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# Institute for International Law and Justice Emerging Scholars Papers

**IILJ Emerging Scholars Paper 3 [2007]**  
(A Sub series of IILJ Working Papers)

**REFLECTIONS AND EXTRAPOLATION ON THE  
ICJ'S APPROACH TO ILLEGAL RESOURCE  
EXPLOITATION IN THE ARMED ACTIVITIES  
CASE**

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ISSN: 1552-6275  
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New York, NY 10012  
U.S.A.



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EXPLOITATION IN THE ARMED ACTIVITIES CASE**

*Robert Dufresne*<sup>1</sup>

***Abstract***

The International Court of Justice's decision in the *Armed activities* case is significant for its treatment of the claims that some of the resource exploitation that took place during the conflict in the DRC was illegal. This article argues that the Court's approach is characterized by a commitment to doctrinal traditionalism, which succeeds in qualifying part of *pendente bello* resource exploitation as illegal, but which arguably sometimes leaves too much of it out of the sphere of unlawfulness. Based on the classical categories and doctrinal apparatus of international law, the Court defined a range of resource exploitation practices, by state officials as well as by private actors, as in some circumstances engaging a state's responsibility. This approach is constructed on the basis of two branches of international law that provide the primary obligations, i.e. the *jus in bello* and the law of occupation, made operative through the mechanism of state responsibility. However, the Court refused to uphold the innovative claim that Uganda violated the DRC's sovereignty over its resources.

For one concerned with resource-fuelled conflicts, the Court's judgment provides only a partial legal appraisal of a larger *problématique*. This article argues that some of the most interesting, difficult, and pressing questions remain unaddressed in the judgement, notably the lawfulness of *pendente bello* resource exploitation by non-state actors and the forms of responsibility and sanctions that the contravention to existing norms can entail. The article also suggests directions that legal policy could take on such issues.

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## REFLECTIONS AND EXTRAPOLATION ON THE ICJ'S APPROACH TO ILLEGAL RESOURCE EXPLOITATION IN THE ARMED ACTIVITIES CASE

### I. INTRODUCTION

The International Court of Justice's decision in the *Armed Activities on the Territory of the Congo (DRC v. Uganda)* case is significant in many regards, notably for its approach to the claims that some of the resource exploitation that took place during the conflict in the DRC was illegal.<sup>2</sup> The Court's foray into this field is most welcome, as it fills a cognitive gap in the jurisprudence in relation to a salient and problematic dimension of contemporary conflicts. While economists and political scientists have written abundantly on the connection between resource exploitation and patterns of organized violence, international law specialists have by comparison devoted little attention to this connection.<sup>3</sup> The Court's decision brings the phenomenon of the resource curse, and the practices that underpin it, into the realm of international law and offers a lens through which international jurists can appraise such practices.

The ICJ's decision reflects both international law's doctrinal potential and its limitations in relation to patterns of resource exploitation that take place during armed conflicts. Prior to this decision, illegal resource exploitation was not a legal concept or category. As a result, there was uncertainty and hesitation about how to appraise this phenomenon from a legal perspective. The parties' pleadings invoked humanitarian law, the law of occupation and general public international law – notably the notion of permanent sovereignty over natural resources.<sup>4</sup> In addition, the rules of state responsibility were necessarily in the background given the litigation forum.

The outcome – the Court's reasoning and decision – stands among the most authoritative appraisals of how to deal with *pendente bello* resource exploitation under international law. Nevertheless, this article argues that the Court's reasoning is characterized by an attitude of doctrinal traditionalism and restraint. This stands in contrast to the doctrinal innovations and novel arguments that the parties, as well as other institutional actors who have examined the question, put forward to assess the resource exploitation dimension of the conflict. The outcome of this traditionalism and restraint is twofold. On the one hand, the decision dissipates some of the theoretical uncertainties surrounding the appraisal of resource exploitation by occupying powers during conflicts – by authoritatively identifying the relevant norms and branches of international law. On

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<sup>2</sup> See *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, International Court of Justice (19 December 2005), at <http://www.icj-cij.org/docket/files/116/10455.pdf>.

<sup>3</sup> On the connection between resource exploitation and armed conflict, see *inter alia* THE POLITICAL ECONOMY OF ARMED CONFLICT (Karen Ballentine & Jake Sherman, eds, 2003); DAVID KEEN, THE ECONOMIC FUNCTIONS OF VIOLENCE IN CIVIL WARS (Adelphi paper 320, 1998); MICHAEL KLARE, RESOURCE WARS (2001); GREED OR GRIEVANCE (David Malone & Mats Berdal, eds, 2000).

<sup>4</sup> See Reply of the Democratic Republic of the Congo, 29 May 2002, chap. IV, at <http://www.icj-cij.org/docket/files/116/8315.pdf> [Reply]; Rejoinder of Uganda, 6 December 2002, paras. 325-522, at <http://www.icj-cij.org/docket/files/116/8314.pdf> [Rejoinder]. See also the oral pleadings of the parties, generally accessible at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=2> [Oral Pleadings].

the other hand, similar resource exploitation by non-state actors and non-occupying states is not tackled in the decision, leaving this issue in need of clarification.

The Court's decision contains four noteworthy positions on the issue of illegal resource exploitation, each of which will be examined in turn by this article. First, the Court resorted to classical categories found in international humanitarian law to identify the forms of misappropriation that are unlawful. In addition to staying within this classical framework, the Court treated the legal categories of misappropriation mostly as an ensemble of perhaps equivalent, interchangeable, or aggregate forms of acquisition, thereby restraining itself from distinguishing between the various categories. Second, the Court gave a prominent place to the law of occupation in its appraisal of the illegality of resource exploitation that took place in Eastern DRC, notably to flesh out multi-tiered state obligations. By doing so, it gave new life to a classical branch of international law that, until recently, had lost some of its prominence. Third, these two classical branches of international law were made legally consequential through the framework of state responsibility. While this does not leave resource exploitation by private actors entirely out of the loop (notably in occupied territory), the framework of state responsibility primarily leaves the conduct of private economic actors in one of international law's blind spots. Fourth, the Court opted for a form of doctrinal traditionalism and rejected entirely novel arguments anchored in the notion of permanent sovereignty over natural resources (PSNR), deeming the notion irrelevant to conflict situations. By and large, therefore, the Court confined its analysis of illegal resource exploitation to traditional categories of international law.

This article argues, however, that it would be a mistake to directly equate the Court's doctrinal traditionalism with political conservatism: rather, the relation is more ambivalent. On the one hand, the Court's attitude can be regarded as a manifestation of conservatism in certain respects. It can be seen to limit the branches of international law that are capable of provide a restraining compliance pull over practices of *pendente bello* resource exploitation. Similarly, it leaves unaddressed the increasingly pressing question of state responsibility for extraterritorial international legal violations by corporations and other economic actors. On the other hand, I argue that the Court's doctrinal conservatism should not to be equated or reduced to an upholding of the practices at stake. First, the Court's refusal to provide exhaustive definitions of the legal categories at issue avoids the risk of excluding some violations, leaving the net of potential violations more open. Second, the Court's revival of the law of occupation is an important ideational move that invites replication in other contexts. Third, while the Court's rejection of the PSNR-based claim may at first seem like a setback for advocates of better resource distribution, it actually amounts to a refusal to uphold a stretched and state-centric interpretation of the PSNR principle, i.e. a claim that Congolese governmental authorities have the authority to decide and benefit from the exploitation of the country's natural resources. By refusing to accept this argument, I read the decision as inviting a reconstruction of the notion of PSNR that would be less attached to central governments and, hopefully, less prone to abuse.

This article examines each of these four manifestations of doctrinal classicism in the Court's decision, stressing the conceptual prudence displayed by the Court (Part IV). My point of departure is always the ICJ's decision itself, but I also go beyond it with extrapolations on what the decision says or does not say that are relevant for tackling at

law the problematic forms of *pendente bello* resource exploitation. As an introduction to this analysis, the article begins by outlining the connection between resource exploitation and the conflict in the DRC (Part II) and provides a general introduction to the parties' pleadings and the Court's decision in *Armed Activities* (Part III).

## II. THE CONFLICT IN THE DRC AND THE CENTRALITY OF RESOURCE EXPLOITATION

The conflict in the DRC has become the epitome of an extreme form of resource curse, where a country's natural resource economy becomes the object of an intense struggle for control between opponents. The DRC's subsoil, particularly in the east, is rich in coltan, diamonds, copper, cobalt, and gold. The conflict that has been raging in the DRC since 1994 has created instability, allowing rebel groups and neighboring states to partake in the proceeds of the exploitation of resources formally belonging to the DRC but no longer under the control of its central institutions.<sup>5</sup> The profits gained from these resources have in turn fuelled the conflict; to use David Keen's apt rephrasing of Carl von Clausewitz' aphorism in relation to the situation in the DRC, the conflict "ha[d] increasingly become the continuation of economics by other means."<sup>6</sup>

The connection between patterns of resource-based enrichment and war-making has been examined by various actors, including: four reports by UN Panels of Experts (First UN Panel Report, Interim Report, Second UN Panel Report, and Third UN Panel Report);<sup>7</sup> Uganda's Porter Commission/Report;<sup>8</sup> Belgium's Great Lakes Inquiry Commission;<sup>9</sup> and the DRC's Lutundula Commission, a review mechanism on contracts

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<sup>5</sup> Among the relevant non-state actors, we find: the Former Uganda National Army, the Lord's Resistance Army (LRA), the Mouvement de libération du Congo (MLC), the National Army for the Liberation of Uganda, the Rassemblement congolais pour la démocratie (RCD), the Rassemblement congolais pour la démocratie-Kisangani, the Rassemblement congolais pour la démocratie-Mouvement de libération, the Sudan People's Liberation Movement/Army, the Uganda National Rescue Front II, and the West Nile Bank Front. Among the state protagonists, we find Uganda, Rwanda, Burundi, Namibia, Angola, Sudan and Zimbabwe.

<sup>6</sup> KEEN, *supra* note 3, at 11.

<sup>7</sup> See *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2001/357 (12 April 2001) [First Panel Report]; *Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/565 (22 May 2002) [Interim Panel Report]; *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/1146 (16 October 2002) [Second Panel Report]; *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. /2003/1027 (28 October 2003) [Third Panel Report].

<sup>8</sup> Republic of Uganda, Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001, Final Report (November 2002) [Porter Report]. The Commission of Inquiry was chaired by Justice David Porter.

