

# THE OPACITY OF OIL: OIL CORPORATIONS, INTERNAL VIOLENCE, AND INTERNATIONAL LAW

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*At all periods of history, wherever it was possible, there has been ruthless acquisition, bound to no ethical norms whatever. Like war and piracy, trade has often been unrestrained in its relations with foreigners and those outside the group. The double ethic has permitted here what was forbidden in dealings among brothers.<sup>1</sup>*

## I. INTRODUCTION

Oil corporations offer a paradigmatic case of the importance of major transnational corporations (TNCs) in international affairs. Economists do not hesitate to write on the international oil industry as a pillar of the international or global political economy,<sup>2</sup> and political scientists also devote significant attention to oil diplomacy.<sup>3</sup> By comparison, international lawyers have remained somewhat oblivious to the centrality of major oil TNCs in shaping international affairs. In our *corpus juris*, oil corporations are a threefold object of preoccupation: as involved in the 1960s-1980s fight over nationalization and the measure of compensation (adequate or full); as holders of *sui generis* property rights under international law; and, more recently, as targets for the application of norms of international environmental law and international labor law. But, there is serious evidence that oil corporations' interests and

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1. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 57 (Talcott Parsons trans., Charles Scribner's Sons 1958).

2. *See, e.g.*, STEPHEN GILL & DAVID LAW, *THE GLOBAL POLITICAL ECONOMY* 256-77 (1988).

3. *See, e.g.*, LOUIS TURNER, *OIL CORPORATIONS IN THE INTERNATIONAL SYSTEM* (1978). *See generally* *ECONOMIE ET GÉOPOLITIQUE DU PÉTROLE: POINTS DE VUE DU SUD* [ECONOMICS AND GEOPOLITICS OF OIL: SOUTHERN POINTS OF VIEW] (Alternatives Sud [Alternatives South], VOL. 10, No. 2, 2003).

power reach far beyond this set of concerns and often touch the very core of the most fundamental problem in political theory, i.e., the legitimate use of violence and of the coerced imposition and preservation of order.

Resource wars, in which contending groups fight for the appropriation and exploitation of valuable resources concentrated in a region, are a phenomenon that offers an entry into the topic.<sup>4</sup> Due to the economic and military importance of petroleum products, oil-thirst creates important tensions in regions such as the Persian Gulf, the Caspian Sea basin, and the China Sea.<sup>5</sup> The recent occupation of Iraq by American, British, and other coalition troops can also, albeit incompletely, be analyzed in petro-strategical terms. Interstate resource conflicts also arise in order to keep oil transportation routes open or to pacify a region in order to establish one.<sup>6</sup> Such large-scale, spectacular, and, usually, media-covered interstate military operations no doubt benefit oil corporations, but they are, to a large degree, conducted and mediated by states. International law, with its prohibition of aggression and of acquisition of territory by force, regulates behavior of that sort.<sup>7</sup> In that respect, the failure of states to abide by international law—such as in the U.S.-U.K. military operation in Iraq<sup>8</sup>—is less significant for our purposes than the fact that international law is rich enough in doctrines and institutions aimed at constraining and sanctioning states undertaking such endeavors.

Beyond oil-motivated interstate use of force, the petroleum industry is also entangled in another form of violence, generally involving small-scale episodic and highly localized operations. This form of violence is located on or around resource exploitation concessions. It is aimed at keeping or gaining control over these resources, repressing manifesta-

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4. See generally MICHAEL T. KLARE, *RESOURCE WARS* (2001). Klare defines resource wars as “conflicts that revolve, to a significant degree, over the pursuit or possession of critical materials.” *Id.* at 25.

5. See *id.* at 51-137.

6. Examples include the Suez Canal Crisis of 1956 and the current fierce competition—involving military built-up, exercises, and feeding conflicts in the Caucasus—over the location of pipelines transporting oil and gas from the Central Asian Republics. See *id.* at 81-108.

