



Universität Hamburg
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FACULTY
OF LAW

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Recent challenges for economic self-determination of peoples

From sovereignty over renewable resources to trading in a time of armed conflict

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Agenda

- 1 Introduction to economic self-determination
- 2 Trade in a time of armed conflict
- 3 Renewable resources and economic sovereignty
- 4 Practice from the Global South and North
- 5 (Some) conclusions

1

Introduction to economic self-determination

Economic self-determination

- Art. 1(2) ICCPR/ICESCR
 - ‘All peoples may, for their own ends, **freely dispose of their natural wealth and resources** without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.’
- Art. 55 UN Charter
 - (inter alia) the UN 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’

Evolution of economic self-determination



Permanent sovereignty over natural resources

- 1962 - UNGA Res. 1803 (XVII), para. 1:
 - ‘The right of peoples and nations to 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’
 - has been advocated by formerly colonized countries in an effort
 - a) to secure—for those peoples still living under colonial rule—the benefits arising from the exploitation of natural resources, and
 - b) to provide newly-independent States with a legal shield against infringements of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies
- 1974 - Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX)
- rule of customary international law, cf. *Armed Activities* (para. 244) and codified extensively
 - eg, ICCPR; ICESCR; Art. 21 African Charter; Art. 13 Vienna Convention on Succession of States in Respect of Treaties; Art. 137 Convention on the Law of the Sea; Art. 3 Convention on Biological Diversity
- PSNR **complements** and further **refines** the right of self-determination of peoples (and the principle of State sovereignty)

Permanent sovereignty over natural resources

- natural wealth and resources in particular, then extended to *all* resources
 - fisheries, agricultural resources, water...
 - renewable resources?
 - wind, water, sun → 'sacred' resources for many indigenous people
 - sovereignty (+)
 - but: equitable use more feasible for renewable resources
 - multi-actor use possible

Subjects of PSNR

- States
 - over all resources within their sovereign territory and where they enjoy sovereign rights
 - however: obligation to ensure exploitation of natural resources in the interest, and to the benefit, of its people
- ‘the right of peoples’
 - national peoples (= the population of a State)
 - peoples of the remaining non-self-governing territories
 - peoples under alien domination, subjugation and exploitation (especially under occupation)
- indigenous people? → relational sovereignty
- different (federal) people in a nation State?

Manifestations of economic sovereignty

- nationalization, expropriation or requisitioning
- conclusion of (association) agreements
 - free trade zones, preferential tariff schemes, mobility agreement for workforce...
- authorizations/quotas to foreign States or private investors
- selling of State assets to private investors
- “resource curse”/the paradox of plenty?
 - a pattern in which mineral-rich states construct their economies around a single commodity, neglecting to develop other industries and leaving the economy vulnerable to booms and busts (Terry Lynn Karl, 1997)

Limitations to economic self-determination

- other State's economic sovereignty
 - equitable use of transnational resources
 - no harm principle
 - rules governing international armed conflicts
 - ...
- other people's economic sovereignty
 - e.g. the occupying State vs. the occupied people
- other rules of international law
 - e.g. WTO law, such as Most Favored Nation clauses = an advantage negotiated with one country must be extended to all trading partners who are WTO members
 - e.g. Law of the Sea, such as limitations to drilling, oil platforms, wind parks etc.
 - ...

Investor-State Dispute Settlement (ISDS)

- conflict of interest: **foreign investor** vs. **national policies**
 - e.g. safeguarding environmental concerns or securing public goods
- (bilateral) trade agreement between the investor State and the State in which the investment takes place
- contractual exclusion of national jurisdiction, instead arbitration as the chosen form of dispute settlement
- continuation of colonial power structures and „neo-colonialism“?
 - earlier forms of colonial extraction was the uncompensated exploitation of resources
 - but concession agreements had been an instrument in colonialist projects as well
- in any event: heightened scrutiny on **consent**

Heightened scrutiny in colonial treaty-making

- Art. 73 UNCh
 - ‘a sacred trust’ to ensure the ‘political, economic, social, and educational advancement, their just treatment, and their protection against abuses’ as well as ‘to develop self-government’ for the non-self-governing territories
- Chagos Advisory Opinion (ICJ 2019)
 - ‘heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony’ (para. 172)
 - Here, territorial disintegration of parts of the territory
 - general rule?

