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A possible legal framework for the exploitation of natural resources by non-State armed groups

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Abstract

The law of belligerent occupation permits the Occupying Power to administer and use the natural resources in the occupied territory under the rules of usufruct. This provision has no counterpart in the provisions of humanitarian law applicable to non-international armed conflicts, which may suggest that any exploitation of natural resources by non-State armed groups is illegal. The International Committee of the Red Cross's updated 2020 Guidelines on the Protection of the Environment in Armed Conflict *did not touch on this issue, and nor did the International Law Commission in its 2022 Draft Principles on the Protection of the Environment in Relation to Armed Conflicts, where it applied the notion of sustainable use of natural resources instead of usufruct. The present paper aims to fill this gap. It first reviews the development of the concept of usufruct and then studies whether the current international law entitles non-State armed groups with*

de facto *control over a territory to exploit natural resources. By delving into the proposals raised by some commentators to justify such exploitation for the purpose of administering the daily life of civilian populations, the paper advocates for a limited version of this formula as the appropriate* lex ferenda. *In the final section, the paper discusses how situations of disaster, as circumstances which may preclude the wrongfulness of the act, may justify the exploitation of natural resources by non-State armed groups in the current international legal order.*

Keywords: non-State armed groups, exploitation of natural resources, International Law Commission, disaster, usufruct, occupation, sustainable use of natural resources.

Introduction

The desire to control natural resources has played an important role in the history of mankind, and there are many instances of wars between our ancestors for control over natural resources.[1] Draining rich natural resources was the main driving force of colonial powers, and interestingly, the dream of regaining those same resources triggered the decolonization uprisings in many countries, which in turn resulted in the establishment of many of the current member States of the United Nations (UN).[2] Various domains of international law reflect these historical experiences. For example, in response to the colonial system which for centuries enabled specific countries and their companies to "unjustly appropriate or dispossess natural resources occurring on distant territories of other peoples and populations",[3] the law and regulations regarding the right to self-determination stipulate how one nation may gain permanent sovereignty over its natural resources and in what manner investment treaties may regulate concession agreements.[4] From another angle, on the one hand, the law of belligerent occupation protects natural resources from pillage, and on the other, the rules of usufruct dictate how the Occupying Power may administer and use natural resources in order not to interrupt the daily life of those living under its jurisdiction in the occupied territory. The existence of these rules and regulations in the sphere of international law, irrespective of some of its shortcomings, guarantees the effectiveness of the law of nations so that international law not only evolves according to the needs of the international community but also remains reasonable and practical for all the actors involved.

1 See Simo Laakkonen and Richard Tucker, "War and Natural Resources in History: Introduction", *Global Environment*, Vol. 5, No. 10, 2012.
2 Yogesh Tyagi, "Permanent Sovereignty over Natural Resources", *Cambridge Journal of International and Comparative Law*, Vol. 4, No. 3, 2015.
3 Petra Gümplova, "Sovereignty over Natural Resources – a Normative Reinterpretation", *Global Constitutionalism*, Vol. 9, No. 1, 2020, p. 14.
4 See, for example, John Baloro, "The Legal Status of Concession Agreements in International Law", *Comparative and International Law Journal of Southern Africa*, Vol. 19, No. 3, 1986.

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It is in this context that concerns and developments in environmental law become essential in addressing the subject of the exploitation of natural resources, particularly during armed conflicts, where the law is designed to regulate the conduct of the warring parties and to protect the individuals, groups and civilian objects, such as the natural environment, that may suffer greatly from the effects of the armed hostilities.[5]

The increasing awareness of humankind about the vital importance of the natural environment, in particular in the face of developments in means and methods of warfare, convinced the International Law Commission (ILC) and the International Committee of the Red Cross (ICRC) to convene new rounds of studies and consultations in order to address the shortcomings of the law in light of these new developments, as well as the practice. The ICRC updated its 1994 *Guidelines on the Protection of the Natural Environment in Armed Conflict* (ICRC Guidelines),[6] issued when the international community was reeling from the environmental devastation caused by the Persian Gulf War, and the ILC produced its 27 Draft Principles on Protection of the Environment in Relation to Armed Conflicts (ILC Draft Principles on the Environment),[7] in order to enhance the protection of the environment in times of armed conflict. Both institutions used their capacity and expertise to, *inter alia*, provide an updated interpretation of the *lex lata* in order to guarantee the effectiveness of the law via a reflection on the realities of current armed conflicts as well as the vulnerability of the environment. Nonetheless, neither the ICRC nor the ILC expanded the scope of their study to cover a reality that is not well considered in law: the existence of non-State armed groups (NSAGs) with *de facto* control over territories, and the way they exploit the natural resources of those territories. This approach is understandable because the current international law does not specifically address the phenomenon of exploitation of natural resources by NSAGs. The academic legal literature on the topic is also mainly concerned with abuses by NSAGs[8] and, except for a very few examples,[9] does not address their exploitation of natural

5 As an example, according to a study carried out by the ICRC, from 1946 to 2010, conflict was the single most important predictor of declines in certain wildlife populations. ICRC, "Natural Environment: Neglected Victim of Armed Conflict", 5 June 2019, available at: www.icrc.org/en/document/natural-environment-neglected-victim-armed-conflict (all internet references were accessed in June 2023).

6 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, Geneva, 2020 (ICRC Guidelines), p. 4.

7 ILC, *Draft Principles on Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/77/10, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2022 (ILC Draft Principles on the Environment).

8 See, for example, Andronico O. Adede, "Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law", *Annual Survey of International and Comparative Law*, Vol. 1, No. 1, 1994; Dieter Fleck, "Legal Protection of the Environment: The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding", in Carsten Stahn and Jens Iverson (eds), *Just Peace after Conflict: Jus Post Bellum and the Justice of Peace*, Oxford University Press, Oxford, 2020; Larissa van den Herik and Daniëlla Dam-de Jong, "Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict", *Criminal Law Forum*, Vol. 22, No. 3, 2011.

9 A review of the work of scholars who address this topic is provided in the below section entitled "Do NSAGs Have a Right to Exploit Natural Resources?".

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resources, especially when they assume government-like functions. The present paper is an effort to contribute to the literature and fill this gap.

