

INDIGENOUS PEOPLES' RIGHTS OVER NATURAL RESOURCES: AN ANALYSIS OF HOST COMMUNITIES RIGHTS IN NIGERIA

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<p>Keywords: Natural Resources, Ownership, International Law, Indigenous Peoples.</p> <p>DOI: 10.25041/lajil.v3i2.2402</p>	<p><i>Many States are engulfed in crises over natural resources in the form of claims and counterclaims over who should exercise legal authority over the resources located within the state territory. In Nigeria, the agitation over control of natural resources has led to militancy and rebellion against the federal government and multinational oil companies. The debate on who should control and manage natural oil resources in Nigeria exists at the local community level, the federating states level, and the federal government level. This paper x-rayed the varying contentions of these agitations from an international law perspective. It adopted the doctrinal method to explore international human rights instruments and other legal and non-legal sources to realize the result and arrive at persuasive conclusions. The paper concluded that although international law guarantees states' exercise of sovereign rights over their natural resources, it safeguards the right of indigenous peoples and communities to manage the natural resources found within their ancestral lands to deepen their economic and social development. It also concluded that the Niger Delta indigenous peoples and oil-producing communities are entitled to exercise some measure of control and management of the processes of exploitation of the natural resources found within their lands. The paper calls on the Nigerian government to fast-track legal and policy reforms to resource rights to indigenous host communities of natural resources in Nigeria.</i></p>

A. Introduction

International law refers to sets of principles and conventions regulating the conduct of nations among themselves, some of which are enforceable while others are persuasive. These enforceable international legal instruments do not bind only States but may be extended to specific regional and international agencies, associations, and even individuals.¹ Numerous conventions and treaties confer rights on individual members of the human community, whichever states they may belong to or are situated. Recent developments in international

¹ ICJ, *Mavrommatis Palestine Concessions* (1924); ICJ, *Advisory Opinion: Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980).

human rights law have moved toward granting individuals and some groups of people fundamental rights against the state. For example, the International Covenant on Civil and Political Rights, 1966 (ICCPR), the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR) and the African Charter on Human and Peoples Rights 1981 (ACHPR),² All contain provisions guaranteeing some measure of rights to indigenous communities over natural resources in their lands. Others include the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; the UN General Assembly Resolution (UNGA) 1803 of 1962; the UN Resolution 3281 (XXIV) of 1974 the Indigenous and Tribal Population Convention 1957 (Convention 107) of the ILO; the Indigenous and Tribal Peoples Convention of 1989 (Convention 169) of the ILO and the UN Declaration on the Rights of Indigenous Peoples 2007.

On the other hand, the Nigerian federation's ownership and management of natural resources are governed by its Constitution. However, the Constitution of the Federal Republic of Nigeria allocates the right of ownership and control of every natural resource located in any sovereign territory of Nigeria on the central government known as the Federal Government.³ This constitutional position on natural resources has not been accepted by the natural resources hosting communities and composite states of Nigeria;⁴ this has given rise to what is today known as resource control agitation.⁵ Heated debates, suspicion, and militancy, have

²The International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the African Charter on Human and Peoples Rights 1981 Respectively.

³ For example, section 44 (3) of the 1999 Constitution provides: "Notwithstanding the preceding provisions of this section, 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 for Nigeria shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly"; Section 4 (2) and part 1 of the Second Schedule to the CFRN, the Petroleum Act 1969 cap. P.10 Laws of the Federation of Nigeria 2010, S. 3(1) Mineral Act Cap.M12, Laws of the Federation of Nigeria, 2010, section 2 of The Petroleum Industry Law of 2012 provides: "The entire property and control of all petroleum in, under or upon any lands within Nigeria, its territorial waters or which forms part of its continental shelf and the Exclusive Economic Zone, is vested in the government of the Federation"; Supreme Court, Attorney General Abia State v. Attorney-General Federation (2002); Emmanuel Ibiam Amah, "An Appraisal of the Rights of the Niger-Delta Peoples over Natural Resources under the African Charter on Human and Peoples' Rights," *African Journal Online (AJOL)* 11, no. 2 (2020), <https://www.ajol.info/index.php/aujilj/article/view/200378>; An Appraisal of the Rights of the Niger-Delta Peoples over Natural Resources under the African Charter on Human and Peoples' Rights (NAUJILJ) 11 (2), 84. It is worth mentioning that this has not been the state of affairs before the enactment of petroleum. The 1963 Republican Constitution entrusted exclusive legislative competence over mineral resources to the federal government but did not vest ownership in them on her; consequently, the Federal Government was required by section 140 (1) of the 1963 Constitution to pay to each Region; (a) sum equal to 50 per cent of proceeds of any royalty received by the federation in respect of any minerals extracted from that Region and, (b) any mining rents derived by the federation during that year from that Region; Amah Emmanuel Ibiam, "An Examination of the Contradictions in the Ownership of Land and Natural Resources in Nigerian Federation," *Journal of Law, Policy and Globalization* 63 (2017), <https://www.iiste.org/Journals/index.php/JLPG/article/view/38051>; It has been opined that the vesting of petroleum in the Federal Government was a tactical means of thwarting the designs of the secessionist Eastern Region of Nigeria; Amechi Okolo, "The Political Economy of the Nigeria Oil Sector and the Civil War," *Quarterly Journal of Administration* 15, no. 1-2 (1981): 107-26.