7. See U.N. CHARTER art. 2, para. 4.

8. Thomas M. Franck, *What Happens How? The United Nations After Iraq*, 97 *Am. J. Int'l L.* 607, 614 (2003).

tions of local discontent in the resource-rich areas and along transportation routes, or at extorting money by conducting nuisance operations involving kidnapping or vandalism. The focus of this Article is on situations in which the violent struggle for the control of the resource-based economy is not framed in statal terms, but rather takes place within a state's borders, without challenging that state's formal title to the territory.<sup>9</sup> The lower intensity of this type of military/police confrontation often causes battle-related casualties that fall below the casualty threshold of the war category, which might partly explain why these are less-studied confrontations.<sup>10</sup> Nonetheless, they entail deeply disruptive consequences for affected populations. In some instances, resort to violence is so closely associated with the operations of oil corporations that it becomes part of the habitual conditions of the conduct of their activities. It is petty-violence as an integral feature of business-as-usual.<sup>11</sup> But, as opposed to the interstate violence alluded to above, the fabric of international law seems more pervious to internal violence associated with oil exploitation—less able to name it and to limit it.

The subject of this Article is the obliviousness of international jurists to the nexus linking the exploitation activities of oil corporations to patterns of internal violence. Given the prediction that resource-gearred conflicts are likely to intensify and to multiply,<sup>12</sup> it seems timely to undertake such examination. This Article seeks to point out the elements in the struc-

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9. The conflict need not be internal as such, as it often involves military assistance of neighboring states so that the exploited resources can reach the external market, nor need it be articulated in terms of international claims by other states. In other words, the oil-based violence that will inform this study consists of instances in which territorial change claims (apart from claims for autonomy) are not dominant and the territorial status quo predominates.

10. The Correlates of War (COW) dataset posits a casualty threshold at 1000 deaths per year in order to be considered. See J. DAVID SINGER & MELVIN SMALL, CORRELATES OF WAR PROJECT: INTERNATIONAL AND CIVIL WAR DATA, 1816-1992 (1994), available at <http://www.umich.edu/~cowproj/dataset.html>. The more recently designed Uppsala database has a lower threshold of 25 battle casualties. See Nils Petter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 J. PEACE RES. 615, 615 (2002), available at <http://www.prio.no/cwp/datasets.asp>.

11. See ARUNDHATI ROY, *POWER POLITICS* 13 (2d ed., 2001).

12. See KLARE, *supra* note 4, at 23-26.

ture and doctrines of international law that mask the nexus between oil exploitation and internal violence and that justify or sustain practices where this nexus operates. This Article will also expose and criticize the legal argumentation veiling this nexus and shielding oil corporations from responsibility for various degrees of involvement in violent schemes of oil exploitation. In that respect, I will examine the instrumentality of articulated or concealed legal arguments.

The Article is divided in three main sections. Part II gives an account of the various forms of connections between oil exploitation and internal violence and of the place and role of oil corporations therein. Part III, the core section, focuses on the instrumentality of international law—taken broadly in its structure and doctrines—in sustaining schemes of oil exploitation despite the violence engendered. I start with the notion of permanent sovereignty over natural resources and its instrumentality in the formation of rights *erga omnes* (including vis-à-vis the local population), in the stabilization of contractual rights vis-à-vis third parties, and in the claim for automatic enforceability of formally valid petroleum agreements (Part III.A). I then examine how TNCs are prompt to use major structural divides of international law to dis-embed themselves from the host state's polity on issues of enforcement and to project all responsibility for enforcement activities on the government (Part III.B). The result of the combination of those two argumentative techniques is to treat the position of TNCs vis-à-vis the dyad local people/host government diachronically: Fully embedded at the time of rights formation—so that TNCs' claims are valid against both prongs of the dyad—but immediately dis-embedded when the enforcement of those very rights necessitates the use of violence to quell dissension. Finally, in Part IV, I look at the contribution of institutions outside the triad to sustaining patterns of violent oil exploitation, notably by creating enforcement incentives for and exerting enforcement pulls on the host government.

## II. THE FACES OF OIL-RELATED INTERNAL VIOLENCE

There are two archetypical situations in which a link—more or less direct—between the regular activities of oil corporations and violence between political contestants within a state is traceable: (1) violence used by or condoned by state

authorities to protect vested interests in resource exploitation schemes in response to strikes, demonstrations, or other forms of social pressure seen as threatening their interests, but which are usually directed against a local population that posed no genuine violent or militarily challenge to state authorities; and (2) violence by groups undertaking to replace the government, challenge its decisions, or at least enfeeble it by attacking its main source of revenues, which usually are met by a violent defense by the government. In its generic sense, the former type of violence is called repression, the latter insurrection.<sup>13</sup> In practice, the line is often blurred given that civil wars sometimes turn into complex political emergencies in which parties and positions are less clearly defined and which are seen by various actors as enrichment opportunities to benefit from rather than as a process out of which to negotiate a political solution.<sup>14</sup> Yet, it is useful to examine a few illustrations of the connection between oil exploitation and violence through the lenses of this rough division.

