

Safeguarding oil resources in unoccupied territories during armed conflict: The Libyan problem

*James Tsabora**

1 Introduction

On 17 March 2011, the fifteen members of the United Nations Security Council voted on a Resolution on Libya,¹ following weeks of mass anti-government protests that triggered a ruthless crack down by President Gaddafi's security forces.² The crackdown is of such a callous nature that the international community began to agree that Gaddafi could be committing crimes against humanity and should be investigated by the Prosecutor of the International Criminal Court.³ The initially peaceful civilian protests gradually developed into an armed movement that launched attacks against government targets and institutions in Libya's towns and cities, and the villages surrounding Tripoli. After recording early victories and almost reaching Tripoli, the rebels were repulsed with even more ruthless force by Gaddafi's security forces. The onslaught by President Gaddafi's forces continued and it became clear that the total defeat of the rebels was only a matter of days away. However, before the capitulation of the rebels could be secured, the United Nations stepped up its efforts to address the situation in Libya, apparently taking sides with the rebel and civilian groups that participated in widespread protests and attacks against President Gaddafi's rule. The efforts of the United Nations culminated eventually in UN Security

*LLB (University of Zimbabwe, Harare, Zimbabwe), LLM (University of KwaZulu-Natal, South Africa), PhD Candidate (Rhodes University, South Africa).

¹Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement> (accessed 2011-03-18). See also Security Council Press Release SC/10200 of 2011-03-17, available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> (accessed 2011-03-18).

²See 'UN Security Council approves no fly zone in Libya' CNN (2011-03-18), available at <http://edition.cnn.com/2011/WORLD/africa/03/17/libya.civil.war/index.html#> (accessed 2011-03-20).

³In the Libyan Resolution, the Security Council even considered 'that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'.

Council Resolution 1973 (2011) where ten of the members, with five abstentions, voted for and authorised international intervention in Libya on 'humanitarian grounds'.⁴

The major talking point of the Security Council Resolution was the imposition of a no fly zone which placed 'a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians'.⁵ As part of the efforts to enforce the no fly zone, the Resolution urged member states 'to take all necessary measures to enforce compliance with the ban on flights imposed'.⁶ The governments of France, the United Kingdom and the United States agreed to lead these actions by carrying out airstrikes against Libya, giving NATO the overall command of the operations. The aerial forces of NATO allied with the Libyan armed rebel groups on the ground against President Gaddafi's forces. The invasion of Libyan airspace by NATO thus took off under the banner of humanitarian intervention, and Libya, like Kosovo before it, was caught in the throes of a conflict supported by the West, but which had originated from what appeared to be peaceful mass protests against the dictatorial regime.

Libya is a country rich in oil reserves and there is no doubt that its political instability affects world oil prices. In the middle of the Libyan unrest, the BBC reported that oil prices had sky rocketed as oil markets feared that the unrest could affect other oil producing regions.⁷ The outbreak of the Libyan conflict and the imposition of the no fly zone further induced anxiety in the oil market and made oil prices very volatile. Any international intervention in Libya is bound to affect Libya's oil production and export in several ways, including the global oil price stability. However, this is not the greatest threat posed by the Libyan conflict. The most serious threat derived from the fate of Libya's oil during the period of the conflict and possibly the transition. As the attacks by NATO and the rebel forces intensify against President Gaddafi, more and more oil rich towns and cities fall into rebel hands. The operation of the oil industry in these areas remains unclear. Will the rebels take over control and continue operating the oil fields? To what extent can NATO interfere to maintain or restore order in Libya's oil industry during the conflict? To whom are the public and private oil producing institutions going to be accountable, particularly if they were hitherto answerable

⁴Humanitarian intervention has been defined as 'the threat or use of force across state borders by a state or group of states aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied'. See Holzgrefe 'The humanitarian intervention debate' in Holzgrefe and Keohane (eds) *Humanitarian intervention: Ethical, legal and political dilemmas* (2003) 18.

⁵Security Council Resolution 1973 (2011) para 6.

⁶*Id* para 8.

⁷See 'Oil prices hit fresh highs on Libya unrest fears' BBC (2011-02-24), available at <http://www.bbc.co.uk/news/business-12563063> (accessed 2011-03-20).

to President Gaddafi's officials? How do prospective oil firms seek to enter the space of Libyan oil exploration and exploitation in the event that pro-Gaddafi mining companies cease their operations? Questions such as these relating to the access to, exploitation and commercialisation of existing resources by parties to a conflict and their agents have always raised disturbing questions in international law. However, thanks in part to sustained legal research in these issues and lessons from recent conflicts such as Iraq, the areas still in need of clarification seem to have dwindled. This notwithstanding, certain issues remain grey areas in international law and parties to the Libyan conflict may exploit such grey areas to their advantage.