⁴ Victor Attah, "Understanding Resource Control" (Kaduna, 2004), <https://dawodu.com/attah1.htm>; Emmanuel Shebbs and Ray Njoku, "Resource Control in Nigeria - Issues of Politics, Conflict and Legality as Challenge to Development of the Niger Delta Region," *Journal of Good Governance and Sustainable Development in Africa (JGGSDA)* 3, no. 3 (2016), <http://rcmss.com/2017/JGGSDA/Resource-Control-In-NigeriaIssues-Of-Politics-Conflict-And-Legality-As-Challenge-To-Development-Of-The-Niger-Delta-Region.pdf>.

⁵ John Adewale Abolurin, *Democratisation, Conflict Management and the Amnesty Question in Nigeria* (Ibadan: John Archers, 2010); Rhuks Ako, "Resource Control in the Niger Delta: Conceptual Issues and Legal Realities," *E-International Relations*, 2012, <https://www.e-ir.info/2012/05/25/resource-control-in-the-niger-delta-conceptual-issues-and-legal-realities/>; Anna Dunin, "Battling the 'Resource Curse' in the Niger-Delta" (Nigeria, 2011), <https://reliefweb.int/report/nigeria/battling-resource-curse-niger-delta>; Amah, "An Appraisal of the Rights of the Niger-Delta Peoples over Natural Resources under the African Charter on Human and Peoples' Rights."

accompanied this agitation in the form of destruction of oil facilities, abduction and kidnapping of expatriate oil workers and continued unrest and retaliation by military troops of the federal government. Host oil communities claim that resources are exploited from their land without commensurate compensation for the environmental consequences of the exploration and exploitation. They also claim loss of livelihood from the destruction of their farmlands and fishing games due to oil spillage, the consequent ruin of their local economy, and the proliferation of poverty. They claim unemployment and political alienation as a result of their minority status. These claims have given rise to debates on the right of the natural resources host communities over the resources found in their lands.⁶

It is pertinent to state that international law does not recommend any system of government for states. However, it does regulate the conduct of a state about its citizen's rights accruable by international conventions, customary international law, and opinions of international disputes settlement bodies. Therefore, the issues this paper intends to discuss are to find out the extent to which a community of people is collectively entitled to internationally guaranteed rights over natural resources as against the state in which they belong and whether these rights inure to the natural resources host communities in Nigeria.

B. Discussion

1. International Legal Regime and Natural Resources Ownership

Ownership of resources has been given international recognition in a vast set of international legal regimes. One notable international legal instrument on natural resources ownership is the United Nations General Assembly (UNGA) Resolution 1803 of 1962 Resolution on Permanent Sovereignty over Natural Resources (RPSNR)⁷ which justifies states appropriation of natural resources by way of nationalization of foreign-owned oil industries.⁸

⁶ Sylvester Chibueze Izah, "Ecosystem of the Niger Delta Region of Nigeria: Potentials and Threats," *Biodiversity International Journal* 2, no. 4 (2018): 338–45, <https://doi.org/10.15406/bij.2018.02.00084>; Victor A. Akujuru and Les Ruddock, "Incorporation of Socio-Cultural Values in Damage Assessment Valuations of Contaminated Lands in the Niger Delta," *Land* 3, no. 3 (2014): 675–92, <https://doi.org/10.3390/land3030675>; Amah, "An Appraisal of the Rights of the Niger-Delta Peoples over Natural Resources under the African Charter on Human and Peoples' Rights"; Abolurin, *Democratisation, Conflict Management and the Amnesty Question in Nigeria*; Ako, "Resource Control in the Niger Delta: Conceptual Issues and Legal Realities"; Oludotun Adetunberu and Akeem O. Bello, "Agitations in the Niger Delta Region, Oil Politics and the Clamours for Restructuring in Nigeria," *International Journal of Peace and Conflict Studies (IJPCS)* 5, no. 1 (2018): 115–25, <http://www.rcmss.com/index.php/ijpcs>; www.academix.ng; Dunin, "Battling the 'Resource Curse' in the Niger-Delta."

⁷ The United Nations General Assembly (UNGA) Resolution 1803 of 1962 in Article 1 provides that; "The right of the peoples and nations to the permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the state concerned"; UN, "United Nations Emergency Force," UN Resolution, 1962, <http://www.geocities.ws/savepalestinenow/unresolutions/studyguide/sgunresgasum1960.html>.

