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State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources

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Abstract

The interplay between public and private actors in the exploitation of natural resources in an occupied territory makes the regime of state and individual responsibility particularly complex in cases of exploitation by private actors that result in breach of international humanitarian law. The Occupying Power has the duty not to deplete the natural resources of the occupied territory and, according to the case law of the International Court of Justice, it must also ensure that private actors do not exploit the natural resources of the occupied territory in violation of international humanitarian law. This paper explores the legal basis of this duty of vigilance and the consequences of the Occupying Power's responsibility for the acts of private actors.

Keywords

Belligerent Occupation, Due Diligence, Natural Resources, Pillage, Private Actors, State Responsibility

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1 Introduction

The law of belligerent occupation has received significant academic attention in recent decades.[1] This essay explores the interplay between public (the Occupying Power) and private (eg companies and corporations) actors in the exploitation of natural resources in the occupied territory. In particular, it focuses on the Occupying Power's international responsibility for acts of exploitation of natural resources in violation of *international humanitarian law* that are committed by private actors, with attention also to the relevant issues of individual criminal liability. For the purposes of this essay, the expression 'illegal exploitation' refers to exploitation of natural resources in violation of international humanitarian law only.

This essay does not specifically address the related topic of the accountability of corporations and companies for the exploitation of natural resources under *international human rights law*,[2] nor does it examine international human rights law obligations incumbent upon the Occupying Power.[3] Suffice it to say that it is well established that the Occupying Power must comply with the rules of international human rights law when it acts in the occupied territory,[4] and the rules regarding property, economic, and social rights are extremely relevant for the exploitation of natural resources.[5]

The subject of the exploitation of natural resources in armed conflict[6] and, specifically, in times of belligerent occupation,[7] has been studied extensively by scholars. However, state responsibility for violations committed by private actors has not been explored in depth from an international humanitarian law perspective; this is quite strange since the International Court of Justice (ICJ) has discussed this issue in the case of the *Armed Activities on the Territory of the Congo* (*DRC v. Uganda*).[8]

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[1] See eg Arai-Takahashi (2009); Dinstein (2009); Kolb, Vité (2009); Koutroulis (2010); Annoni (2012); Benvenisti (2012); Carcano (2015); Sassòli (2015).

[2] On the accountability of companies and corporations for human rights violations, see, among many others, De Schutter (2006); Bonfanti (2012); Chetail (2014).

[3] See, among others, Wilde (2009); Lubell (2012); Ferraro (2013).

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 126, para. 106 (*Wall* opinion); *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (Judgment) [2005] ICJ Rep 168, para. 216.

[5] With specific regard to the role of international human rights law in the exploitation of natural resources in times of occupation, see Scobbie (2011).

[6] See eg Okowa (2007); Tignino (2011); Pertile (2013); Dam-de Jong (2015).

[7] See eg Cassese (1992); Scobbie (1997); Benvenisti (2003); Longobardo (2015).

[8] *DRC v. Uganda*, *supra* n. 4. On the Court's findings regarding the exploitation of natural resources, see Cervell Hortal (2006); Dufresne (2008); Cimiotta (2011).

This paper attempts to fill the void in scholarship surrounding state responsibility by focusing on the narrow context of state responsibility for private actors exploiting natural resources. Accordingly, this paper begins by analysing the rules concerning the exploitation of natural resources in times of belligerent occupation. The paper goes on to test the rules on international responsibility for such exploitative activity in order to verify whether acts of private actors are attributable to the Occupying Power. Moreover, this paper considers the merits of the existence of a duty to prevent private actors from illegally exploiting natural resources in the occupied territory. The paper also draws some conclusions regarding the consequence of acts of exploitation of natural resources in the occupied territory as a matter of individual criminal responsibility of both state organs and private actors.

2 The Relationship Between the Occupying Power and Natural Resources in the Occupied Territory

The law of belligerent occupation is codified in the 1907 Hague Regulations (HR),[9] in the 1949 Fourth Geneva Convention (IV GC),[10] and in the 1977 First Protocol Additional to the 1949 Geneva Conventions (AP I).[11] It is well established that the rules embodied in the HR and in the IV GC reflect general international law,[12] while only some AP I provisions enjoy customary status.[13]

Belligerent occupation is effective control of territory gained during an armed conflict and without the consent of the sovereign of that territory.[14] According to Article 42 HR, which reflects customary international law,[15] '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' Accordingly, the law of belligerent occupation applies irrespectively of the fact that the Occupying Power declares the territory to be occupied or contests this assumption.[16]

[9] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (HR).
[10] Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (IV GC).
[11] First Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I).
[12] *Wall* opinion, *supra* n. 4, para. 89; Meron (1987).
[13] Roberts (1990), p. 54; Dinstein (2009), pp. 7–8. For the identification of customary international humanitarian law rules is extremely helpful the study by Henckaerts, Doswald-Beck (2005) vol. I.
[14] See *DRC v. Uganda*, *supra* n. 4, para. 173. See also Roberts (1985) pp. 251–252; Benvenisti (2012), p. 3.
[15] *Wall* opinion, *supra* n. 4, para. 78; *DRC v. Uganda*, *supra* n. 4, para. 172.
[16] Greenwood (1992), p. 250.

During belligerent occupations, there is a divide between sovereignty, which is vested in the ousted government or in the population of the occupied territory, and the Occupying Power's temporary responsibility for governmental functions. The Occupying Power – notwithstanding its exercise of powers and functions that are similar to those that were exercised by the ousted sovereign before the occupation – does not acquire sovereignty over the occupied territory since the evolution of international law, particularly the emergence of the principle of self-determination of peoples and the ban on the use of force, prevents the Occupying Power from conquering the territory it occupies.[17]

Several international humanitarian law provisions exclude acquisition of sovereignty by the Occupying Power. According to Article 43 HR, the Occupying Power has to respect, unless absolutely prevented from doing so, the law in force in the occupied territory.[18] Moreover, Article 47 IV GC prescribes that protected persons in the occupied territory enjoy the rights embodied in the convention notwithstanding any change introduced in the territory and any annexation. Finally, Article 4 AP I unequivocally affirms that the occupation of a territory does not affect its legal status.

Breaking the normal parallelism between exercise of governmental functions and legal entitlement to do so, belligerent occupation appears to be a state of exception in international relations.[19] Thus, it is a necessarily temporary situation that may end only with the restitution of the territory to the ousted sovereign or an act of volition of the ousted sovereign that confers on the Occupying Power legal title to the territory.[20] Accordingly, even if prolonged occupations occur, they inevitably must terminate sooner or later.[21]

These principles are reflected in the international humanitarian law provisions regarding the exploitation of natural resources in the occupied territory. Natural resources can be categorised as either public or private property depending on the domestic law of the occupied territory in force before the beginning of the occupation.[22] On the basis of the private or public nature of the property, different international rules apply.

With regard to natural resources that are public property, according to Article 55 HR the Occupying Power is 'administrator and usufructuary of public buildings, real estate, forests, and

[17] See *Affaire de la Dette Publique Ottomane (Bulgaria, Irak, Palestine, Transjordan, Greece, Italy and Turkey* [1925] RIAA 529, p. 555. See also Pellet (1992), pp. 244–245; Korman (1996), pp. 218–230; Dinstein (2009), pp. 49–52. Accordingly, the ECJ refused to qualify as 'made in Israel' products manufactured by companies located in the Occupied Palestinian Territory (ECJ, Case C-386/08, 25 February 2010; for a commentary, see Fornari (2013)).

[18] For more on this provision, see Section 4.3.2.

[19] See Benvenisti (2012), p. vii; Ben-Naftali (2012); Bothe (2015), p. 1460.

[20] Greenwood (1992), pp. 244–245; Ben-Naftali (2012), p. 546.

[21] On the difference between the expressions 'temporary' and 'lasting only a short time', see Koutroulis (2012), p. 167. On prolonged occupation, see generally Roberts (1990); Scobbie (2015).

