
The contribution of international law to addressing the challenges ensuing from resource-related armed conflicts

9.1 Introductory remarks

Resource-related armed conflicts pose considerable challenges to the premises on which the international legal framework for the governance of natural resources is based. This book demonstrated that the general legal framework for the governance of natural resources relies on a stable government that is in full control of the State's natural resources and exploits these for the benefit of all. However, resource-related armed conflicts often show a different reality in which governments are unable to exercise sovereignty over portions of the State territory, foreign States and armed groups plunder the State's natural wealth, and/or governments use the proceeds from natural resource exploitation to fund destructive military campaigns.

In order to resolve resource-related armed conflicts and to prevent future armed conflicts fuelled by natural resources, two principal challenges need to be addressed. The first concerns stopping natural resources from financing or fuelling armed conflict. Addressing this challenge requires the adoption of a two-pronged strategy aimed at stopping the illegal exploitation of natural resources as well as the trade in these resources on the one hand and returning the control over the State's natural resources to the lawful government on the other.¹ Strategies that

¹ The current chapter focuses on eliminating the trade in natural resources that finance armed conflict, since this issue raises the most relevant legal questions. For both issues, the legal position of the government is of primary importance, especially when this position is contested. See Chapter 2 for a more detailed discussion of this issue. Reinstating government control over natural resources is mostly achieved by mandating law enforcement tasks to peacekeeping operations. See Chapter 7 for more details.

address these issues aim primarily at removing the opportunities for parties to an armed conflict to derive an income from natural resources and are therefore linked to the feasibility and greed theories formulated by political economists to explain the relationship between natural resources and armed conflict, as introduced in Chapter 1. The second challenge consists of improving the governance of natural resources within States as part of post-conflict reconstruction efforts with the aim of preventing these States from relapsing into armed conflict. Strategies that address this issue focus both on removing the opportunities for parties to an armed conflict to derive an income from natural resources and address issues related to maldistribution of natural resources wealth as a cause of armed conflict. They are therefore linked to the feasibility and grievances theories formulated by political economists, as introduced in Chapter 1.

The objective of this book was to analyse the role of international law in addressing these challenges. More specifically, it has attempted to identify and assess the role of international law in ensuring that natural resources are used to promote development and achieve sustainable peace in countries that have experienced armed conflicts that were either caused, financed or fuelled by natural resources. For this purpose, this book first analysed the general legal framework for the governance of natural resources within States (Chapters 2–4), as well as the effects of armed conflict on this legal regime (Chapter 5). It then examined the additional protection provided to natural resources and the environment under the law of armed conflict (Chapter 6). Finally, it analysed the legal and extra-legal approaches to severing the link between natural resources and armed conflict. More in particular, this book examined the approach of the UN Security Council with regard to resource-related armed conflicts (Chapter 7) and the role of voluntary initiatives that have been developed alongside Security Council action (Chapter 8).

This chapter aims to bring to the fore the most important conclusions that can be drawn from this book for the purpose of addressing the two principal challenges referred to, building on the intermediate conclusions formulated for the various parts of this book. Section 9.2 outlines the contribution of international law to stopping natural resources from financing and fuelling armed conflicts, while Section 9.3 assesses international law's contribution to improving the governance of natural resources within States. Finally, Section 9.4 formulates proposals to address particular issues that encompass both challenges.

9.2 Stopping natural resources from financing and fuelling armed conflict

Natural resources have provided a source of conflict financing for States and armed groups alike. However, current practice addressing this challenge focuses mainly on eliminating the trade in so-called ‘conflict resources’, designating natural resources traded by armed groups to finance their armed struggle. The narrow focus on armed groups becomes most of all apparent from the definition of ‘conflict diamonds’ adopted within the Kimberley Process for the Certification of Rough Diamonds, which defines conflict diamonds as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.’² However, a similar bias can be observed in the practice of the UN Security Council, which has adopted a number of sanctions regimes to stop the trade in natural resources that finance armed conflict. The Council’s approach has proven dynamic, in the sense that it has continuously tried to improve its methods for the purpose of addressing specific threats to the peace more effectively. It embraced innovations such as a certificate-of-origin regime to distinguish between diamonds traded by armed groups and by governments and it adopted due diligence requirements for companies sourcing from the DR Congo. In each instance, these measures were backed up by assistance from peacekeeping operations.