⁸ The struggle for sovereignty over natural resources arguably began in the 19th century when political independence started to develop in some regions, including Latin America. Following World War II in 1945, the movement gained impetus as postcolonial developing country regimes, particularly in Africa and Asia started to claim the right to sovereignty over natural resources. The period was a catalyst for many developing countries (particularly those in Latin America) to contest the validity of concession agreements that their governments had entered into with foreign investors or were imposed during colonial times for exploration and exploitation of natural resources. One of the significant points of contention was that these concession agreements tended to be largely one-sided, and they strongly favored the interests of foreign investors; Mats Ingulstad and Lucas Lixinski, "Raw Materials, Race, and Legal Regimes: The Development of the Principle of Permanent Sovereignty over Natural Resources in the Americas," *World History Bulletin* 29, no. 1 (2013): 34; Ricardo Pereira, "The Exploration and Exploitation of Energy Resources in International Law," in *Environmental and Energy Law*, ed. Karen Makuch and Ricardo Pereira (London: Wiley-Blackwell, 2012), 199–224; Yinka Omorogbe and Peter Oniemola, "Property Rights in Oil and Gas under Domanial Regimes," in *Property and the Law in Energy and*

The desire to guarantee the newly decolonized nations sovereignty and less-developed Third World nations to ensure that non-self-governing nations benefited from their naturally endowed resources occasioned the passage of the UN General Assembly's Resolution (RPSNR) on December 14, 1962. The RPSNR recognized the right of the host state to nationalize and expropriate the property of foreign investor companies, provided that appropriate compensation is paid. It secured each country's right to choose its economic system and exercise sovereignty over its natural resources. It is believed that the permanent sovereignty principle has attained the status of a peremptory norm such that it is binding on all states.⁹

Another international legal regime on natural resources governance is the Rio Declaration on Environment and Development of 1992, which also recognized nationalization as an integral part of the sovereignty of states. It further recognized in its Article 2 thereof the rights of states to exploit their resources following their environmental and developmental policies. It acknowledged that the Charter of the United Nations recognizes these rights and constitutes core principles of international law. Other conventions on human rights that touch on natural resources include; the ICCPR and ICESCR,¹⁰ which provide for the right of self-determination¹¹ and the rights of peoples over their natural resources; the right of the peoples to an adequate standard of living, food, clothing, housing and continuous improvement of their living conditions;¹² the right of the peoples to environmental and industrial hygiene¹³ and the peoples' inherent right to the full enjoyment and free utilization of their natural wealth and resources.¹⁴ A further guarantee of enforceable rights is found in the two ILO Conventions.¹⁵

Natural Resources, ed. Aileen McHarg et al. (Oxford: Oxford University Press, 2010), <https://doi.org/10.1093/acprof:oso/9780199579853.003.0006>.

⁹ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997), <https://doi.org/10.1017/CBO9780511560118>; Article 53 of the Vienna Convention on the Law of Treaties contains the following definition of the concept of peremptory norms: "For the present *Convention*, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; Vienna Convention on the Law of Treaties, opened for signature May 23 1969, 115 UNTS 331 (entered into force January 27 1980); Kamal Hossain and Subrata Roy Chowdhury, *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (London: Francis Pinter, 1984); Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008); Leo-Felix Lee, "Sovereignty Over, Ownership of and Access to Natural Resources," *Environmental Laws and Their Enforcement* 2 (2009), <https://www.eolss.net/sample-chapters/C04/E4-21-05.pdf>.

¹⁰ Article 2 of the Rio Declaration provides inter-alia; "States have...the sovereign right to exploit their resources according to their own environmental and developmental policies..."; UNEP, "Rio Declaration on Environment and Development" (Rio de Janeiro, 1992), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

¹¹ E.g. Article 1(2) of the ICESCR states, "All *peoples* may, for their ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a *people* be deprived of its means of subsistence".

¹² Article 11 of the ICESCR

¹³ Article 12 of the ICESCR

¹⁴ Article 25. In the *Fisheries Jurisdiction Cases* (1974), the ICJ recognizes that under customary international law, as it had crystallized after the 1958 and 1960 Conferences on the Law of the Sea, a coastal State has the right to establish a 12-mile exclusive fishery zone and preferential rights of fishing in adjacent waters 'to the extent of the particular dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development; ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland) (1974).

¹⁵ The Indigenous and Tribal Population Convention 1957 (No. 107) of the International Labour Organization (ILO) and The Indigenous and Tribal Peoples Convention 1989 (Convention 169) of the International Labour Organization (ILO); The Indigenous and Tribal Population Convention 1957 (No. 107) of the International Labour Organization (ILO) applies to the 'indigenous population'. The rights guaranteed are; protection and systematic integration with the dominant political population, protection of the institutions, property, and means of livelihood

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007 though not legally binding, has demonstrated a significant understanding of the right to self-determination in a manner that could help strengthen the natural resources right of indigenous peoples.¹⁶

However, it is noteworthy that both the proponents of state ownership and management of natural resources and those for the host indigenous community's ownership and/or management of natural resources rely on these varying provisions of international law in their respective claims over natural resources. For example, proponents of states ownership and management of natural resources based their claim on state sovereignty, a principle that has become a peremptory norm of international law.¹⁷ Proponents of community ownership and control also argue that the principle of state sovereignty inures to the state citizens as against the state. They also based their contention on numerous human rights instruments that have accorded rights over natural resources to indigenous communities hosting these resources. This paper shall therefore consider the various provisions of international law in support of these conflicting and opposing claims to arrive at a common and better understanding of the position of international law on issues of natural resources ownership and management.

