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The Impact of State Sovereignty on the Right of the Indigenous Peoples: Nigeria in Perspective

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Abstract: *While the contemporary international law has continued to redesign the contours of state sovereignty over natural resources, Nigeria's legal regime has continued to deny host communities of ownership rights, as well as, their right to participate in the use and management of mineral resources found on their land. This paper is a desk-based research, which places reliance on both primary and secondary sources of data which are subjected to contentual and contextual analysis. The paper investigates the Nigerian legal regimes on natural resources ownership and control. The paper appraises the concepts such as, natural resources, sovereignty, right to development, self-determination, indigenous peoples etc. This paper examines the contemporary trend on the issue of permanent sovereignty over natural resources. The paper reveals that the doctrine of permanent sovereignty over natural resources is a hugely consequential one in contemporary world. It is the further finding of this paper that international law and practice recognise the rights of the indigenous peoples over their natural resources, as well as, their right to development and self-determination. This paper concludes on the note that right to development would be better achieved, in an environment that protects the indigenous peoples rights to self-determination and control of their natural wealth and resources, in tune with the universal justice and standard practices. Hence, it is strongly recommended that states should reform their laws to recognise the rights of the indigenous peoples.*

Keywords: *Natural resources, sovereignty, self-determination, right to development, indigenous peoples.*

INTRODUCTION

The doctrine, which has come to be known as the doctrine of permanent sovereignty over natural resources is a powerful organising principle within world politics (Armstrong, 2014). Among others, there has been debates about actors with which sovereignty is vested. (Cotula, 2018) Inconsistent formulations, even within the same legal instrument have created interpretative challenges (Cotula, 2018). Key parts of Resolution 1803 refers to undefined "peoples and nations"[1] and international human rights instruments, vest with "peoples", the arguably related but distinct right to freely dispose of natural resources (Doule, 2015; Cotula, 2018; Duruigbo, 2006) [2].

[1] General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1. However, the fourth Preambular paragraph refers to states.
[2] See e.g. Common Article 1(2) of the International Covenant on Civil and Political Rights (New York 16 December, 1966), (hereinafter referred to as ICCPR) and the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) (hereinafter ICESCR) referring to "peoples" and

However, while human rights jurisprudence has consistently applied to peoples, including groups within states, the rights to freely dispose of natural resources[3], international treaties explicitly frame sovereignty over natural resources as being the preserve of states[4]. More generally, the "Westphalian" configuration of international law has traditionally connected sovereignty to statehood.[5] The next discussion is on the meaning of natural resources.

Natural Resources

To make a good progress in this paper, it is pertinent at this junction to know what natural resources are and what it would mean to enjoy rights over them. Hence, natural resources has been defined as any raw materials (matter or energy) which are not created by humans, but are available to sustain human activities (Armstrong, 2014) [6]. Also, natural resources are materials or substances occurring in nature which can be exploited for human gain, hence the need for sustainable use of natural resources. They are resources that exist without actions of mankind. These include Air, sunlight, water, (seas and fresh water), land, rocks, forests (vegetation) animals (including fish), fossil fuels, and minerals. They are called natural resources and they are the basis of life on earth[7]. Furthermore, natural resources are useful raw materials that we get from the earth. They occur naturally, which means that humans cannot make natural resources. Instead, we use and modify natural resources in ways that are beneficial to us. The materials used in man-made products are natural resources[8]. Definitions, as well as, types of natural resources are endless.

Origin of Sovereignty over Natural Resources

Although, we might make the mistake of assuming it to be a natural fact of a world of states, the principle of permanent sovereignty over natural resources only came to be elaborated and enshrined within the international law during the 1950s and 60s., when it was a highly controversial part of the struggle for decolonization. (Armstrong, 2014; Nico, 1997) In the post-1945, permanent sovereignty over natural resources emerged as a new principle of international law. (Nicolaas, 2020) Although its birth was far from easy, its status in international law has now been clearly affirmed by a variety of legal instruments, as well as, by the international Court of Justice in its judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo.*[9]

The principle has its root in two main concerns of the United Nations, namely, economic development of the developing countries and self-determination of colonised peoples. (Nicolaas, 2020) It also sought to provide the developing countries with a legal shield against infringements of their economic sovereignty as a result of property rights or contractual rights claimed by other states (often the former colonial powers) or foreign companies.[10]

Theoretical Justification for the Principle of Sovereignty

Article 21 of the African Charter on Human and Peoples Rights (Nairobi 27 June 1981) (hereinafter ACHPR), referring to both "peoples" (e.g. Article 21(1) and "state parties" e.g. Article 21(4). On this "peoples" versus "states" debate.

[3] E.g. *The social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 27 October 2001, Communication No 155/96, African Commission on Human and Peoples Rights, paras. 55-58; *Centre for Minority Rights Development and Minority Groups on behalf of Endrois Welfare Council v Kenya*, 25 November, 2009, communication No 276/03. *African Commission on Human and people's Rights v The Republic of Kenya*, 26 May 2017, Judgment, African Court on Human and people's Rights, paras 191-201

[4] E.g. Article 193, United Nations Convention on the Law of the Sea (Montego Bay, 10 December, 1982; Article 3, United Nations Convention on Biodiversity (Rio-de-janerio, 5 June 1992). It has been noted that General Assembly Resolutions adopted after Resolution 1803 also tend to refer to "states" or "countries" see Dam-de jong, D. (2015) International Law and Governance of Natural Resources in Conflict and Post Conflict Situations", Cambridge: Cambridge University Press.

[5] See e.g. UN General Assembly Resolution 2625 (XXY) of 24 October 1970, particularly the principle of sovereign equality of states and related provisions.

