RIJKSUNIVERSITEIT GRONINGEN

SOVEREIGNTY OVER NATURAL RESOURCES:

BALANCING RIGHTS AND DUTIES IN AN INTERDEPENDENT WORLD

Proefschrift

ter verkrijging van het doctoraat in de
Rechtsgeleerdheid
aan de Rijksuniversiteit Groningen
op gezag van de
Rector Magnificus Dr F. van der Woude
in het openbaar te verdedigen op
donderdag 2 maart 1995
des namiddags te 2.45 uur precies

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geboren op 21 mei 1954 te Warmenhuizen

5 Permanent Sovereignty over Natural Resources in Territories under Occupation or Foreign Administration

In Chapter 3 it was noted that during the 1960s the discussion on the principle of PSNR was increasingly confined to developing countries. From the early 1970s, the General Assembly and other UN organs also frequently stressed the principle that PSNR included the right of peoples to regain effective control over their natural resources. For example, in Resolution 3171 (XXVIII) the General Assembly '*supports resolutely* the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources'. The NIEO Declaration stipulates that the right to permanent sovereignty includes, in case of violation, the right to 'restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples'. Problems have arisen over the question of PSNR in territories being administered and/or occupied by third States. In this Chapter three cases are reviewed. Firstly, South West Africa/Namibia: its status and the exploitation of its vast mineral and fish resources by South Africa, other States and foreign enterprises. Secondly, the exploitation of resources of the Sinai and other territories occupied by Israel. Thirdly, the Panama Canal and Zone; the operation and administration of the Panama Canal Zone.

1. The Status of Namibia and its Natural Resources before Independence in 1990

1.1 The Status of South West Africa/Namibia

Namibia, up to the late 1960s called South West Africa, was a German colony from the Berlin Conference (1884–85) up to the First World War, when newly-

[1] Para. 4(f) of GA Res. 3201 (S-VI). See also Art. 16 of CERDS and para. 33 of the Lima Declaration of UNIDO II.

independent South Africa conquered the territory. It soon became clear that South Africa had plans to annex it, but in 1918 President Woodrow Wilson opposed this. South West Africa came under the 'mandate system' of the League of Nations and in 1920 the Mandate over this territory was conferred upon the British Crown, to be exercised by the Union of South Africa. This granted South Africa 'full power of administration and legislation over the Territory' and the right to apply its own laws.[2] But South Africa was also obliged to promote the material and moral well-being and the social progress of the people (Art. 2 of the Mandate). This Mandate may have prevented South Africa from unilaterally annexing the Territory, but the South African statesman Smuts had a point when he called it 'annexation in all but name'.

During the League of Nations period some problems arose between the League and South Africa because of the application of racially discriminatory laws in South West Africa, originally termed *segregation* and later *apartheid*. However, South Africa could easily disregard these protests made by the weak and deeply-divided League of Nations.

In 1946, during the first UNGA session, South Africa proposed the integration of South West Africa into the Union of South Africa. But the Assembly rejected this plan and stated, in its Resolution 65 (I) of 14 December 1946, that South West Africa should now fall under the Trusteeship System of the United Nations. South Africa, in turn, was not willing to recognize that the responsibilities of the League regarding mandated territories had passed to the United Nations. An advisory opinion of the International Court of Justice (ICJ) in 1950 was not very clear on this issue. The Court stated, on the one hand, that South Africa had no right to alter unilaterally the international status of the territory and that the United Nations as the *de facto* successor to the League of Nations could fulfil the supervisory functions which earlier had been carried out by the League, but, on the other hand, it did not provide a clear answer to the question whether South Africa was under a legal obligation to place the Territory under the new Trusteeship System.[3]

In November 1960, Ethiopia and Liberia, the only two African countries which had been members of the League, instituted proceedings against South Africa at the ICJ on the ground that South Africa had violated the obligations arising from the Mandate, primarily by applying *apartheid* policies in the territory. In 1966, the Court, deeply divided on this issue, ruled by a narrow majority that Ethiopia and Liberia '. . . cannot be considered to have established any legal right or interest

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[2] League of Nations, 'Mandate for German South West Africa', *League of Nations Doc.* 21/31/14D, 17 December 1920.

