

International law and governance of natural resources in conflict and post-conflict situations

Dam-De Jong, D.A.

Citation

Dam-De Jong, D. A. (2013, December 12). *International law and governance of natural resources in conflict and post-conflict situations*. *Meijers-reeks*. Meijers, Leiden. Retrieved from https://hdl.handle.net/1887/22865

Version: Not Applicable (or Unknown)

License: License agreement concerning inclusion of doctoral thesis in the

Institutional Repository of the University of Leiden

Downloaded from: https://hdl.handle.net/1887/22865

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle http://hdl.handle.net/1887/22865 holds various files of this Leiden University dissertation

Author: Dam-de Jong, D.A.

Title: International law and governance of natural resources in conflict and post-conflict

situations

Issue Date: 2013-12-12

International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations

International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations

PROEFSCHRIFT

ter verkrijging van de graad van Doctor aan de Universiteit Leiden, op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker, volgens besluit van het College voor Promoties te verdedigen op donderdag 12 december 2013 klokke 10.00 uur

door

Daniëlla Aviva Dam-de Jong

geboren te Utrecht in 1978

Promotiecommissie:

Promotores: prof. dr. N.J. Schrijver

prof. dr. L.J. van den Herik

Overige leden: prof. dr. N.M. Blokker

prof. dr. E. Lijnzaad (Universiteit Maastricht)

prof. dr. M.M.T.A. Brus (Rijksuniversiteit Groningen) prof. dr. R. Rayfuse (University of New South Wales,

Australië)

prof. dr. E. Benvenisti (Tel Aviv University, Israël)

Lay-out: Anne-Marie Krens - Tekstbeeld - Oegstgeest

Drukwerk: CPI Wöhrmann Print Service

ISBN 978-94-6203-475-4

© 2013 D.A. Dam-de Jong

Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voorzover het maken van reprografische verveelvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet 1912 dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet 1912) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.cedar.nl/pro).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

To my father, Pieter-Jan de Jong, and my grandmother, Fokje Bakker-Geertsma, in loving memory.

"Natural resources are neither a curse nor a blessing; they are simply a source of opportunity. They can be used for tremendous good or they can be wasted."

(Former Secretary-General Kofi Annan, addressing the ${\tt UN}$ Security Council, 19 June 2013)

Acknowledgements

I could not have written this book without the support of a number of people, who are special to me in different ways. First of all, I would like to thank Professor Nico Schrijver. He has taught me most of what I know of international law today. From the moment he gave me the opportunity to assist him when I was still a student at the VU University of Amsterdam, he has been a source of inspiration to me. Also, as my PhD. supervisor, he has provided me with invaluable advice and guidance, sharing with me his profound knowledge on international law. I have been very fortunate to have him as my PhD. supervisor. I would further like to thank my other supervisor, Professor Larissa van den Herik, for her excellent guidance. This book has greatly benefitted from her critical comments. I further feel privileged that she has given me the opportunity to write an article together, which has helped me to shape my thoughts on some of the issues of direct relevance to this book.

This book has also benefitted from the many discussions I had with my colleagues at Leiden University over the past years. I would like to thank in particular Vid Prislan, Erik Koppe and Robert Heinsch. Special thanks further go to my two successive roommates, Otto Spijkers and Emilie Kuijt, who supported me both in different phases of my research. I have immensely enjoyed the many conversations – some serious, some less serious – I have had with them.

I would further like to express my appreciation to the members of the board of examiners: Professor Eyal Benvenisti, Professor Niels Blokker, Professor Marcel Brus, Professor Liesbeth Lijnzaad and Professor Rosemary Rayfuse. This book has also benefitted from the skilful editing work done by Tony Langham and Plym Peters as well as from the lay-out done by Anne-Marie Krens. Furthermore, I would like to thank the Netherlands Organisation for Scientific Research (NWO) for its financial support.

Last but not least, I would like to thank my family for their continuous support throughout my research. I would like to thank my mother, Joukje de Jong-Bakker, and my brother, David de Jong, for showing an active interest in my work. Most of all, I would like to thank Peter-Paul Dam for his love and patience as well as our two sons, Alexander and Noam, who are an infinite source of joy to me.

This book has been completed on 1 September 2013.