[6] for a similar definition, see Mathias, R., on Global Justice, Princeton: Princeton University Press (2012)

[7] What are Natural Resources ? See http://www.examples.yourdictionary.com

[8] Types of Natural Resources . See http://www.study.com

[9] See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) Judgment, ICJ Report 2005, p. 168*

[10] Ibid

There are some theoretical bases or justifications for the principle of sovereignty over natural resources, namely: nationalist theory and functionalist theory.

a. Nationalist theorists place emphasis on improvement and attachment as basis of national control over territory and the natural resources therein. (Miller, 2012)
   The improvement-based nationalist theory claims that a nation may have invested a good deal of care and work in a territory or its resources and as such earned rights over that or other resources found within the national territory. (Miller, 2012) [11] The attachment-based nationalist theory claims that the attachment which a nation comes to form with land or other resources justifies granting a nation (State) extensive resource rights (Miller, 2012; Cotula, 2017).
b. The functionalist theory of state sovereignty over natural resources claims that states ability to advance the important ends of justice depends upon their having right over the natural resources. Hence, the ability of the state to perform its function is hinged on the State having controlling rights over natural resources. Put differently, the rights of individuals cannot be defended without states enjoying some rights over resources. (Cara, 2012)
   According to Max Huber, in the famous *Island of Palmas Case*, "the nature of the enduring relationship between polity organised as a states and its territory, including the resources located therein, is one of exclusive jurisdiction.[12] This vision of sovereignty grants the state exclusive power over the territory both as an object and as a spatial entity. An independent polity organised as a state, hence, both 'owns' the territory *(dominium*) and 'controls' the space (*imperium*). (Dupuy and Yann, 2014) Territorial control and ownership including over resources, are thus an intimate expression of a state's independence as it is an essential attribute of sovereignty. (Barral, 2016)
   The Declaration on Permanent Sovereignty over Natural Resources in General Assembly Resolution 1803 of 1962, comprises of eight paragraphs, laying down the principles for the exercise of permanent sovereignty to both "peoples and nations". It also asserts that the right "must be exercised in the interest of their national development and the well-being of the peoples of the state concerned"[13]. The declaration is apparently people-centred, giving rise to the notion of "shared" sovereignty, the exercise of which is disaggregated into multiple decision-making sites within a single state. (Fox-Decent and Dahlman, 2015) [14] Today, the emphasis of the principle of sovereignty over natural resources has shifted from a primarily rights-based principle to duties-based and with specific content. (Cotula, 2018)

Principles of Self-Determination and Sovereignty Over Natural Resources

Self-determination denotes the legal right of people to decide their own destiny in the international order (Berman, 1992; Batistich, The Right to Self-Determination and International Law). Self- determination is a core principle of international law, arising from customary international law, but also recognised as a general principle of law, and enshrined in a number of international instruments. The principles of self-determination, as well as, sovereignty over natural resources have evolved a long parallel lines and notably through normative resolutions originating from a variety of United Nations organs, including resolutions of the General Assembly, the Economic and Social Council, the former Commission on Human Rights and the United Nations Conference on Trade and Development (UNCTAD). (Nicolaas, 2020) From the perspective of the right to development, two specific phases in their evolution are of particular relevance. Firstly, in the

[11] It is a notorious fact that China has pursued relentless policy of buying up the natural resources of many African countries many of which were previously unappropriated. It is not clear what improvement-based claims those African countries would be able to make. They have certainly sold exploration rights to Chinese companies. In global economy the extraction and refining of natural resources is frequently the preserve of the multinational corporations.
[12] See *Island of Palmas Case (Netherlands v USA) 1928) 2 RIAA 829 at 838*.
[13] The UN Declaration on Permanent Sovereignty over Natural Resources in General Assembly Resolution 1803 of 1962. It was adopted by 87 votes in favour, 2 against, with 12 abstentions
[14] Indigenous Peoples Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene, A. Deas, UN Doc. E/CN4/sub.2/2004/30, 13 July 2004. Paras 30. 39-40, 56

1950s, the debate is economic as well as political decolonisation and secondly, the controversy over developing countries economic progress (economic development of developing states) by means of the exercise of their sovereign rights over natural resources. (Nicolaas, 2020)

Furthermore, Article 1, paragraph 2 of the Charter of the United Nations, includes among the purposes of the United Nations, "to develop friendly relations among nations based on **respect for the principle of equal rights and self-determination of peoples**"[15]. In addition, Articles 55, states inter alia, "that the United Nations shall promote economic and social progress and development" as well as, respect for human rights and fundamental freedoms "with a view to the creation of conditions of stability and well-being based on **respect for the principle of equal rights and self-determination of peoples.**[16]

The plain language of the provisions of the Declaration on Permanent Sovereignty over Natural Resources clearly affirming that sovereignty must be exercised in the interest of the well-being of the people signifies that people are prioritised in state agendas. (Anghie, 2004) [17] The language affirms both a sovereign right (to ultimate authority over natural resources) and a sovereign duty (to use authority in the interest of the people). (Cotula, 2018)

As decolonisation via the exercise of peoples' right to self-determination underpinned the emergence of a more truly universal system of international law, and as the notion of sovereignty was redeployed from a colonisation tool to a means of emancipation (Cotula, 2018; Gribert, 2017; Anghie, 2004) [18], the solemn affirmation of permanent sovereignty over natural resources placed people at the centre-stage, and framed sovereignty as involving *ab-initio* both rights and duties in effect, put states at the service of their people. (Violi, 2015) Soon after the creation of the United Nations, both self-determination and resource sovereignty came to be viewed as important dimensions of the decolonisation process. They featured prominently in debates on the causes of underdevelopment and the conditions for development instruments. These principles remain relevant if one interprets them dynamically, using people-centred (anthropocentric) approach to a responsible exercise of sovereignty over natural resources.