For this purpose, the paper first reviews the development of the concept of usufruct, from 1874, when the notion appeared in the Brussels Declaration, to the 2022 ILC Draft Principles on the Environment. Following this historical study, the paper tours the ideas raised by commentators, mainly with a focus on *de lege ferenda*, in extending the notion of usufruct to NSAGs with *de facto* control over territories. Guided by the findings of the historical background of usufruct in terms of international humanitarian law (IHL) and the concept of "sustainable use of natural resources" introduced by the ILC, the paper suggests a slightly different view in shaping future law. In the final section, the paper discusses how the notion of "sustainable use of natural resources", alongside other developments in international law, may provide a legal framework for assessing the legality of the exploitation of natural resources by NSAGs, in the event of disaster as a condition precluding the wrongfulness of the act of exploitation by NSAGs.

The evolution of the notion of usufruct in IHL

The exploitation of natural resources during an armed conflict by an adverse party is only regulated in the law applicable to situations of belligerent occupation. In accordance with a long-standing rule of customary IHL, the Occupying Power must administer the immovable public property located in the occupied territory under the rules of usufruct.[10] While categorizing natural resources under property, whether moveable or immovable, may sound strange to twenty-first-century environmentalists,[11] it seems that this was not the case in the nineteenth century. For example, Article 52 of the 1880 Oxford Manual stipulated that the occupant can only act as the provisional administrator of real property and clearly mentioned forests as an example of such real property.[12] Due to the status of the Occupying Power as a provisional administrator, the Manual provided that the occupant "must safeguard the capital of these properties and see to their maintenance".[13] This formulation was, to a large extent, a derivation from the formulation of such a right in the Lieber Code of 1863, as it permitted

10 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 51, available at: https://ihl-databases.icrc.org/en/customary-ihl. Also, the commentary to Rule 15(b) of the ICRC Guidelines explains that this rule encompasses obligations set out in Articles 46, 52, 53 and 55 of the 1907 Hague Regulations and Articles 53 and 55 of Geneva Convention IV. ICRC Guidelines, above note 6, para. 187.

11 See Jean D'Aspremont, "Towards an International Law of Brigandage: Interpretative Engineering for the Regulation of Natural Resources Exploitation", *Asian Journal of International Law*, Vol. 3, No. 1, 2013, p. 5.

12 Institute of International Law, *The Laws of War on Land*, Oxford, 9 September 1880 (Oxford Manual), in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts*, Martinus Nijhoff, Dordrecht, 1988, pp. 36–48.

13 *Ibid*.

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"sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation" without emphasizing their perseverance.[14] More importantly, the above-mentioned provision of the Oxford Manual, which was adopted based on, among others, the Brussels Declaration of 1874,[15] did not explicitly refer to the right of the Occupying Power as usufructuary.[16]

Conversely, Article 7 of the Brussels Declaration, which was exactly repeated in Article 55 of the 1899 and 1907 Hague Regulations,[17] considered the Occupying Power both as administrator and usufructuary. Article 55 of the Hague Regulations provides:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.[18]

While Article 55 in its literal form seems not to make any distinction between renewable and non-renewable natural resources, the *travaux préparatoires* of Article 7 of the Brussels Declaration demonstrate that such a distinction was clearly what the delegates intended. The first draft of Article 7 that was put into discussion, prepared by Russia, was formulated in a negative form by limiting the rights of the Occupying Power to the rights of administration and enjoyment. This draft also prohibited any act that would not be justified by the usufruct.[19] The first suggestion was to replace the phrase "to refrain from anything that would not be justified by the usufruct" with a phrase that would recognize the Occupying Power as "usufructuary",[20] on the one hand, and "administrator", on

14 Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863 (Lieber Code), Art. 31, in D. Schindler and J. Toman (eds), above note 12, pp. 3–23.

15 Institut de Droit International, *Annuaire de l'IDI*, Vol. 5, 1888, p. 151; see also Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Art. 7.

16 Roman law scholars considered property as the sum total of three rights that, together, gave one absolute control over a thing. These three rights were called *usus* (the right to use the thing), *fructus* (the right to take its fruits) and *abusus* (the right to dispose of the thing). Thomas J. McSweeney, "Property before Property: Romanizing the English Law of Land", *Buffalo Law Review*, Vol. 60, No. 4, 2012, pp. 1158–1159.

17 Regulations concerning the Laws and Customs of War on Land, Annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899 (1899 Hague Regulations), Art. 55; Regulations concerning the Laws and Customs of War on Land, Annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 Hague Regulations), Art. 55.

18 While both the Brussels Declaration and the Oxford Manual formed the basis of the two Hague Conventions on land warfare and the Regulations annexed to them, adopted in 1899 and 1907, the discussion on why the members of the Conference preferred the formulation of the Brussels Declaration is not recorded.

19 Art. 7: "L'armée d'occupation n'a que le droit d'administration et de jouissance des édifices publics, immeubles, forets et exploitations agricoles apparentent à l'État ennemi et se trouvent dans le paye occupe. Elle doit autant que possible sauvegarder le fonds de ces propriétés et s'abstenir de tout ce qui ne serait pas justifié par l'usufruit." *Projet d'une convention internationale concernant les lois et coutumes de la guerre (texte primitif soumis à la conférence): Conférence intergouvernementale (1874, Bruxelles)*, Les Freres van Cleef, The Hague, 1890 (Brussels Declaration), p. 215.

20 *Ibid.*, p. 102.

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the other.[21] More importantly, during the discussions, the representative of Austria-Hungary emphasized that there should be a distinction between exploiting agricultural areas, on one side, and the exploitation of forests, on the other.[22] From his perspective, the risk to agricultural areas was limited in time, while the harm that might be caused by the exploitation of forests would last for many years and would be difficult to recover from. In this way, he suggested either prohibiting the Occupying Power from exploiting the forests or, alternatively, limiting any profit from their exploitation to the purposes that were already prescribed by the rules and regulations of occupied territories.[23] Other delegates were in favour of the latter proposal. The German delegation proposed to add that forests should be exploited in accordance with the rule of good and reasonable administration.[24] Despite these suggestions, the delegates decided not to make any distinction between the exploitation of agricultural areas and other natural resources, because they believed that the Brussels Declaration's articles should be limited to general principles. Moreover, they agreed that the record of this discussion in the proceedings would suffice to convene their intention, and in any case, the obligation of Occupying Powers to follow the rules and regulations of the occupied territory was already reflected in other articles.[25] This nevertheless demonstrates that apart from the good and reasonable administration of natural resources, the distinction between renewable and non-renewable resources was from the beginning part and parcel of the principles of administration and usufruct.

