

Research Article

International Development Law: Resolving the Contentious Question of State Sovereignty and Right to and Ownership of Natural Resources

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Abstract: This work came up against the background of the contentious question and multiplicity of claims of ownership of natural resources located within a given state territory. The paper has addressed the question whether this claim legitimately inheres in the state as a sovereign or in the native inhabitants of the land area where the mineral resources are domiciled pursuant to the international right to self-determination. It is the finding that, among other things, the right to permanent sovereignty over natural resources is a legitimate one in international law. Notwithstanding, as the paper has concluded, only the legislature and the courts in any particular domestic jurisdiction can determine with finality the specific entity, institution, or unit within a state sovereign in whom this ultimate ownership resides

Keywords: Sovereignty, self-determination, natural resources, development law, indigenous people, capital accumulation, profit maximization.

Introduction

International development law is the law that holds together issues pertaining to the ownership and control of natural resources; international development policies, economic progress and technological and scientific advancement of nations; the rights to development and self-determination of peoples and nations as well as other international practices and actions that have the potentiality of improving the value, essence and quality of life of the individual, peoples and nations worldwide. It is also not in dispute that international development law is a later development in international law as a body of rules. This paper examines a notable part of this law, namely, right to and ownership of natural resources.

2. Permanent Sovereignty over Natural Resources (PSNR)

The history of permanent sovereignty over natural resources as an important component of international development law is in fact a history of struggle over the decades by the emergent nations particularly those smarting from foreign political domination for the respect of their rights over their natural endowment and to be accorded the enabling environment to exploit and utilize them for the benefit of their people, their economic advancement and their overall well being. The frontier and battle ground for this agitation has been the auspices of the United Nations. Legal writers, politicians and publicists of African extraction hold the preponderant view that there is not only good reason for this struggle but go further to locate the foundations of African current underdevelopment and backwardness on the doorsteps of their past colonial experiences. According to Rodney:

The question as to who and what is responsible for African underdevelopment can be answered at two levels. Firstly, the answer is that the operation of the imperialist system bears major responsibility for African economic retardation by draining

African wealth and by making it impossible to develop more rapidly the resources of the continent. Secondly, one has to deal with those who manipulated the system and those who are either agents or unwitting accomplices of the said system. The capitalists of Western Europe were the ones who actively extended their exploitation from inside Europe to cover the whole of Africa. In recent times, they were joined, and to some extent replaced, by the capitalists from the United States; and for many years now even the workers of those metropolitan, countries have benefitted from the exploitation and underdevelopment of Africa.¹

Ake views the European colonial adventurism in Africa in terms of the contradictions inherent in capitalism. Explaining this adventure, Ake writes that it is the unwavering motive of profit maximization that propelled the European operators of capitalism to shift away from Europe where the profit margin was getting smaller to come to Africa where there would be maximum profits and also enough space to operate. He insists that it is the motive of capital accumulation and profit maximization that propelled European capitalists to turn to foreign lands, attacked and subjected them and thereafter integrated their economies to those of Western Europe. For him, the experience of western imperialism, particularly colonization, remains, to date, the most decisive event in the history of Africa; that western imperialism in Africa took many forms at different stages, namely, the pillage of Africa's natural resources, trade, and colonization.²

¹ Walter Rodney (2009), *How Europe Underdeveloped Africa*. Abuja: Panaf Publishing Inc.. Pgs 33-34.

² Claude Ake (2002), *A Political Economy of Africa*. Ibadan; Longman Nigeria Plc. Pgs 19-20.

Even after the end of colonialism and the gaining of political independence there are still among African and developing countries heavy economic dependence on the West that manifest in various forms. Firstly, there is neo-colonialism where major economic and even to some extent political decisions in Africa are dictated by the West since most developing countries depend on them for various forms of financial, technological and economic aid. Secondly, the activities of multinational companies (MNC) with bases in the United States and Europe are ubiquitous in different sectors of the economy of developing countries since they not only possess the financial muscle to undertake capital intensive projects also possess the technological skill and know-how to execute very high technical projects in a world that is ever dependant on science and technology and in which the capacity and capability of less developed countries are yet nascent. In spite of their obvious shortcomings, Africa is bountifully endowed with natural resources such that when and if exploited and prudently utilized can guarantee the economic development and advancement of the continent and secure the well-being of its people. The agitation and struggle for permanent sovereignty over natural resources as an international legal right is for Africans and other less developed countries a deliberate and purposeful one.