Right to Development (Atabongawung, 2016; Alston, 1988; Rajagopal, 2013)

'Right to development' is a group right of people, as opposed to an individual right, and was reaffirmed by the 1993 Vienna Declaration and Programme of Action[19]. The concept of right to development is quite broad. The declaration which places primary responsibility on the state, also articulates a collective responsibility of all states for the creation of a favourable international conditions for the right and for the promotion of a new international order, based on interdependence and mutual interest.

In 1986, the United Nations Declaration on Right to Development (UNDRTD) was adopted[20] with 146 votes in favour, only one opposing vote and eight abstention.[21]

According to the Declaration, Right to Development focuses not only on equity and indivisibility of human rights, but also on the importance of inclusive participation in development both as a means and as a goal. This is very much in line with development, such as the 2015 sustainable development goals (SDG), still being emphasisedsss today.[22]

The Right to Development is rooted in the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the two International Human Rights Covenants.[23]

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[15] Article 1(2) of the Charter of the United Nations

[16] Article 55. *Ibid.* Note that Article 55 is the first Article in the Charter which makes explicit reference to the objective of development. However, it is not the only one.

[17] See particularly Article 1 of the Declaration of Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803, 1962

[18] On historical relationship between Sovereignty and imperialism.

[19] The 1993 Vienna Declaration and Programme of Action

[20] UN Doc. A/RES/41/128, adopted on 4 December 1986. For its text see http://www.un.ord/documents/ga/res/41/a41r128.htm

[21] The opposing vote came from the United States of America, while Denmark, Germany, Finland, Iceland, Israel, Japan, Sweden and United Kingdom abstained.

[22] The 17 Sustainable Development Goals (SDG) are part of the United Nations "2030" Agenda for Sustainable Development or "Agenda 2030"

[23] UNCHR, Development of a Human Right, available at https://www.ohchr.org/EN/issues/Development , see Article 55 UN Charter

The Declaration of the Right to development defines such right 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 realised.[24]
The declaration recalls in particular the right of peoples to exercise sovereignty over their natural wealth and resources. Hence, the sovereignty envisaged has both economic as well as political dimensions of the right to self-determination.

The Concept of Indigenous Peoples Permanent Sovereignty

There is a growing and positive trend in international law and practice to extend the concept and principle of self-determination to peoples and groups within existing state[25]. The right to internal self-determination that international law recognises to the indigenous peoples, points to a notion of "shared" sovereignty, the exercise of which is disaggregated into multiple decision making sites within a single state. (Cotula, 2018)
The General Assembly adopted the United Nations Declaration on Rights of the Indigenous Peoples in 2007, hereinafter called UNDRIP. this Declaration which contains 46 Articles, deals comprehensively with the identity, the position and the rights of indigenous peoples[26]. It addresses their right to self-determination, non-discrimination, life and integrity, cultural identity and heritage, education system and health services, as well as, the rights to their lands and resources.[27]
Article 1, UNDRIP provides that "indigenous peoples have the right to the full enjoyment as a collective or as individuals, of all human rights and fundamental freedoms as recognised by the Charter of the UN, the United Nations Declaration of Human Rights (UNDHR) 1948, and international human rights"laws.[28] While Article 2 provides that indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular, that based on their indigenous origin or identity"[29]. Article 3 provides that "indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[30]. Article 4 provides that "indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".[31] Article 5 provides that indigenous peoples shall have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they choose, in the political, economic, social and cultural life of the state.[32] Article 6 provides that "every indigenous individual has a right to a nationality"[33]. Article 10 provides that "indigenous peoples shall not be forcibly removed from their lands or territory. 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 to return".[34] Articles 11 and 12 provide for the rights to practice their cultural

[24] Article 1, Declaration f the Right to Development 1986. Right to Development includes:- full sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity, the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights
[25] Erica-Irene A. Daes (2004) Indigenous Peoples Permanent Sovereignty over Natural Resources, being Lecture delivered at the National Native Title Conference at Adelaide, Australia, Thursday 3 June, 2004. Available at http://www.aiatsis.gov.au/rsrch/ntru/conf2004/home.html. pp.1-18; Nicolaas, S. supra, n.28, pp. 98-102
[26] United Nations Declaration on the Rights of the Indigenous Peoples 2007 (UNDRIP)
[27] See generally the Preambles as well as Articles 1, 2, 3, 4, 10, 26 etc of the UNDRIP
[28] See Article 1 UNDRIP
[29] See Article 2 UNDRIP
[30] See Article 3 UNDRIP
[31] See Article 4 UNDRIP
[32] Article 5 UNDRIP
[33] Article 6 UNDRIP
[34] Article 10 UNDRIP

traditions and customs, as well as, spiritual and religious traditions, customs and ceremonies.[35] The indigenous peoples have right to participate in decision making in matters which would affect their rights through representatives chosen by themselves.[36] They also have right to be consulted by the state in order to obtain their free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them.[37] Article 26(1) provides that "indigenous peoples have the right to the land, territories and resources which they traditionally owned, occupies or otherwise used or acquired"[38]. Article 26 (2) provides that " indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or otherwise traditional occupation or use, as well as, those which they have otherwise acquired"[39]. Article 26(3) provides that "state SHALL give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[40]

Articles 45 provides that "nothing in this Declaration may be construed as diminishing or extinguishing the rights that the indigenous peoples have now or may acquire in the future"[41]