This contribution has three objectives. The first objective will be to identify the rules of international humanitarian law that regulate the exploitation and commercialisation of resources during armed conflict. To achieve this, some of the rights, duties and responsibilities of parties to the conflict, particularly occupying powers, will be explored from the perspective of humanitarian law. Secondly, the grey areas of international humanitarian law will be explored, specifically the uncertainties over the applicable regulatory regime for resource exploitation during armed conflict. This part will briefly comment on the legal uncertainty pertaining to the access, exploitation and use of existing oil resources by non-occupying powers such as armed rebels. Finally, this paper will round off with an analysis of the Libyan situation, highlighting the extent to which Libya's oil resources are protected from illegal resource exploitation by parties to the conflict and their corporate partners.

The true shape and nature of the Libyan conflict is still unfolding and at the time of writing, has been constantly shifting. This naturally presents insurmountable difficulties to the analyst. Certain features have however remained largely constant and still stand out for analysis even at this stage of the conflict. The first is that there has been no formal opposition party to contest political power against Gaddafi's regime. Reports of a rebel leadership council have been made⁸ but apart from that, the rebel groups appear to be at best disparate and rudimentary political structures which took up arms spontaneously in response to the military crackdown perpetrated by Gaddafi's forces on unarmed civilian protesters. Indeed, it could even be argued that the most appropriate term to describe these armed rebel groupings would rather be militias. While most observers now wonder when, and not if Gaddafi's regime is going to collapse, the armed rebel groupings have not produced any serious political roadmap or an alternative political system in preparation for that 'inevitable' day.

⁸See 'Key figures in Libya's rebel council' BBC (2011-03-11), available at <http://www.bbc.co.uk/news/world-africa-12698562> (accessed 2011-03-18). The key figures consist of about fifteen people representing certain portfolios in a 'shadow government' in waiting.

Secondly, at the time of writing, the military intervention by France, the United Kingdom and the United States have largely taken the form of air strikes on Gaddafi's military institutions. No ground forces have been deployed in Libya and some governments, for instance, the United States government have ruled out such a move.⁹ The ground attacks against President Gaddafi's forces have mainly been carried out by the armed rebel groups. A full-blown military intervention into Libya cannot however be discounted at this stage, and remains a possibility should the coalition forces deem it necessary to achieve their military objectives. This factual background, in the writer's point of view, is sufficient to provide a basis for analysis of questions regarding the access, exploitation and commercialisation of Libyan oil resources found in zones of conflict.

2 The Libyan conflict and exploitation of oil resources in humanitarian law

The Libyan conflict, as with other contemporary armed conflicts on African soil, has not escaped the misfortune of plural actors and participants. This particularly complicates the waging, longevity and resolution of the conflict. Evolving from a non-international armed conflict, the conflict has been stoked by the involvement of a coalition of Western forces under the banner of NATO. For all intents and purposes, the Libyan conflict can now be appropriately classified as an international armed conflict. The *Tadic* case,¹⁰ for instance, declared that:

... an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.¹¹

Being an international armed conflict, it falls to be regulated by the applicable laws of war, mainly, the Hague Conventions and Regulations, the Geneva Conventions and Additional Protocol 1. This means the conflict is subject to the various treaties, conventions and other international instruments regulating the means and methods of combat and weapons of war that constitute contemporary humanitarian law. The fundamental nature of rights, duties and responsibilities that characterise this body of law are comprehensive and detailed, and their

⁹See for instance 'NATO Secretary General's Statement on Libya no-fly zone' *NATO News* (2011-03-24), available at http://www.nato.int/cps/en/natolive/news_71763.htm (accessed 2011-03-26). Part of the statement reads, 'We are taking action as part of the broad international effort to protect civilians against the attacks by the Gaddafi regime. We will cooperate with our partners in the region and welcome their contributions'.

¹⁰*Prosecutor v Dusko Tadic* Case no IT-94-1-A.

¹¹*Id* para 34.

analysis is not the subject of this paper. Suffice it to say that over the years, quite a substantial number of the rules regulating the conduct of war have attained the force and status of customary international law.¹² Among these are rules and regulations concerning the exploitation of natural resources during armed conflict.