### A. *Oil Exploitation and Preservative Violence*

#### 1. *Repressive Violence*

There appears to be a significant negative statistical correlation between the economic importance for a state of its oil industry and the democratic character of its government.<sup>15</sup> Of course, nondemocratic governments are by no means to be directly equated with repressive regimes. But, combined with other causal mechanisms, the military repression associated with oil exploitation is thought to account for this statistical relation.<sup>16</sup>

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13. JEAN-PIERRE DERRIENNIC, *LES GUERRES CIVILES* [CIVIL WARS] 14 (2001).

14. See generally Jonathan Goodhand & David Hulme, *From Wars to Complex Political Emergencies: Understanding Conflict and Peace-Building in the New World Disorder*, 20 *THIRD WORLD Q.* 13 (1999) (analyzing contemporary approaches to large-scale violent conflicts and subsequent efforts at peacebuilding).

15. See Michael L. Ross, *Does Oil Hinder Democracy?*, 53 *WORLD POL.* 325, 341-42 (2001).

16. See *id.* at 356-57. The other two causal mechanisms explored by Ross are that oil wealth helps to build a rentier state, which derives a large share of its revenues from external rents, and that it does not foster the emergence of secondary and tertiary economic sectors associated with a democracy-avid

The patterns of repressive violence in which oil corporations are generally involved concern the suppression of dissatisfaction before the conflict between state authorities and a fringe of the population escalates into a civil war. As opposed to violence exercised in the context of civil war, repressive violence is unidirectionally exercised against the local and civil population. It often targets indigenous groups whose lifestyle, habitat, and health are shattered or compromised by the oil exploitation activities. Those groups, sometimes with the help of and pressure from Western NGOs, often try to compensate for their lack of voice in official channels by actions such as demonstration and strikes, which are violently repressed.

In response to the expression of despair and social outrage, and to the voicing of socio-political claims, military or police interventions are undertaken to defend the disturbed concessions and to uphold concretely the conditions for the exercise of exploitation prerogatives. The case of Shell operating in Ogoniland in Nigeria is notorious: The Ogoni people campaigned against the alliance between the federal government and multinational oil corporations, articulating their claims in terms of minority rights and claims against exploitation and pollution.<sup>17</sup> Contestation by the Ogonis intensified and was repeatedly met by repression.<sup>18</sup> Although Shell suspended its activities in the region in 1993, violence culminated with the hanging of MOSOP leaders, among whom was the writer Ken Saro-Wiwa, in 1995, after a bogus trial for murder.<sup>19</sup> Although not directly related to that incident, Shell is alleged to have paid for the transportation costs and salary bonuses of

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population. *See id.* For another, yet weaker, case of how oil exploration supports dictatorship, see generally JOHN BACHER, *PETROTYRANNY* (2000).

17. For an interesting study of how contact with international NGOs changed the discourse or struggle of the Ogonis, see Clifford Bob, *Marketing Rebellion: Insurgent Groups, International Media, and NGO Support*, 38 INT'L POL. 311 (2001); Cyril I. Obi, *Global, State, and Local Intersections: Power, Authority, and Conflict in the Niger Delta Oil Communities*, in INTERVENTION AND TRANSNATIONALISM IN AFRICA 173 (Thomas M. Callaghy et al. eds., 2001) [hereinafter *TRANSNATIONALISM*].

18. For a more detailed account than I can provide here, see FED. MINISTRY OF INFO. & CULTURE, NIG., *THE Ogoni Crisis: The Truth of the Matter* (1995); HUMAN RIGHTS WATCH/AFR., *NIGERIA—THE Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria* (1995).