[3] International Status of South West Africa, Advisory Opinion, *ICJ Reports 1950*, p. 128.

appertaining to them in the subject-matter of the present claims and that, accordingly, the Court must decline to give effect to them'.[4]

In the meantime, through decisions of the political organs of the United Nations, the rules of international law pertaining to self-determination and PSNR developed rapidly.

The United Nations and Namibia

Against this background, the General Assembly decided to take matters in its own hands. In GA Resolution 2145 (XXI) of 27 October 1966, the Assembly declared that South Africa:

> has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate.

For these reasons the General Assembly terminated the Mandate and placed the Territory under the direct responsibility of the United Nations. The Assembly also stated in this Resolution that the people of South West Africa had an inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations and the 1960 Decolonization Declaration.[5] In 1967, the General Assembly established a UN Council for South West Africa to administer the Territory until independence (which was envisaged for 1968) and entrusted the Council, *inter alia*, with the power 'to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage'.[6] It also renamed the country as Namibia.[7] In Resolutions 264 and 269 (1969), 276 and 283 (1970), the Security Council recognized the termination of the Mandate by the General Assembly. The resolutions called upon South Africa to withdraw from Namibia immediately. In its Resolution 276, the Council declared that all actions by South Africa on behalf of or regarding Namibia since the termination of the Mandate were 'illegal and invalid'. This resolution also called upon all States to refrain from any dealings with South Africa in so far as they concerned Namibia. Through its Resolution 284 (1970), the Security Council requested an advisory opinion from the ICJ on the question:

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[4] South West Africa Cases, (Ethiopia and Liberia *vs.* South Africa), *ICJ Reports 1966*, p. 6 (Final Judgment). See also *ICJ Reports 1962*, p. 319 (Judgment on Preliminary Objections).

[5] GA Res. 2145 (XXI), 27 October 1966, was adopted by 114 votes to 2 (Portugal and South Africa), with 3 abstentions (France, Malawi and the UK).

[6] GA Res. 2248 (S-V), 19 May 1967. For the work of the UN Council on Namibia, see Arts (1989).

[7] GA Res. 2372 (XXII), 12 June 1968.

> What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?

In 1971, this time within less than a year after the request, the Court gave its opinion:

1. that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
2. that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.[8]

The Security Council, in Resolution 301 (1971), agreed with the Court's findings by 13 votes to nil, with 2 abstentions (France and UK). It declared that South Africa's illegal occupation constituted 'an internationally wrongful act', and that South Africa was responsible for any violations of its international obligations or the rights of the Namibian people. In relation to foreign companies working in Namibia, the Council declared:

> . . . that franchises, rights, titles, or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly Resolution 2145 (XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia.

1.2 Decree No. 1 for the Protection of the Natural Resources of Namibia

Intensive foreign mining operations carried out in Namibia worried the UN Council for Namibia a great deal. Exploitation of natural resources was taking place without the permission of the Council. Royalties or taxes were not paid to the Council for the benefit of the Namibian people but to the South African Government. Another cause for concern was the overfishing of stocks off the Namibian coast, which would take years to recover. In this way, Namibia's resources were being rapidly depleted.

This situation clearly conflicted with the principle in Article 1 of the 1966 Human Rights Covenants that peoples should be able freely to dispose of their natural resources and that these should be exploited in their interests. On the basis of its mandate in Resolution 2248 (S-V) of 1967, the UN Council for Namibia on 27 September 1974 enacted Decree No. 1 for the Protection of the Natural Resources of Namibia. In the preamble, the Council pointed out that the political aim of the

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[8] *ICJ Reports 1971*, p. 58.

Decree was: '. . . securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs'.