However, the readiness of the UN Security Council to adopt measures is often linked to a particular type of threat to peace and security. Most of the sanctions regimes examined in this book were aimed at assisting the government of a State to restore governance over natural resources that had fallen into the hands of subversive entities. In the few cases in which the Security Council directly targeted the government of a State, the legitimacy of the government itself was at stake. These were the sanctions regimes imposed against Southern Rhodesia and Libya. Moreover, in the case of Liberia under the presidency of Charles Taylor, the Council targeted the Liberian government in order to cut off support provided by the government to rebel movements, notably the RUF.

The question is therefore if and to what extent this practice of the Security Council and the extra-legal initiatives reflect the rules that apply to the exploitation of natural resources in situations of armed conflict. As

² Kimberley Process Certification Scheme, Sect. I.

discussed in Part II of this book, the commercial nature of the exploitation of natural resources has clear implications for the applicable legal framework. IHL is normally considered to be the *lex specialis* in situations of armed conflict, but this field of international law is primarily concerned with acts of warfare and their implications for the population of a State. It only marginally addresses commercial activities such as natural resources exploitation. Therefore, other fields of international law are equally important for the regulation of natural resources exploitation in situations of armed conflict, at least for States. These are, in particular, international economic, environmental and human rights law.

Even though the international legal framework is fragmented and difficult to oversee, it does contain rules relating to the exploitation of natural resources for all parties to an armed conflict. The basic principle underlying the legal framework is that of permanent sovereignty over natural resources, which permits governments to exploit the State's natural resources on behalf of their people. In contrast to this extensive right for governments to exploit natural resources, international law contains a complete prohibition on non-State armed groups exploiting a State's natural resources as well as on third States doing so, except in situations of occupation. In these situations, third States have a right to exploit natural resources pursuant to the right of *usufruct*, subject to stringent conditions.

However, a closer analysis of the applicable rules and their operation reveals two inherent difficulties which shed a different light on the international legal framework. The first ensues from the specific nature of internal armed conflicts. In these armed conflicts, the government does not only represent the State; it is also a party to the armed conflict. In light of these specific circumstances, it is unrealistic to expect an armed group to comply with rules of IHL formulating a complete prohibition on exploiting natural resources, while the opposing party has a broadly defined right to exploit natural resources. This makes even more sense if one considers that every conflict dynamics is different: just as governments do not necessarily represent a good cause, armed groups do not necessarily struggle for a bad cause.

This book does not argue in favour of granting armed groups the same rights and obligations with regard to the exploitation of natural resources as governments, nor does it propose assigning all armed groups the right to exploit natural resources. However, it does propose granting those armed groups that are in control of a portion of the State territory a qualified right to exploit natural resources, based on the right of *usufruct*

that is central to international occupation law. In the absence of effective control over these territories by the *de jure* government, the armed groups that exercise control can be considered to constitute *de facto* authorities in the territories under their control. Therefore, the armed group that is in control should at least be provided the opportunity to show that it is willing to assume governmental responsibilities.

