Natural Resource Governance, Inequality and Human Rights

FALL 2016 COLLOQUIUM

SEMINAR MINI CONFERENCE

Monday, November 28 · 3:45-6:45pm
Goolsby Conference Suite (JON 5.206), Texas Law

The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice

More information available at
rapoportcenter.org

Natural Resource Governance, Inequality and Human Rights
Mini-Conference
Monday November 28, 2016

Panel 1: Protecting Indigenous Rights in Resource Extraction

Chair/Discussant: Ariel Dulitzky

Anne Egerstrom, "International Law and the Construction of Indigenous Identity"

Why has there been a sudden upsurge in the politicization of indigenous identities in Latin America? Drawing upon constructivist assumptions of ethnic identity, we find that ILO 169 and the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples have prompted a re-construction of indigenous identity. Ethnic identity in communities that are vulnerable to the deleterious effects of natural resource extraction have adjusted both their identity and their strategy to maintain tenure over traditional lands in response to the allocation of political participation awarded by international bodies of indigenous rights. This phenomenon especially obvious in Perú, where historically, natural resource extraction has been constant and identification with indigenous has been low. However, recently, specific communities have drawn upon ILO 169 to challenge mineral extraction on or near their territory, thus changing — even if momentarily — their ethnic identification, and altering the strategy by which these marginalized communities approach collective action.

Holly Heinrich, "Can FPIC Protect Indigenous Rights as Myanmar's Vast Hydropower Potential is Developed?"

Myanmar has recently transitioned to a fragile state of democracy after nearly 50 years of oppressive military rule. In response, many countries have lifted sanctions. However, as foreign capital flows into the country, human rights abuses by the military continue and have even increased, particularly in regards to resource development projects in regions that are home to Myanmar's minority ethnic nationality peoples. The minority ethnic nationalities have historically experienced some of the worst abuse by the Burmese military, and generally remain poorer and less politically influential than the ethnic Burman majority.

I argue that free, prior, and informed consent (FPIC), as articulated in ILO 169 and the United Nations Declaration on the Rights of Indigenous People (UNDRIP), has the potential to better protect the human rights of minority ethnic nationalities as Myanmar develops its vast hydropower potential. Currently, minority ethnic nationalities have little to no say in resource development decisions. FPIC has the potential to remedy, at least to some degree, their unequal position. However, without significant rule-of-law reforms, particularly in Myanmar's judicial system and military, FPIC is unlikely to have much value as a protection for human rights.

I use the planned Myitsone Dam as a case study. The dam would be the first of seven dams planned for the Irrawaddy River and would displace thousands of minority ethnic nationality people. The government is expected to lift the construction moratorium currently in place for dam, and what happens next is likely to influence future hydropower development in Myanmar.

Daniel Jimenez, "Environmental Justice in Exploited Communities: Restoring Human Rights to Abra Pampa"

In Argentina, social marginalization and inequality characterize both the development of an ongoing public health crisis in Abra Pampa, a small city in the northwest province of Jujuy, and the subsequent response of the government. Following the closure of Metal Huasi, a metal smelting plant operating in Abra Pampa until the early 1990s, thousands of tons of lead and heavy metal waste were left in the city, contaminating the environment and residents, the majority of whom identify as indigenous Kolla. A forestalled response from the municipal, provincial, and federal government, as well as weak and ineffective institutions, further exacerbated the problem. On May 6, 2016, the Ministry of Health of Jujuy issued a public health resolution, *de jure* establishing a plan for environmental remediation and treatment of residents. But the resolution fails to incorporate a human rights framework or reference international standards on the right to health and healthy environment. This absence of a human rights perspective comprises the focus of this paper – the current legal/institutional framework intended to redress the health crisis in Abra Pampafails to take into account the rights of vulnerable groups.[1]

This paper will discuss the creation of harms and failed government response in Abra Pampa, concludingwith an examination of existing sites of decision-making, and recommendations for an improved legal/institutional framework. The paper draws upon legal and academic scholarship, supplemented by information collected during an advocacy trip to Abra Pampa, San Salvador de Jujuy, and Buenos Aires in November 2016.