2. State Sovereignty versus the right of 'peoples' over Natural Resources

Sovereignty is the ability of a state to decide for itself unrestrained by external influences. It connotes the right of a state to make its decisions about its affairs, including the management of its resources unencumbered by external interference.¹⁸ The unreserved legal right and authority to own and control the management and development of her natural resources can be inferred from Customary International Law, Declarations and Treaties. Therefore, the trend has shifted away from investor authority over resources to the authority of the host state.

Before the 1960s, the trend was for foreign investors to engage in petroleum extraction to carry out their activities in unrestrained host states because they were believed to possess ownership rights over the resources. However, the decolonization process and political independence embolden newly independent states to demand their economic independence and sovereignty rights, culminating in UN intervention.¹⁹ Thus, on December 14, 1962, the General Assembly adopted the United Nations Resolution 1803 of 1962 RPSNR.²⁰ Which acknowledged the inherent rights of states to their natural resources. It further recognized the rights of host states to take over the management of their resources and determine and adopt whatever management system best suits them for the interest of their citizens. Further, compensation should be regulated by the law of the host states.²¹ By this resolution, the newly

of the population, guarantee of the rights of this population to their traditional lands and even provisions of additional land territories where their traditional lands are not sufficient for them.

¹⁶ Dorothee Cambou, "The UNDRIP and the Legal Significance of The Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective," *The International Journal of Human Rights* 23, no. 1–2 (2019): 34–50, <https://doi.org/10.1080/13642987.2019.1585345>.

¹⁷ Ibiam, "An Examination of the Contradictions in the Ownership of Land and Natural Resources in Nigerian Federation."

¹⁸ Lee, "Sovereignty Over, Ownership of and Access to Natural Resources."

¹⁹ Latin America made initial attempts to change the international legal status quo. This was through the insertion of clauses that placed the contracts within the ambit of national and not international law. This came to be known as "*Calvo Clause*" after the jurist who was its prominent exponent; Richard Kiy and Anne McEnany, "Housing and Real Estate Trends among Americans Retiring in Mexico's Coastal Communities," 2010, https://icfdn.org/wp-content/uploads/2015/11/Retiring_Responsibly_Housing_English.pdf.

²⁰ UN, "Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII)" (New York, 1962), https://legal.un.org/avl/ha/ga_1803/ga_1803.html.

²¹ The above statements were reinforced in 1966 by Resolution number 2158(XXI), which provided that the General Assembly should, amongst other things; because foreign capital, whether public or private, is forthcoming at the request of the developing countries. It can play an important role in as much as it supplements their effort to exploit and develop their natural resources. This provides that there is government supervision over the activity of foreign capital to ensure that it is used in the interest of national development, recognizing the rights of all countries to

independent state scored a huge political victory, as they gained the right of control and ownership of natural resources following the principle of state sovereignty.²²

However, this victory is challenged by recent arguments regarding the rights of communities over resources located in their territory of origin as against the state. The question is, does a group of people have the right against the state over natural resources found in their community? In recent years, the notion that the right of permanent sovereignty over natural resources is exclusive to the state (national government) and a matter of domestic affairs, such that peoples of natural resources producing territories may not legally claim some additional benefit from the resources produced from their land has undergone a deadly attack.²³ The understanding has grown to the notion that the right to permanent sovereignty is accruable to "people" or "indigenous people".²⁴ It has been accepted that the right to permanent sovereignty does not grant immunity to the national government on their responsibility under international law. It neither operates to absorb them of their obligation under human rights norms and conventions, especially in natural resources.²⁵ A good number of Conventions on human rights grant some fundamental rights in connection to natural resources on states citizens and communities are produced. For example, Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right of self-determination of peoples over their natural resources. Article 47 of the ICCPR states that "nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources", while Article 1 (2) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) states; "All peoples may, for their ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of

secure their share in the administration of enterprises that are wholly or partly operated by foreign capital and have a greater share in the advantages from that place on an equitable basis, with due regard to development needs and objectives of that people concerned. Considers that when foreign investors exploit the natural resources of the developing countries, the latter should undertake proper and accelerated training of national personnel at all levels and in all fields connected with such exploitation.

²² On December 12, 1974, the General Assembly adopted resolution No 3281 (XXIV) entitled 'Charter of Economic Rights and Duties of State'. This resolution which inter-alia stated; (a) Every state shall freely exercise full permanent sovereignty including possession, use and dispose over all of its wealth, natural resources and economic activities; (b) Each state has the right to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation shall be paid by the state adopting such measure taking into account any relevant laws and regulations and all circumstances that the state considers pertinent. In any case, where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing states and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought based on the sovereignty of states and following the principle of the choice of means.

