

Restraining permanent sovereignty over natural resources

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Abstract

The paper examines the international law principle of the permanent sovereignty over natural resources from a critical perspective of its conflict with demands for global environmental protection and sustainability. It is argued that state framed resource sovereignty *per se* does not represent an obstacle in the path of greater global environmental justice. The principle is strongly justified as a distinct economic expression of post-war state sovereignty and the ramification of the universalization of such principles as decolonization, self-determination, territorial rights, and sovereign equality of states. It is instead the interpretation of sovereignty and the set of practices established in the name of permanent sovereignty over natural resources that undermine international environmental law – the extension of sovereign resource rights beyond state borders, the continuous priority of unrestricted resource rights and development rights over international standards for environmental protection and sustainable use of resources, and the failure to reinforce notions and principles, both conceptually and legally, that better correspond to the global nature and comprehensive demands of ecological systems. The paper argues that the plausibility of resource sovereignty depends on the interpretation of the concept of sovereignty and how it incorporates self-limiting standards in its exercise. A parallel is established between limiting resource sovereignty using environmental sustainability standards and ecological stewardship and human rights as a widely accepted constraint on the exercise of state power over the population.

Keywords: sovereignty; resources; international environmental law; human rights.

Resumen. *La limitación de la soberanía permanente sobre los recursos naturales*

El ensayo examina el principio jurídico internacional de soberanía permanente sobre los recursos naturales desde una perspectiva crítica y analiza su posible colisión con la demanda de sostenibilidad y de una protección del medio ambiente a escala global. Se viene defendiendo que una soberanía nacional sobre los recursos naturales no es obstáculo alguno para la consecución de una justicia ambiental global de mayor alcance. La norma es fuertemente justificada como una expresión económica distinta de la soberanía estatal de postguerra y como una ramificación de la universalización de principios como descolonización, auto-determinación, derechos territoriales y equidad de los estados en cuanto a su soberanía. Pero la interpretación de la soberanía y el aparato de prácticas establecidas en el nombre

de la soberanía permanente sobre los recursos naturales menoscaba, más bien, la ley ambiental internacional, por ejemplo mediante la extensión de los derechos soberanos sobre los recursos más allá de las fronteras de los estados, o estableciendo una prioridad continuada del derecho a un recurso abierto y del derecho al desarrollo por encima de las normas internacionales de protección ambiental y del uso de recursos sostenibles, o contribuyendo al poco éxito en el refuerzo de nociones y principios, tanto conceptual como legalmente, que se correspondan mejor con la naturaleza global y las demandas comprensivas de los sistemas ecológicos. El ensayo defiende que la plausibilidad de la soberanía sobre los recursos depende de la interpretación del concepto de soberanía y de la manera cómo incorpore normas autolimitadoras en el ejercicio de la misma. Se establece un paralelo entre limitar la soberanía sobre los recursos naturales mediante normas de sostenibilidad ambiental, y la vigilancia ecológica responsable y los derechos humanos como medidas limitadoras ampliamente aceptadas para regular el ejercicio del poder estatal sobre los ciudadanos.

Palabras clave: soberanía; recursos; ley internacional medioambiental; derechos humanos.

Summary

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1. Introduction

Permanent sovereignty over natural resources is a firmly established standard of international law that authorizes states to exercise exclusive jurisdiction over natural resources and all components of the natural environment within their national boundaries. Ever since its introduction into international law in the late 1950s, this standard has been widely accepted by states and indigenous groups as an economic corollary of the fundamental right to self-determination. However, permanent sovereignty over natural resources has been contested, if not downright refuted, by environmentalists and seekers of global justice, who argue that national borders and state sovereignty obstruct the solutions for such pressing global issues as climate change, environmental degradation, resource depletion, world poverty and economic inequality.

In terms of ecological sustainability and environmental protection, state-based resource sovereignty appears to be especially questionable. Increasingly urbanized and globalized societies require an ever-growing number of resources: soil, water, sink for greenhouse gases and other waste etc. However, the capacity of the Earth's biophysical and ecological systems to support modern life worldwide is reaching its limit. The critical environmental threshold may have been passed already. A group of scientists led by Johann Rockström recently identified nine measurable planetary boundaries and

showed that human beings had already surpassed three such boundaries: in greenhouse gas loading of the atmosphere, in nitrogen pollution, and in the loss of biological diversity (Rockström, 2012).¹ It is beyond obvious that globalization, modernization, and development not observing responsible use and environmental protection will further undermine the capacity of life-supporting ecological systems to sustain themselves and hence provide ecosystem services for humans.

Claims to permanent, full, inalienable, or absolute rights of states to natural resources within their boundaries, as justified by the permanent sovereignty over natural resources, clearly undermine the global effort to safeguard the environment, if only because environmental systems operate without paying heed to the firmly entrenched and yet historically contingent territorial jurisdictions of sovereign states. How should resource sovereignty, underlain by principles of autonomy and self-determination, the bedrocks of the modern international system, be reconciled with these concerns? In light of today's pressing need for environmental protection, can resource sovereignty be justified at all? This paper argues that there are good reasons not to refuse state sovereignty as a framework for global environmental justice, or for other dimensions of global justice, for that matter. However, the viability of resource sovereignty, both in theory and in practice, depends on the very interpretation of the concept of sovereignty and the way it incorporates self-limiting standards in its exercise. A parallel already exists. Resource sovereignty can be limited by environmental sustainability and ecological stewardship standards in the same way that human rights constrain the exercise of state power over its citizens.