19. *See* WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* 206 (1998); *see also* Obi, *supra* note 17, at 186.

some troops who attacked the Ogonis and to have imported high-tech weapons.<sup>20</sup> In a separate incident in Nigeria, in May 1998, an unarmed protest on an offshore drilling platform operated by Chevron ended with the Nigerian army killing some of the demonstrators.<sup>21</sup> The soldiers who killed the demonstrators had been transported to the platform by Chevron-owned helicopters.<sup>22</sup>

A similar proximity of oil corporations to repressive actions by the military is noticeable in Myanmar. The military junta controlling the government maintains a considerable armed presence (between 3,000 and 10,000 troops) to protect the gas pipeline area,<sup>23</sup> which is used by two international consortia.<sup>24</sup> There are allegations—denied by the corporations concerned—that Total and Unocal hired governmental forces through the MOGE to ensure security in the region.<sup>25</sup> The involvement of the French oil corporation Total is particularly clear: It transports Myanmar army troops on its planes and helicopters to conduct exploration activities and it purchased weapons and helicopters for the Myanmar army.<sup>26</sup>

In the same vein, the U.S. armed forces have engaged in a series of more or less extensive activities in various oil-rich re-

20. *Id.* at 207.

21. See AL GEDICKS, RESOURCE REBELS 49-50 (2001).

22. See *id.*

23. EARTHRIGHTS INT'L & S.E. ASIAN INFO. NETWORK, TOTAL DENIAL: A REPORT ON THE YADANA PIPELINE PROJECT IN BURMA 14 (1996) [hereinafter TOTAL DENIAL].

24. The partners on the Yetagun pipeline are Premier Oil (U.K.), Petronas (Malaysia), Nippon Oil (Japan), the Petroleum Authority of Thailand Exploration and Production (PTTEP), and Myanma Oil & Gas Enterprise (MOGE). EARTHRIGHTS INT'L & S.E. ASIAN INFO. NETWORK, TOTAL DENIAL CONTINUES: RIGHTS ABUSES ALONG THE YADANA AND THE YETAGUN PIPELINES IN BURMA 13 (2000) [hereinafter TOTAL DENIAL CONTINUES]. Total (France), Unocal (USA), PTTEP and MOGE are involved in the Yadana Pipeline. See TOTAL DENIAL, *supra* note 23, at 1, 50; TOTAL DENIAL CONTINUES, *supra*, at 13.

25. See TOTAL DENIAL CONTINUES, *supra* note 24, at 62.

26. BACHER, *supra* note 16, at 145-46. It is interesting to note that when Total's involvement in Myanmar began, the French government was a major shareholder in the company; the French government has retained statutory authority over Total, which must get the government's approval to invest in the country. For additional manifestations of the link between oil exploitation and various forms of violence, repression, and instability, see, for example, *id.* at 47-228; GEDICKS, *supra* note 22, at 41-84.

gions with the consent of foreign governmental authorities and in tandem with their armed forces. Some of these exercises took place in Latin America, notably with the Colombian armed forces, as well as in Central Asia, such as Operation Centrazbat 97 in southern Kazakhstan, with forces from Kazakhstan, Kyrgystan, and Uzbekistan.<sup>27</sup> Whether violence is actually used against local groups (of which I found no actual report), whether repression is exercised disciplinarily via internalized chilling effects, or whether it simply signals the future tacit approval of the use of violence to secure oil exploitation (or even the expectation to do so in certain circumstances), this modality illustrates the same repressive logic linked to unaccountable militarization of the oil exploitation industry.

## 2. *Oil Exploitation as Governmental Support in Civil Wars*

In situations of civil wars *stricto sensu*, oil corporations can generally be involved at two different levels in sustaining patterns of violence. (The second level of oil company involvement in sustaining patterns of violence—when oil companies become involved, directly or indirectly, in defending oil concessions or pipelines—is considered in Part II.B.2, below.) At a first and general level, violence is used by the government to maintain itself in place. When a government is highly dependent on oil-generated revenues for its maintenance, the extraction contracts are part of the system that maintains it in place rather than a challenger. Two examples will suffice to illustrate the indirect entanglement of oil exploitation with internal conflict dynamics.

### a. *Angola*

Despite having Africa's second largest oil production, Angola ranks 164th on the 2003 U.N. Human Development Index,<sup>28</sup> and it is a paradigmatic example of the resource-wealth curse.<sup>29</sup> The oil and gas industry generates close to 90% of

27. See KLARE *supra* note 4, at 1-5.

28. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2003, at 240 (2003), available at [http://www.undp.org/hdr2003/pdf/hdr03\\_HDI.pdf](http://www.undp.org/hdr2003/pdf/hdr03_HDI.pdf).