It is furthermore essential to note that granting a *prima facie* right to exploit natural resources to armed groups that are in effective control over portions of a State's territory does not in any way rule out the possibility of the UN or States adopting enforcement action in individual cases, most notably of the UN Security Council imposing sanctions in situations which pose a threat to the peace. To a certain extent, support for this position can be derived from current practice. The Kimberley Process definition of 'conflict diamonds' refers explicitly to Security Council resolutions, which implies that it only covers diamonds that have been labelled 'conflict diamonds' by the Security Council.³

One of the principal reasons for proposing to grant the right of *usufruct* to armed groups that control portions of a State territory is that it protects the civilian population and the environment more adequately than the current rules do. In the first place, granting armed groups a right of *usufruct* gives them an incentive to respect the rules of IHL. Second, the concept of *usufruct* does not entail a right to use the proceeds from the exploitation of natural resources to buy weapons. It merely grants armed groups a right to set up and maintain a civilian administration for the benefit of the population.⁴ The qualified nature of the concept of *usufruct* strikes a careful balance between the realities of armed conflict and the

³ The definition reads in full, 'rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future'. Emphasis added by the present author. See Kimberley Process Certification Scheme, Sect. I.

⁴ Arguably, compliance by armed groups to these conditions is difficult to oversee. Nonetheless, measuring compliance with the rules of IHL in general is one of the more troublesome aspects of this field of international law. For internal armed conflicts, Article 3 of the 1949 Geneva Conventions provides for an impartial humanitarian body, such as the ICRC, to 'offer its services to the Parties to the conflict'. This is the most commonly used option for measuring compliance by parties to an armed conflict with IHL. It should further be emphasised that resort to enforcement action, such as sanctions, remains open if there are indications of noncompliance to the rules.

provisional character of the situation. Moreover, the concept can be interpreted in the light of relevant human rights and environmental norms. This balancing of rights and obligations is the best way to protect the environment and the civilian population in territories that are controlled by armed groups.

The second issue that casts a different light on the international legal framework is related to the scope of the right of governments to exploit the State's natural resources. The right of governments to exploit natural resources pursuant to the principle of permanent sovereignty over natural resources has clear limits. It is restricted by obligations derived from several fields of international law, including international humanitarian, human rights and environmental law, as discussed in Parts I and II of this book. One of the obligations that qualify the right of governments to exploit the State's natural resources is that the government must act on behalf of the people. Governments therefore have a right to use the proceeds obtained from natural resources exploitation to fund a military campaign, as long as they act for the benefit of the people.

This people-oriented conception of the principle of permanent sovereignty over natural resources is partly derived from international human rights law.⁵ In addition, it is reflected in the resolutions of the UN Security Council with regard to specific resource-related armed conflicts as well as in the extra-legal initiatives discussed in Chapter 8, which emphasise that natural resources should be exploited for the benefit of the people and for national development. The question is therefore to what extent this people-oriented conception is further reflected in the measures adopted by the Security Council and the extra-legal initiatives.

It is clear from the practice of the Security Council that a government which uses the proceeds from natural resources exploitation to fund a military campaign against its own people or which uses these proceeds to support foreign rebel groups is considered to pose a threat to the peace.⁶ The sanctions imposed against the Gaddafi government in Libya and the Taylor government in Liberia attest to this. There are, however, also situations in which the Security Council refrained from imposing commodity sanctions against a government, even where this government used the proceeds of natural resources exploitation for purposes that were clearly

⁵ See Chapters 2 and 3 and Section 9.3 for more details.

⁶ It should be recalled that the concern of the Security Council is not directly related to ensuring respect for international law but rather to addressing threats to peace.

not in the interest of peace – or of the people of the State. The armed conflict in Côte d'Ivoire between the government and the Forces Nouvelles in the first decade of this century constitutes a striking example of such a situation. In this situation, the Security Council adopted sanctions in order to secure the implementation of the peace agreements concluded between the parties to the armed conflict. However, the commodity sanctions exclusively targeted the Forces Nouvelles, while no such measures were adopted to stop the government from violating its commitments pursuant to the peace agreements.