[22] Van den Herik, Dam-de Jong (2011), p. 252; Bothe (2015), p. 1477.

agricultural estates belonging to the hostile State'. This provision clearly reinforces the idea that the Occupying Power does not acquire sovereignty over the occupied territory.[23] However, the Occupying Power may legitimately take possessions of movable natural resources if they may be used for military operations pursuant to Article 53 HR.[24]

Although these provisions refer only to natural resources owned by the ousted sovereign, the provision of Article 47 HR forbidding pillaging[25] pertains to the appropriation of both private and public property.[26] In addition, Article 46 HR specifically protects private property, and this provision also covers private natural resources that are owned by individuals.[27] Privately owned war materials may be seized pursuant to Article 53(2) HR, but they must be restored or compensated at the end of the occupation. Moreover, Article 52 HR regarding requisitions and contributions is sometimes mentioned in order to affirm that exploitation of natural resources owned by private parties is admissible if required by the need of the occupying army.[28]

One can conclude that the Occupying Power is not absolutely precluded from exploiting natural resources in the occupied territory. Rather, it may lawfully sustain its own occupation thanks to the exploitation of natural resources located in the occupied territory. However, since the Occupying Power does not have sovereignty over the occupied territory and the occupation is a temporary situation,[29] the Occupying Power must not deplete the natural resources in the occupied territory, as the territory itself must be returned to the ousted sovereign at the end of the occupation.[30]

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[23] This provision was debated in length by the Supreme Court of Israel in the case HCJ 2164/09, *Yesh Din v. Commander of the IDF Forces et al.*, 26 December 2011 (*Yesh Din* case), unofficial English translation at www.hamoked.org/images/psak.pdf. In the same decision, the Court held that the prolonged nature of the occupation allows a more flexible interpretation of Article 43 regarding the exploitation of natural resources (ibid., paras. 9–13). It is not possible to analyse here the Court's reasoning regarding this issue, which has been strongly criticized by several scholars (see eg Kratzmer (2012), pp. 220-222; Pace (2012)).

[24] According to Article 53 HR, '[a]n army of occupation can only take possession of . . . all movable property belonging to the State which may be used for military operations.' The Court of Appeal of Singapore excluded that crude oil in the ground may fall into the definition of movable property pursuant to Article 53 (Court of Appeal, Singapore, *N.V. De Bataafsche Petroleum Maatschappij & Ors. v. The War Damage Commission*, 13 April 1956, 23 ILR 810, p. 822.

[25] See also Articles 28 HR and 33(3) IV GC.

[26] See eg Charter of the International Military Tribunal, Article 6(b); ICTY Statute, Article 3(e); ICTY, *The Prosecutor v. Zejnil Delalić and Others* (Judgment) IT-96-21-T (16 November 1998), para. 590; SCSL, *The Prosecutor v. Sam Hinga Norman and Others* (Decision on Motion of Acquittal) SCSL-04-14-T (21 October 2005), para. 102 ('The Chamber observes that the terms "pillage", "plunder" and "spoliation" have been varyingly used to describe the unlawful appropriation of private and public property during armed conflict'); *The Prosecutor v. Germain Katanga*, Judgment, ICC-01/04-01/07 (7 March 2014), para. 904; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, ICC-01/05-01/08-3343 (21 March 2016), para. 115.

[27] See Cassese (1992), p. 421; Scobbie (1997), pp. 228–231; Bothe (2015), p. 1477.

[28] See Scobbie (1997), pp. 228–231.

[29] See, eg US Military Tribunal at Nuremberg, *In re Krupp* (1948) 15 AD 620, p. 622: '[I]f as a result of war action, a belligerent occupies a territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations.'

This conclusion is consistent with the principle of permanent sovereignty over natural resources, a norm which is both part of customary international law[31] and embodied in treaty provisions and General Assembly resolutions.[32] Since this rule originated as a corollary of the principle of self-determination of peoples – which is applicable even during belligerent occupation[33] – the principle of permanent sovereignty over natural resources is applicable even in times of belligerent occupation,[34] as confirmed by the practice of the UN Security Council and General Assembly.[35] Accordingly, it is not possible to share the contrary opinion of the ICJ on this issue.[36]

3 State and Individual Responsibility for Acts of Illegal Exploitation Attributable to the Occupying Power

The rules on international responsibility are applicable also in cases of international humanitarian law violations.[37] These rules have developed in general international law and have been recently codified by the International Law Commission in the non-binding – albeit greatly authoritative – Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles).[38] Normally states are held responsible for acts of their organs in breaches of international law. However, even acts of individuals that are not *de jure* organs of the state may involve the responsibility of a state. In this respect, one has to make a distinction between the issue of the attribution of individuals' conduct to a state – which means that the state may be held responsible

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[30] Arai-Takahashi (2009), pp. 209–210; Dinstein (2009), p. 215; Benvenisti (2003), pp. 869–870; Bothe (2015), p. 1477; Van Engeland (2015), p. 1544.

[31] *DRC v. Uganda*, *supra* n. 4, para. 244. On this principle, see generally Brownlie (1979); Schrijver (1997); Bungenberg, Howe (2015).

[32] See eg Article 1 (2) common to the UN International Covenants on Human Rights; UNGA Res. 1803 (XVII) (14 December 1962), UN Doc. A/RES/1803; UNGA Res. 2158 (XXI) (25 November 1966), UN Doc. A/RES/2158; UNGA Res. 3171 (XXVIII) (17 December 1973), UN Doc. A/RES/3171; UNGA Res. 3201 (S-V I) (1 May 1974), UN Doc. A/RES/3201; UNGA Res. 3281 (XXIX) (12 December 1974), UN Doc. A/RES/3281.

[33] *Wall* opinion, *supra* n. 4, para. 88.

[34] See eg Cassese (1992), p. 426; Scobbie (1997), pp. 247–253; Schrijver (1997), pp. 143–160; Cimiotta (2011), pp. 76–78; Tignino (2011), p. 259; Longobardo (2015), pp. 344–346.

[35] For the Security Council practice, see eg UNSC Res. 1483 (22 May 2003), UN Doc. S/RES/1483, preamble and paras. 14, 20; UNSC Res. 1511 (16 October 2003), UN Doc. S/RES/1511, preamble; UNSC Res. 1546 (8 June 2004), UN Doc. S/RES/1546, preamble and para. 3. For the General Assembly practice, see eg UNGA Res. 64/185 (29 January 2010), UN Doc. A/RES/64/185; UNGA Res. 66/225 (29 March 2012), UN Doc. A/RES/66/225; UNGA Res. 67/229 (9 April 2013), UN Doc. A/RES/67/229; UNGA Res. 69/241 (2 February 2015), UN Doc. A/RES/69/241.

[36] *DRC v. Uganda*, *supra* n. 4, para. 244.

[37] See Sassòli (2002); Fleck (2006). The relevance of the law of international responsibility in times of occupation is specifically noted by Benvenisti (2012), p. 18.

[38] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001) (Draft Articles with Commentaries).

for those actions – and the issue of state responsibility for acts of private actors that are not attributable to the state.[39]

The rules embodied in the HR – provisions regarding the exploitation of natural resources included – were drafted from an inter-state perspective, and they were meant to address behaviours of the armed forces of the belligerents. Members of the armed forces are *de jure* state organs and, accordingly, pursuant to the Draft Articles, the Occupying Power is internationally responsible for illegal exploitation committed by the commander of the occupied area and by every member of the occupying forces since their acts are automatically attributable to the Occupying Power.[40] In the words of the ICJ, '[t]he conduct of the [Uganda People's Defence Force] as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, "the conduct of any organ of a State must be regarded as an act of that State"'[41] However, one has to note that the attribution of acts committed by members of the armed forces is slightly different from the ordinary regime: while the conduct of a state organ is attributable to the state only if it acts in its official capacity,[42] the ICJ considered that *every* act committed by a member of the armed forces is attributable to the state pursuant to Article 3 of the 1907 Fourth Hague Convention and Article 91 AP I.[43] Accordingly, it is not relevant whether the organ acted privately or officially in order to trigger state responsibility.

Moreover, a wrongful act is attributable to a state if it is committed by individuals directed or controlled by the state, and by individuals whose conduct is acknowledged and adopted by a State as its own.[44] In these cases, the individuals are usually qualified as *de facto* state organs.[45]

Accordingly, acts of illegal exploitation committed by *de jure* or *de facto* organs of the Occupying Power trigger state responsibility on the basis of their attribution to the state. On the other hand, the same individuals – irrespective of their qualification as state organs – may face international criminal prosecution for their acts of illegal exploitation.