Apostolos Kyprios, "Rebalancing Indigenous Rights with Domestic Laws"

I am proposing an alternative governance regime in the form of new domestic laws in host nations. The statutes will attempt to effectively address the inequalities between host nations and corporations that ultimately harm indigenous communities. Three specific issues my paper will address include:

1. Indigenous communities lack a clear procedural framework for claiming legal rights in lands that overlap with the otherwise controlling title rights of resource extraction corporations.
2. Indigenous communities are not considered parties to the resource extraction contracts and thus may suffer wrongs without remedies.
3. The unequal bargaining powers between host states and corporations.

I will explore current legal regimes and explain why they have been inadequate in remedying these issues. My proposals draw on various sources of statutory and common law, doctrines of contract law, and emerging international law literature.

My proposals include three key provisions either in a single domestic host state law or three separate statutes:

1. A procedural framework for judicial examination and the recognition of indigenous communities claims to lands that corporations may otherwise hold title to.
2. The recognition that if indigenous persons establish legitimate claims to the lands, then they are considered third parties to the original resource extraction contracts.
3. For future resource extraction, a licensing scheme that is transparent, has set tax rates, takes into account the indigenous communities claims to lands,

[1] Here, vulnerable is taken to mean indigenous peoples, women, and children

provides the host state the power to revoke a license on pre-specified grounds, and provides for dispute resolution with a dispersed judicial review system.

Panel 2: New Human Rights Challenges and Questions in Resource Extraction
Chair/Discussant: Julia Dehm

Karina Carpintero, [TBD]
As colonized countries gained independence, the phenomenon called "development" became a sort of business: a specialized arena dominated by powerful countries and private investors dealing with their host states forgetting, in the decision-making process, of the affected people. This business, consequence of neoliberal multiculturalism, irradiated natural resources governance and challenged human rights standards and advocates to address new advocacy strategies.
My main focus for this paper is that when it turns into natural resources governance, human rights framework and advocacy should be rethink from a different angle at the global and local level. This paper aims to explore a human rights-based approach to global governance of natural resources by discussing the following questions: 1) "who gets a sit at the table?" and 2) "what can human rights lawyer do?".
First, I will argue that given the context and characteristics of the power relations and how extractivism take place in the Global South affecting "invisible others", decision making process is key to counter its impact. I will explore that process at international level (creation of frameworks and international cooperation between states and international organizations) and local level (implementation of projects, management and procedural justice).
Secondly, I will argue that natural resources governance presents new actors, corporations and international institutions (as WB, IBD, IMF, PNUD).), that international human rights advocacy strategies must address. I will discuss that human rights lawyers should strengthen their advocacy strategy towards international institutions and arguments against human rights obligations for corporations will be compared and contrasted to arguments in favor of such an extension.

Florian Lehne, "A little BIT of Equality in Transnational Resource Exploitation: Permeability for Human Rights and the Environment in International Investment Law?"
The conventional purpose of International Investment Agreements (IIA) in the form of Bilateral or Multilateral Investment Treaties (BIT and MIT) is to grant foreign investors compensation in the case of expropriation through the host state. By additionally establishing arbitral Investor State Dispute Settlement (ISDS) IIA are said to prevent a possible discrimination of investors before domestic courts. This assumption becomes one-dimensional when investors challenge state measures that allegedly protect or improve the human rights situation and the environmental protection in the host country. To shed more light on this friction this paper shall look at already rendered awards and ongoing disputes in the context of large-scale mining such as the case of the Canadian gold mining company Gabriel Resources vs. Romania before the International Center for Settlement of Investor Disputes (ICSID). In a first step, the paper will analyze why there has been only little susceptibility to environmental and human rights arguments in ISDS. Secondly, it will discuss present approaches that aim to guarantee better balancing of investor interests with human rights and environmental aspects of public interest. Thereby different legal concepts

will be analyzed in their potential to tackle the existing impermeability of investment law. Materially, the increasing reference to HR and the Environment in IAA can be a first step. However, also procedural reforms such as binding precedents or the exhaustion of legal remedies have to be envisioned. Ultimately, the establishment of permanent transnational investment court(s) could significantly induce public interest reasoning in transnational resource governance.