If the Security Council truly adheres to a people-oriented conception of permanent sovereignty, it should therefore be ready to use its powers under Chapter VII more readily to ensure that all parties to an armed conflict, including governments, use the proceeds of natural resources for the benefit of the people – or, at least, do not use them in ways that harm the people, as was the case in Côte d'Ivoire. This might entail the adoption of sanctions in specific instances. Likewise, the extra-legal initiatives that are designed to eliminate the trade in conflict resources should not shy away from addressing the contribution of governments to fuelling armed conflicts through the proceeds of natural resources exploitation. The OECD Due Diligence Guidance does address this issue to some extent, by addressing companies' responsibility in preventing the commission of gross human rights violations and international crimes. The Guidance does not restrict companies' due diligence to preventing such acts from being committed by armed groups alone. At the same time, the threshold of the OECD Guidance is extremely high, exactly because it addresses only the most serious violations of international law. It does not address the responsibility of companies to exercise due diligence in relation to situations in which it is apparent that a government uses the proceeds from its extractive industries to fuel internal armed conflict. In addition, the Kimberley Process does not address the issue of governments fuelling armed conflict at all; it focuses exclusively on stopping the trade in diamonds by armed groups.

There is an obvious logic in the failure of these mechanisms to address the contribution of governments to fuelling armed conflict. Besides sovereignty-related issues, the causal link between natural resources exploitation and conflict financing is more remote when it concerns the government. It is difficult to assess the contribution of natural resources to fuelling armed conflict separately from government public financing in general. Nevertheless, it is submitted that the Security Council as well as voluntary mechanisms should address instances where it is apparent

that a government uses the proceeds from natural resources exploitation to fuel armed conflict.

9.3 Improving the governance of natural resources within States

The second challenge associated with resource-related armed conflicts is to improve the governance over natural resources within States, both to resolve existing armed conflicts and to prevent these States from relapsing into armed conflict. Natural resources endowment can certainly constitute an engine for development, provided that the resources are used wisely. The primary responsibility for the governance of natural resources lies with the State in which they are located, based on the principle of permanent sovereignty over natural resources. This principle is partly rooted in the right to self-determination of peoples. Although the principle of permanent sovereignty is considered to be attached to the sovereignty of the State, its roots in the right to self-determination are not without significance. As already referred to in the preceding section, it demonstrates that the State's natural resources should be exploited for the benefit of the people of the State. It further demonstrates that peoples are not only beneficiaries of the principle of permanent sovereignty over natural resources but subjects as well. This can also be derived from the landmark 1962 Declaration on Permanent Sovereignty over Natural Resources, which designates both peoples and States as holders of the right to exercise permanent sovereignty over natural resources and stipulates that they must exercise this right 'in the interest of their national development and of the well-being of the people of the State concerned'.⁷ This is also reflected in the identical Articles 1 of the 1966 Human Rights Covenants.

As the organising principle of natural resources governance, permanent sovereignty over natural resources is a rights- and duties-based concept, as already alluded to in the previous section.⁸ Most importantly, States have a right to exploit their natural resources pursuant to their own developmental priorities. This is a fundamental right for States, which the international community should respect at all times. At the same time, current practice in the context of resource-related armed conflict increasingly qualifies the principle of permanent sovereignty over natural resources by setting procedural standards for resource governance related

⁷ Declaration on Permanent Sovereignty over Natural Resources, *UNGA Resolution 1803 (XVII)* of 14 December 1962.

⁸ See Schrijver, *Sovereignty over Natural Resources*.

to 'good governance'. Both UN Security Council resolutions and extra-legal initiatives require States to manage their natural resources in an effective, transparent and accountable way. However, this book argued that 'good governance' for the purpose of preventing and resolving armed conflicts related to natural resources is broader and also encompasses standards related to public participation and sustainability.

Therefore, this book defined 'good governance' as follows:

the sustainable, transparent and accountable management of natural resources for the purposes of equitable and sustainable development. It entails clear and participatory decision-making procedures at the level of public authorities, transparent and accountable institutions and the primacy of law in the management and distribution of natural resources and their revenues, as well as capacity building for elaborating and implementing measures aimed in particular at preventing and combating corruption in the public administration of revenues from natural resources.