The main points of the operative part of the Decree can be summarized as follows:

a. *Prohibition of exploitation and export.* Paragraph 1 of the Decree forbade the prospecting, mining, processing, selling, exporting, etc., of natural resources within the territorial limits of Namibia without permission of the UN Council. Paragraph 2 declared concessions, licences, etc., granted by others, for example, the South African Government, to be null and void no matter when granted. Paragraph 3 forbade the export of natural resources without permission of the UN Council.

b. *Seizure and forfeitures of illegally obtained resources and the means of transport thereof.* If minerals or other natural resources were exported contrary to the above provisions, these resources could be seized and declared forfeited by the UN Council (paragraph 4). Paragraph 5 stated that every vehicle, ship or container which transported illegally-obtained Namibian resources could be seized and forfeited for the benefit of the Namibian people.

c. *Future claims for damages.* Paragraph 6 stated that the future government of an independent Namibia could hold each person or firm contravening the provisions of the Decree liable for damages caused to the Namibian people. This related to an action for damages and not to criminal proceedings.

The legal value of Decree No. 1

The form (not just another resolution, but a Decree), the formulation (not general but specific, not worded as a recommendation but mandatory) and the content (not only objectives but prohibitory provisions) created the initial impression that this concerned a binding decision which was meant to be 'directly applicable'. The Decree was clearly meant to have extraterritorial effect, in other wordsto be valid and to be applied outside Namibia. Such an extraterritorial effect would in principle be possible, except that from a legal point of view the paragraphs on seizure and forfeiture of the means of transportation of Namibian raw materials outside Namibia seemed untenable. Formally, the Decree was a decision of a subsidiary organ of the General Assembly. The question arose whether the Decree, as a decision of a subsidiary organ, could be binding, while decisions of the main organ, the General Assembly, were in principle non-binding.

The UN Council for Namibia had been vested with the power to administer the territory and to serve as the caretaker government until independence. Moreover, in various resolutions[9] the General Assembly had reaffirmed the Decree and reiterated its core contents. For example, in its Resolution 33/182 A, on the work of

[9] Including GA Res. 33/40, 33/182 A and C.

Box 5.1
UN Council for Namibia, 27 September 1974
Decree No. 1
For the Protection of the Natural Resources of Namibia

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

The United Nations Council for Namibia,

Recognizing that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966 the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the territory of Namibia,

Furthering the decision of the General Assembly in resolution 1803 (XVII) of 14 December 1962 which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

Noting that the Government of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,

Acting in terms of the powers conferred on it by General Assembly resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

(Continued on next page)

the UN Council for Namibia, the General Assembly declared that the natural resources of Namibia were 'the birthright of the Namibian people and that the exploitation of those resources by foreign economic interests . . . is illegal and contributes to the maintenance of the illegal occupation régime'. In this connection, it is also relevant to recall an observation the ICJ made in its advisory opinion on Namibia:

> it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence resolutions which make determinations or have operative design.[10]

[10] *ICJ Reports 1971*, p. 50.

UN Council for Namibia, 27 September 1974
Decree No. 1
For the Protection of the Natural Resources of Namibia
(Continued)

Decrees that

1. No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;

2. Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the 'Administration of South West Africa' or their predecessors, is null, void and of no force or effect;

3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;

7. For the purposes of the preceding paragraphs 1, 2, 3, 4 and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take the necessary steps after consultations with the President.

In earlier work the present author concluded that the legal validity of the Decree varied from one legal order to another as well as from country to country.[11] In general, the legal status of the Decree is bound to be less than that of a binding decision of, say, the Security Council, but greater than that of an 'ordinary' General Assembly resolution or a law of a foreign State. It concerned fundamental provisions which resulted from the unique international status of Namibia and which aimed at protecting the development potential of a people that had hitherto been unable to exercise its fundamental right to political and economic self-determination. For example, taking into consideration the relative 'receptiveness' of the legal system of the Netherlands for decisions of international institutions (Art. 93 of its Constitution) and the statements of the Netherlands Government recognizing the authority of the UN Council for Namibia to enact such decrees, the legal force of the Decree in the Netherlands was greater than in countries with a less receptive legal system or another Namibia policy. Thus, on 21 October 1975, Herman Burgers, the delegate of the Netherlands stated in the Fourth Committee of the UN General Assembly:

> My Government, however, has no doubt of a legal nature concerning the competence of the General Assembly to create the Council and to invest it with executive powers ... In the Netherlands' view, the Council was legally entitled to decree that the exploitation, etc., of natural resources in Namibia would henceforward require the consent and permission of the UN Council for Namibia.[12]

1.3 The UN Council for Namibia vs. Urenco, UCN and the Netherlands

The Netherlands and Namibian uranium

During the 1970s, the involvement of the Netherlands Government and of companies based in the Netherlands in the processing of Namibian uranium was under discussion. It seemed very likely that uranium, originating from Namibia, was being enriched at the Urenco plant in Almelo (the Netherlands). Before enrichment, the uranium had been processed into uranium hexafluoride in France and the UK. The Dutch Government regarded the purchase and utilization of Namibian uranium as 'undesirable' but it pointed out that Urenco itself did not become the owner of the uranium which it only enriched for its clients. The Decree, however also prohibited the 'processing' and 'refining' of natural resources of Namibia without the permission of the UN Council. The Netherlands Government stated that it was impossible to determine which part of the material originated from Namibia, since it had been mixed in British and French processing plants with uranium from other countries. Consequently, its origin could no longer be deter-

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[11] Schrijver (1985: 29–35).

[12] Publication no. 116 of the Netherlands Ministry of Foreign Affairs, 1976, pp. 548–49.

mined and it could no longer be regarded as the same product as before. Additionally, the Government referred to an obligation incumbent upon the parties to the Treaty of Almelo (the Netherlands, Germany, and the UK) to accept all enrichment orders. The Government argued that it was unable to undertake any action itself, but stated that 'it was up to the Council to seek the implementation of the Decree in the courts of the Netherlands'.[13]

The writ of summons

On 14 July 1987, the UN Council for Namibia summoned Urenco Nederland, Ultra Centifruge Nederland (UCN) and the State of the Netherlands to appear in the District Court in The Hague.[14] The Council stated that defendants:

> are acting unlawfully vis-à-vis the people of Namibia, viz. infringing and contributing towards the infringement of the right to self-determination of the people of Namibia, the rights of that people with respect to the ownership and exploitation of the natural resources of Namibia (. . .) and (. . .) are acting contrary to the diligence they are bound to observe vis-à-vis the people of Namibia and its natural resources.

The Council based its writ not only on the infringement of the Decree, but also on the 1920 Mandate, the UN Charter, the General Assembly resolutions concerning PSNR and the termination of the Mandate, the 1971 advisory opinion of the ICJ and the Security Council resolutions ordering South Africa to terminate its exercise of power over Namibia and all other States and companies under their direct or indirect control to refrain from any dealing with respect to commercial or industrial enterprise or concessions in Namibia.[15]

In the writ of summons, the UN Council asked for a court order prohibiting any further carrying out of enrichment orders by Urenco and UCN which were placed wholly or partly on the basis of Namibian uranium. In order to ensure compliance with this prohibition, Urenco and UCN would have to submit a negative certificate of origin ('a written statement from the party by or on whose behalf the order is placed') as obtained from their principals. Moreover, the UN Council required the State of the Netherlands to supervise the observance of these court orders and to do everything in its power to prevent the enrichment of Namibian uranium. It is striking that the Council did not file a claim for compensation for damages, seizure or forfeiture in conformity with the Decree, but only aimed at a declaratory judgment and at a prohibition on the carrying out in future of any order to enrich uranium originating from Namibia.

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[13] Report of the Mission of Consultation of the UN Council for Namibia to the Netherlands, 1981. *UN Doc.* A/AC.131/L.225, 25 June 1981, para. 27.

[14] Schrijver (1988a: 42).

