able to develop sustainably, but at the same time respect, protect and fulfill their human rights: self-determined, nationally recognised, and internationally mandated. There is no place that illustrates Okikendawt Hydroelectric Power Plant's relationship between sustainable development and human rights more comprehensively than the impact assessment report (below).¹⁰⁴

From a stakeholder relations perspective, the compatibility between stakeholders is unquestionable. In this case study, the terms of the commercial development project were dictated by the indigenous community, while at the same time, they also acted as a member of the corporate stakeholder team. The rest of the corporate stakeholders, while in the majority in terms of finances, were also assigned the disposition and actions (by the Dokis) that would lead to the most compatible relations. The Dokis First Nation was unilaterally able to oversee both the dispositions and actions of all other primary stakeholders. Additionally, the Dokis' history and familiarity with the necessary and relevant land use instruments allowed them to dictate the requirements for stakeholder relations within a government-sanctioned legal space (land use and ownership) requiring minimal oversight from the Canadian Government. However, there was one step in the commercial development process that required additional federal government relations: the impact assessment report.

Impact Assessment: Sustainable Development, Environmental Regulations, and Human Rights

The impact assessment report for the Okikendawt Hydroelectric Power Plant, fully titled the Environmental Assessment Screening Report, was produced in August 2011 to determine the efficacy of the project.¹⁰⁵ While the report does not use a human rights framing or refer directly to human rights standards, it does assess potential rights violations including social, economic, cultural, civil, and political, in addition to determining adherence to domestic environmental

¹⁰⁴ Public Works and Government Services Canada (n 38).

¹⁰⁵ *ibid.*

policy.¹⁰⁶ The Environmental Assessment Screening Report is broken up into a list of “Valued Ecosystem/Social Components” and was deemed necessary by the Canadian Environmental Assessment Act 2009–2012.¹⁰⁷ The Canadian Environmental Assessment Act 2009–2012 states the responsibilities and procedures for completing an environmental assessment as well as determining the environmental effects.¹⁰⁸ There are three reasons why the Canadian Environmental Assessment Act 2009–2012 deemed the Environmental Assessment Screening Report necessary for the Okikendawt Hydroelectric Power Plant: (1) it is considered a federal project in that the federal government has leased land for partial transmission of a pipeline, (2) Fisheries and Oceans Canada has a regulatory duty under the Fisheries Act 1985 and Indian and Northern Affairs Canada has a regulatory duty under the Dominion Water Power Act 1603, and (3) a provincial environmental assessment was also deemed necessary and therefore combined into a single report in order to eliminate waste.

For the purposes of this case study, a vitally important excerpt of the Environmental Assessment Screening Report addresses the intention of the project. Purpose and framing will be addressed in more detail in the consultation section (below). However, since the Environmental Assessment Screening Report has the only concise and comprehensive articulation of the intention, it is relevant to cite here:

The purpose of the project is to foster economic development for the benefit of the Dokis First Nation by harnessing hydroelectricity from the existing Portage Dam, to be supplied to the Ontario Power Authority through the Feed-In Tariff Program. With success, the Okikendawt hydroelectric project is intended to create long-term sustainable economic and social development for the Dokis First Nation.¹⁰⁹

Sustainable economic and social development, as exemplified by the line items in the Environmental Assessment Screening Report (below) includes specific and comprehensive rights

¹⁰⁶ *ibid.* Human Rights themselves are not, by design, part of the impact assessment, however the environmental impact assessment does reference economic, social and cultural impacts, thereby effectively mapping to the potential impacts onto human rights.

¹⁰⁷ *ibid.*; Canadian Environmental Assessment Act 2009-2012.

¹⁰⁸ Canadian Environmental Assessment Act 2009-2012.

¹⁰⁹ Public Works and Government Services Canada (n 38) 5.

protections. The scope of the assessment includes various factors, as required by Section 16 of the Canadian Environmental Assessment Act 2009–2012.¹¹⁰ These include a list of potential environmental risks, public comments and consultations, technically and economically feasible solutions to any environmental risks, potential health and other socioeconomic risks (including human rights violations), physical and cultural heritage risks, risking land use for traditional purposes by Aboriginal purposes, and alterations to any structure of historical significance.¹¹¹ These are divided into two categories, Valued Ecosystem Components (VEC) and Valued Social Components (VSC).¹¹² The implied economic, social, and cultural rights protections fall under the Valued Social Components.

The Environmental Assessment Screening Report contains a strict consultation process, similar to free prior and informed consent under the United Nations Declaration on the Rights of Indigenous Peoples, however, due to the Dokis' authority over the consultation systems, it proved to be an unnecessary set of guidelines in this case.¹¹³ Attached to the Environmental Assessment Screening Report are support letters from six surrounding First Nations, even some Nations whose land was not disrupted due to the Okikendawt Hydroelectric Power Plant construction.¹¹⁴ This is in addition to the direct consultation with the Dokis Nation. Consultation was also undertaken with federal and provincial agencies. All these consultation letters were attached, and the comments were incorporated into the Environmental Assessment Screening Report.¹¹⁵ The data used to analyse the Valued Ecosystem Components and Valued Social Components included: existing and historical site information, review of project-related activities, appraisal of the environmental setting, temporal and/or special conflict, and professional judgement.

Considering the scientific, governmental, and anecdotal evidence, in addition to the Environmental Assessment Screening Report, it can be concluded that the Okikendawt Hydroelectric Power Plant is a sustainable, environmentally friendly project. This case study will

¹¹⁰ Legislative Services Branch, 'Consolidated Federal Laws of Canada, Canadian Environmental Assessment Act' (6 July 2012) <<https://laws-lois.justice.gc.ca/eng/acts/C-15.2/>> accessed 18 April 2020; Canadian Environmental Assessment Act 2009-2012.

¹¹¹ Canadian Environmental Assessment Act 2009-2012; Public Works and Government Services Canada (n 38).

¹¹² Public Works and Government Services Canada (n 38) 8.

¹¹³ Public Works and Government Services Canada (n 38); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 76).

¹¹⁴ Public Works and Government Services Canada (n 38) 30.

¹¹⁵ *ibid* 27–41.

now transition to focus on a rights-based analysis of the Environmental Assessment Screening Report.

The second section of the Environmental Assessment Screening Report analysis, entitled Aboriginal Community Considerations focuses on possible disruptions to ways of life, potentially violating rights.¹¹⁶ The minor disruptions include temporary disruption to local traffic patterns and temporary closures for recreational land activities such as snowmobiles and parks, neither of which contribute to right violations. The major disruptions are described below.

The human rights that are touched on in the report are social, economic, and cultural: (1) Increased air pollution from construction vehicles may have implications for the right to health.¹¹⁷ (2) Increased water pollution has implications for the rights to health and water.¹¹⁸ (3) Species at risk including turtles, engages with cultural rights.¹¹⁹ (4) Impacts to terrestrial habitats, breeding grounds, and vegetation may impact hunting practices and therefore both economic (right to work) and cultural rights.¹²⁰ (5) Fish habitat and migratory patterns has implications for economic rights including the right to work.¹²¹ (6) Access will be limited to spiritual, ceremonial, cultural, archeological, and burial sites potentially inhibiting cultural rights.¹²² (7) Impacted land resources

¹¹⁶ *ibid* 11–22.

¹¹⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 12(1); Public Works and Government Services Canada (n 38).

¹¹⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 12(1); United Nations Human Rights Office of the High Commissioner, United Nations Human Settlement Programme, and World Health Organization, 'The Right to Water: Fact Sheet No. 35' (2003); Public Works and Government Services Canada (n 38). The right to water is not included in international human rights treaties, but is considered a human right by the United Nations and is linked to human rights laws including sanitation, health, safety, and privacy.

¹¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Articles 18(1), 18(3); Public Works and Government Services Canada (n 38).

¹²⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Articles 6(1), 12(3); Public Works and Government Services Canada (n 38).

¹²¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 6(1); Public Works and Government Services Canada (n 38).

¹²² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 12(3); Public Works and Government Services Canada (n 38).

traditionally used for harvesting has implications for the right to work.¹²³ (8) Limited harvesting of timber in the construction area has implications on the right to work.¹²⁴

The next section of the Environmental Assessment Screening Report looks at these social and economic considerations and either mitigates them or provides technological and economically sound solutions: (1) In the case that construction requires additional housing, staff housing will be constructed and then converted for community use. (2) Traffic flow disruptions, potentially impacting access to school (education) and hospitals (health) will be mitigated by building an alternate access road. (3) The potential negative effect on community character and the enjoyment of property would be mitigated through reinvesting the profits directly into the community. (4) There are no potential employment (economic rights) infringements as the Dokis leadership developed a plan to ensure hunting, fishing, trapping, and gathering practices are not adversely affected. (5) There is no effect on the surrounding labour supply as no bids are being taken from surrounding urban areas. (6) An economic boom in the area will occur as local consulting, legal services, concrete providers, steel trucking, lodging, fuel, and food will all be patronised. (7) There will be no residual effect on the right to health from noise and vibration from construction activities, air quality, public and worker safety, or electric and magnetic fields emitted by transmission lines. Each of these potential rights violations have either been turned into a contribution toward the progressive realisation of rights, particularly economic, or mitigated through alternative plans in collaboration with the Dokis First Nation.¹²⁵ Additionally, some of the remediation solutions to the potential human rights violations contribute directly to community development, independent of the community developments that would be funded with the Dokis' share of profits from the Okikendawt Hydroelectric Power Plant.

The final section of the Environmental Assessment Screening Report claims that the project is not likely to cause any adverse environmental or cumulative effects, and that the monitoring process should continue to ensure that all the mitigation procedures agreed to are implemented and effective.¹²⁶ After reading the Environmental Assessment Screening Report,

¹²³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 6(1); Public Works and Government Services Canada (n 38).

¹²⁴ Public Works and Government Services Canada (n 38); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (n 73) Article 6(1).

¹²⁵ Public Works and Government Services Canada (n 38); Legislative Services Branch (n 110); Canadian Environmental Assessment Act 2009-2012.

¹²⁶ Public Works and Government Services Canada (n 38).

Fisheries and Oceans Canada, Public Works and Government Services Canada, and Aboriginal Affairs and Northern Development Canada, all signed off on the Okikendawt Hydroelectric Power Plant, allowing it to move forward without modifications. As mentioned above, various surrounding First Nation communities were informed about the Okikendawt Hydroelectric Power Plant even though the project would not infringe on their land, and they too supported the project's progression.

While the Environmental Assessment Screening Report is not a rights analysis instrument per se, it very clearly outlines potential rights violations and for each, provides at least one of the following solutions: (1) explaining why the concerns (listed above) are unnecessary, due to already planned solutions, (2) offering an alternative plan so as not to violate rights, and (3) showing how certain practices will assist in progressively realising rights. The Okikendawt Hydroelectric Power Plant is thus a clear example of a sustainable development project that both internally (within the Dokis Nation) and externally (for the federal government and corporate stakeholders) aims to respect, protect, and fulfill human rights as a means to both commercial and community development. The Environmental Assessment Screening Report, as an impact assessment report, is an instrument that incorporates an equitable framing of community development, is a tool to achieve rights, and advocates for consultative measures across stakeholders.

From a stakeholder perspective, the Environmental Assessment Screening Report reiterates the compatible nature of all relevant stakeholder relations in the case study. Even while introducing new secondary stakeholders, the compatible nature still holds. The impact assessment helps to indicate disposition and as described above, the Dokis First Nation had the prerogative to set the disposition for many of the stakeholders. This report continued to support that assertion. While consultation between stakeholders takes on a different model from the previous two case studies, there are new methods of consultation that arise between the Dokis First Nation and the various corporate stakeholders (including Hydromega).

Alternative Consultation: Stakeholder Collaboration and Dynamics

The Okikendawt Hydroelectric Power Plant has been publicly recognised as a commercial development project with overwhelmingly positive results, both for its sustainable nature and for

the structure of the consultation process that was undertaken in respect of it.¹²⁷ This specific case study expands the definition of the term consultation (as defined in Chapter II, as part of the analytical framework) in order to recognise stakeholder collaborations and new dynamics. The Dokis Nation's control of the Okikendawt Hydroelectric Power Plant recognised the need for alternative mechanisms for consultation. This section considers that expanded notion.

The Dokis Nation, Hydromega, various federal agencies, surrounding First Nations, the banks, and lawyers were all in public agreement that the purpose of the project was “to create long-term sustainable economic and social development for the Dokis First Nation.”¹²⁸ As briefly mentioned above, the Okikendawt Hydroelectric Power Plant was preceded by a process of education and consultation all of which underpinned the purpose of the commercial development project, namely supporting long-term and sustainable development for the Dokis First Nation. Achieving this aim, which was considered in Chapters I and II, also had the potential to contribute to the progressive realisation of human rights.

The education programme was developed by Ottawa's Lumos Energy, and they were hired to provide the programming to the Dokis people in advance of the project. Lumos Energy had no financial stake in the project itself, but instead was engaged to teach commercial development processes to the Dokis people so they would feel prepared and equipped to make the decisions that would foster the most social and economic development.¹²⁹

One vital decision that the Dokis First Nation needed to make was to select which corporate partners to engage with in undertaking the project. The Dokis people sat in a position of power when interviewing potential partners: socially, economically, and informationally (with their newfound education on commercial development). The Dokis' land ownership and legal land management agreements (considered above) put them in a position that required full cooperation from external partners and a sign-off from the band council.¹³⁰ This sign-off, in turn, required a public vote. The relationship with Hydromega, the firm that was engaged as a corporate partner, was one of interviewer and interviewee. Hydromega needed to prove to the Dokis First Nation that

¹²⁷ 'Okikendawt Hydro Project on the French River Begins Construction' (n 94); 'Construction of Ontario's 10-MW Okikendawt Small Hydropower Project under Way' (n 98); 'New Chief of Dokis Looks to a Bright Future' (n 22); Ingram (n 38).

¹²⁸ Public Works and Government Services Canada (n 38).

¹²⁹ 'New Chief of Dokis Looks to a Bright Future' (n 22).

¹³⁰ 'Dokis First Nation, Lands Department, Lands and Estates Department' (n 17); Dokis First Nation (n 17); First Nations Land Management Act 1999; Dokis First Nation Land Management Code 2014.

they were the best fit in each of the sustainability categories that the Dokis required. This was done through respect, inclusion, additional education, and by framing the project's disposition as one that was to achieve community development (and rights) for the Dokis people, as opposed to one with a sole purpose of profit maximisation.¹³¹ The land ownership agreement was so vital to the project that even though Hydromega is a 60% owner, the project is still considered collaborative and for the benefit of the Dokis people.¹³² The other stakeholders held similar views. Stonebridge, the financial corporation, and CIMA+, the equipment provider, were brought on board because of their disposition toward the purpose and overall vision for the project.¹³³

For the Dokis people, community development and human rights are fundamentally intertwined because of their relationship with the land. However, the instruments surrounding the project itself (as opposed to the national instruments) use development, rather than an express human rights framing. The Dokis' long held land rights allowed their disposition toward the project to be rights and development (community and commercial) based, with the goal of furthering economic and social rights and development for their own community. The realisation of land rights empowered the Dokis to set the terms of their own commercial and community development. They achieved this by maintaining control over the framing and consultation processes of the project, as well as dictating many of the other stakeholders' dispositions and related actions.

Conclusion: Results and Future Models for Indigenous Human Rights and Development Projects

The Okikendawt Hydroelectric Power Plant is now a model sustainable development project in Canada and has received positive publicity and awards.¹³⁴ In 2014, the Okikendawt Hydroelectric Power Plant was awarded the Pollution Probe Sustainability Award for

¹³¹ *Dokis First Nation Okikendawt Project* (n 3).

¹³² 'Okikendawt Hydro Project on the French River Begins Construction' (n 94); 'Okikendawt Hydro LP Financing' (n 98).

¹³³ 'Okikendawt Hydro LP Financing' (n 98); 'Okikendawt Hydroelectric Power Plant' (n 2).

¹³⁴ Ingram (n 38); Farooqi (n 103); Heather Castleden, 'Indigenous-Led Clean-Energy Projects Could Power Reconciliation' (*The Conversation*, 23 April 2019) <<http://theconversation.com/indigenous-led-clean-energy-projects-could-power-reconciliation-111903>> accessed 8 February 2020.

exemplifying positive environmental change.¹³⁵ This was accomplished by adhering to Pollution Probe's values: inclusive, independent, non-partisan, results oriented, evidence based, learning and innovative work.¹³⁶ This public statement of approval, in addition to the clear successes for the Dokis First Nation and all stakeholders, allowed the Okikendawt Hydroelectric Power Plant to serve as a model for indigenous-led energy projects across Canada.¹³⁷ It also affirms that the framing, instruments, and consultation all worked in congruence to achieve a successful project across all metrics.

Indigenous Clean Energy is a nonprofit organisation that helps to advance indigenous-led energy projects in Canada.¹³⁸ They are currently tracking 152 renewable energy projects and emphasise Aboriginal power in their advocacy and consulting materials.¹³⁹ These projects have fostered economic development that expands outside of First Nation communities, providing job opportunities and stimulating local economies.¹⁴⁰ This is not to say that Canada's record on First Nation relationships, treatment, and sustainable development is faultless.¹⁴¹ There are many outstanding conflicts in each of these areas. The Okikendawt Hydroelectric Power Plant and projects like it have the potential to serve as a model for other indigenous communities around the world for, first, their land rights and ownership, and second, fostering a collaborative approach to framing and consultation.¹⁴² This approach to commercial and community development uses contributions to the progressive realisation of rights and internal (to the stakeholders, in this case the Dokis First Nation) social and economic development as mandates in order to procure new projects for the communities. The Okikendawt Hydroelectric Power Plant shows that mutually

¹³⁵ Ingram (n 38).

¹³⁶ *ibid.*

¹³⁷ Farooqi (n 103); Castleden (n 134); Nicole Ireland, 'First Nations See Economic Future in Growing Clean Energy Industry' *CBC News* (5 November 2016) <www.cbc.ca/news/indigenous/first-nations-pursue-canada-clean-energy-economy-1.3829405> accessed 8 February 2020.

¹³⁸ 'Indigenous Clean Energy Projects' (*Indigenous Clean Energy*) <<https://indigenouscleanenergy.com/ice-projects/>> accessed 8 February 2020.

¹³⁹ *ibid.*

¹⁴⁰ Margo McDiarmid, 'Indigenous Communities Embracing Clean Energy, Creating Thousands of Jobs' *CBC News* (11 October 2017) <www.cbc.ca/news/politics/first-nations-renewable-energy-projects-1.4348595> accessed 8 February 2020.

¹⁴¹ Woodrooffe (n 90); Canada (n 88); *ibid.*

¹⁴² Ingram (n 38). It is important to note the challenges of implementing a project such as this one in other countries with different levels of development. Canada's legal relationship to the Dokis community provides land use opportunities that may not be practical or available in other places. This project may be able to serve as a model for future commercial development, but the circumstances under which it occurred are unique (at least among the three case studies).

beneficial stakeholder relations are necessary to achieve long-term, sustainable respect, protection, and fulfillment of human rights as well as localised social and economic community development.

Stakeholder relations surrounding the Okikendawt Hydroelectric Power Plant are unique among the three case studies. As a result of standardised dispositions as a prerequisite for participating, the indigenous community created a context in which dispositions and actions were inevitably aligned. It is worth recognising that while the Dokis First Nation's due diligence in finding a corporate stakeholder partner, maintaining their land use rights, and achieving universal agreement within the tribe, was successful, any step along the way might have derailed the process, and therefore the compatible relations. This is to say that a different corporate stakeholder may have agreed with the Dokis' instructed disposition, but not acted on it. Alternatively, due to more valuable natural resources, Canada may have decided to terminate their peaceful relationship with the Dokis First Nation. All events needed to proceed exactly as they occurred for this project's successes, and therefore act as a model for future projects.

As exemplified by the other case studies, perfectly aligned dispositions and actions do not always occur. This case study exists as part of this thesis in order to present a context in which a range of factors can lead to compatible stakeholder relations. However, the factor that has not been addressed thus far is the role of accumulated wealth in the global north. While this may in fact be one necessary indicator of compatible stakeholder relations, analyzing this factor is outside the scope of this thesis and ought to be included in additional analyses (more in Chapter VII).

The Okikendawt Hydroelectric Power Plant is the gold standard for commercial development that engages with human rights and community development. Attempting to replicate this project with other stakeholders may not necessarily succeed. For that reason, in attempting to create compatible relations between stakeholders, it is not the project itself that must be replicated, but the approaches, both dispositions and actions. Breaking a successful project such as this one down to the micro level helps to clarify the steps that went right, as opposed to making a carbon copy, without a complete understanding of what led to its success. The unique stakeholder relations, paired with framings and instruments that considered both rights and development (community and commercial), alongside a broad scope of consultation measures, created a project that can act as a model for stakeholders, to promote long-term, sustainable development and the fulfillment of human rights.

CHAPTER VI

A Taxonomy of Approaches to Rights and Development

The commercial development contexts described in the three case studies above present numerous instances of compatible and conflicting stakeholder relations. Compatible relations can (1) foster community development, and (2) respect, protect, and fulfill human rights obligations in commercial contexts. This analysis chapter aims to put case studies in conversation with each other by analysing specific stakeholder relations. In particular, the congruence and incongruence of dispositions and actions within any given stakeholder, and between stakeholders, are relevant to the ways in which the stakeholders approach human rights and development.

This chapter will (1) present a taxonomy of approaches to human rights and development that has emerged from the analysis of the case studies, (2) individually engage with each of the three approaches in the taxonomy and look at how framing, instruments, and consultation measures may indicate a specific approach, (3) examine the three approaches in context with one another, with a particular focus on how dispositions and actions can indicate any given approach within a specific stakeholder relation, (4) analyse examples from the case studies where stakeholder approaches came into conflict, (5) analyse examples from the case studies where stakeholder approaches are compatible, and (6) expand upon the relationship between the analytical framework (framing, instruments, consultation measures) and the approach taxonomy for future commercial development analysis. These sections of this chapter will continuously refer back to specific examples of stakeholder relations within the case studies and make comparisons across the case studies to determine effective ways of improving upon stakeholder relations.

The taxonomy of approaches (below) is an expansion of the current work on human rights and commercial development which has been considered in Chapter I. The first two approaches, within the taxonomy, are common understandings of the potential relationships between human rights and development. The third approach is novel and aims to capture the complexity of how stakeholders may choose their dispositions and actions. Additionally, contextualising these three approaches alongside each other in a taxonomy is also a novel contribution. The previously binary conception considers whether or not commercial development aims and succeeds at respecting, protecting, and fulfilling human rights (Chapter I).

Throughout the three case studies, the relationship between rights and development (community and commercial) has begun to come into focus. There is significant literature on the relationship between development and human rights, as Chapter I maps out, but even still, there is much debate over whether commercial development is an effective means of respecting, protecting, and fulfilling rights.¹ As articulated in Chapters I and II and as demonstrated in the case studies, particularly in Chapters IV and V, this thesis argues that it can be. The argument is underpinned by the analytical framework and resulting taxonomy developed through analysis of the case studies.

This analysis is far from comprehensive. The case studies above each contain multitudes of stakeholder relations, each with unique circumstances and approaches to human rights and development. The purpose of this chapter is to select the most relevant examples of conflicting and compatible stakeholder relations to see how they fit into the taxonomy of approaches, thereby solidifying it as a useful tool for analysis in future case studies. This is to say, human rights and community development in commercial contexts are more complex and interrelated than the current tools for analysis have the ability to explain. The analysis in this chapter will embrace this complexity of stakeholder relations, with a focus on human rights and commercial development, and create a categorisation system to make this type of analysis simpler for new commercial development contexts. The taxonomy also has potential beyond a theoretical analysis, namely assisting stakeholders to identify their approaches to specific relations with other stakeholders. This may give stakeholders the ability to aim for compatible relations, while still achieving their desired ends.

¹ Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755; Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36 *Economic and Political Weekly* 11; Brendan O'Dwyer and Jeffrey Unerman, 'Enhancing the Role of Accountability in Promoting the Rights of Beneficiaries of Development NGOs' (2010) 40 *Accounting and Business Research*; S McInerney-Lankford, 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 *Journal of Human Rights Practice* 51; Paul J Nelson and Ellen Dorsey, 'At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs' (2003) 31 *World Development* 2013; The World Bank and the OECD, 'Integrating Human Rights into Development' (The World Bank and the OECD 2016); 'Rights Up #RightNow - Female Genital Mutilation as a Question of Gender Equality, Soundcloud Podcast'; Ignacio Saiz and Kate Donald, 'Tackling Inequality Through the Sustainable Development Goals: Human Rights in Practice' (2017) 21 *The International Journal of Human Rights* 1029; Jessie Jackson, 'Measuring Human Rights and Development By One Yardstick' 15 *California Western International Law Journal* 9; Inga T Winkler and Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21 *The International Journal of Human Rights* 1023; Anders Dahlbeck, 'A Human Rights Based Approach to the Means of Implementation of the Sustainable Development Goals' [2020] *The Danish Institute for Human Rights* 74.

Taxonomy

Analysing these three cases studies through a stakeholder relations lens has helped to identify various stakeholder approaches to human rights and commercial development. These approaches do not monolithically apply to each of the case studies.

The following three categories make up a set of approaches to stakeholder relations in commercial development contexts.² As described in Chapter II, the term ‘approach’ entails both a disposition and an action. While the results of the actions may not be in line with the disposition, for the purposes of this thesis, we will assume that the intention behind the action is the same as the disposition for a specific stakeholder in a specific stakeholder relation for the commercial development project. Approach, or the combination of disposition and action, can be derived by looking at the commercial development through the analytical framework outlined in Chapter II, that is by considering (1) the choice of framing by/of different stakeholders, (2) the instruments (or lack thereof) referenced and acted on by stakeholders throughout the process, and (3) the consultation measures and mechanisms instituted by, and acted on by, the stakeholders. The three parts of the analytical framework, as seen throughout the cases, will help to identify which of the three approaches below is utilised by each stakeholder relation.

A Taxonomy of Stakeholder Approaches to Human Rights in Commercial Development Contexts:

1. A Non-Rights-Based Approach to Development
2. A Human Rights-Based Approach to Development
3. A Development-Based Approach to Human Rights

² McInerney-Lankford (n 1). As described in the Introduction, Chapters II and III, the term ‘development’ has two (sometimes overlapping) meanings. Community development (which includes states) and commercial development are interrelated. In all three case studies, Bangladesh, Kenya, and Canada, one form of development can lead to the other and vice versa. The term development, as it applies to the approach taxonomy, takes both contexts into account. The application of the taxonomy to the case studies, and more generally to human rights protections in development, will clarify which area of development is being addressed in each context.

This three-part taxonomy of approaches allows for more complexity in an analysis of stakeholder relations. This taxonomy is particularly useful when examining how community development and human rights relate to each other as either intentional results, or unintended byproducts of a commercial development project. As Chapters I and II describe, approaches to rights and development (community and commercial) can apply to specific relations between any number of stakeholders, or across the entirety of a project. However, none of the three case studies in this thesis can be fully described by any one of the three approaches in this taxonomy. Rather, across the three case studies, the approaches can be used to describe specific stakeholder relations and interactions. Any of the three approaches can be applied in (1) a specific situation by one or more stakeholders, (2) by one or more stakeholders throughout the project, or (3) by all stakeholders throughout the project. Each of these three areas of application will be described in detail below, using examples from the case studies.