One of the objectives of this book was to assess whether and to what extent these requirements for good governance are reflected in international law as well as in current approaches to addressing the links between natural resources and armed conflict.

It is notable that current approaches to improve governance of natural resources for the purposes of conflict prevention and resolution focus mainly on transparent and accountable management of natural resources. This book argues that, in addition, international law contains an emerging obligation for States to inform and consult local communities and the general population of proposed projects involving the exploitation of natural resources and to grant them access to justice. This obligation can first of all be derived from international environmental law, particularly the principle of public participation, which can be found in several international environmental conventions, including in the 1992 Convention on Biological Diversity. In addition, a right to public participation can partly be derived from international human rights law, most notably from identical Articles 1 of the ICESCR and the ICCPR as well as from Articles 25 and 27 of the ICCPR. These provisions have been extensively interpreted by human rights bodies and courts with respect to the protection of the rights of indigenous peoples. This book argues that these provisions also provide the basis for a more general right for the population to be more actively involved in decisions regarding resource exploitation projects, including in relation to the allocation of concessions and the management of revenues derived from these projects. Involving the

population actively in these decisions creates a sense of ownership among the population and prevents (renewed) grievances over the distribution of natural resources wealth, which is essential to prevent a relapse into armed conflict.

Furthermore, international law requires States to use their natural resources in a sustainable way and to prevent damage to the environment. This obligation is enshrined in several international environmental conventions as well as increasingly in customary international law. Although these conventions do not formulate a general obligation for States to protect their own environments, they do establish standards of due care. In addition, significant parts of the environment are protected under 'common regimes' established for the purpose of protecting parts of the environment that are of interest to a larger community of States. Examples include the obligations to protect 'world heritage' and to conserve biological diversity. In addition, States are under a general obligation to conduct an EIA to assess the risks of resource exploitation projects on the environment. The obligation to use natural resources in a sustainable way and to prevent damage to the environment is particularly important for the purpose of preventing grievances among local communities in relation to their living environment as well as to improve prospects to achieve long-term development.

This book argues that current approaches to improving the governance of natural resources within States should integrate requirements relating to sustainability and public participation more closely into their strategies. Moreover, it is essential to move from ad hoc to more structural approaches towards improving the governance of natural resources in conflict-torn States. Much has been done already to improve the governance of natural resources in conflict-torn States, notably by UN peacekeeping operations, by specific programs such as the Liberian GEMAP and LFI programs and by the UN Peacebuilding Commission. Their work has greatly contributed to improving the governance of natural resources in specific States, including Cambodia, Sierra Leone and Liberia. It is now time to build upon the best practices developed for these countries and to develop a systematic approach to improving resource governance in conflict-torn States.

It is argued that a working group composed of the most relevant actors, including the UN Peacebuilding Commission and the World Bank, under the direction of the UN Secretariat, should develop general standards for the management of natural resources in States recovering from armed conflict for the purpose of achieving sustainable peace. These standards

should build upon the definition of good governance as provided above and reflect more fully the obligations of States under international law, most notably obligations relating to public participation and sustainable use of natural resources.

Finally, to ensure a more coherent approach to improving resource governance in conflict-torn States in the future, it is essential to appoint one institution to coordinate the peacebuilding process. The UN Peacebuilding Commission would be a logical candidate, given its advisory function relating to post-conflict peacebuilding. For this purpose, the current peacebuilding architecture should however be amended in some respects. First of all, it is essential that the UN Security Council involves the UN Peacebuilding Commission directly in the phase of conflict resolution, e.g., by asking the Commission for advice in relation to the design and mandate of UN peacekeeping operations. Second, the international financial institutions, most notably the World Bank, should be more directly involved in the work of the UN Peacebuilding Commission by giving them a seat in the Commission's organisational committee. Last, and most important, the UN Peacebuilding Commission should receive a stronger mandate in order to perform its functions effectively. This mandate should reflect the Commission's role as a coordinating rather than a purely advisory instance, e.g. by linking the available funds for peacebuilding more directly to the Commission.