2. The development of resource sovereignty: territorial expansion and economization

Permanent sovereignty over natural resources emerged from post-war efforts to reinforce the sovereign equality of states and economic equity in the post-colonial international order. The original statement regarding this collective right is recorded in the United Nations Resolution *Declaration on Permanent Sovereignty over Natural Resources* adopted in 1962. This resolution declares that permanent sovereignty over natural wealth and resources is an inherent

1. The Earth's biophysical and ecological systems include climate change, rate of biodiversity loss, nitrogen cycle, phosphorus cycle, stratospheric ozone depletion, ocean acidification, intensive global freshwater use, changes in land use, atmospheric aerosol loading, and chemical pollution. According to Rockström, quantitative planetary boundaries are defined for each system as a threshold beyond which the systems move into a state in which they can no longer provide support for the social and economic development of human societies. For example, the suggested climate change boundary of 350 parts per million of carbon dioxide in the atmosphere aims to prevent crossing of the threshold beyond which a significant climate change will most likely occur (Rockström, 2012; Folke, 2013).

and overriding right of a state to control the use of its natural resources in its territory, thus protecting them against foreign infringement.²

Permanent sovereignty over natural resources was further confirmed and developed in a series of charters and resolutions dealing with human rights, international economic order, social progress, development, and the environment. The *Human Rights Covenants* from 1966, the *Charter of Economic Rights and Duties of States* (1974) and the *Declaration on the Establishment of a New International Economic Order* (1974) are the most important international law instruments through which resource sovereignty was affirmed *erga omnes*.³ As a result of these treaties and legal instruments, permanent sovereignty over natural resources legally protects the right of the states to unlimited control, free exploitation and disposal of natural resources in their territories, to choose their economic system without outside interference, and also to regulate and nationalize foreign investment.

While the standard of permanent sovereignty over natural resources is relatively unambiguous in its aim and origin in the decolonization process, it has been less clear what state prerogatives it authorizes and, more importantly, what practices cannot be justified in its name. When assessing the development of the set of practices established in the name of permanent sovereignty over natural resources, one general tendency becomes apparent which, as Nico Schrijver rightly argued, is towards extending the scope of rights and prerogatives justified by resource sovereignty, with significantly less attention being paid to the question of what duties are incumbent on states and what kinds of limits are imposed on them in the exercise of their sovereignty over natural resources (Schrijver, 1997: 306). Unfortunately, it is in the field of environmental sustainability and protection where the emphasis on limits and duties has not quite corresponded to the urgency of environmental issues.

From the perspective of the sustainability of global ecological systems, three problematic tendencies can be observed as critical in the process of the gradual establishment of the practice of resource sovereignty. First, economically motivated pressure has been exerted by states to extend sovereign resource rights beyond their borders. Starting in the 1960s, this pressure led to a significant expansion of sovereign territoriality into marine areas and to a lesser extent into airspace and hence to the broadening of the scope of the appropriation of resources that had previously been international. Today, permanent sovereignty over natural resources comprises claims to natural resources and wealth not only on the land within a territory, but also to terrestrial and marine natural resources – and all economic activities for their exploitation (Schrijver, 2010: 111).

The second parallel tendency is the continuous prevalence and priority of unrestricted resource rights and development rights over international standards

2. The resolution is available here: <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803%28XVII%29>

3. In international law, *erga omnes* standards are the concern of all states regardless of their multilateral or bilateral agreements. All states have a legal interest in the protection of these standards; they are obligations for everyone.

for environmental protection and the sustainable use of resources. Although the sustainable use of natural resources underlies concepts such as the right to development, human rights, and economic growth, there is clear anthropocentric and economic substance in the concept of sustainable development resulting from ongoing efforts to reinforce economic development in developing countries and reduce poverty and inequality. A retrospective look at UN conferences and declarations on the environment show that the international community is actually less and less specific when it comes to guidelines for the management and conservation of natural resources, while it increasingly emphasizes the view that environmental policy should not obstruct development policy.⁴ At the World Summit on Sustainable Development in Johannesburg in 2002, the principles of international environmental law and their role in the promotion of sustainable development were barely touched upon. Instead, strategies for poverty reduction, food production, consumption and production patterns and the need to safeguard natural resources for the sake of social and economic development were addressed (Schrijver, 2008: 82, 96).

Finally, there has been a failure to reinforce, either conceptually or legally, notions and principles that better correspond to global nature and the comprehensive demands of ecological systems. International law, for example, has not adopted any consistent framework for natural resource domains that are not subject to national jurisdiction but belong to the global community as a whole. These resources are sometimes referred to as 'global commons'. The climate, the atmosphere, outer space, and the high seas are obvious candidates for global commons located outside national borders. However, international law does not recognize the concept of global commons; and neither has it developed a consistent jurisdiction for these spaces. The so-called 'common heritage of humankind' regime, introduced to foster international cooperation for peaceful purposes and to share among all nations the benefits from the use of common resources from oceans, unfortunately remains conceptually underdeveloped and inconsistently applied. It has not provided a real environmental alternative to an essentially economic concept of permanent sovereignty over natural resources (Schrijver, 2010: 75-113).

The development of the international law of the sea in recent decades might serve as a telling example of all these trends. Until the second half of the twentieth century, territorial sovereignty was strictly limited to land within state boundaries. Maritime states could only claim a narrow belt of the sea about three nautical miles off the coast. The use of the rest of the oceans was regulated by a regime called freedom of the high seas. This traditional principle of international law defined the sea as common to all and prohibited state-based or private appropriation of its territory and resources. Ships could thus freely navigate the waters, and states could engage in trade and fishing. The

4. Three conferences are relevant: the UN Conference on the Human Environment in Stockholm, 1971, the Earth Summit in Rio de Janeiro, 1992, and the World Summit on Sustainable Development in Johannesburg, 2002.

assumption was that the sea's resources are inexhaustible and that humans are unable to impair the quality of the marine environment.