Maria Victoria Ricciardi, "Mining and Socio-Environmental Conflicts in Argentina"

In the last decade large mining projects grew exponentially in Argentina. As the mining projects expanded so did socioenvironmental conflicts. Environmental conflicts multiply a long the Andean Cordillera Area of the country. However, commnity-based resistance to mining projects in different provinces had different outcomes, in spite of the fact that thay used similar strategies. While in some cases a total ban to "open- pit mining" was achieved in other cases there was no substantial alteration to existing projects.

In the first place, this article, will articulate that while important community-based resistance by itself is not enough to influence political decisions regarding mining investments. In the second place, the article will look to identify some other factors thart are relevant and might explain the different outcomes in different parts of the country. It will start by describing how the existing conflict between the local and the federal government over their regulatory power over environmental issues opens up the space for the existance of diverse regimes in different provinces. Then, it will analyse the cases of two provinces –a successful case and one of failure- the case of the province of Mendoza and San Juan. By analysing these two cases, I will argue that the provincial political regime and the structure of the local economy play a fundamental role in determining the different outcomes.

Finally, I will conclude that inequality (since more closed policital systems and less diversified economies will explain the nule impact of resistance) is an important factor to explain the odds of success of environmental community-based movements. Moreover, and due to the relevance of these factor there might be a need for strong federal regulation.

Scott Squires, "Adverse Attention: The Benefits and Consequences of Greater International Attention for Environmental Defenders"

As states in the Global South become more reliant on natural resource extraction as a paradigm for economic development, extractive projects continue to encroach on the lands of indigenous and local people who don't necessarily reap the benefits of that development. When advocates exercise their right to speak out against such state-sponsored projects, they may encounter threats of physical violence, intimidation, extortion, or even death by state security actors, paramilitary forces, or hired goons.

But what are the long-term consequences of highlighting these environmental human rights defenders in the international community? To what extent does greater international attention protect or endanger the lives and efforts of these advocates, and how does the class status of these activists affect their level of danger?

In this paper, I contend that highlighting prominent environmental defenders simultaneously discourages extractive projects and enables short-run perverse consequences that further endanger precisely the environmental advocates the international community is attempting to protect. Furthermore, I suggest that class

plays a role in this dynamic, as class status dictates who is selected for international attention, who is targeted, and who is protected from harm.
This paper will use a diachronic analysis of two prominent environmental human rights defenders killed in 2015, as well as other incidents from history. The analysis will critique the aftermath of those killings in order to illustrate the short and long-term affects of greater international attention. This paper will also utilize recent data on the killings of environmental defenders to illustrate trends in assassinations and analyze how in-country economic inequality may play a role in the dangers posed to these advocates.

Panel 3: Governing Natural Resources in Diverse National/Sub-National Contexts

Chair/Discussant: Daniel Brinks

Greer Gregory, [TBD]

As Texas' population continues to grow exponentially and as climate change exacerbates current drought conditions, it has become increasingly clear that the State of Texas does not have enough water to sustain its current usage for even the next fifty years. The Texas Legislature has ostensibly addressed conservation by adopting a state water plan, yet it has failed to adequately fund it. Coherent solutions to water allocation and conservation are complicated by diverse stakeholder perspectives, varied geographical landscapes, and many layers of legal regimes. Texas courts continue to uphold the arbitrary legal differentiation between groundwater and surface water. While surface water is held in the public trust and therefore treated like a common good, groundwater is treated quite differently. Overlapping authority in groundwater allocation creates an inherent tension between individual property rights and state regulatory authority. When individual property rights in groundwater are prioritized it incentivizes the commodification of water.
I apply a human rights perspective to existing Texas water law to illuminate both procedural and substantive inequalities in current water allocation. In contrast, I apply an economic perspective demonstrating how it is unsustainable. When human rights law is used as normative framework to evaluate cohesive goals for future water law legislation in Texas it provides prioritization for more equitable water allocation while also serving the pursuit of conservation measures.