Approach 1: A Non-Rights-Based Approach to Development

This first approach is one in which those driving the project fail to consider human rights in commercial development or community development contexts. The majority of commercial development projects that employ the Non-Rights-Based Approach to Development simply don't account for human rights in framing, instruments, or consultation measures. While rights are not given consideration in this type of approach, this does not necessarily mean that rights are intentionally not respected, protected, or fulfilled by any stakeholder. In some instances, as a matter of happenstance, the project could have unintended positive consequences for rights fulfillment. Stakeholders using this approach simply do not consider human rights when making commercial development decisions. In other words, human rights are not a design principle of commercial development projects pursuing a Non-Rights-Based Approach to Development.

It is rare for every stakeholder to take the same approach in a project. In this approach, it is usually (but certainly not always) the corporate and financial partners that set the relation arrangements, with the state following suit. Under a Non-Rights-Based Approach to Development that has detrimental effects on individuals, communities, or the environment, civil society may speak out in protest against the developers (state, corporation or otherwise).

Similarly, commercial development stakeholders may complete impact assessments that indicate potential human rights violations. In this approach, the potential violations would be ignored, and both the disposition and action of the stakeholder would lead to a Non-Rights-Based Approach to Development. In a situation where different stakeholders use different approaches, such as the corporate stakeholders taking a Non-Rights-Based Approach to Development, and the state, indigenous communities, and others taking differing approaches, any number of outcomes are possible. This is to say that more often than not, in instances where there are potential rights violations, a Non-Rights-Based Approach to Development by some stakeholders is incompatible with one or more of the other approaches, especially when states and corporations use differing approaches. A Non-Rights-Based Approach to Development that violates human rights is not uncommon, especially in states without strong human rights protections. It should be noted that a project as a whole could still violate human rights even if the corporations, states, and majority of the other stakeholders consistently take on one of the other two approaches. A violation of rights by any number of stakeholders does not, alone, constitute a Non-Rights-Based Approach to Development. As made clear in the examples below, the approach (disposition and action) must actively or passively ignore rights in order to be a Non-Rights-Based Approach to Development.

A Non-Rights-Based Approach to Development is recognisable in stakeholder framings, use of instruments, and (design of and implementation of) consultation measures. Any stakeholder that frames their contributions to a project using a Non-Rights-Based Approach to Development would only use development (community and commercial) language and aim to achieve development (community and commercial) goals. The corporate partners would aim for commercial development and set their goals in terms of their profit maximisation. State, civil society, and indigenous communities would use community development language and set their goals in terms of development policy. By way of example, in Bangladesh, the National Committee to Protect Oil, Gas, Mineral Resources, Power and Ports, an NGO, claimed that they wanted different forms of reparations for the harm caused to the local populations, as opposed to protections against future human rights abuses caused under the same circumstances.³ This may have included increasing access to healthcare for indigenous communities (development) as

³ National Committee to Protect Oil Gas Mineral Resources Power and Ports and National Committee to Protect Oil Gas Mineral, 'The Alternative Power and Energy Plan for Bangladesh (Draft)' (National Committee to Protect Oil Gas Mineral Resources Power and Ports 2017).

opposed to fulfilling indigenous communities' right to a minimum standard of health (rights). The instruments used in a Non-Rights-Based Approach to Development would focus on development policy. Stakeholders would refrain from referencing human rights instruments such as international human rights treaties and relevant domestic law. Impact assessments are critical instruments in commercial development projects and are especially useful when attempting to determine the approach taken to a project. Regardless of which stakeholder prepares the impact assessment report, the use of language gives an indication as to the framing, and which approach is being taken. In particular, the language used to articulate the potential impacts on local communities is highly indicative: rights violations versus policy infringement versus community development inhibitors.

Consultation measures can be indicators of approach as well. In a Non-Rights-Based Approach to Development, community development language would be used in stakeholder interviews and compiled responses. The solutions to mitigate potential problems are, in many contexts, the clearest indicators of the approach because in proposing a solution, the responses articulate (and thus expose the frame through which they perceive) the problem. If the problem is phrased as a potential rights violation, that particular stakeholder may not be using a Non-Rights-Based Approach to Development. If the problem is phrased as a community development issue, especially one that could easily have been mapped onto and articulated in respect of a specific right, a Non-Rights-Based Approach to Development may be in effect. In the case of Bangladesh, many of the consultation mechanisms resulted in feedback which indicated that local communities were interested in labour opportunities at the Phulbari Coal Mine.⁴ The successful consultation language celebrated this commercial development boon, offering well-paying jobs to the local community. Across all three approaches, but in particular for a Non-Rights-Based Approach to Development, the framing of the impact assessments and consultation measures can indicate the type of approach each stakeholder is utilising. These indicators prove helpful when attempting to map out the various relations between any number of stakeholders. The interconnectedness and interrelatedness of these relations become much more complex when introducing the following two approaches.

⁴ Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 1) Main Report' (SMEC 2006); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (Asia Energy Corporation (Bangladesh) Pty Ltd 2006).

Approach 2: A Human Rights-Based Approach to Development

In the human rights and development literature, a Human Rights-Based Approach to Development is the most commonly referenced approach to simultaneously achieve community development goals while respecting, protecting, and fulfilling human rights.⁵ As noted in Chapters I and II, this thesis picks up where the existing human rights and development conversation leaves off, thereby expanding the definition of a Human Rights-Based Approach to Development. Traditionally, the term development in the Human Rights-Based Approach to Development refers to community development. For the purposes of this thesis and this taxonomy, it is being expanded to apply to a human rights-based approach to commercial development. In other words, the Human Rights-Based Approach to Development in this taxonomy takes an approach that would traditionally advocate for using human rights in order to achieve community development and applies it within commercial development contexts. In such an approach, entire development processes would be evaluated to ensure mitigation of any potential human rights violations at each step. Projects that use the Human Rights-Based Approach to Development are still built with the goal of delivering competitive financial returns. Each step is analysed, and human rights protections are inserted based on international and local standards and obligations, including treaties, constitutional law, regional agreements, ILO standards and instruments, the Equator Principles, and local rights protections. Simply put, in this approach, human rights run parallel to the commercial development process, acting as a system of checks on, and mitigations of, potential violations.

In commercial development contexts, respecting, protecting, and fulfilling human rights obligations has the potential to help facilitate or inhibit financial returns. In many contexts, including all three case studies in this thesis, it is more expensive to ensure human rights protections in commercial development.⁶ The costs could come from a range of situations, from

⁵ Damilola S Olawuyi, *The Human Rights Based Approach to Carbon Finance* (Cambridge University Press 2016); United Nations, OECD, World Bank, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (United Nations 2003); Dahlbeck (n 1).

⁶ Asia Energy Corporation (Bangladesh) Pty Ltd (n 4); QBIS, 'Socioeconomic Study of Key Impacts from LTWP Project' (2018) Impact Assessment Report <www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>; Public Works and Government Services Canada, 'Environmental Assessment Screening Report: Okikendawt Hydroelectric Project'

slowing down the process to ensure sacred animals are not being harmed, to constructing entirely new villages for displaced communities. Providing access to healthcare services, educational facilities, and well paid and safe jobs, could be a byproduct of plans that were already built into the cost of the project, thereby helping to facilitate the progressive realisation of human rights. Having a healthy, educated, local workforce is an investment that could end up being financially beneficial for long-term, large-scale commercial development projects. A Human Rights-Based Approach to Development does not unequivocally lead a project to success or failure. It is a nuanced approach to commercial development that stakeholders may *need* to employ to protect human rights and may *want* to employ to protect financial and public perception interests. In other words, stakeholders (in particular, commercial developers) may be incentivised to incorporate this approach into their corporate social responsibility initiatives (Chapter I). In the context of Kenya's Lake Turkana Wind Power project, the corporate stakeholders continuously worked to engage with the community and hear concerns throughout the process.⁷ For Bangladesh, in consideration of the post-2006 Phulbari Coal Mine, the corporate stakeholders employed a Human Rights-Based Approach to Development in order to protect their investment and hopefully bring the coal mine online.⁸

When a stakeholder uses a Human Rights-Based Approach to Development, it may be evident in each part of the analytical framework: framing, instruments, and consultation processes. As the case studies make clear, the three elements of the framework are interconnected and interdependent. In order to frame a stakeholder relation as one that uses a Human Rights-Based Approach to Development, the specific language must have both community development and human rights components. Side by side, the community development and rights framings are interdependent. These rights are derived from a variety of human rights instruments, with references to international treaties, domestic and local rights provisions, governmental policy goals, corporate policy goals, impact assessment reports, or indigenous and NGO reports.

(Public Works and Government Services Canada 2011). While these reports do not explicitly detail the financial repercussions of respecting, protecting and fulfilling rights, these three impact assessment reports indicate the additional work that is required to utilize a Human Rights Based Approach to Development: building new settlements, slowing down construction, mitigating pollution, and others. This additional work is undoubtedly more expensive than not completing it.

⁷ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' <<https://ltwp.co.ke/public-consultation-and-engagement/>> accessed 19 May 2019; 'FEEDBACK MECHANISM – Lake Turkana Wind Power' <<https://ltwp.co.ke/feedback-mechanism/>> accessed 18 May 2019.

⁸ Abdullah Nadvi, 'Phulbari Movement of 2006: Where We Stand Now' (*The Daily Star*, 1 September 2017).

Employing instruments with human rights framings, as exemplified in the case studies, is highly effective at ensuring a specific stakeholder relation uses a Human Rights-Based Approach to Development. A Human Rights-Based Approach to Development found in consultation measures may look slightly different. It takes a more integrated approach. Usually, as in the case studies above, a set of instruments (rights-based or otherwise) dictates the consultation measures used for a project. It is for this reason that rights may be embedded within consultation measures. This is not always the case, as those consulted may not be aware of the rights that protect them, and certain stakeholders may take advantage of this ignorance. However, if the disposition and action of the approach is human rights focused, then consultation measures ought to be easy to incorporate into the Human Rights-Based Approach to Development. This is to say, if the stakeholder disposition and framing both include human rights, there is no reason for consultation measures to actively attempt to deceive stakeholders that were unaware of consultation in the first place. In the context of the Lake Turkana Wind Power project, the indigenous stakeholders responded favourably to the Human Rights-Based Approach to Development consultative measures. Lochillia Nyangayo, Clan Elder Loiyangalani shared “From my point of view as an elder, Lake Turkana Wind Power has been good for the communities living in this area. Most importantly, it has brought us fresh water [...] and security.”⁹ These community development and rights successes were echoed by Stephen Nakeno, a Sarima spokesperson, “We are appreciating the effort of LTWP Power Project because our lives have been transformed in many different ways. We are looking forward to support the project and stand with it because the fruits we are getting are much juicy too. The state of peace is positive by now, people are integrating and living together. Our happiness is harmonious existence!”¹⁰

These consultative measures ensure that the stakeholder relations maintain an open dialogue among stakeholders in the case that any rights violations arise and need to be remedied. A Human Rights-Based Approach to Development relies on stakeholder relations to discover any potential violations and use the tools provided by framing instruments and consultations to remedy them as quickly and efficiently as possible. Again, this approach is rarely, if ever, implemented universally across all stakeholders in a project. This is why it is vital that the tools for mitigating

⁹ ‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ (n 7).

¹⁰ *ibid.*

rights abuses are established by instruments and consultation measures. In other words, tools that are external to the stakeholders.

Depending on the stakeholder that is employing the Human Rights-Based Approach to Development, they (the specific stakeholder) may utilise different responses to potential violations. A corporation may attempt to mitigate the potential violation themselves by employing free prior and informed consent or other legal and policy mechanisms.¹¹ An indigenous community (or civil society organisation speaking on their behalf) may oppose the project on human rights grounds until the potential violations are remedied. The state may collaborate with a corporation to ensure that all domestic human rights obligations are being protected as well as supply tools for mitigation of violations. This may include assistance in relocation, subsidies for building sustainably, incentives for employing a local labour force, and encouraging cultural heritage protections, *inter alia* (in the three case studies).

Examples of this approach as already situated in the scholarship are highly apparent at the international level. While the 2003 Interagency Workshop on a Human Rights-Based Approach in the context of UN Reform's standards (Chapter I) were not necessarily envisioned to apply in commercial development contexts, they are highly indicative of this approach. The standards were not invoked as an instrument in and of themselves in any of the case studies, however, they provide additional context as to the international community's disposition toward stakeholder relations: (1) people as actors in their own development, (2) participation as means and goal, (3) strategies are empowering, (4) evaluation and monitoring processes, (5) analysis of all stakeholders, (6) focus on marginalised communities, (7) locally owned processes, (8) reducing inequalities, (9) top-down and bottom-up approaches, (10) a focus on causality, (11) measurable goals, (12) strategic partnerships, and (13) stakeholder accountability.¹² These 13 standards encourage a Human Rights-Based Approach to Development in commercial development contexts (above and

¹¹ United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP); John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> accessed 25 November 2018.

¹² United Nations, OECD, World Bank (n 5). These standards can be categorised based on the analytical framework, albeit with some overlap: Framing: Standards 1, 2, 3, and 9. Instruments: Standards 4, 9, 10, 11, and 12. Consultation Measures: Standards 3, 4, 6, 7, 8, 10, 12, and 13.

beyond their community development intentions) purely based on their integrated approach to stakeholder relations, calling on a very similar analytical framework as this thesis.

The Human Rights-Based Approach to Development could be taken up by as few as none, or as many as all stakeholders in a project, but again, even with all stakeholders participating, it does not guarantee full human rights protections. Rather, a Human Rights-Based Approach to Development requires, at minimum, an *attempt* to respect, protect, and fulfill human rights obligations in tandem with the commercial development project.

Approach 3: A Development-Based Approach to Human Rights

The case studies considered in this thesis suggest a third approach to human rights and development: a Development-Based Approach to Human Rights. Unlike the Human Rights-Based Approach to Development, a Development-Based Approach to Human Rights puts human rights at the centre of commercial development, rather than as a series of checks and mitigation tools that run alongside it. It sets the fulfillment of human rights as the underlying purpose of the project, using community and commercial development to respect, protect, and fulfill these rights. The approach comprises a rights disposition and development action. In the previous two approaches of the taxonomy, the purpose has been commercial development.

Under a Human Rights-Based Approach to Development, when possible (financially and reputationally), rights are considered. A Development-Based Approach to Human Rights is different. Every step of the project is aimed at fulfilling one or more rights. These rights are fulfilled by way of specific community and commercial development practices. As in the other two approaches, competitive financial returns are still part of the equation for commercial development, but the motivation is the protection and fulfillment of rights. In this thesis, the primary example of a Development-Based Approach to Human Rights occurs in reference to the Dokis First Nation's stakeholder relations regarding Okikendawt Hydroelectric Power Plant.

A Development-Based Approach to Human Rights can be applied in both community development and commercial development contexts. The case studies considered in this thesis envision the possibility of a Development-Based Approach to Human Rights undertaken by a range of actors (including states) in order to both fulfill their human rights obligations (states) and achieve the most effective community development (states and nonstate actors alike). In

commercial development contexts, a Development-Based Approach to Human Rights does not necessarily equate to a greater financial commitment than a Human Rights-Based Approach to Development.¹³

The rights-focus of a Development-Based Approach to Human Rights allows the entire project to have a singular mission. The finances, planning, marketing, construction, and partnerships are all organised around the rights-based mission in advance of commercial development. In this approach, the ways in which stakeholders frame the relations to each other are very different from the other two approaches in the taxonomy. The Dokis First Nation community leaders took on the role of corporate stakeholder (articulated above) in order to respect, protect, and fulfill the rights of the members, while at the same time educating them about sustainable development. Their Development-Based Approach to Human Rights involved researching the appropriate mechanisms for finances, planning, marketing, construction, and partnerships.

A Development-Based Approach to Human Rights is framed by human rights language and a rights-based disposition. When setting tasks, goals, or requirements on a commercial development project, a Development-Based Approach to Human Rights would frame them as tasks to achieve rights, goals focused on rights fulfillment, and requirements to respect and protect rights. The specific actions used to achieve these tasks, goals, or requirements may use community development, but the core of the framing is rights-based. The Dokis' turtle protection requirement and burial ground protections were all considered under the umbrella of protecting cultural rights.¹⁴ Using the appropriate commercial development language to communicate with their construction partners, the Dokis respected, protected, and fulfilled their own rights by way of community and commercial development practices. This is to say that a human rights framing is a not a side constraint on commercial development (as in a Human Rights-Based Approach to Development). Under a Development-Based Approach to Human Rights, dispositions are framed by human rights

¹³ Office of the High Commissioner for Human Rights, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (Office of the High Commissioner for Human Rights 2017); Aldwych International, 'Lake Turkana Wind Power Project (LTWP): Seminar on Sustainable Energy Investments in Africa' (Copenhagen, 24 June 2014); Business & Human Rights Resource Centre and others, 'Mapping the Renewable Energy Sector to the Sustainable Development Goals: An Atlas (Consultative Draft)' (2018). A full analysis of this claim is outside the scope of this thesis and deserves more research.

¹⁴ *Dokis History of the First Nation* <www.youtube.com/watch?v=I9rlyioz-Es> accessed 10 February 2020; *Dokis First Nation Okikendawt Project* <www.youtube.com/watch?v=yhvY2700N5w> accessed 8 February 2020.

(at their core), even if resulting actions may present themselves as having a community development framing.

Under this approach, the instruments created for a specific commercial development project would be written using a rights-based framing. These instruments may be written by states, corporations, civil society, indigenous communities, or individuals. The rights-based framing extends to the choice of international instruments, domestic and local rights doctrines, governmental policy goals, corporate policy goals, impact assessment reports, and indigenous and NGO reports. While none of the case studies in this thesis utilised this approach for impact assessment, by way of example, an impact assessment report that uses a Development-Based Approach to Human Rights may use human rights to measure successes and violations¹⁵ (Chapter I), as opposed to the Sustainable Development Goals. Specifically, under a Development-Based Approach to Human Rights, stakeholders may explicitly attempt to fulfill the right to an adequate standard of health versus attempting to achieve targets in SDG 3, Good Health and Well-Being.¹⁶ Simply put, an impact assessment report using a Development-Based Approach to Human Rights may use a human rights framework to find potential violations, as opposed to community development goals, as a metric for success or failure in achieving certain policies. From a consultation perspective, under a Development-Based Approach to Human Rights, the goal is to ensure that rights are respected, protected, and fulfilled through feedback mechanisms in advance of any potential violations. This process, as with the Dokis First Nation, may involve education.¹⁷ Some communities may not be aware of their rights. In these case studies, the consultation process must inform them of the protections that are due to them, in advance of determining the validity of the project. Framing, instruments, and consultation measures are vital to stakeholder relations that aim to use a Development-Based Approach to Human Rights.

The Three Approaches: Disposition and Action

¹⁵ Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment' [2008] Economics Working Papers 41; Jackson (n 1).

¹⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Article 12; United Nations Department of Economic and Social Affairs, 'Sustainable Development Goals: Sustainable Development Knowledge Platform' Goal 3 <<https://sustainabledevelopment.un.org/?menu=1300>> accessed 7 June 2020.

¹⁷ *Dokis First Nation Okikendawt Project* (n 14).

A Development-Based Approach to Human Rights will not unequivocally lead to a more “successful” commercial development project. Rather, this depends on how the project in its entirety measures success. A Non-Rights-Based Approach to Development will often use financial returns as the primary key performance indicator. In the context of the Phulbari Coal Mine, the US Ambassador to Bangladesh still lobbied for the mine even after understanding the human rights violations occurring as a result of the project. A Human Rights-Based Approach to Development will use both human rights and financial returns as key performance indicators, one superseding the other depending on the circumstances. For the Lake Turkana Wind Power project corporate stakeholders, respecting, protecting, and fulfilling human rights was far more costly due to the nature of their consultation and feedback mechanisms. A Development-Based Approach to Human Rights sets the respect, protection, and fulfillment of rights as the primary key performance indicator. This is not to say that financial returns are unimportant in a Development-Based Approach to Human Rights. For the Dokis First Nation in Canada, profit sharing was part of the calculus that allowed them to fulfill certain rights.

Prioritising rights does not necessarily result in lower financial returns, as the case studies make clear. Each approach has different results in each circumstance. By way of example, in Canada, the state prepared an impact assessment report that uses a Non-Rights-Based Approach to Development. This report assessed the social, economic, political, and environmental impacts of a company and community that used a Human Rights-Based Approach to Development and Development-Based Approach to Human Rights, respectively. This relation could just as easily prove to be a success or a failure. This depends on how the stakeholders acted upon their disposition. Much in the same way that a Non-Rights-Based Approach to Development does not necessarily lead to rampant human rights violations, a Development-Based Approach to Human Rights might inadvertently fail to protect one or more rights. The approach is not necessarily an indicator of the human rights successes or failures across an entire commercial development project. Instead, the approach reflects the disposition of a single stakeholder, in a single circumstance of a commercial development project.

All three of the approaches are stakeholder dependent. Even for a single stakeholder, a single approach may not be effective, or even possible, across an entire commercial development project. This is to say that a Development-Based Approach to Human Rights may be used in a

single interaction, a single instrument, or a single consultation measure, insofar as that particular context is approached with human rights as the goal, and both types of development as the means of achievement. There may even be situations in which a stakeholder employs a Non-Rights-Based Approach to Development in interactions with one stakeholder and a Development-Based Approach to Human Rights in interactions with another. As mentioned above, relations between stakeholders are highly nuanced and may require one or more approaches in each circumstance. None of the case studies in this thesis include a single stakeholder that is consistent in their approach across all relations. There is however one unlikely circumstance that will almost undoubtedly lead to the respect, protection, and fulfillment of human rights: a universal Development-Based Approach to Human Rights across all stakeholders, in all aspects of a project. If this situation existed on one side of a sliding scale, the polar opposite may be a universal Non-Rights-Based Approach to Development across all stakeholders with intentional human rights violations or sacrifices in the name of commercial development. Again, this is a highly unlikely circumstance, and it does not occur in any of the case studies in this thesis. All three case studies, and nearly all other commercial development projects, occur somewhere between the two extremes.

When looking at the analytical framework (framing, instruments, and consultation), as they may align with the approaches (Non-Rights-Based Approach to Development, Human Rights-Based Approach to Development, and Development-Based Approach to Human Rights), it is clear that this thesis focuses on the pre-action stages of stakeholder relations. In the case studies, it is possible to discern most stakeholders' dispositions by using the analytical framework. In each case study, the impact assessment report is one of the key indicators of approach. While it is an instrument in and of itself, the framing and consultation measures within an impact assessment report tend to indicate the disposition toward certain stakeholder relations. Impact assessment reports are generally pre-action instruments that are developed to, among other things, anticipate the potential results of specific stakeholder relations. In other words, impact assessment reports apply certain dispositions in order to predict certain actions. The dispositions in the three case studies in this thesis use either a rights or community development framing, reference a range of instruments, and either suggest or describe consultation measures.

There are many similarities between the Human Rights-Based Approach to Development and Development-Based Approach to Human Rights. Each of the case studies in this thesis

employs both approaches by one or more stakeholders in one or more contexts. It is conceivable that a strong Human Rights-Based Approach to Development and a weak Development-Based Approach to Human Rights could lead to the same outcomes in a commercial development context. Therefore, it is rather difficult to find outcome-based evidence above and beyond the key performance indicators (above) to differentiate between these two approaches. However, this thesis is concerned with deriving stakeholder dispositions, which may or may not indicate the outcomes of commercial development. Analysing these dispositions will lead to clearer indicators of the type of approach that is being employed by each stakeholder. To be clear, the taxonomy of approaches, in its entirety, is a tool for analysis, not a tool to encourage stakeholders to utilise one approach over another. Through this analysis, this thesis attempts to discern the types of outcomes that are likely to result from each type of approach. Differentiating between the latter two approaches in the case studies require in depth analysis of both dispositions and actions using the key performance indicators (above).

The three case studies, when possible, describe both dispositions and actions. This is in order to discern how well the dispositions, in advance of actions, predict the outcome of any specific relation, and therefore, how relevant the three approaches are to respecting, protecting, and fulfilling human rights. Even so, the relationship between disposition and action is not linear. Much the same as the relationship between framing and the relevant instruments and consultation measures is not linear. The case studies provide some examples of dispositions leading to incongruous actions, and rights-based framings leading to insufficient consultation measures. Even in their complexity, nuance, and in some cases non-linearity, the three approaches are strong indicators of human rights protections in these commercial development contexts.

Conflicting Approaches in the Case Study Contexts

When two or more stakeholders adopt different approaches to the commercial development, conflicts may arise. Using specific relations from the three case studies, a pattern begins to emerge: human rights violations tend to occur in situations where the approaches to stakeholder relations come into conflict.

In all three case studies, the states have different approaches than one or more of the other stakeholders. In the Phulbari Coal Mine case study, the Bangladesh Government initially took a

Non-Rights-Based Approach to Development, as a result of their financial interest in the project.¹⁸ They also rested on Article 47(1) of the Bangladesh Constitution for legal protection in the case of human rights violations.¹⁹ This approach conflicted with civil society, both locally in the Phulbari Upazila as well as nationally, from the National Committee to Protect Oil, Gas, Mineral Resources, Power and Ports. These NGOs employed a Human Rights-Based Approach to Development, attempting to be realistic about inserting human rights protections during the commercial development process, even though construction had already begun.²⁰ Some local communities were appreciative of the increased labour opportunities and saw these as means to rights fulfillment, while others were concerned about rights violations.²¹ Resultantly, the communities made use of different approaches, Non-Rights-Based Approach to Development, Development-Based Approach to Human Rights, and Human Rights-Based Approach to Development. The lengthy impact assessment reports for the Phulbari Coal Mine employed a Human Rights-Based Approach to Development and a Development-Based Approach to Human Rights depending on the circumstance and focus of the individual sections of the report.²² The Mine and Environment section (Volumes 2 and 3) employed a Human Rights-Based Approach to Development while the Social section (Volume 4) employed a majority, Development-Based Approach to Human Rights.²³ The corporate partners, by way of the impact assessment reports, attempted to use compatible approaches in stakeholder relations. The conflicts in approach resulted in part from (1) treating the local communities as a single stakeholder with a single approach, and (2) the differences between the state approach and the corporate approach to the local communities.

¹⁸ Asia Energy PLC, 'The Phulbari Coal Project' (November 2004).

¹⁹ Constitution of the People's Republic of Bangladesh 1972 47(1d).

²⁰ National Committee to Protect Oil Gas Mineral Resources Power and Ports and National Committee to Protect Oil Gas Mineral (n 3).

²¹ TOOMEGANE, *The Blood-Soaked Banner of Phulbari*(1/2)

<www.youtube.com/watch?time_continue=431&v=PnpEJAZiwf0> accessed 13 October 2018; *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014)). It should be emphasised again that local communities ought not be considered a single stakeholder. Both in the Bangladesh and Kenya case studies, different approaches by different factions within local communities brought about conflict.