The United Nations *Convention on the Law of the Sea* (UNCLOS) from 1982 substantially extended territorial sovereignty over maritime areas by dividing the sea into various legal zones measured from the coastal state's baseline. Territorial sea was extended to 12 nautical miles from the baseline, with the adjacent contiguous zone extended to 24 nautical miles. The Convention also introduced the so-called exclusive economic zone (EEZ) which extends as far as 200 nautical miles from the baseline, within which a coastal state does not enjoy complete territorial sovereignty (the state is obliged to respect freedom of navigation, for example). However, it does enjoy exclusive rights to the exploration, exploitation, management, and conservation of natural resources, both living (fisheries) and non-living (resources of the seabed and its subsoil).

It is important to note that the pressure to claim much wider marine territory was motivated by attempts to achieve equitable sharing of resources and reverse the legacy of the colonial economic order. This came from Latin American countries and newly independent African states who felt the need to halt the large-scale exploitation of what were supposedly 'their' fish stocks by foreign fishing fleets and oil by foreign oil companies. The classical freedom of the high seas implied open access to the sea and would have led to first-come-first-served advantage for more economically powerful states. The continuation of this traditional standard would certainly have led to an unaccountable system of predatory economic power, unlimited exploitation of resources, and some forms of colonial competition among rich maritime nations. A new legal regime was thus necessary to define standards for the proper and sustainable management of marine resources, to protect the economic security of coastal states, and simultaneously to ensure that the sea is preserved for the benefit of all (Schrijver, 1997: 205, 228).

Therefore, parallel to the affirmation and reinforcement of sovereign resource rights to the sea, a new principle of resource management for non-sovereign maritime areas was introduced: the principle of the common heritage of mankind.⁵ Designed specifically for the use of maritime resources,⁶ this regime set standards and principles for the governance of non-sovereign areas and resources. The aim was to protect and manage common areas in the name of equity, preservation, and sharing by a global community. While resource

5. The size of the maritime area to which the common heritage principle applies has been significantly reduced by the establishment of 200-mile EEZ and can be potentially further diminished by the possibility of the extension of the outer limits of EEZ up to 350 nautical miles. EEZs, claimed or claimable, now cover about 35% of the marine area and are estimated to include approximately 90% of the living resources under commercial exploitation, tuna and whales being the main exception (Schrijver, 1997: 228).
6. The principle was first formulated in the General Assembly Resolution from 1970 called the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction; then it was incorporated into UNCLOS.

sovereignty protects exclusive national access to resources, common heritage of mankind is a form of resource management that prohibits sovereign or private appropriation. As opposed to exclusive appropriation, common international management, economic cooperation, the sharing of benefits from exploitation, the use of resources for peaceful purposes, freedom to engage in scientific research, and preservation for future generations are emphasized (Schrijver, 2010: 9).

However, the principle of the common heritage of humankind has not become a counterbalance to permanent sovereignty over natural resources, and especially to territorial expansion and the economization of resource management justified in its name. The principle of common heritage of humankind has only been applied to specific resources in the oceans, namely to the area of the deep seabed and the ocean floor and its subsoil. It remains unclear what the principle entails when it comes to these resources. With the recent discovery that the great ocean depths contain so-called 'polymetallic nodules' that are rich in valuable metals, and with ensuing attempts to examine and commercially exploit these resources, it is obvious that the seabed will not remain a completely decolonized or scientific zone nor a resource preserved for future generations.⁷

The environmental and non-economic aspirations of the principle of the common heritage of humankind are being further undermined by the possibility of extending the exclusive economic zone even further than 200 nautical miles. The Arctic region is currently a battleground where states motivated by resource grab are competing for further territorial extension of their exclusive economic zones. Although scientific data on what lies under the Arctic Ocean is incomplete, mineral deposits in the Arctic seabed are estimated to hold 25% of the world's current oil and natural gas reserves (Sonntag, Luth, 2011). Technological developments and the recent ice melt, which is said to have reduced sea ice by as much as 50%, ignited territorial temptations and resource scramble among Arctic states that are now striving to extend their exclusive economic zones beyond the 100 nm limit. In this area, which unlike Antarctica lacks a specific international legal regime to protect it against commercial exploitation,⁸ further territorial expansion is in fact possible on the basis of the criteria for the delimitation of maritime zones set in UNCLOS.

7. As a matter of international law, all rights to these polymetallic nodules are vested in humankind as a whole. In practice, this means that the International Seabed Authority (ISA) issues contracts that authorize exploration and mining and collects and distributes royalties, taking into consideration the needs and interests of developing countries. So far, research is only being conducted by the governments of China, India, South Korea, France, Germany, and Russia (Schrijver, 2010: 76-78).
8. Antarctica is designated as an area that shall be used only for peaceful purposes, including scientific investigation. The Antarctic Treaty of 1959 declared Antarctica a special conservation area and froze states' existing claims to sovereignty. Furthermore, there is a 50 year moratorium on Antarctic mineral resource activities established through the adoption of the Protocol on Environmental Protection to the Antarctic Treaty in Madrid in 1991.

These criteria allow states to further expand their exclusive economic zone to 350 nautical miles from the baseline or to 110 nautical miles from the 2,500 meter isobath,⁹ whichever is more favorable to the applicant State. The coastal state has to prove that there is a continental shelf attributable to it that reaches that far as a natural prolongation of its land territory.¹⁰ Countries such as Russia and Canada have devoted significant resources to measuring and mapping their extended continental shelves in order to establish resource sovereignty over the Arctic Ocean floor and its subsoil beyond their 200-mile exclusive economic zones. In August 2007, a Russian expedition placed a Russian flag on the seabed at the North Pole, claiming it as the utmost peak of its territory prolonged by submarine geological formations in its continental shelf.