Concerns for the principle of permanent sovereignty over natural resources have played out at the level of international law for more than half a century now. According to Karikpo, the term first appeared in the United Nations General Assembly Resolution 626 (vii) of 12 December 1952 which was titled “Right to Exploit Freely Natural Wealth and Resources.”³ Karikpo further states that at any rate the most explicit reference to the right to exercise sovereignty over natural resources was made in the United Nations General Assembly Resolution 1803 (xvii) of 1962 which declares that both peoples and nations have the right to exercise sovereignty over their natural resources. But according to Duruigbo, a significant omission in Resolution 1803 is that there is no clear statement as to who possesses the right of permanent sovereignty over natural resources. For him, this omission has some strategic implications, and has understandably generated quite some controversy. The first implication, according to him, is that it has led to the questioning of the legal validity of the principle of permanent sovereignty over natural resources itself; second, and most importantly that the omission affects the full and proper enjoyment of the right to permanent sovereignty over natural resources.⁴

Several interpretations have emerged regarding the scope of the concept and the bearers of the right of permanent sovereignty over natural resources. Accordingly, the right has been contended and stated differently as being vested exclusively in peoples, solely in states or nations, or jointly

in peoples and states. Jurists and publicists who hold the opinion that the right belongs to the state have reasons for such opinion. For them, the concept emanated from relations between multinational resource extraction corporations and their host states and as such the state has the natural right to legislate for the common good in the area of natural resources and so national economic activities have become the primary construction given to the principle of permanent sovereignty over natural resources. In the *East Timor Case*, Judge Skubiszewski gave a dissenting ruling in which he adverted attention to the issue of each member of the United Nations respecting every other states right to permanent sovereignty over natural resources. Again, in the *Liamco case*⁵, the sole arbitrator, Mahmassani, noted that resolutions such as Resolution 1803 if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of states over their natural resources. According to Duruigbo:

Reading this right as vested in the state could convey the impression that states hold it exclusively and that only government, as representatives of state can exercise it. It would also mean that the people would be hamstrung in challenging natural resource policies and actions of the government at the international level, even when such policies and actions work against their wishes and aspirations. An additional danger of conceiving rights of this type as exclusive to states is the risk that the benefits arising from their exercise would accrue only to the elites while perpetuating the socio-economic inequalities inside a country.⁶

A number of international instruments also vest this right on states. Article 193 of the United Nations Convention on the Law of the Sea,⁷ provides that states have the sovereign right to exploit their natural resources pursuant to their environment policies and in accordance with their duty to protect and preserve the marine environment. The convention also confers on states, various powers and rights to exploit the natural resources within its exclusive economic zone (EEZ) and its continental shelf.⁸

The second paragraph of the preamble to the United Nations framework convention on climate change recalls that states have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of area beyond the limits of national jurisdiction.⁹ Likewise, the preamble to the United Nations Convention to Combat Desertification in those countries experiencing serious drought and/or

³ M. Karikpo *Negotiating Resource Sovereignty, Fueling Conflicts: The Case of West African Gas Pipeline Project*, accessed on 5/12/2017 on <http://www.google.com.ng>

⁴ E. Duruigbo (2006) *Permanent sovereignty and Peoples Ownership of Natural Resources in International Law*. Washington: George Washington University National Law Centre.

⁵ *Libya -American Oil Company (Liamco) vs. Libya* (1977).

⁶ Duruigbo op. Cit.

⁷ United Nations Convention on the Law of the Sea, adopted 10 December 1987.

⁸ See Articles 55-57 and 76-77 of the Convention.

⁹ Adopted on 9 May, 1992.

desertification, particularly in Africa¹⁰ re-affirms the Rio Declaration on Environment and Development which states in its Principle 2 that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

However, there are quite a number of international legal instruments that categorically confer the right of permanent sovereignty over natural resources on peoples. Common Article 2 of the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights declares that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and International law. It further states that in no case may a people be deprived of its own means of subsistence.¹¹ Both Article 25 of the International Covenant on Economic, Social and Cultural Rights and Article 47 of the International Covenant on Civil and Political Rights emphasize that nothing in the covenants shall be so interpreted as to impair the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Furthermore, Article 15 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts¹² states in paragraph 4 that Agreements concluded between the predecessor state and the newly independent state to determine succession to state property otherwise than by the application of paragraphs 1-3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. Furthermore, Article 38 (2) of the convention stipulates that the Agreement among other things shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibrium of the newly independent state. Much more elaborately, the African Charter on Human and Peoples' Rights¹³ in its Article 21 provides that all peoples shall freely dispose of their wealth and natural resources. It states empirically that this right over natural resources shall be exercised in the exclusive interest of the people and that in no case shall a people be deprived of their natural resources. Just for any happenstance, Article 21 (2) provides that in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The International Labour Organization Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries provides in its Article 14 (1) that the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized and measures were to be taken in appropriate cases to

safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, particular attention being paid to the situation of nomadic peoples and sifting cultivators. Article 14 (2) mandates governments to take steps where necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. By Article 15 (4), the rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded including their rights to participate in the use, management and conservation of these resources. Article 15 (2) imposes a duty on the state where it retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, to establish or maintain procedures through which they shall consult the people with a view to ascertaining whether and to what extent their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. Aside of this, the peoples concerned shall whenever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities. Article 18 further provides that adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Similarly, the United Nations Draft Declaration on the Rights of Indigenous Peoples is unequivocal that indigenous populations are the owners of the rights to natural resources in their areas. As such indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used and to uphold their responsibilities to future generations in this regard.¹⁴ They have the right to own, develop, control and use the lands and territories including the total environment of the lands, air, waters, coastal seas, sea ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used including the right to full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of or encroachment upon these rights.¹⁵ Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without their free and informed consent. And where that is not possible, they have the right to just and fair compensation which shall take the form of lands, territories and resources equal in quality, size and legal status, unless there is an agreement for alternative measures.¹⁶ Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands,

¹⁰ Adopted on 17 June, 1994.

¹¹ Both Covenants were adopted on 16 December, 1966.

¹² Adopted on 8 April 1983.

¹³ Adopted on 27 June 1981.

¹⁴ Article 25.

¹⁵ Article 26.

¹⁶ Article 27.

territories and resources as well as to assistance for this purpose from states and through international co-operation.¹⁷ In the same vein, they have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources. In line with agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.¹⁸

The Inter-American Declaration on the Rights of Indigenous Peoples¹⁹ in its Article 18 provides among other things that indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of control, ownership, use and enjoyment of territories and property; the right to the recognition of their property and ownership rights with respect to lands territories and resources they have historically occupied including the use of those ones they have historically land access for their traditional activities and livelihood. The right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources particularly as it concerns traditional uses of their land, interests in lands and resources, such as subsistence; and the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favourable than the standard of international law.

If there are proofs in international law that the right to permanent sovereignty over natural resources belongs to states or to peoples exclusively, there is also proof in that same law that they belong to them concurrently. The Vienna Convention on Succession of States in Respect of Treaties²⁰ provides that nothing in the convention shall affect the principles of international law affirming the permanent sovereignty of every people and every state over its natural wealth and resources. Similarly, the African Charter on Human and Peoples Rights²¹ after specifying in Article 21 (1) and (2) that the right to natural resources inheres in the people goes further to stipulate in Article 21 (4) that states parties to the charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. In Article 21 (5) it provides that states parties to the charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources. The tenor of the preceding legislations are that

the right to permanent sovereignty over natural resources are conferred simultaneously on peoples and states. Modern trends in international law overwhelmingly support this proposition. It is also realistic and practicable in terms of the peculiar relationship between the individual, the state, and the international community. Although, today, due to the rapid advances recorded in the area of international human rights generally, individuals rather than states have become subjects of international law and the rights the individual and by extension group can enjoy in this regard often come up against other *jus cogens* rules of international law such as the principles of state sovereignty and territorial integrity. In fact, sovereignty is a concomitant attribute of statehood. And the incidents of sovereignty include state independence, which was stated in the *Island of Palma's Case*²² to be the capacity to exercise in relation to any portion of the globe and to the exclusion of any other state functions of a state; equality of states regarding legal rights and duties;²³ peaceful co-existence among states; and state immunity.²⁴ In further support of the preceding analysis, the Convention on the Rights and Duties of States²⁵ gave four pre-requisites of statehood to include people or human population, a government that controls the population, capacity to enter into relations with other states of the world, and most importantly, territory. According to Norman, a state is an area organized in an effective manner by an indigenous people with government in effective control of the area.²⁶ Some legal writers hold the view that it is almost impossible to conceive of a state as existing without a territorial base. According to Oppenheim, a wandering tribe even though it

²² (1928) 2 RIAA, Pgs 289 and 838; see also the *Treatment of Polish Nationals Case* (1931) PCIJ Ser. A/B no 41.

²³ The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by the United Nations General Assembly in 1970 provided among other things that each state enjoys the rights inherent in full sovereignty; has the duty to respect the personality of other states; its territorial integrity and political independence are inviolable; and has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.