²³ Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*; Anita Rønne, "Public and Private Rights to Natural Resources and Differences in Their Protection?," in *Property and the Law in Energy and Natural Resources*, ed. Aileen McHarg et al. (Oxford: Oxford University Press, 2010), <https://doi.org/10.1093/acprof:oso/9780199579853.003.0003>; Lila Barrera-Hernández, "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and National Resources Allocation," *Annual Survey of International & Comparative Law* 12, no. 1 (2006): 43, <https://core.ac.uk/download/pdf/233103609.pdf>.

²⁴ RPSNR, UN Doc. A/RES/3281 (XXIX) annex at 2(1); article 1 of the ICCPR and Article 1 of the ICESCR, which recognizes the peoples' right to self-determination.

²⁵ Protocol to the Convention for the Protection of HRs and Fundamental Freedom, ETS NO. 9, as amended by Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 155, November 1 1998) article 1 herein recognize the right to property as a fundamental human right; "Every natural or legal person is entitled to the peaceful enjoyment of their (or their) possessions. No one shall be deprived of his or her possessions except in the public interest and subject to the condition provided for by the law and by the general principles of international law"; UN, "Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII)."

international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a person be deprived of their means of subsistence”.²⁶

The implication of permanent sovereignty over natural resources to “peoples” of a state is that it could arguably form the basis of a challenge to a government’s decision to authorize multinational companies to operate in the natural resources sector in a state’s territory against the will of the citizens in general or the natural resources host community in particular. Secondly, governments would also be bound to utilize natural resources to benefit the whole population. Hence, the realization of the right to permanent sovereignty as belonging also to peoples add new relevancy to the “RPSNR” in the post-colonial period, directing sovereign states to use resources for ‘the wellbeing of their peoples’.²⁷

The principle of permanent sovereignty has evolved to a peremptory norm of international law. It is said to be sharing the same status with the prohibition of the use of force.²⁸ Therefore, it is binding on states and will amount to illegality for any state to violate the principle therein.

a. The Indigenous Peoples Right to their Natural Resources under International Conventions

A good deal of conventions and treaties protecting the right of indigenous peoples and communities are available and supportive of the assertion that international law favors peoples’ ownership and management of natural resources found in their territory. Much of the international protection guaranteed to indigenous people can be found in three documents;

- 1) The Indigenous and Tribal Population Convention 1957 (Convention 107) of the International Labour Organization.
- 2) The Indigenous and Tribal Peoples Convention 1989(Convention 169) of the International Labour Organization (ILO)
- 3) The United Nations Declaration on the Right of Indigenous People.

Who are indigenous peoples under these international conventions and declarations? Martinez Cobo made the most acceptable definition of indigenous peoples. According to Cobo;²⁹ “Indigenous communities, peoples, and nations have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories or parts of them. They form as present non-dominant sectors of society. They are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples, following their cultural pattern, social institutions, and legal systems.”

²⁶ This recognizes the right of people to self-determination. (ICESCR, opened for signature December 16 1966, 993 UNTS 3 (entered into force)

²⁷ Jane A. Hofbauer, “The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications” (University of Iceland, 2009), https://skemman.is/bitstream/1946/4602/1/Jane_Hofbauer.pdf; Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*; Rønne, “Public and Private Rights to Natural Resources and Differences in Their Protection?”

²⁸ Article 53 of the *Vienna Convention on the Law of Treaties* contains the following definition of the concept of peremptory norms: "For the present *Convention*, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; *Vienna Convention on the Law of Treaties*, opened for signature May 23 1969, 115 UNTS 331 (entered into force January 27 1980); Ricardo Pereira and Orla Gough, “Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law,” *Melbourne Journal of International Law* 14, no. 2 (2013): 451–95; Hossain and Chowdhury, *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice*; Brownlie, *Principles of Public International Law*.

²⁹ Martínez Cobo, “Study on the Problem of Discrimination against Indigenous Populations,” 1983, http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf.

According to the 2003 Report of the African Commission's Working Group of Experts on Indigenous Population/Communities,³⁰ the expression "indigenous people" refers to those communities in Africa:

- 1) whose cultures and ways of life differ considerably from the dominant society, and whose cultures are under threat, in some cases to the point of extinction;
- 2) The survival of their particular way of life depends on access and rights to their traditional lands and natural resources thereon;
- 3) who suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society;
- 4) who live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially;
- 5) who are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority; and,
- 6) who identify themselves as indigenous

From this definition, it can safely be deduced that "indigenous people" and "peoples" could also be "minorities".³¹ The UN Declaration guarantees "indigenous people" or indigenous communities to maintain their unique cultures and traditions. It further guarantees the right of indigenous peoples to freely determine their political status and the right to just and fair compensations in cases of expropriation of their lands.

Indigenous peoples have been referred to as tribes, aborigines, first people, first nations, ethnic groups, Adivasi, Janajati, etc.³² the phrase has also been used to refer to occupational groups with ancestral ties like hunter-gatherers, nomads, peasants, hill people, etc.³³ Therefore "people" or indigenous peoples or tribal peoples under the UNDRIP, the ILO Conventions and other international legal instruments could rightly apply to indigenous or ancestral communities of the Niger-Delta of Nigeria who share common ancestral ties with their traditional lands.³⁴

³⁰ IWGIA, "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities" (Copenhagen, 2005), https://www.iwgia.org/images/publications/African_Commission_book.pdf.