²² Asia Energy Corporation, 'Summary Environmental Impact Assessment' (2006) 39933; Asia Energy Corporation (Bangladesh) Pty Ltd (n 4); Asia Energy Corporation (Bangladesh) Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 2) The Mine' (Mine Consult Pty Ltd 2005); SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 3) Environment' (Asia Energy Corporation (Bangladesh) Pty Ltd 2005); SMEC Australia Pty Ltd (n 4).

²³ Asia Energy Corporation (Bangladesh) Pty Ltd (n 22); SMEC Australia Pty Ltd (n 22); SMEC Australia Pty Ltd (n 4).

The state's disposition and actions for community and commercial development at the expense of rights was in conflict with the disposition of the corporate partners, who attempted, and ultimately failed, in using a Human Rights-Based Approach to Development. The intention, by all stakeholders in this context, was to maintain compatible stakeholder relations. Even with this intention, the attempt at a Human Rights-Based Approach to Development was insufficient for compatibility.

Looking at the local community as a single stakeholder led to conflicting approaches in Kenya's Lake Turkana Wind Power project as well. The corporate stakeholders' partial Human Rights-Based Approach to Development resulted in the court case brought by certain factions of the indigenous communities who also used a Human Rights-Based Approach to Development, albeit in different ways.²⁴ The respect, protection, and fulfillment of rights in the corporate Human Rights-Based Approach to Development did not extend to the entire indigenous community, although the disposition was for the approach to apply to the entire community.²⁵ The consultation reports confirmed this disposition through complex and costly relocation and training programmes, respecting, protecting, and fulfilling rights to land, property, health, and education, but falling short on cultural rights.²⁶ While it may seem that two stakeholders using a Human Rights-Based Approach to Development should not result in conflict, in this case it did. Corporate stakeholders failed to recognise that there were factions of the local community (additional stakeholders) that did not have a seat at the table. This prevented certain specific cultural rights from being incorporated into the corporate Human Rights-Based Approach to Development, thereby limiting its scope and resulting in the legal battle between a certain faction of the indigenous communities and the corporation. Within the three approaches, there are ranges of disposition and action within each. As in this case, a Human Rights-Based Approach to Development can intentionally or unintentionally fail to incorporate one or more rights and one or more stakeholders. This may lead to conflicts between seemingly identical approaches. However, as made clear in the examples below, this does not undermine the usefulness of the taxonomy of approaches as an analytical tool.

Returning to the state approaches in the case studies, the Bangladesh Government switched to a Human Rights-Based Approach to Development after the extrajudicial killings and

²⁴ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 21).

²⁵ QBIS (n 6).

²⁶ 'FEEDBACK MECHANISM – Lake Turkana Wind Power' (n 7); 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 7).

international outcry.²⁷ The swift and firm change allowed a Human Rights-Based Approach to Development response to the US Ambassador who used a Non-Rights-Based Approach to Development when communicating with the Bangladeshi Prime Minister's Adviser.²⁸ The international outcry from civil society, the United Nations, and other countries advocated for, at the minimum, a Human Rights-Based Approach to Development across all stakeholders.²⁹ Even so, a Human Rights-Based Approach to Development may not have been enough in the eyes of these international stakeholders. In essence, the responses from the UN Special Rapporteurs were asking for a Development-Based Approach to Human Rights from all stakeholders. This has proved difficult as the measure of success would have had to drastically shift. The limited and differing scopes of the previously utilised Human Rights-Based Approach to Development were not enough to ensure fulfillment of the rights to life, property, and cultural participation.

In Kenya, the state initially took up a Non-Rights-Based Approach to Development for different reasons from Bangladesh. The government's focus was on Vision 2030, a community development programme, rather than human rights.³⁰ When the faction of indigenous leaders brought the case against the Lake Turkana Wind Power project, the judge used a Human Rights-Based Approach to Development, primarily because the Plaintiffs testified that the Defendants failed to employ free prior and informed consent and made a human rights-based argument.³¹ The arguments, in part, ended up pinning international human rights law against domestic rights protections. The judge's Human Rights-Based Approach to Development required a revisit to the claimed cultural land, and even without sufficient evidence from the visit, returned the decision to the local county, calling for the formation of a new deciding council. This approach by the judge returned the decision to the local community (ultimately relying on the stakeholder relations and representation on the to-be-formed deciding council).³² Again, two Human Rights-Based

²⁷ Nadvi (n 8).

²⁸ Ambassador James F. Moriarty, 'Ambassador Urges Prime Minister's Adviser to Accelerate Energy Sector Development' (Bangladesh Dhaka 2009) Wikileaks Public Library of US Diplomacy 09DHAKA741_a <https://wikileaks.org/plusd/cables/09DHAKA741_a.html> accessed 27 October 2018.

²⁹ De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food, 'Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts' (*UN Special Rapporteur on Food*, 28 February 2012); International Accountability Project, 'The Phulbari Coal Project: A Threat To People, Land, And Human Rights In Bangladesh' (International Accountability Project 2012); Open Letter, Endorsed by 110 NGOs from International Accountability Project, 'Open Letter to the Investors in Global Coal Management Resources' (August 2008).

³⁰ Kenya Vision 2030, 'Kenya Vision 2030' <<https://vision2030.go.ke/>> accessed 26 May 2019.

³¹ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 21).

³² *ibid.*

Approaches to Development came into conflict with each other when the scope of the human rights that were set to be respected, protected, and fulfilled alongside the project did not align between the stakeholders.

In analysing the conflicts between approaches, even identical approaches may lead to human rights violations. Specifically, when employing a Human Rights-Based Approach to Development, different stakeholder dispositions have the potential to be so wide ranging because the goals of one stakeholder may be completely different from another, even under the same approach. In Kenya, one stakeholder believed that the other valued social and cultural rights, thereby prioritising them in the approach, when in fact, it was economic and cultural rights that took precedence. This was only made clear when combining the approaches of multiple indigenous stakeholders. In Bangladesh, the international response came from a failure to protect civil rights but shed light on economic social and cultural rights as well. A Human Rights-Based Approach to Development relies on the stakeholders to determine the rights that must be respected, protected, and fulfilled, and where along the development process these rights can be implemented. If not, even under the same approach, there may be conflict as in Kenya and Bangladesh. This is to say that when multiple stakeholders employ a Human Rights-Based Approach to Development, the disposition must be a collective one, agreed upon by stakeholders, to achieve the most effective commercial development project and rights protections.

Compatible Approaches in the Case Study Contexts

In the three case studies, compatible stakeholder approaches stem from (1) dispositions that in combination, result in (2) actions that (3) do not violate (or abuse) human rights. However, this does not necessarily equate to the intentional respect, protection and fulfillment of human rights. Compatibility is not wholly approach dependent. A compatible approach may be between a stakeholder using a Non-Rights-Based Approach to Development and a stakeholder using a Development-Based Approach to Human Rights. The first stakeholder may not care if rights are actively protected, as long as there are no financial repercussions. The second stakeholder may understand the first stakeholder's approach and design the project with human rights at the core, while fulfilling the needs of the other stakeholder. These approaches are compatible even though their dispositions and actions are different.

In the three case studies there are multiple examples of compatible stakeholder relations. Returning to the Kenyan Government's original approach, their Non-Rights-Based Approach to Development was compatible with the Lake Turkana Wind Power project's Human Rights-Based Approach to Development. A sustainable development policy agenda was being fulfilled by way of the Lake Turkana Wind Power project, a clean energy wind farm that would bring electricity to 22 million Kenyans and achieve federal policy goals.³³ This is not to say that the Kenyan Government encouraged human rights violations in the name of commercial development. Their Non-Rights-Based Approach to Development was not anti-human rights. It was purely pro-sustainable development. This example furthers the idea that the same approaches may have different dispositions, and still be compatible.

The Lake Turkana Wind Power project's impact assessment reports used a Human Rights-Based Approach to Development which was compatible with certain factions of the local communities. While employing a Human Rights-Based Approach to Development, the Lake Turkana Wind Power project outlined an extensive plan for resettlement, ensuring that the rights to education, food, health, and property were being respected, protected, and fulfilled.³⁴ For the indigenous communities that did not participate in the court case, this was compatible with their mix of a Human Rights-Based Approach to Development and a Non-Rights-Based Approach to Development. This hybrid existed for two reasons: (1) they saw an increase in their rights realisation through the construction of new hospitals and schools, and/or (2) the indigenous communities did not use a rights-based framing and saw the hospitals and schools as community development benefits. Regardless of the outcome, the approaches to the relocation programmes by the Lake Turkana Wind Power project and the indigenous communities were compatible, and utilised both rights and community development framings. The approach that the Lake Turkana Wind Power project used in the impact assessment report had a rights disposition. It should be noted that the disposition and action of the approach did not lead to the intended result in the stakeholder relation. The lawsuit is evidence that there is not always a linear relationship between an approach and the corresponding stakeholder relation.

³³ Aldwych International (n 13).

³⁴ African Development Bank, 'SUMMARY OF THE SIRIMA VILLAGE RESETTLEMENT ACTION PLAN' (Lake Turkana Wind Power 2015); 'Sarima Village Resettlement Process Information Document' (Lake Turkana Wind Power 2017).

In Bangladesh something very similar occurred with a different outcome. The compatibility here was between the corporate partners and certain factions of the local communities. These factions were in the small minority, and first and foremost saw the Phulbari Coal Mine as a labour opportunity.³⁵ These factions used a Non-Rights-Based Approach to Development and again, were not actively anti-human rights, but prioritised the job opportunities and used a community development framing. Based on the language in the impact assessment report, the corporate stakeholders employed a Human Rights-Based Approach to Development.³⁶ The corporate approach was compatible with a different faction (a majority of the local community).³⁷ It was not enough to bring about a successful project. However, this is another example of local communities employing a range of approaches and certain stakeholders failing to understand and alter their own approach based on this diversity. Much like in Kenya, in Bangladesh, the indigenous communities were not a single stakeholder, and therefore required a broader range of approaches.

With regards to Canada's Okikendawt Hydroelectric Power Plant, the compatible approaches still came from a range of stakeholder relations. Even in this case study, all three approaches were utilised by different stakeholders. The Canadian Government applied the same approach, with different dispositions, in multiple relations with the same stakeholder. The first example of a Non-Rights-Based Approach to Development was used by the federal, provincial, and local governments, with regards to Dokis land ownership and usage.³⁸ This approach was a result of the land protections from domestic rights-based instruments that the Dokis First Nation had secured over centuries of treaties. Again, this is not to say that the state's Non-Rights-Based Approach to Development actively violated rights. The state's disposition in this project was to respect and protect (not fulfill) rights (in particular land rights) based on the various treaties in place with the Dokis. Since the land ownership and usage was not in dispute, the state involvement, from a rights perspective, was minimal. The rights fulfillment component was left to the Dokis community as they spearheaded the project. For the second example of a Non-Rights-Based Approach to Development, the state used a community development framing when preparing the

³⁵ TOOMEGANE (n 21).

³⁶ SMEC Australia Pty Ltd (n 4).

³⁷ TOOMEGANE (n 21).

³⁸ Dokis First Nation, 'Dokis First Nation Land Code Executive Summary' (2013); Dokis First Nation Land Management Code 2014.

impact assessment report.³⁹ It should be noted that this is the only one of the three case studies where the state has a domestic legal obligation to prepare the impact assessment report.⁴⁰ The report itself confirms that “With success, the Okikendawt hydroelectric project is intended to create long-term sustainable economic and social development for the Dokis First Nation.”⁴¹ Even though the state utilised a Non-Rights-Based Approach to Development, with a focus on sustainable development, the Dokis community utilised a Development-Based Approach to Human Rights to great effect.

The Dokis’ history entailed unique framings, instruments, and consultation measures which in turn, contributed to a hybrid of a Human Rights-Based Approach to Development and a Development-Based Approach to Human Rights around the Okikendawt Hydroelectric Power Plant. Property and land use rights were of paramount importance to the Dokis community. They saw land, and its potential, as a means to rights fulfillment as well as community and commercial development.⁴² These rights were at the core of not only the Okikendawt Hydroelectric Power Plant, but many other Dokis development projects. The construction of roads and bridges, respected and protected by the land rights agreements, allowed for the community to reach local hospitals, industry, and schools, thereby spurring economic and social development. When the Okikendawt Hydroelectric Power Plant began, it was because of a community decision to develop as a way to fulfill human rights, and to fulfill rights as a means to community and commercial development. Building a hydroelectric plant on their own terms allowed the Dokis community to protect their cultural traditions, while incentivising younger members to stay close to home. It also created jobs that would bring members that had left, back to the owned land, thereby fostering even more community and commercial development. The Dokis educated themselves about what it would take to partner with a corporation to ensure a successful project that put their rights at the forefront. The stakeholders that the Dokis First Nation brought into the project were heavily vetted

³⁹ Public Works and Government Services Canada (n 6).

⁴⁰ Legislative Services Branch, ‘Consolidated Federal Laws of Canada, Canadian Environmental Assessment Act’ (6 July 2012) <<https://laws-lois.justice.gc.ca/eng/acts/C-15.2/>> accessed 18 April 2020; Canadian Environmental Assessment Act 2009-2012.

⁴¹ Public Works and Government Services Canada (n 4).

⁴² Dokis First Nation Land Management Code 2014; ‘Dokis First Nations Land Management Resource Centre (RC)’ (*First Nations Land Management Resource Centre (RC)*) <<https://labrc.com/first-nation/dokis/>> accessed 9 February 2020; *Dokis History of the First Nation* (n 14); ‘New Chief of Dokis Looks to a Bright Future’ <<http://anishinabeknews.ca/2016/06/06/new-chief-of-dokis-looks-to-a-bright-future/>> accessed 9 February 2020.

to ensure their approaches would be compatible.⁴³ The minimum standards for the approach were set as a Human Rights-Based Approach to Development (the Dokis did not use this terminology, but this assertion is based on their dispositions and actions). This is to say that either a Human Rights-Based Approach to Development or Development-Based Approach to Human Rights were necessary dispositions from each corporate partner, in order for them to be brought on board. Having the approach (and the scope of the approach) set by the local community led to compatible approaches across the entire project.

Hydromega, the primary corporate partner, brought the commercial development expertise, and used a Human Rights-Based Approach to Development that was designed by the Dokis.⁴⁴ This unique stakeholder relation allowed for one stakeholder to ensure that the rights-based approach was incorporated effectively into the commercial development practices. Cultural rights in particular, such as the protection of local turtles and burial sites, influenced the way that Hydromega constructed the Okikendawt Hydroelectric Power Plant.⁴⁵ The approach to stakeholder relations between the Dokis and Hydromega was highly compatible. The Dokis utilised a Development-Based Approach to Human Rights for their own roles in the project, especially surrounding community engagement. However, when engaging with Hydromega and other corporate partners, they employed a Human Rights-Based Approach to Development, essentially teaching the other stakeholders the rights that must be respected, protected, and fulfilled for the project to continue. The Dokis community held the power over other stakeholders, initially choosing each one, hiring or partnering with them, and therefore setting a standard scope of a Human Rights-Based Approach to Development.

⁴³ Government of Canada; Indigenous and Northern Affairs Canada, 'Dokis First Nation Okikendawt Project' (*Indigenous and Northern Affairs Canada*, 31 March 2016) <www.aadnc-aandc.gc.ca/eng/1459449220161/1459449341752>.

⁴⁴ Elizabeth Ingram, 'Ontario Hydropower Project Wins Sustainability Award' *Hydro Review* (3 December 2014) <www.hydroreview.com/2014/12/03/ontario-hydropower-project-wins-sustainability-award/>; 'Okikendawt Hydro LP Financing' (*Stonebridge*) <<https://stonebridge.ca/okikendawt-hydro-lp-2/>> accessed 8 February 2020.

⁴⁵ Nicole Ireland, 'First Nations See Economic Future in Growing Clean Energy Industry' *CBC News* (5 November 2016) <www.cbc.ca/news/indigenous/first-nations-pursue-canada-clean-energy-economy-1.3829405> accessed 8 February 2020; 'Construction of Ontarios 10-MW Okikendawt Small Hydropower Project under Way' (*Hydro Review*, 29 August 2013) <www.hydroreview.com/2013/08/29/construction-of-ontarios-10-mw-okikendawt-small-hydropower-project-under-way/> accessed 8 February 2020; 'Okikendawt Hydro Project on the French River Begins Construction' *Anishinabek News* (27 August 2013) <<http://anishinabeknews.ca/2013/08/27/okikendawt-hydro-project-on-the-french-river-begins-construction/>> accessed 8 February 2020.

Each approach has the potential to be compatible with any other under the right circumstances. Additionally, an incompatible approach between two stakeholders does not mean that their entire relationship is incompatible. The approaches in the taxonomy are taken context by context. The disposition and action that make up the approach sometimes does not lead to intended results, as in the relation between the Lake Turkana Wind Power project and the local communities. In other contexts, the disposition and action lead to a result that fulfills rights even more than intended, as in Hydromega's relationship with the Dokis First Nation. Regardless of the result, this approach taxonomy is useful in understanding the intended relationship between stakeholders with regards to human rights in commercial development contexts.

Human Rights, Development, and the Analytical Framework

It is important to not minimise the means by which these three approaches can contribute to states' obligations to respect, protect and fulfill human rights. The nature of human rights, and their systems, are fundamentally different from community development. For an individual member of the indigenous community in the Lake Turkana region of Kenya, they may not care whether it was the obligations of human rights laws or development policy that ultimately brought about the local hospital. This hospital may be progressively realising the right to health, achieving certain targets under Sustainable Development Goal 3 (Good Health and Well-Being) or fulfilling a certain aspect of Kenya's Vision 2030. However, to the extent that a state ratifies the related treaty, human rights are obligatory within the structure of the specific right, with review procedures from domestic to international levels. These obligations are state duties, and while the state may employ additional stakeholders (corporate or otherwise) to assist in respecting, protecting, and fulfilling certain rights, the rights are ultimately binding on the state.

However, it could be argued that the progressive realisation of economic and social rights is impossible without community development. Community development may be undertaken by any stakeholder and there are no legal obligations to community development as a policy matter.⁴⁶

⁴⁶ Khalid Abdalla, 'Declaration on the Right to Development (History)' 6; Sengupta, 'Right to Development as a Human Right' (n 1); Arjun Sengupta, 'Conceptualizing the Right to Development for the Twenty-First Century' <www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_587738a4-en> accessed 30 September 2018; Arjun Sengupta, 'Realizing the Right to Development' [2000] *Development and Change* 26. The right to development is a different articulation of community development. Some states rely on

This is to say that construction, safety, zoning, standards, and other legal requirements are necessary in commercial development projects, but the right to community development and development agendas are soft law, and not legal obligations on the part of the state (in more detail in Chapter I).⁴⁷ This idea that realising economic and social rights requires community development is not novel.⁴⁸ In the three approaches outlined and applied above, rights and community development, while different, continuously feed into each other. Community development (in many instances) drives rights fulfillment and rights fulfillment (inevitably) requires community development.⁴⁹ These approaches affirm this mutual drive toward respect, protection, and fulfillment of rights and community development achievements.

A few new lessons emerge from the three case studies. The lessons may predict compatible approaches to stakeholder relations in a variety of contexts. There are myriad factors that could indicate a specific disposition and resulting action. Stakeholders have a choice of framings, a set of instruments, and a range of potential consultation measures through which they can pursue a commercial development project. The options available within the analytical framework (framing, instruments, and consultation measures) can provide indicators as to the type of approach that a stakeholder ought to use in specific contexts in order to respect, protect, and fulfill human rights. This is to say that while the stakeholders do have choices, their choices may be bound by the context of the commercial development project including the state, the indigenous communities, the international obligations, inter alia. Determining the most effective tools (to fulfill human rights) within the boundaries of the circumstance will indicate approaches that, in turn, aim to fulfill human rights.

the right to development to justify commercial development projects that violate rights, but as a policy matter, there are no formal legal obligations in the sense that this thesis describes.

⁴⁷ Surya P Subedi, 'Introductory Note: Declaration on the Right to Development' [2021] Audiovisual Library of International Law 9; Office of the High Commissioner For Human Rights, 'General Comment No. 3: The Nature of States Parties' Obligations' (Committee on Economic, Social and Cultural Rights 1990). Except in so far as economic and social rights enshrined in the ICESCR lead to development.

⁴⁸ Alston (n 1); Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 Human Rights Quarterly 866; 'United Nations - About Economic and Social Development' <www.un.org/esa/about_esa.html> accessed 18 April 2020; Office of the United Nations and High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights' (Office of the United Nations High Commissioner for Human Rights) <www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

⁴⁹ UNDG, 'UN (Sustainable) Development Group Human Rights Case Studies' (UN Development Operations Coordination Office 2013).

The relationship between the analytical framework and the approaches is not necessarily linear, however there are strong causal relationships. First, engaging with instruments that utilise human rights framings indicates that a stakeholder is using either a Human Rights-Based Approach to Development or a Development-Based Approach to Human Rights. As is made clear in the case studies, stakeholders that utilise human rights instruments tend to apply rights-based framings to their impact assessment reports. The impact assessment reports may not use human rights language, but by way of certain commercial development processes, aim to respect, protect, and fulfill rights obligations. This is particularly true in the instances where the corporate developers are responsible for the impact assessment reports. In Kenya, the corporate stakeholders prepared the impact assessment report and attempted to protect economic, social, and cultural rights, in addition to civil and political rights.⁵⁰ In Bangladesh, again, the corporate stakeholders attempted to protect the rights to work, health, and culture.⁵¹ In both of these case studies, had the states written the reports, their uses of a Non-Rights-Based Approach to Development may have resulted in impact assessment reports that were differently framed. In Canada, the government prepared the impact assessment report and focused on achieving community development for the Dokis community, which in turn would progressively realise economic and social rights.⁵² The Canadian Government was not at risk of violating the Dokis' human rights protections due to the nature of the project and may have concluded that a community development framing was sufficient.

Beyond impact assessment reports, any stakeholder that makes use of an instrument with a human rights framing tends to indicate that their approach will either be a Human Rights-Based Approach to Development or a Development-Based Approach to Human Rights. Additional examples include the court case *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* when the indigenous communities alluded to the United Nations Declaration on the Rights of Indigenous Peoples by claiming a lack of free prior and informed consent.⁵³ Using a human rights-based argument affirmed that these specific indigenous stakeholders were using a human rights-based approach in their argument, and in this case, a Human Rights-Based Approach to Development. In Canada, the Dokis community's education processes (learning about how the

⁵⁰ QBIS (n 6).

⁵¹ SMEC Australia Pty Ltd (n 4).

⁵² Public Works and Government Services Canada (n 6).

⁵³ *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 21); United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP) (n 11).

hydroelectric plant would be constructed and its effects on the land) allowed them to ensure that all stakeholders participating in the commercial development's construction would utilise either a Human Rights-Based Approach to Development or a Development-Based Approach to Human Rights.⁵⁴ The Dokis community informed the stakeholders that human rights were of paramount importance and needed to be respected, protected, and fulfilled alongside the project. Therefore, these stakeholders utilised a Human Rights-Based Approach to Development. The Dokis community framed the entirety of the project, relying on a range of human rights instruments that afforded them the ownership and land use for commercial development.⁵⁵ In Bangladesh, the state's direct violation of human rights laws in the extrajudicial killing of peaceful protesters was at odds with the corporate stakeholders' and NGO stakeholders' uses of instruments to inform the impact assessment reports.⁵⁶ This separation between the state, which utilised a Non-Rights-Based Approach to Development, and the remaining stakeholders who utilised either a Human Rights-Based Approach to Development or Development-Based Approach to Human Rights is indicated by the referenced instruments that utilised human rights framings and language.⁵⁷ The use of instruments is not wholly indicative of a specific approach, but, alongside the framing and consultation measures is a good indication of a stakeholder's approach to commercial development, and the intention to respect, protect, and fulfill human rights.

There is an additional instrument consideration in the case studies that may signify certain approaches to stakeholder relations. Sustainable development, and the Sustainable Development Goals, are considerations in two out of the three case studies: Kenya and Canada. The sustainable nature of a context does not preclude the respect, protection, and fulfillment of human rights. The Lake Turkana Wind Power project's impact assessment report uses the Sustainable Development Goals as a framework, but selectively incorporates the goals and targets that may prove achievable

⁵⁴ Government of Canada; Indigenous and Northern Affairs Canada (n 43).

⁵⁵ Dokis First Nation (n 38); Dokis First Nation Land Management Code 2014.

⁵⁶ Dhaka Tribune, 'Phulbari Protesters Give Ultimatum to Meet 6-Point Demands' (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 27 October 2018; Phulbari Resistance, 'Phulbari Resistance: Urgent Appeal by World Organization against Torture: Risk of Violent Suppression of Public Opposition to the Phulbari Coal Mine Project' (*Phulbari Resistance*, 22 December 2007) <<http://phulbariresistance.blogspot.com/2007/12/urgent-appeal-by-world-organization.html>> accessed 16 October 2020; Asia Energy Corporation (n 22).

⁵⁷ International Accountability Project (n 29); Faizunnessa Taru, 'Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments' (2016) 46 *Journal of Law, Policy and Globalization* 9; Constitution of the People's Republic of Bangladesh (n 19).

by way of the wind farm's development.⁵⁸ Canada's sustainable development policies include a focus on renewable energy.⁵⁹ The Okikendawt Hydroelectric Power Plant in Ontario contributes toward achieving both their SDG commitments and domestic policy goals.⁶⁰ It is possible, as the limited number of case studies in this thesis begins to indicate, that there may be a causal relationship between the use of the Sustainable Development Goals as an instrument, and certain approaches to rights, community, and commercial development.

Much like the instruments, certain consultation measures are not universal indicators of approaches, but may show certain signs of which approach a stakeholder may utilise. Widespread consultation mechanisms among stakeholders before, during, and after commercial development projects may not necessarily lead to fewer human rights violations. However, specific methods of consultation, and the specific stakeholders that are consulted, may lead to an increase in the respect, protection, and fulfillment of human rights. In the three case studies, the impact assessment reports again provide clues as to the stakeholders consulted, the plans developed, and the intended and enacted resulting measures. In the Phulbari Upazila, Snowy Mountain Engineering Corporation consulted a range of stakeholders. Their impact assessment report used a community development framing and community development language, with a small handful of mentions of human rights in Volume 4.⁶¹ The impact assessment report included stakeholder consultation reports with plans for relocation, health and safety, environmental and water protection, and labour for the local communities.⁶² As made clear by the protests and resulting international response, the consultation measures and resulting plans did not reflect the needs of the local stakeholders. For the Phulbari

⁵⁸ QBIS (n 6).

⁵⁹ Environment and Climate Change Canada, 'Federal Sustainable Development Strategy' (18 June 2018) <www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html> accessed 8 February 2020; Environment Canada, 'Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada' (Environment Canada 2010).

⁶⁰ British Columbia Council for International Cooperation, 'Where Canada Stands Volume II: A Sustainable Development Goals Shadow Report' (British Columbia Council for International Cooperation 2018); Environment and Climate Change Canada, 'Federal Sustainable Development Strategy' (*aem*, 18 June 2018) <<https://www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html>> accessed 8 February 2020; Environment Canada, 'Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada.' (Environment Canada 2010) <<http://ra.ocls.ca/ra/login.aspx?inst=centennial&url=https://www.deslibris.ca/ID/225302>> accessed 10 February 2020; Elizabeth Ingram (n 33).