(Lack of) consent in international treaty-making

- Art. 34 VCLT
 - 'A treaty does not create either obligations or rights for a third State without its consent.'
 - *pacta tertiis* rule/principle of relative effect of treaties
 - people entitled to self-determination = third party
- error, fraud, corruption, coercion (Arts. 48 – 52 VCLT), fundamental change of circumstance (Art. 62 VCLT)
- Art. 53 and Art. 64 VCLT
 - 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.'
 - *jus cogens* = 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'
 - self-determination of peoples (undisputed colonial self-determination) included

2

Trade in a time of armed conflict

PSNR in armed conflict and occupation

- 464 SD movements in 120 countries from 1945 to 2012 (Sambanis et al, 2018)
- During occupation?
 - UNGA Resolution 62/181 of 19 December 2007
 - reaffirmed ‘the principle of the permanent sovereignty of peoples under foreign occupation over their natural resources’ (para 3)
 - exploitation of resources of people under occupation only under very strict circumstances and not for the occupant’s own gain
- During hostilities?
 - Armed Activities in the Congo: ICJ (-), but this was a controversial decision

Examples of conflict resources

- minerals and diamonds (UNGA Res. 55/56 (2001))
- oil
- water
- marine resources
- „green energy“

Case Study

Northern Cyprus/Turkey

Turkey and Northern Cyprus

- since 1974 – Northern Cyprus under Turkish occupation (36% of the island), Turkish Republic of Northern Cyprus (TRNY) only recognised by Turkey
- Greek Cypriotes fled to the South, Turkish Cypriots to the North
- Initially, agricultural resources as the main mode of exploitation
 - imported into the EU common market as either *Made in Cyprus* or *Made in Turkey*
- since 2012 – Turkish gas exploration including drilling activities for natural gas off the coast of Northern Cyprus
- 2019 – EU sanctions Turkish private individuals for the drilling activities and suspends negotiations for association agreements and Turkey's EU candidate status
- Cyprus itself is granting exploration licenses (Exxon, ENI...)
 - Turkey: Cyprus's hydrocarbon activities 'have been carried out unilaterally' and 'violate the rights of the Turkish Cypriots, who are one of the co-owners of all natural resources of the island'

Case Study

Ukraine/Russia



Ukraine and Russia

- 2013 – Yanukovich refuses to sign the long-awaited (political and economic) EU-Ukraine association agreement
- 2013/2014 – Maidan uprising
- 2014 – annexation of the Crimean peninsula following an (internationally not recognized) referendum on Crimean self-determination, pro-Russian movements in Donbas (Donetsk and Luhansk People's Republics)
- 2017 – EU-Ukraine AA enters into force
- 2022 – Russian armed attack on Ukraine
 - Initially, claims of possible genocide in Eastern Ukraine
 - 'historic Russian lands'/'one people' (Putin)
- since 2022 – intensification of EU-Ukraine relations amidst the most recent Russian armed attack
- 2023 – Ukraine is granted EU accession candidate status

Ukrainian economic self-determination – EU perspective

- ‘Russia’s unprovoked and unjustified war of aggression against Ukraine since 24 February 2022 has had a profoundly negative impact on the **ability of Ukraine to trade with the rest of the world**, both because of the destruction of production capacity and the unavailability of a significant proportion of means of transport due to, for example, the restriction and uncertainty of access to the Black Sea.
- Under such exceptional circumstances and to **mitigate the negative economic impact** of Russia’s war of aggression against Ukraine, it is necessary to accelerate the development of closer economic relations between the Union and Ukraine in order to provide continued support to the Ukrainian authorities and **population.**’