Article 46(1) provides that "nothing in this declaration may be construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign or independent states"[42]

From the foregoing, it is understood that self-determination no longer include a right to secession or full political independence[43] (excepts for a few situations or under certain exceptional conditions)[44]. Nowadays, the right to self-determination contains a range of alternatives including the right to participate in the governance of the state, as well as, the right to various forms of autonomy and self-governance.[45] Hence, the term "sovereignty" can be appropriately used in reference to indigenous peoples and their natural resources within independent state. Therefore two "sovereigns" can co-exist within one state or share in the same resources.[46]

The use of the term "sovereignty" in relation to indigenous peoples does not place them on the same level or footing as states, or place them in conflict with state sovereignty. It is recognised in international law that a "sovereign" could be under the protection of another greater sovereign without losing its "sovereignty"[47]

Global Manifestation and Recognition of the Notion of "Shared" Sovereignty.

Indigenous peoples have been recognised as being sovereign by many countries in various parts of the world. In contemporary world, it is common place to observe that no state enjoys unfettered sovereignty, and all states are united in their sovereignty by treaties and by customary international law.

- **Selected Case Laws**

National, regional and international courts have recognised the sovereign rights of the indigenous peoples over their land and natural resources. For instance, in the case of *Mayagna (sumo) Community of Awas Tingni v Nicaragua*[48], the inter-American Court of Human Rights (IACHR), found in its judgment that the

[35] Articles 11 and 12 UNDRIP
[36] Article 18 UNDRIP
[37] Articles 19 and 38 UNDRIP
[38] Article 26(1) UNDRIP
[39] Article 26(2) UNDRIP
[40] Article 26(3) UNDRIP
[41] Article 45 UNDRIP
[42] Article 46(1) UNDRIP
[43] Article 4 UNDRIP specifies that autonomy or self-determination of indigenous peoples relate to "their internal and local affairs". Article 46(1) UNDRIP supports or complements Article 4 thereof
[44] Erica-Irene, A (2004) *supra.* N.43. p.6
[45] *Ibid*
[46] *Ibid*
[47] Ibid
[48] Inter-American Court of Human Rights Court (IACHR) Judgement of 31 December, 2001.

indigenous peoples have rights to their lands, territories and resources.[49] The IACHR interprets the notion of property to include indigenous peoples communal land tenure.[50] The above position has been further confirmed and elaborate in the later decisions of the Inter-American Commission and Court, for instance, in *Moiwana Community v Suriname*[51], the court found that the state violated the American Convention on Human Rights (which is *impari-materia* with the provisions of the UN Declarations on the Rights of Indigenous Peoples). The facts of this case are , on the 29 November, 1986, members of the armed forces of Suriname attacked the N'djuka Maroon village of Moiwana. The state agents allegedly massacred over 40 men, women and children, and razed the village to the ground[52]. Furthermore, as of the date of the application, there allegedly had not been an investigation of the massacre and no one had been prosecuted or punished and the survivors remains displaced from their lands. In consequence, they have been supposedly unable to return to their traditional ways of life. The court found that the state violated the indigenous peoples rights of the Moiwana Community, contrary to the American Convention on Human Rights, as well as, other international Human Rights instruments.[53]

Also, in *Saramaka People v Suriname*[54], this case addresses indigenous peoples rights to their land and their struggle against encroachment by mining and logging companies carrying out activities on their territory on the basis of concession granted by the state without consultation with the indigenous people.[55] The court found that the state committed a violation of the American Convention on Human Rights against the people of Saramaka, a tribal community living in the Upper Suriname River region, by failing to adopt effective measures to recognise the Saramaka peoples right to the use and enjoyment of the territory they traditionally own, occupy and use.[56]

Further support for giving the term "peoples" wider meaning can be found in a decision of the African Commission on Human and Peoples Rights, in a case involving the Ogoni People of Nigeria[57], the Commission found that the term "peoples" referred to in Article 21 of the African (Banjul) Charter on Human and Peoples Rights (affirming the right of "all peoples" to "freely dispose of their wealth and natural resources") includes the indigenous people within a state and does not refer only to the whole people of the state.[58]

Also, in the later case of *The Centre for Minority Rights Development (Kenya) and the Minority Rights Group International on behalf of Endrois Welfare Council v Kenya.*[59] The African Commission on Human and Peoples Rights found a violation of the right to development, thereby recognising the African Conventions endorsement of indigenous peoples rights[60].

Article 21(1) of the African Carter on Human and Peoples Rights reads, in part:

> *"All peoples shall freely dispose of their wealth and natural resources. This rights shall be exercised in the exclusive interest of the people and in no case shall the people be deprived of it"*[61]

The above provision of the African Charter has been judicially confirmed in the foregoing case laws.

Apart from the regional courts, various domestic courts of the UN members states have been advancing the rights of the indigenous peoples. For instance, in the case of *Maya Indigenous Communities v Belize*[62], the Supreme Court of Belize ordered the government to abstain from carrying out any activities on Mayan land.

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[49] *Ibid*
[50] *Ibid*
[51] IACHR judgment of 28 December 2005.
[52] *Ibid*
[53] Ibid
[54] See IACHR judgment of 28 November 2007, para 95
[55] *Ibid*
[56] *Ibid*
[57] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples Rights, Communication No 155/ 96 (2001)*
[58] *Ibid*
[59] African Commission on Human and Peoples Rights, Communication No 276/2003
[60] *Ibid*
[61] Article 21(1) African Charter on Human and Peoples' Rights.
[62] Case No. 12053, Inter- Amer. Court of Human Rights, Report No 78/00, Judgement of 5 October 2000.