Table of Contents

1	INTRODUCTION 1				
1.1		onships between natural resource wealth and armed conflict	4		
1.2		ctors involved in resource-related armed conflicts	7		
	1.2.1	Domestic governments	8		
		Foreign States	11		
		Armed groups Companies	11 17		
1.3		cations for strategies to address resource-related armed conflicts	17		
1.4		ition of terms used in this book	22		
1.5		of the book	24		
1.6		ture of the book	25		
1.7		pproach to international law adopted in this book	28		
1.,		Treaties and treaty interpretation	29		
		Customary international law	33		
		Soft law	36		
	1.7.4	Binding acts of international organizations: UN Security Council			
		Resolutions	39		
	1.7.5	Principles of international law	41		
PAI		The legal framework for the governance of natural resources in States ntroductory remarks to Part I	43		
2	Defin	IING THE RIGHT OF PEOPLES AND STATES TO FREELY EXPLOIT THEIR			
		RAL RESOURCES: PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES	45		
2.1	Introd	luctory Remarks	45		
2.2		ation of the principle of permanent sovereignty over natural	10		
۷.۷					
	2.2.1	Early recognition: permanent sovereignty and the right to self-	46		
		determination	46		
	2.2.2		40		
		The 1962 Declaration and the following years: regulating	40		
		The 1962 Declaration and the following years: regulating foreign investment	47		
	2.2.3	foreign investment			
	2.2.3	· · · · · · · · · · · · · · · · · · ·			
	2.2.32.2.4	foreign investment From resource rights to duties: permanent sovereignty and	47		
		foreign investment From resource rights to duties: permanent sovereignty and sustainable development	47		

X Table of Contents

2.3	The nature and legal status of the principle of permanent sovereignty over natural resources		
2.4			
	resou	,	59
2.5		osition of governments under international law	59
2.6	Concl	luding remarks	65
3		OSER LOOK AT PEOPLES AS SUBJECTS AND BENEFICIARIES OF THE	
	PRINC	IPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES	67
3.1		ductory Remarks	67
3.2		ore detailed definition of "peoples"	68
		A definition of "peoples"	68
		"Peoples" in the sense of indigenous peoples	72
2 2	3.2.3		74
3.3		ight to self-determination Evolution of the right to self-determination	75 75
		The nature and legal status of the right to self-determination	88
	3.3.3	Implementation of the right to economic self-determination in	00
	0.0.0	the sovereign State	91
3.4	The r	ight to development	97
		Evolution of the right to development	98
		The nature and legal status of the right to development	105
	3.4.3	The implementation of the right to development within the	
		sovereign State	108
3.4	Appr	aisal	109
4	ENIVIE	DONIMENTAL LAW OPLICATIONS DELEVANT FOR THE COVERNANCE OF	
4		RONMENTAL LAW OBLIGATIONS RELEVANT FOR THE GOVERNANCE OF RAL RESOURCES	113
11			
4.1 4.2		ductory remarks	113
4.2	4.2.1	ns and structure of international environmental law Origins of international environmental law	114 114
	4.2.2	The structure of international environmental law	117
4.3		iples resulting from international environmental law	119
1.0	4.3.1	The obligation to conserve and sustainably use natural wealth	11,
		and resources	120
	4.3.2	The obligation to safeguard natural resources for future	
		generations	125
	4.3.3	The obligation to prevent damage to the environment of other	
		States	129
	4.3.4	The obligation to adopt a precautionary approach to protect the	
		environment and natural resources	136
4.4		mon regimes	144
	4.4.1	Natural resources situated within State territory with special1	
		importance for the international community	145

Table	e of Contents	XI
4.5	4.4.2 Common concern 4.4.3 Shared natural resources Conclusions	148 149 153
	CONCLUDING REMARKS TO PART I	155
PAR	T II – The governance of natural wealth and resources in situations of armed conflict Introductory remarks to Part II	159
5	THE ROLE OF INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW IN SITUATIONS OF ARMED CONFLICT	161
5.1 5.2	Introductory remarks The outbreak of armed conflict as grounds for the termination or	161
0.2	suspension of treaties 5.2.1 General principles concerning the effects of armed conflict on	165
	treaties	165
	5.2.2 Human rights instruments	167
	5.2.3 International environmental treaties	175
	5.2.4 Conclusions on the outbreak of armed conflict as a ground for	
	the termination or suspension of treaties	180
5.3	Termination or suspension of treaties under the 1969 Vienna	
	Convention on the Law of Treaties	181
	5.3.1 Material breach	181
	5.3.2 Supervening impossibility of performance	184
	5.3.3 Fundamental change of circumstances	186
	5.3.4 Conclusions on the relevance of other grounds for the	
	termination or suspension of treaties in situations of armed	
	conflict	188
5.4	Circumstances precluding wrongfulness	189
	5.4.1 Force majeure	189
	5.4.2 Necessity	191
5.5	Customary international law	193
	5.5.1 The principle of permanent sovereignty over natural resources	193
	5.5.2 The environmental principles of sustainable use and prevention	105
5.6	of environmental damage	195
5.0	The role of international human rights and environmental law in situations of armed conflict	197
6	PROTECTION OF NATURAL RESOURCES AND THE ENVIRONMENT UNDER	201
	INTERNATIONAL HUMANITARIAN LAW	201
6.1	Introductory Remarks	201
6.2	Qualification of the legal situation	203
	6.2.1 Internal armed conflict	204