As for the living resources of the high seas (fish stocks), these are not managed using the principle of the common heritage of mankind but through the principle of open access. In practice, this means that all states have the right to engage in fishing on the high seas on a first come, first served basis. As a result of this regulation, almost all living resources (fisheries) in the world's oceans were brought under commercial exploitation. Freedom of fishing is limited by UNCLOS provisions regarding the conservation and management of the living resources of the high seas. To avoid overexploitation, the state is obliged to maintain the population of harvested species at levels that can produce 'the maximum sustainable yield'.¹¹

Nevertheless, the vast majority of exploited fish populations have been depleted to abundance levels well below those recommended by conventional management guidelines. According to several reports, most fish species are on a continuing trajectory of decline (Pikitch, 2012). The World Bank report of 2009 predicts that if current fishing rates continue, all the world's fisheries will have collapsed by the 2050s (The World Bank, 2009). Faced with the collapse of large-fish populations, commercial fleets are searching deeper in the ocean and farther down the food chain for viable catches. This 'fishing down' is triggering a chain reaction that is upsetting the delicate balance of the sea's biological system. And yet, an ecosystem based approach with more precautionary management has not replaced traditional management of fisheries focused on obtaining the maximum sustainable yield for a single species of fish and ignoring the detrimental effects of fishing on the entire ecosystem.

9. Isobath is defined in bathymetry as the line connecting points at a depth of 2,500 meters below sea level.
10. UNCLOS provides an exception to this rule. If the continental shelf breaks into an oceanic ridge, it cannot be extended to more than 350 nm from the coast no matter where the 2,500 meter isobath falls. This issue lies at the heart of the Russian dispute over parts of the Arctic territory. Russia challenges the definition of the Lomonosov and Alpha-Mendeleev ridges as submarine ridges, claiming instead that they are natural geographical components of their continental shelf reaching to the North Pole (Sonntag, Luth, 2011).
11. Marine mammals are subject to a different management regime with stronger protection and conservation measures (Schrijver, 2010: 83-88).

As the example of marine resources shows, the principle of common heritage of humankind (a potentially far-reaching principle applicable as a set of protective measures of ecological systems regardless of the lack of an overlap with the state territory) does not represent an environmental alternative to the regime of territorial sovereignty, which explicitly protects the right to economic appropriation and exploitation of resources. Its application to other candidates for global commons has also been ambiguous.¹² For example, the atmosphere does not enjoy any special legal status or governance regime. Despite atmospheric resources sharing many features with natural resources in international areas, they are not global commons. When they are located above areas under the national jurisdiction of states and above exclusive economic zones, they are subject to the sovereignty of states. The remaining atmospheric resources are a common property, providing a completely free and open waste disposal system for a whole range of pollutants (Schrijver, 2010: 98). Only recently, the ozone layer and the climate system were vaguely declared a 'common concern of humankind' and their protection has become the subject of several protocols stipulating the necessary measures and control mechanisms for tackling ozone depletion and climate change.¹³

3. Sovereignty, territory, and global justice

Is the standard of permanent sovereignty over natural resources *per se* the obstacle to achieving greater global justice, environmental or other? I argue that the problem is not resource sovereignty itself. The key to responding to global issues is a proper understanding of the concept of sovereignty and the interpretation of resource sovereignty as being constituted by limits and duties, exactly like state sovereignty today is understood as being constituted and limited by human rights standards. Simultaneously, the reinforcement of the global regime for the management and protection of resources or ecological systems (both within sovereign territories and beyond them) must complement the reinterpretation of resource sovereignty.

12. For example, the non-appropriation of resources is not clearly articulated in any treaty or agreement regulating outer space and celestial bodies. The Moon Agreement from 1979, ratified by only 13 states (none of which are capable of space exploitation), stipulates that states have the right to exploration and use of the moon without discrimination of any kind and on an equal basis. Unlike UNCLOS, the agreement does not establish a specific institutional structure to govern the exploitation of these resources (Schrijver, 2010: 88-90).
13. The Montreal Protocol was adopted to reduce the emission of ozone-depleting substances. Unfortunately, the ratification of most recent amendments with stronger control measures has been seriously lagging despite the obvious fact that the gap in the Antarctic's ozone layer will persist longer than estimated. As regards climate change, the Kyoto Protocol from 1997 determines measures necessary for stabilizing atmospheric concentrations of greenhouse gases. Support and participation in the Protocol has been low; and ensuing conferences on climate change have not produced any binding commitments on further reduction of emissions (Schrijver, 2010: 101-110).

The reasons not to dismiss permanent sovereignty over natural resources are of both a historical and conceptual nature. Resource sovereignty is unintelligible if one does not understand its political significance in the historical context. As the history of post-war international law shows, resource sovereignty originated in negotiations over the inequitable arrangements imposed on colonized nations during the colonial period. The exploitation and appropriation of resources by foreign companies and their insistence on the continuity of their contractual rights to exploit the resources in the new post-colonial era were among the most salient injustices that the new standard of resource sovereignty corrected. Contrary to the terms of foreign investment contracts from the colonial period, developing nations claimed rights of ownership of their resources, understood as a corollary of a more fundamental right to self-determination and independence. The utilization of a state's own natural resources protected by permanent sovereignty over natural resources was an essential prerequisite for economic development and the bulwark against predatory and imperial forms of economic power and economic domination, and hence the bedrock of political independence (Anghie, 2005; Sornarajah, 2010).