In 2004, the Inter-American Commission on Human Rights (IACHR) issued a report recognising Maya peoples collective right to land traditionally used and occupied in Toledo[63]. The IACHR found that the state had violated Maya Peoples rights to property and equality under international law, and it recommended that the government delimit, demarcate and title Maya ancestral land[64]. In 2007, the Mayan Leaders Alliance and Toledo Alcaldes Association, on behalf of the thirty-eight Mayan Communities brought an action in the domestic court for non-implementation of the IACHR decision. The Supreme Court of Belize ordered the government to recognize Maya land rights, demarcate and title their land and cease and abstain from interfering with their right to property. The government never appealed the decision. After 2007, very little progress was made in terms of enforcing the customary land rights recognised by the Supreme Court of Belize.[65]

Another law suit was lodges with the Belize Supreme Court in June 2008, seeking a declaration that the government's failure to protect the Mayan rights is a violation of the constitution, and requesting the Supreme Court to order the government to abstain carrying out any activities on Mayan Land[66]. In 2010, the Supreme Court classified that the 2007 judgment applied to Maya throughout Toledo and issued an injunction prohibiting concessions.[67] The government appealed the 2010 judgment in 2013, whereof the Court of Appeal affirmed Maya land rights and finding that Maya of Toledo possess rights to land and resources in Southern Belize based on longstanding use and occupation.[68] That decision was appealed to the Carribean Court of Justice (CCJ) and the matter was decided by consent judgment, with the recognition of Maya land rights and entitlement to titling of their land forming a major part of the consent judgment.[69] Maya's case shows how Maya people successfully challenged oil and logging concessions granted by the government (state) within Mayan ancestral lands.

The case of *Mabo v Queensland (No2) of Australia*[70], further strengthens and confirms the rights of indigenous people to own, use and control their resources.[71] Also, the decision of the Supreme Court of Canada help articulated it in *Delgamuukw v British Columbia*[72] that "an original title encompasses mineral rights". Hence, indigenous peoples rights covers mineral resources. The Canadian court also clarified it that sub-surface resources are included in the scope of natural resources over which indigenous peoples may have sovereignty[73]. In *Alexkor Limited & The Government of South Africa v The Richtersveld Community & Ors*[74], the Constitutional Court of South Africa held that the indigenous people concerned owned the sub-surface (sub-soil) resources pertaining to their lands. The court further held that the Indigenous Richtersveld Community had a right to communal ownership of the indigenous land.94[75]

In *Worcester v Georgia*[76], a landmark case in which the United States Supreme Court vacated the conviction of Samuel Worcester and held that the Georgio colonial statute that prohibited non-native Americans from being present on Native American Lands without a licence from the state was unconstitutional.[77] This case arose when the state of Georgia imprisoned several missionaries who were living on Cherokee Nation territory in violation of a state law requiring non-Indians to obtain a licence from the governor.[78] Justice John

[63] Belize: Advocating Maya Peoples Rights to Land – Minority Rights Group, available at http://www.minorityrights.org-maya-in-belize
[64] *Ibid*
[65] *Ibid*
[66] *Ibid*
[67] *Ibid*
[68] *Ibid*
[69] *Ibid*
[70] (1992) High Court of Australia, 175 CLR 1
[71] Erica-Irene (2004) *supra*. P.16
[72] (1997) 3 SCR 1010
[73] *Ibid*
[74] (CCT 19/03 (2003) ZACC 18; 2004 (5) SA 460 (CC) judgment delivered on 14 October 2003
[75] Ibid. Erica-Irene (2004)supra
[76] (1832) 31 U.S. (6 Pet) 515.
[77] *Ibid*
[78] Erica-Irene (2004) *supra*

Marshal decided what is still the law today in the United States when he founded that Indian Nations have been recognised as a distinct, independent political communities, and are as such, qualified to exercise powers of self-governance not by virtue of any delegation of powers from the federal government, but by reason of their original tribal sovereignty.[79] The decision is most famous for its dicta, which laid out the relationship between tribes and the state and federal government. This decision is considered to have laid the foundations of the doctrine of the tribal sovereignty in the United States.99[80] This decision also confirmed the aboriginal rights of the American Indians Sovereignty of the Cherokee nation.

Other similar cases are; the *Yanomani Indians v Brazil*[81], where the Inter-American Commission Human Rights held that harm arising from mining activities violated the Yanomani Indigenous community's rights to life and health. The petition related to mass presence of foreigners and mining activities on indigenous land. The court held that the mining licence granted by the state on Yanomaris's indigenous land was a violation of their rights.[82] In *Ominayak and the Lake Lubricon Bank v Canada*,[83] the UNHRC held that the expropriation and destruction of indigenous tribes land for oil and gas exploitation threatened the way of life and culture and consequently, an infringement of their right to enjoy cultural habit.