The regulation of the access, exploitation and management of existing natural resources during armed conflict stretches as far back as the 19th century.¹³ Since then, various international treaties in humanitarian law have explicitly acknowledged the criminality of illegal forms of economic and resource exploitation such as pillage, plunder and looting during the bedlam of war. While most of these instruments sought to cover specific matters,¹⁴ the ones that sought to outlaw plunder, pillage and looting were the United States Lieber Code of 1863,¹⁵ the Brussels Declaration,¹⁶ the 1880 Oxford Manual,¹⁷ the 1899 and 1907 Hague Conventions¹⁸ and Regulations.¹⁹

A consequence of this is that these rules, including those on economic spoliation during armed conflict, have been encapsulated in post-war statutes aimed at the criminal prosecution of those involved in the irregular access, exploitation and use of existing natural resources to further the military and commercial interests of their states. The Nuremberg Charter of 1945²⁰ is the bedrock, having been drawn up to try Nazi war criminals after the Second World War. Article 6(b) of the Nuremberg Charter included plunder of public or private property among the list of war crimes which invited individual criminal responsibility.²¹ The indictment of Carl Krauch and twenty-three other German corporate officials by the International Military Tribunal²² included the charge of

¹²See the ruling of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion* ICJ Reports 2004 at 172 para 89.

¹³It has been argued that the first codification of contemporary laws of war was the Instructions for the Government of Armies of the United States in the Field General Orders no 100 of April 1863, known as the 'Lieber Code'. Article 44 of the Code stated that 'all pillage or sacking, even after taking a place by main force ... are prohibited under the penalty of death or such other severe punishment as may seem adequate for the gravity of the offense'.

¹⁴For instance, the 1864 Geneva Convention was for the Amelioration of the Condition of the Wounded in Armies in the Field.

¹⁵Article 44 of the Lieber Code.

¹⁶Both arts 18 and 39 outlaw pillage in explicit terms.

¹⁷Article 32 of the 1880 Oxford Manual provides: 'It is forbidden ... to pillage, even towns taken by assault'.

¹⁸Article 28 of the 1899 Hague Regulations provides: 'The pillage of a town or place, even when taken by assault is prohibited'.

¹⁹Article 47 of the 1899 Hague Regulations provides 'Pillage is formally prohibited'. Articles 28 and 47 of the 1907 Hague Regulations both prohibit pillage. Both art 7 of 1907 Hague Conventions IX and art 21 of the 1907 Hague Conventions X similarly contain a prohibition on pillage.

²⁰See the Constitution of the Nuremberg International Military Tribunal available at <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed 2011-03-20).

²¹*Ibid.*

²²See 'The IG Farben and Krupp Trials' (1949) vol X *Law Reports of Trials of War Criminals* selected and prepared by the United Nations War Crimes Commission 4.

participation in 'the plunder of public and private property, exploitation, spoliation, and other offences against property, in countries and territories which came under the belligerent occupation of Germany in the course of its invasions and aggressive wars'.²³

Recently, the pursuit for post-conflict justice on the African continent has also expanded international humanitarian law jurisprudence on the criminality of illegal forms of economic exploitation *pendente bello*. For instance, at the end of the Sierra Leone civil war, the Special Court of Sierra Leone established in terms of the Statute of Sierra Leone,²⁴ Charles Taylor and Foday Sankoh, major architects of the civil war and responsible for various war crimes and crimes against humanity, were indicted for using financial and military means in order to obtain illegal access to Sierra Leone's mineral resources.²⁵

Another outstanding example of an African conflict that demonstrated wide scale economic exploitation of natural resources during its lifespan was the Democratic Republic of Congo conflict (1998-2003). The conflict saw multiple actors in Congo's economic space, and these ranged from state armies to non-state actors off the field of combat such as multinational companies, businessmen, private agents, arms brokers, armed groups and politicians. These groups formed sophisticated resource extraction, commercialisation and exportation networks with military officials and artisanal miners while simultaneously extending their illegal resource exploitation activities beyond the borders of the Congo, thus defying the territorial limitations of the Congolese state.²⁶ The resultant complex predatory war economy compelled the United Nations Security Council to appoint the Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the Congo with the objective of investigating and exploring the links between the war and illegal resource exploitation. The Panel adopted its own definitions and concepts and produced various reports²⁷ that have since illuminated the links between the pursuit for economic exploitation of natural resources *pendente bello* and the continuation of the conflict.