These considerations around the notion of usufruct have not only been followed in modern times but have also directed authorities to impose stricter regulations. For example, in 1947, the Nuremberg Tribunal in the *Flick* case described usufructuary as a privilege for occupants and held that "wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 [of the 1907 Hague Regulations] is violated".[26] State practice, gathered by the ICRC, demonstrates that while several military manuals have repeated the provisions of the Hague Regulations, others have added more details to the general rule not only to illustrate the meaning of usufruct but also to integrate the concept of sound and reasonable administration. For example, the manuals of Australia, Canada and New Zealand state that the public immovable property of the enemy may not be confiscated.[27] Canada's law of armed conflict manual indicates that "the

21 *Ibid.*, p. 103.
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*, p. 104. Article 3 of the Brussels Deceleration reads: "With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary."
26 Nuremberg War Crimes Trials, *USA v. Friedrich Flick et al.*, Case V, 3 March 1947–22 December 1947.
27 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, Rule 51, available at: https://ihl-databases.icrc.org/en/customary-ihl.

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occupant becomes the administrator of the property and is able to use the property, but must not exercise its rights in such a wasteful or negligent way as will decrease its value".[28] The UK manual provides more detailed instructions on reasonable administration:

> The occupying power is the administrator, user and, in a sense, guardian of the property. It must not waste, neglect or abusively exploit these assets so as to decrease their value. The occupying power has no right of disposal or sale but may let or use public land and buildings, sell crops, cut and sell timber and work mines. It must not enter into commitments extending beyond the conclusion of the occupation and the cutting or mining must not exceed what is necessary or usual.[29]

In light of these practices, in her first report to the ILC, Marja Lehto, the Special Rapporteur of the Commission on the issue of protection of the environment in relation to armed conflicts, states that while the concept of usufruct has been traditionally regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones,[30] such a right was never unlimited.[31] By referring to developments in related fields that have a bearing on the interpretation and implementation of the obligations of the Occupying Power in exploiting natural resources, such as the right to self-determination and permanent sovereignty over natural resources, the Special Rapporteur relies, *inter alia*, on the finding of the International Court of Justice (ICJ) in the *Armed Activities on the Territory of the Congo* case[32] to conclude that an important limitation under IHL is that the Occupying Power is permitted to exploit the natural resources of the occupied territory for the benefit of the local population.[33] With respect to developments in the law of occupation, she further submits that following Article 43 of the Hague Regulations, the Occupying Power is under the obligation to take care of the welfare of the occupied population and this "should be interpreted to entail environmental protection as a widely recognized public function of the modern State".[34] Moreover, with reference to the specific obligations of the Occupying Power, she states that the right of the occupant in relation to natural resources refers to "good housekeeping", according to which the usufructuary "must not exceed what is necessary or

28 Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, para. 1243.
29 United Kingdom, *The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, para. 11.86.
30 Marja Lehto, *First Report on Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/720, 30 April 2018, para. 30.
31 The Special Rapporteur argues that "the occupying State should use natural resources only to the extent of military necessity": *ibid.*, para. 31; See also para. 36, where she states that "[p]ursuant to article 55, the occupying State, as usufructuary, would be required to prevent overexploitation of the assets and to maintain their long-term value".
32 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, p. 168, para. 249.
33 M. Lehto, above note 30, paras 32–37.
34 *Ibid.*, para. 50.

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usual" while exploiting natural resources.[35] Having this in mind, she describes the modern equivalent of usufruct as including sustainable use of natural resources as "a prolongation of the concepts of resource protection, resource preservation and resource conservation, as well as those of wise use, rational use or optimum sustainable yield".[36] On this basis, without using the term "usufruct" in her proposed draft principle, she states:

> To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment.[37]

In its commentary introducing the concept of "sustainable use of the environment" as a modern replacement of usufruct, the ILC emphasizes that the concept is nothing but the reflection of developments in international law, especially in the areas of human rights and environmental law.[38] On this basis, the Commission also stresses the precautionary principle in exploiting natural resources and states that the notion of sustainable use of natural resources "entails that the Occupying Power shall exercise caution in the exploitation of non-renewable resources, not exceeding preoccupation levels of production, and exploit renewable resources in a way that ensures their long-term use and capacity for regeneration".[39] In this way, the ILC revives the distinction between renewable and non-renewable natural resources that, as reflected above, was also a concern of the negotiating States when writing the international law on the exploitation of natural resources in occupied territories.

Not only did the inclusion of the notion of "sustainable use" as part of the obligations of the Occupying Power by the ILC receive no negative response, but also, States generally supported such an inclusion.[40] For example, for the Netherlands, a modern-day interpretation of usufruct would include the "sustainable use" of resources,[41] and for Jamaica, the draft principle was an effort to "bring the rules of usufruct into line with modern realities and developments in international environmental law".[42] Interestingly, the United States, while not opposing the inclusion, suggested replacing the word "shall" with "should", as in its view, the draft principle did not reflect an existing obligation under

35 *Ibid.*, para. 96.
36 *Ibid.*
37 ILC Draft Principles on the Environment, above note 7, Principle 20.
38 *Ibid.*, commentary on Principle 20, paras 8–9.
39 *Ibid.*, para. 9.
40 Marja Lehto, *Third Report on Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/750, 1 June 2022, paras 235, 240.
41 *Official Records of the Sixth Committee of the UN General Assembly*, UN Doc. A/C.6/73/SR.29, 31 October 2018, para. 46.
42 *Official Records of the Sixth Committee of the UN General Assembly*, UN Doc. A/C.6/74/SR.33, 6 November 2019, paras 35–36.

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international law.[43] The Special Rapporteur rightly rejected this suggestion, arguing that "both the concept of usufruct and that of 'sustainable use of natural resources' are designed to prevent *overexploitation*".[44] She further added that "an evolutionary interpretation of a general term in light of subsequent legal developments does not turn an established customary rule into a recommendation".[45] The designation of the notion of "sustainable use" to prevent "overexploitation" of natural resources by an Occupying Power, which is one of the major threats to biodiversity,[46] is a very important step in protecting the environment in situations of armed conflict. It also provides a more objective and contemporary understanding of the rule that exploitation of natural resources by an occupant which goes beyond the rules of usufruct – i.e., excessive consumption of resources[47] – may amount to pillage.