(Council of the EU and EU Parliament, 2023)

Ukrainian economic self-determination – EU perspective

- EU has sanctioned Russian private and governmental individuals in 2014 and in 2022
- However: no engagement with question of self-determination
 - **very** common for EU accession candidates
 - similarly, see for example Kosovo
- economic warfare?
 - ‘hot war and cold freezes’ (Mathias Goldmann, 2022)

3

Renewable resources and economic sovereignty

Renewable resources and economic sovereignty

- significance
 - no risk of depletion or unrecoverable harm through armed conflict
 - after a prolonged state of conflict, or prolonged foreign occupation where the occupier illegally exploited the natural resources of the people or the conflict caused serious harm to the environment or infrastructure, renewable energy can increase the economic strength of a people immediately
 - fosters foreign investments
- challenges
 - environmental degradation
 - exploration activities often very resource-intensive

Case Study

Western Sahara

European colonization of Morocco and Western Sahara



Historical background

- 1975 – Spain wants to end the administration of Western Sahara, ICJ gives its advisory opinion on Western Sahara
- ICJ finds no legal ties of Moroccan sovereignty over Western Sahara, affirms Sahrawi right of self-determination
- 1975 – Morocco annexes Western Sahara (Green March/settlements as well as military action, involvement of Algeria and Mauretania as well)
- since 1975 – under Moroccan occupation (cf. UNSC Resolutions), Spain still *de jure* administering power of Western Sahara