- **Selected Statutory Instruments and Institutional Recognition of the Notion of Shared Sovereingty.**

There are plethora of statutory instruments at local, regional and global levels, wherein the sovereignty of the indigenous peoples have been recognised, without diminishing the State sovereignty, namely:

The International Labour Organisation Indigenous and Tribal Peoples Convention (ILOITPC)[84]. This Convention has provisions protecting the rights of the indigenous peoples to exercise control over their natural resources.[85] As well as, the right to participate in the use, management and conservation of these resources.[86]

As far as the ILOITPC is concerned, the sovereignty of the indigenous people does not in the least diminish or contradict the sovereignty of the state. Two sovereigns can conveniently co-exist within a state. Another instrument is the Organisation of American States (OAS) Americans Declaration on the Rights of Indigenous Peoples(ADRIP).[87] It was adopted on the 15 June 2016, after nearly thirty years of advocacy and negotiation. The ADRIP provides that "states shall recognise and respect the multi-cultural and multi-lingual character of the indigenous peoples who are integral part of their societies".[88] It also provides that indigenous people have the right to self-determination[89], cultural identity,[90] indigenous spirituality,[91] lands territory and resources.[92]

The World Bank Group in recognition of the rights of the indigenous peoples to natural resources has now insisted that free, prior and informed consent of the indigenous peoples is a pre-condition required before the World Bank Group can participate in any extractive industry project. (World Bank Group, 2020) By this, the World Bank has emphasised and shown its support, for the internal sovereignty of the indigenous peoples/communities and the need to carry them along in mining and exploration activities on their lands.

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[79] *Ibid*
[80] Ibid. The New Georgia Encyclopedia 1832.
[81] Case No 7615IACHR Resolution No.12/85, Judgement of March 5,1985.
[101] *Ibid. Songi, O. Resource Control, Community Participation and Nigeria Petroleum Industry Bill, available at https://www.researchgate.net accessed 8 April,2020-04-11*
[83] CCPR/C/38/D/167/1984; UN Human Rights Committee (HRC), 26 March 1990, available at http://www.refworld.org/cases,HRC,472/C5b42.html (accessed 4 April 2020); Songi, O, Resource Control Community Participation and Nigeria's Petroleum Industry Bill
[84] No 169 of 1989
[85] Article 15, article 14, ILO Convention concerns ownership of land specifically
[86] Article 2 ILO Convention
[87] American Declaration on the Rights of Indigenous Peoples. OAS is a regional inter-governmental organisation of 35 member countries of the Americans including the United States.
[88] Article 2 ADRIP
[89] Article 3, *Ibid,* Also Article 21 ibid.
[90] Article 13 *Ibid*
[91] Article 16, *Ibid*
[92] Article 25, *Ibid*

The World Bank Group is of the view that with good governance and transparent management of natural resources, the revenues from extractive industries can have an impact on reducing poverty, and help achieve the much desired sustainable development goals. Hence, the crucial importance of natural resources to indigenous peoples was one such conclusion.

The identity and rights of indigenous peoples have been recognised via statutory enactments at national levels, in places like Canada[93], New Zealand[94], Nicaragua, and so on. Nicaragua was an international pioneer in granting significant land rights to native peoples. In 1987 indigenous communities gained autonomy over their ancestral land/territories on the Caribbean Coast. In 2003, LAW 445 bound the government to clear indigenous territories of people without proper land titles.[95]

The consequence of the foregoing is that there are various forms of indigenous sovereignty over natural resources within sovereign states.

The Nigerian Situation or Reality

Issue of ownership , is relevant to both privately and publicly held rights to use, manage and transact valuable resources. In many jurisdictions, national law vests ownership of mineral and petroleum resources with the state. Private (non-state) rights to sub-soil resources do exist in some countries. (Cotula, 2018) This includes arrangements that legally recognise customary or indigenous rights to sub-soil resources, which in some cases have paved the way for joint ventures or partnership agreements between investors and indigenous groups for example in Canada and South Africa.[96]

Patterns of resource ownership have a bearing on natural resource contracting. One reason is that, beyond the great diversity of national law regimes, it is commonly recognised that a contracting party cannot transfer rights that it does not hold (you cannot give what you don't have).[97]

In most countries, however, commercial mining and petroleum projects primarily involve licences issued by the state, or contracts with the state or state-owned entity. (Cotula, 2018) The trends in land ownership presents greater diversity and globally there is extensive experience with land related contracts awarded by non-state actors. (Cotula, 2018)

This trend partly reflects historical legacies inherited in the colonial period. (Cotula, 2016) In Nigeria, prior to the colonial era, host communities were fully involved in decision and were partakers in benefits of the trade in their kingdom, and resources were utilised for the developmental benefits of the communities concerned. (Songi, 2020; Omeregbe, 2002)

However, the colonialists declared upon their arrival that the land upon which they were to settle was *Terra-nullius*, (i.e. a no man's land). (Bunter, 2005) The people were thus stripped of their "national and natural resources sovereignty". (Songi, 2020)

Interestingly, even after independence, Nigeria's political elites have continued to maintained the status quo of exploration, exploitation and expropriation of the peoples natural resources without regard to their natural sovereignty. (Songi, 2020) This act of the political leaders hiding under the veil of government has led to resource-extraction conflicts.[98] It has also given rise to age long agitations by the host communities on the

[93] See The Indian Act of Canada 1876 as amended. See First Nations Land Management Act, enacted by Ottawa in 1999.

[94] The concept of the Indigenous Maori peoples is an accepted legal framework of the state of New-Zealand E.g. The Treaty of Waitangi between the British Crown and Maori is a fundamental instrument of New Zealand. Treaty was signed on 6 February, 1840. The Treaty recognise Maori ownership of their lands and other properties. The concept of Maori sovereignty is known by Maori term "*tino rangatiratanga"*

[95] Nicaragua Recognises Indigenous Land Rights- See www.Intercontinentalcry.org

[96] For examples of legal recognition of customary indigenous mineral rights, see in Canada Article 3.19-3-20 of the Nisga'a Final Agreement (British Columbia, 27 April 1999), and in South Africa*, Alexkor Ltd v Richtersveld Community and Others, Constitutional Court of South Africa (CCT 19/03) (2003) 18*

[97] See the Latin maxims *nemo dat quod non habet* and *nemo plus juris as alium transfere protest quam ipse habet*