Principle 16 of the ILC Draft Principles on the Environment restates the prohibition on the pillage of natural resources in both international armed conflicts (IACs) and non-international armed conflicts (NIACs)[48] and emphasizes that it forms part of the broader context of illegal exploitation of natural resources that exists both during and after armed conflict.[49] By referring to the relevant UN Security Council resolutions,[50] the commentary adds that illegal exploitation of natural resources is a general notion that may also cover the activities of States or non-State entities.[51] But does this mean that from the ILC's perspective all exploitation of natural resources by NSAGs, apart from that which is justified by imperative military necessity,[52] should be considered illegal, since no corresponding provision to Article 55 of the Hague Regulations exists in the legal framework applicable to NIACs? From the ICRC's perspective, as much as the natural environment can be subjected to ownership, the prohibition on pillage applies to its appropriation or obtention when not justified by the exceptions provided in IHL.[53] The ICJ, in the *Armed Activities* case, although addressing the issue in the context of an IAC, expresses that the unlawful exploitation of natural resources, including gold and diamonds, falls within the scope of the prohibition on pillage.[54] But what if an NSAG does not appropriate, obtain or even benefit from the natural resources but rather uses them only for the benefit

43 *Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others*, UN Doc. A/CN.4/749, 17 January 2022, p. 117.
44 M. Lehto, above note 40, para. 245 (emphasis added).
45 *Ibid.*, para. 245.
46 Biodiversity Information System for Europe, "Overexploitation", available at: https://biodiversity.europa.eu/europes-biodiversity/threats/overexploitation.
47 ICRC Guidelines, above note 6, commentary on Rule 15(b), para. 194.
48 ILC Draft Principles on the Environment, above note 7, p. 149.
49 *Ibid.*, para. 7.
50 See, for example, UNSC Res. 1457, 24 January 2003, para. 2, in which the Council "[s]trongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo"; and UNSC Res. 2136, 30 January 2014.
51 ILC Draft Principles on the Environment, above note 7, para. 7.
52 ICRC Guidelines, above note 6, commentary on Rule 14, para. 184.
53 *Ibid.*, para. 182.
54 ICJ, *Armed Activities*, above note 32, paras 237–250.

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of the people living in the territories under its control? Moreover, does the nature of the natural resource in question – i.e., being renewable like plants or agricultural areas, or non-renewable[55] like minerals and fossil fuels – make any difference to this discussion?

These questions and, in general, the exploitation of natural resources by NSAGs engaged in NIACs have not been addressed either in the ICRC Guidelines or the ILC Draft Principles. The ILC Special Rapporteur, without explicit reference to this issue, admits in her second report that "while there are certain developments clarifying the status and international obligations of organized armed groups, a number of questions remain".[56] The next section aims to discover how scholarly works have addressed these questions.

Do NSAGs have a right to exploit natural resources?

According to an estimation provided by the ICRC, as of July 2022, a total of at least 175 million people are likely to live in areas controlled by armed groups.[57] In terms of territorial control, in 2022, the ICRC declared that seventy-seven armed groups fully and exclusively control territory and 262 armed groups contest and fluidly control territory. According to the ICRC data, a large number of these groups control territory for four years or more.[58] In such a context, it is not surprising that scholars have warned that for regulating the exploitation of natural resources, focusing merely on States, when rebels and other non-State groups exercise day-to-day *de facto* administrative control over some territories, is "problematic and a stumbling block to meaningful regulatory initiatives".[59] For example, Okowa, in light of the practice of some States in recognizing the Libyan National Transitional Authority as the legitimate representative of the Libyan

55 While different definitions of natural resources exist, in the present paper natural resources and renewable/non-renewable resources should be understood as per the definition used by the United Nations Environment Programme (UNEP) and relied on by the ICRC in its Guidelines: "Natural resources are actual or potential sources of wealth that occur in a natural state, such as timber, water, fertile land, wildlife, minerals, metals, stones, and hydrocarbons. A natural resource qualifies as a renewable resource if it is replenished by natural processes at a rate comparable to its rate of consumption by humans or other users. A natural resource is considered non-renewable when it exists in a fixed amount, or when it cannot be regenerated on a scale comparative to its consumption." ICRC Guidelines, above note 3, p. 75 fn. 416. Compared this with the definition of natural resources used by the World Trade Organization (WTO), which includes the element of "scarce and economically useful in production or consumption": WTO, *World Trade Report 2010*, 2010, p. 46, available at: www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf.

56 Marja Lehto, *Second Report on Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/728, 27 March 2019, para. 58.

57 Matthew Bamber-Zryd, "ICRC Engagement with Armed Groups in 2022", *Humanitarian Law and Policy Blog*, 12 January 2023, available at: https://blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/.

58 More concretely, 82% of groups that fully control territory have done so for four years or more and 62% of groups that fluidly control territory have done so for four years or more. *Ibid.*

59 Phoebe Okowa, "Sovereignty Contests and the Protection of Natural Resources in Conflict Zones", *Current Legal Problems*, Vol. 66, No. 1, 2013, p. 73.

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people with competence to exploit and enter into resource-related transactions at a time when the Gaddafi regime was still in power,[60] argued that since "the exercise of public power by rebels has equally profound implications for the natural resources of the territory, … any regulatory regime ought to consider insurgent participation as a legitimate object for legal regulation".[61] This is while most scholars have elaborated prohibitive legal rules applicable to the conduct of NSAGs in exploiting natural resources during armed conflict.[62]

These rules, however, cannot address all possible scenarios that will be raised with regard to the exploitation of natural resources by NSAGs. Most importantly, when the basic needs of civilian populations in the territory under the control of the NSAG are not met, it seems unreasonable to consider any exploitation of natural resources by the group to be illegal when such exploitation is only for the benefit of those populations. Perhaps this was the reason why the European Union, in a regulation adopted in 2013, permitted, *inter alia*, the sale, supply or transfer of key equipment and technology for the key sectors of oil and natural gas in territories controlled by the Syrian oppositions "[w]ith a view to helping the Syrian civilian population, in particular to meeting humanitarian concerns, restoring normal life, upholding basic services, reconstruction, and restoring normal economic activity or other civilian purposes".[63]

This crucial aspect has led Dam-de Jong to reconsider the question of the exploitation of natural resources by NSAGs from another angle and to argue for a right for NSAGs to exploit natural resources. She submits that not all exploitation of natural resources by NSAGs should be considered illegal; rather, "an exception can be envisaged for small-scale natural resource exploitation that would enable armed groups to ensure the continuation of daily life in the territories that are under their control".[64] Her approach is based on offering the most protection possible to civilians affected by armed conflict. In this way, she argues:

> As the de jure government has lost control over these territories and is therefore not in a position to perform its obligations towards the local population, one could argue that an armed group that is capable of performing basic administrative functions would be entitled to exploit natural resources to generate revenues to sustain its own civilian administration of the territory and to cover the basic needs of the local population.[65]

60 Stefan Talmon, "Recognition of the Libyan National Transitional Council", *ASIL Insights*, Vol. 15, No. 16, 2011, available at: www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council.