Despite early contentions surrounding the adoption and application of the term 'illegal exploitation of resources' in contemporary humanitarian law²⁸ it would

²³*Id* 44.

²⁴ Available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJew%3D&> (accessed 2011-02-13).

²⁵ See Case no SCSL 03 *The Prosecutor Against Charles Ghankay Taylor* 2003-04-07 and Case no SCSL 03 -02-01 *The Prosecutor Against Foday Saybana Sankoh* 2003-03-07 para 20.

²⁶ *Reports of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC* (UN Doc S/2001/357 (2001-04-12), UN Doc S/2002/565 (2002-05-22), UN Doc S/2002/1072 (2001-11-13), UN Doc S/2002/1146 (2002-10-16) and UN Doc S/2003/1027 (2003-10-28).

²⁷ See (n 27).

²⁸ See also Samset 'Conflict of interest or interests in conflict? Diamonds and war in the DRC' 1993/1994 *Review of African Political Economy* 463, 466. The writer contends that '(t)he main problem of this (definition of illegality) is that economic activities regarded as "legal" may contribute

appear that the international community now regard it as synonymous with the traditional terms of 'plunder', 'looting' and 'spoliation'. For instance, in the case of *Armed Activities (DRC v Uganda)*,²⁹ the International Court of Justice embraced and adopted the term, using it interchangeably with 'plunder' and 'looting'.³⁰ The African Commission on Human and Peoples' Rights, considering a communication received from the Congo against Rwanda, Burundi and Uganda, also regarded the term 'illegal exploitation of resources' as synonymous with looting.³¹ This and other indications point to the fact that contemporary humanitarian law generally regards forms of illegal access, exploitation and use of existing natural resources in a conflict zone as plunder.

3 Exploitation of existing natural resources in occupied territories

Most rules regulating *pendente bello* activities have focused more on the law of military occupation (or 'belligerent occupation'). The term military/belligerent occupation has its roots in article 42 of the Hague Regulations, 1907, which defines the occupation of territory as a situation:

... when (territory) 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.

A number of scholars have argued that an occupying power's relationship to natural resources occurring in the occupied area is that of a possessor, or a usufructuary in terms of Article 55 of the Hague Regulations.³² Gerson further points out that to this extent, the property interests that the Hague Regulations protect are those of the ousted power, not of the occupying power.³³ Exploitation of natural resources by the occupying power, he further argues, can only be carried out if that is necessary to ensure that the occupying forces and their sources of supply are not adversely affected by the hostile acts of the conquered population.³⁴ Cummings argues that natural resources and property seized by an occupying power in occupied territories may not be exploited for commercial

to fuelling war as much as "illegal" activities do. What matters for analysing the continuation of war is hence not primarily an activity's lawfulness, but whether it has helped to keep the war going or not. Focusing on "illegal" activities only blurs a clear understanding of why war is sustained'.

²⁹*Armed Activities Case (DRC v Uganda)* no 116 of 2005-12-19.

³⁰*Id* para 232-243.

³¹*Communication 227/99 DRC/Burundi, Rwanda and Uganda* para 94.

³²Cummings 'Oil resources in Occupied Arab Territories under the law of belligerent occupation' 1974 (9) *Journal of International Law and Economics* 533. Gerson 'War, conquered territory, and military occupation in the contemporary international legal system' (1977) 18 *Harvard International LJ* 525.

³³Gerson (n 32) 38.

³⁴*Id* 540.

purposes or be shipped to the occupying state.³⁵ Von Glahn buttresses this, stating that it is also unlawful for the occupant to seize property and remove it beyond the borders of the occupied enemy territory.³⁶ Vasarhelyi also agrees, opining that it is forbidden to remove from an occupied territory any private or public property to merge it into the proper economic life of the occupying state.³⁷ A number of war crimes albeit in domestic courts have followed this reasoning, admitting that seizure of property during military occupation is permitted only for military purposes, not for trade.³⁸