Permanent sovereignty over natural resources has therefore become a widely accepted principle of a new international order and an inherent element of post-war state sovereignty. From the conceptual perspective, the emergence of permanent sovereignty over natural resources marks a profound transmutation of the institution of state sovereignty in the twentieth century that went largely unnoticed by political theory. Permanent sovereignty over natural resources translates the principles inherent in the concept of sovereignty (independence, autonomy, non-intervention, and self-determination) into the economic sphere. It emphasizes territorially determined resource rights as an economic expression of state sovereignty. But how do we account for economic competences and prerogatives of sovereign states? Is there any continuity between the concept of economic sovereignty and political sovereignty in the discourse about the state and sovereignty in political theory? Can the notion of economic sovereignty be derived from the predominantly legal discourse about political authority and state power over persons? What is the normative conception of economic rights and competences of the state and their limits?

Unfortunately, modern discourse on sovereignty offers almost no clues for answering these questions and so it is no wonder that a theory of economic aspects of state sovereignty and territoriality is still missing from political theory. This is because political and legal discourse on sovereignty has, for the most part, identified the state with its constitutional form and focused on the juridical-political questions about the form, the location, and limits on political power. From this legalistic perspective, territory has appeared to have a merely functional meaning of spatial circumscription of a sphere of jurisdiction over a population located within geographic boundaries. The concept of permanent sovereignty over natural resources can thus hardly appear as a corollary of the traditional discourse about sovereignty framed as a problem of legality and

legitimacy of political authority whose jurisdiction is thought to be directed primarily at persons.

A much younger framework of territorial rights and rights to self-determination to which resource sovereignty is connected historically might offer a starting point for an account of permanent sovereignty over natural resources. A theory of territorial rights, which includes the account of collective rights of the people over natural resources, is indeed the appropriate conceptual framework for understanding collective sovereign claims over resources. The theory of territorial rights emerged only very recently in response to several pressing issues, such as the need to find a resolution for territorial disputes or to respond to the claims to territory made by indigenous peoples (Iverson, 2002; Hendrix, 2008), and of course to the need to resolve the question of the claims to resources and their redistribution, domestically and globally (Beitz, 1990; Steiner, 1996; Pogge, 2002).

One of the distinct features of the theory of territorial rights is that it shifts attention from narrow juridical-political concern with the form, location, and limits on political power towards a more fundamental question of the moral justification of the existence of sovereign political authority and of rights, duties, and demands that belong to it. In this respect, theorists of territorial rights are reviving, explicitly or implicitly, the approach of early modern natural law thinkers who used to ask what justifies political authority and state sovereignty over particular populations and territories. Natural law thinkers assumed that both the sovereignty and territoriality of political authority play a vital role in implementing the conditions of justice. The territorial scope of sovereign political power had a broader meaning in this somewhat forgotten tradition of political thought insofar as the people's territorial rights (individual property rights and collective resource rights, for example) were conceived as a matter of pre-political natural law and justice. Sovereign rights to set positive laws were designed with the purpose of reinforcing and safeguarding this natural justice, which included not only peace and security, but also private property and the economic system (Locke, [1689] 1980). Later, the preoccupation with constitutionalism narrowed the discourse on sovereignty down to the question of the legality of sovereign political authority (Kelsen, [1934] 1970).

Some of the most recent approaches to the theory of territorial rights have been inspired by the link natural law theorists established between sovereignty, territoriality, and justice. Cara Nine, for example, offers a contemporary liberal-collectivist defense of territorially limited resource rights. Nine defends the view that the holder of territorial rights is a collective with the capacity to be politically self-determining and can establish justice within a particular geographical space through legislation and the adjudication and enforcement of laws regarding persons *and* natural resources. Recalling natural law tradition, she emphasizes that the justification for the claim made by a collective to be a territorial right holder comes from the paramount value of justice for the members of this collective.

Peace, security, and the protection of private property emphasized by early modern natural law thinkers are important parts of the implementation of the

idea of justice. However, in order to implement justice in contemporary society, these basic human needs must, in Nine's view, be extended. Relying on new interdisciplinary research in social sciences combining psychology, ethics, moral philosophy, and social policy,¹⁴ Nine thus expands the notion of justice into a new paradigm of human well-being that depends not only on the rule of law but also material welfare and economic development. Consequently, territorial rights involve more than a legitimate claim to make, adjudicate, and enforce legal rules *over persons* within a territorial domain. As Nine shows, they also include jurisdictional rights *over resources* within the territory: the authority to determine property rights, to determine the management, withdrawal and alienation of natural resources etc. (Nine, 2012: 6-9).

Nine's theory helps to recast the territorial meaning of sovereignty in economic terms. Simultaneously, it offers a response to global justice theorists and cosmopolitans who refuse territorial sovereignty and the institution of territorially demarcated political authority as a means of implementing the conditions of justice (Beitz, 1990; Barry, 1991; Pogge, 2002; Caney, 2005). Critical examination of theories of global justice is beyond the scope of this paper. Suffice to say that regardless of the scope of justice (domestic or global), it necessarily presupposes the idea that a collective is entitled to goods or resources. Such an entitlement can be explained and justified only by a theory of territorial rights that addresses who is a legitimate holder of territorial rights, what these rights exactly involve, and what justifies such an exclusive territorial claim (Nine, 2012: 146).