[98] See chapter 5 "Natural Resources and Armed Conflict" in Schrijver, N.J., Development Without Destruction: The UN and Global Resource Management (Bloomington and Indianapolis. , Indiana University Press (2010). The Ogoni Struggle led to the Arrest and Execution of Ken-Saro-Wiwa and eight other MOSOP leaders by hanging on the 10 November 1995 by Nigeria Military dictator Late General Sani Abacha. See Platform London: The Ogoni Struggle, available at http://platformlondon.org. Accessed on 5 April, 2020

platform of ethnic-based recognitions, such as the Movement for the Survival of the Ogoni People (MOSOP), the Ijaw Youth Council (IYC), Movement for the Emancipation of the Niger Delta (MEND) etc. Where their demands are not met, it has always led to disruption of exploration activities through protest, demonstrations, conflicts, and in extreme cases, hostage taking and vandalisation of petroleum installations by armed groups.[99]

The various texts of Declarations of Rights by those communities reveal one central theme- which is 'resource control and community participation'.[100]

The legal frameworks in Nigeria, wholly support state's permanent sovereignty, ownership and control of the natural resources found within the territory of Nigeria. For instance, the Petroleum Act[101] provides for the exploration of petroleum from territorial waters and the continental shelf of Nigeria and it vests the ownership of, and all on-shore and off-shore revenue from petroleum resources in the federal government and for matters incidental thereto.[102] Petroleum Act is the principal statute that governs petroleum operation, including exploration, production and use in the Federal government.[103] It vests ownership and control of all petroleum exclusively in the Federal government and the exercise of the powers in the Minister of petroleum resources[104].

Also, the Minerals and Mining Act,[105] regulates the exploitation and exploration of solid mineral in Nigeria. It gives ownership of all mineral resources in Nigeria and in the Exclusive Economic Zone to the Federal Government, for and on beheld of the people of Nigeria.[106] The Act provides that all lands in which minerals have been found in commercial quantities shall be acquired by the Federal government in accordance with the Land Use Act.[107]

The Land Use Act (LUA)[108] bothers majorly on ownership rights.[109] If you acquired a land without a Certificate of Occupancy (C. of O.), then the land is not yours, all you have is lease. You never have a freehold because the government can seize your land or property[110]. Under LUA, all the rights formerly vested in the holder of the land shall from the commencement of LUA be extinguished and the land shall be vested in the Governor and administered as provided by the Act[111]. The LUA altered the existing land laws in the country by removing corporate groups, families and chiefs from trusteeship of land and replaced them with the state governors. LUA abolished existing land ownership right, it abolished all existing freehold systems.

The Constitution of the Federal Republic of Nigeria 1999 (as amended)[112] states that " the entire property in and control of all minerals, mineral oils and natural gas, in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribes by the National Assembly. (Odumosu-Ayanu, 2015) [113]

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[99] Oil Exploration and Challenges of Development in the Niger Delta. Available at www.unn.ed.ng accessed 5 April, 2020; Oil Pipeline Vandalisation and the Socio-economic Effects in Nigeria, available at https://www.researchgate.net.

[100] See the aspirations of the various ethnic nationalities as contained in their various Bills of Rights and Declarations, such as, The Ogoni Bill of Rights 1990; The Charter and Demands of the Ogbia People 1992; Karama Declaration 1998; The Resolutions of the First Urhobo Economic Summit 1998; The Akalaka Declaration 1999; The Warri Accord 1999; The Ikwere Rescue Charter 1999; the First Niger Delta Indigenous Conference 1999; the Oron Bill of Rights 1999; the Niger Delta Peoples Compact 2008; etc

[101] CAP 350, LFN 1999, now CAP 10 LFN 2004

[102] See Section 1 Petroleum Act. *Ibid*

[103] *Ibid*

[104] Section 2 *Ibid*

[105] No. 20, 2007

[106] Section 1(1) *Ibid*

[107] Section 1(2) *Ibid*

[108] CAP L5 LFN 2004 (originally 1978)

[109] Section 1 *Ibid*

[110] Section 28 *Ibid,* contains power of governor to revoke rights of occupancy and compensation thereof.

[111] Sections 1 and 2 *Ibid*

[112] Section 44(3) of

[113] *Ibid*

The foregoing shows that in Nigeria there is gross exclusion of the host or indigenous communities in the ownership and management of the natural resources located in the indigenous communities. The Petroleum Industry Bill (PIB) currently before the National Assembly offers no hope in that direction.

Host communities participation is key to ensuring long term sustainability and success of investments, (Cotula, et al., 2009) in Nigeria. Recognising the indigenous peoples (host communities) sovereignty over their natural resources in their land would not conflict with states sovereignty over the Nigerian nation .

Criticisms of State Sovereignty over Natural Resources.

State permanent sovereignty over natural resources has been criticised on the following grounds:

Centralised resource control has often enabled Kleptocratic capture of national wealth (Duruigbo, 2006), in patterns that involve not only "grand" corruption at high political levels but also more diffuse networks of rent-seeking and patronage. (Chabal and Daloz, 1999; Bayart, 1993) It is questionable today, particularly in Nigeria, whether the permanent sovereignty over natural resources is exercised in the interest of national development and well-being of the Nigerian people in accordance with the General Assembly Resolution 1803 of 1962.