<sup>9</sup> See Sénat de Belgique, Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l'implication de la Belgique, Rapport fait au nom de la Commission d'enquête «Grands Lacs» par MM. Colla et D'Allemagne, (20 February 2003) [Great Lakes Commission Report].

and concessions granted during the war (1996-2003).<sup>10</sup> Without delving in detail into the various reports produced in these circles,<sup>11</sup> it may be useful to highlight some of their key findings on the relation between the conflict and the struggle for control over the resource-based economy, as well as on the evolution of this relationship.<sup>12</sup>

The First Panel Report noted that an original phase of mass-scale looting by conquering armies had turned into systematic and systemic resource exploitation endeavors.<sup>13</sup> It concluded that the economies of many states supporting the rebels in eastern DRC (opposing the Kabila, father and son, governments) benefited from the war, given their involvement in the exploitation of natural resources in zones under their control (or under the control of rebel groups that they backed).<sup>14</sup> Resource exploitation benefited from the backing of senior state and army officials and a few key private businessmen (Rwandan President Kagame, Ugandan President Museveni and the late Congolese President Laurent Kabila were even identified as potential stakeholders)<sup>15</sup> and from the legitimizing input of administrative structures in Rwanda and Uganda.<sup>16</sup> The First Panel Report concluded that the relation between the continuation of the conflict and the exploitation of natural resources in the DRC was circular – with control of the resource economy financing the war effort and the use of coercion and force being central to the control of the resource-rich territory.<sup>17</sup>

Later reports note a continuation and consolidation of the practices of exploitation of resources found in militarily disputed zones and zones characterized by a high degree

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<sup>10</sup> DRC, Assemblée Nationale, Commission spéciale chargée de l'examen de la validité des conventions à caractère économique et financier conclues pendant les guerres de 1996-1997 et de 1998, Rapport des travaux, 1ere partie (2005) [Lutundula Commission Report].

<sup>11</sup> Note that this does not exhaust the range of inquiries made into resource exploitation in the DRC. See, e.g., Amnesty Int'l, Democratic Republic of the Congo – “Our Brothers who Help Kill us” – Economic Exploitation and Human Rights Abuses in the East (2003); Global Witness, Rush and Ruin – The Devastating Mineral Trade in Southern Katanga, DRC (September 28, 2004); Same Old Story: A Background Study on Natural Resources in the Democratic Republic of Congo (July 6, 2004); Branching Out: Zimbabwe's Resource Colonialism in the Democratic Republic of Congo (February 7, 2002); Human Rights Watch, The Curse of Gold (June 2, 2005).

<sup>12</sup> The practice of sustaining rebel armies through the wealth generated by the exploitation of natural resources in eastern DRC started with the late Laurent Désiré-Kabila's movement opposing Mobutu Sese-Seko's Zairian forces. But most appraisals focus on the second phase of the conflict. What follows focuses on findings in UN Panel Reports. Note that while the factual findings of the Porter Report are more sober than those of the UN Panels of Experts, they nonetheless identify problematic involvement by Ugandan individuals and groups in illegal practices pertaining to the exploitation of Congolese resources. This is important as the Court relied significantly on the findings of the Porter Report in its decision.

<sup>13</sup> First Panel Report, *supra* note 7, paras. 5-6 and 214.

<sup>14</sup> An illustration is Uganda's reported yearly export, from 1997-2000, of 5 to 11 tons of gold, even though it produces virtually no gold nationally,<sup>14</sup> as well as its entry into the club of diamond-exporting countries in the same period. *Id.*, Table 2 and paras. 100 and 104.

<sup>15</sup> *Id.*, paras. 6 and 195-212.

<sup>16</sup> *Id.*, paras. 71-86. The Panel concluded, however, that the systems set up in Uganda and in Rwanda differed. In Uganda, these activities are undertaken by individual top army commanders, using their influence and connections, with the knowledge of the Ugandan political authorities. In Rwanda, the structure of the exploitation of the DRC's natural resources involves a network of various companies and financial institutions operating under a disciplined pyramidal structure controlled by a few influential persons. *Id.*, para. 85, at 17. The circle of actors contributing to fueling the conflict can be widened to include local rebel groups, local corporations, banks, transit states and foreign corporations. See *id.*, paras. 46-93, at 9-19, and paras. 181-94, at 37-39.

<sup>17</sup> *Id.*, para. 130, at 30.



of militarization.<sup>18</sup> But they also identified certain transformations and adjustments to such practices. The UN Interim Report of May 2002 notes that transit routes had apparently been modified, commodities were relabeled to conceal their Congolese origin, and bordering countries continued to be transit points – for both open trade and more underground transactions.<sup>19</sup> Moreover, it found that “[c]ontrol over fiscal resources — licensing fees, export taxes, import duties and general state and community taxes — seems to be gaining increasing importance in the eastern Democratic Republic of the Congo for the rebel groups and the foreign armies.”<sup>20</sup> The fiscal receipts so generated were said to be used either to benefit individuals or to finance small groups or foreign armies.<sup>21</sup> The October 2002 Report observed that the intensity of the main conflicts in the DRC had deflated but had given way to micro-conflicts “fought over minerals, farm produce, land and even tax revenues.”<sup>22</sup> The 2002 Final Report identified three elite networks with “control over a range of commercial activities involving the exploitation of natural resources, diversion of taxes and other revenue generation activities in the three separate areas controlled by the Government of the Democratic Republic of the Congo, Rwanda and Uganda, respectively.”<sup>23</sup>

### III. THE PARAMETERS UNDERLYING THE COURT’S APPRAISAL OF THE LAW

Before delving into the Court’s reasoning and examining various aspects of its doctrinal traditionalism, it is useful to examine two dimensions of the decision that created the parameters for the Court’s appraisal of the applicable law: the terms of the Congolese demands and the factual findings of the Court in relation to practices of resource exploitation.

#### A. The Nature of the DRC’s claims in Relation to Resource Exploitation

The DRC instituted judicial proceedings against Burundi, Rwanda, and Uganda in June 1999. The original Congolese Application did not seek an explicit ruling on “illegal resource exploitation” as a violation of international law.<sup>24</sup> Rather, this dimension was subsumed into the DRC’s request that the Court declare that “Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in flagrant disregard of the elementary rules of international humanitarian law in

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<sup>18</sup> Interim Report, *supra* note 7, para. 28. The Panel of Experts held that in spite of the ceasefire agreement, “[o]n either side of the ceasefire line, foreign armies have consolidated their presence and the struggle over maintaining control of natural resources and territory has become a principal preoccupation.” *Id.*, para. 36.

<sup>19</sup> *Id.*, paras. 31-32.

<sup>20</sup> *Id.*, para. 54.

<sup>21</sup> *Id.*, para. 54.

<sup>22</sup> Second Panel Final Report, *supra* note 7, para. 12.

<sup>23</sup> *Id.*, paras. 20-21.

<sup>24</sup> See Application Instituting Proceedings (23 June 1999), para. 5, at <http://www.icj-cij.org/docket/files/116/7151.pdf> [Application]. There is nothing specifically about resource exploitation in the Application, notably in the section identifying violations of international law. However, the factual beginnings of this sort of claim can be found in its identification of “*Systematic looting of public and private institutions, theft of property of the civilian population.*” *Id.*, para. 5.

conflict zones,”<sup>25</sup> and in the reference to misappropriation in the DRC’s claim for compensation.<sup>26</sup>

Resource exploitation appeared as a more autonomous dimension of the case when, a year later, the DRC presented a request for provisional measures.<sup>27</sup> Temporally, the notion of illegal resource exploitation was thus introduced in the proceedings after the filing of the First Panel Report, in which the concept was prominent.<sup>28</sup> The identification of illegal resource exploitation as an autonomous violation of international law gained more salience in subsequent stages of pleadings. The DRC’s July 2000 Memorial labeled illegal exploitation, pillaging and spoliation as violations of a range of international legal principles, including: state sovereignty (including sovereignty over natural resources), equality of peoples, self-determination, non-interference in domestic matters, law of armed conflicts, and human rights law.<sup>29</sup> The Congolese Reply of May 2002 provided an even clearer and better articulated position.<sup>30</sup> In its Reply, the DRC consolidated the various practices into two main violations triggering Uganda’s responsibility: a violation of the DRC’s sovereignty over its natural resources and a violation of Uganda’s obligation of due diligence (*obligation de vigilance*), referring to Uganda’s failure to prevent the illegal exploitation of resources by private Ugandans and rebel groups. In other words, the DRC provided a more solid basis for state responsibility by using a framework in which state acts and passive state omission in relation to private deeds were framed as violations of distinct, yet complementary, obligations. Finally, in the oral pleadings, the DRC’s argument identified two legal principles through which violations ought to be appraised: permanent sovereignty over natural resources (PSNR) and the law of armed conflict, including the law of occupation.<sup>31</sup> In writing its decision, therefore, the Court was primarily responding to this last and most elaborate of the DRC’s argumentative frameworks.

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<sup>25</sup> *Armed Activities*, para. 23, subpara. (b).

<sup>26</sup> *Id.*, para. 23, subpara. (3): The DRC requested the Court to declare that it “is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the [DRC] reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.”

<sup>27</sup> Request for the Indication of Provisional Measures, Order of 1 July 2000, para. 13 [Provisional Measures Order], at <http://www.icj-cij.org/docket/files/116/8058.pdf>. Among other things, the DRC requested the Court to order that Uganda “must cease forthwith all illegal exploitation of the natural resources of the Democratic Republic of the Congo and all illegal transfer of assets, equipment or persons to its territory.”

<sup>28</sup> Formally, the expression “illegal resource exploitation” was, as was later pointed out by Uganda, first used by the Security Council itself. In resolution 1291 of 24 February 2000, the Security Council “[e]xpresses its serious concern at reports of illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo, including in violation of the sovereignty of that country [and] calls for an end to such activities.” U.N. Doc. S/RES/1291 (2000), para. 17.

<sup>29</sup> *Armed Activities*, para. 24.

<sup>30</sup> Reply, *supra* note 4, Chapter IV. Arguably, the evolution and tightening of the DRC’s argument throughout the various rounds of written and oral pleadings can be partly seen as responding to the chronology of reports and studies on resource exploitation in the DRC.

<sup>31</sup> Oral Pleadings, *supra* note 4, Verbatim Record, Wednesday 13 April 2005, at 3 p.m., para. 2 (Sands), at <http://www.icj-cij.org/docket/files/116/4297.pdf?PHPSESSID=5e43f5f648bac889811899df0743300c> [Sands].