61 P. Okowa, above note 59, p. 37.

62 See above note 8; see also Thibaud de la Bourdonnaye, "Greener Insurgencies? Engaging Non-State Armed Groups for the Protection of the Natural Environment during Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 102, No. 914, 2020.

63 Council Decision 2013/255/CFSP, Art. 10.

64 Daniëlla Dam-de Jong, "Greening the Economy of Armed Conflict: Natural Resource Exploitation by Armed Groups and Their Engagement with Environmental Protection", *Hague Yearbook of International Law*, Vol. 32, 2019, p. 184.

65 *Ibid.*

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Dam-de Jong defends her argument by relying on the ruling of the ICJ in the *Namibia* case, the so-called "Namibia principle",[66] stating that the welfare of the local population should be taken into consideration when deciding on questions of whether or not to recognize the effects of legal acts undertaken by an illegal regime.[67] She acknowledges that it is not possible to infer a right to exploit natural resources by NSAGs from the general rules of permanent sovereignty over natural resources or the human right to self-determination.[68] However, she contends that such a right may be derived from the underlying rationality of the right of peoples to freely dispose of their natural resources, which aims to ensure that peoples are the main beneficiary in the exploitation of those resources.[69] She suggests that "the pragmatism that is inherent in international law regulating other situations in which an authority has effective control over territory without a valid legal title" would reinforce such a conclusion.[70] In this way, she argues that the same rationality that could justify the inclusion of a regime of usufruct for the exploitation of natural resources by the Occupying Power can be extended to NSAGs since, like the case of occupation, it is "the continuation of daily life in the occupied territory" that overrides the need for a valid legal title.[71] She strengthens her argument by contending that her conclusion accords with the underpinning idea of Additional Protocol II[72] and Article 3 common to the four Geneva Conventions, applicable to NIACs, which is to protect the civilian population, as well as the Martens Clause, which in her words "indicates that the well-being of the civilian population is paramount" and "should therefore always be taken into consideration in interpreting and applying the law".[73]

In order to apply the concept of usufruct to NIACs, Dam-de Jong limits its application to territories falling under the effective control of an armed group. Relying on Article 43 of the 1907 Hague Regulations, she adds the criteria of being "highly organized" for NSAGs to be able to act within the territory under their control as a *de facto* authority.[74] This would mean, for example, that NSAGs may be entitled to exploit not only water resources in the territories under their control but also non-renewable natural resources such as oil in order to maintain their civil administration and to meet the needs of the population under their control.

66 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports 1971*, p. 16.
67 D. Dam-de Jong, above note 64, p. 185.
68 *Ibid.*, p. 206.
69 *Ibid.*, p. 184.
70 *Ibid.*
71 *Ibid.*, p. 185.
72 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
73 D. Dam-de Jong, above note 64, p. 206.
74 Daniëlla Dam-de Jong, "Armed Opposition Groups and the Right to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria", *Netherlands International Law Review*, Vol. 62, No. 1, 2015, p. 21.

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While such a conclusion has definitely been developed in response to the humanitarian needs of people living in territories under the control of NSAGs, we believe that granting a "complete" right of usufruct to NSAGs, analogous to that of the Occupying Power, in the absence of a legal provision, cannot be justified at all times even if the exploitation is for the benefit of people living under the control of an NSAG. In this regard, it should be noted, firstly, that the rights of the Occupying Power to exploit natural resources include both administration and use of those resources. While meeting the needs of civilians may justify the administration of, for example, existing water resources, this objective rarely justifies the entitlement of an NSAG to benefit from such exploitation. As discussed above, in the historical background of the adoption of Article 55 of the Hague regulations, the two notions of administration and usufruct, while interlinked, were considered as two different concepts, evidenced by the fact that the Oxford Manual contained no reference to the right of usufruct. Moreover, the inclusion of the rights of both administration and enjoyment for the NSAG may to some extent contravene the UN Security Council's statement that the warring parties to a conflict should not use natural resources to perpetuate the conflict.[75]

Secondly, the idea of analogous occupant rights for NSAGs is challengeable because this approach does not make any distinction between the exploitation of renewable and non-renewable resources. It is true that control over renewable resources, particularly when they are scarce, may not only contribute to escalations of conflict[76] but may also lead to using such resources as a method of warfare.[77] Despite these concerns, it is difficult and even impractical not to permit an NSAG to exploit renewable resources in order to meet the needs of people under its control, if those resources are administered in accordance with the ILC's proposal: "in a way that ensures their long-term use and capacity for regeneration".[78] It is difficult, however, to extend such a conclusion to the

75 See, for example, UNSC Res. 1625, 14 September 2005, para. 6. See also the statement of the UN Secretary-General to the Security Council in which he notes that since 1990, 75% of civil wars in Africa have been partially funded by revenues from natural resources. António Guterres, "Remarks to Security Council on the Maintenance of International Peace and Security: The Root Causes of Conflict – The Role of Natural Resources", 16 October 2018, available at: www.un.org/sg/en/content/sg/speeches/2018-10-16/maintenance-international-peace-and-security-remarks-security-council.

76 For example, a study on the causes of conflict in Darfur from 1930 to 2000 demonstrated that competition for pastoral land and water has been a driving force behind the majority of local confrontations for the last seventy years. See UNEP, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict*, 8 October 2012, p. 30, available at: www.un.org/en/land-natural-resources-conflict/pdfs/GN_Renew.pdf

77 For example, see the practice of the so-called Islamic State group in weaponizing water resources. Tobias von Lossow, "Water as Weapon: IS on the Euphrates and Tigris", SWP Comments No. 3, German Institute for International and Security Affairs, 2016, available at: www.swp-berlin.org/publications/products/comments/2016C03_lsw.pdf; Irene Mia and Rica Pepe, "Climate Change and the Instrumentalisation of Natural Resources in the Continuum of War: The Role of Non-state Armed Groups and International Responses", International Institute for Strategic Studies, 18 November 2022, available at: www.iiss.org/blogs/analysis/2022/11/acs-2022-climate-change-and-the-instrumentalisation-of-natural-resources; Marwa Daoudy, "Water Weaponization in the Syrian Conflict: Strategies of Domination and Cooperation", *International Affairs*, Vol. 96, No. 5, 2020.