³¹ Oswaldo Ruiz Chiriboga, "The Right to Cultural Identity of Indigenous Peoples and National Minorities: A Look from the Inter-American System," *SUR: Revista Internacional de Derechos Humanos* 3, no. 5 (2006), <https://doi.org/10.1590/S1806-64452006000200004>; Dieter Kugelmann, "The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversities," *Max Planck Yearbook of United Nations Law* 11, no. 1 (2007), <https://doi.org/10.1163/18757413-90000007>.

³² Bayo Oluphunda, "Protecting Nigeria's Indigenous Population," PUNCH, 2016, <https://punchng.com/protecting-nigerias-indigenous-population/>.

³³ Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self Determination," *Transnational Law and Contemporary Problems* 3, no. 1 (1993).

³⁴ Jennifer Gitiri, "Protection of Cultural Rights of Indigenous Peoples under the ICCPR/ICESCR and the African Charter: A Comparative Study" (Central European University, 2015), http://www.etd.ceu.hu/2015/gitiri_jennifer.pdf; Indigenous peoples have been used to refer to tribes, aborigines, first people, first nations, ethnic groups, Adivasi, janajati etc. It has also been used to refer to occupational groups with ancestral ties like hunter-gatherers, nomads, peasants, hill people, etc. Therefore "people" under the African Charter could rightly apply to indigenous or ancestral communities of the Niger-Delta of Nigeria who share common ancestral ties with their traditional lands; Oluphunda, "Protecting Nigeria's Indigenous Population"; Amah, "An Appraisal of the Rights of the Niger-Delta Peoples over Natural Resources under the African Charter on Human and Peoples' Rights"; an International meeting of experts on further study of the concept of the rights of peoples, convened by UNESCO held in Paris on 27-30 November 1989, SHS-89/VCONF.602/7, para.23; Miriam J. Aukerman, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context," *Human Rights Quarterly* 22, no. 4 (2000): 1011-1050, <https://doi.org/10.1353/hrq.2000.0041>; The Niger Delta houses a large number of different ethnic and linguistic groups, which includes Andoni, Brass, Dioubu, Etche, Ijaw, Kalabari, Nembe, Ogoni, Okirika, Ikwerres, Orons, Itsekiris, Ukwanis, Bribes, Ibibio, Efik, and other smaller minority groups, as well as some part of Ibo and Yoruba tribes. These different ethnic and linguistic groups are regarded as indigenous peoples; International Crisis Group, "The Swamps of Insurgency: Nigeria's Niger Delta

The indigenous peoples of the Niger-Delta of Nigeria face the same danger experienced by other indigenous peoples of the world.³⁵ They have been disposed of their ancestral lands, deprived of their sources of economic livelihood. Their territory is constantly under military occupation, deprived not only of their territorial but also economic and political self-determination.³⁶ Their ancestral ties, traditional lifestyles, values and custom, cultural heritage all face extinction. The same applies to their identity, sense of pride, and traditional practices. The Nigerian state has violated their collective rights to self-development, the entirety of their economic, social, and cultural rights, and their rights to dispose of their natural resources freely.³⁷ It is worth reiterating that as far back as 1996, the Human Rights Council had directed the Nigerian government to immediately carry out legal reforms to guarantee human rights protection in line with the provisions of the ICCPR and in particular, to take appropriate legislative and policy steps to secure the rights of indigenous peoples and indigenous minorities in Nigeria.³⁸ The Nigerian government has not implemented these recommendations to date. The rights over natural resources provided in favor of indigenous peoples inure to the Niger-Delta of Nigeria.

b. Natural Resources Rights and the Principle of Self Determination

The right to self-determination is a fundamental principle of human rights. It entails the individual and collective right of a people to freely determine and pursue their political, economic, social, and cultural development and status.³⁹ This right is linked with decolonization, especially in indigenous peoples, such as in Australia and the USA. The International Court of Justice (ICJ) has held that this is a right held by the people rather than the government alone and that it is a norm of *jus cogens* which is the highest rule of international law and must be obeyed at all times.⁴⁰ It is arguable that since self-determination is a right that attaches to "all peoples", the rights are also accruable to indigenous peoples of a state. The Constitutional Court of South Africa has upheld indigenous peoples' rights to ownership of subsoil and minerals by their historical occupation and use.⁴¹

This principle is enshrined in the International Labour Organization (ILO) Convention 169 on the indigenous and tribal peoples in independent countries, and this convention has two vital attributes:

- 1) The right of individuals to participate in the use, management, and conservation of natural resources derived from their lands.