## B. The Court's Factual Findings

The Court's analysis concerning resource exploitation began with an assessment of the factual basis of the allegations, then turned to a discussion of the legal principles at stake for which Ugandan responsibility could be engaged, and finally dealt with the issue of reparations. Considering the value of the sources that the DRC relied on to prove looting and illegal resource exploitation, the Court

considers that both the Porter Commission Report, as well as the United Nations Panel reports, to the extent that they have later proved to be probative, furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting, plundering and illegal exploitation of the DRC's natural resources.<sup>32</sup>

The Court added that in order to decide the Congolese claim, it was not necessary to make factual findings "with regard to each individual incident alleged."<sup>33</sup>

In fact, the Court relied extensively on the findings of the Porter Commission to derive its own factual findings. The Court's findings can be grouped in three clusters. First, the Court pointed to the clear awareness of General Kazini concerning the involvement of UPDF officers doing business in the DRC, including the use of military aircraft and their involvement in "gold mining and trade, smuggling and looting of civilians."<sup>34</sup> The Court also found that although General Kazini delivered a radio message appearing to condemn such conduct, he had no genuine intent of curbing it and little or no follow-up action was taken as a result of the message.<sup>35</sup> Second, the Court noted the Porter Commission's conclusions on General Kazini's assistance to Victoria, a company engaged in the smuggling of diamonds, holding that he was "an active supporter" of the smugglers and that "it is difficult to believe that he was not profiting for himself from the operation."<sup>36</sup> Third, the Court upheld the Porter Commission's conclusion that "exploitation had been carried out, *inter alia*, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings; by cross-border trade and by private individuals living within Uganda."<sup>37</sup> The Court accepted the Commission's finding that "both RCD and UPDF soldiers were imposing a gold tax, and that it is very likely that UPDF soldiers were involved in at least one mining accident."<sup>38</sup>

Overall, the Court considered "that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities did not take any measures to put an end to these

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<sup>32</sup> *Armed Activities*, para. 237. The Court also discussed evidentiary considerations and its approach in light of the controversy associated to some of the sources before it – notably the UN Expert Reports. *See id.*, para. 61.

<sup>33</sup> *Id.*, para. 237.

<sup>34</sup> *Id.*, para. 238.

<sup>35</sup> *Id.*, para. 239.

<sup>36</sup> *Id.*, para. 240.

<sup>37</sup> *Id.*, para. 241.

<sup>38</sup> *Id.*

acts.”<sup>39</sup> It concluded, however, that it lacked “credible evidence” to find that there was a governmental policy by Uganda to exploit the resources of its neighbor.<sup>40</sup>

#### IV. THE COURT’S DOCTRINAL RESTRAINT AND TRADITIONALISM

##### A. Examining the Illegal Exploitation of Resources through the Lens of International Humanitarian Law

This section examines how the Court identified the categories of misappropriation that it used to assess the extent of the violations of international law, by Uganda and by private actors, in the instant case. It discusses the merits and demerits of the categories used in the decision and it suggests avenues in which the category of illegal resource exploitation can dovetail with international law’s traditional framework.

###### 1. The ICJ Adopted IHL Categories of Misappropriation

The ICJ used international humanitarian law to find the categories of misappropriation that amount to violations of international law for which state responsibility can be engaged. Specifically, the Court recalled the prohibition of pillage (expressed in Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949), as well as the entitlement to recovery and compensation in the case of spoliation, under the terms of Article 21(2) of the African Charter.<sup>41</sup>

The Court’s discussion of these rules both creates and avoids doctrinal uncertainty concerning the various categories of misappropriation. The Court concluded that Uganda was responsible for three forms of misappropriation: looting, plundering, and resource exploitation (it also used the concept of pillage).<sup>42</sup> But the Court did not formally define or distinguish these terms, leaving some doctrinal uncertainty about the precise scope and meaning of each. Additional uncertainty stems from the Court’s use of the looting/plundering/exploitation triad in its discussion of the facts and of the parties’ contentions, in contrast to its exclusive reliance on *jus in bello* prohibitions (which do not include a category of illegal resource exploitation) after it rejected the use of the PSNR principle, and its resorting to the triad anew when it determined Uganda’s responsibility for violations of the law of war and the law of occupation.<sup>43</sup> In addition, the Court refused to adopt a new and independent legal category of “illegal resource exploitation.”

In the following discussion, I argue in support of the Court’s decision to maintain some definitional uncertainty as to which of the legal prohibitions were specifically violated and I express support for its rejection of an overloaded notion of illegal resource exploitation.

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<sup>39</sup> *Id.*, para. 242.

<sup>40</sup> *Id.*, para. 242.

<sup>41</sup> *Id.*, para. 245.

<sup>42</sup> *Id.*, para. 250.

<sup>43</sup> *Id.*, paras. 222-27, 230, 242 and 250.

i. *The Value of the Court's Reluctance to Enter the Definitional Game*

The way in which the Court maintained uncertainty in relation to the distinction between looting, plundering, and spoliation, and avoided espousing the notion of illegal resource exploitation as an autonomous category is by no means valueless. While the relative silence of the Court on distinctions between various modes of unlawful appropriation does not provide tools for doctrinal clarification of those legal categories, it may still be sound judicial policy. Insisting on strict definitions and distinctions between categories of misappropriation could open the door to undesirable technical circumventions of the prohibitions.

In addition, the ICJ's non-hermetic approach to the categories of misappropriation in *Armed Activities* is actually in line with the judicial practice of the ICTY. The ICTY recently recognized that 'pillage' is used rather interchangeably with 'plunder' in practice, notably as a result of the use of the latter term to define the jurisdiction of various institutions.<sup>44</sup> In *Delalic*, the ICTY's Trial Chamber considered that plunder was to be understood as covering "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage.'"<sup>45</sup> By avoiding a rigid distinction between looting, plundering and spoliation, the ICJ thus maintained consistency with the ICTY's jurisprudence, while preserving its ability to look more broadly at patterns of misappropriation and avoid traps of under-inclusion in future cases.

A similar argument can be made with regard to the Court's refusal to address illegal resource exploitation as a separate legal category. The Court's conscious decision not to use the notion of illegal resource exploitation as a distinct form of unlawful appropriation avoids buttressing a concept that is marred with uncertainty and controversy. Unlike terms such as pillage, plundering, and spoliation, illegal resource exploitation is barely anchored in any legal source and has a very thin claim to existence under international law. The Court was right to refuse to address this category at this point in time, without explicitly ruling it out, thus leaving open the possibility that it may in future crystallize into a firmer norm of international law.

Illegal resource exploitation is a generic category that draws its content from several more specific bodies and branches of international law. For example, the First Panel Report holds that "the understanding of illegality [of resource exploitation] is underpinned by four elements all related to the rule of law."<sup>46</sup> The first and largest consideration is the involvement and support of neighboring states, including by some of their high officials and with the use of military means. Legality is thus measured in relation to the law on the use of force and the principle of territorial integrity. In that vein, the first Report of the DRC Panel of Experts "posit[s] that all activities – extraction, production, commercialization and exports – taking place in the [DRC] without the consent of the legitimate government are illegal."<sup>47</sup> The Panel considered that this broad definition targets exploitation by uninvited forces and their nationals – hinting that

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<sup>44</sup> *Prosecutor v. Delalic et al*, Judgment, IT-96-21-T (ICTY TC, 16 November 1998), para. 591 [*Delalic*].

<sup>45</sup> *Delalic*, para. 591; *Prosecutor v. Kordic*, Judgment, IT-95-14/2-T (ICTY Appeals, 17 December 2004), para. 79 [*Kordic*].

<sup>46</sup> First Panel Report, *supra* note 7, at 5.

<sup>47</sup> *Id.*, para. 15.

resource exploitation by Zimbabwe and Angola, invited by the Kabila government, would not be illegal on this ground. The second element identified by the Panel is “[r]espect by actors of the existing regulatory framework in the country or territory where they operate or carry out their activities.”<sup>48</sup> Here, illegality or unlawfulness is grounded in violations of the terms of exploitation as set out in legislative or regulatory enactments. The third element focuses on the “discrepancy between widely accepted practices in trade and business and the way business is conducted in the [DRC].”<sup>49</sup> According to the Report, this element targets instances of abuse of power in the means by which business is conducted, such as forced monopolies, unilateral price fixing by the buyer, confiscation or looting, and the use of military force to protect interests or to create monopolies. Finally, the illegal nature of resource exploitation can arise from “violation of international law, including soft law.”<sup>50</sup> What rules or principles of international law are implicated remains unclear, but the Panel clearly has in mind rules the infringement of which renders business activities illegal.

Attacks on this broad conception of the notion of illegal resource exploitation were fierce. Reservations were expressed in the Security Council debates on the First Panel Report.<sup>51</sup> The Porter Commission Report unmistakably distanced itself from it, stating that it “does not think that the definition of illegality is quite as simple as the original Panel of Experts has set out in the report.”<sup>52</sup> Notably, the Porter Commission contested the direct link between violation of sovereignty and illegal resource exploitation. Moreover, it also considered that a series of more specific practices that would fall under the UN Panel’s broad definition of illegality were in fact not illegal.<sup>53</sup>

Belgium’s Great Lakes Inquiry Commission Report of February 2003 also questioned the Panel’s definition of illegal resource exploitation for its focus on the notion of the legitimacy of the authority (along the binary of rebel-illegal/governmental-legal), although it did not articulate an alternative definition.<sup>54</sup> In fact, the Commission Report is not helpful in identifying a narrower and more workable category of unlawful

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Rwanda and Uganda notably attacked the invited/uninvited state distinction on the ground that the Lusaka Accord set up a principle of temporary shared responsibility for public administration of the territory (between the Government of the DRC, the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (MLC)), apparently relying on a form of ‘invitation’ by those local administrations to legitimate their exploitation of resources. This argument however found little reception. The Ugandan representative expressed its opposition in the following terms: “...the rest of the report, the rest of the investigation, was based on the understanding that every activity – the extraction of minerals, production of any kind and any commerce or export in areas not controlled by the Government – was illegal and therefore defined as looting and plundering the resources of the Congo. We think that that is erroneous; it is an incorrect definition of illegality, and we do not think that that was the meaning conveyed to the Panel by this Council.” U.N. Doc. S/PV.4317 (3 May 2001), at 13. This point received some acknowledgements in Security Council discussions. U.N. Doc. S/PV.4317 (resumption 1), at 6. The vagueness and unhelpfulness of a concept of illegality based on unspecified norms of international law, including of soft law, was also highlighted.

<sup>52</sup> Porter Report, *supra* note 8, at 14.

<sup>53</sup> E.g. non-application of the fiscal regulatory framework, forced monopoly in trading, unilateral price-fixing by the purchaser, practices contrary to soft law standards. *Id.*, espec. 10-16 and *Annex 3: Paper on Illegality*, at 235-47.