In this regard, even if international criminal law does not address directly the protection of natural resources, several scholars argue that the war crime of pillaging pursuant to Article 8(2)(b)(xvi) of the Rome Statute of the International Criminal Court (ICC Statute) may apply to acts of illegal exploitation.[46] The International Criminal Court has not had the chance to pass judgment

[39] On the issue of attribution, see, among others, Condorelli (1984).
[40] See Draft Articles with Commentaries, *supra* n. 38, Articles 4, 7.
[41] *DRC v. Uganda*, *supra* n. 4, para. 213.
[42] See Draft Articles with Commentaries, *supra* n. 38, p. 42, and the international case law mentioned therein.
[43] *DRC v. Uganda*, *supra* n. 4, para. 214.
[44] Draft Articles with Commentaries, *supra* n. 38, Articles 8, 11.
[45] See generally Palchetti (2007); Palchetti (2012).
[46] See eg Stewart (2010); Lundberg (2008); Keenan (2014); Tiwari (2016).

on this issue yet; however, from the ICC Statute and the Elements of Crimes it is plausible that unlawful exploitation of natural resources in times of occupation may amount to the war crime of pillaging[47] – an idea recently supported by the ICC Office of the Prosecutor.[48] Indeed, even if the ICC Statute provisions regarding pillage were drafted with personal belongings and movable properties in mind, the ICJ affirmed clearly that plundering natural resources in the occupied territory amounts to pillaging.[49] Moreover, according to the International Criminal Tribunal for the Former Yugoslavia, pillage may refer also to 'the seizure of property undertaken within the framework of a systemic economic exploitation of occupied territory'.[50] Finally, there is a consistency between the fact that the exploitation of natural resources is lawful if justified by military operations and that the war crime of pillaging only encompasses appropriation for private or personal purposes.

In brief, with respect to illegal exploitation committed by *de jure* or *de facto* state organs, the Occupying Power may be held responsible for the violations of the international humanitarian rules regarding the exploitation of natural resources in the occupied territory; the same state organs, individually, may be prosecuted for the war crime of pillaging.

4 State and Individual Responsibility for Acts of Illegal Exploitation Committed by Private Actors in the Occupied Territory

4.1 Introductory Remarks

The concept of a *de facto* state organ does not encompass individuals who act without any link to a state. Such individuals are commonly referred to as private actors.

In times of belligerent occupation, it happens that private actors that are not organs of the Occupying Power exploit the natural resources in the occupied territory. For instance, during the Ugandan occupation of the Ituri region in DRC, the exploitation of the local natural resources was undertaken by both members of the Ugandan armed forces and private businessmen and

[47] Van den Herik Dam-de Jong (2011), pp. 272–273. For a discussion of the possibility of punishing illegal exploitation of natural resources under different war crime definitions, see ibid, pp. 256–261.
[48] See Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016), para. 41, available at www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.
[49] *DRC v. Uganda*, *supra* n. 4, para. 245.
[50] *The Prosecutor v. Zejnil Delalić and Others*, *supra* n. 26, para. 590; *The Prosecutor v. Blaškić*, Judgment, IT-95-14-T (3 March 2000), para. 184.

entrepreneurs.[51] Similarly, some UN bodies and NGOs have affirmed that the exploitation of natural resources in the West Bank by Israeli settlers is supported and carried out through private companies, both Israeli and foreign.[52]

Because of the involvement of private actors in the illegal exploitation of natural resources in the occupied territory, it is necessary to explore whether the Occupying Power is internationally responsible for such illegal exploitation as a matter of international humanitarian law, and the relevant issues regarding individual criminal responsibility.

One should note that, as a matter of international human rights law, the Occupying Power has the duty to respect, protect, and fulfil human rights in the occupied territory. In international human rights law, 'protect' means that a state must prevent and punish interference with human rights that are committed by third parties. The case law of international courts and tribunals is well established on this point.[53]

With regard to the activities of companies in light of international humanitarian law, the situation is more uncertain.[54] Therefore, it is necessary to explore the law of belligerent occupation and the law of state responsibility in order to find out whether private acts in violation of international humanitarian law involve the responsibility of the Occupying Power. At least two main options could be examined.

4.2 Grounds for the Occupying Power's Responsibility for Illegal Exploitation Committed by Private Actors

4.2.1 Occupying Power's Direct Responsibility for Acts of Illegal Exploitation

[51] See 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 (16 October 2002), UN Doc. S/2002/1146, para. 98.

[52] See e.g. Report of the Special Rapporteur Richard Falk on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 (19 September 2012), UN Doc. A/67/379, paras. 55–57, 72–74; Human Rights Watch, *Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights* (2016) www.hrw.org/sites/default/files/report_pdf/israel0116_web.pdf.

[53] See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8; Committee on the Elimination of Discrimination against Women, General Comment 19: Violence against Women (1992), UN Doc. A/47/38, para. 9; *Velasquez Rodriguez v Honduras*, Judgment, Inter-American Court of Human Rights, Series C, No. 4 (29 July 1988), paras. 172, 174; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm No. 155/96 (13–27 October 2011). See also *Osman v. United Kingdom* (Case 87/1997/871/1083) (2000) 29 EHRR 245, para. 115, and many other subsequent decisions of the ECtHR, commented upon in Spielmann (2016).

[54] On this topic, the International Committee of the Red Cross has published a non-binding paper that does not provide significant insights: *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises Under International Humanitarian Law* (International Committee of the Red Cross 2006) www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf.

First, it may be argued that the Occupying Power is responsible for having tolerated such acts in the territory under its control. In this case, the Occupying Power would be considered directly responsible for the violations of the relevant international humanitarian law rules.

This conclusion could be drawn by applying to the instant issue the theory that Hugo Grotius formulated regarding state responsibility for acts of private actors committed within the boundaries of a state. According to Grotius, in these cases, a State (*rectius*: the King) may be held directly responsible for having violated international law only if it has not punished the perpetrators due to its own *culpa*,[55] since it has tolerated (*patientia*) and thus, accepted (*receptus*) the acts of private actors located in its territory.[56] On this basis, more recent authors have developed the so-called 'theory of complicity', according to which a state is directly responsible for acts of private actors if it fails to prosecute them.[57]

Grotius' theory and its developments have the advantage of immediately allocating responsibility for a breach of international law to a state, which is the subject of international law *par excellence*. However, in the case of the Occupying Power's responsibility, it would be considered responsible for an international wrongful act – the illegal exploitation of natural resources – that is not attributable on the basis of the customary rules on international responsibility codified in the Draft Articles.

In the alternative, one might argue that a special secondary rule[58] on attribution of the conduct of private actors during belligerent occupation exists in international customary law and that it prevails as *lex specialis* on the rules codified in the International Law Commission on the basis of Article 55 Draft Articles. However, such a rule in not embodied in any international humanitarian law convention, nor is there any relevant *opinio juris* and state practice on its existence *qua* customary law. Accordingly, the view of the Occupying Power being directly responsible for acts of private actors should be considered out of line with contemporary international law.

4.2.2 Occupying Power's Direct Responsibility for Not Having Prevented Acts of Illegal Exploitation

[55] Grotius (1964), p. 436.

[56] See the remarks of Russeau (1983), pp. 15–16; Ago (1940), p. 178.

[57] See eg De Vattel (1802), p. 72; Bluntchli (1873), p. 264. For more on this, see Report of the International Law Commission on the work of its twenty-seventh session, UN Doc. A/10010/Rev1, in [1975-II] Yearbook of the International Law Commission 81.

[58] For the distinction between primary and secondary rules, see David (2010).

Second, it is possible to shift the attention from secondary rules regarding the attribution of wrongful acts to states to the field of the relevant primary rules. In fact, the law of international responsibility considers that a state may be held responsible for the conduct of private persons only if it has assumed the role of guarantor for certain conduct or events to either happen or not happen.[59]

In cases of private actors violating the rules pertaining to the exploitation of natural resources in the occupied territory, there is room to argue that the Occupying Power is not responsible for the violations of the aforementioned conventional rules of *jus in bello*. On the contrary, the Occupying Power may be considered responsible for the violation of an autonomous and different rule, whose content is the duty to prevent private actors from violating international humanitarian law.