78 ILC Draft Principles on the Environment, above note 7, Principle 20, para. 9.

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exploitation of non-renewable resources in the face of both the very nature of these kinds of resources, which exist in a fixed amount or cannot be regenerated on a scale compared to their consumption, and the pattern of abusive practices of NSAGs exploiting resources such as diamonds or oil.[79]

While we agree with Dam-de Jong that the protection of the civilian population should, from a *de lege ferenda* perspective, permit NSAGs to exploit natural resources, we believe that this authorization cannot be considered analogous to the privileges of the Occupying Power as being both administrator and usufructuary. In other words, we agree with the rationale and arguments of Dam-de Jong that an NSAG can exploit natural resources to meet the needs of civilians in the territory under its control, but we believe that such a permission should be minimal and strictly limited to its purpose in order to bar any possibility of abuse.[80] Furthermore, we suggest that such a permission, contrary to the right of an Occupying Power, should be limited only to the administration of renewable resources.

This argument is a limited version of what is proposed by Dam-de Jong and consequently suffers from the same deficiencies, chief among them being the lack of a solid base or non-recognition in international law of a right for an NSAG to exploit natural resources in territories under its control. Dam-de Jong herself acknowledges that in the absence of consistent practice and *opinio juris* on the part of States on the subject, there appears to be no solid legal basis for a right of armed groups to exploit the natural resources under their control.[81] Nonetheless, as developed in the next section, we argue that limited exploitation of natural resources by NSAGs for the benefit of the local population can be justified as a matter of *lex lata* when a situation of humanitarian emergency exists.

Legality of the exploitation of natural resources in the event of disaster

In this section, we argue that in the event of a disaster, the exploitation of natural resources by NSAGs may be legally justified because the occurrence of a disaster may exclude the wrongfulness of the acts of NSAGs in international law. In this way, we contend that while, as discussed in the previous section, the legality of

79 According to a report published by UNEP in 2009, since 1990, at least eighteen civil wars have been fuelled by non-renewable natural resources such as diamonds, timber, oil, and minerals. UNEP, *Protecting the Environment during Armed Conflict*, 2009, p. 8.

80 Apart from the risk of abuse by NSAGs, which is also a risk with regard to occupying States, we believe that in granting rights to NSAGs comparable to those of States, it should not be forgotten that States, besides the rights granted to them, have heavy legally binding obligations under international law. For example, corresponding to the right of a State to exploit the natural resources located in an occupied territory in the context of usufruct, Geneva Convention IV, the Hague Regulations and other applicable rules impose many obligations on that State as the Occupying Power. These rules do not necessarily encompass many counterpart obligations applicable to NSAGs. From this, it can be also suggested that in the process of designing *lex ferenda*, any right granted to NSAGs must be accompanied by related obligations.

81 D. Dam-de Jong, above note 64, p. 188.

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the exploitation of natural resources by NSAGs, outside the scope of imperative military necessity, remains controversial, the existence of a disaster and the obligation of NSAGs to provide relief may justify such exploitation subject to the conditions detailed below.

In 2016, the ILC launched its Draft Articles on the Protection of Persons in the Event of Disasters (ILC Draft Articles on Disasters).[82] These articles, in sum, are an attempt by the ILC to codify and develop the rules of international law in order to enhance the protection of persons suffering from disasters. Unfortunately, however, the protection discussed in the Draft Articles on Disasters does not explicitly address the situation of persons living in territories under the control of NSAGs, even though, following the adoption of the Draft Articles by the ILC, disasters such as the COVID-19 pandemic, the famine and cholera in Yemen, and recently the earthquake in Syria have had an even more severe effect on persons living under the *de facto* control of NSAGs.[83] Perhaps this is the reason why some scholars, while referring to the various responses to COVID-19 by NSAGs, argue that these situations provide an opportunity to add an additional layer to the existing literature, "focusing on emergency governance by armed non-state actors".[84]

Article 3(a) of the ILC Draft Articles on Disasters describes the term "disaster" as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society". The commentary on this article, relying on the provisions of the Tampre Convention,[85] emphasizes that the results mentioned in the article and the disruption of the functioning society are necessary elements in the definition of disaster, distinguishing it from other events that may affect a community.[86]

While, as pointed out by Siddiqi, "[t]here is empirical evidence of the increased frequency and intensity of disasters in the most conflict-affected states",[87] the ILC does not explicitly distinguish between disasters which might happen due to the occurrence of an armed conflict and other situations of disaster. However, the elements mentioned above for the characterization of disaster support the conclusion that an armed conflict, *per se,* cannot necessarily

82 ILC, *Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries*, UN Doc. A/71/10, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2016 (ILC Draft Articles on Disasters).

83 See, for example, Irénée Herbet and Jérome Drevon, "Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19", *International Review of the Red Cross*, Vol. 102, No. 915, 2020. See also Geneva Call's COVID-19 Armed Non-State Actors' Response Monitor, available at: www.genevacall.org/covid-19-armed-non-state-actors-response-monitor/.

84 Sandra Krähenmann, Ximena Galvez Lima and Hiba Mikhail, "Emergency Governance: Armed Non-State Actors Facing COVID-19", *Armed Groups and International Law*, 2 March 2022, available at: www.armedgroups-internationallaw.org/2022/03/02/emergency-governance-armed-non-state-actors-facing-covid-19/.

85 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 2296 UNTS 5, 18 June 1998.

86 ILC Draft Articles on Disasters, above note 82, para. 5.

87 Ayesha Siddiqi, "Disasters in Conflict Areas: Finding the Politics", *Disasters*, Vol. 42, No. 2, 2018, p. 4.

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be considered a disaster.[88] This conclusion may also be understood from the fact that as clearly mentioned in Article 18(2), the ILC Draft Articles on Disasters do not apply to the extent that the response to a disaster is governed by the rules of IHL. The commentary to Article 18(2) elaborates that the formulation of the article was intended, on the one hand, to emphasize the IHL rules as the *lex specialis* of situations of armed conflict, and, on the other, to highlight that the Draft Articles "would continue to apply 'to the extent' that legal issues raised by a disaster are not covered by the rules of international humanitarian law".[89] In this respect, it is important to note that the Draft Articles on Disasters also cover the human rights of persons affected by disasters.[90] This would mean that in times of disaster that occur during an armed conflict, the Draft Articles are intended to be implemented as complementary to the rules of both IHL and international human rights law (IHRL).