<sup>54</sup> See Great Lakes Commission Report, *supra* note 9, section 2.1.

appropriation of resources. Indeed, the Commission used an extremely broad, socio-economic conception of pillage, premised on the appropriation of added value and under which pillage was deemed to have started before the war, with the Congolese elites appropriating the wealth of the country without generating local or widespread benefits.<sup>55</sup>

Finally, Uganda unsurprisingly also contested this broad definition of illegal resource exploitation.<sup>56</sup> In the oral pleadings, Professor Eric Suy argued that the notion of “illegal resource exploitation” does not meet international law’s requirements for the establishment of state responsibility.<sup>57</sup> For Suy, the notion of illegality, as defined in the First Panel Report, “contient, en effet, des éléments qui ne permettent pas d’engager la responsabilité d’un Etat devant une juridiction internationale.”<sup>58</sup> Among the elements incapable of engaging state responsibility, Suy listed three elements on the basis of which the First Panel Report built its notion of illegality: “[r]espect by actors of the existing regulatory framework in the country or territory where they operate or carry out their activities”; “discrepancy between widely accepted practices in trade and business and the way business conducted in the [DRC]”; and “violation of international law, including soft law.”<sup>59</sup> Suy made a distinction between illegality and illicitness. He argued that only the latter notion is relevant to the sphere of international responsibility and that the DRC used to its benefit a collapsed notion of illegality-illicitness.<sup>60</sup>

The Court did not discuss the merits and demerits of a legal category of illegal resource exploitation. Its silence is telling. The definition of the concept as presented to the Court was much too broad to be received as such and no convincing argument was made to the effect that illegal resource exploitation could (and should) stand as an autonomous legal category. Despite the flaws of the overly broad definition presented to the Court, however, the Court was also wise not to have explicitly dismissed it. By not

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<sup>55</sup> While it examines looting practices and the militarization of extraction and trade networks for various commodities, the Report does not provide findings of illegality or legal responsibility in relation to the conduct examined. *See id.*, Part III (Constatations finales), paras. 2-3 : « La commission n'a pas constaté d'actes ou d'actions contraires à la loi de la part de personnes qui occupent des fonctions publiques en Belgique et exercent des mandats autorisés par la loi ou entretiennent des relations d'affaires avec des entreprises citées dans les rapports de l'ONU. (...) Les témoins des entreprises citées dans les rapports de l'ONU que la commission a entendus ont, sous serment, récusé les allégations portées contre eux dans les rapports de l'ONU. Sans préjudice de preuves qui seraient apportées dans le futur, la commission, avec les moyens dont elle disposait, n'a pas constaté de faits contraires à la loi de la part des personnes qu'elle a entendues.»

<sup>56</sup> Uganda insisted that the Panels were not meant to establish liability or to attribute blame, as a judicial or quasi-judicial organ would; they were simply part of the political process of the work of the UN Security Council. *Rejoinder, supra* note 4, paras. 323, and 332-38. Cleverly, Uganda also highlighted serious and fundamental attacks against the April 2001 Report, including some formulated by the DRC itself. *Id.*, paras. 324, 339-79. According to the Ugandan rejoinder, the DRC pointed to three major flaws in the First Report: (1) accusations made outside of the broader context of the conflict; (2) accusations unfounded on evidence; (3) mistaken understandings of what is legal and what is not. *Id.*, para. 340 ss.

<sup>57</sup> Oral Pleadings, *supra* note 4., Verbatim Record, 20 April 2005, at 10 a.m., para. 29 [Suy], at <http://www.icj-cij.org/docket/files/116/4313.pdf?PHPSESSID=5e43f5f648bac889811899df0743300c>.

<sup>58</sup> Translation: “indeed contains elements that do not permit to engage the responsibility of a state before an international jurisdiction.” Suy, *supra* note 57, para. 30.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*, para. 32: « [P]armi la nébuleuse des faits prétendument «illégaux» répertoriés dans les rapports des groupes d’experts et repris par le Congo, la Cour ne peut en réalité s’intéresser qu’aux faits «illicites», c’est-à-dire aux violations des règles du droit international opposables à l’Ouganda. »

killing the bird in the egg, the Court left room for the eventual construction of a narrower and more workable notion of illegal resource exploitation.

## 2. Filling the Gap: Reflections on the Notion of Illegal Resource Exploitation beyond the Court's Decision

Despite the elaborated benefits of leaving the notion of illegal resource exploitation unaddressed (for the present), the Court's silence on this increasingly important concept invites reflection on how this concept could be buttressed to provide a coherent legal construct that the Court, and other international jurists, might adopt in future cases.

There are two ways to give coherence and credibility to the concept of illegal exploitation – used in the decision in relation to Uganda's responsibility (though, oddly, not discussed as a primary prohibition) and in UN Panel Reports. The first approach conceives of the notion as an umbrella concept, similar to the notion of crimes against humanity; the second articulates the concept as an independent violation of international law, defined in relation to the concept of spoliation.

First, illegal resource exploitation can simply remain as an umbrella concept under which more precise and specific prohibitions form the basis on which conduct is assessed and responsibility is engaged. Illegal resource exploitation would thus not be in itself a violation of international law, but instead an enveloping notion – perhaps a bit like crimes against humanity or war crimes, if a loose parallel can be drawn. Under this perspective, systemization would require the identification of the prohibitions falling under the ambit of this umbrella concept. While the First UN Panel Report attempted to do just that, in light of the criticisms discussed above, it would seem wise to refrain from such an overly broad approach: *qui trop embrasse, mal étreint*. At the very minimum, therefore, illegal resource exploitation would seem to encompass the prohibitions contained in the doctrines of *jus in bello* and *jus occupando*, such as pillage, plundering, and looting. Arguably, in the future, other prohibitions could also be included, conventionally or customarily. For instance, some commentators are using a notion of “conflict commodity” – which could fit under this general umbrella approach.<sup>61</sup>

Alternatively, if one insists on defining the term as its own independent violation of international law, then more specific contours must be adumbrated. While there is little guidance as to the direction that such an approach could take, I suggest that the First Panel Report's distinction between two phases of illegal exploitation – a period of mass-scale looting and a phase of systematic and systemic resource exploitation – could be a place to start.<sup>62</sup> In relation to the second phase, the First Panel Report embraces the idea that processes of “normalization” or attempts to preserve the impression of regular economic transactions by actors involved in the self-enriching exploitation of an occupied territory's potential should be disregarded as mere modalities of a similar quality of exploitation.<sup>63</sup> It thus recognized a functional equivalence of the various modes of resource exploitation in Eastern DRC:

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<sup>61</sup> Mark Taylor, *Economies of Conflict: Private Sector Activities in Armed Conflict*, Emerging Conclusions – March 2002, at 21-23, at <http://www.fafo.no/nsp/emrg302.pdf>.

<sup>62</sup> See First Panel Report, *supra* note 7, para. 15.

<sup>63</sup> *Id.*, paras. 47-55.



The aforementioned [examples of various modalities of timber and mineral exploitation] demonstrates that the procedures and processes for exploiting the natural resources of the Democratic Republic of the Congo are continuously evolving. Occupying forces began with the easiest method, looting stockpiles. As the wells ran dry, they developed efficient means of extracting additional resources necessary to keep the coffers full. Eventually, any means necessary was recognized as a legitimate mode of acquisition.<sup>64</sup>

This approach calls into play a dimension of illegal resource exploitation jurisprudentially developed by the U.S. Military Tribunal in the *Krupp* and *Farben* cases through the notion of spoliation. While pillage, plunder, and spoliation are part of the same *genus* of offenses against property, spoliation can be viewed as entailing, in addition to the unlawfulness attaching to its mode of appropriation (constituting a wrong vis-à-vis the owner of the goods), a second dimension of unlawfulness pertaining to the pattern of instrumentalization of a local economy to the benefit of the spoliator.<sup>65</sup> The transition from isolated acts to a systemic pattern is not necessarily a purely quantitative issue. Spoliation often involves a ‘normalization’ which gives the misappropriation a veneer of ordinary economic activity. In the *I.G. Farben* and *Krupp* cases, the Tribunal clearly pointed to the necessity of looking beyond the appearances of legality of transactions involving local property.<sup>66</sup> In the former case, it considered two forms of acquisition: acquisition after confiscation by the Reich authorities and acquisition through negotiations with the owner. The USMT concluded that, when read in the larger context, neither form of acquisition was voluntary, the former involving direct seizure by military authorities and an intent by Farben to acquire such property, the latter involving the constant threat of forceful seizure or of countermeasures of some sort in the case of refusal. In light of the larger context and of their common purpose, the USMT concluded that both modalities violated the prohibition on spoliation:

The result was enrichment of Farben and the building of its greater chemical empire through the medium of the military occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of the Hague Regulations. It was in violation of rights of private property, protected by the laws and customs of war and, in the instance involving public property, the permanent acquisition was in violation of that provision of the Hague Regulations which limits the

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<sup>64</sup> *Id.*, para. 70.

<sup>65</sup> During the Second World War, the Krupp industrial group had acquired, used, and seized property in occupied territory, in addition to using forced labor. In *In re Krupp and others*, officials of the Krupp industrial enterprises were charged with four counts, including “plunder, spoliation and exploitation of public and private property in occupied territory.” The decision highlights the dual aspect of spoliation: “Spoliation of private property, then, is forbidden under two aspects; firstly, the individual private owner must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of the war effort – always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory.” *Krupp case*, Law Reports of Trials of War Criminals, vol. IX, 1327, at 1342 (U.S.M.T., 1948) [*Krupp*].

<sup>66</sup> *Krupp*, at 1346-47 (standing for the proposition that it is the result that counts, not the legal technique).

occupying power to a mere usufruct of real estate. The forms of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage plunder and spoliation stands out and there can be no uncertainty as to the actual result.<sup>67</sup>

Arguably, if illegal resource exploitation is regarded as a distinct category of misappropriation, it could be considered as a form of spoliation specific to the natural resource extraction sector (or to some subset thereof) and gain legal cogency through the pedigree pertaining to that concept.

As seen in the above examination of the Court's analysis, the Court did not apply either of these approaches to the concept of illegal resource exploitation, leaving the norm open to future development. The Court remained on the beaten path of clearly identified forms of misappropriation under international law by resorting to *jus in bello* prohibitions, but, as the next section will demonstrate, it also supplemented its analysis by examining as well the violation of primary obligations under the *jus occupando*.

## **B. The Court's Use of the Law of Occupation to Impose Additional Obligations**

### **1. The Court's Conception of an Occupier's Obligations**

The true importance of the Court's decision regarding resource exploitation-connected violations of international law by Uganda can only be understood in light of the Court's key finding concerning the law of occupation.<sup>68</sup> Under international law, a territory is occupied when it is "actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."<sup>69</sup> On that basis, the Court considered that Uganda was an occupying Power under international law in the district of Ituri, but not in other regions where the evidence was not conclusive as to the actual existence of Ugandan authority.<sup>70</sup>

According to the Court, the designation as an occupying Power affects the scope of violations of international law for which Uganda's responsibility can be engaged. In particular, the Court held that as an occupier, Uganda

was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged

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<sup>67</sup> *I.G. Farben Trial*, Law Reports of Trials of War Criminals, vol. VIII, at 1132, 1140 (U.S.M.T.).

<sup>68</sup> *Armed Activities*, paras. 172-80.