Unrest" (Brussels, 2006); Hemen Philip Faga, "Re-Conceptualizing the Right of the Niger Delta Peoples to Self-Determination as Indigenous Peoples and National Minorities in International Law: Exploring New Horizon and Research Potentials," Martins Library, 2020, <https://martinslibrary.blogspot.com/2015/03/review-of-re-conceptualizing-right-of.html>; Wikipedia, "Indigenous Peoples of the Niger-Delta," n.d.; Alan Phillips, "The World Directory of Minorities and Indigenous Peoples-Nigeria" (London, 2018), <https://www.refworld.org/docid/4954ce6719.html>.

³⁵ Olupohunda, "Protecting Nigeria's Indigenous Population."

³⁶ Daes, "Some Considerations on the Rights of Indigenous Peoples to Self Determination."

³⁷ Tim Elombah, "Indigenous Peoples Of Niger Delta Commence Earnest Self-Determin," Elombah, 2017, <https://elombah.com/indigenous-peoples-of-niger-delta-commence-earnest-self-determination/>.

³⁸ Human Rights Council, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee" (Geneva, 1996), CCPR/C/79/Add.65.

³⁹ Nadesan Satyendra, "Self Determination: Principle and the Law," Tamilnation, accessed December 31, 2016, <http://www.tamilnation.org/selfdetermination/>.

⁴⁰ ICJ, Case Concerning East Timor (Portugal v. Australia) (1995); Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?," *Human Rights Law Review* 11, no. 4 (2011): 609–10, <https://doi.org/10.1093/hrlr/ngr025>.

⁴¹ Constitutional Court of South Africa, *Alexkor Ltd v. Richterrald Community* (2005); Pereira and Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law."

- 2) The government's consultation with the people to establish or ascertain to what degree the people's interest would be prejudiced.

The above attributes can also be found in the *Aarhus Convention on the Access to Environmental Information and Public Participation in Environmental Decision-Making*.⁴² Self-Determination is a principle enabling people to determine their internal political status without being subjected to any form of external or outside interference.⁴³ The right to political self-determination will not be sustainable without the correlative right of the beneficiaries to use and manage their natural resources. Thus, Articles 3 and 26 of the United Nations Declaration on the Right of Indigenous Peoples provided for the right of self-determination of indigenous peoples and, more specifically, indigenous peoples' right to lands, territories, and resources they have traditionally occupied.⁴⁴ Indigenous peoples should be able to exercise a measure of control over their lands. In a broader context, land rights mean the right to partition, own, develop, utilization and decision-making on issues concerning the land.⁴⁵ Therefore, indigenous peoples' land rights shall include preserving their ancestral shrines and their subsistence living. The state is obliged not only to respect these rights but also to protect them. The right to self-determination of indigenous peoples provides the basis within which the political, economic, and social rights of indigenous peoples can be realized within the framework of a sovereign state. While the right could not form the basis for the secession of indigenous peoples living within an independent state, it guarantees self-government in the form of autonomy in matters affecting them locally. Though the principles of "PSNR" are not legally binding, it is an essential element of the right of self-determination, which has attained the status of customary international law.⁴⁶ Further, the "PSNR" principle has received wider acceptance, having been incorporated in many legally binding treaty laws like the ICCPR, ICESCR, ILO Conventions and even the African Charter on Human and Peoples Rights.

Admittedly, the principle of "PSNR" does not transfer "sovereign" rights to peoples as against the state's government; the right accruable to indigenous peoples under the Declaration is a "participatory rights". Consequently, indigenous peoples cannot be alienated in matters touching on their lands. Thus, Article 4 provides that the autonomy or self-government of indigenous peoples relates to their internal or local affairs. In contrast, Article 46 (1) prohibits any interpretation of the Declaration that suggests supporting the right to secession. The ICJ has defined the self-determination principle as the "need to pay regard to the freely expressed will of the people...in matters concerning their condition".⁴⁷ In the *East Timor case*,⁴⁸ the Court acknowledged the principle of self-determination as one of the "essential principles of international law" and a right with "erga omnes character". Also, in the *Endorois case*⁴⁹ the African Commission acknowledged the right of self-determination as available for a community of people living in an independent state.

⁴² UNECE, "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" (1998), <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

⁴³ Kalana Senaratne, "Internal Self-Determination in International Law: Critical Third World Perspective," *African Journal of International Law* 3, no. 2 (2013): 305–39, <https://doi.org/10.1017/s2044251313000209>.

⁴⁴ Frank Dietrich, "Natural Resources, Collective Self-Determination, and Secession," *Law, Ethics and Philosophy* 6 (2018): 36, <https://doi.org/10.31009/LEAP.2018.V6.02>.

⁴⁵ Erica-Irene A. Daes, "Human Rights of Indigenous Peoples: Second Progress Report of the Special Rapporteur" (Geneva, 1999), E/CN.4/Sub.2/1999/18.

⁴⁶ Pereira and Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law"; Hossain and Chowdhury, *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice*; Brownlie, *Principles of Public International Law*.

⁴⁷ ICJ, *Western Sahara: Advisory Opinion* (1975).

⁴⁸ ICJ, *Case Concerning East Timor (Portugal v. Australia)*, 84.