9.4 Proposals for strengthening the international legal framework

The principal question that this book aimed to answer is related to the contribution of international law to ensuring that natural resources are used to promote development and to achieve sustainable peace. The previous sections argued that international law addresses the challenges to resource-related armed conflicts fairly well. However, the system as it exists today is not perfect. The previous sections formulated specific recommendations to better address the two principal challenges ensuing from resource-related armed conflicts. The current section formulates two additional proposals that encompass both challenges.

A first proposal is to strengthen the contribution of existing treaties to addressing the problems associated with resource-related armed conflicts. There are several treaties that could play an important role in addressing the challenges ensuing from resource-related armed conflicts. Examples include mixed trade-environmental treaties such as CITES and ITTA that could be more directly relied on in efforts to stop natural resources from

being used for the financing of armed conflicts. In addition, conventions such as the Biodiversity Convention and the UNESCO World Heritage Convention are of great value in assisting States to protect their environment in situations of armed conflict and to restore their environment in the immediate aftermath of armed conflict. Both conventions have funds dedicated to assisting States in protecting their biological diversity and natural heritage respectively.

In addition, these conventions benefit from strong institutional structures, which could be called upon to assist in addressing particular problems. Both the World Heritage Committee and the Conference of the Parties of the Biodiversity Convention, for example, issue guidelines and recommendations for State parties to give content and meaning to the provisions of the respective conventions. Specific guidelines could be issued to address challenges ensuing from resource-related armed conflicts. Also, in a more practical sense, these conventions could make a difference. The World Heritage Committee, for example, can provide practical assistance to States in protecting their natural heritage in situations of armed conflict. The institutional bodies of CITES and the ITTA for their part could play an important role in developing tracking and tracing systems for conflict timber. These mechanisms should be used more systematically and should address resource-related armed conflicts.

A second issue concerns the responsibility of the international community to assist States in their efforts to achieve a sustainable peace and to prevent resource-related armed conflicts, including most importantly in relation to building strong and accountable institutions for public administration. An additional responsibility can be discerned for the home States of multinational companies, the latter having occasionally contributed to fuelling past and present armed conflicts through their procurement policies. There is an urgent need for the international community to address the role of the private sector in fuelling armed conflicts by adopting more stringent legislation in relation to its compliance with international norms and the transparency of its business practices, with regard both to companies' procurement policies and to their contracts with the governments of the host States.

The US Dodd–Frank Act and the revised EU Transparency Directives are encouraging trends in this respect, but their geographical scope and their objectives are limited. In addition, informal mechanisms such as those of the OECD and the UN Guiding Principles on Business and Human Rights are important initiatives in addressing corporate social responsibility, but their noncommittal nature stands in the way of

effectively regulating corporate behaviour. There is a need for a global effort to address the responsibility of the private sector, even though this will be a long and politically sensitive process. The adoption of the due diligence guidelines by the UN Security Council for minerals procured in the DR Congo can be regarded as a first precedent, since it applies to all companies sourcing from the DR Congo and is partly binding. An initiative addressing the responsibility of the private sector should, however, have a wider geographical and subject-matter scope. It should address broader concerns relating to the mineral procurement policies of companies globally, including the contribution of the private sector to fostering corruption.

It is finally through a concerted effort of the international community that natural resource endowment can again be associated with development. The first steps have been taken. The large number of ad hoc initiatives to address resource-related armed conflicts clearly shows the determination of the international community to address these issues. The time has come to build upon these approaches and to devise more comprehensive solutions, based on the existing legal framework for the management of natural resources. International law has proven sufficiently flexible to accommodate new global concerns and its dynamics should be used more systematically to stop natural resources from fuelling armed conflicts.