⁶¹ SMEC Australia Pty Ltd (n 4).

⁶² Asia Energy Corporation (Bangladesh) Pty Ltd (n 4); Asia Energy Corporation (Bangladesh) Pty Ltd (n 22); SMEC Australia Pty Ltd (n 22); SMEC Australia Pty Ltd (n 4).

Coal Mine, the measures used a Non-Rights-Based Approach to Development, purely focusing on how to replicate current access to labour, health, water, and other resources, while relocating some of the affected communities. Human rights protections were not included in the consultations, and when mentioned, did not make their way into the actions that were intended by the consultation measures.⁶³

In Kenya, the Human Rights-Based Approach to Development of the corporate partners was mirrored in the consultation measures. The measures fell short of their goals, particularly in their failure to fully recognise the scope of the indigenous communities.⁶⁴ Consultation from some stakeholders failed to incorporate cultural norms from certain groups within the indigenous community, which is what led to *Mohamud v Lake Turkana Wind Power Ltd.*⁶⁵ The Lake Turkana Wind Power project's impact assessment report used community development to attempt a Human Rights-Based Approach to Development but insufficient consultation measures brought about an unintentional mix of approaches.⁶⁶

In Canada, the Okikendawt Hydroelectric Power Plant's impact assessment report was prepared by the Canadian Government and used community development framing and language.⁶⁷ Consultation measures played less of a factor as compared to the other two case studies, however, the Dokis First Nation consulted with nearly every stakeholder to ensure their ability to develop sustainably and protect human rights. This inverted consultation, with the local community setting the consultation measures and feedback mechanisms, again, set the standards for a collaborative Development-Based Approach to Human Rights and a Human Rights-Based Approach to Development. Consultation measures, and their framing, can clue into the type of approach that ought to be taken in order to respect, protect, and fulfill human rights. In the contexts of Bangladesh and Kenya, there was a structural failure. The corporate partners and resulting impact assessment reports failed to recognise the scope of the stakeholders, particularly the diversity within the indigenous communities. A comprehensive stakeholder analysis seems vital in order to have

⁶³ TOOMEGANE (n 21).

⁶⁴ 'FEEDBACK MECHANISM – Lake Turkana Wind Power' (n 7); 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 7); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 21).

⁶⁵ TOOMEGANE (n 21); *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (n 21).

⁶⁶ 'PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power' (n 7); QBIS (n 6).

⁶⁷ Public Works and Government Services Canada (n 6).

effective consultation measures and both dispositions and actions that reflect the intended approach.

The framing of a stakeholder relation by any given stakeholder is apparent in the instruments, the consultation measures, and the impact assessment reports. Framing is a key indicator of intention and therefore approach, but it does not stand on its own. Framing is inextricably attached to the tools above, and across all three case studies, is indicative of a stakeholder's disposition. This is to say that a framing which recognises the importance of human rights in commercial development contexts, in these three case studies, tends to lead to a Human Rights-Based Approach to Development. A purely commercial development framing, in these three case studies, tends to lead to a Non-Rights-Based Approach to Development. A framing that recognises the ability for commercial development to lead to rights fulfillment tends to lead to a Development-Based Approach to Human Rights. Phulbari, Lake Turkana, and Okikendawt are not universal indicators of the relationship between framing and disposition, however, there is at least a strong correlation, if not causation.

The Approach Taxonomy: A Civil Society Context

In the context of this thesis, the taxonomy described above is a method of characterising stakeholder relations, namely their dispositions and actions. Much like the Okikendawt Hydroelectric Power Plant, it is a nice and clean set of options, under which stakeholder relations may be filed. In reality, the commercial development contexts in which human rights and community development play a role are far messier and more complicated. There are instances where, as a result of changing tax policies, the actions of a corporate stakeholder are wholly different from their dispositions as described in an impact assessment report. In other instances, an indigenous community may value financial returns more than either human rights or community development. The commercial contexts in which stakeholder relations are key to determining how human rights play a role, are infinite. Ultimately, a taxonomy such as the one above, may not effectively apply to all contexts. Civil society organisations are one context in which the approach taxonomy can be implemented and further developed. Certain organisations are already pushing beyond a traditional human rights based approach to development.

In 2003, Oxfam President Raymond C Offenheiser and Brandeis University Professor Susan H Holcombe described a move away from the welfare model of community development and toward a Human Rights-Based Approach to Development for civil society organisations.⁶⁸ The collaborators mention other organisations that at this point were taking the same approach (Save The Children, World Vision, and CARE). Oxfam describes a multi-stakeholder approach and shows particular emphasis on integrating social and economic rights protections into civil society work, alongside civil and political rights advocacy:

A rights-based approach to development bridges theoretical gaps between political, civil, social, and economic rights by understanding how they are interconnected in practice. During the past half-century, specialized civil society organizations like Amnesty International and Human Rights Watch have effectively spotlighted violations of political and civil rights, using the “stick” of adverse publicity to halt violations, case by case. Civil society has yet to focus on the “carrots” needed to build social, cultural, and institutional capacity and to create a positive environment that makes honoring rights our new norm.⁶⁹

Finding “carrots”⁷⁰ for certain stakeholders, and progressively realising social and economic rights for others, are key for integrating rights and commercial development. While an ideal world of commercial development looks rather close to the Okikendawt Hydroelectric Power Plant, there are less successful examples that provide mutual benefits to a range of stakeholders, including the corporate partners. For the Lake Turkana Wind Power project, the corporate stakeholder’s disposition toward the indigenous community (regardless of the misunderstanding of the term) was to aim for mutual benefits. Lake Turkana Wind Power Ltd and Kenya completed a sustainable development project that brought clean electricity to millions of Kenyan homes, while helping to fulfill the policy goals of Vision 2030. Simultaneously, had the disposition effectively turned into action, the indigenous communities would have been relocated with additional economic and social development benefits, progressively realising rights that had not been fulfilled. This seems

⁶⁸ Raymond C Offenheiser and Susan H Holcombe, ‘Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective’ (2003) 32 *Nonprofit and Voluntary Sector Quarterly* 268, 270.

⁶⁹ *ibid* 286.

⁷⁰ *ibid*.

like a carrot approach for all relevant stakeholders. The Human Rights-Based Approach to Development, in and of itself, seems to offer the mutual benefits that Oxfam was anticipating, above and beyond the welfare approach to development. While the next and final chapter will focus more on contextualising the approach taxonomy (above) within the current conceptions of rights-based approaches to development, it is important to recognise that the primary stakeholders are not the only relevant parties. Civil society organisations played pivotal roles in the first two case studies, but the primary stakeholders were, for the most part, corporate, governmental (domestic and international), and indigenous.

The Oxfam approach in ‘Challenges and Opportunities in Implementing a Rights-Based Approach to Development’, describes the organisation’s advocacy work in helping to implement new approaches to human rights. The approach that is described is for civil society, in particular, Oxfam’s advocacy work, to assist local communities to campaign for other stakeholders to implement these approaches. In the taxonomy above, the approaches are taken by the three primary stakeholders, but can be applied to civil society as well.

There is clearly more work to be done to implement human rights-based approaches and development-based approaches directly for corporate and government stakeholders. These three case studies and the approach taxonomy extol the virtues of having all stakeholders participate in this self-reflection process: recognising and being intentional about their approaches to both human rights and community development in commercial contexts.

The Approach Taxonomy: Law, Policy, and Justice

The taxonomy presented at the outset of this chapter is not meant to replace any legal frameworks or mechanisms in specific country contexts, or in international law. Rather, this taxonomy of approaches to rights and development (community and commercial) allows stakeholders to categorise the different ways in which they may choose to think and act on the practices of commercial development. At this point, the taxonomy is a tool for analysis, with the potential to turn into a roadmap for stakeholders to engage with. Regardless of whether stakeholders engage with the taxonomy, the legal (local, regional, and international) mechanisms still stand. A failure to engage with the taxonomy is not the same as a failure to comply with legal obligations. It is purely a failure to utilise an approach, and therefore there is no formal (legal)

consequence for any stakeholder. Each of the case studies reference different types of legal obligations and describe the relevant legal enforcement mechanisms. There is no obligation for stakeholders to engage with the taxonomy of approaches, nor a mechanism for remedy in the case that a stakeholder fails to uphold a claim to utilise a certain approach.

It ought to be made abundantly clear that even with a widespread implementation of this taxonomy, remedies for human rights violations and access to justice, still fall within the legal obligations of stakeholders and are independent of the three approaches described above. While still relevant as described in the case studies, the taxonomy of approaches is highly relevant to, but non-binding regarding (1) the state duty to protect human rights in the context of commercial development projects, (2) business responsibilities to respect human rights, or (3) victims' right to access to remedy in the context of human rights violations associated with commercial development projects. This taxonomy is meant to decrease the need for engaging with the hard and soft law that obliges stakeholders to address these three concerns (state duties, business responsibilities, and access to remedy). This taxonomy supports, and exists alongside, the relevant hard and soft law, but in its current form, is not meant to be binding on any stakeholder.

This taxonomy has the potential to serve two functions. In one sense, it can be a tool for stakeholders to understand and amend their own human rights due diligence practices. The current human rights due diligence practices, as described in Chapter I and throughout the case studies, are primarily limited to corporate stakeholders and states. This taxonomy is a tool that can be implemented across all stakeholders in a commercial development project. In a more aspirational sense, another goal would be for elements of the taxonomy of approaches to become soft law. This is to say that one of the latter two approaches (Human Rights-Based Approach to Development and Development-Based Approach to Human Rights) ought to eventually become obligations on certain stakeholders. If implemented to its fullest extent, a soft law approach could have the potential to oblige stakeholders beyond the state, namely corporations and community organisations. As mentioned above, this approach is highly aspirational and the current human rights and commercial development landscape is extremely far from allowing soft law such as this to be implemented. However, the next and final chapter describes the development of new declarations, treaties and policies that would oblige and bind stakeholders in ways that would begin to implement these approaches in commercial development projects. For example, the taxonomy of approaches has the potential to build upon the aspirational natures of Principles 15 and 17 of

the UN Guiding Principles on Business and Human Rights, specifically with regard to commercial developers respecting human rights and incorporating human rights due diligence practices into their commercial developments.⁷¹ The taxonomy of approaches offers concrete ways of identifying the efficacy of corporate due diligence practices, while at the same time, identifying the ways in which state, local, indigenous and other stakeholders are engaging around human rights. Corporate stakeholders, as the case studies identify, are vital to respecting, protecting and fulfilling human rights, but they are only one participant in a complex web of stakeholder relations.

From a policy perspective, the Sustainable Development Goals are the global policy agenda that aligns most closely with the latter two approaches within the taxonomy. The SDGs are interconnected, interrelated, and interdependent with each other, and with human rights. The preamble to the 2030 Agenda for Sustainable Development mentions human rights 14 times and affirms the need for the goals to uphold the values of the Universal Declaration of Human Rights, as well as support the achievement of health, gender, inequality, peace, and partnerships.⁷² Human rights are a core component of the SDGs.⁷³ The SDGs, if achieved, will help to progressively realise human rights while the progressive realisation of human rights is not possible without multi-stakeholder commitments to community and commercial development. The two sustainable development case studies in this thesis are not nearly enough to prove correlation or causation between a commercial development project's sustainable nature and its commitment to human rights. However, the two sustainable development case studies in this thesis contain multiple stakeholders that, at minimum, utilise a Human Rights-Based Approach to Development, and in some instances, a Development-Based Approach to Human Rights.

Moving forward, sustainable development policies, regardless of whether they are aimed at achieving the Sustainable Development Goals in particular (for example Kenya's Vision 2030, Canada's Sustainable Development plans), can also help to differentiate between implementing a Human Rights-Based Approach to Development and a Development-Based Approach to Human Rights. In this thesis, sustainable development policies directed at energy, health, education, labour, and partnerships could each be rationalised based on the progressive realisation argument

⁷¹ Ruggie (n 11) 15, 17.

⁷² United Nations, 'The 2030 Agenda for Sustainable Development' (United Nations) A/RES/70/1.

⁷³ 'The Human Rights Guide to the SDGs' (*The Danish Institute for Human Rights*) <www.humanrights.dk/human-rights-guide-sdgs> accessed 9 June 2020; Permanent Missions of Denmark and Chile to the United Nations at Geneva, 'Human Rights and the SDGs Pursuing Synergies' (The Danish Institute of Human Rights 2017).

(above, namely that sustainable development policy may lead to the fulfillment of certain human rights). In order to identify this as a Development-Based Approach to Human Rights, the policies themselves would need to include a human rights disposition. This is to say that a policy to increase access to healthcare or educational facilities would need to explicitly include a mention of human rights obligations to the same end, much the same as the analysis of the Sustainable Development Goals in Chapter I. Contextualising human rights within community and commercial development policies is one of the first steps toward a wider use of the taxonomy of approaches.

For each of the approaches in the taxonomy, as with any new mechanism, additional case studies will help to specify and concretise the ways in which analyses may be drawn out, and eventually, stakeholders can intentionally adopt them. The approaches themselves will require nuance and their own development as they get applied to more and more case studies. This thesis selectively chose certain stakeholder relations to focus on within this chapter and could go further to develop and analyse every stakeholder relation from each of the case studies. The analysis in this chapter is meant to be the first step in the development of this taxonomy, built out of the three case studies.

This taxonomy includes the Non-Rights-Based Approach to Development, the Human Rights-Based Approach to Development and the Development-Based Approach to Human Rights. Each of these categories are interdependent and interrelated, much the same as many community development concepts. As the history of human rights and development makes clear (briefly described in Chapter I), these relationships are ever evolving. As the following chapter will present, utilising this taxonomy is the next step in the evolution toward a mutually beneficial and reinforcing relationship between commercial development, community development, and human rights.

CHAPTER VII: CONCLUSION

Lessons Learned by Applying the Taxonomy to the Case Studies

This thesis analysed and proposed approaches to human rights and development in commercial development contexts. The case studies show that commercial development projects have the potential to foster community development, and by way of this development, fulfill state human rights obligations. The thesis argues that stakeholders, and their approaches to rights and development (community and commercial), are the tools that can help to foster this relationship. The taxonomy of approaches in the previous chapter is a result of the in-depth case study analysis from the preceding chapters. However, as the case studies and analysis make clear, the relationship between rights and development is not a one-way street. Commercial development does not necessarily lead to community development, which does not necessarily lead to human rights fulfillment. Community development may simultaneously allow for commercial development and human rights fulfillment (as in the case of the Dokis First Nation in Canada). Human rights may be abused or violated by stakeholders other than commercial developers, namely by duty bearers (as with the local protesters around the Phulbari Coal Mine in Bangladesh). The relationship in some cases may not necessarily be linear, creating a web of commercial development, community development, and human rights that are constantly dependent on each other (as in the local communities surrounding the Lake Turkana Wind Power project in Kenya). This is to say that the relationship between rights and development (community and commercial) is complex, nuanced, and has not been fully analysed or articulated based on the three case studies in this thesis. There is more work to be done.

The Problem and Hypothesis

There is a clear and consistent problem. Commercial development projects, in many cases, result in human rights abuses. This thesis is interested in not only combating the human rights abuses, but in finding ways for commercial development to lead to human rights fulfillment. The various stakeholders in a commercial development project provide the keys to flipping this problem and turning it into a benefit for all involved. Stakeholder approaches, or the dispositions and actions of stakeholders in commercial development can be modified, to allow for compatible

relations over the course of a project. Dispositions and actions are the key indicators that determine whether a stakeholder considers human rights, community development, commercial development, or a combination of two or more in their approach to a project.

This thesis first asks the question: How do stakeholder approaches to rights and development affect the respect, protection, and fulfillment of human rights obligations in commercial development contexts? It then hypothesises that commercial development has the potential to foster community development and this community development has the potential to fulfill human rights obligations. Based on the events in the case studies, commercial development can contribute to states fulfilling their human rights obligations. However, this thesis and the analysis go beyond attempting to determine the veracity of this claim. By way of the case studies and analysis, the thesis teases out the ways in which this claim can be accomplished, thereby answering the research question. The answer to the question comes in the form of the three stakeholder approaches described in Chapter VI: (1) A Non-Rights-Based Approach to Development: ignoring any human rights effects in commercial development contexts. (2) A Human Rights-Based Approach to Development: a system of checks that attempts to protect the human rights of all stakeholders at each step of commercial development. (3) A new contribution to the field, a Development-Based Approach to Human Rights: using human rights fulfillment as the foundational goal of commercial development.

Filling Gaps in the Literature

The recent literature in the fields of human rights and development contains three gaps (as described in Chapter I) that this thesis aimed to fill: (1) it is unclear from the literature whether the rightsification of development inhibits the fulfillment of human rights or the achievement of community development, (2) it is unclear from the literature if applying a Human Rights-Based Approach to Development (as opposed to community development without the rights-base) can sufficiently contribute to states obligations to respect, protect, and fulfill rights, and (3) it is unclear from the literature if commercial development has the potential to intentionally achieve community development goals as a path toward human rights realisation. This thesis has contributed to filling all three of these gaps.

With regards to the first gap, this thesis looked primarily at community development contributing to rights fulfillment in the contexts of Kenya and Canada. In Kenya, Lake Turkana Wind Power Ltd claimed to understand the state's human rights obligations and through Winds of Change and the Resettlement Action Plan, helped to progressively realise rights to property, education, health, inter alia by way of a community development project. In Canada, the Doki First Nation went a step further and used the commercial development project to intentionally contribute to the realisation of economic, social, and cultural rights by way of the local community owning a piece of the commercial development and incentivising band members to return home. Based on these two case studies, it seems that community development initiatives can contribute to rights fulfillment.

The second gap in the literature is addressed in all three of the case studies as well as in the taxonomy of approaches. An outright determination of whether applying a Human Rights-Based Approach to Development (as opposed to community development without the rights-base) provides a different experience for the people that are developing is beyond the scope of this thesis. However, there are examples where commercial development, even with the attempt to provide employment, education, property, and health has failed to fulfill human rights of the related matters (the rights to work, education, land, inter alia). The relocation programme surrounding the Phulbari Coal Mine was based on insufficient cultural research and resulted in a violation of cultural rights for the indigenous communities. For this programme, the corporate stakeholders purely focused on community and commercial development, and did not use a human rights-based approach. For the Lake Turkana Wind Power project, various stakeholders attempted to use a human rights-based approach. For some of the local communities it was sufficient, for others it was insufficient, with particular complaints about a lack of free prior and informed consent. In the taxonomy of approaches, this thesis recognises the value of a Human Rights-Based Approach to Development but goes one step further by presenting a more human rights-centric approach: a Development-Based Approach to Human Rights. While this thesis does not fill this gap in the literature in its entirety, it does make clear that human rights-based approaches will not necessarily fulfill human rights obligations and not necessarily provide sufficient community development. The human rights-based approach has the ability to provide rights fulfillment and community development, but the results are case and stakeholder specific. Therefore, it is impossible, without context, to offer a blanket statement about the experiences of the people that are developing.

The third gap in the literature is the primary thematic driver of the thesis: the potential of commercial development to intentionally achieve community development aims as a path toward human rights realisation. Based on the stakeholder dispositions surrounding the Lake Turkana Wind Power project in Kenya and the overall stakeholder approaches to the Okikendawt Hydroelectric Power Plant in Canada, this thesis analysed case studies in which this potential was realised. In Lake Turkana, the corporate stakeholders intended to protect human rights, based on their consultation measures and instruments. The resulting lawsuit and claims of human rights violations resulted from a lack of due diligence on customary and cultural practices. Regardless of the resulting court case, the disposition of the corporate stakeholders had a dual framing of both development (community and commercial) and human rights. For the Dokis First Nation in Ontario, nearly every stakeholder was compelled to understand this relationship between human rights and community development. However, the Dokis First Nation strategically used either a rights or development (community and commercial) framing, depending on which framing was more relevant to each stakeholder. The Canadian Government, as it related to land ownership and use, required a human rights framing, while Hydromega, the corporate partner, required a development framing. The Okikendawt case study went beyond the linear structure of the proposed gap in the literature. The commercial development fostered community development and thereby contributed to Canada fulfilling its human rights obligations. But beyond this linearity, the case study presented a circular structure. The circularity occurred because the Dokis' right to develop their land was based on a human rights treaty. This treaty, and the relevant human rights, were what allowed the commercial development to occur in the first place, placing human rights at both the beginning and the end of the process. These two case study-based examples provide grounding for additional research on the potential for commercial development to foster community development and fulfill human rights. However, this thesis is sufficient to consider that the potential is realistic.

Next Steps: Human Rights

While this thesis provides sufficient grounding for additional research, there are a few external contexts that reinforce the importance of this research and highlight next steps. The Draft Convention on the Right to Development 2020 is a proposal for a binding legal human rights

instrument that is based on the previous literature described in Chapter I.¹ The Human Rights Council Working Group on the Right to Development published their Draft and commentaries after all the events described in all three case studies had concluded.² The Draft Convention 2020 specifically refers to Human Rights-Based Approaches to Development, impact assessments, indigenous development and sustainable development.

In simple terms, Article 3(c) describes a Human Rights-Based Approach to Development, providing that “development is a human right and should be realized as such and in a manner consistent with and based on all other human rights.”³ While this definition focuses on development as a right in and of itself, the commentaries on the Draft Convention 2020 come closer to the breadth of the literature (Chapter I) and the redefinition (of a Human Rights-Based Approach to Development) in the taxonomy of approaches (Chapter VI). A Human Rights-Based Approach to Development, for the Working Group is

for ensuring that development is not operationally realized in a manner inimical to human rights, but rather in a way that ensures respect, protection and fulfilment thereof. It focuses on linking and aligning the objectives of development projects to specific human rights norms, standards and principles. This paragraph highlights that laws, policies and practices related to development must incorporate a human rights-based approach founded on the fundamental principle (in the definition above). The two elements of this principle – that development is a human right and that its realization must be compatible with all other human rights – are central as a guide for the implementation of almost every obligation contained in the draft convention, including those related to conducting impact assessments and implementation of development agendas.⁴

Again, this description focuses on the human rights side of the approach, namely that community development is ought to be treated as a right in and of itself. This proposal in the Draft Convention

¹ Human Rights Council, Working Group on the Right to Development, ‘Draft Convention on the Right to Development A/HRC/WG.2/21/2’ (2020).

² *ibid*; Human Rights Council, Working Group on the Right to Development, ‘Draft Convention on the Right to Development, with Commentaries A/HRC/WG.2/21/2/Add.1’ (2020).

³ Human Rights Council, Working Group on the Right to Development (n 1) Article 3(c).

⁴ Human Rights Council, Working Group on the Right to Development (n 2) Article 3, Comment 7.

2020 can still be problematised by Mary Robinson's comments regarding community development practitioners' unwillingness to utilise legal strategies, and legal practitioners' unwillingness to use community development strategies.⁵ This Draft Convention 2020 is also not the first time that states would be bound as duty bearers for community development (examples listed in Chapter I). Like Peter Uvin's critiques⁶ of the Declaration on the Right to Development 1986⁷, this Draft Convention 2020⁸ still may be too abstract, (with Article 3(c) as a prime example) in that it fails to have the teeth to achieve specific community development goals: education, health, poverty reduction, inter alia. Instead of resorting to the abstract nature of a declaration or treaty, the taxonomy of approaches addresses modes of interaction in specific contexts. The analytical framework, including framing, instruments, and consultation are all relevant to these modes of interaction. The Draft Convention 2020 addresses a few of these modes, namely types of instruments.

The regulation of impact assessments in the Draft Convention on the Right to Development 2020 occurs in Article 19(1):

States Parties undertake to take appropriate steps, individually and jointly, including within international organizations, to establish legal frameworks for conducting prior and ongoing assessment of actual and potential risks and impact of their national laws, policies and practices and international legal instruments, policies and practices, and of the conduct of legal persons which they are in a position to regulate to ensure compliance with the provisions of the present Convention.⁹

The commentaries on Article 19 address each of the clauses, however there are two important elements to note as they relate to this thesis. First, establishing a legal framework for impact assessments is a significant move for the human rights and development world. The commentaries

⁵ Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199284627.001.0001/acprof-9780199284627> accessed 7 February 2021.

⁶ Peter Uvin, *Human Rights and Development* (Lynne Rienner Publishers 2004) <<https://ebookcentral-proquest-com.proxy.library.nyu.edu/lib/nyulibrary-ebooks/detail.action?docID=3328882>>.

⁷ Declaration on the Right to Development (4 December 1986) A/RES/41/128 (DRTD).

⁸ Human Rights Council, Working Group on the Right to Development (n 1).

⁹ *ibid* Article 19(1).

mention that the impact assessments should continuously assess all human rights, not just those in the Draft Convention 2020. The second significant element is that states can measure “the conduct of legal persons which they are in a position to regulate to ensure compliance” which in many countries, includes corporations.¹⁰ This notion is also supported by Article 11(c) The Obligation to Protect. State parties ought to use all their available resources (as limited by Article 11) to ensure that legal persons do not inhibit the enjoyment of the right to development, including “The legal person conducting business activities, including those of a transnational character, [who] is domiciled in the State Party, by virtue of having its place of incorporation, statutory seat, central administration or substantial business interests in that State Party.”¹¹ While there is no guarantee that this language will be included in the final version of the convention, legally binding commercial developers is a move in the same direction that this thesis proposes, even just by way of including human rights in legally required impact assessment reports.

Article 17, Indigenous and Tribal Peoples, reiterates provisions from the United Nations Declaration on the Rights of Indigenous Peoples including free prior and informed consent.¹² Article 22, Sustainable Development, reiterates the definition of sustainable, and encourages the pursuit of development that does not “compromise the ability of future generations to realise their right to development.”¹³ The potential for sustainable development to be applied alongside the one or more of the approaches in the taxonomy will be analysed below. While it is always useful to reiterate the importance of certain rights, some of the articles, including 17 and 22, may not provide any additional benefits above and beyond the rights instruments and community development policies already adopted by the international community.

The academic commentaries on the Draft Convention 2020 question its usefulness as well: “it is questionable whether the adoption of a new Convention on the Right to Development would serve the cause of the right to development. The right to development is already well rooted in the existing core human rights treaties...”¹⁴ This comment is in line with the original academic responses to the Declaration on the Right to Development (Chapter I). Since both commentaries

¹⁰ *ibid.*

¹¹ *ibid* Article 11(c).

¹² *ibid* Article 17; United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP).

¹³ Human Rights Council, Working Group on the Right to Development (n 1) Article 22(b).

¹⁴ Nico Schrijver, ‘A New Convention on the Human Right to Development: Putting the Cart before the Horse?’ (2020) 38 *Netherlands Quarterly of Human Rights* 84, 84.

align, and one instrument has the intention of binding state parties while the other does not, it begs the question: Does legal enforceability of a right to development contribute to international law in any valuable fashion?

Regardless of whether it becomes international law, The Draft Convention on the Right to Development 2020 is moving the human rights and development conversations (if not law) at the international level closer to a place envisioned by this thesis. However, as with a number of other economic and social rights, the Draft Convention 2020 is entirely progressively realisable, and as this thesis concludes, will require concrete community and commercial development tools in order to realise these rights. In other words, development (community and commercial) may be necessary to progressively realise the right to development.

