

A Commentary on Chris Armstrong, ‘Against Permanent Sovereignty Over Natural Resources’, and Leif Wenar, ‘Property Rights and the Resource Curse’

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This commentary asks what the implications of Armstrong’s refutation of the principle of permanent sovereignty over resources are for Wenar’s project of addressing some of the gravest injustices in global trade by recurring to this very principle. After briefly presenting both accounts, the commentary first shows that the practical implications are few since Wenar’s is a legal project and thus to some considerable degree immune against philosophical critiques addressing the principles underlying current law. It then raises doubts as to whether the idea that national communities are especially entitled to benefit from the resources found in their territory can easily be given up even in the context of Armstrong’s powerful critique.

## I

In his paper ‘Property Rights and the Resource Curse’ Leif Wenar proposes a novel way to use the currently existing international legal framework to address one blatant global injustice, namely the so-called resource curse. This ‘curse’ refers to the correlation between a country’s wealth – understood in terms of easily exportable natural resources – and the three related curses of authoritarianism, civil conflict, and low economic growth rates for most of the population. While the correlation between richness in extractable resources and curses for the population is neither sufficient nor necessary, there are a number of exemplary cases where the discovery of rich natural resources such as oil or diamonds made life for the average citizens of these countries worse rather than better. Wenar’s examples are Nigeria, Sierra Leone, Democratic Republic of Congo, and Equatorial Guinea.

The income from selling these resources was used by the elites to cement their power by giving them more resources to suppress the main of the population and/or fight amongst each other again to the detriment of ordinary citizens.

Wenar’s simple yet powerful claim is that we, that is consumers everywhere, contribute to the atrocities committed in these countries by funding these authoritarian regimes by buying stolen goods. The resources these dictators and juntas sell are not theirs to sell. Furthermore,

for many of the relevant cases, we have more than enough information regarding the human rights record of these countries to know that they could not possibly have ‘good title’ to these goods. There is no way to argue that they are authorised by the nations owning these resources to sell them. We thus know that we are buying stolen goods. Given the widespread commitment of all major international players to the principles of free trade including the principle of property, our current system – as inadequate as it is – can respond to these outrageous human rights violations simply by following its own rules regarding the ban on trafficking stolen goods. Wenar elaborates further on how a ‘Clean Hands Fund’ can help to avoid the challenge that we would still benefit from stolen goods through trading with international partners less scrupulous of where they purchase their raw materials.

This commentary is not about the details and practicalities of Wenar’s proposal. Rather, this paper addresses the central premise underlying Wenar’s property based approach: the idea that the resources in question are to be considered as stolen because authoritarian governments cannot have good title to them. “The natural resources of a country belong [...] to its people.” ((Wenar 2008), 9)

## II.

This claim is the starting point of Chris Armstrong’s paper ‘Against Permanent Sovereignty Over Natural Resources.’ As Wenar lays out, this idea is currently widely accepted and enshrined in several prominent instruments of international law. See (Wenar 2008), 9f. Wenar, furthermore, sees it as an advantage that this principle is rather imprecise and loose since this allows its application within the context of widely different economic orders and property regimes. Armstrong’s minute discussion, however, shows how each possible understanding and justification of the claim remains ultimately unconvincing when measured against its own criteria.

Before discussing the four most promising accounts of why we think that the resources of a country properly belong to its populus, Armstrong applies Elinor Ostrom’s helpful distinction of five different property rights (See (Ostrom 2000)) to analyse the title ‘permanent sovereignty over natural resources’ and adds a further interpretation:

1. Access: "right to interact with a resource and to enjoy ‘non-subtractive’ benefits from it”

2. Withdrawal: “right to obtain and indeed to remove resource units for one’s own use“
3. Management: “right to regulate use patterns and to transform a resource by making improvements to it.”
4. Exclusion: “right to determine who can access and withdraw a resource”
5. Alienation: “right to sell a resource, or moving up a level, the right to sell management and exclusion rights.”
6. Derive Income: “right to obtain proceeds from the sale of a resource, or to extract some other form of income from it.” (Armstrong 2014, 6).

These six rights are conceptually and practically separable and Armstrong’s analysis shows that most justifications only ever justify some (and to a limited degree) rather than all of them. He distinguishes between two direct justifications, which ground the ownership of resources in some particular relationship between the nation and the resource in question, and two indirect ones, which argue that national ownership is in some sense preferable to alternative property arrangements.