While such a territorial claim can be global in scope, I believe that there are good reasons to maintain the framework of state sovereignty. For one reason, the state involves the correspondence between jurisdictional authority over a community of persons and rights over resources. These are two inseparable ways of establishing justice for members of a collective. While both these authorities can be theoretically be conceived as belonging to a global community, the sovereign territorial state remains *the* institution that involves a public, coercive and legitimate legal order, with direct effect on individuals, and creating distinct associative obligations and duties. Moreover, only within the framework of the sovereign territorial state are both authorities bound to conditions that make them politically legitimate in a relatively strong sense. Therefore, the goals of global justice are better achieved through limits that territorial collectives impose on themselves. The question is thus what limits need to be inserted in the conception of territorial rights that prevent collectivities (states) from assertively expanding their territorial rights, from engaging in controversial practices such as unlimited and environmentally harmful exploitation of natural resources or from economic exploitation or devastation of global commons.

14. For example, the "capabilities approach" popularized by Martha Nussbaum stresses that basic human needs are irreducible to mere physiological maintenance and extend to active social and political well-being that depends on what individuals are effectively able to be (Nussbaum, 2000).

To conclude: permanent sovereignty over natural resources is a standard implied in the conception of collective territorial rights that emphasizes the inextricable link between political self-determination, autonomy, sovereignty and, independence on the one hand, and the autonomy to determine the social and economic system on the other. When accounted for in this framework, permanent sovereignty over natural resources is the economic corollary of state sovereignty, and of the principles of sovereign statehood universalized only after World War II: political self-determination, supremacy of domestic legal order, external independence, social and economic autonomy, sovereign equality and non-intervention. (Cohen, 2012: 200). The task is to avoid the interpretation of resource sovereignty in terms of permanent, absolute, inalienable, full sovereignty and to interpret it in terms of self-limiting standards that restrain its exercise.

4. International human rights law and environmental law

In the final section of the paper, I would like to discuss the possibility of restraining resource sovereignty using environmental ethics and sustainable development standards. To assert the idea of constitutive self-limiting standards in the exercise of sovereignty, I suggest we explore and use human rights discourse as a model for the de-absolutization of sovereign resource rights. First, I shall briefly summarize the impact of human rights, both as a discourse and practice, on the institution of state sovereignty.

Sovereignty emerged in early modern political thought as a concept of a supreme political power that has the sole authority to create law. To highlight this novel, quintessentially modern concept of the supreme political authority and its unity with law enactment and enforcement, early modern political thinkers (Hobbes in particular) characterized sovereignty in terms of the unity, indivisibility, unconditionality, and unlimitedness of the absolute power unbound by the covenant that institutes it (Hobbes, [1651] 1985). Based on the first modern theories of sovereignty, the concept of sovereignty has been generally interpreted as involving the following tenets: 1) the idea that sovereignty is located in a single and unitary organ of the state or is embodied in a person; 2) the idea that the coherence and unity of a legal system have to be traceable back to the will of the sovereign, who is *legibus solutus*, i.e. above the law; 3) the view that law ought to be obeyed merely because it is the sovereign's command; and 4) the view that sovereignty is linked to a specific set of prerogatives that also include the *jus belli* (right to war) which renders sovereignty incompatible with international law.

It is beyond the scope of this paper to ask whether this is the right interpretation of the original concept of sovereignty.¹⁵ The fact remains that until

15. I argue elsewhere that this interpretation does not do justice to the essence of the concept of sovereignty and that constitutionalism is the original discourse about sovereignty (Gümplová, 2011).

World War II, sovereignty was understood as a political fact of absolute and impermeable state power existing independent from and prior to international law. In the second half of the 20th century, a momentous transformation had a serious impact on the concept of sovereignty and the practice of sovereign statehood. On one hand, there was an unprecedented effort to regulate the use of military force and install a global security regime. Contemporary sovereign states no longer have the right to go to war and to annex or colonize foreign territories. On the other hand, the prerogatives of sovereign states in the domestic sphere have changed under the impact of international laws on human rights.¹⁶

The international human rights regime has developed steadily since 1948 through multilateral treaty making, domestic state practice, and the work of international courts and other actors. Dozens of human rights treaties are now in effect due to organizations such as the United Nations, the Council of Europe, the Organization of American States, and the African Union. Some of these treaties have been ratified by more than three-quarters of the world's countries. The main source of the contemporary conception of human rights is still the *Universal Declaration of Human Rights* (UDHR) adopted in 1948, which indicates rights such as that to live, freedom from torture, freedom from slavery, right to a fair trial, freedom of speech, freedom of thought, conscience and religion, freedom of movement, and the right to engage in political activity as universal rights for all peoples irrespective of their nationality or political allegiance. The reaffirmation of these rights in numerous international covenants and resolutions and the incorporation of these rights in national constitutions have made human rights articulated under terms of the UDHR almost universally accepted standards for human well-being and political allegiance (Beitz, 2011).

As human rights theorists of all proveniences agree, human rights protect the basic rights of all individuals by virtue of being human. They are universal, i.e. they are valid and binding on all individuals and societies whatever their religion, tradition, or culture. An important feature of human rights is that they are meant to protect the essential and universal features of human personhood against the state.¹⁷ As Jean Cohen emphasized, human rights are thus 'associational' rights, activated by the presence of and membership of specific socio-political institutions. As such, they impose constraints on these institu-

16. There are countless accounts of how the post-World War II international legal order based on the sovereign equality of states and international law based on consent is being complemented by a new system of geo-governance by the international community and intergovernmental networks addressing issues of human rights and security (Teitel, 2011; Sikkink, 2011; Fox, 2008).