²⁴ Much of the law of diplomatic immunity is contained in the Vienna Convention on Diplomatic Relations, 1961. While preparing the Drafts, the International Law Commission stated the theories on which diplomatic immunity is based to include the extra territoriality theory according to which diplomatic premises are assimilated to the territory of the sending state; the representation character theory which is based on the notion that the diplomatic missions personify the sending state; and the functional theory which considers that immunities and privileges are necessary for the mission to perform its functions effectively. See further *Mighell vs Sultan of Jahore* (1984) Q.B. 149. *U.S Diplomatic and Consular Staff in Tehran Case (U.S. vs Iran)* C.J. Rep (1980).

²⁵ Adopted by the UN on 26 December, 1933.

²⁶ J.G.P Norman (1963) *Political Geography*. New York; Mc Graw-Hill Book Coy. Inc.

¹⁷ Article 28.

¹⁸ Article 30.

¹⁹ Approved by the Inter-American Commission on Human Rights on 26 February, 1997.

²⁰ Adopted 23 August 1978.

²¹ See Article 13.

has a government and is organized is not a state until it has settled down on a territory of its own.²⁷ The Permanent Court of Arbitration observed in the *North Atlantic Fisheries Case* that one of the essential elements of sovereignty is that it is to be exercised within territorial limits and that failing proof to the contrary, the territory of a state is co-terminus with its sovereignty.²⁸

With the overwhelming powers and obligations conferred and imposed on the state by international law, it is difficult if not impracticable for the people as distinct from the state to fully enjoy the right of permanent sovereignty over natural resources without recourse to the state. This reality has inexorably led to the debate as to who and what peoples mean in the context of international law. According to Kiwanuka, people or peoples can be permissively used to encompass all persons within a dependant of independent territory, people used synonymously with state, and all persons within a state.²⁹ This view draws the support of other eminent and distinguished legal scholars.³⁰ From the foregoing analysis, it is not possible to wish away the state as regards the issue of permanent sovereignty over natural resources. The state is indispensable in the management of external relations without which meaningful disposition of the natural resources at the international market is impossible. Suitable and adequate financial capacity as well as technical and professional expertise needed for the exploitation of the resources can, in most if not all cases, only be assembled by the state or through the instrumentality of the apparatus of state. Furthermore, responsibility for the management of the crises that would naturally arise from the exploitation and disposal of the resources falls squarely on the state that maintains peace and order within its territory, in addition to reduction of economic inequalities among the social classes within the system. As Duruigbo has acknowledged, the right to sovereignty over natural resources resides in the people with a correlative duty on states to manage these resources for the benefit of the people. Duruigbo's view finds support in the release in 2003 by the United Kingdom of its position in the matter titled "Principles and Agreed Actions on the Extractive Industries Transparency Initiative" which affirmed that:

Management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development. Accordingly, not only should governments proactively use resources for the benefit of people, they are also prevented under international law from exercising permanent sovereignty in a way

that would cause substantial harm to their peoples.³¹

It can be inferred from the foregoing discourse that whereas the existence of the right to permanent sovereignty over natural resources is today a settled one in international law, the person or authority in whom the right inheres may continue to generate controversy among jurists and legal scholars. And only the legislature and the courts in individual countries can resolve the issue with any finality.

3. Recommendation

It is accordingly recommended that the legislature within the domestic jurisdiction should muster the requisite political will to frame enabling legislations that would secure and guarantee effective management of natural resources in a just, fair, equitable, all inclusive and sustainable manner capable of balancing the onerous responsibilities of the state against the legitimate aspirations of the native owners for self-determination.

4. Conclusion

This work has taken a studious gaze at the controversial, and in some cases volatile, claims of ownership of natural resources within a given state territory. It has discovered that the issues surrounding the controversy can only be laid to rest when the legislature and the judiciary within a specific state domain works proactively within their spheres of authority to frame and interpret legislations that would result in the efficient, fair, just and sustainable management and control of those natural resources. Only then would the state make any meaningful and enduring progress in its economic, political, and social development.

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²⁸ *Great Britain vs. United States* (1910) ICJ Reports p. 209.

²⁹ R.N. Kiwanuka, "The Meaning of People in the African Charter on Human and Peoples Rights" (AJIL, 1988) vol. 82 pg. 80

³⁰ See for instance U.O. Umozurike (1997) *African Charter on Human and Peoples Rights*. The Hague: Kluwer Law International. Pg. 8.

³¹ See Duruigbo, op. cit at p. 22; See also the *Social and Economic Rights Action Centre (SERAC) vs. Nigeria* of 2001 where the African Commission on Human and Peoples Rights interpreted Article 21 of the African Charter to encompass a duty incumbent on governments to ensure a concrete realization of the right to natural resources.

7. Rodney, Walter (2009), *How Europe Underdeveloped Africa*. Abuja: Panaf Publishing Inc.
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