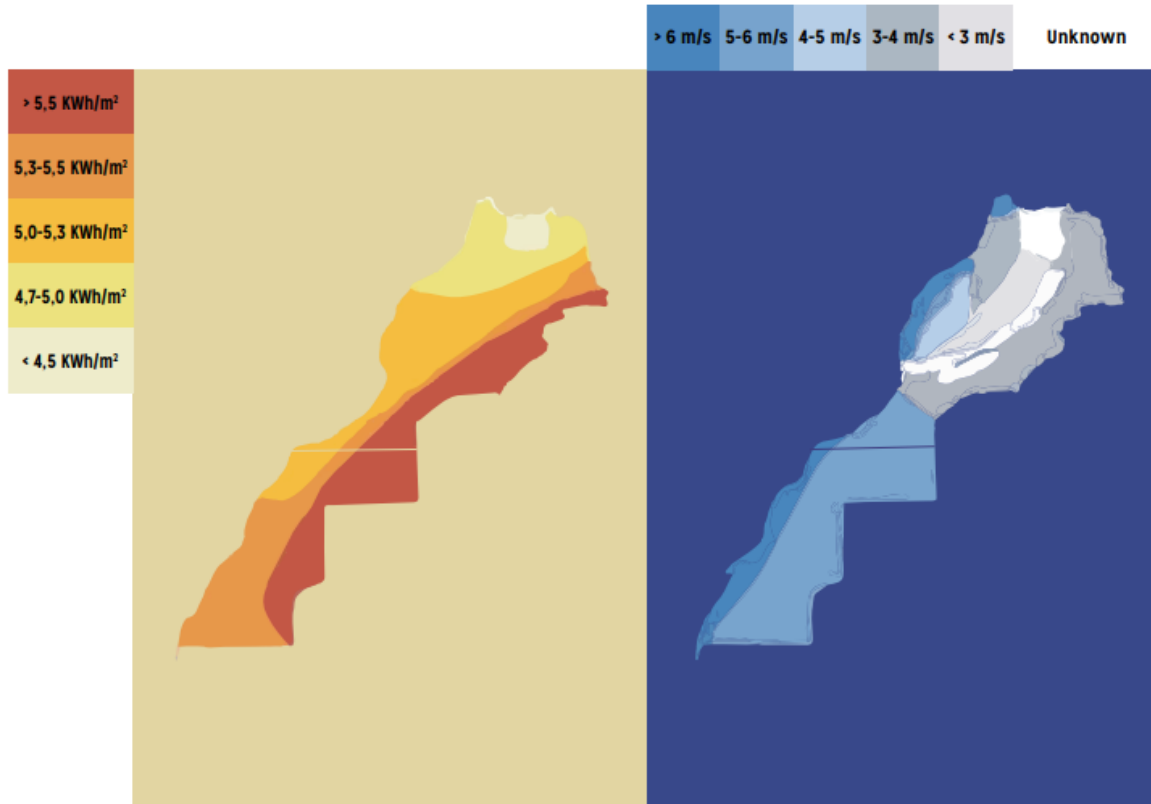
Moroccan occupation of Western Sahara



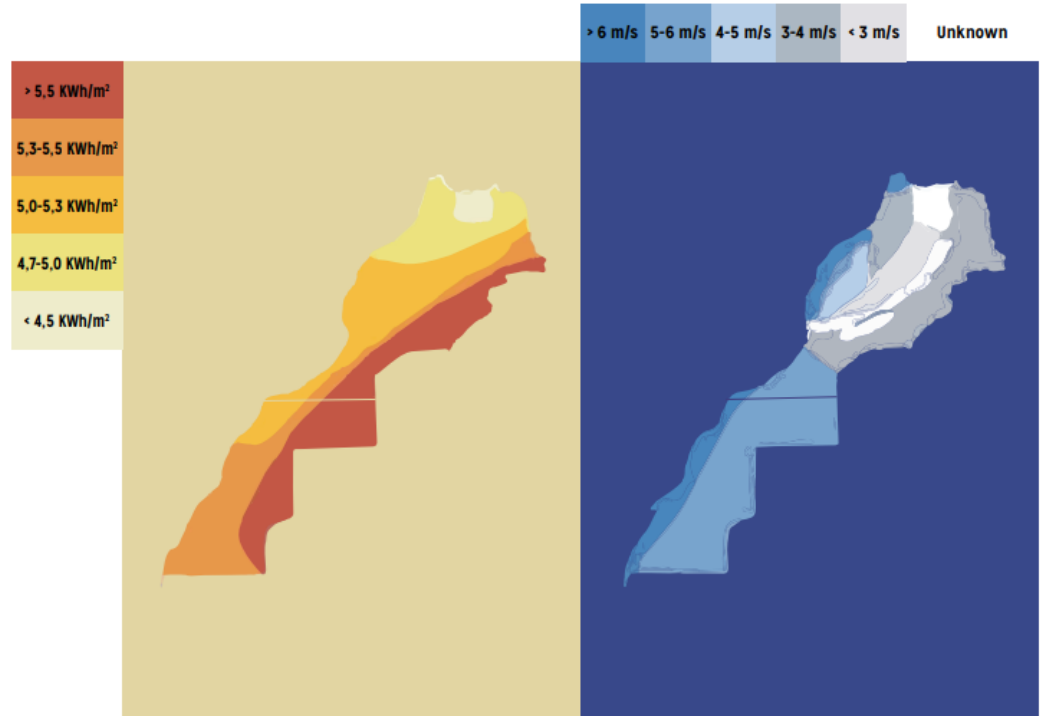
- Morocco-controlled territory
- Polisario-controlled territory

..... Berm

Renewable energy potential



Renewable energy potential



Western Sahara, the sun and the wind

Sahrawi poet Mohammed Ebnu, *Children of the Sun and the Wind*

[...]

We still follow the same clouds,
resting in the shadows of thorn trees [...]

- 95% windmill energy needed for Moroccan state-owned phosphate company OCP to exploit Western Sahara's non-renewable phosphate reserves in Bou Craa
- the renewable energy is generated by 22 Siemens wind turbines at the 50 MW Fom el Oued farm, operational since 2013
- UN climate body UNFCCC accepts Morocco's reporting on its energy infrastructure in Western Sahara as part of its own commitments to reach the Paris Agreement targets
- technical impossibility to distinguish between Moroccan and Western Saharan power imports to the EU

4

Strategies from the Global South and North

Strategies from the Global South



Strategies from the Global North

DAKHLA

à partir de
311 €/TTC**
ALLER RETOUR
prix au départ de Strasbourg

MAROC

Le Maroc vous sourit
** Tarifs valables du 30/09/2011 au 30/09/2012

oneworld

EU policy towards resources in Western Sahara

Council Decision (EU) 2019/217

(6) It should be ensured that the trade flows developed over the years are not disrupted, while establishing appropriate guarantees for the protection of international law, including of human rights, and sustainable development in the territories concerned. (...).