29. See generally GLOBAL WITNESS, A CRUDE AWAKENING (1999) (profiling the role of the banking and oil industries in Angola's civil war), available at <http://www.globalwitness.org/reports/download.php/00048.pdf> [hereinaf-

state revenues and accounts for close to 50% of the national economy.<sup>30</sup> Diamonds are also found in abundance and their sale is thought to have resulted in income to UNITA (*Uniao Nacional para Independencia Total de Angola*) of \$3.7 billion between 1992-1997.<sup>31</sup> Despite such wealth, 82.5% of Angola's 11.7 million inhabitants live in absolute or relative poverty,<sup>32</sup> and the country has been at war for most of the past four decades, first to gain independence from Portugal and then for the control of the government (with the latter fighting mostly between the *Movimento Popular para Libertacao de Angola* (MPLA) and the *Uniao Nacional para Independencia Total de Angola* (UNITA)).<sup>33</sup>

In May 1991, the Bicesse Accords were signed and provided for the first national elections of the country.<sup>34</sup> Following the election of dos Santos as President in 1992, UNITA reneged on its commitment under the Accords and resumed hostilities with the government.<sup>35</sup> A period of severe violence ensued; approximately ten thousand Angolans were killed in the three months following the elections.<sup>36</sup> During the initial period of the resumption of the civil war, UNITA was gaining ground and was better equipped than the government, which no longer enjoyed Soviet financial support. But, with the end of the Cold War, there was no longer a need for the West to support UNITA, resulting in a shift in the internal balance of power from UNITA to the MPLA government. In September 1993, the fighting parties reached a truce anew, following the

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ter CRUDE AWAKENING]; GLOBAL WITNESS, ALL THE PRESIDENTS' MEN (2002) (providing a history of oil's contribution to Angola's civil war), available at <http://www.globalwitness.org/reports/download.php/00027.pdf> [hereinafter ALL THE PRESIDENTS' MEN]; INT'L CRISIS GROUP, AFR. REP. NO. 58, DEALING WITH SAVIMBI'S GHOST: THE SECURITY AND HUMANITARIAN CHALLENGES IN ANGOLA (2003), available at [http://www.crisisweb.org/library/documents/report\\_archive/A400905\\_26022003.pdf](http://www.crisisweb.org/library/documents/report_archive/A400905_26022003.pdf).

30. CRUDE AWAKENING, *supra* note 29, at 6-7.

31. Assis Malaquias, *Diamonds Are a Guerilla's Best Friend: The Impact of Illicit Wealth on Insurgency Strategy*, 22 THIRD WORLD Q. 311, 312 (2001).

32. CRUDE AWAKENING, *supra* note 29, at 1.

33. *See id.* at 4, 21.

34. Virginia Page Fortna, *A Lost Chance for Peace: The Bicesse Accords in Angola*, GEO. J. INT'L AFF., Winter/Spring 2003, at 73, 73-74; *see also* ALL THE PRESIDENTS' MEN, *supra* note 29, at 11.

35. *See* INT'L CRISIS GROUP, *supra* note 29, at 3.

36. MADELAINE DROHAN, MAKING A KILLING 204 (2003).

imposition of an oil and arms embargo on UNITA by the U.N. Security Council.<sup>37</sup> Further negotiations eventually led to the Lusaka Protocol in November 1994, but the agreement never materialized into an actual situation of peace.<sup>38</sup>

Most of the Angolan petroleum deposits are offshore, which makes them less accessible to rebels seeking to control them. Yet, two oil-producing regions, Soyo (offshore) and Cabinda (on land) have been militarily disputed between UNITA rebels and the government.<sup>39</sup> With the UN embargo and the relative security offered by offshore oil deposits, President dos Santos was able to obtain financial and military assistance by entering into a number of contractual arrangements with major oil corporations, all accompanied by lucrative signature bonuses amounting to more than \$1 billion for 1993-1999.<sup>40</sup> During the last phase of the conflict, military expenses were the most important governmental expenditure, costing more than four times the combined expenditures for health and education.<sup>41</sup> As the government's funding possibilities increased and solidified, UNITA's deteriorated. After resuming in 1998, the conflict turned into low-intensity hostilities that were formally terminated with the signature of the Luena Accords<sup>42</sup> in the spring of 2002.<sup>43</sup>