⁴⁹ HRW, "Kenya: Landmark Ruling on Indigenous Land Rights" (New York, 2010), <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>.

Further, the African Commission advisory opinion on UNDRIP reaffirms the right to internal autonomy for indigenous peoples.⁵⁰ The right to internal autonomy can only be meaningfully exercised by the indigenous communities when they are allowed to participate in decisions affecting the use of their lands. This is what the UNDRIP described as the right of free, prior, and informed consent.⁵¹ The Inter-American Court of human rights (IACHR) has endorsed and applied these rights in several cases involving indigenous peoples and their state governments.⁵² At the regional level, the African Commission of human rights has recognized internal self-determination as available to communities in African states. The Commission found for the land rights of the Ogiek peoples of Kenya.⁵³ The Commission has also made findings in favor of the mineral resources hosting peoples of Ogoni located in the Niger-Delta area of Nigeria. Its communication requested the Nigerian government to take necessary measures to ensure better protection of human rights of Ogoni people and measures that will facilitate their enjoyment of environmental, health, land, and natural resources rights.⁵⁴

Therefore, it is no surprise that the natural resources hosting communities of the Niger Delta areas of Nigeria⁵⁵ are beginning to implement the Self-determination principle to be enshrined in the Constitution, giving them some form of control over the resources extracted daily from their land. The Niger Delta region of Nigeria has been under perpetual tension for over three decades due to non-inclusion in decision-making and non-benefit of the indigenous inhabitants from the proceeds of hydrocarbon and other hydrocarbon resources exploited on their lands.⁵⁶

C. Conclusion

We have seen that international law provides a set of legal principles through which communities can rely on their struggle for equity and justice about the distribution of natural resources. International law lays down some fundamental rights for the benefit of indigenous

⁵⁰ Shawkat Alam and Abdullah Al-Faruque, "From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources," *Georgetown Environmental Law Review* 32, no. 1 (2020), <https://www.law.georgetown.edu/environmental-law-review/wp-content/uploads/sites/18/2020/01/GT-GELR190045.pdf>.

⁵¹ Lorenza B. Fontana and Jean Grugel, "The Politics of Indigenous Participation through 'Free Prior Informed Consent: Reflections from the Bolivian Case,'" *World Development* 77 (2016): 249–61, <https://doi.org/10.1016/j.worlddev.2015.08.023>.

⁵² Inter-American Court, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), The Court held that the community's right to its property prevented the Nicaraguan government from unilaterally exploiting its natural resources and fulfilling its obligations under the Inter-American Convention on Human Rights. Furthermore, the Commission found that Nicaragua was required to officially delimit, demarcate, and title the lands belonging to the Awas Tingni community with the community's full participation and consideration of customary law, values, usage, and customs. The Court concluded that demarcation could proceed only with the participation of the Awas Tingni community, which meant that they must give consent to such distinction; Inter-American Court, *Mary and Carrie Dann v. United States* (2002), The Commission held that the provisions in the American Declaration on Rights and Duties of Man on fair trial and property require that any determination of indigenous land rights be based on the fully informed consent of the whole community, meaning that all members must be fully and accurately informed and have the chance to participate; Inter-American Court, *Maya Indigenous Communities v. Belize* (2004), The Commission held that "the duty to consult is a fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied".

⁵³ African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (2017).

⁵⁴ African Commission on Human and People's Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2002).

⁵⁵ Wikipedia, "Indigenous Peoples of the Niger-Delta."

⁵⁶ Terry Mission Bagia and Samuel Chisa Dike, "The Principle of Permanent Sovereignty over Natural Resources (PSNR) How Far with Nigeria's Petroleum Industry?," *The Journal of Jurisprudence, International Law and Contemporary Issues* 14, no. 1 (2020), <https://ssrn.com/abstract=3767653>.

and tribal peoples. Further, it imposes obligations on states to protect these rights in favour of their indigenous communities. These rights include the rights to participate meaningfully in natural resources governance and benefit from the proceeds of natural resources exploitation in a manner that satisfactorily serves the indigenous communities' economic, social, and cultural needs. The right to self-determination and the “peoples” or “indigenous peoples” over their lands and natural resources are available to host indigenous communities of natural resources in Nigeria.

The exploitation of oil in the Niger Delta has severe consequences for the people. It results in oil spillage, the destruction of farmlands, the degradation of the ecosystem, and the disempowerment of the people. Despite the vast oil revenue generated from the Niger Delta region, the indigenous communities in the Region remain in abject penury without basic social infrastructure and any means of livelihood and empowerment.

Therefore, it is recommended that the entire legal regime on natural resources in Nigeria be overhauled to give the natural resources hosting communities a measure of ownership and control rights overexploitation of the commodity within their domain. Legislative provisions extending the right to participation in decision-making over these resources to indigenous communities are pretty essential. We also recommend that the Nigerian government fast-track constitutional and policy reforms provide and protect the rights of Nigeria's indigenous communities to the natural resources located in their land. This will engender peace and development and strengthen the county's federal practices.

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