This second option has a notable advantage. It considers the Occupying Powers to be internationally responsible only for conduct that is attributable to it on the basis of the law of international responsibility.

Accordingly, one has to find such primary rule concerned with the Occupying Power's duty to prevent international humanitarian law violations committed by private articles. The problem is that there is not a specific provision regarding the Occupying Power's duty to prevent private actors' illegal exploitation in the international humanitarian law conventions. However, this duty can be inferred from more general provisions. In this regard, at least two options are available.

4.3 In Search of an Autonomous Duty to Prevent Private Actors from Violating International Humanitarian Law in the Occupied Territory

4.3.1 Article 1 Common to the Four Geneva Conventions

First, one could consider that Article 1 common to the Four Geneva Conventions (common Article 1) embodies the duty of the contracting parties to ensure private actors' respect for international humanitarian law, rules on the exploitation of natural resources included.[60] According to common Article 1, '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. This provision has been widely debated among publicists in search of an interpretation of the expression 'ensure respect', which seems to imply something different from the duty to respect the convention.[61]

[59] Anzilotti (1906), pp. 14–15. More recently, see Wolfrum (2005), p. 425; De Frouville (2010), pp. 277–280.
[60] See Koutroulis (2006), pp. 728–735.
[61] See, generally, Pictet (1951), pp. 15–17; Condorelli, Boisson De Chazournes (1984); Boisson De Chazournes, Condorelli (2000); Focarelli (2010); Kolb (2013); Geiβ (2015); Henckaerts (2016).

In some scholars' opinions, the duty to ensure respect for the Conventions pursuant to common Article 1 is also related to the acts of private actors that are under the authority of one of the contracting states.[62] This interpretation is supported by the *travaux preparatoires*,[63] by some military manuals,[64] and by the case law of the Inter-American Court of Human Rights.[65] Accordingly, the Occupying Power is under a duty of due diligence, which is an obligation of conduct, regarding private actors violations, on the basis of common Article 1.[66]

In evaluating this option, however, one should take into account some factors that, without entirely excluding this view's soundness, shed some doubts on its actual relevance in cases of occupation. First, the text of common Article 1 specifically refers only to the obligations embodied in the Four Geneva Conventions, while the rules regarding the exploitation of natural resources are codified in the HR. Only according to one author does the obligation to ensure respect explicitly regard rules embodied in the HR;[67] this author refers to the International Committee of the Red Cross' study on customary international humanitarian law that prescribes a duty to ensure respect only with regards to acts of members of the armed forces and *other persons or groups acting on a belligerent's instructions, or under its direction or control*.[68] This reference is not relevant since, as mentioned afore, these individuals fall into the definition of *de facto* organs, while in the case at hand, the acts are committed by private actors. Moreover, since they are state organs – even if *de facto* rather than *de jure* – their conduct fall under the state's duty to respect the Geneva Conventions, rather than under the duty to ensure respect.

Second, the application of common Article 1 to private actors' conduct is not mentioned in international case law. For instance, the ICJ has invoked the duty to ensure respect pursuant to common Article 1 mainly in order to emphasise the *erga omnes* / *erga omnes partes* character of the duties embodied in the Four Geneva Conventions.[69] In these same occasions, the ICJ never mentioned that such a duty exists with respect to the HR. Moreover, the ICJ did not mention

[62] Sassòli (2002), p. 412; Geiβ (2015), p. 118; Henckaerts (2016), paras. 33–35.

[63] *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II-B, 53.

[64] See eg the military manuals of Kenya, Russia, and Switzerland, cited in Henckaerts, Doswald-Beck (2005) vol. II, pp. 3161–3162.

[65] Inter-American Court of Human Rights, *Mapiripán Massacre case*, Judgment, 15 September 2005, para. 114.

[66] See Sassòli (2002), p. 412; Geiβ (2015), p. 118; Henckaerts (2016), paras. 33–35. On the concepts of due diligence and obligations of conduct, see Section 4.4.

[67] See Henckaerts (2016), para. 16.

[68] See Rule 139 in Henckaerts, Doswald-Beck (2005) vol. I, p. 495.

[69] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Judgment) [1986] ICJ Rep 14, para. 220; *Wall* opinion, *supra* n. 4, paras. 158–159; *DRC v. Uganda*, *supra* n. 4, Separate Opinion of Judge Simma, para. 34. This view is far from uncontroversial in legal scholarship; for instance, it was advocated by Condorelli, Boisson De Chazournes (1984), and criticised by Focarelli (2010).

common Article 1 in dealing with acts of illegal exploitation committed by private actors in the occupied territory.[70]

As I will argue in the subsection below, there is a provision dealing only with private actors' conduct in occupied territory, rather than in every circumstances – Article 43 HR. Accordingly, Article 43 HR should be regarded as the source of the Occupying Power's duty since it is a provision more specifically pertaining to belligerent occupation – and, thus, it should be applied instead of the concurring provision of common Article 1 as a matter of *lex specialis*. However, this conclusion does not impair the relevance of common Article 1 with respect of private actors' conduct in breach of international humanitarian law; rather, common Article 1 is a less correct source of duties regarding private actors than Article 43 HR, which applies only in the specific circumstance of belligerent occupation.

4.3.2 Article 43 HR

Article 43 HR is the most important provision regarding the duties and rights of the Occupying Power, a sort of legal framework in which every specific provision pertaining to the administration of the occupied territory finds its justification.[71] The Occupying Power must comply with the duties embodied in Article 43 HR even if it chooses not to establish a formally structured administration in the occupied territory.[72] Article 64 IV GC complements article 43 HR.[73]

According to Article 43 HR, the Occupying Power 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.'[74] Consequently, Article 43 HR could be read as the source of the Occupying Power's duty to prevent private actors from illegally exploiting natural resources.

Article 43 HR is comprised of a set of obligations that are the core objectives of the administration of the occupied territory. These duties include the duty to restore and ensure public order, which encompasses 'responsibility for preserving order, punishing crime, and protecting lives

[70] For the ICJ's reasoning on this issue in *DRC v. Uganda*, see Section 4.3.2.

[71] See Supreme Court of Israel, *Yesh Din* case, *supra* n. 23, para. 8. On the centrality of Article 43 HR, see Sassòli (2005); Benvenisti (2012), p. 69; Longobardo (2015), pp. 323–338.

[72] See *DRC v. Uganda*, *supra* n. 4, para. 310. See also Dinstein (2009), pp. 55–56.

[73] On this provision, which is not particularly relevant for the instant issue, see Pictet (1951), pp. 334–337.

[74] Actually, the non-authoritative English text refers to 'safety' rather than to 'civil life'. This is a blatant error of translation since the word 'safety' does not mean the same as 'vie publique' (in the original and authoritative French text). See Schwenk (1945), p. 393; Dinstein (2009), p. 89; Benvenisti (2012), p. 68.

and property within the occupied territory',[75] the duty to restore and ensure civil life, which encompasses the 'whole social, commercial and economic life of the community'[76], and 'a variety of aspects of civil life, such as the economy, society, education, welfare, health, [and] transport',[77] as well as the duty to respect, *sauf empêchement absolu*, the laws in force in the territory – an obligation that pertains to the way in which the Occupying Power has to implement its duties to restore and ensure public order and civil life, as demonstrated by the text itself of Article 43 HR ('while respecting. . .' and 'en respectant. . .'). This last duty to respect the laws in force in the occupied territory is relevant for the exploitation of natural resources in the occupied territory since the Occupying Power may not lawfully pass new legislation in order to enable private actors to exploit the natural resources in the occupied territory. Consequently, new contracts may be concluded only as long as they are based on the law in force before the beginning of the occupation, and are not valid after the end of the occupation since they should be seen as the product of the will of the Occupying Power.[78]

However, it is submitted here that Article 43 HR contains yet another obligation regarding the duty to prevent private actors from illegally exploiting natural resources. This duty is not written in the text of the provision, but it can be construed through implications.