<sup>69</sup> *Id.*, para. 172.

<sup>70</sup> *Id.*, paras. 177-78.

both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.<sup>71</sup>

This position partly espouses one of the DRC's claims, i.e. that Uganda had a duty of vigilance. The DRC noted that the duty of vigilance traditionally requires taking measures to ensure that activities prejudicial to another state's rights do not take place on territory under its control or jurisdiction.<sup>72</sup> The duty of vigilance applies both to the activities of a state's nationals, as well as to the acts of private actors over whom a state wields influence or control.<sup>73</sup> The DRC then implied that these characteristics of the duty of vigilance apply to the obligation to respect other states' sovereignty over their natural resources.<sup>74</sup> This meant that Uganda was under an obligation to take adequate measures so that its nationals or groups under its control did not engage in illegal resource exploitation on the territory of the DRC.<sup>75</sup>

The Court concluded that Uganda's obligation "to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory cover[ed] private persons in this district and not only members of Ugandan military forces."<sup>76</sup> It did not refer broadly to a legal duty of vigilance, although its finding was by and large to the same effect. The Court's decision differed from the DRC's argument in two respects. First, the Court strictly linked this duty of vigilance to Uganda's status as an occupying Power. Second, the Court held that Uganda had a duty to prevent only that exploitation that falls within one of the legal categories of misappropriation discussed in the previous section — not all forms of resource exploitation, as the DRC had broadly contended. It can be argued that while this second restriction is sound policy-wise, the first may restrict international law's ability to tackle the problem of resource exploitation in conflicts where there is no occupation.

In the instant dispute, the Court concluded that rather than discharging this obligation, high-level UPDF officers facilitated the traffic of natural resources, notably diamonds, by commercial entities. Again, General Kazini's intervention to facilitate the business of the Victoria company was stressed. On that basis, the Court held that Uganda failed to discharge its obligation as an occupying power.<sup>77</sup>

## 2. Testing the Limits of the Court's Occupation Analysis

There are three interesting directions in which to take the Court's reasoning in relation to the additional obligation of vigilance of occupiers which permit us to test its limits and to assess its value by applying it to similar contexts of occupation, other forms of exploitation in occupation contexts that would remain lawful, and resource exploitation in non-occupation contexts. Arguably, this extrapolation of the Court's

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<sup>71</sup> *Id.*, paras. 178-80.

<sup>72</sup> Reply, *supra* note 4, para. 4.71.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, para. 4.72.

<sup>75</sup> *Id.*

<sup>76</sup> *Armed Activities*, para. 248.

<sup>77</sup> *Id.*, paras. 238-40 and 248.

framework raises the most interesting questions on the relationship between resource exploitation and armed conflict.

*i. The Relevance of the Court's Analysis for other Situations of Occupation*

The first and most obvious direction for potential extrapolation is in relation to other occupation and/or administration regimes. States are often reluctant to appear as occupying powers and it has been noted that the law of occupation had fallen into temporary abeyance.<sup>78</sup> Nevertheless, there seems to be a recent surge in situations of formal occupation or situations akin to occupation scenarios. Arguably, the *Armed Activities* framework of administrative authority control over the acts of private persons could be applied in situations such as Afghanistan and Iraq (although the relationship between the occupying forces and the local governments in those cases might entail some modification), not to mention in Palestinian territory. The duty to prevent private acts of looting and plundering could be relevant to such scenarios.

*ii. The Court Left Open the Possibility of Some Lawful Exploitation of Resources in Occupation Situations*

A second and even more interesting direction for extrapolation involves the extent to which lawful exploitation profiting private actors can take place in a situation of occupation. In other words, if the occupying power only has to prevent forms of resource exploitation that qualify as looting, plundering and, arguably spoliation through normalized transactions, is there some room left for lawful resource exploitation by the occupying power, even if it generates profits for private actors?

The Court's decision is at least compatible with the idea that some resource exploitation is lawful, even during an occupation. This idea is not as abhorrent as it might at first sound: cutting off all trading possibilities in a region governed by rebels or by a foreign administration would be an overly zealous position, potentially threatening the survival of the inhabitant and, in certain contexts, inimical to groups fighting against oppressive authorities that enjoy a high degree of legitimacy. To use an imperfect example, if the African National Congress had controlled part of South Africa's territory during the Apartheid regime, who would have wanted to deny them all trading opportunities on the ground that their hold on the territory was maintained by force?

*Armed Activities* does not clarify the extent of possible lawful exploitation of resources. As a result, jurists are left with the rules of occupation law codified decades, if not a hundred years ago, as well as with the ICJ's position in the Namibia opinion.<sup>79</sup>

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<sup>78</sup> In the 1970-1980s, the main trend was avoidance of the regime and lexicon of occupation. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 149 (1993).

<sup>79</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Rep. 1971 [Namibia]. The case constitutes an important judicial enunciation of limits associated to the conduct of illegitimate de facto governments. The Court considered the continued presence of South Africa to be illegal, and it held that it was under an obligation to withdraw. The Court's position on South Africa's legal ability to exploit resources found on the Namibian territory is subsumed in its findings on the unlawfulness of the South African presence and the obligations of third states not to support the administering power. It appears to have construed a realm of principled unlawfulness coupled to

Although this issue could itself become the subject of an entire article, I will briefly suggest some possible parameters of lawfulness, based on the notion of limited usufructuary power conditional on the maintenance of order and on the creation of benefits for the population of the occupied territory.

The patrimonial dimension of occupation is addressed in the Hague Convention (IV) of 1907.<sup>80</sup> The Convention's governing principles are divided along two axes: the public/private ownership of the property and the movable/immovable character of the goods.<sup>81</sup> Regarding state property, an occupant can take possession of movable goods that could be used for military purposes.<sup>82</sup> Article 55 defines the occupier's capacity vis-à-vis the state's public domain:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

In spite of explicitly enumerating only a narrow subset of property, it can be argued that a contemporary reading of this provision allows for its application to the broader category of all natural resources.<sup>83</sup> Under this interpretation, an occupier would have some capacity to exploit the natural resources of the territory that it controls, but its powers would remain limited and bounded in two respects: by the nature of what usufructuary entails and by broad purposive considerations linked to the context of occupation.

First, usufructuary powers are patrimonial powers of a limited ambit: they usually entail the power to use and to collect the fruits generated by the property, and the correlative obligation to preserve the capital thereof. This is an impossible combination in relation to non-renewable resources: the ability to use the proceeds of exploitation inevitably entails the consumption of the capital. In such a situation, it seems most reasonable to apply a principle of continuity and allow for exploitation to continue at the

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exceptional lawfulness dependent on the conferral of an actual benefit upon the population. See also Caleb M. Pilgim, *Some Legal Aspects of Trade in the Natural Resources of Namibia*, 61 B.Y.I.L. 249 (1990); R. Zacklin, *The Problem of Namibia in International Law*, 171 R.C.A.D.I. 225, at 318 ss (1981).

<sup>80</sup> The Fourth Geneva Convention of 1949 contains rules applicable to occupation but it is focused on the protection of peoples and does not deal with the power of the occupant over the territory's public assets. Note that the principles of the Hague Regulations have been recognized as customary international law. See generally Brice M. Clagett & O. Thomas Johnson Jr., *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 A.J.I.L. 553, at 560-61 (1978).

<sup>81</sup> On the protection of private property, see Articles 46-49, 52 and 53(2) of the Hague Convention (IV): *Convention respecting the laws and customs of war on land* (Hague IV, 1907), 2 A.J.I.L. Supp. 90.

<sup>82</sup> Article 53 of the Hague Convention (IV).

<sup>83</sup> Article 55 of the Hague Convention (IV) is narrowly drafted in terms of the kinds of public property at stake. But other codifications preceding it are broader and therefore support the reading given above. See Section 31 of the Lieber Code (1863); Article 52 of the *The Laws of War on Land*, Manual published by the Institute of International Law (1880) [Oxford Manual]; Article 7 of the Brussels Convention on the Law and Customs of War (1874). Moreover, many authors explicitly recognize that the principle of usufructuary power also applies to the exploitation of mines and the extraction of oil deposits. See Clagett & Johnson, *supra* note 81, at 563; see also *N.V. De Bataafsche Petroleum Maatschappij v. The War Damage Commission*, 51 A.J.I.L. 808 (1957) [*De Bataafsche Petroleum*].

pre-occupation level.<sup>84</sup> While empowering in the sense that it goes beyond mere preservation and non-alienation, a principle of continuity is simultaneously restrictive in two ways. First, an occupant is thereby limited in its exploitation prerogatives by the *de facto* or regulatory pre-occupation exploitation pace.<sup>85</sup> In corporate parlance, business-as-usual sets an upper limit to exploitation. The second limit is that the principle of continuity covers exploitation schemes existing at the beginning of the usufruct, thus limiting the occupier's capacity to develop the full potential of the territory.<sup>86</sup>

A second set of limiting principles – arguably the most important in order to prevent self-serving occupations – comes from general principles of occupation law and could provide two general limitations. The first limitation can be thought of as a *principle of conditionality*, linking the exercise of occupant prerogatives to the concrete provision of minimal order. The regime of occupation is not something that kicks in as soon as there are hostilities: a threshold of minimum presence and authority is required, as the *Armed Activities* decision itself illustrates.<sup>87</sup> Article 43 of the Hague Convention (IV) also sets out an obligation for the occupant “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in

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<sup>84</sup> In an exhaustive analysis of the concept of usufruct and of the legislative history of Article 55, Brice M. Clagett and O. Thomas Johnson Jr. identified the predominant principle of accommodation to tackle such a clash. Regarding the exploitation of mines, usufruct holders were entitled to continue to collect the fruits of existing exploitations – in spite of the diminution of the capital – thus accepting a relaxation of the principle of preservation of the property in favor of a principle of continuity. Clagett & Johnson, *supra* note 81.

<sup>85</sup> See *Administration of Waters and Forests v. Falk*, 4 Ann. Dig. 563 (Ct Cass., France 1927); United States, *Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez (October 1, 1976)*, 16 I.L.M. 733, at 740-41 (1977) [U.S. Memorandum]. See also Clagett & Johnson, *supra* note 81, at 576; G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 177 (1957).