In addition to the provisions of the Hague Regulations, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 confirms the institution of military occupation. The Convention thus regulates the exercise of military, legal and administrative powers in occupied zones.³⁹ It should be noted that the type of occupation recognised by both the Hague Regulations and the Geneva Conventions is called *bellum occupatio*, generally known as belligerent occupation.⁴⁰ Gerson explains that this stage follows the invasion stage, where a successful army establishes effective control of conquered territory and assumes quasi-governmental and administrative functions.⁴¹ It is during this phase of conflict, he says, that the Hague Regulations and the Geneva Conventions apply and not before.⁴² This therefore implies that the scope and ambit of the laws regulating belligerent occupation are limited to the post-invasion stage. This is likely to be problematic if external aggressor forces choose to interfere with the access, exploitation and appropriation of natural resources during the invasion stage. An example remains the anti-Mobutu invasion by the Kabila led AFDL forces in mid 1996. It was the control, exploitation and application of Congo's vast mineral resources by Kabila during his march to Kinshasa that enabled him to finance his military operations. The fact that humanitarian law confines itself to regulating the access, use and exploitation of natural resources only during the period of military occupation, and not before, makes it less helpful to resolve issues of resource management in African conflicts financed by these resources.

³⁵Cummings (n 32) 583.

³⁶Von Glahn *The occupation of enemy territory* (1957) 188.

³⁷Vasarhelyi *Restitution in international law* (1964) 59.

³⁸*Grilli v Administration of State Railways* 20 ILR 429, 430 (Court of Cassation Italy, 1961). See also *US v Weizsecker (Ministries Case)* 14 *Trials of War Criminals before the Nuremberg Military Tribunals* 771-772, where the Tribunal stated that it was a violation of the Hague Regulations to ship machinery from occupied territories to the Reich, whether such property was taken from the state or private persons.

³⁹Section III art 42 – art 78 of the Geneva Convention relative to the Protection of Civilians in Time of War of 1949-08-12.

⁴⁰For a detailed examination of this, see Cummings (n 32) 592; Gerson (n 32) 525.

⁴¹Gerson (n 32) 529.

⁴²*Id* 529.

An important addition to humanitarian jurisprudence on the exploitation of existing natural resources, particularly oil resources in occupied territories, was given by none other than the United States in a Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, May 1977.⁴³ Among its important statements of international law, the Memorandum highlighted that:

An occupant's rights under international law do not include the right to develop a new oil field, to use the oil resources of occupied territory for the general benefit of the home economy or to grant oil concessions. Further, Israel must respect the oil concessions held by Amoco in the Gulf of Suez all of which are valid, whether granted before or after June, 1967.⁴⁴

The Memorandum further stated that as a mere usufructuary, the occupant is not allowed to open or exploit new oil fields and such taking of property would be only for the purposes of the military occupation. Further to this, the Memorandum declared that an occupant has no right under international law to grant mineral exploitation concessions to commercial entities.⁴⁵ The granting of such concessions has to be done in terms of the legal framework of the occupied state which the occupying power has to comply with and enforce. In as far as oil exploration concessions are concerned, the occupying power has no right to cancel or interfere with concessions granted by the ousted power to private entities operating in the occupied territory. Other scholars have argued that, depending on the nature of the conflict, institutional reform may be introduced by the occupying power and this is likely to affect the access, exploitation and commercialisation of natural resources existing in the state in conflict. However, it should be recalled that upon occupation, the ousted power retains its sovereignty, albeit in a state of abeyance over the occupied territory.⁴⁶ The institutional reforms should thus be necessary and should not conflict with, or compromise the future exercise of political sovereignty by the ousted power.

Various other scholars have followed a substantially similar interpretation of humanitarian law. The rationale on the rules regulating military occupation is that a state should be left to choose its own political, social and economic destiny, as well as enact, implement and enforce its own laws, practices and procedures of governance. It would be highly unacceptable for these fundamental values to be left to the whims and caprices of a foreign power during the period it occupies the territory of another state.

The foreign invasion of Libya by the NATO coalition forces under the authorisation of the Security Council is alive to most of these important issues. In highlighting the inviolability of Libya's sovereignty, the Libyan Resolution reaffirmed

⁴³ Available at <http://www.jstor.org/stable/20691753> (accessed 2011-03-23).

⁴⁴ US Memorandum of Law 2.

⁴⁵ *Id* 16.

⁴⁶ (N 41) 529.

the United Nation's 'strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya'. Further, the Resolution ruled out any possibility of the NATO coalition forces seeking to institute institutional changes by noting 'the decisions of the Secretary General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union' to send its own Committee with the objective of facilitating political dialogue which could lead to political reforms.⁴⁷ As indicated above, the Libyan invasion has been classified as humanitarian intervention aimed at protecting the Libyan civilian population from gross human rights abuses, attacks and repression by President Gaddafi. To this extent, the Resolution has discounted any foreign occupation such as that seen in Iraq, stating that it authorises measures by member states and regional organisations aimed at the protection of civilians from attack by Gaddafi's security forces, but that such protection excludes 'a foreign occupation force of any form on any part of Libyan territory'.⁴⁸ As clear as this might seem, it might be too early to discount developments in the Libyan conflict that might necessitate such an occupation of Libyan territory in order to protect civilians or in response to other critical exigencies that might eventuate in the near future.