Article 43 HR puts forward the aims and the duties of the Occupying Power's administration in broader terms. Along with this provision, the law of belligerent occupation embodies a number of specific provisions that limit the Occupying Power's discretion regarding its administration. It would be illogical to contend on the one hand that the Occupying Power is prevented from taking certain actions, while arguing on the other hand that it may lawfully tolerate private actors committing the same actions themselves. Moreover, such a self-contradictory argument would be in contrast with the principles of effectiveness and good faith that are relevant for the interpretation of any treaty provision, the international humanitarian law conventions included.[79]

Article 43 HR is an adequate source of the Occupying Power's duty to prevent private actors from violating international humanitarian law as it regulates in general terms the duties and rights that are consequences of the belligerent occupation. In other words, Article 43 HR is the tool

[75] US Military Tribunal at Nuremberg, *In re List and Others* (Hostages Trial) (1948) 15 AD 632, p. 652.

[76] Germany, British Zone of Control, Control Commission, Court of Criminal Appeal, *Grahame v. Director of Prosecutions* (1947) 14 AD 228, p. 232.

[77] Supreme Court of Israel, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in Judea and Samaria Region et al,* HCJ 393/82, 37(4) PD (1983) 785.

[78] See UK, *Joint Service Manual of the Law of Armed Conflict* (2004), section 11.46; US Department of Defence, *Law of War Manual* (June 2015), section 11.18.5.2.

[79] A treaty must be interpreted in good faith according to the Vienna Convention on the Law of Treaties, 23 May 1969, Article 31(1); the principle of effectiveness was applied in some decisions by the ICJ (first time in *Fisheries Jurisdiction (Spain v Canada)* (Judgment) [1988] ICJ Rep 432, para. 52) and it is considered to be a component of teleological interpretation pursuant to Article 31(1). See Dörr (2012), p. 539 and pp. 549-550.

through which international law imposes some obligations on a state due to its effective control over a portion of territory. However, it also burdens the Occupying Power with the responsibilities to restore and ensure public order and civil life, and these obligations may not be fulfilled if the Occupying Power allows private actors to violate international humanitarian law.

Furthermore, *if new legislation is required* in order to issue concessions and contracts regarding the exploitation of natural resources, the duty not to pass new legislation in violation of the law in force in the occupied territory prevents the Occupying Power from explicitly allowing private actors' acts of exploitation.[80]In these circumstances, every exploitation carried out with the consent of the Occupying Power would be pursuant to Article 43 HR, while every exploitation conducted without such a legislative authorisation would be devoid of any legal basis – and thus it should be repressed by the Occupying Power pursuant to its duty to maintain order in the occupied territory.[81]

State practice and international case law confirms that Article 43 HR is the source of a duty of vigilance regarding the violations of international humanitarian law by private actors. According to the US Law of War Manual, '[t]he Occupying Power has a general duty to maintain public order and to provide for the preservation of rights of the inhabitants, including rights to their private property.'[82] In the framework of Article 43 HR, this conclusion does not mean the Occupying Power has to refrain from violating individuals' property rights – a matter discussed in another section of the US Law of War Manual;[83] rather, it refers to the duty of vigilance of the Occupying Power with regard to private property, as affirmed by relevant national and international case law.[84] Clearly, this duty pertains to the protection of private property pursuant to the law in force in the occupied territory before the occupation. However, it can be read as pertaining to the protection of both public and private property pursuant to international humanitarian law as well. To this regard, the US Law of War Manual itself openly acknowledge that '[m]litary occupation of enemy territory

[80] It is noteworthy that the Republic of Azerbaijan, which considers the region of Nagorno-Karabakh to be occupied by Armenia, affirms that exploitation of natural resources in the area is illegal also because Armenia does not comply with the Azerbaijani laws regarding permission and licenses, which are allegedly covered by Article 43 HR (see Ministry of Foreign Affairs of the Republic of Azerbaijan, *Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan* (2016) pp. 91-92, www.mfa.gov.az/files/file/MFA_Report_on_the_occupied_territories_March_2016_1.pdf). On the controversial issue regarding the qualification of Nagorno-Karabakh as occupied territory, see Ronzitti (2014), pp. 39-42.

[81] Obviously, contracts concluded and licenses issued before the beginning of the occupation may be implemented, since they are based on the law in force in the occupied territory before the occupation. See Bekker (2003).

[82] US Department of Defence, *supra* n. 78, section 11.5.

[83] Ibid., section 11.18.

[84] See *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 159 (1913): 'The protocol of August 12, 1898 (30 Stat. 1742) […] left our Government, by its military forces, in the occupation and control of Porto Rico as a colony of Spain, and bound by the principles of international law to do whatever was necessary to secure public safety, social order, and the guaranties of private property.' See also US Military Tribunal at Nuremberg, *supra* n. 75, p. 652.

involves a complicated, *trilateral* set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of occupied territory.'[85]

As to the international case law supporting the existence of such a duty of vigilance regarding private actors' acts in breach of international humanitarian law, first, one has to mention the findings of the Eritrea-Ethiopia Claims Commission, according to which:

> Whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings in the town, Ethiopia, as the Occupying Power, *was responsible for the maintenance of public order, for respecting private property, and for preventing pillage*. Consequently, Ethiopia is liable for permitting the unlawful looting and stripping of buildings in the town during the period of its occupation.[86]

Although this paragraph refers to destruction and seizure of private property, it is extremely relevant in the framework of private actors' illegal exploitation of natural resources for several reasons. First, Eritrea-Ethiopia Claims Commission bases the Occupying Power's responsibility on duties embodied in Article 43 HR combined with the specific international humanitarian law provisions regarding private property in occupied territory.[87] In this case, Article 43 HR is the basis for the Occupying Power's duty to prevent the commission of that same conduct that it may not carry out directly pursuant to the law of occupation. Second, this duty is inherent to the situation of occupation since 'Ethiopia is not liable for damages [that] . . . occurred either before or after its occupation of the town.'[88] Third, the Eritrea-Ethiopia Claims Commision's reasoning is applicable to other conduct that is *per se* prohibited to the Occupying Power, and that the Occupying Power must prevent private actors from performing pursuant to Article 43 HR; this last consideration is also supported by the fact that the Eritrea-Ethiopia Claims Commission's dictum regarded pillage, a word that is today commonly construed as pertaining also to the illegal exploitation of natural resources.[89]

The Eritrea-Ethiopia Claims Commission's conclusion regarding a duty of prevention incumbent upon the Occupying Power pertaining to the conduct of private actors was authoritatively confirmed a year later by the ICJ. In the *DRC v Uganda* case, the ICJ considered that Article 43 HR is the source of the Occupying Power's obligation regarding private actors:

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[85] US Department of Defence, *supra* n. 78, section 11.4.

[86] Eritrea-Ethiopia Claims Commission, *Partial Award: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22*, 28 April 2004, para. 67 (emphasis added).

[87] Ibid., fn 29: 'Hague Regulations, supra note 15, at arts. 43, 46, 47.'

[88] Ibid., para. 67.

[89] See *supra* section 3.

> Uganda was under an obligation, according to *Art. 43 HR*, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area . . . 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*. [90]

Correctly, and in accordance with the Eritrea-Ethiopia Claims Commission's case law, the ICJ emphasised that this duty regarding private actors' activity is typical of the situation of belligerent occupation. In the ICJ's own words,

> . . . *the fact that Uganda was the occupying Power in Ituri district extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons* in this district and not only members of Ugandan military forces.[91]

Reading this paragraph *a contrario*, one has to conclude that, had Uganda not been the Occupying Power in Ituri, it would not have been responsible for acts of private actors in violation of international humanitarian law.[92]

This conclusion is consistent with the nature of belligerent occupation, a situation in which governmental functions are exercised on the basis of *de facto* control over a territory, rather than a legal title. The duty incumbent upon the Occupying Power is similar to states' obligation not to allow private actors under their jurisdiction to use their territory in order to cause harm to other states.[93] In the instant case, the Occupying Power has to prevent private actors under its jurisdiction from doing harm to another state, that is the sovereign of the occupied territory that has been temporally ousted, but which retains its rights in relation to that territory, integrity of its natural resources included. As affirmed by the ICJ, the absence of a legal title over the territory is irrelevant

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[90] *DRC v. Uganda*, *supra* n. 4, para. 158. See also para. 250.