<sup>86</sup> The existence of a development capacity was claimed by Israel, intending to set up new oil exploitation schemes in the Gulf of Suez, over which it exercised rights derived from its occupation of the Sinai. Israel contended that the project to be undertaken would enhance the value of the land to be eventually restored and would consequently not be wasteful – thereby complying with the powers of a usufructuary. Egypt, as the absent sovereign, of course objected. The United States, surely with a view to defending the concession rights of Amoco granted by Egypt, also opined strongly against the Israeli position. In a memorandum of the U.S. State Department, it held that usufruct powers did not include the possibility of developing new oil fields, using the resources for the benefit of the occupant's home economy or the grant of oil concessions. The doctrine has thus mostly rejected the idea that an occupant can proceed to develop the unexploited resource potential of the occupied territory. The logic behind such a prohibition is simply to prevent giving aggressive states a functioning mechanism for resource extraction from foreign territory which would encourage states to occupy resource-rich areas and discourage them from withdrawing. In the end, the Sinai and the corresponding authority over the Gulf of Suez were restored to Egypt with the signature of the Peace Treaty between Israel and Egypt in 1979, so no development took place. See Government of Israel, *Memorandum of Law, reprinted in* 17 I.L.M. 432 (1978) [Israeli Memorandum].

<sup>87</sup> *Armed Activities*, paras. 173 and 177-80. Occupation is usually preceded by invasion or preceded by invasion or military intervention and it necessitates an actual or effective exercise of authority for occupation to begin. See Adam Roberts, *What is Military Occupation?*, 55 B.Y.I.L. 249 (1984), at 256. More recently, the ICTY listed five criteria to make this determination: (1) position of the AOG to substitute its authority to the precedent one, incapable to function; (2) surrender, defeat or withdrawal of the enemy's forces; (3) sufficiency of troops, actual or potential, to impose effective power; (4) establishment of a temporary administration; (5) issuance and enforcement of directions to the civilian population. *Prosecutor v. Naletilic*, Judgment, Case No. IT-98-34-T, 31 March 2003 (Trial Chamber I), para. 217.

the country.”<sup>88</sup> As usufructuary powers constitute a form of positive prerogative, it would appear reasonable to make such entitlements conditional on the occupier first complying with these fundamental obligations.<sup>89</sup> From this perspective, an occupier that merely secures the enclaves and transportation routes necessary for resource exploitation to take place arguably does not qualify as an occupier at all, which prevents it from claiming the legal capacity to preside over lawful resource exploitation.

The second principle supplements the principle of conditionality by addressing another form of abuse, defined in relation to the *économie* of the law of occupation, providing yardsticks to prevent its being turned into a predatory endeavor. From this perspective, an upper limit to the way in which an occupant can use the public domain of the state can be derived from the *principle of relative severance of coercion and wealth accumulation* permeating the law of occupation – i.e. the idea that enrichment through coercion underpinning occupation of a territory will be regarded suspiciously from a legal perspective.<sup>90</sup>

At its most general level, this principle is rooted in a doctrine of abuse of power.<sup>91</sup> But it is also supported by a tendency to associate the economic prerogative of an occupier with specific ends, i.e. (1) “to meet [the occupant’s] own security needs” in the territory; (2) “to defray the expenses involved in the belligerent occupation”; (3) “to protect the interests and well-being of the inhabitants.”<sup>92</sup> This seems to be consistent

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<sup>88</sup> See BENVENISTI, *supra* note 79, compare 5 with 30-31.

<sup>89</sup> This has notably been asserted in relation to other income-generating powers of occupying or de facto administrations. ROBIN, *DES OCCUPATIONS MILITAIRES* 691 (1913) (concerning the right to collect taxes); Max Huber, *La propriété publique en cas de guerre sur terre*, 20 R.G.D.I.P. 657, at 672 (1913). It is also implicit in Rougier’s threefold classification of AOG as rebels (holding no sovereign prerogatives), belligerents without governments (partial sovereign powers based on authority over the territory controlled) and de facto government (same powers as a foreign state militarily occupying another). ANTOINE ROUGIER, *LES GUERRES CIVILES ET LE DROIT DES GENS*, § 58, at 256-64 (1903). In its memorandum on Israel’s oil development projects in occupied territory, the U.S. State Department made this point explicit by linking the rights enjoyed by the occupant as “concomitants of the occupation itself and the occupant’s duties.” U.S. Memorandum, *supra* note 86, at 745-46.

<sup>90</sup> This principle underpins the prohibition or limitation of certain means of acquisition of property, as well as the limitation on the extent to which local labor can be enlisted for military purposes. First, under Article 47 of the Hague Convention (IV) and Article 33 of the Fourth Geneva Convention pillage is forbidden. Second, the taking of private property is prohibited under Article 46 of the Hague Convention (IV) – subject to the possibility of requisition for military purposes. Third, regarding the possibility of enlisting the local labor force for military tasks, the limits are expressed in Article 51 of the 1949 Fourth Geneva Convention.

<sup>91</sup> The idea that occupation powers have limits and that overstepping them is a form of abuse is present in the early codifications of the 19<sup>th</sup> century. See Article 4 of the Lieber Code, the heading of the section of the Institute’s Oxford Manual containing rules on public property. The idea of a theory of abuse of right at the heart of occupation power also finds echo in doctrine. See CHARLES CALVO, *LE DROIT INTERNATIONAL*, Tome IV, at 238 (1896) (writing, about the « droit de continuer l’exploitation régulière du domaine national situé sur le territoire occupé », that « en aucun cas ce droit ne doit dégénérer en exactions ou en déprédations abusives. »).

<sup>92</sup> Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 419 (Emma Playfair ed., 1992), at 422; JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICTS* 697 (1954). Article 48 of the Hague Convention (IV) expresses the connection between the power that an occupant can exercise and its behavior as administrator: it provides that if it “collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied

with the ICJ's position in the Namibia Advisory opinion, where the Court carved out a window for the use of economic prerogatives by South African authorities in relation to their administration of Namibia, provided this was done in the interest of the local population.<sup>93</sup> In the same vein, limitations framed in terms of a correlation to the expenses of the occupation and in terms of reasonableness vis-à-vis the economy of the occupied territory have been jurisprudentially endorsed.<sup>94</sup> Alternatively, abuses can be defined in relation to a negative teleology of prerogatives, i.e. by looking at what purposes public prerogatives should not serve. The inability of an occupant to use or capture the local economy with a view to generating profits for itself provides such a negative limitation.<sup>95</sup> Maintaining a "high level of military preparedness" has also been considered to contravene the permitted objectives of economic co-option of the occupied territory.<sup>96</sup>

The framework described above combines a circumscribed sphere of legality for resource exploitation and principles defining the limits thereof. This goes beyond a narrow reading of the Court's decision to address a relevant issue with regards to the broader situation and dispute. In pleadings before the Court, the DRC contended that all resource exploitation by Uganda in the territory of the DRC was unlawful, whereas Uganda disputed that claim.<sup>97</sup> Moreover, this dimension was also dealt with by other bodies that examined the Uganda-DRC dispute. In its fourth Report, the DRC Expert Panel appeared to make an overture to the narrowly-construed acceptability of certain aspects of resource exploitation conducted by an insurgent administration and a partial concession to the Uganda's argument.<sup>98</sup> This approach would also seem in tune with the less all-encompassing conception of illegality retained by the Porter Commission set up by the Ugandan government in response to the allegations of involvement of Uganda and its high officials in illegal resource exploitation of the DRC.<sup>99</sup> The parameters adumbrated above could help the Court and other jurists flesh out the rights and duties of occupying powers in future cases.

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territory to the same extent as the legitimate Government was so bound." Moreover, to the extent that an occupant collects financial revenues other than existing taxes, "this shall only be for the needs of the army or of the administration of the territory in question." No such explicit purposive attachment of conditioning is posited in connection to usufructuary powers over immovable public property. But it has been argued that systemic coherence commands that prerogatives over such property be subjected to similar restrictions. Cassese, *id.*, at 428-29 (noting that the Hague Regulations explicitly constrain the use of movable property that the occupant can *appropriate*, so limitations should also attach to powers of a lesser intensity, such as concerning immovable property on which it only holds usufructuary powers).

<sup>93</sup> See *supra* note 80.

<sup>94</sup> See *Krupp; In re Flick*, 14 ANN. DIG. 266 (U.S.M.T., 1947).

<sup>95</sup> Jordan J. Paust, *Oil Exploitation in Occupied Territory: Sharpening the Focus on Appropriate Legal Standards*, 1 HOUSTON J. INT'L L. 147, 149 (1978-79).

<sup>96</sup> Clagett & Johnson, *supra* note 81, at 582; see also *De Bataafsche Petroleum*, at 808.

<sup>97</sup> See Reply, *supra* note 4, para. 4.74; Rejoinder, *supra* note 4, paras. 432-55.

<sup>98</sup> Third Panel Report, *supra* note 7, at 5.

<sup>99</sup> Porter Report, *supra* note 8, espec. 10-16 and Annex 3, at 235-47. The Porter Report notably contests the direct link between the violation of sovereignty and illegal resource exploitation.



iii. *The Court Did Not Address the Duties of Non-occupying States*

When the Court ruled that Uganda had an obligation to prevent – and arguably punish – violations of international law by private actors within the territory that it occupied, it implied that such a duty did not extend to Uganda otherwise. This is unfortunate, although there was little in the DRC’s arguments to support the claim that a broader duty of vigilance existed. As a result, a third direction for extrapolation concerns the obligations of non-occupying states, i.e. those that do not meet the formal test to qualify as an occupier and those towards or through which looted, plundered, or extracted resources transit. Does a state incur any obligation at all – of action or omission – in relation to private deeds constituting violations of IHL committed on a territory over which it exercises no governmental authority *stricto sensu*?

While the Court did not face that question as such in *Armed Activities*, the centrality of the resource-based economy in contemporary conflicts makes it highly relevant. The Court dealt with a similar question in the *Namibia* Advisory Opinion, although it addressed it through the angle of non-recognition and the issue was not framed as one of looting and plundering.<sup>100</sup> It was clear in that case that states could not themselves conclude economic transactions with the South African administration over Namibia, but the Court’s approach on whether private actors could do so was more ambiguous.<sup>101</sup> The existence and the extent of obligations of states in relation to looted, plundered and illegally acquired resources that enter, transit, and remain on their territory through normalized trade channels thus remains uncertain. On the one hand, absent the imposition of mandatory sanctions by the Security Council, it seems difficult to hold that there is an obligation to cut or suspend all trade in such resources. On the other hand, it seems appropriate that commodities acquired in violation of *jus in bello* principles would be considered misappropriated even after their incorporation into normal trade channels.

One can however trace a middle course between the tenets of total prohibition and the tenets of complete freedom based on an axiomatic separation of private and public spheres. This could take the form of an obligation, for transit and import states, to create a space for relative (as opposed to absolute) nullity of transactions of misappropriated resources. In other words, resource appropriation from a zone of conflict would not be void *ab initio* or *ipso facto*, but it would be voidable under certain circumstances. The doctrine of relative nullity rests on two axioms that define the terms of opposability of invalid or *ultra vires* resource exploitation transactions. First, only affected parties – and in the case of property-based cases, parties with a better property title – can challenge the validity of a deed. Second, importing states have no strict obligation to prohibit transactions, but they nonetheless incur obligations of a lesser intensity: i.e. an obligation of abstention in the struggle between affected parties and a resource exploiter.