4 Access and exploitation of oil resources in unoccupied zones

Having analysed, albeit in brief, the basic nature of the rights and responsibilities of an Occupying Power in occupied territories and its obligations in relation to existing natural resources, it remains to discuss the legal framework for non-occupying forces and their responsibilities regarding existing natural resources. As highlighted earlier, humanitarian law comprehensively regulates the institution of military occupation at the expense of other conflict situations. This militates against a deeper analysis of contemporary armed conflicts that are not characterised by military occupation, and for the past two decades, such conflicts have been common in Africa.

In terms of international law, armed groups such as armies, militias, guerrilla movements or coalition forces that fight to secure an area or enclave or to defend certain positions and have not established any significant control or authority over a hostile territory cannot qualify as an Occupying Power in terms of humanitarian law. To the extent that they do not qualify as occupying powers, they are barred from claiming to exercise the legal power to regulate the social, economic and political affairs in areas where they are present. In international law, they are thus prohibited from influencing the economic order of the areas in which they are found. This means, in ordinary circumstances, that they do not have a legal

⁴⁷UN Security Council Resolution 1973 (2011) para 2.

⁴⁸*Id* para 4.

capacity to seek, claim and demand the access, exploitation and use of existing natural resources such as oil.

Armed rebel groups and occupying powers are further prohibited from transacting with the civilian population or civilian business community and private sector in a way that affects the economic enterprises of areas in which they are present. These agreements remain invalid even if they had been properly paid for or if they had rehabilitated exploited natural resources. In the *IG Farben*⁴⁹ case before the Nuremberg International Military Tribunal, the Tribunal declared that prima facie valid agreements between the occupying forces and the civilian private sector constituted economic spoliation since the consent given by the civilian business community was always invalidated by coercion. The Tribunal's dictum on agreements between the French business sector and Nazi corporate entities was that, since consent was not freely given:

... it is of no legal significance that the agreement may have contained obligations on the part of Farben, the performance of which may have assisted in the rehabilitation of the French industries. Nor is the adequacy of consideration furnished for the French properties in the new corporation a valid defence. The essence of the offence is the use of the power resulting from the military occupation of France as the means of acquiring private property in utter disregard of the rights and wishes of the owner. We find the element of compulsion and coercion present in an aggravated degree in the Francolor transaction, and the violation of the Hague Regulations is clearly established.⁵⁰

The fact that these forms of participation in the economic life of an occupied territory are prohibited even to an Occupying Power suggests that non-occupying forces are similarly prohibited, possibly in even stricter terms.

The Libyan situation has seen Libyan armed rebels making steady and important territorial gains into Gaddafi's economic and political strongholds. Buoyed and reinforced by NATO airstrikes, the rebels have taken and continue to seize oil rich towns and cities from Gaddafi's regime.⁵¹ It is not clear to what extent they have sought to exploit the oil rich areas they 'liberate' to sustain their rebellion, but there are reports that the rebels have already begun exploiting and exporting oil.⁵² The military superiority of NATO forces make it likely that more such oil rich cities, towns and villages will be seized from Gaddafi's administration, management and control. A strict application of the international

⁴⁹'The IG Farben and Krupp Trials' (n 22).

⁵⁰*Id* 51.

⁵¹'Libya rebels recapture key town' BBC (2011-03-26), available at <http://www.bbc.co.uk/news/world-africa-12869658> (accessed on 2011-03-26). The report mentioned that with the assistance of the allies, Libyan rebels had recaptured the oil town of Ajdabiya from Gaddafi's forces.

⁵²See 'Libyan rebels sweeping westwards' BBC (2011-03-27), available at <http://www.bbc.co.uk/news/world-africa-12873434> (accessed 2011-03-27). The report stated that rebels in the stronghold of Benghazi say oil fields in the areas they control are producing 100,000 to 130,000 barrels per day, and that this could easily be increased to 300,000.

law of occupation would bar the rebel groups from accessing, exploiting and controlling such oil fields. They are further banned from granting concessions to any other entities, or cancelling existing concessions, mining licences or other rights. With the international condemnation of 'conflict resources' in recent times, the rebel groups would clearly be prohibited from applying the appropriated oil resources to sustain their military operations against Gaddafi's forces.