There is lack of transparency on the part of the state in the exercise of the sovereign power over natural resources management. The opacity in contracting and non-disclosure of contracts create the breeding ground for corruption and shady deals that do not maximise the public interest (Rosenblum and Maples, 2009). The citizens have a right to know how the government manages publicly owned resources. (Rosenblum and Maples, 2009)

Another point is that, the political-economic factors can create misalignments between constituencies the state is meant to represent. The distributive dimensions of natural resources investments compound these challenged. Public revenues may accrue to the national level and their use may advance the priorities of those in power, while a disproportionate share of the adverse impacts such as land acquisition and environmental degradation are only felt at the local level. (Cotula, 2018)

Furthermore, the doctrine of state sovereignty is criticised in view of the fact that some (African) countries are outrightly selling out natural resources to China. China is recently pursuing a policy of buying up the natural resources in many African countries, many of which were previously unappropriated (Armstrong, 2014). Some African countries are selling exploration right to Chinese Companies. (Armstrong, 2014) This is in sheer violation of the preservative, conservative and sustainability duty imposed on the state. State sovereignty over natural resources involves both rights and duties. (Cotula, 2018) [114]

In a federal state like Nigeria, where there are three tiers of government (federal, state and local), merely increasing the derivative revenue to the state governments , may not translate to sustainable development of host communities, because of the problem of corruption. Where public financial management is poor at the national level, it is often also poor at the sub-national levels. (Songi, 2020; Dietsche, 2009)

Another vital criticism is that there is a conflict between state sovereignty and survival is an interdependent world. Hence, developments in the environmental field have led to a renewed conception of sovereignty. (Virginie, 2016; Phillippe and Jacqueline, 2012; Bowman, 2010) The growing environmental interdependencies and the corresponding rise of new or redefined legal concepts and categories such as "common concern", "common property" or "shared resources", challenge traditional conceptions of sovereignty. (Virginie, 2016; Nico, 1997; 2. Francesco, 2013) [115] No state has exclusive sovereignty over common property or shares resources. (Patricia et al., 2009) [116] There are also constraints on sovereignty for activities involving

[114] See Article 3 of the Convention on Biological Diversity, Principle 2 of the Rio Declaration on Environment and Development (Rio-de-Janeiro, 12 August, 1992) The Rio Principle builds on earlier jurisprudence, see *Trail Smelter Case United States v Canada) 3 RIAA 1905 (Perm . ct Art. 1938, 1941*)

[115] Convention on Biological Diversity adopted 5 June 1992, entered into force 29 December 1993

[116] See Concepts of Common Spaces, Common Heritage; see *Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits (1974) ICJ Reports 3, para. 72*

transboundary damage and beyond (Franz, 1996; Stephen, 2010; Duncan, 2016) [117]. All the above and many more, clearly delimit and fetter state sovereignty, over resources located within its territory.

Concluding Remarks

This paper has advanced arguments for permanent sovereignty over natural resources, vis-a-vis theoretical basis. It also on the other way round advocated for the principle of indigenous sovereignty over natural resources located in the indigenous land. It is the conclusion here that the arguments in favour the recognition of the rights of the indigenous peoples to own, control and use their natural resources far outweighs that of the state sovereignty. Also, global justice in the contemporary times demand unalloyed support for and implementation of the right to self-determination of the indigenous peoples or host communities, to facilitate the indigenous peoples right to development, as well as, their sustainable development. The contemporary international law and practice have undoubtedly redesigned the contours of state sovereignty.

Recommendations

- States should cooperate for worldwide sustainable development which is more easily attainable and sustainable, under a legal order that recognises the right to self-determination of the indigenous peoples and control of their natural resources.
- States should reform their laws to allow for host communities participation in the planning, decision-making, implementation, management, monitoring, benefit (harm) sharing or evaluation of the activities carried out on their land.
- Equity participation scheme should be floated whereby percentage of equity share would be documented for the host communities in the form of Community Development Agreement and in the Participation Agreement.
- New mechanisms and measures are needed at national level, at least on the interim basis, to assist states in their efforts to encourage, monitor and examine their progress in implementing indigenous peoples permanent sovereignty over natural resources.
- State laws, policies, and legal systems that arbitrarily declare that resources which once belonged to indigenous peoples are now the property of the state, are discriminatory against the indigenous peoples, whose ownership of the resources predates the state, and are thus contrary to international law. Such arbitrary state laws and policies which are vestiges of colonialism should to be abandoned.[118]
- States powers to hijack or compulsorily acquire the resources of the indigenous peoples for overriding public purposes (with compensation) must be exercised, if at all, in a manner that fully respects and protects all the human rights of the indigenous peoples. In the generality of situations, this would appear to mean that states may not take indigenous peoples resources, even with fair compensation, because to do so could destroy the future existence of the indigenous culture, religion, spirituality and society and possibly deprive it of its means of subsistence. Human rights of the indigenous peoples takes top priority.
- There is a need for law reform to make states laws vest important resources right on the indigenous peoples (non-state actors) and set up arrangements to ensure that states over see the management of the resources in the interest of the people.
- One way to reconcile these competing interest (between state and indigenous people) involves recognising that, on one hand, sovereignty resides with the people, as explicitly affirmed in numerous national constitutions,[119] and is constituted through peoples exercising their right to self-determination;

[117] see ILC Second Report on the Protection of the Atmosphere, Special Rapporteur Maruse (2015) UN.DOC.A/CN 41681 at 22
[118] See Erica-Irene (2014) *op.cit.* p.17
[119] See Section 14 Constitution of the Federal Republic of Nigeria 1999 (as amended); Article 3 Political Constitution of Columbia 1991; Article 1 Constitution of the Italian Republic 1948 (as amended); Article 1 Constitution of Kenya 2010, etc.

and on the other hand , that state provides the organisational structures through which sovereignty is held and exercised in international legal relations.

- There is humanitarian limits to state sovereignty.

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