Resource exploiters seeking to acquire resources from a conflict zone can currently see their freedom curtailed through economic sanctions. The avenue suggested here would add a second curtailing opportunity. Under the doctrine of relative nullity, a lawful government, as a claimant of title in resources, could potentially obtain – where

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<sup>100</sup> *Namibia*, *supra* note 80.

<sup>101</sup> *Id.*, paras. 119, 124-25 and the conclusion of the Advisory Opinion. On this question, see also Ammoun J. (Sep. op.), para. 16, 97-98; De Castro J. (Sep. op.), at 218-19; Petré J. (Sep. op.), at 135; Dillard J. (Sep. op.), at 138; Fitzmaurice J. (Diss. op.), at 217.

resources were originally misappropriated – at least the cessation of such transactions in the future, and perhaps some form of compensation under an unjust enrichment doctrine. Thus, resource exploiters taking title from an armed opposition group or foreign occupier acting *ultra vires* under international law (under the terms identified in the preceding section) would do so at their peril as they could not claim a fully opposable title.<sup>102</sup> Rather than leading to responsibility-based disputes (tort, criminal, or state responsibility), patterns of misappropriation could then be treated as a struggle for the best property entitlement in the circumstances.

In the end, the Court's use of the law of occupation appears as a double-edged sword: it enhances the obligatory slate of states and offers a way to police patterns of misappropriation, but it seems to confine indirectly such additional obligations to the narrow situation of occupiers. The above section reflected on solutions to ensure that inferences from the decision's gray zones – to the effect that all resource exploitation of a territory under occupation is *ipso facto* unlawful or that states incur no responsibility at all for misappropriation by persons under their jurisdiction because they are not occupiers – are not drawn too quickly.

### C. The Court's Framework: the Law of State Responsibility

Once primary rules of international law have been identified (as discussed in the previous two sections), inter-state judicial disputes call into play secondary principles under which state responsibility can be established. This section examines the Court's reasoning on responsibility, before discussing frameworks of responsibility other than state responsibility under which *pendente bello* resource exploitation can also, and perhaps better, be appraised and constrained.

#### 1. The Court's Reasoning Concerning Uganda's Responsibility

In the context of the *Armed Activities* case, there were two key questions concerning state responsibility. The first question concerned attribution: given the plurality of actors involved in the looting and resource exploitation, to what extent could those acts be attributed to Uganda? The second main issue was the extent to which wholly private deeds could nonetheless indirectly engage Uganda's responsibility through the operation of the duty of diligence that it incurred as an occupant.

With regard to attribution, the Court made two key findings: one in relation to Uganda's own troops and officials and one in relation to armed groups with which Uganda interacted and cooperated on the ground. First, the Court concluded:

that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.<sup>103</sup>

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<sup>102</sup> See Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, in INTERNATIONAL LAW – THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, vol. 5, 542, 563-64 (Elihu Lauterpacht ed., 2004) (making a similar argument in relation to property acquired *ultra vires* by a belligerent).

<sup>103</sup> *Armed Activities*, para. 180.

On that basis, Uganda was held responsible for the conduct of the UPDF and for the conduct of its individual soldiers and officers, even if they acted contrary to instructions.<sup>104</sup>

The Court also examined whether Uganda's relationship to Congolese rebel groups sufficed to engage the responsibility of the former for the acts of the latter. Notably, the Court found that the MLC rebel group was not a state organ of Uganda, that it did not exercise an element of state authority on Uganda's behalf, and that the MLC did not act on Uganda's instructions or under its control.<sup>105</sup> As none of the legal tests for attribution of the MLC's conduct to Uganda were met, the latter could not be held responsible for the acts of the former.

The Court considered that responsibility for violations of international law by non-state actors could be engaged for deeds committed on the territory that Uganda occupied, but not otherwise. In other words, in order for state responsibility to exist in such a context, there must be a twofold violation: a violation of international law by private actors and an absence of action or reaction sufficient, on the part of Uganda, to fulfill its obligation as an occupying power to prevent such violations.

In the end, the Court held Uganda internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.<sup>106</sup>

In terms of reparations, the Court declared Uganda obligated to make reparation for the injury caused through its violations of international law, including looting, plundering and resource exploitation, leaving it up to the parties in the first instance to determine the measure thereof.<sup>107</sup>

## 2. Moving Beyond the Court's Classical State Responsibility Analysis

Litigation before, and the decision-making of, the ICJ are undertaken from the angle of state responsibility and are, in a sense, a prisoner of that angle. The Court's classical state responsibility analysis does not adequately address conflict-based patterns of resource exploitation. In order to effectively limit such practices, we must look beyond the Court's decision, along three lines of extrapolation.

First, even if one remains within the confines of state responsibility, it may be argued that the decision does not address all the ways in which a state can be held responsible for the unlawful appropriation of resources. As discussed in previous sections, there are still possible international legal obligations – for states and/or for individuals – that the ICJ has not explicitly examined or ruled out, the violation of which

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<sup>104</sup> *Id.*, paras. 243, and 246-47.

<sup>105</sup> *Id.*, paras. 160 and 247.

<sup>106</sup> *Id.*, para. 250.

<sup>107</sup> *Id.*, para. 258.

could trigger state responsibility. One possibility is that a prohibition of trading in conflict commodities could eventually develop into international law; another possibility is an obligation to permit de-spoliated states to obtain a remedy, in the courts of a foreign state, for the transit or appropriation in that state of resources acquired in violation of international legal prohibitions. Similarly, the view that states have a duty to prevent and punish their national corporations for violations of certain international legal prohibitions could gain prominence.<sup>108</sup> State responsibility could come into play to remedy these additional layers of obligations in ways not explored in the *Armed Activities* case.

Second, there are of course other forms of responsibility that could contribute to curbing or remedying *pendente bello* resource exploitation. Individual criminal responsibility in international criminal law is an obvious alternative to state responsibility. Indeed, the prohibitions on forms of misappropriation that the ICJ's decision rests on have the necessary attributes to engage criminal liability.<sup>109</sup> For instance, Charles Taylor, the former President of Liberia, has been indicted by the Special Court for Sierra Leone on seventeen counts including crimes against humanity and grave breaches of Geneva Conventions with the intent "to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state."<sup>110</sup> This form of liability is likely limited, however, as it is controversial whether it applies to corporations – a possibility not retained by the ICC.<sup>111</sup>

Third, other mechanisms and avenues are increasingly being explored to target the behavior of corporate actors and to impute responsibility directly to them. In the United States, the jurisdictional opening created by the Alien Tort Claims Act (ATCA) has been used to scrutinize the behavior of corporate actors in situations of armed conflict or recurrent use of violence – although with limited results.<sup>112</sup> While the ATCA remains an oddity, other domestic non-judicial fora are increasingly relied on to examine claims of corporate abuses or complicity therein – although again without much success to date. For instance, Global Witness has filed a complaint with the British National Contact Point against Afrimex, alleging it engaged in conflict-fueling activities by not complying with the OECD Guidelines in the DRC.<sup>113</sup>

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<sup>108</sup> See Worth Loomis, *The Responsibility of Parent Corporations for the Human Rights Violations of their subsidiaries* in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 145 (Michael K. Addo ed., 1999); Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, in TORTURE AS TORT 491 (Craig Scott ed., 2001).

<sup>109</sup> See, inter alia, Article 8(2)(a)(iv) and Article 8(2)(b)(xiii) of the ICC Statute.

<sup>110</sup> *Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-01-I (Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004), at 4-5.

<sup>111</sup> See M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in INTERNATIONAL CRIMINAL LAW, VOL. I, 3 (M. Cherif Bassiouni ed., 1998), at 18.

<sup>112</sup> On ATCA litigation, see inter alia SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004). More generally on what are the domestic avenues to sanction conflict-related prohibitions against economic actors, see Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law - Executive Summary* (2006) available at [www.fafo.no/liabilities](http://www.fafo.no/liabilities).

<sup>113</sup> Global Witness calls upon the UK Government to hold British company Afrimex to account for fuelling conflict in the Democratic Republic of Congo, Press Release – 21/02/2007, [http://www.globalwitness.org/media\\_library\\_detail.php/510/en/global\\_witness\\_calls\\_upon\\_the\\_uk\\_government\\_to\\_hold](http://www.globalwitness.org/media_library_detail.php/510/en/global_witness_calls_upon_the_uk_government_to_hold).

What seem to be missing, however, when dealing directly with corporations, are fora and remedies that go directly to the core of their activities, by examining the impact of patterns of misappropriation on the proprietary entitlement that they claim with respect to the resources acquired controversially. In other words, rather than an exercise in responsibility or blame allocation – through tort or criminal law – the focus should shift to examining the proper circumstances or terms for the acquisition of property in the first instance.<sup>114</sup> Again, this does not mean that all resource exploitation from a conflict zone ought to be interrupted. But it would make a better connection between the economic and the political sphere, by making the upholding of transactions and by permitting resources to continue to flow conditional on the provision of a minimal degree of order, security, and local benefits by the *de facto* authorities. Concretely, this could involve mechanisms such as relative nullity, as describe above, which would permit the interruption of resource flows in circumstances where minimum obligations are not met. It could also involve the creation and reinforcement of certification mechanisms similar to those existing in the diamond and timber industries.<sup>115</sup>

When read together with the rules of the *jus in bello* and of the law of occupation, the Court's decision constructs a threefold framework that connects patterns of pillage, plundering, and resource exploitation to a state's responsibility. This framework combines the rules on the attribution of acts to a state and the separate obligation for states which, like Uganda, are occupying Powers.

This fairly classical approach has the advantage of not unduly inflating the notion of state responsibility, as it keeps out of the responsibility-triggering set of practices most private violations of the rules of IHL on misappropriation. There is something to be said in favor of not elevating too readily all private misdeeds to the realm of state responsibility. On the other hand, this approach may also influence states to adopt practices that generate the desired benefits without being caught in the net of state responsibility. For instance, the Court's approach may maintain or suggest an undesirable loophole for states that want to enjoy the benefits of additional proceeds from the exploitation of resources extracted from another state's territory: the reliance on private hands to extract and import such resources. Of course, states would have to be careful never to exercise sufficient control to become occupiers, thus they are less likely to set up an administration and more likely to rely increasingly on armed groups that they do not control but with which they establish patterns of cooperation. This may lead to a very undesirable rise in unchecked private behavior and abuses in unsecured zones for which no state responsibility can be allocated.

#### **D. The Court's Rejection of PNSR-based Arguments**

##### **1. The Court's Decision: A Refusal to Extend the PSNR Principle to Situations of Armed Conflict:**

The last element of the Court's decision that deserves to be examined is its rejection of the DRC's argument built around the notion of PSNR (permanent

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<sup>114</sup> See BENVENISTI, *supra* note 78, at 199; Felice Morgenstern, *Validity of the Acts of the Belligerent Occupant*, 28 B.Y.I.L. 291 (1951); see also M.J. PETERSON, *RECOGNITION OF GOVERNMENTS* 150 (1997).