[15] See the section above on *The United Nations and Namibia.*

The State of the Netherlands was held jointly liable and was consequently summoned as well by the Council, because the Treaty of Almelo had provided for a Joint Committee—consisting of the three States Parties—with wide policy-making powers, which enabled the governments to exercise a decisive influence on the policy of the industrial companies.[16]

The response of the Dutch Government

Following the writ of 14 July 1987, the Dutch Government on 23 July 1987 sent a letter to the UN Secretary-General, expressing dissatisfaction that it had not been offered an opportunity to explain its point of view during a formal meeting of the UN Council for Namibia and its dismay at the accusation of having committed a wrongful act towards the people of Namibia:

> By levelling such an unwarranted accusation against the Netherlands, the Council seemed to question the sincerity of the Netherlands Government on this vital issue, despite the latter's long-standing commitment to the well-being and legitimate aspirations of the Namibian people.[17]

On 6 November 1987, the Netherlands, commenting on reports of the UN Council for Namibia, stated that the Council ought to concentrate on 'evidence and actual forms of plunder and depletion of the natural resources of Namibia'. It pointed to the overfishing by 'some States' and called upon the Council 'to undertake any decisive action to put an end to this form of exploitation'. Concerning the Urenco suit, it declared that the Government's position was based upon 'convincing legal arguments'. Nonetheless, the Dutch Government felt compelled to state:

> We wish to stress that our votes on draft resolutions in the Assembly, be it in the past or the present, may in no way be construed as supportive of the Council's claim in the case pending before the court in the Netherlands.

Namibian independence in 1990

After instituting the proceedings, the claimant did not actively pursue the court case. Because of the many factual and legal complications, there was no guarantee of success. In view of the prospects for a settlement of the Namibian question, the UN Council considered it better to await events. Indeed, after years of negotiation, stalemate and breakthroughs, the independence process finally gathered momentum in 1989 and on 21 March 1990 Namibia acquired its independence.[18] In

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[16] The text of this treaty has been published in *Tractatenblad* of the Kingdom of the Netherlands, Vol. 1970, no. 41.

[17] *UN Doc.* A/42/414, 14 July 1987.

[18] Schrijver (1994a: 1–13).

1990 the court case in the Netherlands was withdrawn and thus this PSNR case was terminated inconclusively.

2. Permanent Sovereignty over 'National' Resources in Israeli-Occupied Territories

On 15 December 1972, the General Assembly affirmed for the first time 'the principle of the sovereignty of the *population* of the occupied territories over their *national* wealth and resources'.[19] It called upon all States, international organizations and specialized agencies not to recognize or co-operate with any measures undertaken by the occupying power, Israel, to exploit the resources of the occupied powers. This Resolution was adopted in response to a report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of Occupied Territories.[20] In subsequent years, this finding was elaborated in a series of resolutions specifically dealing with this issue.[21]

In 1973, Pakistan, supported by 17 other developing countries,[22] submitted a draft resolution on 'Permanent Sovereignty over *National* Resources in the Occupied Arab Territories',[23] in which it drew particular attention to the economic consequences resulting from Israeli exploitation of the natural resources of the occupied Arab territories. It referred particularly to exploitation of oil in the Sinai area by Israel, which accounted for two-thirds of Israeli needs. Israel regretted attempts to involve the Second Committee of the General Assembly in this highly politicized subject, while China, the GDR, Egypt, Kuwait and the USSR spoke in support of the draft resolution. The resolution, adopted on 17 December 1973,[24] recalled, *inter alia*, the 1962 Declaration on PSNR and affirmed the right of 'the Arab States and peoples whose territories are under foreign occupation to permanent sovereignty over all their natural resources'. It reaffirmed that the Israeli measures 'to exploit the human and natural resources of the occupied Arab territories are illegal' and called upon Israel to bring such measures forthwith to a halt. It also affirmed the right of Arab States and peoples whose territories were under Israeli occupation to 'the restitution of and full compensation for the exploitation and looting of, and damages to, the natural resources . . . of the occupied territo-

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[19] Para. 4 of GA Res. 3005 (XXVII); emphasis added.

[20] *UN Doc.* A/8828.

[21] See Table 4.1.

[22] Three from Asia, 12 from Africa, and Cuba and Yugoslavia.

[23] *UN Doc.* A/C.2/L.1333, emphasis added.

[24] GA Res. 3175 (XXVIII), adopted by 90 votes to 5, with 27 abstentions.