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37. S.C. Res. 864, U.N. SCOR, ¶ 19, U.N. Doc. S/RES/864 (1993). Additional sanctions were afterwards adopted in Security Council resolutions 1127, S.C. Res. 1127, U.N. SCOR, ¶ 4(a),(b), U.N. Doc. S/RES/1127 (1997), (imposing travel restrictions on senior UNITA officials and their families) and 1173, S.C. Res. 1173, U.N. SCOR, ¶ 11, U.N. Doc. S/RES/1173 (1998) (imposing financial sanctions against UNITA).

38. See HUMAN RIGHTS WATCH, *ANGOLA UNRAVELS: THE RISE AND FALL OF THE LUSAKA PEACE PROCESS* 1-6 (1999).

39. See *CRUDE AWAKENING*, *supra* note 29, at 5.

40. See *ALL THE PRESIDENTS' MEN*, *supra* note 29, at 3, 36. For a detailed account of those bonuses, see HUMAN RIGHTS WATCH, *SOME TRANSPARENCY, NO ACCOUNTABILITY* 29-30, tbl. 7 (2004).

41. See *CRUDE AWAKENING*, *supra* note 29, at 8; cf. U.S. DEP'T OF STATE, *WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS, 1999-2000*, at 42 (2002), available at <http://www.state.gov/documents/organization/18738.pdf> (showing that Angola spent 41% of its national budget on military expenditures).

42. Formally, the *Memorandum of Understanding: Addendum to the Lusaka Protocol for the Cessation of Hostilities and the Implementation of the Outstanding Military Issues Under the Lusaka Protocol*, U.N. SCOR, U.N. Doc. S/2002/483 (2002) (signed April 4, 2002). See also the *Lusaka Protocol*, U.N. SCOR, 47th Sess., U.N. Doc. S/1994/1441 (1994).

b. *Sudan*

The civil war in Sudan,<sup>44</sup> beginning before its independence in 1956, continues to ravage the country today, despite a peace interlude from 1972 to 1983.<sup>45</sup> The country is basically divided between the North, which controls Khartoum and the government, and the South.<sup>46</sup> Civilians have been severely affected by the civil war: Since 1983, close to two million Sudanese have been killed, 4.5 million have been internally displaced, and, currently, more than one million live in exile.<sup>47</sup> Although a religious matrix is often used to explain the position of the various parties, social and economic dimensions must be factored in to develop a more textured account of the conflict.

Beginning in the 1970s, Sudanese oil was exploited by Chevron, but the company left in 1984 following attacks on its personnel and facilities.<sup>48</sup> Oil exploitation recently resumed, and the government in Khartoum now benefits from the revenues of oil wells in the south, which enable it to buy weapons and to hold coercively onto the oil exploitation and transportation facilities located therein.<sup>49</sup> From 1997 to 1999, a south-north pipeline was built by an international consortium, crossing territories where the civil war is fought.<sup>50</sup> China—whose China National Petroleum Corporation (CNPC) owns a major

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43. After the conclusion of the peace agreement, the sanctions imposed against UNITA by the Security Council were lifted. S.C. Res. 1448, U.N. SCOR, ¶ 2, U.N. Doc. S/RES/1448 (2002). On the current challenges for the maintenance of peace, see INT'L CRISIS GROUP, *supra* note 29.

44. See generally HUMAN RIGHTS WATCH, *SUDAN, OIL AND HUMAN RIGHTS* (2003).

45. See AMNESTY INT'L, AFR 54/01/00ERR, *SUDAN: OIL IN SUDAN: DETERIORATING HUMAN RIGHTS 2* (2000), available at <http://web.amnesty.org/library/Index/ENGAFR540012000>.

46. See *id.* at 2-3.

47. *Id.*; *Report on the Situation of Human Rights in the Sudan, Prepared by Leonardo Franco, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1999/15 and Economic and Social Council Decision 1999/230, 54th Sess., Agenda Item 116(c), Annex, ¶ 47, U.N. Doc. A/54/467* (1999) [hereinafter *Franco Report*]. Note that famine is a significant factor, and likely also a political tool, in the conflict.