Armstrong first considers the idea that the natural resources of a country belong to its people because of the contributions the people make to the land it inhabits. As he points out this justification is indirect too in a sense, given that the argument presented is not usually made with regards to (extractable) natural resources but much more generally with regard to the land that the population in question inhabited and cultivated throughout history. Claims to land are different from claims to resources but the assumption often is that the latter can be derived from the former. As Armstrong shows, this is not generally the case but rather only in some limited circumstances. The key difference between land and particular natural resources is that in the latter case it makes even less sense to see an entire nation as contributing to the improvement that is the basis of the special claim. Here it is easy to see units smaller than the nation (such as e.g. companies) or agents outside of the nation (such as e.g. international companies) as doing the relevant refinement. It is furthermore unclear why contributing to some sort of improvement should grant full and expansive property rights to the entirety of the improved resource.

The second justificatory strategy emphasises the value the resource in question has in the cultural identity of the relevant nation. Here, once more, it is obvious that the argument cannot apply to all resources and all national groups. Rather, where a cultural identity is

genuinely based on some natural resource, as e.g. the culture of the Saami people of Scandinavia is based on roaming reindeer herds, the population unit is smaller than the nation state while the territory relevant for the resource is larger than one state's boundaries.

Having shown severe weaknesses regarding the scope and application of justifications for national ownership of resources based on the particular relationship between the nation and the resource in question, Armstrong turns to indirect explanations. The first strand of the argument emphasises the importance of national resources for the realisation of important basic rights through consolidated state action. The key question however is “just *which* rights over *which* resources are necessary to meet citizens' basic needs”? (Armstrong 2014, 11).

The assumption that full sovereignty – including the entire list of property rights – is necessary for the state to protect the basic rights of its citizens is questionable. This is especially so in the context of a world where the news reminds us daily of the need for international human rights regimes to protect citizens from their own governments. The focus on *national* resources is vulnerable both from examples where a state is over-rich and could satisfy all relevant rights with a fraction of its national resources and of resource poor states which would be doomed to fail to provide the necessary for their populations if they were restricted to their own national resources.

The second strand of indirect justifications for permanent national sovereignty over national resources refers to incentives for conservation. It tries to apply conclusions from critiques regarding unclear responsibilities in tragedies of the commons to the global level. There are two empirical claims underlying this argument. The first is that “assets (such as resources) will deteriorate in value unless they are ‘owned’ or controlled by a single, specified agent.” (Armstrong 2014, 14). The second is that with regard to natural resources the state is the most suitable agent. It is this second premise that renders the argument vulnerable to a number of critiques. The most obvious is that this argument was originally developed to object to state holdings. The most powerful is the reference to all the examples where the self-interest of national states prevents rather than furthers conservation and where the need for international co-operations is painfully obvious (examples range from regional agreements regarding fishing to genuinely global action against climate change...). The first premise too raises an important question: are all of the different kinds of property rights really necessary

for conservation or would it be possible to further sustainability effectively without, for example, the right to sell or derive income from the resource in question?

Armstrong's discussion does not show that the common sense idea that "[t]he natural resources of a country belong [...] to its people," is not valid (Wenar 2008, 9). It shows that the only justifications of this claim currently discussed in the literature cannot support the full set of property rights over national resources that states are often deemed to have.

### III

What then are the implications of Armstrong's analysis for Wenar's paper whose entire approach depends on this principle to use the international regime of property rights for the purpose of fighting gross injustices?

On the practical side the implications seem small. Wenar's approach is explicitly a *legal* approach: he provides the blueprint for employing current international law in a way that for once protects the most vulnerable people of this planet. Armstrong's *philosophical* dissection of the insufficient normative foundations of this legal principle is for these purposes irrelevant – until the legal situation changes. And despite the argumentative power of Armstrong's paper this is not likely to happen soon.

Even on second glance, when taking account of how the rhetorical misuse of any philosophical principle might undermine the *motivation* to employ the currently available legal instruments, the impact is still likely to be small. Yes, corporations willing to buy from regimes who seized national resources might grasp at anything to justify why this is *not* like trafficking stolen goods. Yes, Armstrong's paper raises important doubts over the assumption that resources automatically belong to the people of the country in or under which they happen to be found. And yes, if the population never had any real title to 'their' resources, these resources cannot be stolen from them even if their regime is authoritarian in the worst sense.

However, even though Armstrong shows that the arguments supporting national claims to resources are more limited in scope than usually assumed, this does not help at all to explain why the authoritarian regimes selling the resources in question should be considered the legitimate owners of these resources. To challenge the current legal provisions assuming permanent national sovereignty over resources one needs a strong alternative account for a suitable global regime of resource ownership.