Next Steps: Development

The taxonomy of approaches described in the preceding chapter is meant to be one set of tools alongside many others, some of which were utilised throughout the case studies: the Sustainable Development Goals, the Equator Principles, Clean Development Mechanism, stakeholder capitalism *inter alia*. The Sustainable Development Goals in particular have the potential to assist states in progressively realising a range of economic and social rights. If used alongside a Development-Based Approach to Human Rights, the Sustainable Development Goals may be an even more useful tool for targeting specific forms of development (community and commercial) in specific contexts. In the Lake Turkana Wind Power project, the impact assessment report was framed using the Sustainable Development Goals. In making use of the taxonomy of approaches, the assessment report would have had a clearer understanding of when the Sustainable Development Goals were appropriately utilised, and when the report ought to have utilised a human rights framing (particularly in relation to indigenous communities). In the Okikendawt Hydroelectric Power Plant, the governmental impact assessment may have utilised the approach taxonomy effectively as it articulated the environmental and social impacts and solutions. The solutions may have been framed as development (community and commercial) or rights-based depending on which stakeholder was the duty bearer for the solution to a potential problem. Sustainable development, and the Sustainable Development Goals seem to have a significant role to play in finding common ground between human rights and commercial or community

development. Two of the case studies (Kenya and Canada) see a stronger positive correlation between approach, sustainability, and human rights than the other case study (Bangladesh). The taxonomy of approaches, with more research, may prove to be another tool for multi-stakeholder engagement in sustainable development, particularly as a tool to formalise the disposition toward respecting, protecting and fulfilling human rights.

The Equator Principles and Clean Development Mechanism are sustainable development tools to help commercial development foster community development. The Equator Principles then take the next step by including a human rights framework. However, this framework is a series of checkboxes, not necessarily integrating human rights across a project. Alternatively, the taxonomy of approaches facilitates incorporating human rights throughout all levels of a commercial development project by looking at each stakeholder and determining the most effective ways of collaborating. The Clean Development Mechanism is a more specific mode of realising sustainable development. However, a corporate stakeholder that applies for the Clean Development Mechanism has an affinity toward sustainable development, thereby opening the door to other potential sustainable mechanisms. Much like the Sustainable Development Goals, the Equator Principles and Clean Development Mechanism may benefit from being implemented alongside the taxonomy of approaches.

As described in Chapter I, stakeholder capitalism is at an early-stage definition and fails to capture the nuance of how to fully engage all varieties of stakeholders. The definition mentioned above is repeated here, “The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities, and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.”¹⁵ This definition is not stakeholder inclusive, fails to recognise a range of dispositions, and limits the purpose of a company to focus on financial gain. Using the taxonomy of approaches, there is a path forward for commercial development as the field begins to understand that the most compatible projects are ones that engage stakeholders around commercial development,

¹⁵ Klaus Schwab, ‘Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution’ (*World Economic Forum*, 2 December 2019) <www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/> accessed 16 February 2021.

community development, and human rights, all while recognising a range of dispositions for a variety of stakeholders. Moving forward, stakeholder capitalism must take into account the larger ecosystem in which corporations operate, identifying the competing (and complementary) interests and incorporate them alongside the system of incentives that exist within a capitalist framework. How and why companies ought to adopt this approach is the subject for future research and analysis.

These next steps for the commercial and community development fields all include widening the tent to include more stakeholders, while simultaneously recognising that the dispositions of these stakeholders may be different than those initially imagined. Stakeholder relations are key to understanding these dispositions. These dispositions are teased out by way of the framing, instruments, and consultation measures in specific and local contexts. It is true that these are time consuming and complex steps to take in order to aim for compatible stakeholder relations. However, the consequences as seen in both Kenya and Bangladesh are far more expensive (financially and reputationally) and far more time consuming. A complete stakeholder analysis is necessary to continue building a bridge between human rights and both forms of development.

The Case Studies as Models

The case studies above can serve as models to learn about (1) integrating the taxonomy of approaches into energy development projects, (2) aiming for compatible stakeholder relations, (3) fostering community development, and (4) fulfilling human rights. While the Phulbari Coal Mine in Bangladesh did lead to limited community development and significant human rights violations, lessons may be learned from its failure in all four of the categories above. In Bangladesh, from the corporate side, there was a complete disregard for stakeholder approaches across the board. While ostensibly the ultimate goal was compatible stakeholder relations, there was little evidence of this in either disposition or action. The only piece of evidence that may have pointed to a disposition to foster community development and fulfill human rights was the lengthy impact assessment report. This goes to show that even in-depth research and planning, without sufficient action based on it, will ultimately fail in all four of these categories.

In Kenya, the corporate stakeholder's disposition was a Human Rights-Based Approach to Development, but in action, it failed to be carried out. Again, the aim was for compatible stakeholder relations, but the lack of research and preparation led to a failure of compatibility between the corporate developers and a subsection of the indigenous communities. The remaining subsection of the indigenous communities did recognise the dispositions and actions by Lake Turkana Wind Power Ltd. and Winds of Change to foster community development. However, the framing, instruments, and consultation measures showed that this community development fell short of fulfilling human rights obligations. Utilising the taxonomy of approaches in case studies similar to Kenya could allow for a more comprehensive approach to stakeholder relations.

In Canada, the taxonomy of approaches would not have necessarily led to a different outcome. The stakeholder relations were compatible, community development was fostered, and human rights were fulfilled. However, as the style of development project is already being replicated across Canada, use of the taxonomy of approaches may allow for this type of project to be replicated in other places, with different types of commercial development.

Each of these case studies contain numerous examples of compatible and conflicting stakeholder relations that can be further analysed using the taxonomy of approaches. This in the hopes of standardising the ways in which stakeholder relations may be implemented and measured in case studies. It is worth noting that the case studies were analysed as real-world examples, placed in an analytical framework developed through theory. As with any research of this style, the results must be tested in real-world situations before being implemented widely.

Further Work to Be Done

The lessons learned from these cases set the stage for additional work to be done as the world adopts more sustainable development practices. This may include taking the approach taxonomy a step further by examining how the disposition of each stakeholder informs the resulting action. This thesis begins to look at that relationship but does not go far enough to glean any useful lessons in that specific area. Regardless of the nature of the commercial development, the approach taxonomy may be a useful tool to make connections between the framing, instruments, and consultation measures used in stakeholder relations: as a signifier for a stakeholder's disposition, to anticipate the compatibility or incompatibility of multiple

stakeholders, or to suggest a specific set of instruments or consultation measures to alter the approach.

This thesis focused on energy development. As the introduction made clear, the energy focus of each of the cases was not wholly relevant except to limit the number of variables as the case studies were analysed. A next iteration of this study may be to apply the taxonomy of approaches to different types of commercial development, outside of the energy field. This would allow for the taxonomy to be refined to fit a larger range of commercial development enterprises.

There are some additional modes of questioning that arose out of this research. While through the case studies it seems as if community development has the potential to help progressively realise human rights, there is more work to be done in this space. Sustainable development and the corresponding goals may have the potential to realise human rights, completely independently of a rights-based framing. Further research and analysis must be done to determine the value of an independent development framework, that as a byproduct, allows both duty bearers and other stakeholders to assist in respecting, protecting, and fulfilling human rights obligations. As the gaps in the literature (above) make clear, there is additional work to be done that determines if fulfilling the targets and indicators of a Sustainable Development Goal gives a community a fundamentally different experience from fulfilling a human rights obligation that had not formerly been realised. As this was a secondary theme that was explored throughout this thesis, there is not sufficient evidence in the case studies to make a claim in one direction or another.

Another area for additional work is surrounding corporate social responsibility. Throughout the case studies, the corporate social responsibility policies (for the most part) informed the way impact assessments and consultation measures were developed and performed. There is potential for more alignment between sustainable development, human rights obligations, and corporate social responsibility policies. Applying the taxonomy of approaches is a good first step as it fosters awareness of the range of stakeholders in commercial contexts, helping to set the stage for the types of policies that may be helpful for corporations to implement.

As described in Chapters II and VI, a complete analysis of the motivations for stakeholders to take on a certain disposition, action, or approach, is beyond the scope of this thesis, however, it is an area of research worth exploring. While stakeholders are surely aware that utilising human rights in their approaches to development (community and commercial) will probably lead to greater enjoyment of rights than if they had not utilised the approach at all, there are any number

of reasons that could influence their decisions. As described in Chapter II, accountability mechanisms and ESG research makes a case for sustainable development and human rights indicators as future indicators of profitability. Even now, there are many circumstances (as in the Phulbari Coal Mine case study) where commercial developers and states prioritise short term profit over any human rights considerations. Additionally, available resources must be considered in this further research. As described in Chapter VI, the state resources in Bangladesh, Kenya, and Canada may contribute to determining how human rights are addressed in commercial development contexts. Global inequalities play a significant role in both development (community and commercial) and human rights. However, this thesis does not address these topics in detail, and they ought to be considered for further research, especially in applying the taxonomy of approaches in additional country contexts.

On the legal front, it is worth continuing down the path that the Draft Convention on the Right to Development 2020 has begun. While at this point in time it is questionable if a legally binding instrument will have any additional effect, it is worth continuing to develop the legal approach, alongside the development processes. As the Sustainable Development Goals will expire in 2030, there will undoubtedly be a new community development agenda that is implemented. This new agenda, alongside a legally binding instrument (especially with the power to bind corporations) may provide new insight as to the relationship between human rights and development (community and commercial) with new potential for mutual reinforcement. There is significant work to be done across this area of research and this thesis sits in conversation with a larger discussion about stakeholders in the spheres of both human rights and development (community and commercial).

Human Rights and Development – Ships Meeting in the Night

This nexus of human rights and (sustainable) development has the potential to be a mechanism for mutual achievement, as long as the approaches are compatible. This thesis seeks to contribute to this field by providing a new lens by which the relationship between human rights and development may be examined, and then, become mutually reinforcing. The current literature in the field of human rights and development is varied, but primarily focuses on (1) the right to development, (2) a Human Rights-Based Approach to Development, (3) community development

as a mode of progressively realising rights, and (4) commercial development as a tool to foster community development. This thesis recommends a fifth category for further analysis: commercial development as a means to the realisation of human rights. The taxonomy of approaches as described in Chapter VI will be a useful tool to implement this fifth category.

The goal of this thesis was to discover the potential for a mutually beneficial relationship between human rights and development (community and commercial). At this point, it can be unequivocally claimed that there is indeed potential for a mutually beneficial relationship. The ways in which the relationship is built and the ways in which the benefits are manifested still requires additional research, but the work has certainly begun.

Philip Alston's 'Ships Passing in the Night' has been the standard for following the paths of human rights and community development as they fail to realise that they are attempting to approach the same ends using different means.¹⁶ This thesis attempts to show that these means can be mutually beneficial, mutually reinforcing, and mutually productive. Human rights and community development are two approaches to the same goal: protecting and improving the lives of people. Finding ways for human rights and community development to work together toward this end is a worthwhile endeavour, if only for the ships to meet each other in the night and realise this potential. All the tools in this thesis aim to bring about this convergence between the two fields, but as the work in this space continues, it must be centred around stakeholders. Stakeholders will continuously draw on these fields from the international arena to the local communities and from the theoretical to the practical. Those individuals and groups that have a stake in both the process and results of a commercial development project are the most effective participants in shaping the project. This participation has the end result of achieving community development goals while respecting, protecting, and fulfilling human rights. This is not to say that international legally binding instruments are not valuable. However, as this thesis makes clear, no matter the number of international treaties, impact assessments, consultation interviews, or any other mechanism, there is still potential for human rights abuses. These abuses can be mitigated with strong stakeholder relations, ensuring that all the voices can be heard, and actions are taken based on the dispositions from all relevant parties.

¹⁶ Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 Human Rights Quarterly 755.

Commercial development, community development, and human rights are part of a complex web, each with the potential to help realise the other. This thesis contributes to the conversation about the potential for one to lead to the other, but it is not a linear path. This mutual reinforcement comes from a web of stakeholders using a range of framings, instruments, and consultation measures to achieve their goals. These goals have the potential to help communities develop while simultaneously assisting states in respecting, protecting, and fulfilling human rights.

BIBLIOGRAPHY

3rd High Level Forum on Aid Effectiveness, 'Accra Agenda for Action' (3rd High Level Forum on Aid Effectiveness 2008)

'7 Point Demands' (*NCBD - National Committee of Bangladesh*) <http://ncbd.org/?page_id=69> accessed 22 November 2018

Aba E and others, 'Expert Round Table on Elements of a Possible Nonbinding International Instrument on Business and Human Rights' (University of Notre Dame London Gateway 2017)

Abedi M, 'Why a UN Declaration on Indigenous Rights Has Struggled to Become Canadian Law' (*Global News*, 2 November 2019) <<https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>> accessed 10 February 2020

'About: Aboriginal Rights' (*Indigenous Foundations*) <https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/> accessed 9 February 2020

'About: Constitution Act, 1982 Section 35' (*Indigenous Foundations*) <https://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/> accessed 9 February 2020

'About SPII – SPII' <<https://spii.org.za/about-spii/>> accessed 19 June 2021

Achiba G, 'Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya' (2019) 8 *Land* 7

African Commission on Human and Peoples' Rights, 'REPORT OF THE HUMAN RIGHTS PROMOTION MISSION TO THE REPUBLIC OF SEYCHELLES' (6 April 2015)

African Commission on Human and Peoples' Rights, 'African Commission on Human and Peoples' Rights Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly - Draft'

African Development Bank, 'SUMMARY OF THE SIRIMA VILLAGE RESETTLEMENT ACTION PLAN' (Lake Turkana Wind Power 2015)

Aguirre D, 'Multinational Corporations and the Realisation of Economic, Social and Cultural Rights' (2004) 35 *California Western International Law Journal* 30

——, 'Corporate Social Responsibility and Human Rights Law in Africa' [2005] *African Human Rights Law Journal*

——, 'Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation' (2011) 42 *California Western International Law Journal* 26

Aguirre D and Pietropaoli I, 'Institutional Reform in Myanmar: Preventing Corporate Land Rights Abuses' (2021) 15 *International Journal of Transitional Justice* 148

Ahmed A and Mustofa J, 'Mechanisms for Implementation of Human Rights: A Critical Analysis in Bangladesh Perspective' (2016) 10 *Prime University Journal* 24

Ahmed R, "'You Cannot Eat Coal": Resistance in Phulbari' (*BanglaPraxis*, 18 August 2008) <<https://banglapraxis.wordpress.com/2008/08/19/%e2%80%98you-cannot-eat-coal%e2%80%99-resistance-in-phulbari/>> accessed 29 October 2018

Aldwych International, 'Lake Turkana Wind Power Project (LTWP): Seminar on Sustainable Energy Investments in Africa' (Copenhagen, 24 June 2014)

Alliance News, 'GCM Resources Inks Consultancy Deal To Advance Phulbari Coal Project' (*MorningstarUK*, 4 September 2019) <http://www.morningstar.co.uk/virtual/SolrNews/AllianceNews.aspx?Site%3Duk%26DocId%3DAN_1567602924380139500> accessed 4 September 2019

Alston P, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332

Alston P, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755

—, 'Civil and Political Rights, Including the Question of Disappearances and Summary Executions. Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston Addendum' (Economic and Social Council 2006) E/CN.4/2006/53/Add.1

Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156

Alston P and Robinson M (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199284627.001.0001/acprof-9780199284627> accessed 7 February 2021

Ambassador James F. Moriarty, 'Ambassador Urges Prime Minister's Adviser to Accelerate Energy Sector Development' (Bangladesh Dhaka 2009) Wikileaks Public Library of US Diplomacy 09DHAKA741_a <https://wikileaks.org/plusd/cables/09DHAKA741_a.html> accessed 27 October 2018

Amnesty International, 'Bangladesh Submission to the UN Human Rights Committee' (UN Human Rights Committee 2017) 119th Session

——, ‘Corporate Accountability’ <www.amnesty.org/en/what-we-do/corporate-accountability/>
‘Andritz -Okikendawt Supplier’ <www.andritz.com/hydro-en/hydronews/hydro-news-24/24-highlight-okikendawt> accessed 8 February 2020

An-Na’im AA, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 2010)

Argyrou A, ‘Making the Case for Case Studies in Empirical Legal Research’ (2017) 13 Utrecht Law Review 95

Arnold DG and Valentin A, ‘Corporate Social Responsibility At The Base Of The Pyramid’ (2013) 66 Journal of Business Research 1904

Arnold R (ed), *The Universalism of Human Rights* (Springer Netherlands 2013)
<<http://link.springer.com/10.1007/978-94-007-4510-0>> accessed 5 March 2018

Arts K and Tamo A, ‘The Right to Development in International Law: New Momentum Thirty Years Down the Line?’ (2016) 63 Netherlands International Law Review 221

Aryeh N, “‘Naming and Shaming’”: Still the Human Rights Movement’s Best Weapon’ (*Open Global Rights*, 11 July 2018) <www.openglobalrights.org/Naming-and-shaming-still-the-human-rights-movements-best-weapon/> accessed 15 August 2021

Asia Energy Corporation, ‘Summary Environmental Impact Assessment’ (2006) 39933

Asia Energy Corporation (Bangladesh) Pty Ltd, ‘Environmental and Social Impact Assessment Report (Volume 2) The Mine’ (Mine Consult Pty Ltd 2005)

——, ‘Environmental and Social Impact Assessment Report (Volume 1) Main Report’ (SMEC 2006)

Asia Energy PLC, ‘Making Natural Resources Work For The People of Bangladesh - Annual Report 2004’ (Asia Energy PLC 2004)

——, ‘The Phulbari Coal Project’ (November 2004)

‘Asia Energy Submits \$2 Billion Phulbari Coalmine Development Project’ *BD News 24* (Bangladesh, 1 October 2005)

Asian Indigenous and Tribal Peoples Network and (AITPN), ‘Economic Social and Cultural Rights. Written Statement* Submitted by the Asian Indigenous and Tribal Peoples Network (AITPN), a Non-Governmental Organization in Special Consultative Status’ (Economic and Social Council 2005) E/CN.4/2005/NGO/10

Asian Indigenous and Tribal Peoples Network (AITPN), ‘Question of the Violations of Human Rights and Fundamental Freedoms in Any Part of the World. Written Statement* Submitted by

the Asian Indigenous and Tribal Peoples Network (AITPN), a Non-Governmental Organization in Special Consultative Status.’ (Economic and Social Council 2005) E/CN.4/2005/NGO/9

Asian Legal Resource Center, ‘Written Statement Submitted by the Asian Legal Resource Centre (ALRC)’ (UN General Assembly) A/HRC/4/NGO/60

Association for Land Reforms and Development (ALRD), ‘An Alternative Report of the Civil Society On the International Covenant on Economic, Social and Cultural Rights’ (United Nations Committee on Economic, Social and Cultural Rights 2018)

‘Background – SIPLF’ <<http://siplf.org/background/>> accessed 2 February 2019

Bangladesh Dalit and Excluded Rights Movement (BDERM), Network of Non-mainstreamed and Marginalized Communities (NNMC), and International Dalit Solidarity Network (IDSN), Nagorik Uddyog, ‘Social, Economic, and Cultural Status of Dalit Community in Bangladesh’ (United Nations Committee on Economic, Social and Cultural Rights 2018)

‘Bangladesh Development Overview’ (*World Bank*)

<www.worldbank.org/en/country/bangladesh/overview> accessed 21 August 2021

Bangladesh Housing Land and Property (HLP) Rights Initiative, ‘Land Acquisition for Climate Displaced Communities of Bangladesh’ (Young Power in Social Action (YPSA) 2013)

‘Bangladesh Human Rights’ (*Amnesty International USA*)

<<https://www.amnestyusa.org/countries/bangladesh/>> accessed 21 August 2021

Bangladesh LH, ‘Fundamental Rights in the Constitution of Bangladesh’ (*Law Help BD*, 12 February 2017) <<https://lawhelpbd.com/constitution/fundamental-rights-constitution-bangladesh/>> accessed 14 October 2018

‘Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts’ (Office of the High Commissioner for Human Rights 2012) <http://sr-watersanitation.ohchr.org/en/pressrelease_bangladesh.html> accessed 25 November 2018

‘Bangladesh: Sustainable Development Knowledge Platform’

<<https://sustainabledevelopment.un.org/memberstates/bangladesh>> accessed 7 June 2020

Banglapedia, ‘Phulbari Upazila, Dinajpur District’, *Banglapedia - The National Encyclopedia of Bangladesh* (rev 2nd edn, 2012)

Banktrack, ‘UBS Alerted over Phulbari Coal Mine’ (*Banktrack*, 17 December 2007)

<www.banktrack.org/show/news/ubs_alerted_over_phulbari_coal_mine> accessed 27 October 2018

Barelli M, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 957

- Baxi U, 'From Human Rights to the Right to Be Human: Some Heresies' (1986) 12 *India International Centre Quarterly* 185
- Bedi HP, 'Right to Food, Right to Mine? Competing Human Rights Claims in Bangladesh' (2015) 59 *Geoforum* 248
- Begum S, 'Govt in Difficulty to Scrap Deal on Phulbari Coal Mine' (*Energy Bangla*, 24 February 2015) <<http://energybangla.com/govt-difficulty-scrap-deal-phulbari-coal-mine/>> accessed 27 October 2018
- Bell D, 'The East Asian Challenge to Human Rights: Reflections on an East West Dialogue' (1996) 18 *Human Rights Quarterly* 641
- Bell DA and Coicaud J-M, *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge University Press 2007)
- Benhabib S, 'The Rights of Others. Aliens, Residents and Citizens' ("Migrants, Nations and Citizenship", 5 July 2004)
- , 'Another Universalism: On the Unity and Diversity of Human Rights', *Proceedings and Addresses of the American Philosophical Association* (JSTOR 2007)
- Bennoune K, 'Universality, Cultural Diversity and Cultural Rights' (United Nations General Assembly 2018) A/73/227
- Bielefeldt H, "'Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 *Political Theory* 90
- Biswas S, 'State of Indigenous Peoples Rights In Bangladesh' (BRAC University 2008) 'BNamericas - Over 1GW at Risk in Indigenous Consultation Hotspots' <www.bnamericas.com/en/news/over-1gw-at-risk-in-indigenous-consultation-hotspots> accessed 17 May 2019
- Boykoff J and Gaffney C, 'Only UN Peacekeepers Can Stop Rio Olympics Bloodbath: Column' (*USA TODAY*) <www.usatoday.com/story/opinion/2016/04/28/rio-de-janeiro-brazil-olympics-summer-2016-police-corruption-brutality-column/83568856/> accessed 8 October 2018
- Bridle WR and others, 'Fossil Fuel to Clean Energy Subsidy Swaps: How to Pay for an Energy Revolution' *The International Institute for Sustainable Development* 33
- British Columbia Council for International Cooperation, 'Where Canada Stands Volume II: A Sustainable Development Goals Shadow Report' (British Columbia Council for International Cooperation 2018)

Broberg M and Sano H-O, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664

Bronen R, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine' *NYU Review of Law and Social Change* 52

Bruce Porter, 'Rethinking Progressive Realization: How Should It Be Implemented in Canada?' (Social Rights Advocacy Center 2015)

Brundtland Commission and The World Commission on Environment and Development, *Our Common Future* (Volker Hauff ed, Oxford University Press 1987)

Burke L and Logsdon JM, 'How Corporate Social Responsibility Pays Off' (1996) 29 *Long Range Planning* 495

Business & Human Rights Resource Centre, 'Kenya: Report by Danwatch Reveals Negative Impacts of Lake Turkana Wind Project on Indigenous Community Rights' <www.business-humanrights.org/en/kenya-report-by-danwatch-reveals-negative-impacts-of-lake-turkana-wind-project-on-indigenous-community-rights> accessed 18 May 2019

—, 'Mapping the Renewable Energy Sector to the Sustainable Development Goals: An Atlas (Consultative Draft)' (2018)

Business Daily, 'Lake Turkana Wind Farm Opens up Dry Marsabit' (12 February 2019) <www.businessdailyafrica.com/news/Lake-Turkana-wind-farm-opens-up-dry-Marsabit/539546-4979078-639k7p/index.html> accessed 19 May 2019

Canada, 'ARCHIVED - Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (29 June 2011) <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 15 April 2020

—, 'Canadian Energy Generation' (*Government of Canada*, 6 October 2017) <www.nrcan.gc.ca/science-and-data/data-and-analysis/energy-data-and-analysis/energy-facts/electricity-facts/20068> accessed 22 August 2021

Canada (eds), *A Consolidation of the Constitution Acts, 1867 to 1982* (Dept of Justice Canada 2012)

'Canada Development Overview' (*World Bank*) <www.worldbank.org/en/country/canada/overview> accessed 21 August 2021

'Canada Human Rights' (*Amnesty International USA*) <www.amnestyusa.org/countries/canada/> accessed 21 August 2021

‘Capacity Building for Businesses on Human Rights Approach’ (*Kenya National Commission on Human Rights*) <www.knchr.org/Articles/ArtMID/2432/ArticleID/1048/Capacity-Building-for-Businesses-on-Human-Rights-Approach> accessed 4 July 2019

Castleden H, ‘Indigenous-Led Clean-Energy Projects Could Power Reconciliation’ (*The Conversation*, 23 April 2019) <<http://theconversation.com/indigenous-led-clean-energy-projects-could-power-reconciliation-111903>> accessed 8 February 2020

‘CDM Code of Conduct’ (UNFCCC 2012) EB 69

‘CDM: Designated National Authorities (DNA)’ <<https://cdm.unfccc.int/DNA/index.html>> accessed 27 October 2019

‘CDM: Lake Turkana 310 MW Wind Power Project’ <<https://cdm.unfccc.int/Projects/DB/SGS-UKL1298369167.94/view>> accessed 27 October 2019

‘CDM: LTWP Emissions Reduction Calculations’

‘CDM News for Civil Society and Policy Makers in the Context of the 59th Meeting of the CDM Executive Board’ (CDM Watch 2011)

‘CDM Projects in Kenya – Clean Development Mechanism’ <<http://webcache.googleusercontent.com/search?q=cache:http://meas.nema.go.ke/cdm/cdm-projects-in-kenya/>> accessed 29 January 2020

‘CDM: Role of the Executive Board (EB)’ <<https://cdm.unfccc.int/EB/index.html>> accessed 27 October 2019

Cernic JL, ‘Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ (2009) 6 *Miskolc Journal of International Law* 24

Chenwi L, ‘Unpacking “Progressive Realisation”, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ [2013] *De Jure* 28

‘Child Rights International Network: Bangladesh: National Laws’ (*Child Rights International Network*, 24 January 2012) <[en/library/publications/bangladesh-national-laws](http://en.library/publications/bangladesh-national-laws)> accessed 24 December 2018

Chimni BS, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3

‘CLEAN DEVELOPMENT MECHANISM PROJECT DESIGN DOCUMENT FORM (CDM-PDD) - LTWP’ (28 July 2006)

‘Climate Change Environmental Threats and Human Rights in Turkana County Kenya’
<<https://primarysources.brillonline.com/browse/climate-change-and-law-collection/climate-change-environmental-threats-and-human-rights-in-turkana-county-kenya:cccc014720150147002>> accessed 26 May 2019