48. See *Franco Report, supra* note 47, ¶ 76.

49. See AMNESTY INT'L, *supra* note 45, at 3-5, 11. For more details on the setting up of the consortium and notably on the involvement of the Canadian oil company Talisman, see DROHAN, *supra* note 36, at 243-89.

50. See AMNESTY INT'L, *supra* note 45, at 7-8.

part of the Great Nile Petroleum and Oil Corporation (GNPOC) consortium operating the Unity and Heglig blocks<sup>51</sup>—was involved in the construction of the pipeline and there are allegations that Chinese armed workers were involved in the displacement of local people necessitated by the construction of the pipeline.<sup>52</sup> Since coming into operation in August 1999, the pipeline has repeatedly been a direct target of attacks by rebels, and inhabitants of the oil-rich regions have been forcibly displaced by military forces in charge of securing the pipeline, making inhabitants the victims of a scorched earth policy.<sup>53</sup> While the oil concessions are not in the midst of fighting, rival parties struggle over who will get the lucrative control of securing the activities of the oil consortium.<sup>54</sup> In that vein, the Canadian company Talisman Energy, also part of the GNPOC consortium, is accused of having actively requested and obtained direct protection from the Popular Defense Force, a government-organized militia, for the conduct of its operations, and is now facing legal proceedings under the Aliens Tort Claims Act.<sup>55</sup> Similarly, CNPC contracted with the Sudanese government to obtain protection from the army against the guerrillas in the areas surrounding the Heglig and Unity wells.<sup>56</sup> The revenues from oil exploitation in Sudan are substantial: In 2000, revenues from oil exports were expected to amount to 21% of the state budget, or \$1.2 billion.<sup>57</sup> Further, some establish a connection between this enhanced flow of revenues and Sudan's subsequent military purchases.<sup>58</sup> A peace process, opened with the signature of the Machakos Protocol on July 20, 2002, gave hope that violence would cease, but there has been renewed military activity

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51. *See id.* at 7.

52. *See id.* at 14.

53. *See id.* at 5, 9; *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Sudan*, U.N. GAOR, 57th Sess., Prov. Agenda Item 111(c), ¶¶ 35-39, U.N. Doc. A/57/326 (2002); *Franco Report*, *supra* note 47, ¶ 77.

54. *Franco Report*, *supra* note 47, ¶ 79.

55. *See AMNESTY INT'L*, *supra* note 45, at 7, 14. Talisman has since sold its share in the project to an Indian company, the Oil and Natural Gas Corporation. *See Canadian Press*, *Talisman Completes Sale of Sudan Oil Interest*, *TORONTO STAR*, Mar. 13, 2003, at C6.

56. *See AMNESTY INT'L*, *supra* note 45, at 14.

57. *Id.* at 11.

58. *See id.*

since January 2003 in the oil provinces of the Upper Nile.<sup>59</sup> Illustrating the importance of oil as a revenue base for the government is the Security Council's recent threat to take economic measures against Sudan's petroleum sector if the government does not end the systematic violence in the province of Darfur.<sup>60</sup>

## B. *Oil Exploitation and Contestative Violence*

### 1. *Coups and Incentives to Seize Power*

Given the benefits attached to controlling the government in oil-wealthy states, it is not surprising that envious leaders or groups in the antechamber of power often attempt to overthrow the government in place so as to succeed it and to enjoy those benefits. Nigeria, Congo (Brazzaville), Venezuela, and Iran, to take a few examples that come easily to mind, all have experienced coups or coup attempts that can be at least partly traced to the oil-related enrichment possibilities offered in government. The 2003 overthrow of the government in Sao Tome & Principe offers a patent illustration of the close association between internal struggles for power and participation in the global economy through oil exploitation. In the late 1990s, oil reserves were discovered in the Gulf of Guinea, offshore from the tiny Sao Tome & Principe islands. President Menezes had dissolved the Parliament in January 2003 following a dispute on his authority to negotiate petroleum agreements.<sup>61</sup> He also disclosed having used donations from oil corporations for his electoral campaign.<sup>62</sup> The authors of the coup were thought to be attempting to benefit from the coming first proceeds from the sale of the exploitation rights for

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59. See AMNESTY INT'L, AFR 54/036/2003, SUDAN: EMPTY PROMISES? HUMAN RIGHTS VIOLATIONS IN GOVERNMENT CONTROLLED AREAS 4 (2003), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AFR540362003ENGLISH/\\$File/AFR5403603.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR540362003ENGLISH/$File/AFR5403603.pdf). Moreover, the Sudan Liberation Army was formed in February 2003 in Darfur, western Sudan. See *id.* at 1.