[91] Ibid, para. 248.

[92] This conclusion was endorsed by International Law Association, which made express reference to the ICJ case law in order to affirm that the Occupying Power have obligations of this kind. See ILA Study Group on Due Diligence in International Law, *Second Report* (June 2014), p. 18, www.ila-hq.org/download.cfm/docid/574BBB1E-32EA-48C6-94ACDF79A22B8477.

[93] *Corfu Channel Case (UK* v *Albania)* (Merits) [1949] ICJ Rep 4, p. 22; Arbitration on the *Island of Palmas (Netherlands/USA)* [1928] 2 RIAA 829, p. 839; *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 101.

for the instant issue, since 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'.[94] This is particularly true in times of belligerent occupation, when the Occupying Power, thanks to its factual and effective control over the territory, has the duty to exercises governmental functions in order to restore and ensure public order and civil life pursuant to Article 43 HR.[95] When such control is not effective, it is more difficult to identify a duty of vigilance in armed conflict.[96]

For these reasons, Article 43 HR is better suited to be considered the source of the Occupying Power's duty to prevent private actors' violations of international humanitarian law.

4.4 Nature and Scope of the Duty of Vigilance Against Private Actors' Violations of International Humanitarian Law

According to the ICJ, the Occupying Power's duty regarding illegal exploitation carried out by private actors is a duty of vigilance.[97] In other words, the Occupying Power's responsibility is a consequence of the violation of a primary rule – Article 43 HR or, less convincingly, common Article 1 – but it is triggered by private actors' activities that are in conflict with the international humanitarian law provisions regarding exploitation of natural resources.[98]

This kind of obligation encompasses two related duties: the duty of vigilance and the duty to punish private actors' violations if they occur.[99] The Occupying Power can punish those private actors through the judicial system of the occupied territory and its own military courts.[100]

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[94] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para. 118. See also Lozano Contreras (2006), pp. 168–172.

[95] See Haupais (2007), pp. 131–133. *Mutatis mutandis*, this was the conclusion regarding the duty of the Occupying Power to prevent acts of terrorism envisaged by Condorelli (1989), pp. 240–241.

[96] See eg the problem regarding corporations financing internal conflicts through the exploitation of natural resources, explored by Pertile (2016), pp. 400–406.

[97] *DRC v. Uganda*, *supra* n. 4, para. 179: '. . . Uganda's responsibility is engaged 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 . . .' (emphasis added).

[98] See, from a more general perspective, the remarks of the International Law Commission in the Draft Articles with Commentaries, *supra* n. 38, p. 39, para. 4: '. . . a State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all the necessary steps to protect the embassy from seizure, or to regain control over it. . . . [T]here is often a close link between the basis of attribution and the particular obligation to have been breached, even though the two elements are analytically distinct.' See also Pisillo Mazzeschi (1992), p. 26; Dufresne (2008), pp. 211–212.

[99] *Argentina* v *Uruguay*, *supra* n. 93, para. 197. See also Pisillo Mazzeschi (1992), p. 26; ILA Study Group on Due Diligence in International Law, *First Report* (7 March 2014) www.ila-hq.org/download.cfm/docid/8AC4DFA1-4AB6-4687-A265FF9C0137A699.

[100] For an overview of the judicial system in the occupied territory, see Arai-Takahashi (2015), pp. 1429–1436.

The duty of vigilance pursuant to Article 43 HR is a duty of conduct, rather than a duty of result. According to some authors, every obligation in Article 43 HR is an obligation of conduct.[101] Roberto Ago introduced the distinction between obligations of conduct (or of means) and of result in the work of the International Law Commission regarding state responsibility; according to Ago, an obligation of conduct demands a state to achieve a certain result and specify the means through which the state must attain that result.[102] Ago's definition does not correspond to what civil law systems consider an obligation of conduct, and so it was not included in the final Draft Articles and is considered incorrect by the majority of publicists.[103] On the basis of the concept elaborated by civil law traditions, today, an obligation of conduct require states 'to deploy adequate means, to do the outmost, to obtain [a] result'.[104]

The main character of obligations of conduct is that a state under such an obligation is not automatically responsible if an event in violation of its obligation occurs; on the contrary, the state may demonstrate that it has endeavoured to prevent that violation, and, thus, it does not incur international responsibility.[105] However, this does not mean that the state's behaviour and choices may not be contested before a competent court;[106] rather, the state that failed to perform adequate prevention and vigilance may avoid its international responsibility if it demonstrates that its behaviour was characterised by *due diligence*.[107]

The assessment of due diligence is not easy,[108] and must be conducted *in concreto*,[109] on the basis of several factors such as the degree of control of the state (*rectius*: the Occupying Power), the importance of the interest to be protected in the specific situation, the degree of predictability of the violation, and the degree of risk involved.[110] In other words, the Occupying Power has to adopt all

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[101] Sassòli (2005), p. 664; Benvenisti (2012), p. 76.

[102] Report of the International Law Commission on Its Twenty-Ninth Session, UN Doc. A/CN.4/302, in [1977-II] Yearbook of the International Law Commission 8ff.

[103] For some critical remarks on Ago's definitions, see Combacau (1981), pp. 184–187; Pisillo Mazzeschi (1992), pp. 47–48; Dupuy (1999); Economides (2010).

[104] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, para. 110 (regarding activities related to the exploitation of natural resources). See also Dupuy (1999), p. 375.

[105] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para. 430.

[106] This seems to be Dinstein's opinion regarding other obligations of conduct embodied in Article 43 HR; see Dinstein (2009), p. 92.

[107] On the concept of due diligence, see Pisillo Mazzeschi (1992); Barnidge (2006); Lozano Contreras (2006); ILA Study Group, *supra* n. 99; Koivurova (2013); Chetail (2014), p. 125.

[108] *Responsibilities*, *supra* n. 104, para. 43. The elusiveness of this parameter is considered the reason for Ago's distrust by Gattini (2014) pp. 35–36.

[109] *Bosnia v. Serbia*, *supra* n. 105, para. 430.

[110] Ibid.; *Responsibilities*, *supra* n. 92, para. 117. See also Pisillo Mazzeschi (1992), p. 44; Lozano Contreras (2006), pp. 202–229; Chetail (2014), pp. 125–126.

the 'reasonably appropriate'[111] measures at its disposal pursuant to the law of occupation in order to ensure private actors' respect for international humanitarian law.

Accordingly, the Occupying Power is released from responsibility if it demonstrates that it has carried out a diligent policy of vigilance over and punishment of private actors' illegal exploitation of natural resources.

4.5 Consequences in Terms of Individual Criminal Responsibility

In cases of illegal exploitation committed by private actors, they are the only individuals that may possibly be prosecuted for the war crime of pillaging if their behavior falls into the definition of this crime and the relevant conditions for the prosecution are met.[112]

The organs of the Occupying Power who failed in their vigilance – even showing a lack of *due diligence* – are not to be prosecuted since they themselves have not violated the international humanitarian law rules regarding the exploitation of natural resources. They only violated a duty embodied in Article 43 HR, whose breach, however serious, does not constitute a war crime under the ICC Statute. Accordingly, those state organs may not be individually prosecuted at the international level, although their behavior is able to trigger state responsibility.

Moreover, their individual criminal responsibility is excluded under Article 28 ICC Statute regarding responsibility of commanders and other superiors. It is true that, according to treaty and customary law, commanders and superiors may be held responsible for not having prevented and punished war crimes committed by their subordinates.[113] However, private actors illegally exploiting natural resources in the occupied territory are not considered subordinates of the military commander of the area – meaning that they would be *de facto* organs rather than private actors. Conversely, Article 28 ICC Statute requires a legal or factual hierarchical relationship between the commander(s) and the perpetrator(s) of the crime(s), a requirement that is not present in case of illegal exploitation of natural resources by private actors.[114]

More generally, belligerent occupation is control over territory, not control over individuals. Accordingly, one may not claim that the occupation implies such an obtrusive control over every individual dwelling in the area and that they are all subordinates of the military commander. The Occupying Power's control is similar to the control exercised by a state over its own territory, and

[111] *Responsibilities*, *supra* n. 104, para. 120.

[112] See Section 3.