Cobbah JAM, ‘African Values and the Human Rights Debate: An African Perspective’ (1987) 9 Human Rights Quarterly 309

‘Commentary: Challenges to Hold Corporations Accountable for Human Rights Abuses Abroad’ (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/latest-news/commentary-challenges-to-hold-corporations-accountable-for-human-rights-abuses-abroad/> accessed 22 June 2021

Commission on Human Rights, ‘Letter Dated 22 June 2000 from the Permanent Representative of Bangladesh to the United Nations Office at Geneva Addressed to the Chairman of the Commission on Human Rights’ (Economic and Social Council 2000) E/CN.4/2001/8

—, ‘Commission on Human Rights, Sixtieth Session, Summary Record of the 7th Meeting’ (Economic and Social Council 2004) E/CN.4/2004/SR.7

Committee on Economic, Social and Cultural Rights, ‘Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya*’ (Committee on Economic, Social and Cultural Rights 2016) E/C.12/KEN/CO/2-5

—, ‘Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights’ (Economic and Social Council 2017) E/C.12/BGD/1

—, ‘Summary Record of the 7th Meeting. Initial Report of Bangladesh’ (Economic and Social Council 2018) E/C.12/2018/SR.7

—, ‘Summary Record of the 8th Meeting. Initial Report of Bangladesh (Continued)’ (Economic and Social Council 2018) E/C.12/2018/SR.8

—, ‘Summary Record of the 9th Meeting. Initial Report of Bangladesh (Continued)’ (Economic and Social Council 2018) E/C.12/2018/SR.9

Committee on the Elimination of Racial Discrimination, ‘SUMMARY RECORD OF THE 1457th MEETING’ (International Convention on the Elimination of all Forms of Racial Discrimination 2001) CERD/C/SR.1457

—, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination’ (International Convention on the Elimination of all Forms of Racial Discrimination 2001) CERD/C/304/Add.118

——, ‘SUMMARY RECORD OF THE 1462nd MEETING’ (International Convention on the Elimination of all Forms of Racial Discrimination 2001) CERD/C/SR.1462

——, ‘Concluding Observations on the Fifth to Seventh Periodic Reports of Kenya’ (Committee on the Elimination of Racial Discrimination 2017) CERD/C/KEN/CO/5-7

——, ‘Eleventh Periodic Reports of States Parties Due in 2000. Addendum: Bangladesh’ (International Convention on the Elimination of all Forms of Racial Discrimination 2000) CERD/C/379/Add1

——, ‘SUMMARY RECORD OF THE 1458th MEETING’ (International Convention on the Elimination of all Forms of Racial Discrimination 2001) CERD/C/SR1458

‘Community Projects Map – Lake Turkana Wind Power’ <<https://ltwp.co.ke/community-projects-map/>> accessed 29 January 2020

Conceição P and United Nations Development Programme, *Human Development Report 2019: Beyond Income, beyond Averages, beyond Today: Inequalities in Human Development in the 21st Century* (2019)

‘CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE KYOTO PROTOCOL’ (UNFCCC 2006) FCCC/KP/CMP/2005/8/Add.1

‘Construction of Ontarios 10-MW Okikendawt Small Hydropower Project under Way’ (*Hydro Review*, 29 August 2013) <www.hydroreview.com/2013/08/29/construction-of-ontarios-10-mw-okikendawt-small-hydropower-project-under-way/> accessed 8 February 2020

Cookson P, Kuna J and Golla E, ‘Benefits of Low Emission Development Strategies’ (LEDs Global Partnership, USAID 2017) <<https://ltwp.co.ke/newsite/wp-content/uploads/20170203-Kenya-Benefits-Case-Study-FINAL.pdf>>

Coomans F, ‘The Limburg Principles Turned 30 Maastricht University - Blog’ (15 December 2016) <www.maastrichtuniversity.nl/blog/2016/12/limburg-principles-turned-30> accessed 16 June 2021

Cowan JK, Dembour M-B and Wilson RA (eds), ‘Claiming Cultural Rights’, *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A016/type/book_part> accessed 16 May 2018

Cowan JK, Dembour M-B and Wilson RA, ‘Introduction’ in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A009/type/book_part> accessed 16 May 2018

Craven MCR, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1995)

Cruft R, Liao SM and Renzo M (eds), *Philosophical Foundations of Human Rights* (1st edn, Oxford University Press 2015)

Cultural Survival, 'Violations of Indigenous Peoples' Rights in Bangladesh' (United Nations 2017) International Covenant on Civil and Political Rights Alternative Report Submission

Cultural Survival and American Indian Law Clinic, 'Observations on the State of Indigenous Human Rights in Bangladesh' (United Nations, Human Rights Council 2017) Universal Periodic Review 30th Session

Czech Republic, Latvia, Liechtenstein, Netherlands, Sweden, UK, 'ADVANCE QUESTIONS TO BANGLADESH' (Universal Periodic Review)

Dacey A and Koproske C, 'Islam & Human Rights: Defending Universality at the United Nations' (Center For Inquiry 2008)

<www.centerforinquiry.net/uploads/attachments/ISLAM_AND_HUMAN_RIGHTS.pdf>

——, 'Islam & Human Rights Defending Universality at the United Nations' (Center For Inquiry 2008)

Dahlbeck A, 'A Human Rights Based Approach to the Means of Implementation of the Sustainable Development Goals' [2020] *The Danish Institute for Human Rights* 74

Dahlsrud A, 'How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1

Dallmayr F, "'Asian Values" and Global Human Rights' (2002) 52 *Philosophy East and West* 173

Darrow M and Tomas A, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 471

Davis K and others, *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012)

<www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199658244.001.0001/acprof-9780199658244> accessed 19 February 2020

De Schutter O (ed), *Transnational Corporations and Human Rights* (Hart Pub 2006)

De Schutter, Olivier, United Nations Special Rapporteur on the Right to Food, 'Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts' (*UN Special Rapporteur on Food*, 28 February 2012)

‘Deal with Asia Energy on Phulbari Coalmine Invalid’ (*London Mining Network*, 27 January 2013) <<https://londonminingnetwork.org/2013/01/deal-with-asia-energy-on-phulbari-coalmine-invalid/>> accessed 26 November 2018

Delgadillo N, ‘Olympic Development in Rio Leaves a Tarnished Legacy’ (*CityLab*) <www.citylab.com/design/2016/08/olympic-development-in-rio-leaves-a-tarnished-legacy/496754/> accessed 8 October 2018

Dembour M-B, ‘Following the Movement of a Pendulum: Between Universalism and Relativism’ in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A012/type/book_part> accessed 16 May 2018

Denmark, Germany, ‘ADVANCE QUESTIONS TO BANGLADESH Addendum’ (Universal Periodic Review)

Deutsche Welle, ‘Kenya’s Lake Turkana Wind Park Goes on the Grid’ (*Deutsche Welle*, 13 March 2019) <www.dw.com/en/kenyas-lake-turkana-wind-park-goes-on-the-grid/av-47886815> accessed 19 May 2019

Dhaka Tribune, ‘Phulbari Protesters Give Ultimatum to Meet 6-Point Demands’ (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 27 October 2018

Dinajpur BSS, ‘Phulbari Protesters Give Ultimatum to Meet 6-Point Demands’ (*Dhaka Tribune*, 10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 14 October 2018

Dinstein Y, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 *International and Comparative Law Quarterly* 102

Dokis First Nation, ‘Dokis First Nation Land Code Executive Summary’ (2013)

‘Dokis First Nation - Homepage’ <www.dokis.ca/default.aspx> accessed 9 February 2020

‘Dokis First Nation, Lands Department, Lands and Estates Department’ <<https://centraleastontario.cioc.ca/record/CIR0640>> accessed 17 April 2020

Dokis First Nation Okikendawt Project <www.youtube.com/watch?v=yhvY2700N5w> accessed 8 February 2020

‘Dokis First Nations Land Management Resource Centre (RC)’ (*First Nations Land Management Resource Centre (RC)*) <<https://labrc.com/first-nation/dokis/>> accessed 9 February 2020

Dokis History of the First Nation <www.youtube.com/watch?v=I9rlyioz-Es> accessed 10 February 2020

Donnelly J, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *The American Political Science Review* 303

——, 'Human Rights, Democracy, and Development' [1999] *Human Rights Quarterly* 26

——, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281

——, 'Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)' (2008) 30 *Human Rights Quarterly* 194

——, *Universal Human Rights in Theory and Practice* (3rd ed, Cornell University Press 2013)

——, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right To Development' 15 *California Western International Law Journal* 38

Donoho DL and Renteln AD, 'International Human Rights. Universalism Versus Relativism.' (1991) 85 *The American Journal of International Law* 416

Douzinas C, *The End of Human Rights: Critical Thought at the Turn of the Century* (Bloomsbury Publishing 2000)

——, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007)

Duchesne R, 'Charles Taylor's Philosophy of Minority Ethnic Identity and the Suppression of Eurocanadian Identity' (2016) 16 *The Occidental Quarterly* 18

'Due Diligence Examples & Case Studies, Incl. HRIA' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/due-diligence-examples--case-studies-incl-hria/>> accessed 6 March 2022

Duquette G, *Indigenous Voices on Treaties* <www.youtube.com/watch?time_continue=441&v=HUIZ9oE5FZw&feature=emb_logo> accessed 9 February 2020

'Dutch Court to Hear Case vs. Shell Brought by Widows of Hanged Nigeria Activists' (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/es/%C3%BAltimas-noticias/dutch-court-to-hear-case-vs-shell-brought-by-widows-of-hanged-nigeria-activists/> accessed 22 June 2021

Eide A, *Economic Social and Cultural Rights* (Springer Netherlands 2001)

Eisenstadt SN and Helle HJ (eds), *Perspectives on Sociological Theory* (SAGE Publications 1985)

EJOLT, 'Corporate Wind Farms in Ixtepec vs Community's Initiative, Oaxaca, Mexico' (*Environmental Justice Atlas*) <<https://ejatlas.org/conflict/communal-members-of-ixtepec-contending-to-develop-a-wind-farm-cooperative>> accessed 10 May 2019

—, 'Lake Turkana Project in Indigenous Territories, Kenya' (*Environmental Justice Atlas*) <<https://ejatlas.org/conflict/lake-turkana-project-in-indigenous-territories>> accessed 2 February 2019

Environment and Climate Change Canada, 'Federal Sustainable Development Strategy' (18 June 2018) <www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html> accessed 8 February 2020

Environment Canada, 'Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada' (Environment Canada 2010)

—, 'The 2012 Progress Report of the Federal Sustainable Development Strategy' (Environment Canada 2012)

Equator Principles, 'The Equator Principles' (2020) <<https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>>

Eriksen TH, 'Between Universalism and Relativism: A Critique of the UNESCO Concept of Culture' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A015/type/book_part> accessed 16 May 2018

ESCR-Net, 'Progressive Realisation and Non-Regression' (*ESCR-Net*) <www.escr-net.org/resources/progressive-realisation-and-non-regression> accessed 14 February 2021

European Commission, Directorate General for Justice and Consumers and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report.' (Publications Office 2020) <<https://data.europa.eu/doi/10.2838/39830>> accessed 26 February 2022

'Everything You Need to Know about Human Rights and Corporate Accountability' <www.amnesty.org/en/what-we-do/corporate-accountability/> accessed 22 June 2021

'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights' (Office of the High Commissioner for Human Rights)

Farooqi H, 'Energizing the Nation to Nation Relationship: The Rise of Indigenous Participation in the Energy Industry (York University, Environmental Justice and Sustainability Clinic)' (19

February 2018) <<https://ejscclinic.info.yorku.ca/2018/02/indigenous-participation-in-energy-industry/>> accessed 8 February 2020

Faruque MO, 'The Politics of Extractive Industry Corporate Practices: An Anatomy of a Company-Community Conflict in Bangladesh' (2018) 5 *The Extractive Industries and Society* 177

'Federal Government Introduces UNDRIP Legislation' (*Fasken*, 10 December 2020) <www.fasken.com/en/knowledge/2020/12/9-federal-government-introduces-undrip-legislation> accessed 12 June 2021

'FEEDBACK MECHANISM – Lake Turkana Wind Power' <<https://ltwp.co.ke/feedback-mechanism/>> accessed 18 May 2019

Fichino D, Marinho G and Campagnani M, 'Guide for Journalists and Media Professionals: Human Rights Violations in the Olympic City' (Justiça Global 2016)

FIDH, OMCT, WCADP, AFAD, ALRC, Odhikar, 'Joint NGO Submission to the UN Human Rights Committee Prior to the Adoption of the List of Issues for the Review of Bangladesh' (UN Human Rights Committee 2015)

'Fight for Indigenous Rights in Bangladesh Continues' *The Daily Star* (9 August 2017) <www.thedailystar.net/opinion/human-rights/fight-indigenous-rights-bangladesh-continues-1445536> accessed 17 October 2020

Fisher A, 'Minimum Core and the Right to Education' (The World Bank 2017) <<http://hdl.handle.net/10986/29142>> accessed 8 August 2021

Food and Agriculture Organization of the United Nations, 'Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities' (FAO 2016)

—, 'National Legal Framework | Gender and Land Rights Database' <www.fao.org/gender-landrights-database/country-profiles/countries-list/national-legal-framework/en/?country_iso3=BGD> accessed 4 June 2021

Foundation TR, 'Portuguese Youth Sue European States over Climate Change Threat' (*news.trust.org*) <<https://news.trust.org/item/20200903091021-09c8d/>> accessed 22 June 2021

'FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT - Executive Summary' (First Nations Land Management Resource Center 1996)

Freedman R, 'The United Nations Human Rights Council: A Critique and Early Assessment' (School of Law, Queen Mary, University of London 2011)

Freeman M, 'Are There Collective Human Rights?' (1995) *XLIII Political Studies* 25

Frey DF, 'Economic Growth, Full Employment and Decent Work: The Means and Ends in SDG 8' (2017) 21 *The International Journal of Human Rights* 1164

Fukuda-Parr S, Lawson-Remer T and Randolph S, 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment' [2008] *Economics Working Papers* 41

GCM Resources, 'Prefeasibility Study for Further Mine Mouth Power Plants' (11 September 2018) <http://otp.investis.com/clients/uk/gcm_resources/rns1/regulatory-story.aspx?cid=1564&newsid=1179833> accessed 14 October 2018

Gearty C, *Can Human Rights Survive?* (Cambridge University Press 2006)

Gellner DN, 'From Group Rights to Individual Rights and Back: Nepalese Struggles over Culture and Equality' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A018/type/book_part> accessed 16 May 2018

Genasci L, 'Environmentalists Name and Shame Global Fashion Brands' (*China Water Risk*) <www.chinawaterisk.org/opinions/environmentalists-name-and-shame-global-fashion-brands/> accessed 15 August 2021

'General Assembly Adopts Resolution on Protecting Palestinian Civilians Following Rejection of United States Amendment to Condemn Hamas Rocket Fire' <www.un.org/press/en/2018/ga12028.doc.htm> accessed 3 September 2018

'General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions' (Committee on Economic, Social and Cultural Rights 1997)

'General Comment No. 21, Right of Everyone to Take Part in Cultural Life' (UN Committee on Economic Social and Cultural Rights 2009) E/C.12/GC/21

Glendon MA, *A World Made New, Eleanor Roosevelt and The Universal Declaration of Human Rights* (Random House 2001)

Global Alliance for Monitoring Learning, 'Measurement Strategy for SDG Target 4.7' (2017) 'Global Citizenship Education' (*UNESCO*, 9 January 2018) <<https://en.unesco.org/themes/gced>> accessed 27 December 2018

Gneiting U and others, 'Setting Higher Goals: Rights and Development Trade-Offs and Challenges in Implementing a Rights-Based Approach to Development' [2009] *Monday Developments*

Goffman E, *Frame Analysis. An Essay on the Organization of Experience* (Northeastern University Press 1974)

- Gold J, *Interpretation: The IMF and International Law* (Kluwer Law International 1996)
- Goodale M, 'The Myth of Universality: The UNESCO "Philosophers' Committee" and the Making of Human Rights: The Myth of Universality' (2018) 43 *Law & Social Inquiry* 596
- Goodhart M, 'Neither Relative nor Universal: A Response to Donnelly' (2008) 30 *Human Rights Quarterly* 183
- Government of Canada, '2017–2020 Departmental Sustainable Development Strategy' (4 October 2017) <www.aadnc-aandc.gc.ca/eng/1507123239042/1507123348499> accessed 10 February 2020
- Government of Canada D of J, 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada' (12 April 2021) <www.justice.gc.ca/eng/declaration/index.html> accessed 12 June 2021
- , 'Proposed Legislation: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples (TBC)' (12 April 2021) <www.justice.gc.ca/eng/declaration/about-apropos.html> accessed 3 August 2021
- Government of Canada; Indigenous and Northern Affairs Canada, 'Dokis First Nation Okikendawt Project' (*Indigenous and Northern Affairs Canada*, 31 March 2016) <www.aadnc-aandc.gc.ca/eng/1459449220161/1459449341752>
- Graham Taggart, Finance Director, 'GCM Response to UN Statement on Phulbari' (20 March 2012)
- Gready P, 'Rights-Based Approaches to Development: What Is the Value-Added?' (2008) 18 *Development in Practice* 735
- Griffin J, 'The Relativity and Ethnocentricity of Human Rights', *On Human Rights* (Oxford University Press 2008)
- Griffiths T, 'Seeing "REDD"? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' (Forest People's Programme 2009) <<https://unfccc.int/resource/docs/2012/smsn/ngo/242.pdf>>
- Gros Espiell H, 'Universality of Human Rights and Cultural Diversity' (1998) 50 *International Social Science Journal* 525
- Guzman A and Meyer T, 'International Soft Law' (2010) 2 *Journal of Legal Analysis*
- Hafner-Burton EM, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 *International Organization* 689

Halliday F, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' (1995) 43 *Political Studies* 152

Hannum H, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 112

——, 'The UDHR in National and International Law' (1998) 3 *Health and Human Rights* 15

HELVETAS Swiss Intercooperation, 'Support to Landless People to Apply for Formal Access to State-Owned "khas" Land - Learn' (2005) <<https://learn.landcoalition.org/fr/good-practices/support-landless-people-apply-formal-access-state-owned-khas-land/>> accessed 17 October 2020

Herskovits MJ and Pojman LP, 'Is Morality Relative to Culture?' (2004) 9th Edition *Taking Sides: Clashing Views on Controversial Moral Issues* 12

Hewson B and Lea J, 'Electricity Generation License' (Ontario Energy Board 2011) EG-2010-0387

Hopgood S (ed), 'The Endtimes of Human Rights', *Debating The Endtimes of Human Rights* (Amnesty International Netherlands 2014)

——, 'Human Rights: Past Their Sell-by Date' (*openDemocracy*) <www.opendemocracy.net/en/openglobalrights-openpage/human-rights-past-their-sell-by-date/> accessed 14 February 2021

Hopgood S, Snyder J and Vinjamuri L (eds), *Human Rights Futures* (Cambridge University Press 2017)

Hornsby C, *Kenya: A History since Independence* (I B Tauris 2012)

Hosain MdM, 'Application of UDHR by Supreme Court of Bangladesh: Analysis of Judgments' [2013] *Chancery Law Chronicles*

Howard R, 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' (1984) 6 *Human Rights Quarterly* 160

'Human Development Index (HDI) | Human Development Reports' <<http://hdr.undp.org/en/content/human-development-index-hdi>> accessed 2 October 2018

'Human Development Report 2000' (United Nations Development Programme 2000)

'Human Development Reports' <<http://hdr.undp.org/en/2020-report>> accessed 2 October 2018

Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (Human Rights Committee 2012) CCPR/C/KEN/CO/3

—, ‘List of Issues in Relation to the Initial Report of Bangladesh’ (International Covenant on Civil and Political Rights 2016) CCPR/C/BGD/Q/1

—, ‘Concluding Observations on the Initial Report of Bangladesh’ (International Covenant on Civil and Political Rights 2017) CCPR/C/BGD/CO/1

Human Rights Committee, Mr. Fathalla (Vice-Chair), ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (Continued) Initial Report of Bangladesh (Continued)’ (International Covenant on Civil and Political Rights 2017) CCPR/C/SR.3340

—, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Initial Report of Bangladesh’ (International Covenant on Civil and Political Rights 2017) CCPR/C/SR.3339

Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh Addendum’ (Human Rights Council 2009) A/HRC/11/18/Add.1

—, ‘Decision 11/104 Outcome of the Universal Periodic Review: Bangladesh’ (Universal Periodic Review 2009)

—, ‘Report of the Working Group on the Universal Periodic Review** Bangladesh’ (Human Rights Council 2009) A/HRC/11/18*

—, ‘Report of the Human Rights Council on Its Eleventh Session’ (Human Rights Council 2009) Outcomes of Periodic Reviews A/HRC/11/37

Human Rights Council and Working Group on the Universal Periodic Review, ‘NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15(A) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1’ (Universal Periodic Review 2008) A/HRC/WG.6/4/BGD/1

—, ‘SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15(C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1’ (Universal Periodic Review 2008) A/HRC/WG.6/4/BGD/3

—, ‘COMPILATION PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15(B) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1’ (Universal Periodic Review 2008) A/HRC/WG.6/4/BGD/2

Human Rights Council, Working Group on the Right to Development, ‘Draft Convention on the Right to Development A/HRC/WG.2/21/2’ (2020)

——, ‘Draft Convention on the Right to Development, with Commentaries A/HRC/WG.2/21/2/Add.1’ (2020)

Human Rights Forum, ‘List of Bangladesh’s Ratification of International Treaties’ (2012)

Human Rights Forum Bangladesh, ‘Economic, Social and Cultural Rights in Bangladesh: An Alternative Report to the United Nations Committee on Economic, Social and Cultural Rights’ (United Nations Committee on Economic, Social and Cultural Rights 2018)

Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (The Office of the High Commissioner on Human Rights 2003)
Human Rights Watch, ‘Bangladesh: Crackdown on Social Media’ (*Human Rights Watch*, 19 October 2018) <www.hrw.org/news/2018/10/19/bangladesh-crackdown-social-media> accessed 19 October 2018

——, ‘Canada: Events of 2020’ (2020) <www.hrw.org/world-report/2021/country-chapters/canada> accessed 21 August 2021

——, ‘Kenya: Events of 2020’ (2020) <www.hrw.org/world-report/2021/country-chapters/kenya> accessed 21 August 2021

——, ‘Bangladesh: Events of 2020’ (2021) <www.hrw.org/world-report/2021/country-chapters/bangladesh> accessed 21 August 2021

Hunt L, *Inventing Human Rights* (WW Norton & Company Inc 2007)

IAP, ‘Press Release on the Phulbari Coal Mine’ (*Medium*, 24 November 2014) <<https://medium.com/@accountability/press-release-on-the-phulbari-coal-mine-347a52c525a4>> accessed 10 October 2020

Ignatieff M, ‘The Attack on Human Rights’ (2001) 80 *Foreign Affairs* 102

‘ILO Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)’

‘Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse’ (Human Rights Council 2016)

Indian and Northern Affairs Canada and Affairs Canada, ‘Sustainable Development Strategy 2007–2010’ (Minister of Public Works and Government Services, Canada 2006)

‘Indigenous Clean Energy Projects’ (*Indigenous Clean Energy*) <<https://indigenouscleanenergy.com/ice-projects/>> accessed 8 February 2020

‘Indigenous Knowledge Crucial to Tackling Climate Change, Experts Say’ *Reuters* (28 June 2017) <www.reuters.com/article/us-climatechange-science-environment-idUSKBN19J27V> accessed 8 February 2020

‘Indigenous Peoples in Kenya - IWGIA - International Work Group for Indigenous Affairs’ <www.iwgia.org/en/kenya/655-indigenous-peoples-in-kenya> accessed 4 July 2019

‘Indigenous Peoples Need Land Rights’ *Dhaka Tribune* (26 November 2016)
Ingram E, ‘Ontario Hydropower Project Wins Sustainability Award’ *Hydro Review* (3 December 2014) <www.hydroreview.com/2014/12/03/ontario-hydropower-project-wins-sustainability-award/>

Ingram G, ‘Civil Society: An Essential Ingredient of Development’ (*Brookings*, 6 April 2020) <www.brookings.edu/blog/up-front/2020/04/06/civil-society-an-essential-ingredient-of-development/> accessed 17 August 2021

Intercontinental.Cry, ‘A New Day for Indigenous Rights in Kenya’ (*Intercontinental Cry*, 11 August 2010) <<https://intercontinentalcry.org/a-new-day-for-indigenous-rights-in-kenya/>> accessed 28 January 2020

International Accountability Project, ‘Phulbari Coal Project: An Assessment of the Draft Resettlement Plan Prepared by Global Coal Management/Asia Energy Corporation’ (International Accountability Project 2008)

—, ‘The Phulbari Coal Project: A Threat To People, Land, And Human Rights In Bangladesh’ (International Accountability Project 2012)

International Accountability Project and Hoshour K, ‘Analysis of The Indigenous People’s Development Plan’ (2012)

International Accountability Project and The World Development Movement, ‘Initial Assessment By The UK National Contact Point For The OECD Guidelines For Multinational Enterprises: Complaint From The International Accountability Project And The World Development Movement Against GCM Resources Plc In Bangladesh’ (2013)

—, ‘Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises Concerning GCM Resources (UK)’ (2012)

International Accountability Project, Open Letter, Endorsed by 110 NGOs, ‘Open Letter to the Investors in Global Coal Management Resources’ (August 2008)

‘International Energy Agency - Kenya’ (*IEA*) <www.iea.org/countries/kenya> accessed 21 August 2021

International Federation for Human Rights, ‘Question of the Violations of Human Rights and Fundamental Freedoms in Any Part of the World. Written Statement* Submitted by the International Federation for Human Rights (FIDH), a Non-Governmental Organization with Special Consultative Status’ (Economic and Social Council 2005) E/CN.4/2005/NGO/174

International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and Other Minorities and Rights of Ethnic, Religious, Linguistic and Other Minorities (IFPRERLOM), ‘Indigenous Issues: Written Statement* Submitted by the International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and Other Minorities (IFPRERLOM), a Nongovernmental Organization on the Roster’ (Economic and Social Council 2006) E/CN.4/2006/NGO/151

International Federation of Human Rights Leagues (FIDH), ‘Question of the Violations of Human Rights and Fundamental Freedoms in Any Part of the World. Written Statement* Submitted by the International Federation of Human Rights Leagues (FIDH), a Non-Governmental Organization in Special Consultative Status’ (Economic and Social Council 2004) E/CN.4/2004/NGO/158

International Finance Corporation, ‘Performance Standard 7: Indigenous Peoples’ (1 January 2012)

—, ‘Performance Standard 8: Cultural Heritage’ (1 January 2012)

International Labour Organization, ‘Countries That Have Not Ratified This Convention’ <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO> accessed 7 June 2020

—, ‘Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) Ratifications of ILO Conventions: Ratifications by Convention’ <www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252> accessed 4 June 2021

—, ‘Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ratifications of ILO Conventions: Ratifications by Convention’ <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 4 June 2021