It should always be admitted, however, that the reality of African conflicts and conflicts in the oil rich Arab world have always made clear legal rules difficult to apply. The example of the war in Iraq supplies ample evidence to drive this point home. Oil resources, gold, diamonds and coltan have all been directly employed to wage war by parties to armed conflicts. Laurent Kabila, for instance, extensively relied on control of the diamond, coltan and copper mining areas from Mobutu to finance his rebellion against Mobutu and his march to Kinshasa in 1996-1997.⁵³ The desire to control diamond fields in Angola⁵⁴ and Sierra Leone⁵⁵ and apply the acquired profits to fund military operations extended the lifespan of internal armed conflicts in these countries. In every sense, it would seem unfair and unjust to accept Gaddafi's use of oil resources under his control to fight his war while at the same time denying the same advantage to armed rebels fighting for a cause with which the international community is in sympathy. Further, in the event of Gaddafi's oil management officials taking flight and leaving the oil mines unmanned, the rebel groups would in all probability appear to be justified in taking over control of these oil resources, even without having to establish an effective administrative system in these areas. It would be very unlikely that this access and exploitation of abandoned oil resources would amount to the war crime of economic spoliation or illegal resource exploitation. However, it is not clear to what use the armed rebels can apply the profits acquired from such exploitation, without necessarily being castigated for making oil a 'conflict resource'.

A further grey area is whether the Libyan rebels are prohibited from participating in the economic welfare of areas they have seized or 'liberated'. Generally, it has been stated that participation in the economic affairs of an area is a privilege of an Occupying Power only. The rebels have not demonstrated to the world that they have effectively occupied the territories they have seized from Gaddafi. However, since the prohibition on economic participation could have been targeted at foreign powers not in occupation of territories they seize, the same prohibition is difficult to extend to local armed rebel and opposition groups such as the Libyan rebels. In most cases, economic inequality and disenfranchisement,

⁵³Dunn 'A survival guide to Kinshasa' in Clark (ed) *The African stakes of the Congo war* (2004) 57.

⁵⁴See for instance Global Witness *A rough trade: The role of companies and governments in the Angola conflict* (1998). The UN Security Council passed Security Council Resolution 1173 (1998) and 1176 (1998) in an attempt to prevent Angolan rebels, UNITA, from accessing and exporting diamonds.

⁵⁵Richards *Fighting for the rainforest: War, youth and resources in Sierra Leone* (1996).

unemployment and economic mismanagement are part of the reasons why armed rebel groups decide to stage a rebellion against ruling elites. Further, more often than not, the leadership and members of the armed rebels and opposition groups would already have been involved in the economic life of the areas they seize and liberate. It is thus difficult to sustain the argument that these rebel groups lose their right to participate in, or take control of, the economic affairs in those seized and liberated territories the moment they form a rebellion against a dictatorship.

The United Nations has acknowledged the troublesome nature of conflicts where the control and exploitation of natural resources plays a crucial part in the nature and duration of hostilities. In 2007, through a Presidential Statement, the Security Council recognised that 'United Nations missions and peacekeeping operations deployed in resource-endowed countries experiencing armed conflict could play a role in helping the Governments concerned, with full respect of their sovereignty over their natural resources, to prevent the illegal exploitation of those resources from further fuelling the conflict'.⁵⁶ It also stressed the general need to prevent the illegal exploitation of natural resources by the parties to the conflict, in particular, where appropriate, by developing adequate observation and policing capacities to that end. Although the Presidential Statement contemplated the assisting of 'governments' only, it is submitted that in cases like the Libyan conflict, this interpretation would entail United Nations missions and sanctioned operations offering assistance to the political institution and entity whose cause the UN would be supporting. Unfortunately, there seems to be no precedent defining the nature of the 'assistance' contemplated by this statement. Its usefulness is thus nothing more than academic, particularly if it were meant to negate or break the emerging dialectic nexus between African conflicts and the exploitation and application of existing natural resources.