An agreement between the European Union and the Kingdom of Morocco is the only means of ensuring that the import of products originating in Western Sahara benefits from preferential origin, given that only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences.

(7) (...) The effects of tariff benefits on employment, human rights and the exploitation of natural resources are very difficult to measure as they are by nature indirect. Moreover, it is not easy to obtain objective information on this issue.

EU policy towards resources in Western Sahara

- ‘powerful leverage effect [...] for economic growth and thus social development outweigh the disadvantages raised in the consultation process’
- ‘failure to grant tariff preferences would significantly jeopardise exports from Western Sahara, especially those of fishery and agricultural products’
 - overwhelming majority of fish stocks under Moroccan administration
 - already being increasingly depleted by European (Spanish) vessels

EU policy towards resources in Western Sahara

Council Decision (EU) 2019/441

- ‘It should be possible for Union fleets to continue the fishing activities they had pursued since the entry into force of the Agreement, and the scope of application of the Agreement should be defined so as to include the waters adjacent to the territory of Western Sahara.’

Commission Report on benefits for the people of Western Sahara (2018)

- 'most people now living in Western Sahara are very much in favour of the extension of tariff preferences to products from Western Sahara under the EU-Morocco Association Agreement' (p. 31)
- 'positive opinion [...] expressed by Western Saharan elected representatives to national, regional and local bodies following the awareness and consultation exercise carried out by the authorities among Moroccan institutions' (p. 31)
- 'shared by a large majority of grass-roots socio-economic organisations in the region' (p. 32)

Implementation reports (2020 and 2021)

- ‘Western Sahara shows the characteristics of a market economy in expansion, and the main industries are fishing and fish processing, phosphate mining, agriculture (especially earlygrowing fruit and vegetables and pastoral nomadism), trade and craft industries.’ (p. 13)

The CJEU and Sahrawi economic self-determination

- 1) infer from the **principle of self-determination** that WS separate and distinct status must be respected and
- 2) infer from the **principle of relative effect of treaties** that the people of that territory must consent to any agreement which would be implemented on that territory (para. 348)
 - both conditions were set out by the CJEU (in 2016) as ‘clear, unconditional and precise obligations imposed on the institutions’ in relation to the Sahrawi as a third party
 - the margin of appreciation of the Council is limited by these clear obligations

Cases T-279/19, T-344/19 and T-356/19, General Court, *Front Polisario v Council*, 29 September 2021

→ appeal pending, judgement expected for summer 2024

Some conclusions

Sovereignty over resources is one of the main reasons
for armed conflict.

01

Renewable resources are part of
a people's permanent sovereignty
over their natural resources.

02

Consent must prevail over economic
benefit.

03

Some questions

Further questions

- Are illegitimate governments, e.g. in Haiti, entitled to exploit natural resources in the name of the Haitian people?
- How do you sustainably restore economic self-determination after prolonged conflict or occupation?
- How do you avoid the resource curse with the means of economic self-determination?
- Is ISDS a continuation of colonial power structures?



Further reading

- Thomas D. Musgrave, 'An analysis of the 1969 Act of Free Choice in West Papua', in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility* (CUP 2015), 209-228
- Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law*, 651–684
- Nora Fisher-Onar and Kalypso Nicolaidis, 'The decentering agenda: A post-colonial approach to EU external action', in Sieglinde Gstöhl and Simon Schnuz (eds.), *The External Action of the European Union: Concepts, Approaches, Theories* (London 2021), 288-304

Thanks for engaging!



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