International Olympic Committee, ‘Rio 2016 Launches Sustainability Plan with Support from UNEP’ (*International Olympic Committee*, 16 August 2016) <www.olympic.org/news/rio-2016-launches-sustainability-plan-with-support-from-unep> accessed 12 October 2018

International Rivers, *Community Voices of Lake Turkana* <www.youtube.com/watch?v=wireovN1L0k> accessed 10 May 2019

International Work Group for Indigenous Affairs, ‘Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya’ <<https://primarysources.brillonline.com/browse/human-rights-documents-online/renewable-energy-projects-and-the-rights-of-marginalisedindigenous-communities-in-kenya:hrdhrd10312015001>> accessed 19 May 2019

‘Investegate |Asia Energy PLC Announcements | Asia Energy PLC: Economic Parameters’
<www.investegate.co.uk/article.aspx?id=200409301234065328D> accessed 18 October 2020

‘_____’ <www.investegate.co.uk/article.aspx?id=200409301234065328D> accessed 17 October 2020

Ireland N, ‘First Nations See Economic Future in Growing Clean Energy Industry’ *CBC News* (5 November 2016) <www.cbc.ca/news/indigenous/first-nations-pursue-canada-clean-energy-economy-1.3829405> accessed 8 February 2020

‘Is the CDM Fulfilling Its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement’ (Öko-Institut/World Wide Fund for Nature 2007)

Islam S and Khan MdZR, ‘A Review of Energy Sector of Bangladesh’ (2017) 110 *Energy Procedia* 611

Islam S, Moula G and Islam M, ‘Land Rights, Land Disputes and Land Administration in Bangladesh—A Critical Study’ (2015) 06 *Beijing Law Review* 193

Islamic Council of Europe, ‘Universal Islamic Declaration of Human Rights’ (London, Islamic Council of Europe, 19 September 1981)

Jabbar MA, ‘Land Reform in Bangladeshi’
<www.researchgate.net/publication/264442160_LAND_REFORM_IN_BANGLADISH>

Jackson J, ‘Measuring Human Rights and Development By One Yardstick’ 15 *California Western International Law Journal* 9

Jacobsen M and Bruun O, *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Curzon Press 2000)

Jahangir S, ‘Govt Backtracks on Open-Pit Mining in Barapukuria, Phulbari’ *Daily Sun* (23 September 2016)

JAMAKON (National Human Rights Commission of Bangladesh), ‘JAMAKON Report to the UN Human Rights Committee’ (UN Human Rights Commission 2016)

James Carroll, *Constantine’s Sword: The Church and the Jews, A History* (Mariner Books 2002)

James McBride, ‘The Economics of Hosting the Olympic Games’ (*Council on Foreign Relations*) <www.cfr.org/backgrounder/economics-hosting-olympic-games> accessed 8 October 2018

Jochnick C, ‘The Human Rights Challenge to Global Poverty’ [1999] Center for Economic and Social Rights <www.cesr.org/publications.html>

——, ‘Challenging Corporate Power Through Human Rights’ in César Rodríguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2015)

Jochnick C and Rabaeus N, ‘Business And Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon’ [2010] *Suffolk Law Review* 19

Kamungi P, ‘National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya’, *From Responsibility to Response* (Brookings 2011)

Karim F, ‘WikiLeaks Cables: US Pushed for Reopening of Bangladesh Coal Mine’ *The Guardian* (21 December 2010) <www.theguardian.com/world/2010/dec/21/wikileaks-cables-us-bangladesh-coal-mine> accessed 27 October 2018

Kennedy D, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005)

Kenya, ‘Fourth Periodic Report Submitted by Kenya under Article 40 of the Covenant, Due in 2015’ (Human Rights Committee 2018) CCPR/C/KEN/4 <www.cambridge.org/core/product/identifier/S0002930000101204/type/journal_article> accessed 4 July 2019

‘Kenya Development Overview’ (*World Bank*) <www.worldbank.org/en/country/kenya/overview> accessed 21 August 2021

‘Kenya Human Rights’ (*Amnesty International USA*) <www.amnestyusa.org/countries/kenya/> accessed 21 August 2021

Kenya National Commission on Human Rights, ‘Report to the Human Rights Committee to Inform Its Review of Kenya’s Third Periodic Report on Implementation of the Provisions of the International Covenant on Civil and Political Rights’ (2012)

—— (ed), *Compendium on Submissions to ICESCR 2016: Committee on Economic, Social and Cultural Rights* (Kenya National Commission on Human Rights 2016)

——, ‘Business And Human Rights’ <www.knchr.org/Our-Work/Business-and-Human-Rights> ‘Kenya National Commission on Human Rights > Our Work > Business and Human Rights’ <www.knchr.org/Our-Work/Business-and-Human-Rights> accessed 2 April 2019

‘Kenya Straddles a Volcanic Rift. It’s a Green-Energy Geyser’ (*Environment*, 7 November 2018) <www.nationalgeographic.com/environment/2018/10/geothermal-energy-kenya-photography/> accessed 2 February 2019

‘Kenya: Video on Pastoralist Communities’ Mobilization in the Face of Extractive Industries’ (IWGIA) <www.iwgia.org/en/kenya/2128-kenya-video-on-pastoralist-communities-mobilization> accessed 18 May 2019

Kenya Vision 2030, ‘Kenya Vision 2030’ <<https://vision2030.go.ke/>> accessed 26 May 2019
‘Kenya Vision 2030: The Popular Version’ (Government of the Republic of Kenya 2007)

Kinney ED, ‘The International Human Right to Health: What Does This Mean for Our Nation and World?’ [2002] SSRN Electronic Journal <www.ssrn.com/abstract=296394> accessed 7 August 2021

Kjellén B, ‘Improving the Clean Development Mechanism’ 25

Kleinfeld J, ‘The Double Life of International Law: Indigenous Peoples and Extractive Industries’ (2016) 129 Harvard Law Review <<https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/>> accessed 8 August 2021

Koliev F, ‘Naming and Shaming: The Politics and Effectiveness of Social Pressure in the ILO’ (Stockholm University 2018)

Kolshus HH and others, ‘Can the Clean Development Mechanism Attain Both Cost-Effectiveness and Sustainable Development Objectives?’ 25

Kothari M, ‘Economic, Social and Cultural Rights. Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari Addendum’ (Economic and Social Council 2005) E/CN.4/2005/48/Add.1

Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford University Press 1995)

‘Kyoto Protocol To The United Nations Framework Convention On Climate Change’ (United Nations 1998)

Lake Turkana Wind Power, ‘Statement by Lake Turkana Wind Power Limited on Concerns Raised in the IWGIA Report Titled “Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya”’ (2016) <<https://media.business-humanrights.org/media/documents/files/documents/LTWP_Response_re_Indigenous_Peoples_Report_Feb_2016.pdf>>

‘Lake Turkana Wind Power Project: The Largest Wind Farm Project in Africa’ (*African Development Bank Group*, 17 September 2015) <www.afdb.org/en/projects-and-operations/selected-projects/lake-turkana-wind-power-project-the-largest-wind-farm-project-in-africa-143/> accessed 26 March 2019

‘Lake Turkana Wind Power: Renewable Energy & Human Rights Business & Human Rights Resource Centre’ <www.business-humanrights.org/en/lake-turkana-wind-power-renewable-energy-human-rights> accessed 18 May 2019

‘Legally Binding Instrument to Regulate Business and Human Rights. 6 Areas to Monitor’ (*Ksapa - en*, 23 October 2019) <<https://ksapa.org/legally-binding-instrument-to-regulate-business-and-human-rights-6-areas-to-monitor/>> accessed 5 June 2020

Legislative Services Branch, ‘Consolidated Federal Laws of Canada, Canadian Environmental Assessment Act’ (6 July 2012) <<https://laws-lois.justice.gc.ca/eng/acts/C-15.2/>> accessed 18 April 2020

Leitz C, Willi M and UBS, ‘Global Coal Management’ (6 December 2007)

Lichtenstein CC, ‘Hard Law v. Soft Law: Unnecessary Dichotomy?’ (2021) 35 *The International Lawyer* 10

Lindgreen A and Swaen V, ‘Corporate Social Responsibility’ (2010) 12 *International Journal of Management Reviews* 1

‘Local Stakeholder Engagement on Human Rights - 5 Tips to Get It Right’ (*Ksapa - en*, 18 February 2020) <<https://ksapa.org/local-stakeholder-engagement-on-human-rights-5-tips-to-get-it-right/>> accessed 5 June 2020

Lovekin D, ‘Diesel, Renewables, and the Future of Canada’s Remote Communities’ (*Pembina Institute*, 15 January 2019) <www.pembina.org/blog/remote-microgrids-intro>

‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (International Commission of Jurists, Urban Morgan Institute on Human Rights, Centre for Human Rights of the Faculty of Law of Maastricht 1997) <http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html> accessed 8 August 2021

‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2011) <<http://journals.sagepub.com/doi/10.1177/016934411102900411>> accessed 8 August 2021

MacNaughton G, ‘Vertical Inequalities: Are the SDGs and Human Rights up to the Challenges?’ (2017) 21 *The International Journal of Human Rights* 1050

Mahoney LS and others, ‘A Research Note on Standalone Corporate Social Responsibility Reports: Signaling or Greenwashing?’ (2013) 24 *Critical Perspectives on Accounting* 350

Makoloo MO, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (Minority Rights Group 2005)

——, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity - PAGE 23* (Minority Rights Group 2005)

Malo S, 'Lawyer Who Sued Chevron over Ecuador Pollution Faces N.Y. Contempt Trial' (*Reuters*, 10 May 2021) <www.reuters.com/world/us/lawyer-who-sued-chevron-over-ecuador-pollution-faces-ny-contempt-trial-2021-05-10/> accessed 22 June 2021

'Mandatory Due Diligence' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/>> accessed 26 February 2022

Manglapus RS, 'Human Rights Are Not a Western Discovery' (1978) 21 *Worldview Magazine*

Manion M and others, 'Budget Analysis as a Tool to Monitor Economic and Social Rights: Where the Rubber of International Commitment Meets the Road of Government Policy' (2017) 9 *Journal of Human Rights Practice* 146

Manusher Jonno Foundation, 'Rights of the Ethnic People (Indigenous Peoples)' (2018)

Marien M, 'The Fragmented Futures of Human Rights and Democracy' (1996) 28 *Futures* 51

Marks S and Clapham A, *International Human Rights Lexicon* (Oxford University Press 2005)

Marks SP and Friedrich-Ebert-Stiftung (eds), *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung 2008)

Martin, 'Ban Urges All to Build on Sustainable Development of Olympics' (*United Nations Sustainable Development*, 22 August 2016)

<www.un.org/sustainabledevelopment/blog/2016/08/ban-urges-all-to-build-on-sustainable-development-effects-of-rio-olympics/> accessed 8 October 2018

'Mass Negativity Dimming Shine of Africa's Largest Wind Farm' (*Daily Nation*)

<<https://mobile.nation.co.ke/blogs/Mass-negativity-dimming-shine-of-Africa-largest-wind-farm/1949942-4855416-hnwjbl/index.html>> accessed 20 May 2019

Mathison S, 'Stakeholder Involvement', *Encyclopedia of Evaluation* (SAGE Publications 2004)

Mbondenyi MK and Ambani O, *New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing 2013)

McDiarmid M, 'Indigenous Communities Embracing Clean Energy, Creating Thousands of Jobs' *CBC News* (11 October 2017) <www.cbc.ca/news/politics/first-nations-renewable-energy-projects-1.4348595> accessed 8 February 2020

McDonald L, 'Regrouping in Defence of Minority Rights: Kymlicka's Multicultural Citizenship' 34 *Osgoode Hall Law Journal* 29

McDowell C, 'Climate-Change Adaptation and Mitigation: Implications for Land Acquisition and Population Relocation' (2013) 31 *Development Policy Review* 677

McInerney-Lankford S, 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 *Journal of Human Rights Practice* 51

McKinsey & Company, 'ESG Framework' <www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value> accessed 18 February 2021

Meckled-García S and Çali B, 'The Human Rights Ideal and International Human Rights Law' [2006] *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* 10

Meier BM and others, *Monitoring the Progressive Realization of the Human Rights to Water and Sanitation*, vol 1 (Ken Conca and Erika Weinthal eds, Oxford University Press 2017) <<http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199335084.001.0001/oxfordhb-9780199335084-e-21>> accessed 16 June 2021

Meijer BH, 'Widows of Hanged Nigeria Activists Can Continue Case vs Shell: Dutch Court' *Reuters* (1 May 2019) <www.reuters.com/article/us-shell-widows-lawsuit-idUSKCN1S73CY> accessed 22 June 2021

Merry SE, 'Changing Rights, Changing Culture' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A011/type/book_part> accessed 16 May 2018

'Mexican Winds and the Need for Community Alternatives' (*openDemocracy*) <www.opendemocracy.net/en/democraciaabierta/mexican-winds-and-need-of-community-alternatives/> accessed 10 May 2019

'Mexico: Ixtepec Wind Project Impacts Communities in Oaxaca | Business & Human Rights Resource Centre' <www.business-humanrights.org/en/mexico-ixtepec-wind-project-impacts-communities-in-oaxaca> accessed 10 May 2019

Michaelowa A and Umamaheswaran K, 'Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector' [2006] *SSRN Electronic Journal* <www.ssrn.com/abstract=908824> accessed 27 October 2019

Miller-Dawkins M, 'Global Goals and International Agreements' 26

Milman O, 'The Lawyer Who Took on Chevron – and Now Marks His 600th Day under House Arrest' (*The Guardian*, 28 March 2021) <www.theguardian.com/us-news/2021/mar/28/chevron-lawyer-steven-donziger-ecuador-house-arrest> accessed 22 June 2021

Ministry of Land, 'Ministry of Land (Bangladesh)' <<https://minland.portal.gov.bd/>> accessed 17 October 2020

Minority Rights Group International, 'Alternative Report to the Committee on the Elimination of Racial Discrimination: Review of the Periodic Report of Kenya' (Committee on the Elimination of Racial Discrimination 2017)

Mohamed A, 'Kenya: Ethiopia Dam Draining Out Lake Turkana' (*ZeHabesha – Latest Ethiopian News Provider*, 16 October 2015) <www.zehabesha.com/kenya-ethiopia-dam-draining-out-lake-turkana/> accessed 26 May 2019

Mondol S and Mondol R, 'Constitution of Bangladesh and Human Rights: A Comparative Study' (2017) 22 IOSR Journal of Humanities and Social Science 10

Mooney PH and Hunt SA, 'A Repertoire of Interpretations: Master Frames and Ideological Continuity in U.S. Agrarian Mobilization' (2020) 1996 *The Sociological Quarterly* 22

Moran G, 'National Human Rights Commission of Bangladesh' [2011] Final Report 175

——, 'Perceptions, Attitudes and Understanding: A Baseline Survey on Human Rights in Bangladesh' (National Human Rights Commission of Bangladesh 2011)

Moyn S, *The Last Utopia: Human Rights in History* (Belknap Press 2012)

——, 'Are Human Rights Enough? The Universal Declaration between Welfare State and Neoliberal Globalization' [2017] *Eurozine* 1

——, *Not Enough: Human Rights in An Unequal World* (Belknap Press 2018)

Mutua M, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) <www.jstor.org/stable/j.ctt3fhtq0> accessed 19 September 2018

——, 'The Complexity of Universalism in Human Rights', *Human Rights with Modesty: The Problem of Universalism* (Springer 2004)

——, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' 35 *Virginia Journal of International Law* 43

Nadvi A, 'Phulbari Movement of 2006: Where We Stand Now' (*The Daily Star*, 1 September 2017)

Narine ML, 'Living in a Material World – From Naming and Shaming to Knowing and Showing: Will New Disclosure Regimes Finally Drive Corporate Accountability for Human Rights?' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape* (Cambridge University Press 2015)

<www.cambridge.org/core/product/identifier/9781316155219%23CN-bp-8/type/book_part>
accessed 17 February 2021

National Committee to Protect Oil Gas Mineral Resources Power and Ports and National Committee to Protect Oil Gas Mineral, 'The Alternative Power and Energy Plan for Bangladesh (Draft)' (National Committee to Protect Oil Gas Mineral Resources Power and Ports 2017)

National Environment Management Authority, Dr. A. Mwinzi, EBS, Director General, 'Letter of Approval and Authorization for the Lake Turkana Wind Power Project, Kenya' (24 June 2010)

National Human Rights Commission of Bangladesh, 'National Human Rights Commission, Bangladesh Report to the UN Committee on Economic, Social and Cultural Rights' (National Human Rights Commission of Bangladesh 2018)

'National Institutions for the Promotion and Protection of Human Rights' (The Office of the High Commissioner on Human Rights, April 1993)

National Report, 'Brazil: Universal Periodic Review' (Working Group on the Universal Periodic Review 2017) A/HRC/WG.6/27/BRA/1

Nelson PJ and Dorsey E, 'At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs' (2003) 31 World Development 2013

'New Chief of Dokis Looks to a Bright Future' <<http://anishinabeknews.ca/2016/06/06/new-chief-of-dokis-looks-to-a-bright-future/>> accessed 9 February 2020

Nineteenth Islamic Conference of Foreign Ministers, 'Cairo Declaration On Human Rights in Islam' (Nineteenth Islamic Conference of Foreign Ministers, 5 August 1990)

Nuremowla S, 'Land, Place and Resistance to Displacement in Phulbari' (2016) 1 South Asia Multidisciplinary Academic Journal

Nussbaum MC, *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press: Harvard University Press 2006)

O'Dwyer B and Unerman J, 'Enhancing the Role of Accountability in Promoting the Rights of Beneficiaries of Development NGOs' (2010) 40 Accounting and Business Research
OECD, 'OECD Guidelines for Multinational Enterprises' (OECD 2011) <www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en>
accessed 10 October 2020

Offenheiser RC and Holcombe SH, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 Nonprofit and Voluntary Sector Quarterly 268

Office of the Attorney General and Department of Justice, ‘National Human Rights Policy and Action Plan’ (2014) SESSIONAL PAPER NO 3 OF 2014

Office of the High Commissioner For Human Rights, ‘General Comment No. 1: Reporting by States Parties’ (Committee on Economic, Social and Cultural Rights 1981)

——, ‘General Comment No. 3: The Nature of States Parties’ Obligations’ (Committee on Economic, Social and Cultural Rights 1990)

Office of the High Commissioner for Human Rights, ‘Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment’ (Office of the High Commissioner for Human Rights 2017)

Office of the Secretary General, ‘Question of the Violations of Human Rights and Fundamental Freedoms in Any Part of the World. Cooperation with Representatives of United Nations Human Rights Bodies Report of the Secretary-General’ (Economic and Social Council 2004) E/CN.4/2005/31

Office of the United Nations and High Commissioner for Human Rights, ‘Frequently Asked Questions on Economic, Social and Cultural Rights’ (Office of the United Nations High Commissioner for Human Rights)
<www.ohchr.org/Documents/Publications/FactSheet33en.pdf>

Office of the United Nations High Commissioner for Human Rights, ‘Land and Human Rights: Standards and Applications’ (2015)

——, ‘Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet #33’ OHCHR, ‘What Are Human Rights?’
<www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> accessed 17 January 2021

‘OHCHR | Forced Evictions’ <www.ohchr.org/en/issues/forcedevictions/pages/index.aspx> accessed 7 August 2021

‘OHCHR | Land and Human Rights’
<www.ohchr.org/en/issues/landandhr/pages/landandhumanrightsindex.aspx> accessed 6 August 2021

‘——’ <www.ohchr.org/EN/Issues/LandAndHR/Pages/LandandHumanRightsIndex.aspx> accessed 3 January 2021

‘OHCHR | Universal Declaration on Cultural Diversity’
<www.ohchr.org/en/professionalinterest/pages/culturaldiversity.aspx> accessed 30 July 2018

‘OHCHR | UPR’ <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>> accessed 14 February 2021

‘OHCHR | UPR Basic Facts about the UPR’

<www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> accessed 24 August 2021

‘——’ <www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> accessed 9 August 2021

‘OHCHR | What Are the Obligations of States on Economic, Social and Cultural Rights?’

<www.ohchr.org/en/issues/escr/pages/whataretheobligationsofstatesonescr.aspx> accessed 5 August 2021

‘Okikendawt Hydro LP Financing’ (*Stonebridge*) <<https://stonebridge.ca/okikendawt-hydro-lp-2/>> accessed 8 February 2020

‘Okikendawt Hydro Project on the French River Begins Construction’ *Anishinabek News* (27 August 2013) <<http://anishinabeknews.ca/2013/08/27/okikendawt-hydro-project-on-the-french-river-begins-construction/>> accessed 8 February 2020

‘Okikendawt Hydroelectric Power Plant’ (*CIMA* +) <www.cima.ca/en/project/okikendawt-hydroelectric-power-plant/>

Olawuyi DS, *The Human Rights Based Approach to Carbon Finance* (Cambridge University Press 2016)

Olivier M, ‘The Relevance of “soft Law” as a Source of International Human Rights’ [2021] *The Comparative and International Law Journal of Southern Africa* 20

Ontario Waterpower Association, ‘Footprints To Follow: Ontario Aboriginal Waterpower Case Studies’ (Ontario Waterpower Association 2017)

Ortiz I and Cummins M, ‘Austerity Measures in Developing Countries: Public Expenditure Trends and the Risks to Children and Women’ (2013) 19 *Feminist Economics* 55

O’Sullivan D, ‘Is the Declaration of Human Rights Universal?’ (2000) 4 *The International Journal of Human Rights* 25

Peerenboom R, ‘Beyond Universalism and Relativism: The Evolving Debates about Values in Asia’ (2003) 14 *Indiana International and Comparative Law Review* 1

Penna DR and Campbell PJ, ‘Human Rights and Culture: Beyond Universality and Relativism’ (1998) 19 *Third World Quarterly* 7

Permanent Mission of Bangladesh to the UN, ‘Reference to the Concluding Observations of the CESCR’ (Office of the High Commissioner for Human Rights 2018) BMG/CESCR-301

Permanent Mission of Bangladesh to the United Nations, ‘Bangladesh’s Request for Candidature for Membership of the Human Rights Council’ (12 April 2006)

——, ‘Bangladesh’s Responses to Certain Observations of the Human Rights Committee’ (Office of the High Commissioner for Human Rights 2017) BMG/CHR-319(A)

Permanent Missions of Denmark and Chile to the United Nations at Geneva, ‘Human Rights and the SDGs Pursuing Synergies’ (The Danish Institute of Human Rights 2017)

Perry MJ, ‘Are Human Rights Universal? The Relativist Challenge and Related Matters’ (1997) 19 *Human Rights Quarterly* 461

Pervez S, ‘Effects and Roles of Laws of Bangladesh Against Crimes: A Study’ [2015] *American Journal of Engineering Research* 6

‘Phulbari Protesters Give Ultimatum to Meet 6-Point Demands’ *Dhaka Tribune* (10 May 2017) <www.dhakatribune.com/bangladesh/nation/2017/05/10/phulbari-protesters-ultimatum-demands/> accessed 25 November 2018

Phulbari Resistance, ‘Phulbari Resistance: Urgent Appeal by World Organization against Torture: Risk of Violent Suppression of Public Opposition to the Phulbari Coal Mine Project’ (*Phulbari Resistance*, 22 December 2007) <<http://phulbariresistance.blogspot.com/2007/12/urgent-appeal-by-world-organization.html>> accessed 16 October 2020

‘Phulbari Tragedy’s 13th Anniv Today, Govt Ignores Pact’ *New Age* (26 August 2019) <www.newagebd.net/article/82578/phulbari-tragedys-13th-anniv-today-govt-ignores-pact> accessed 25 August 2019

Posner E, ‘The Case against Human Rights’ *The Guardian* (4 December 2014) <www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 2 October 2018

Preis A-BS, ‘Human Rights as Cultural Practice: An Anthropological Critique’ (1996) 18 *Human Rights Quarterly* 286

‘Progressive Realisation and Non-Regression’ (*ESCR-Net*) <<https://www.escr-net.org/resources/progressive-realisation-and-non-regression>> accessed 16 June 2021

‘Protests at GCM Resources AGM over Bangladesh Coal Mine’ (*Global Justice Now*, 4 December 2013) <www.globaljustice.org.uk/news/protests-at-gcm-resources-agm-over-bangladesh-coal-mine/> accessed 5 June 2021

‘PUBLIC CONSULTATION AND ENGAGEMENT – Lake Turkana Wind Power’ <<https://ltwp.co.ke/public-consultation-and-engagement/>> accessed 19 May 2019

Public Works and Government Services Canada, ‘Environmental Assessment Screening Report: Okikendawt Hydroelectric Project’ (Public Works and Government Services Canada 2011)

QBIS, 'Socioeconomic Study of Key Impacts from LTWP Project' (2018) Impact Assessment Report

<www.vestas.com/~media/vestas/about/csr/20180604_ltwp%20impact%20assessment.pdf>

Rahman KF, 'Linkage between Right to Development and Rights-Based Approach: An Overview' (2014) 1 Northern University Journal of Law

<www.banglajol.info/index.php/NUJL/article/view/18528> accessed 2 October 2018

Randolph S, Fukuda-Parr S and Lawson-Remer T, 'Economic and Social Rights Fulfillment Index: Country Scores and Rankings' (2010) 9 Journal of Human Rights 230

'Ratifications of ILO Conventions: Ratifications by Convention'

<www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 8 August 2021

Regeneration International, 'What Is Regenerative Agriculture?' (*Regeneration International*, 24 February 2017) <<https://regenerationinternational.org/2017/02/24/what-is-regenerative-agriculture/>> accessed 26 June 2019

Reichert E, 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 Journal of Comparative Social Welfare 23

Remmert G, Koalick M and Wilde L, 'Stakeholder Engagement in Human Rights Due Diligence' (Global Compact Network, Germany, twentyfifty Ltd 2014)

<www.globalcompact.de/migrated_files/wAssets/docs/Menschenrechte/stakeholder_engagement_in_humanrights_due_diligence.pdf>

'Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya'

<<https://primarysources.brillonline.com/browse/human-rights-documents-online/renewable-energy-projects-and-the-rights-of-marginalisedindigenous-communities-in-kenya;hrdhrd10312015001>> accessed 19 May 2019

Renteln AD, *The Cultural Defense* (Oxford University Press 2004)

——, *International Human Rights: Universalism Versus Relativism* (Quid Pro Books 2013)

'Report of the United Nations Conference on Environment and Development' (United Nations 1992) A/CONF.151/26/Rev.1 (Vol. 1)

'Report of the Working Group on the Right to Development on Its Fifteenth Session' (United Nations General Assembly 2014) A/HRC/27/45

'Reporting Compliance by State Parties to the Human Rights Treaty Bodies' (United Nations Human Rights Office of the High Commissioner 2020)

'Reservations and Declarations to the African Charter on Human and Peoples' Rights / Legal Instruments / ACHPR /' <www.achpr.org/instruments/achpr/#eg> accessed 16 September 2018

‘Restore The Earth’ <<http://restoretheearth.org/>> accessed 26 June 2019

Richardson C and Hosain MdM, ‘Application of International Law in Bangladesh: An Analysis of the Supreme Court Judgments’ [2015] Jagannath University Journal of Law 16