17. Dignity, freedom, and equality are usually cited as the most fundamental moral features of personhood. There are a number of approaches to human rights; and they differ not just in how they provide general justification of human rights, but also in explaining what essential and universal features of human beings must be protected by human rights – agency, personhood, basic interests, capabilities, autonomy, and dignity. For an overview, see Donnelly (2013: 7-21).

tions and on those acting in their name. They function as standards for state governments such that their violation or non-fulfillment is justification for remedial action by the global community. International human rights thus indicate that the way a state treats its own citizens is a matter of international concern (Cohen, 2012: 182).

Many cosmopolitan thinkers and legal theorists argue that today, the state sovereignty and legitimacy of governments should be considered contingent on their being both non-aggressive externally and, more importantly, minimally just internally, i.e. respectful of human rights (Macdonald, Johnston, 2005; Klabbers et al., 2009). Although there are 'statist' thinkers who insist that international law still is and should remain protective of state sovereignty, domestic autonomy, and non-intervention, a profound transformation is indeed occurring. Under the impact of human rights and collective security standards, there has been a shift from the classic statist interpretation of sovereignty as independence, non-intervention, and impunity to the interpretation of sovereignty as justice and security for individuals and citizens of a given state, and hence responsibility and accountability to the international community and potentially also the liability of perpetrators (state officials or private entities) in terms of international sanctions (Cohen, 2012: 159-162).

It is beyond doubt that the concept of sovereignty has changed over time in light of this new global principle of legitimacy, namely respect for human rights. Human rights provide a regulatory source of limitations on the prerogatives of sovereign states and a government's power. However, sovereignty has not been displaced by human rights. As Jean Cohen rightly argued, international human rights treaties are not designed to abolish state sovereignty and replace it with a cosmopolitan legal order but to encourage states to construct and commit to a common international standard and to abide by it in their domestic law and policies (Cohen, 2012: 162). Sovereignty and human rights are two distinct but interrelated legal principles of the same, dualistic, international political system. This dualistic political system is composed of sovereign states (and the international law they make through consent) *and* new global governance institutions that provide global cosmopolitan legal elements derived from non-derivative human rights standards. States are still autonomous and self-determining. However, when a state commits genocide or enslavement or oppresses its people in radical ways, it is subject to the international community's concern or potential intervention justified by inviolable human rights (Cohen, 2012: 201-207).

It is also obvious that the international human rights regime differs substantially from other international regimes. Although there has yet to be a systematic comparative analysis of different international law regimes in comparative law studies, it can be argued, as Donnelly did, that unlike other regimes, the international human rights regime verges on authoritative international standard setting, creation and elaboration (Donnelly, 1986: 608). There is an advanced and rich philosophical discourse with a long tradition regarding the nature, essence, scope, and justification of human rights.

Although interpreted in various ways, there is an accepted view that human rights appeal to a universally valid conception of human well-being and interests. Human rights standards are coherent, strong, and widely accepted. Such concepts as the prohibition of genocide, slavery, and torture are considered *jus cogens*: they represent fundamental, overriding principles of international law from which no derogation is permitted. There is a relatively complex and centralized system of global governance based on the legalization of human rights and globalization of human rights discourses that includes international standard setting, treaty making and monitoring bodies creating *erga omnes* obligations, international criminal law and the international criminal court, and, as of late, the development of humanitarian law.

Does international environmental law enjoy comparable authority? Despite its proliferation in recent decades¹⁸ (there has been considerable activity concerning treaty making, agreements, resolutions, decisions of various international courts and tribunals (there is no international environmental court, however) and soft law instruments such as declarations following environmental conferences and the literature, especially following the Earth Summit in Rio de Janeiro in 1992¹⁹) the international environmental protection regime is comparably less authoritative than the human rights regime. In fact, as many observers agree, international environmental law provides an ineffective legal response to environmental degradation (Leary, Pisupati, 2010). Not only is there little compliance with policy goals set in treaties and declarations made in the aftermath of the Rio Summit (especially concerning the reduction of CO₂ emissions); the role of international environmental law is actually declining. As Schrijver points out, the World Summit on Sustainable Development in Johannesburg in 2002 focused largely on development goals (reduction of poverty, sustainable food production, the management of natural resources as the basis of social and economic development) and made little reference to the role of international environmental law in promoting the sustainability of resources (Schrijver 2008, 71-76, 95-96).

From the critical perspective of the Earth's vital ecosystems reaching dangerous planetary boundaries that I suggested at the beginning of the paper, the most salient failure of the international regime of environmental protection is that there is no legally and politically relevant conception of global environment or ecological system(s) overlying and complementing the deeply

18. Environmental law is still a very young branch of international law. Current issues of international concern covered by environmental law include ozone layer depletion and global warming, desertification, destruction of tropical rain forests, pollution of air and water, international trade in endangered species (i.e. ivory), shipment of hazardous wastes to Third World countries, deforestation of Brazil and the Philippines, protection of wetlands, oil spills, transboundary nuclear air pollution (i.e. Chernobyl), dumping of hazardous wastes, groundwater depletion, international trade in pesticides, and acid rain.
19. The conference produced important multilateral treaties – Climate Change Convention and Biodiversity Convention. Treaties addressing anti-desertification, the conservation and management of fisheries, and climate change followed in the 1990s (Schrijver, 2008: 68-76).

embedded division of the Earth into sovereign territories. Not only has international environmental law failed to provide a systematic and elaborate descriptive and prescriptive conception of vital planetary ecosystems (here, the ozone layer, climate system, ocean ecosystem, and tropical rainforests²⁰ would be the most obvious examples); it has, as already indicated, not adopted any consistent framework or jurisdiction for domains that are outside of state boundaries (the atmosphere, polar regions, high seas). The common heritage of humankind regime, introduced to promote international cooperation and the sharing of economic benefits among all nations, unfortunately remains a regime of resource use and exploitation with relatively vague implications. An alternative approach, for example that of 'ecological stewardship' (Chapin et al., 2009), which might better respond to the idea of responsible and sustainable use and conservation of the environment, has not yet made it into philosophical and legal debates, and it has not been addressed either in international environmental law or in the theory of territorial or resource rights.