XII Table of Contents

	6.2.2	International armed conflict	209
	6.2.3	The relevance of the distinction between international and	
		internal armed conflicts	213
6.3	Interr	national humanitarian law protection of natural resources and the	
	envir	onment	215
	6.3.1	The protection of property	216
	6.3.2	The protection of civilian objects	232
6.4	The N	Martens Clause	243
6.5	Prelin	ninary conclusions	248
	Conc	ELUDING REMARKS TO PART II	251
PAR	T III –	The governance of natural resources as part of conflict resolution	
		and post-conflict peacebuilding efforts	
		Introductory remarks to Part III	257
7	UN SE	CURITY COUNCIL SANCTIONS REGIMES	261
7.1		luctory remarks	261
7.1		ral remarks concerning sanctions	263
7.2		<u> </u>	266
7.3	7.3.1	examples of resource-related sanctions regimes The 232 Southern Rhodesia Sanctions Regime	266
	7.3.1	· · · · · · · · · · · · · · · · · · ·	269
		Comparing the sanctions regimes	273
7.4		ive commodity sanctions	273
7.4		The 792 Cambodia Sanctions Regime	275
		The 864 UNITA Sanctions Regime	280
		The 1132 Sierra Leone Sanctions Regime	285
	7.4.4	The 1343 Liberia Sanctions Regime	288
		The 1521 Liberia Sanctions Regime	293
	7.4.6	The 1572 Côte d'Ivoire Sanctions Regime	297
	7.4.7	· · · · · · · · · · · · · · · · · · ·	302
7.5		commodity sanctions to targeted sanctions	304
7.0	7.5.1	The 1493 DR Congo Sanctions Regime	304
	7.5.2	The 1970 Libya Sanctions Regime	311
	7.5.3	Comparing the sanctions regimes	316
7.6		aisal of the Security Council's approach to addressing the links	010
7.0		een natural resources and armed conflict	316
	7.6.1	Legal basis	317
	7.6.2	Objectives	317
		Evolution in the approach of the Security Council	320
	7.6.4	Sustainability: a missed opportunity	321
		The role of the Security Council	323

Table of Contents	XIII

8	ADDRESSING RESOURCE-RELATED ARMED CONFLICTS WITH INFORMAL	
	NORMATIVE PROCESSES	327
8.1	Introductory remarks	327
8.2	The Kimberley Process for the Certification of Rough Diamonds	330
	8.2.1 Context	330
	8.2.2 Scope and objectives of the scheme	331
	8.2.3 Participants and institutional structure	334
	8.2.4 Operation of the scheme	336
	8.2.5 International recognition of the Kimberley Process	339
	8.2.6 Appraisal of the initiative	340
8.3	Extractive Industry Transparency Initiative	343
	8.3.1 Context	343
	8.3.2 Scope and objectives of the initiative	343
	8.3.3 Participants and institutional structure	345
	8.3.4 Operation	346
	8.3.5 International recognition of the initiative	348
	8.3.6 Appraisal of the initiative	352
8.4	OECD Due Diligence Guidance for Responsible Supply Chains of	
	Minerals from Conflict-Affected and High-Risk Areas	354
	8.4.1 Context	354
	8.4.2 Scope and objectives of the initiative	355
	8.4.3 Participants and institutional structure	358
	8.4.4 Operation	361
	8.4.5 International recognition of the initiative	363
	8.4.6 Appraisal of the initiative	365
8.5	Substantive contribution of the initiatives to improving resource	
	governance	367
8.6	Effectiveness of the initiatives	369
8.7	Concluding remarks	370
	CONCLUDING REMARKS TO PART III	373
9	REGULATING THE GOVERNANCE OF NATURAL RESOURCES FOR THE PURPOSES	
	OF CONFLICT PREVENTION, CONTAINMENT AND RESOLUTION	375
9.1	Introductory remarks	375
9.2	The general legal framework for the governance of natural resources	
	within States	376
9.3	The governance of natural resources in situations of armed conflict	379
9.4	The governance of natural resources as part of conflict resolution and	
	post-conflict peacebuilding efforts	383
9.5	The contribution of international law to the prevention, containment	
	and resolution of resource-related armed conflicts	386

XIV	Table of Contents
	
SAMENVATTING	389
BIBLIOGRAPHY	399
TABLE OF TREATIES	417
TABLE OF CASES	421
UNITED NATIONS DOCUMENTS	425
INDEX	439
CURRICULUM VITAE	443