Other than the principle of “might makes right”, authoritarian states and companies willing to buy from them have few arguments supporting their claim. Given their human rights record, they certainly cannot make instrumental claims that the proceeds of these resources are needed to fund the protections of basic rights for the population at large. Nor are the states, that Wenar is concerned with, renowned for their conservation efforts. Attempts to apply the idea that a people has some legitimate claims to the particular resources necessary to continue their traditional cultural way of life are also doomed to fail. The idea that ‘culture’ justifies that elites are entitled to the luxuries they got used to by selling all the resources they could grab is most implausible.

The best hope is for such regimes to argue that it was they who controlled the extraction and possibly the refinement of these resources and therefore gained claims to these resources by improving their value. As Armstrong points out, this line of argument is circular if it presumes that those who worked on the resources had a right to do so and a right to exclude others from doing so. It is not circular if it is based on the brute fact of control, but then it collapses to the idea of “might makes right.”

This ‘principle’ is – as Wenar points out – still influential in the current legal system but it is one of the most obvious indicators of what is wrong with the current system. It also makes for a somewhat unstable rationale. If authoritarian regimes want to challenge the existing legal system’s insistence that resources belong to the people of the country in or under which they are found, this would not be a good candidate to replace it with... That is, even if one could claim that authoritarian regimes cannot have stolen the resources from their populations, we could uphold the claim that these resources are still stolen goods since they certainly did not belong to the members of the junta in question.

#### **IV**

The obvious question raised by Armstrong’s paper is who really should be considered the legitimate owners of natural resources. The paper does not explicitly answer this question. Armstrong’s project is to raise doubts that the justifications currently available in the philosophical literature really support the current legal praxis. It questions the assumption that full ownership rights automatically belong to the people of the states in or under whose territory the resources are found. With regard to the question “who if not them” the paper remains silent.

However, there is one recurrent theme in Armstrong's critiques, which he also addresses in his conclusion: the current global resource ownership regime does not do justice to the rights of foreigners. A recurring background assumption is that – according to the very arguments used to justify ownership in resources – others too can have legitimate claims. As mentioned before, the arguments from adding value or links to cultural identity better fit for groups smaller than the nation and do not necessarily link up to either citizens of the state in or under which the resources are found or even one particular territory since resources often spread across political borders. The arguments from rights-protection and conservation, on the other hand, suggest advantages of considering humanity at large as entitled to get access to or control the responsible use of at least some fundamentally important resources when needed.

At this point it is also once more important to take into account Armstrong's and Ostrom's distinctions between different kinds of property rights. The relevant questions in the context of Wenar's paper are:

1. Who has the “right to sell a resource, or moving up a level, the right to sell management and exclusion rights” (alienation)?
2. Who should have the right to derive income from any particular resource, that is, the “right to obtain proceeds from the sale of a resource, or to extract some other form of income from it.” (Armstrong 2014, 6).

Armstrong's discussion has many implications for the rights to withdrawal, management and exclusion. A general national right to blankly exclude all others is ill defended on all accounts. Arguments from rights provision and conservation strongly support extending management rights beyond the nation. If we take seriously the idea of ensuring the necessary material means for guaranteeing basic rights for all human beings, finally, we probably need to change the current property regime with regard to withdrawal. The implications for alienation and deriving income, however, are less clear. While the arguments suggest that the international community might be entitled to restrict how much of any perishable resource should be used at any given time, they provide no indication as to who should decide among the choices within the permissible set and who is entitled to the profits generated after relevant basic needs are met.

As Armstrong mentions in the conclusion, he explicitly does not rely on arguments from cosmopolitan egalitarianism that generally suggest that natural resources are jointly owned by

humanity at large (internationally *and* intergenerationally). Nonetheless, in the aftermath of his critiques, proposals regarding common ownership of the earth seem to gain further plausibility as an alternative default position. However, without further positive argument it is not clear whether such proposals can overcome the strong intuition that there is something wrong if the people living in the territory from which tradable resources are gained are not the first to profit from the riches of their homeland. The outrage about the situation in the countries suffering from the resource curse obviously has many sources. The mere fact of human rights violations in itself, the unjust enrichment of the powerful, and the complicity of the international community are at least as powerful in this respect as the objection that populations are excluded from benefiting from 'their' resources. Yet, this last concern – embodied in international law in the context of decolonisation – is powerful in its own right. It might be that it cannot be defended in abstraction from its historical roots or it might be that we have not yet found the best possible argument, but it definitely deserves further consideration.

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