Regrettably, the only relatively well-developed standard that serves as the source for constraints on the state based principle of the permanent sovereignty over natural resources remains that of sustainable development. Having expanded impressively in a relatively short period of time, the concept of sustainable development has indeed become firmly established in international and domestic law. Today, sustainable development (the protection and conservation of the environment and resources for the benefit of present and future generations) represents one of the core values of the international community, similar to peace, security, and human rights (Schrijver, 2008: 29). But does it provide an effective and strong catalogue of limits and duties regarding resource sovereignty?

The introduction of the concept of sustainable development in the 1980s represented a considerable change of paradigm in the practice of resource sovereignty, which until then had been limited by a few standards or principles, such as good neighborliness, the duty not to cause trans-boundary damage and of course limits resulting from the contractual rights of foreign investment companies. Sustainable development has acknowledged resource sovereignty and economic development as primary interests of states; however, it defined such development as being restricted by the capability of future generations to also fulfill their needs via development.²¹ Since the publication of the Brundtland Commission's report *Our Common Future*, sustainable development has become legally grounded in numerous global and regional treaties in countless areas. It has been solidly embedded in conventions and protocols

20. The International Tropical Timber Agreement (ITTA) is the only agreement to directly address rainforest deforestation. However, the ITTA exclusively focuses on the timber trade, so it cannot completely accomplish the goal of rainforest preservation.

21. This is a definition introduced by the Brundtland Commission (United Nations, 1987): sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

addressing climate change, the conservation of biological diversity and marine biodiversity, fisheries and freshwater resources, marine and trans-boundary air pollution, desertification, and other areas. Across various areas, the standard posits a desirable future state for human societies in which the use of the environment and resources meet human needs without undermining their sustainability or capacity to serve the needs of future generations.

The concept of sustainable development has broadened over time. Today, unfortunately, it represents a rather vague notion for everything good for the environment. There is a tendency observed by many critics concerning the weakening of the standard of sustainable development vis-à-vis other general international laws (security and humanity) and also persistent reorientation towards social and economic development. As Schrijver argues, sustainable development has developed from the original meaning of sustainable use of natural resources, i.e. the use that preserves these resources for future use, to an anthropocentric notion with a dominant socio-economic substance. Today, it is intended to serve not simply the needs of environmental protection but also entails reorientation of the international community to the world's economic system and persistent efforts to tackle the problem of development in the Third World (Schrijver, 2008: 217; Birnie et al., 2002: 45).

This tendency is reinforced by the introduction of the 'right to development', the youngest of human rights concepts, and its recognition as a universal and inalienable right and an integral part of the catalogue of fundamental human rights.²² The content, nature, and status of this right are still contested and there is no political consensus on its practical interpretation. However, the right to development represents the latest expression of the recurrent effort to reform unjust international economic order towards one based on social welfare and social justice. Hence, a vital link between sustainability and civil, political, economic, and social rights has been fostered, but not with environmental law.²³ The right to development is aimed at the integration of economic and human rights issues in one coherent policy framework. Rather than evolving parallel to human rights as a standard limiting the economic sovereignty of states, sustainable development thus lost its environmental potential by turning (social and economic) development into a human right. Regrettably, rather than being reinforced and strengthened so as to compensate for the lack of an effective global regime of environmental protection, sustainable development

22. The Declaration on the Right to Development was adopted by the UN in 1986. It defines the right to development 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 realized." Since then, the UN has devoted substantial resources to elevating the significance of this right and to promoting its implementation. At the World Conference on Human Rights in Vienna in 1993, it was recognized as a universal and inalienable right and an integral part of fundamental human rights.

23. The text of the UNDRD makes no mention of the environment whatsoever (Bunn, 2000: 1442).

weakened under the impact of the growing significance of social and economic human rights.

Contemporary use of sustainable development in various regimes and discourses emphasizes principles that express the clear statist and economic orientation of the concept.²⁴ These principles involve: the duty of states to ensure the sustainable use of natural resources, the principle of equity and the eradication of poverty, the principle of common but differentiated responsibilities of countries, the precautionary principle and environmental impact assessment, public participation, good governance, and the principle of integration and interrelation. These principles reflect the fact that states are committed to correcting the failures of the global economic system and to intra-generational justice (the eradication of poverty) rather than to inter-generational justice; and that industrial nations carry a heavier burden of environmental protection. The emphasis on good governance indicates that there is a shift from environmental protection to general principles of government and resource management such as efficiency, non-corruptibility, transparency, financial accountability, responsibility to civil society, and the legitimacy of decision-making.

Permanent sovereignty over natural resources remains the most significant legal and political framework in any effort to tackle environmental problems. Unfortunately, due to failures by the international environmental regime to promote the conception of non-sovereign territoriality and suitable jurisdiction for it, and due to the growing emphasis on economic development and social justice in domestic state policies, the degree of restraint in resource sovereignty has not really increased over time. In the current interpretation, permanent sovereignty over natural resources thus undermines the urgent need for the global community to assume responsibility for the protection of environment.

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24. These principles were formulated at the biennial conference of the International Law Association in 2002 as the New Delhi Declaration of Principles of International Law Relating to Sustainable Development.

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