[113] See Article 87 AP I; rule 153 in Henckaerts, Doswald-Beck (2005) vol. I, pp. 558–563.

[114] See eg *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* n. 26, paras. 180–190. This paper is not the proper occasion for discussing command and superior responsibility. For more on this topic, see Triffterer, Arnold (2016), pp. 1091–1094, and the case law cited therein.

state officials are not considered automatically commanders or superiors of every individual under their jurisdiction. A different conclusion would turn the Occupying Power's obligation of conduct into an obligation of result for the purposes of international criminal law.

In light of the above, when acts of illegal exploitation are committed by private actors, the Occupying Power may be held responsible for not having diligently prevented them, but only the private actors – and not state organs – may be prosecuted for the international crimes.[115]

5 Conclusive Remarks

The interplay between public and private actors in the illegal exploitation of natural resources in the occupied territory is the source of a number of complex issues related to international state responsibility and individual criminal liability.

The correct identification of the relevant international norms applicable to the illegal exploitation of natural resources is the cornerstone of every attempt to hold the Occupying Power and its organs accountable for illegal exploitation. As this paper sought to demonstrate, it is important to make a distinction between two different situations: illegal exploitation may be carried out by the Occupying Power's organs (either *de jure* and *de facto*), or by private actors. In the first case, the Occupying Power may be held directly responsible for violations of the international humanitarian law rules regarding the exploitation of natural resources in the occupied territory, and its organs individually may face international criminal prosecution for those conduct.

In contrast, when the illegal exploitation is carried out by private actors, the Occupying Power may be held responsible only for not having prevented that illegal exploitation on the basis of a duty of vigilance pursuant to Article 43 HR, according to which the territorial control gained *manu militari* demands that the Occupying Power prevent individuals that are in the occupied territory from illegally exploiting the natural resources present therein. This responsibility is vested in the Occupying Power because international law always considers internationally responsible for acts of private actors those states that exercise governmental functions over the territory where those actors carry out their activity – irrespective of any legal title at the basis of this exercise. However, since this duty of vigilance is an obligation of conduct, illegal exploitation by private actors triggers the Occupying Power's international responsibility only if the state fails to demonstrate that it had exercised its powers in order to prevent that illegal conduct. When the exploitation of natural resources is carried out by private actors, the Occupying Power's organs who failed in their

[115] The International Military Tribunal of Nuremberg has envisaged the possibility of prosecuting private actors for war crimes such as companies and corporations. On this topic, see Marston Danner (2006); Jessberger (2010).

vigilance may not be held responsible individually for war crimes since a serious violation of Article 43 HR is not considered to be a war crime by any international criminal justice instrument.

In light of the above, it is clear that, today, the law of belligerent occupation must take into consideration even private actors, and not only the Occupying Power, the ousted sovereign, and the population of the occupied territory, which are the traditional stakeholders during occupations. This proliferation of actors involved in the occupation further complicates the individuation of the relevant international norms and path of state and individual accountability.

References

Ago R (1940) La colpa nell'illecito internazionale. In: Scritti giuridici in onore di Santi Romano, vol II. Cedam, Padova, pp 177–206

Annoni A (2012) L'occupazione "ostile" nel diritto internazionale contemporaneo. Giappichelli, Torino

Anzilotti D (1906) La responsabilité internationale des Etats à raisonnes dommages soufferts par des étrangers. RGDIP 13:5–29

Arai-Takahashi Y (2009) The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law. Martinus Nijhoff, Leiden

Arai-Takahashi Y (2015) Law Making and Judicial Guarantees. In: Clapham A, Gaeta P, Sassòli M (eds) The 1949 Geneva Conventions: A Commentary. Oxford University Press, Oxford, pp 1421–1455

Barnidge RP (2006) The Due Diligence Principle Under International Law. Int Com LR 8:81–121

Bekker PHF (2003) The Legal Status of Foreign Economic Interests in Occupied Iraq. ASIL Insights (20)8, www.asil.org/insights/volume/8/issue/20/legal-status-foreign-economic-interests-occupied-iraq

Ben-Naftali O (2012) Belligerent Occupation: A Plea for the Establishment of an International Supervisory Mechanism. In: Cassese A (ed), Realizing Utopia: The Future of International Law. Oxford University Press, Oxford, pp 538–552

Benvenisti E (2003) Water Conflicts During the Occupation of Iraq. AJIL 97:860–872

Benvenisti E (2012) The International Law of Belligerent Occupation (2nd edn). Oxford University Press, Oxford

Bluntchli JC (1873) Le droit international codifié, 2nd edn. Libraire de Guillaumin et Cie, Paris

Boisson De Chazournes L, Condorelli L (2000) Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests. Int Rev Red Cross 82:67–87

Bonfanti A (2012) Imprese multinazionali, diritti umani e ambiente: profili di diritto internazionale pubblico e privato. Giuffrè, Milano

Bothe M (2015) The Administration of Occupied Territory. In: Clapham A, Gaeta P, Sassòli M (eds) The 1949 Geneva Conventions: A Commentary. Oxford University Press, Oxford, pp 1455–1484

Brownlie I (1979) Legal Status of Natural Resources in International Law. RCADI 162:245–318

Bungenberg M, Howe S (eds) (2015) Permanent Sovereignty over Natural Resources. Springer, The Hague

Carcano A (2015) The Transformation of Occupied Territory in International Law. Brill, Leiden

Cassese A (1992) Powers and Duties of an Occupant in Relation to Land and Natural Resources. In: Playfair E (ed) International Law and the Administration of Occupied Territories. Clarendon Press, Oxford, pp 419–442

Cervell Hortal MJ (2005) La explotación ilegal de los recursos naturales de un estado a la luz de la sentencia del Tribunal Internacional de Justicia sobre las actividades armadas en el territorio de Congo (2005). Anuario español de derecho internacional 22:559–577

Chetail V (2014) The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward. In: Denis Alland et al (eds) Unité et diversité du droit international – Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy. Brill, Leiden, pp 105–130

Cimiotta E (2011) Conflitto armato nella Repubblica Democratica del Congo e principio della sovranità permanente degli Stati sulle proprie risorse naturali. In: Ligustro A, Sacerdoti G (eds) Problemi e tendenze del diritto internazionale dell'economia: Liber amicorum in onore di Paolo Picone. Editoriale Scientifica, Napoli, pp 55–78

Combacau J (1981) Obligations de résultat et obligations de comportement: quelques questions et pas de réponse. In: Mélanges offerts a Paul Reuter. Pedone, Paris, pp 181–204

Condorelli L (1984) L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances. RCADI 189:9–221

Condorelli L (1989) The Imputability to States of Acts of International Terrorism. Israel YHR 19:233–246