It is not in doubt that the international community, personified by the United Nations, the African Union, the League of Arab States and the Organisation of the Islamic Conference have all condemned the actions of Gaddafi,⁵⁷ and sympathised with the Libyan rebels' cause. To condone does not, however, entail legality and as long as the armed rebels fail to pass the test for an Occupying Power in the territories they have seized, the legal basis for their capacity to seek access to and to exploit Libya's oil resources is always in doubt. That the international community has supported the Libyan rebels seems to suggest that the rebels are fighting a 'just war' and have a just cause. However, the just war doctrine is of no relevance in humanitarian law and most importantly, it does not preclude or absolve any party

⁵⁶See the United Nations Security Council Presidential Statement (in short "S/PRST2007/22"), available at <http://www.un.org/News/Press/docs/2007/sc9060.doc.htm> (accessed 2011-03-19). See also Security Council Press Release SC9060 of 2007-06-25.

⁵⁷The African Union has shown unhappiness with Libya's political system and urged Gaddafi to implement some democratic political reforms. See 'AU lays out roadmap for Libyan mediation' available at <http://allafrica.com/stories/201103280143.html> (accessed 2011-03-28).

from respecting and complying with the laws of war.⁵⁸ As the conflict unfolds, the Libyan rebels have appeared to be 'liberators', suggesting that they might lay claim to the title of 'national liberation movement'. The traditional understanding of national liberation movements is, however, tied to non-self governing or racist, colonial regimes.⁵⁹ A number of armed rebel groups in Africa have identified themselves as liberation groups, having been formed to oust perceived dictators. An example would be Kabila's *Alliance des Forces Democratiques pour la Liberation du Congo – Zaire* ('the AFDL') whose objective was to oust the dictator Mobutu, or Bemba's Movement for the Liberation of Congo ('the MLC'), which in turn aimed at toppling Kabila from power.

It should also be stated that the failure by Libyan rebels to assume full administrative and political responsibilities in areas they have seized from Gaddafi should ordinarily deprive them of the legal competence to entreat with prospective oil firms, multinational companies and the private sector. To enter legitimately into such commercial relationships would require the endorsement of economic and commercial institutions which are currently under the control of Gaddafi's regime. This hurdle can easily be bypassed by the armed rebels instigating institutional and legislative reform in areas they have seized to displace the economic systems set by Gaddafi's regime. Without claiming territorial occupation, this is likely to be an arduous task and if they can succeed in doing so, they face the extra burden of searching for the legal basis that allows them to do so.

5 Conclusion

It is not easy to provide a comprehensive analysis of any particular feature of a current armed conflict, particularly one fraught with such problematic elements as the Libyan conflict. The duties, responsibilities and obligations of parties to an armed conflict, while now generally known, are difficult to implement in such conflicts. In all conflicts, and the Libyan conflict is no exception, parties to the conflict seek maximum advantage and the Libyan rebels have demonstrated this. They have quickly moved to seize and exploit oilfields in areas left by Gaddafi's retreating officials. With the international community largely expressing sympathy with their cause, the legality in international law of such actions has been ignored. This unfortunate development has been exacerbated by the fact that international law has fewer answers to the problem of the access, exploitation and use of existing natural resources by non-state actors in unoccupied zones during war. An analysis of the possible legal rights and duties of these groups, particularly armed rebel groups during the conflict, is thus bound to be short.

⁵⁸Cummings (n 32) 533. The author highlights (548-549) that the argument that an aggressor is not entitled to the protection of the laws of war is not sustainable.

⁵⁹See for instance art 1(3) of the Protocol Additional to the Geneva Conventions of 1949-08-12 and relating to the Protection of Victims of International Armed Conflicts, 1977-06-08.

The approach of this contribution which should be avoided because it is too simplistic is that because they are non-occupying powers, armed rebels lack certain rights and powers regarding the access to and exploitation of existing natural resources. This is because they should pass the single test of an occupying power to enjoy such rights to existing natural resources. Be that as it may, even a strict application of this test exposes that this is a grey area. It is admitted that the armed rebels may be absolved and exonerated from some legal expectations in light of the realities of armed conflict in Africa, and particularly the manner in which the Libyan conflict was triggered and the shape it has assumed so far. The greatest danger is that the appearance of condoning certain practices during the Libyan conflict, in spite of any extenuating circumstances, may set a dangerous precedent. Such a development would throw us three decades back to when the international community seemed less concerned with the access, use and exploitation of existing natural resources by rebel groups to fund their politico-military objectives. The implications of this retrogression are beyond doubt grave and it is hoped that such a course would be avoided. Although Libya provides a classic platform for the international community to re-emphasise the law, it appears the world will have to wait until yet another conflict to condemn in clear terms the irregular and illegal access, exploitation and application of existing natural resources during armed conflict.