Juliann Krolick, [TBD]

The resource curse is a phenomenon where countries rich in natural resources grow more slowly than countries without natural resource wealth. As natural resource production continues, it is imperative that the countries gain a better understanding of the multi-faceted causes of resource curses in order to avoid them. Many have pointed to institutional failures as the cause of the resource curse and advocated for increased government accountability and transparency as the solution. However, this paper instead looks to other factors that prevent countries from translating natural resource wealth into increased well-being for their citizens. Specifically, (1) tax regimes have a significant influence on natural resource wealth translation and, (2) by limiting a country's ability to determine the most effective method of capturing rents from natural resource production, preferential trade agreements and international trade negotiation exacerbate the resource curse.

Ben Manne, [TBD]
What can Tanzania do to better manage its natural resource wealth? The discovery of 50.5 trillion cubic feet of natural gas off the coast of Tanzania has positioned the country as one of the world's largest future producers. Its close proximity to developing Asian countries means that Tanzania is poised to use natural gas to fuel Asia's industrial boom. But whether Tanzania itself can achieve sustainable economic growth depends on how it manages distributive challenges that, if left unchecked, will lead to increased inequality and human rights abuses.[2] A 10-year study – conducted before the discovery of offshore natural gas – found that Tanzania lost $248 million on average annually because it lacked the capacity to manage resource revenues.[3] This paper will focus on domestic policies that will minimize the growing gap between Tanzania's rich and poor populations (vertical inequality) with the aim of securing value for current and future generations of Tanzanians. It offers a number of guidelines to accomplish this. Namely, that Tanzania should prevent its economy from depending solely on natural gas revenues; it should strengthen legal and institutional mechanisms to manage revenues; and it should adopt policies that boost productivity in manufacturing, agriculture, and other non-extractive industries.

Guilherme Vasconcelos, "The advantages of small institutional re-designs in the decision-making process of allocation of revenues of Ghana's oil resources"
The effectiveness of Economic and Social Rights (ESR) is directly linked to economic aspects of public policy choices. Every ESR granted by the States requires an efficient allocation of resources by decision-makers so that such rights can be fully enjoyed by the people. Therefore, the object of this paper is the institutional relations of official agents, private agents and the civil society organizations (CSOs) in both transnational–national and national–local levels when it comes to the expenditure of financial resources of oil reserves in Ghana.
This paper will use the theoretical framework of the institutional theory to combine two dimensions of analysis: the institutional capacities of agencies and the dynamic effects created by the decision-makers. Both dimensions of analysis are very relevant in order to maximize the efficacy of the enforcement of well-known democratic values, such as accountability, transparency and deliberation.
The hypothesis of this paper is that small re-designs in the legal framework of the institutions that deal with the decision-making process of how the revenue will be used can generate a pervasive impact in Ghana's right of development in a sustainable long-term way, thus avoiding past mistakes from other countries regarding the problems arising with the resource curse. This is also important for decisions concerning the possibility of collateralizations, short and long term loans and the management of environmental and local impacts. Ultimately, these re-designs can affirm the will of the people of Ghana through a stable process of creating robust

[2] According to the Norwegian Agency for Development Corporation, "the Tanzanian Revenue Authority doesn't have capacity for extractive taxation generally but especially on oil and gas . . . . While revenues will come seven to ten years from now, that's not so far away and it is good to put things in place very early. If we don't build the capacity to properly tax these resources, all the revenues that should be used for pro-poor development would be a distant dream." Siri Bjerkreim Hellevik, Farouk Al-Kasim, Prosper Ngowi, Harald Stokkeland and Karen Sund, "Mapping and analysis of the needs for petroleum related education in Tanzania ," Norwegian Agency for Development Cooperation (December 2013).
[3] See http://www.g ntegrity.org/wp-content/uploads/2014/05/Hiding_In_Plain_Sight_Report-Final.pdf

institutions that could slowly combat political entrepreneurship based on informalisation and clientelism.
For instance, changes regarding the voting rules and the discretionary power of the Minister of Finance related to allocation of resources through the Annual Budget Funding Amount can increase deliberation and efficiency. Furthermore, the necessity of transparency can be fulfilled with a legal obligation of organized disclosure of data from all agencies involved with the biddings and other processes. This will enhance the ability of CSOs to process a great amount of data, specially with new improvements of information technologies that allow new perspectives of analysis such as data mining and development of datasets, which can stimulate new debates and help with accountability.