Condorelli L, Boisson De Chazournes L (1984) Quelques remarques à propos de l'obligation des États de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances». In: Swinarski C (ed) Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet. International Committee of the Red Cross, Geneva, pp 17–35
Dam-de Jong D (2015) International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations. Cambridge University Press, Cambridge
David E (2010) Primary and Secondary Rules. In: Crawford J, Pellet A, Olleson S (eds) The Law of International Responsibility. Oxford University Press, Oxford, pp 27–33
De Frouville O (2010) Attribution of Conduct to the State: Private Individuals. In: Crawford J, Pellet A, Olleson S (eds) The Law of International Responsibility. Oxford University Press, Oxford, pp 257–280
De Schutter O (2006) (ed) Transnational Corporations and Human Rights. Hart, Oxford
De Vattel E (1802) Le droit des gens, ou Principes de la loi naturelle, vol 2. Robert et Gauthier, Paris
Dinstein Y (2009) The International Law of Belligerent Occupation. Cambridge University Press, Cambridge
Dörr O (2012) Article 31 – General Rule of Interpretation. In: Dörr O, Schmalenbach K (eds) Vienna Convention on the Law of Treaties: A Commentary. Springer-Verlag, The Hague-Berlin, pp 521–570
Dufresne R (2008) Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case. NYU J Int'l L & Pol 40:171–217
Dupuy P-M (1999) Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. EJIL 10:371–385
Economides CP (2010) Content of the Obligation: Obligations of Means and Obligations of Result. In: Crawford J, Pellet A, Olleson S (eds) The Law of International Responsibility. Oxford University Press, Oxford, pp 371–381
Ferraro T (2013) The Law of Occupation and Human Rights Law: Some Selected Issues. In: Kolb R, Gaggioli G (eds) Research Handbook on Human Rights and Humanitarian Law. Edward Elgar, Cheltenham, pp 273–293
Fleck D (2006) International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law. J Conflict & Security L 11:179–199
Focarelli C (2010) Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble? EJIL 21:125–171
Fornari M (2013) La Cour de Justice de l'Union Européenne se prononce sur l'importation de produits fabriqués dans les territoires palestiniens occupés: verre demi plein ou verre demi vide? In: Boschiero N et al (eds) International Courts and the Development of International Law: Essays in Honour of Tullio Treves. Springer, The Hague, pp 897–910
Gattini A (2014) Breach of International Obligations, In: Nollkaemper A, Plakokefalos I (eds) Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art. Cambridge University Press, Cambridge, pp 25–59
Geiβ R (2015) The Obligation to Respect and to Ensure Respect for the Conventions. In: Clapham A, Gaeta P, Sassòli M (eds) The 1949 Geneva Conventions: A Commentary. Oxford University Press, Oxford, pp 111–134
Greenwood G (1992) The Administration of Occupied Territory in International Law. In: Playfair E (ed) International Law and the Administration of Occupied Territories. Clarendon Press, Oxford, pp 241–266
Grotius H (1964), De jure belli ac pacis libri tres, vol 2 (Francis W Kelsey tr). Oceana-Wildy & Son, New York.
Haupais N (2006) Les obligations de la puissance occupante au regard de la jurisprudence et de la pratique récentes. RGDIP 111:117–146
Henckaerts J-M (2016) Article 1: Respect and Ensure Respect. In: International Committee of the Red Cross, Updated Commentary on the First Geneva Convention, www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CDEF5D508578B983C1257F15004A89CA
Henckaerts J-M, Doswald-Beck L (2005) (eds) Customary International Humanitarian Law. Cambridge University Press, Cambridge
Jessberger F (2010) On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial. JICJ 8:783–802
Keenan PJ (2014) Conflict Minerals and the Law of Pillage. Chicago JIL 14:524–558
Koivurova T (2013) Due Diligence. In: Wolfrum R (ed) Max Planck Encyclopedia of Public International Law, online edition.
Kolb R (2013) Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949. RBDI 46:513–570
Kolb R, Vité S (2009) Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuelles. Bruylant, Bruxelles
Korman S (1996) The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice. Clarendon Press, Oxford
Koutroulis V (2006) L'affaire des Activités armées sur le territoire du Congo (Congo c. Ouganda): une lecture restrictive du droit de l'occupation. RBDI 39:701–741
Koutroulis V (2010) Le début et la fin de l'application du droit de l'occupation. Pedone, Paris

Koutroulis V (2012) The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time? Int Rev Red Cross 94:165–205
Kratzmer D (2012) The Law of Belligerent Occupation in the Supreme Court of Israel. Int Rev Red Cross 94:207–236
Longobardo M (2015) The Palestinian Right to Exploit the Dead Sea Coastline for Tourism. German YBIL 58:317–352
Lozano Contreras JF (2006) La noción de debida diligencia en derecho internacional public. Atelier, Alicente
Lubell N (2012) Human Rights Obligations in Military Occupation. Int Rev Red Cross 94:317–337
Lundberg MA (2008) The Plunder of Natural Resources During War: A War Crime. Georgetown JIL 39:495–525
Marston Danner A (2006) The Nuremberg Industrialist Prosecutions and Aggressive War. Virginia JIL 46:651–676
Meron T (1987) The Geneva Conventions as Customary Law. ASIL 81:348–370
Okowa PN (2007) Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection? Int Com LR 9:237–262
Pace M (2012) Sfruttamento delle risorse naturali e occupazione bellica in una recente sentenza della Corte Suprema d'Israele. in Diritti umani e diritto internazionale 6:679–684
Palchetti P (2007) L'organo di fatto dello Stato nell'illecito internazionale. Giuffré, Milano
Palchetti P (2012) De Facto Organs of a State. In: Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law, vol 2. Oxford University Press, pp 1048–1052
Pellet A (1992) The Destruction of Troy will not Take Place. In: Playfair E (ed) International Law and the Administration of Occupied Territories. Clarendon Press, Oxford, pp 169–204
Pertile M (2013) La relazione tra risorse naturali e conflitti armati del diritto internazionale. Cedam, Padova
Pertile M (2016) On the Financing of Civil Wars through Natural Resources: Is there a Duty of Vigilance for Third States on the Activities of Trans-national Corporations? In: Romanin Jacur F, Bonfanti A, Seatzu F (eds) Natural Resources Grabbing: An International Law Perspective. Brill, Leiden, pp 383–406
Pictet JS (1951) (ed), Commentary to the IV Geneva Convention Relative to the Protection of Civilians in Time of War. International Committe of the Red Cross, Geneva
Pisillo Mazzeschi R (1992) Due Diligence and International Responsibility of States. German YBIL 35:9–51
Roberts A (1985) What is a Military Occupation? British YBIL 55:249–305
Roberts A (1990) Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967. AJIL 84:44–103
Ronzitti N (2014) Il conflitto del Nagorno-Karabakh e il diritto internazionale. Giappichelli, Torino
Russeau C (1983) Droit international public, vol 5. Sirey, Paris
Sassòli M (2002) State Responsibility for Violations of International Humanitarian Law. Int Rev Red Cross 84:401–434
Sassòli M (2005) Legislation and Maintenance of Public Order and Civil Life by Occupying Powers. EJIL 16:661–694
Sassòli M (2015) Concept and the Beginning of Occupation. In: Clapham A, Gaeta P, Sassòli M (eds) The 1949 Geneva Conventions: A Commentary. Oxford University Press, Oxford, pp 1389–1420
Schrijver NJ (1997) Sovereignty over Natural Resources. Cambridge University Press, Cambridge
Schwenk EH (1945) Legislative Power of the Military Occupant under Article 43, Hague Regulations. Yale LJ 54:393–416
Scobbie I (1997) Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty. In: Bowen S (ed) Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories. Martinus Nijhoff, Leiden, pp 221–290
Scobbie I (2011) Natural Resources and Belligerent Occupation: Perspectives from International Humanitarian and Human Rights Law. In: Akram SM et al (eds) International Law and the Israeli Palestinian Conflict: A Right-Based Approach to Middle East Peace. Routledge, Abingdon, pp 229–252
Scobbie I (2015) International Law and the Prolonged Occupation of Palestine. papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130
Spielmann D (2016) Companies in the Strasbourg Court-room. CJICL 5 (forthcoming)
Stewart J (2010) Corporate War Crimes; Prosecuting the Pillage of Natural Resources. Open Society Justice Initiative Publication, New York
Tignino M (2011) L'eau et la guerre: éléments pour un régime juridique. Bruylant, Bruxelles
Tiwari G (2016) Breaking the 'Resource Curse': Prosecuting Pillage of Natural Resources. In: Romanin Jacur F, Bonfanti A, Seatzu F (eds) Natural Resources Grabbing: An International Law Perspective. Brill, Leiden, pp 407–426
Triffterer O, Arnold R (2016) Article 28 – Responsibility of Commanders and Other Superiors. In: Triffterer O, Ambos K (eds) The Rome Statute of the International Criminal Court: A Commentary, 3rd edn. C.H.Bechk-Hart-Nomos, Berlin-Oxford-Baden Baden, pp 1056–1107
Van den Herik L, Dam-de Jong D (2011) Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation. Criminal Law Forum 22:252–273
Van Engeland A (2015) Protection of Public Property. In: Clapham A, Gaeta P, Sassòli M (eds) The 1949 Geneva Conventions: A Commentary. Oxford University Press, Oxford, pp 1535 –

Wilde R (2009) Complementing Occupation Law - Selective Judicial Treatment of the Suitability of Human Rights Norms. Isr Law Rev 42:80–100
Wolfrum R (2005) State Responsibility for Private Actors: An Old Problem of Renewed Relevance. In: Ragazzi M (ed) Essays in Memory of Oscar Schachter. Martinus Nijhoff, Leiden, pp 423–434