The ILC Draft Articles on Disasters are only focused on the obligations of States and do not address NSAGs expressly, but they contain elements that may justify the application of some of their provisions to NSAGs. With general reference to the international law obligations of affected State, Article 10(1) indicates that an affected State has the duty to ensure the protection of persons and the provision of disaster relief assistance not only in its territory but also "in territory under its jurisdiction or control". Interestingly, while the commentary on this article explicitly states that such a duty stems mainly from State's sovereignty, it immediately adds that a State does not necessarily have sovereignty "in territory under its jurisdiction or control".[91] In the same vein, Article 3(b) defines an "affected State" as including "a State in whose territory, *or in territory under whose jurisdiction or control*, a disaster takes place" (emphasis added). The commentary further adds that "in exceptional cases, there may be two affected States: the State upon whose territory the disaster occurs and the State exercising jurisdiction or control over the same territory".[92] The reference to "exceptional cases" indicates that the ILC did not restrict itself to a "sovereignty-based approach" and instead took an "effective approach". In other words, the ILC, with the aim of enabling international law to enhance the level of protection of persons in the event of disasters, did not link the "duty to ensure the protection" to sovereignty; rather, it provides that in territories where the State has a kind of control, the mentioned duty to protect will be applicable.

While the notion of "sovereignty" is not discussable at all when it comes to NSAGs, the fact that they may exercise effective control over some territories is undeniable. According to a study carried out by the ICRC on the roles of NSAGs,

88 See also ILC Draft Articles on Disasters, above note 82, para. 10.

89 *Ibid.*, commentary on Art. 3, paras 8–9. The commentary on Article 18 further states: "The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law": *ibid.*, commentary on Art. 18, para. 9.

90 Article 5 emphasizes that these persons are "entitled to the respect for and protection of their human rights in accordance with international law".

91 *Ibid.*, commentary on Art. 10, para. 3.

92 *Ibid.*, commentary on Art. 3, para. 15.

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"some non-State armed groups may develop State-like capacities and provide services for the population".[93] In such a context, if the criterion of the application of Article 10(1) is the exercise of control, it is difficult not to conclude that the general duty referred to in this draft article will also be applicable to those NSAGs which exercise *de facto* control over a territory.

It is beyond the scope of this paper to dig into controversies over the subject of the duty of NSAGs to protect persons living in territories under their control and who are affected by the hostilities – a duty that is widely discussed in the legal literature[94] – but for the sake of the present discussion it seems sufficient to remind ourselves that, in its 2011 IHL Challenges Report, the ICRC states that in cases where the NSAG by virtue of stable control over territory has the ability to act like a State, "human rights responsibilities may therefore be recognized *de facto*".[95] Needless to say, this does not exclude the general protections of IHL.[96] In other words, like the Occupying State, in times of disaster, an NSAG is under dual obligations from both the IHL and IHRL perspectives to respond to those needs. More specifically, in times of disasters such as epidemics, pandemics or natural disasters, individuals living under the control of NSAGs are still entitled to minimum standards of treatment.

From the foregoing, one may conclude that although the rules of IHL do not encompass any clear reference to the "usufructuary function" of NSAGs with *de facto* control over a territory, this humanitarian consideration, which also mirrors the effective approach taken by the ILC in Draft Articles on Disasters, results in permitting NSAGs to administer and use properties including the natural resources available in the territory under their *de facto* control to respond to these needs in times of disaster.

Although stricter than the argument raised by Dam-de Jong, the above reasoning may face similar criticisms, as mentioned earlier – i.e., the lack of legality or non-recognition in international law of a right for an NSAG to act as usufructuary in territories under its control. In other words, this reasoning does not automatically preclude the wrongfulness of the act of exploitation of natural resources by an NSAG under the current international rules and regulations. Having this in mind, we assert that another criterion is needed to justify the legality of the exploitation of natural resources by an NSAG in response to a disaster: when the event of disaster amounts to a situation of *force majeure* or distress, or a state of necessity.

The ILC has codified these elements as circumstances recognized under customary international law to preclude the wrongfulness of acts or omissions by

93 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 52.

94 See, for example, Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017.

95 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, pp. 14–15, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

96 See Tilman Rodenhäuser, "The Legal Protection of Persons Living under the Control of Non-State Armed Groups", *International Review of the Red Cross*, Vol. 102, No. 915, 2021.

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States and international organizations respectively.[97] In its introductory commentary on Chapter V of its 2011 Draft Articles on the Responsibility of International Organizations, the ILC stipulates that there is "little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations".[98] The commentary on this chapter does not provide any other argument to justify this reading, but it is nonetheless clear that when international law imposes some obligations on international organizations and there is a possibility of raising their international responsibility due to non-compliance, there should also be some situations that preclude the wrongfulness of their actions. Yet, as stated by the ILC, "this does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States".[99] On this basis, compared to those enshrined in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC drew stricter lines for international organizations to invoke these circumstances. For example, while the 2001 Draft Articles permit States to invoke a state of necessity to, *inter alia*, safeguard an essential interest of their own, Article 25 of the 2011 Draft Articles excludes safeguarding the essential interest of the international organization, stating that "as a matter of policy, necessity should not be invocable by international organizations as widely as by States".[100]

The increasing level of violations of IHL by organized NSAGs with *de facto* control over territories in recent years has triggered a series of scholarly works on the concept of international responsibility of these entities.[101] The ILC Draft Principles on the Environment do not enter into this discussion, but Principle 9(3)(a) indicates that these draft principles are without prejudice to "the rules on the responsibility of non-state armed groups". The commentary on this provision stipulates that this area is less settled in international law.[102] The ILC Special Rapporteur, in her second report, delved into this issue and, after reviewing the challenges in international law with regard to applying the secondary rules to NSAGs, stated that "the international responsibility of organized armed groups, while not a legally uncharted area, is a fragmented topic on which few solid conclusions can

97 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001 (ARSIWA); ILC, *Draft Articles on the Responsibility of International Organizations*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2011 (DARIO).

98 DARIO, above note 97, p. 70, Introduction to Chap. V, para. 2.

99 *Ibid.*

100 *Ibid.*, commentary on Art. 25, para. 4.

101 See, for example, Ezequiel Heffes and Brian E. Frenke, "The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules", *Goettingen Journal of International Law*, Vol. 8, No. 1, 2017; Laura Inigo Alvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*, Intersentia, 2020; Annyssa Bellal, "Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution", in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, Brill, Leiden, 2015. See also ILA, *Washington Conference 2014: Non-State Actors*, 3rd report prepared by co-rapporteurs Cedric Ryngaert and Jean d'Aspremont, 2014.