<sup>115</sup> See e.g. the Kimberley Process: <http://www.kimberleyprocess.com/>. See also Forest Stewardship Council: <http://www.fsc.org/en/>.

sovereignty over natural resources). PSNR, a legal by-product of decolonization, expresses the sovereignty and proprietary entitlements of states and their people over the resources found on their territory.<sup>116</sup> The DRC claimed that PSNR informed the institutions of the law of occupation, that it could be violated in a situation of occupation, and that Uganda in fact committed such a violation by taking control of the economic activities of the region.<sup>117</sup>

The Court dismissed the Congolese submission extremely succinctly, refusing to extend the ambit of the PSNR principle to this sort of situation, holding that:

While recognizing the importance of this principle, which is a principle of customary international law, the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State, which is the subject-matter of the DRC's third submission. The Court does not believe that this principle is applicable to this type of situation.<sup>118</sup>

## 2. Beyond the Court's Reasoning: How the Court's Dismissal of PSNR Opens the Door to a Rejuvenation of the Concept

In a sense, this dimension of the decision is more noteworthy than the Court's acceptance of the DRC's position on the application of the principles of occupation law and the law of armed conflict. After all, it was the first time that the Court was called upon to pronounce on allegations of violations of a state's PSNR. From that perspective, its refusal can at first sight appear as a missed opportunity for the Court to develop the concept of PSNR. Nevertheless, the Court's refusal to follow the DRC's argument or to substitute its own interpretation of how the principle of PSNR is relevant in this conflict is not entirely surprising and leaves open the possibility of future development of the concept. There are two factors that help to explain this dismissal.

First, there are strategic considerations linked to the Court's decision-making process that favoured rejecting the DRC's argument. Most importantly, the Court could hold Uganda responsible for the very same conduct – acts of looting and resource exploitation – on the basis of international obligations that were much more precise and much less controversial as applied to situations of armed conflict than the PSNR principle. While there is no conceptual problem with a given act simultaneously violating multiple legal principles (e.g. non-use of force and non-intervention), the decision to rely exclusively on the law of armed conflicts and to dismiss the argument of violation of the PSNR principle is bolstered by the contrast between the former's well-established character and the latter's novelty. As is often the case, necessary negotiations between the judges writing the decision can be thought to have tilted the Court's reasoning in favour of the most broadly acceptable common denominator.

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<sup>116</sup> See UN General Assembly resolution 1803 for its most classical enunciation. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, 1194th plen. mtg., at 15, U.N. Doc. A/5217 (1962).

<sup>117</sup> See Reply, *supra* note 4, para. 4.59-4.84; Sands, *supra* note 31, para. 7

<sup>118</sup> *Armed Activities*, para. 244.

The second dimension that helps to understand the rejection of the PSNR-based argument is anchored in policy considerations. The language used by the Court actually appears to be carefully crafted to satisfy both conservative and progressive voices. Conservatives will be content with the Court's refusal to enlarge the scope of application of a doctrine largely associated with challenges to dominant economic vectors and redistributive pressures. Keeping the PSNR principle anchored in the decolonization context and refusing to stretch or renew its applicability vis-à-vis other situations by and large condones the current productive and redistributive excesses that the international system is facing.

Perhaps more surprisingly, there is also a progressive argument in favour of not accepting the DRC's PSNR-based argument. The view sustaining this position is that PSNR's capacity to produce a fair and equitable distribution of the proceeds of resource exploitation has in many instances failed. The PSNR doctrine has certainly been useful in formulating redistributive claims in situations of patent imbalance of the division of wealth between local actors and foreign investors.<sup>119</sup> But this use of the principle has itself led to questionable patterns of distribution. Because PSNR is operationalized through government authorities, it has produced a concentration of the resource-based wealth in the hands of the political elites controlling state apparatuses, obscuring any assessment of the internal sharing among different groups.<sup>120</sup> In fact, the DRC, as the Great Lakes Commission's report documents and illustrates, was a paragon of such perverse effects of the PSNR approach.<sup>121</sup>

From this perspective, it is not surprising that the progressive members of the Court were not seduced by the Congolese argument. In their pleadings, both the DRC and Uganda<sup>122</sup> insisted on the idea that resource exploitation must be exercised in the

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<sup>119</sup> See ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 141-42 (1994).

<sup>120</sup> See Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence and International Law*, 36 *NYU J. INT'L L. & POL.* 331 (2004); Thomas Pogge, *Priorities of Global Justice*, 32 *METAPHILOSOPHY* 21 (2001) (coining this empowerment of from the power of state authority to set up resource exploitation schemes the 'international resource privilege'); see also CHRISTOPHER CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM* 19 (1996); ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990).

<sup>121</sup> Great Lakes Commission Report, *supra* note 9.

<sup>122</sup> Uganda contended that its position was also compatible with a reading of the notion of PSNR that stresses the connection of people with the resources and their ability to freely dispose thereof. To the statist approach put forward by Professor Sands for the DRC, Professor Suy responds with a people-based reading of PSNR:

« En effet, la perpétuation des relations commerciales entre l'est du Congo, l'Ouganda et plusieurs autres Etats, s'est faite *dans l'intérêt de la population locale*, conformément au critère fixé par la jurisprudence internationale. En effet, les produits de base ne peuvent pas attendre dans des dépôts jusqu'à ce que le gouvernement central ait réussi à rétablir son autorité. Le café, par exemple, est cultivé, puis il grandit, il est cueilli par les paysans, séché, stocké, mais il ne peut certainement pas attendre vingt ou trente ans, jusqu'à ce que les dirigeants aient pu résoudre le différend. Un marché, un acheteur doit être trouvé avant qu'il ne soit abîmé. Et si ce marché se trouve dans le pays voisin, c'est là qu'il sera vendu, quelles que soient les règles d'une administration centrale située à des milliers de kilomètres, qui n'exerce plus aucune autorité *de facto* sur la région où le café est cultivé. A un niveau supérieur de commerce, celui des minéraux, il faut observer que là où il y a des mines, il y a des mineurs. Et ces mineurs doivent pouvoir vivre et nourrir leurs familles. Fermer les mines parce que l'administration centrale veut recevoir elle-même les taxes d'exploitation, à la place des autorités locales (congolaises elles aussi) qui exercent le contrôle *de facto*, signifie condamner ces personnes à une mort certaine. » Suy, *supra* note 57, para. 58.

interest of the people, with the former taking a more statist approach and the latter a localist one. In its Judgment, the Court explicitly rebuffed Uganda's claim that the exploitation that was going on during the conflict had de facto been in the interests of the local population.<sup>123</sup> While the Court did not have to pronounce itself on whether the DRC was itself living up to the standards of the PSNR principle, its refusal to embrace the Congolese argument may be thought to proceed from, or at least to be compatible with, a profound hesitation to adopt a statist interpretation of the PSNR principle. Reading between the lines, one can detect a certain dose of prudence vis-à-vis the PSNR's potential to generate acceptable distributive outcomes. By extrapolation, the Court seems to have combined its finding that the Ugandan authorities had not exploited the DRC's resources in the interests of the local population with a subtle *tu quoque* addressed to the DRC.

Moreover, it is true that at the same time as the Court rejected PSNR's applicability, it strongly reasserted its existence as customary international law, in terms that leave little doubt.<sup>124</sup> Some might read this as a simple effort to limit PSNR's scope of application to the realm of peaceful relations. But arguably there is more to it, i.e. a recognition that while PSNR could serve as a useful vehicle for distributive claims for benefits between foreigners and locals at the time of decolonization, its capacity to do the same in current struggles or tensions between local elites controlling the state apparatus and the local population is limited.

If this interpretation holds, the Court's decision somewhat undermines PSNR and leaves it in a state of flux. This should not be lamented. While the Court could have attempted a re-interpretation of PSNR sensitive to the abuses of the centralization of powers that it entails, it did not have to do so in the given case. Neither of the parties were asking that much. But the Court's attitude is helpful in initiating a limited deconstruction or attenuation of PSNR favourable to better distributive policies. In its best light, the decision thus amounts to an invitation for a renewal of a somewhat antiquated legal institution reminiscent of old struggles and not quite fit for tackling contemporary ones. The decision does not discard PSNR, but it rather opens the door to its rejuvenation and to a better dovetailing with today's social reality.

## V. Conclusion

The ICJ's decision in *Armed Activities* is significant in many regards. Based on the classical categories and doctrinal apparatus of international law, the Court succeeded in defining a range of resource exploitation practices, by state officials as well as by private actors, as in some circumstances engaging a state's responsibility. This approach is constructed on the basis of two branches of international law that provide the primary obligations: the *jus in bello* to identify the prohibited forms of appropriation and the law of occupation to apply a duty of vigilance to the occupying power. Those rules are then made operative through the mechanism of state responsibility. Tackling *pendente bello* resource exploitation in this way has the merit of shedding light on large-scale toleration of practices that violate international legal prohibitions, but it comes with the correlative

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<sup>123</sup> *Armed Activities*, para. 249.

<sup>124</sup> *Id.*, para. 244.



disadvantage of not targeting the most direct beneficiaries of those income-generating transactions – individuals and other economic actors such as corporations.

The case also constitutes a refusal to uphold a stretched and state-centric interpretation of the PSNR principle, thereby supporting the claim that PSNR must undergo a conceptual renewal. The task of reconstruction is left open but one direction seems urgent: a better consideration of the interests of the peoples, notably of affected populations, potentially through a relaxation of governmental privileges.<sup>125</sup>

In spite of its internal merits and demerits, it must be recalled that the judgment provides only a partial legal appraisal of the phenomenon of *pendente bello* resource exploitation. This article has argued that some of the most interesting, difficult, and pressing questions remain in the shadow zones left untouched by this judgement. As the case left open a set of questions on the lawfulness of *pendente bello* resource exploitation by non-state actors and on the forms of responsibility and sanctions that the contravention to existing norms can entail, this article has adumbrated directions to take in reflecting upon those questions. Of course, the Court's nature as an inter-state litigation forum means that it did not have to (and probably could not) address all of these dimensions. But for scholars and practitioners concerned with tackling at law the practices of *pendente bello* resource exploitation, the decision leaves gaps which are in dire need of some authoritative conceptual filling and clarification. In other words, the decision dissipates some of the theoretical difficulties and uncertainties surrounding the appraisal of resource exploitation during conflicts as an inter-state problem, but it leaves largely untouched the difficulties and uncertainties pertaining to the conduct of non-state actors and of non-occupying states in relation to them.

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<sup>125</sup> For a recent effort in that direction, see Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33 (2006).