‘Rights of Indigenous Peoples in Bangladesh’ *The Daily Star* (9 August 2016)
Rio 2016, ‘New Sustainability Measures Set for the Rio 2016 Summer Olympics’ (*UN Environment*) <www.unenvironment.org/news-and-stories/press-release/new-sustainability-measures-set-rio-2016-summer-olympics> accessed 8 October 2018

Ritter MA, ‘Human Rights: The Universalist Controversy. A Response to “Are the Principles of Human Rights Western Ideas” - An Analysis of the Claim of the Asian Concept of Human Rights from the Perspectives of Hinduism, by Dr. Surya P. Subedi’ (1999) 30 *California Western International Law Journal* 71

Roberto Garduno y E, ‘Alternative Wind Plan Proposed for Oaxaca’ (*La Jornada*, 19 October 2012) <www.jornada.com.mx/2012/10/19/estados/037n1est> accessed 17 May 2019

Robinson M, ‘Business and Human Rights: A Progress Report’ (Office of the High Commissioner for Human Rights 2000)

——, ‘Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance’ (World Bank Presidential Lecture, Washington DC, 3 December 2001)

——, ‘Advancing Economic, Social, and Cultural Rights: The Way Forward’ (2004) 26 *Human Rights Quarterly* 866

Rodríguez-Garavito C, ‘Against Reductionist Views of Human Rights’ (*OpenDemocracy*, 30 July 2013) <www.opendemocracy.net/en/openglobalrights-openpage/against-reductionist-views-of-human-rights/> accessed 14 February 2021

——, ‘Towards a Human Rights Ecosystem’, *Debating the Endtimes of Human Rights* (Amnesty International Netherlands 2014)

—— (ed), *Business and Human Rights: Beyond the End of The Beginning* (Cambridge University Press 2017)

Rolnik R, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context’ (Human Rights Council 2012) A/HRC/22/46

Rosa W (ed), ‘Transforming Our World: The 2030 Agenda for Sustainable Development’, *A New Era in Global Health* (Springer Publishing Company 2017)
<<http://connect.springerpub.com/lookup/doi/10.1891/9780826190123.ap02>> accessed 7 June 2020

Rosga A and Satterthwaite ML, 'Measuring Human Rights: U.N. Indicators in Critical Perspective' 19

Ruggie J, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> accessed 25 November 2018

——, 'A UN Business and Human Rights Treaty?' (Harvard Kennedy School 2014)

——, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' [2015] SSRN Electronic Journal <www.ssrn.com/abstract=2554726> accessed 15 February 2021

Ruggie J, Rees C and Davis R, 'Making "Stakeholder Capitalism" Work: Contributions From Business & Human Rights' Working Paper of the Corporate Responsibility Initiative 35

Saiz I and Donald K, 'Tackling Inequality Through the Sustainable Development Goals: Human Rights in Practice' (2017) 21 *The International Journal of Human Rights* 1029

Samson C, 'Rights as the Reward for Simulated Cultural Sameness: The Innu in the Canadian Colonial Context' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) <www.cambridge.org/core/product/identifier/CBO9780511804687A020/type/book_part> accessed 16 May 2018

Santos B de S, 'Toward a Multicultural Conception of Human Rights', *Moral Imperialism: A Critical Anthology* (University of Michigan 2000)

'Sarima Village Resettlement Process Information Document' (Lake Turkana Wind Power 2017)

Schabas W and United Nations (eds), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013)

Schrijver N, 'A New Convention on the Human Right to Development: Putting the Cart before the Horse?' (2020) 38 *Netherlands Quarterly of Human Rights* 84

Schwab K, 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' (*World Economic Forum*, 2 December 2019) <www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/> accessed 16 February 2021

Sekaggya M, 'Human Rights Defenders' (UN General Assembly 2010) General Assembly resolution 62/152

Sen A, *Development as Freedom* (1st edn, Knopf 1999)

Sengupta A, 'Realizing the Right to Development' [2000] *Development and Change* 26

——, 'Right to Development as a Human Right' (2001) 36 *Economic and Political Weekly* 11

——, 'Conceptualizing the Right to Development for the Twenty-First Century' <www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_587738a4-en> accessed 30 September 2018

Sepúlveda Cardona M and de Albuquerque C, 'Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (UN General Assembly 2010) A/HRC/15/55

Sheldrick K, 'CDM Project Activity Registration Form: LTWP' (1011)

Shelton D, 'Soft Law', *Handbook of International Law* (Routledge Press 2008)

Shields DK, 'The Minimum Core Obligations of Economic, Social and Cultural Rights: The Rights to Health and Education' The Nordic Trust Fund and The World Bank 40

Shift, 'Bringing a Human Rights Lens to Stakeholder Engagement' (Shift 2013)

<<[——, 'Reporting Principles : UN Guiding Principles Reporting Framework' \(2017\)](https://shiftproject.org/wp-content/uploads/2013/08/Shift_stakeholderengagement2013.pdf#:~:text=Applying%20the%20human%20rights%20lens%20to%20stakeholder%20engagement,engagement%20systems%20re%EF%AC%82ected%3A%20%E2%80%9CWe%E2%80%99re%20still%20approaching%20these%20issues>></p></div><div data-bbox=)

<www.ungpreporting.org/framework-guidance/reporting-principles/> accessed 5 June 2020

Shiree, 'Khasland for the Poorest - Simplify the Process' (UK Aid and The Government of Bangladesh 2011)

Shiva Kumar AKS, 'National Experience with the Right to Development', *Realizing the Right to Development* (United Nations 2013) <www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_cdf8a998-en> accessed 2 October 2018

Shue H, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980)

Shura E, 'New Strategies for Progressive Realization Assessments of Economic, Social, and Cultural Rights: Cambodian AIDS-Related Orphans and Vulnerable Children as the Hard Case' (2008) 32 *Fordham International Law Journal* 43

Sieder R and Witchell J, 'Advancing Indigenous Claims through the Law: Reflections on the Guatemalan Peace Process' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights* (Cambridge University Press 2001)

<www.cambridge.org/core/product/identifier/CBO9780511804687A019/type/book_part> accessed 16 May 2018

'Silicon Ranch Sets up Program to Bring More Grazing Animals and Native Plants to Its Solar Projects' (*Solar Power World*, 26 June 2019)

<www.solarpowerworldonline.com/2019/06/silicon-ranch-sets-up-program-to-bring-more-grazing-animals-and-native-plants-to-its-solar-projects/> accessed 26 June 2019

Similie I, 'Climb Every Mountain: Civil Society and the Conflict Diamonds Campaign' in Paul Gready (ed), *Fighting For Human Rights* (Routledge 2004)

Simmons, 'Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights"' (2009) 16 *Indiana Journal of Global Legal Studies* 437

Simons M, 'What You Think You Know About Chevron and Steven Donziger Is Wrong' (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/latest-news/what-you-think-you-know-about-chevron-and-steven-donziger-is-wrong/> accessed 22 June 2021

Slaughter JR, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 *Human Rights Quarterly* 735

SMEC, 'SMEC | Professional Engineering and Development Consultants' <www.smec.com/en_au> accessed 18 October 2020

SMEC Australia Pty Ltd, 'Environmental and Social Impact Assessment Report (Volume 3) Environment' (Asia Energy Corporation (Bangladesh) Pty Ltd 2005)

—, 'Indigenous People's Development Plan for Asia Energy's Phulbari Coal Project Area' (Asia Energy Corporation (Bangladesh) Pty Ltd 2005)

—, 'Environmental and Social Impact Assessment Report (Volume 4) Social' (Asia Energy Corporation (Bangladesh) Pty Ltd 2006)

Snow D and Benford R, 'Master Frames and Cycles of Protest' <www.researchgate.net/publication/246773271_Master_Frames_and_Cycles_of_Protest>

South-South Human Rights Forum, 'Beijing Declaration Adopted by the First South-South Human Rights Forum' (South-South Human Rights Forum, 8 December 2017)

Special Rapporteur on Adequate Housing and Miloon Kothari, 'Basic Principles And Guidelines On Development Based Evictions And Displacement' (United Nations, Human Rights Council) A/HRC/4/18

Ssenyonjo M, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 Netherlands International Law Review 259

Staff Correspondent, 'Govt Says "No" to Open-Pit Mine' (*New Age*, 24 August 2015)

'Stakeholder Engagement: UN Guiding Principles Reporting Framework' <www.ungpreporting.org/reporting-framework/management-of-salient-human-rights-issues/stakeholder-engagement/> accessed 5 June 2020

'State of the World's Children 2003 - Child Participation' (UNICEF 2003)

'State of the World's Indigenous Peoples: Rights to Lands, Territories and Resources.' (United Nations Department of Economic and Social Affairs 2021) ST/ESA/375

Stavenhagen R, 'Human Rights and Indigenous Issues Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen Addendum' (Economic and Social Council 2005) E/CN.4/2005/88/Add.1

——, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (Human Rights Council, UN General Assembly 2007) A/HRC/4/32/Add.3

——, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen' (UN General Assembly 2007) A/HRC/4/32/Add.1

Steiner, Henry, Alston, Philip, and Goodman, Ryan, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford University Press 2007)

Stephan Manning, 'The Fashion Trap: Why Fairtrade Works in Coffee but Not in Clothing' (*Organizations and Social Change*, 2 May 2013) <<https://organizationsandsocialchange.wordpress.com/2013/05/02/the-fashion-trap-why-fairtrade-works-in-coffee-but-not-in-clothing/>> accessed 15 August 2021

Street J, "'Fight the Power": The Politics of Music and the Music of Politics*' (2003) 38 *Government and Opposition* 113

Subedi SP, 'Introductory Note: Declaration on the Right to Development' [2021] *Audiovisual Library of International Law* 9

'Support Our Demands – SIPLF' <<http://siplf.org/support-our-demands/>> accessed 2 February 2019

Sutter C and others, 'Does the Current Clean Development Mechanism (CDM) Deliver Its Sustainable Development Claim? An Analysis of Officially Registered CDM Projects' (Springer Science and Business Media 2006)

Talbot A and Carter TF, 'Human Rights Abuses at the Rio 2016 Olympics: Activism and the Media' (2018) 37 *Leisure Studies* 77

Taru F, 'Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments' (2016) 46 *Journal of Law, Policy and Globalization* 9

Tasioulas PJ, 'Minimum Core Obligations: Human Rights in the Here and Now' (The World Bank 2017)

Taylor C, 'Conditions of an Unforced Consensus on Human Rights' in Daniel Bell and Joanne R Bauer, *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) <www.iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf>

'Teach SDGs Free Assets' (*TEACH SDGs*) <www.teachsdgs.org/assets.html> accessed 27 December 2018

'Teach SDGs Resources' (*TEACH SDGs*) <www.teachsdgs.org/resources.html> accessed 27 December 2018

The Center for Media and Democracy, 'Barapukuria Coal Mine - SourceWatch'

——, 'Phulbari Coal Project - SourceWatch' (*The Center for Media and Democracy*)

'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (Office of the High Commissioner for Human Rights 2012)

The Danish Institute for Human Rights, 'Goal 4. Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All' (The Danish Institute of Human Rights)

——, 'The Human Rights Guide to the Sustainable Development Goals' <<http://sdg.humanrights.dk/>> accessed 1 October 2018

The Danish Institute of Human Rights, 'Goal 9. Build Resilient Infrastructure, Promote Inclusive and Sustainable Industrialization, and Foster Innovation' (The Danish Institute of Human Rights) <www.humanrights.dk/sites/humanrights.dk/files/media/migrated/sdg-goal-9.pdf> accessed 9 June 2020

‘The Deadly Side of the Rio 2016 Olympics’
<www.amnesty.org/en/latest/campaigns/2016/06/deadly-side-rio-olympics-2016/> accessed 21 January 2019

‘The Equator Principles – Environmental and Social Risk Management for Projects’
<<https://equator-principles.com/>> accessed 18 October 2020

‘The Geneva Pledge’ (OHCHR/Climate Justice 2015)

‘The Human Rights Guide to the SDGs’ (*The Danish Institute for Human Rights*)
<www.humanrights.dk/human-rights-guide-sdgs> accessed 9 June 2020

The International Federation of Red Cross and Red Crescent Societies, ‘Housing, Land and Property Law in Bangladesh’ (2017) lxdp A0138585882v8 120641715

‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1986)

‘The United Nations Human Rights Treaty System’ (OHCHR, June 2005)
‘The United Nations Millennium Declaration’ A/RES/55/2

The World Bank and the OECD, ‘Integrating Human Rights into Development’ (The World Bank and the OECD 2016)

Tilley JJ, ‘Cultural Relativism’ (2000) 22 *Human Rights Quarterly* 501
TOOMEGANE, *The Blood-Soaked Banner of Phulbari*(1/2)
<www.youtube.com/watch?time_continue=431&v=PnpEJAZiwf0> accessed 13 October 2018

Turk D, ‘The Realization of Economic Social and Cultural Rights: Final Report Submitted by Mr. Danilo Turk. Special Rapporteur’ (Economic and Social Council 1992)
E/CN.4/Sub.2/1992/16

‘Twenty Years after Peace Accord, Indigenous Bangladeshis Still Attacked over Land’ *Reuters* (18 September 2017) <www.reuters.com/article/us-bangladesh-landrights-idUSKCN1BT1K0> accessed 2 February 2019

‘UK NCP Complaint Handling Process’ (*GOV.UK*) <www.gov.uk/guidance/uk-ncp-complaint-handling-process> accessed 22 August 2021

‘U.K. Supreme Court Rules Zambians Harmed by Mining in Zambia May Sue in the U.K. (April 10, 2019) | ASIL’ <ILIB/uk-supreme-court-rules-zambians-harmed-mining-zambia-may-sue-uk-april-10-2019> accessed 22 June 2021

‘UN Human Rights “Issues Paper” on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies’ (Office of the High Commissioner for Human Rights 2020)

UN News, ‘Open-Pit Coal Mine Project in Bangladesh Threatens Human Rights – UN Experts’ (*UN News*, 28 February 2012) <<https://news.un.org/en/story/2012/02/404922-open-pit-coal-mine-project-bangladesh-threatens-human-rights-un-experts>> accessed 27 October 2018

UN Secretariat, ‘Note by the Secretariat Replies to the Questionnaire on National Protection Systems’ (Economic and Social Council 2004) E/CN.4/2005/126

UNDG, ‘UN (Sustainable) Development Group Human Rights Case Studies’ (UN Development Operations Coordination Office 2013)

UNESCO, ‘Progress on Education for Sustainable Development and Global Citizenship Education: Findings of the 6th Consultation on the Implementation of the 1974 Recommendation’ (UNESCO)

UNFCCC, ‘Paris Agreement’ (United Nations 2015)

United Nations, ‘An Implementation Guide to the Clean Development Mechanism’ (UN Conference on Trade and Development 2003)

— (ed), *Economic, Social, and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations 2005)

—, ‘Report of the United Nations High Commissioner for Human Rights’ (Economic and Social Council 2007) E/2007/82 <www.un-ilibrary.org/content/books/9789210573863> accessed 9 August 2021

— (ed), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013)

—, ‘Report of the United Nations High Commissioner for Human Rights’ (UN 2014) E/2014/86 <www.un-ilibrary.org/content/books/9789210573863> accessed 6 August 2021

—, ‘The 2030 Agenda for Sustainable Development’ (United Nations) A/RES/70/1 ‘United Nations - About Economic and Social Development’ <www.un.org/esa/about_esa.html> accessed 18 April 2020

‘United Nations Declaration on the Rights of Indigenous Peoples’ <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

‘—’ <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 7 June 2020

United Nations Department of Economic and Social Affairs, ‘Sustainable Development Goals: Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/?menu=1300>> accessed 7 June 2020

United Nations Development Programme, ‘Integrating Human Rights with Sustainable Human Development’ (1998)

——, ‘Human Development Report 2020: The Next Frontier - Human Development and the Anthropocene’ (United Nations 2020) <www.un-ilibrary.org/content/books/9789210055161> accessed 22 August 2021

United Nations Educational, Scientific and Cultural Organization, ‘Cultural Diversity’ <www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/cultural-diversity/> accessed 30 July 2018

United Nations Evaluation Group, ‘UNEG Principles for Stakeholder Engagement’ (2017) <www.unevaluation.org/document/download/2790>

United Nations Human Rights Office of the High Commissioner, ‘The Right To Development at a Glance’ (United Nations 2010)

——, ‘The Corporate Responsibility to Respect Human Rights: An Interpretive Guide’ (2012)

——, ‘Status of Ratification - Interactive Dashboard’ <<https://indicators.ohchr.org/>>

——, ‘UN Treaty Body Database: Kenya’ <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN> accessed 5 June 2021

United Nations Human Rights Office of the High Commissioner, United Nations Human Settlement Programme, and World Health Organization, ‘The Right to Water: Fact Sheet No. 35’ (2003)

‘United Nations Millennium Development Goals’ <www.un.org/millenniumgoals/> accessed 9 June 2020

United Nations, OECD, World Bank, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (United Nations 2003)

‘United Nations Treaty Collection - ICCPR’

‘United Nations Treaty Collection - ICESCR’

‘UPR-SDG Recommendations Explorer’ (*UPR-SDG Data Explorer*) <<http://upr.humanrights.dk/sdg-upr-recommendations-explorer>> accessed 1 October 2018

‘US Supreme Court Rules That Foreign Corporations Cannot Be Sued for Human Rights Abuses under the Alien Tort Statute’ (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/latest-news/us-supreme-court-rules-that-foreign-corporations-cannot-be-sued-for-human-rights-abuses-under-the-alien-tort-statute/> accessed 22 June 2021

Uvin P, *Human Rights and Development* (Lynne Reinner Publishers 2004) <<https://ebookcentral-proquest-com.proxy.library.nyu.edu/lib/nyulibrary-ebooks/detail.action?docID=3328882>>

——, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ (2007) 17 *Development in Practice* 597

‘Validation Report: Lake Turkana Wind Power Limited’ (SGS Climate Change Programme 2011) Issue 5.2

Van Der Heijden B and Tahzib B, *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (Martinus Nijhoff Publishers 1998)

‘VIDEOS – Lake Turkana Wind Power’ <<https://ltwp.co.ke/videos/>> accessed 19 May 2019

Vincent RJ, *Human Rights and International Relations* (Cambridge University Press 1986)

‘Violence Has No Place in These Games! Risk of Human Rights Violations at the Rio 2016 Olympic Games’ (*Amnesty International USA*) <www.amnestyusa.org/reports/violence-has-no-place-in-these-games-risk-of-human-rights-violations-at-the-rio-2016-olympic-games/> accessed 21 January 2019

Walzer M, ‘Thick and Thin: Moral Argument at Home and Abroad’ (1995) 74 *Foreign Affairs* 166

Ward T, ‘The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law’ (2011) 10 *Northwestern Journal of International Human Rights* 32

Watts J, ‘Rio Olympics Linked to Widespread Human Rights Violations, Report Reveals’ *The Guardian* (8 December 2015) <<https://www.theguardian.com/world/2015/dec/08/rio-olympics-2016-human-rights-violations-report>>

Way S-A, ‘The “Myth” and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to Be Incorporated in an International Bill of Rights”’ (2014) 36 *Human Rights Quarterly* 869

Weiss DC, ‘In Closing Brief, Disbarred Environmental Lawyer Claims His Prosecution Is “Run by an Oil Company”’ (*ABA Journal*, 11 June 2021) <www.abajournal.com/news/article/in-closing-brief-disbarred-environmental-lawyer-claims-his-prosecution-is-run-by-an-oil-company> accessed 22 June 2021

Weyler R, ‘Steven Donziger: The Man Who Stood up to an Oil Giant, and Paid the Price’ (*Greenpeace International*, 26 February 2020) <www.greenpeace.org/international/story/28741/steven-donziger-chevron-oil-amazon-contamination-injustice> accessed 22 June 2021

‘What We Do’ (NCBD - National Committee of Bangladesh) <http://ncbd.org/?page_id=67> accessed 22 November 2018

‘When Clean Energy Gets Dirty: Experiences from Kenya’ (Heinrich Böll Stiftung East & Horn of Africa) <<https://ke.boell.org/2017/06/19/when-clean-energy-gets-dirty-experiences-kenya>> accessed 18 May 2019

‘Who We Are’ (NCBD - National Committee of Bangladesh) <http://ncbd.org/?page_id=65> accessed 22 November 2018

‘Wind at Work | Yansa’ <<https://yansa.org/wind/>> accessed 10 May 2019

Winkler IT, ‘Respect, Protect, Fulfill: The Implementation of the Human Right to Water in South Africa’ in Philippe Cullet and others (eds), *Water Governance in Motion* (Foundation Books 2010)

Winkler IT and Williams C, ‘The Sustainable Development Goals and Human Rights: A Critical Early Review’ (2017) 21 *The International Journal of Human Rights* 1023

Witte Jr. J and Nichols JA, *Religion and the American Constitutional Experiment: Third Edition* (Westview Press 2010)

Woodrooffe S, ‘Canada Is Being Sued By Indigenous People For 150 Years of Back Rent’ (*Vice*, 2 November 2017) <www.vice.com/en_ca/article/wjgg3x/canada-is-being-sued-by-indigenous-people-for-150-years-of-back-rent> accessed 9 February 2020

‘Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (United Nations General Assembly 2018) A/73/163

Working Group on the Universal Periodic Review, ‘Bangladesh: Universal Periodic Review’ (Office of the High Commissioner for Human Rights 2013) A/HRC/WG.6/16/BGD/2

——, ‘Brazil: Universal Periodic Review’ (Office of the United Nations High Commissioner for Human Rights 2017) A/HRC/WG.6/27/BRA/2

World Cup and Olympics Popular Committee and of Rio de Janeiro, ‘Rio 2016 Olympics: The Exclusion Games’ (2015)

‘World Report 2020: Rights Trends in Canada’ (*Human Rights Watch*, 13 December 2019) <www.hrw.org/world-report/2020/country-chapters/canada> accessed 12 June 2021

‘World Report 2020: Rights Trends in Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties’ (*Human Rights Watch*, 8 January 2020) <www.hrw.org/world-report/2020/country-chapters/global-2>

Xinhua, ‘Beijing Declaration’ (South-South Human Rights Forum, December 2017)

Yes to Life no to Mining, 'Bangladesh Government Says NO to Phulbari Coal Mine' (*Yes to Life no to Mining*, 26 August 2015)

Young IM, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250

——, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23 *Social Philosophy Foundation*

Young KG, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale International Law Journal* 64

Zamfir I, 'The Universal Declaration of Human Rights and Its Relevance for the European Union' (European Parliamentary Research Service 2018) PE 628.295

Zechenter EM, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1997) 53 *Journal of Anthropological Research*

Ziegler J, 'The Right to Food Report of the Special Rapporteur, Jean Ziegler Addendum Mission to Bangladesh*' (United Nations Committee on Economic, Social and Cultural Rights 2003) E/CN.4/2004/10/Add.1

Zussman R, 'B.C. Becomes First Province to Implement UN Indigenous Rights Declaration' (*Global News*, 24 October 2019) <<https://globalnews.ca/news/6077339/b-c-becomes-first-province-to-implement-un-indigenous-rights-declaration/>> accessed 15 April 2020

'Rights Up #RightNow - Female Genital Mutilation as a Question of Gender Equality, Soundcloud Podcast'

'RightsUp #Rightnow - Human Rights and the UN Sustainable Development Goals' *Bangladesh and another v Hasina and another*, 2008, 37 *CLC (AD)*

BNWLA v Government of Bangladesh and others, 2001, 40 *CLC (HCD)*

Hussain Muhammad Ershad v Bangladesh and others II ADC (2005) 271 16 August 2000

Jesner v Arab Bank, PLC [2018] SCUS 16-499

Kiobel v Shell [2019] Court of The Hague C/09/540872 / HA ZA 17-1048

Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others (Environment and Land Court at Meru (CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO 1330 OF 2014))

Nevsun Resources Ltd v Araya [2020] SCC 5 37919

Tayazuddin and another v Bangladesh, Criminal appeal, 21 BLD (HCD) 2001

United States Of America V Steven Donziger [2021] United States District Court Sdny No. 19-Cr-561 (LAP)

Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20

African Charter on Human and People's Rights (Banjul Charter), Organization of African Unity (OAU), (adopted 27 June 1981, entered into Force 21 October 1986)

An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples [C-15 (43-2)]

Arab Charter on Human Rights (adopted 15 September 1994) (ACHR)

Constitution of Kenya 2010

Constitution of the People's Republic of Bangladesh 1972

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 entry in to force 3 September 1981) UNGA Res 34/180 (CEDAW)

Convention on the Rights of the Child (adopted 20 November 1989 entry in to force 2 September 1990) UNGA Res 44/25 (CRC)

Declaration on the Right to Development (4 December 1986) A/RES/41/128 (DRTD)

General Comment No. 23: The rights of minorities (Art. 27) 08/04/94. ICCPR/C/21/Rev.1/Add.5

General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 08/10/17 E/C.12/GC/24

Honorable Law Minister of Bangladesh, Opening Statement During the Initial Report of Bangladesh on ICCPR 2017

Indigenous and Tribal Peoples Convention, 1989 (No. 169) Adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session (entered into force 5 September 1991)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

The Constitution of Kenya, Defunct 1963

The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2013 [No. 56 of 2012]

United Nations Declaration on the Rights of Indigenous Peoples UNGA (13 September 2007) (UNDRIP/DOTROIP)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

Universal Declaration on Cultural Diversity UNESCO (2 November 2001) (UDCD)

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980

Agreement Establishing the Inter-Governmental Authority on Development 1996

Canadian Charter of Rights and Freedoms 1982

Canadian Environmental Assessment Act 2009-2012

Canadian Human Rights Act 1985

Charter of the United Nations and Statute of the International Court of Justice 1945

Chittagong Hill Tracts Peace Accord 1997

Climate Change Act 2016

Consolidation of The Constitution Acts 1867-1982

Dokis First Nation Land Management Code 2014

Dominion Water Power Regulations 1603

Environmental Land and Court Act 2015

Federal Sustainable Development Act 2008

First Nations Land Management Act 1999

Fisheries Act 1985

Framework Agreement on First Nation Land Management 1996

ILO C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)

Indian Act 1985

Industrial Property Act 2016

Land Act 2018

Land Adjudication Act 2016

Land Consolidation Act 2012

Land Control Act 2017 (Chapter 302)

Land Reforms Ordinance 1984 (Ordinance No. X of 1984)

Land Registration Act 2016

Local Authorities Recovery of Possesions of Property Act 2012

Ontario Human Rights Code 1990 (Chapter H 19)

Protection of Traditional Knowledge and Cultural Expressions Act 2016

Public Private Partnerships Act 2015

Registration Act 1908 (Act No. XVI of 1908)

Robinson Huron Treaty 1850

The James Bay Treaty (Treaty No 9) 1905-1906 1929-1930

The Marsabit County Energy Development Act 2016

The Marsabit County Trade Licensing Act 2017

The Marsabit County Vocational Training Act 2017

The Protection of Traditional Knowledge and Cultural Expressions Act 2016

Transfer of Property Act 1882 (Act No. IV of 1882)

Trust Land Act 2009

Trusts of Land Act 2012

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Wildlife Conservation and Management Act 2017