102 ILC Draft Principles on the Environment, above note 7, commentary on Principle 9, para. 12.

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be drawn".[103] She referred to a 2014 International Law Association (ILA) report which concludes that "the mechanism of direct responsibility of [organized armed groups] seems to be, at the very best, a doctrine *in statu nascendi*".[104] A thorough discussion of the concerns raised by the ILA report and other scholars is beyond the scope of this paper, but we believe the concerns raised, such as complications in terms of the attribution of wrongful acts to NSAGs or of reparations, are without prejudice to the general principle that is reflected in all legal systems which stipulates that whenever the responsibility of an entity is raised, that entity is entitled to justify its conduct with reference to surrounding circumstances.[105] This is the difference that exists between, in the words of the ILC, the "sword" and the "shield".[106] In other words, while there are still many uncertainties regarding how the rules of international responsibility apply to NSAGs as a "sword", the idea that an NSAG, like any other entity or individual, has the right to use a "shield" to justify non-performance is not subject to controversy. As we discuss below, however, the size of the NSAG's "shield" is much smaller than the one that is designed for States in international law.

Although relying on the regime of international responsibility of States or international organizations is an appropriate technique for imagining the future law on international responsibility of NSAGs, as pointed out by Herman, "it should not be understood as a process of mechanically copying and pasting legal rules and principles".[107] This was exactly the approach of the ILC in creating the 2011 Draft Articles on the Responsibility of International Organizations. It is in line with this approach that we argue that even stricter lines should be drawn for circumstances which may preclude the wrongfulness of the conduct of NSAGs – that is, only when due to the occurrence of a disaster, the life and dignity of people living in territories under the control of an NSAG are in danger.

On this basis, we argue that in times of disaster, a very narrow reading of the above-mentioned circumstances may preclude the wrongfulness of exploitation of natural resources by NSAGs if: (1) the situation of disaster reaches the level of *force majeure* as indicated in Article 23 of the 2001 and 2011 Draft Articles, and this situation, either alone or in combination with other factors, is not due to the conduct of the NSAG invoking it or the NSAG has not assumed the risk of that situation occurring; or (2) the NSAG has no other reasonable way, in a situation of distress due to the occurrence of the disaster, of saving the lives of persons living or being present in the territory under its *de facto* control, providing that the situation of distress, either alone or in combination with other factors, is not due to the conduct of the NSAG invoking it or the exploitation is

103 M. Lehto, above note 56, para. 58.
104 ILA, above note 101, p. 11.
105 For further discussion, see Federica I. Paddeu, "Circumstances Precluding Wrongfulness", *Oxford Public International Law*, 2014, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2151.
106 ARSIWA, above note 97, commentary on Chap. V, para. 2.
107 Olivia Herman, "Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations", *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1043.

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not likely to create a comparable or greater peril;[108] or (3) the occurrence of the disaster reaches the level of a state of necessity as indicated in Article 25 of the 2001 and 2011 Draft Articles and the exploitation is the only means for the NSAG to safeguard against a great and imminent peril to an essential interest of the population living or being present in the territory under its *de facto* control, providing that the NSAG has not contributed to the situation of necessity.

Moreover, it is important to note that in accordance with Article 27(a) of the 2001 and 2011 Draft Articles, "a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected."[109] Paddeu and Waibel have perfectly commented on this statement by adding that "determining the start and end dates of the situation of necessity can be a difficult and imprecise assessment, especially in situations of crises or emergencies. These do not need to overlap with the situation of necessity. This is a matter that requires objective determination."[110] On this basis, they argue that "it is not necessary that the situation return to its pre-crisis normality before the state of necessity ends".[111] This generally accepted principle applies to all circumstances discussed above.[112]

This leads us to conclude that the occurrence of a disaster only in very limited situations, as discussed above, may preclude the wrongfulness of exploitation of natural resources by an NSAG in a restricted time and scale. Of course, overexploitation or any violation of the provision contained in Principle 20 of the ILC Draft Principles on the Environment with respect to sustainable use may result in pillage or other wrongful acts under international law. Therefore, this criterion only works when the two other elements are also met: (1) the exploitation is solely for the purpose of meeting the needs of people living in territories under the effective control of the NSAG and who are affected by the disaster, and (2) the exploitation is not carried out in violation of the formula provided by the ILC for sustainable use of natural resources, which is that the NSAG shall exercise caution in the exploitation of non-renewable resources, not exceeding the levels of production that existed before the territory fell into the hands of the NSAG, and shall exploit renewable resources in a way that ensures their long-term use and capacity for regeneration.

Conclusion

More than ever, the prevailing realities of the current international community demonstrate the need to go beyond prohibitive rules in regulating the conduct of NSAGs, as they have proved to be persistent players affecting the lives of millions

108 ARSIWA, above note 97, Art. 24; DARIO, above note 97, Art. 24.
109 DARIO, above note 97, commentary on Art. 27, para. 1.
110 Federica Paddeu and Michael Waibel, "Necessity 20 Years On: The Limits of Article 25", *ICSID Review – Foreign Investment Law Journal*, Vol. 37, No. 1–2, 2022, p. 181.
111 *Ibid.*, p. 182.
112 ARSIWA, above note 97, commentary on Art. 27, para.1.

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of people around the world. For this purpose, among different fields of international law, IHL, as the law applicable to all parties to an armed conflict, including NSAGs, is in a better situation to regulate the conduct of these groups. To ensure the protection of all those affected by armed conflicts, scholars have recently addressed complicated issues related to, for example, NSAGs' conduct of hostilities, detention and courts, in order to extend the rules and principles of IHL to the conduct of these actors. In the sphere of the protection of the environment during armed conflicts, the same realities have convinced some commentators to assert that the notion of usufruct, as defined in the law of occupation, may also be of use to legitimize the exploitation of natural resources by NSAGs. This paper, while touching on the realities on the ground, takes a more precautionary approach on the subject due to concerns over the increasing vulnerability of the natural environment in recent armed conflicts. Based on the proposal by the ILC, it argues that, in designing the law appropriate to this situation, any right granted to NSAGs to exploit natural resources should be limited by distinguishing between administration and the use of natural resources, on one side, and between renewable and non-renewable natural resources, on the other. The paper contends that it is only in situations of disaster which may result in the occurrence of circumstances that preclude the wrongfulness of the exploitation of natural resources by an NSAG that such exploitation may be justified in current international law. These circumstances, nevertheless, may in no case legitimize the exploitation of natural resources for the benefit of the group or beyond the lines drawn by the ILC under the notion of "sustainable use of natural resources".

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