60. S.C. Res. 1564, U.N. SCOR, para 14, U.N. Doc. S/RES/1564 (2004).

61. See Jean-Phillippe Rémy, *Le Putsch de Sao-Tomé s'est Déroulé sur un Arrière-Plan d'Après Négociations Pétrolières* [*Sao-Tomé Putsch Occurred Against a Backdrop of Fierce Petroleum Negotiations*], LE MONDE, July 19, 2003, at 4.

62. *Id.*

the offshore blocks.<sup>63</sup> President Menezes returned to power shortly after the coup.<sup>64</sup>

It is arguable that, in order to consolidate their hold on power, leaders who come to power after a *coup d'Etat* in turn resort to repressive violence to compensate for their lack of legitimacy or to counter attacks thereon. The spiral of unending violence is thus activated. Nigeria and Iran exemplify the connection between seizure of power through a coup and the consolidation of power through repression.

## 2. *Oil Exploitation as a Target in Civil Wars*

The involvement of oil companies in internal violence reaches a more significant level when rebels, in order to counter the empowerment of governments that have contracted with oil corporations, directly attack oil concessions or pipelines. Then, rather than being simply part of the working conditions of a larger system that—to a certain and not insignificant degree—oil companies can claim not to control, their activities become directly involved in the dynamics of internal violence. In a sense, the defense of pipelines and of oil concessions is the material threshold that defeats the oil companies' argument that they are uninvolved in conflicts and merely carrying out commercial interaction.

Defending oil concessions and pipelines can take many forms. First, it can be undertaken by the country's armed forces as part of their general task of defense. Second, the official armed forces may specifically and contractually commit to defend the installations and assets of oil corporations. The commitment can be made generally, with the oil corporation paying for the special attention it is to receive, or might entail the dispatch of army battalions and military gear for the specific purpose of defending the corporation. This appears to be the current practice in Colombia. In 1996, British Petroleum hired a battalion (150 officers, 500 soldiers, and an elite mobile unit) from the Colombian Army for three years for \$60

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63. See Rémy, *supra* note 61, at 4.

64. *Le retour du président à Sao-Tomé marque la fin du coup d'Etat* [*The Return of the President of Sao-Tomé Marks the End of the Coup d'Etat*], LE MONDE, July 25, 2003.

million (U.S. dollars).<sup>65</sup> Also, Occidental Petroleum Corporation (Oxy) undertakes the maintenance of two army units to deter attacks by guerrillas on the Cano Limon pipeline in Colombia.<sup>66</sup> Since 1986, the pipeline has been the target of more than one thousand attacks by guerrilla groups, and in 2001 it was inoperable for 266 days due to such attacks.<sup>67</sup> Third, oil corporations increasingly contract for the defense of their concession and transportation devices with private security firms.<sup>68</sup> In Sudan, the private security firm Executive Outcome was hired to protect the oil interests of Talisman Energy, a Canadian corporation.<sup>69</sup> Another such firm, Defence Systems Ltd., was retained by private interests to protect oil fields and mines in Angola.<sup>70</sup>

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65. See Kevin A. O'Brien, *Privatizing Security, Privatizing War? The New Warrior Class and Regional Security*, in *WARLORDS IN INTERNATIONAL RELATIONS* 52, 74 (Paul B. Rich ed., 1999).

66. See GEDICKS, *supra* note 21, at 60. In April 2003, a lawsuit was filed against Oxy and one of its security contractors (Airsca) for their involvement, as part of the protection of the pipeline, in the bombing of Santo Domingo in December 1998, which killed 17 civilians. (Case filed as *Mujica v. Occidental Petroleum, et al.*, No. 03-2860 (C.D. Cal. filed Apr. 24, 2003).) The lawsuit is brought in the U.S. under the Alien Tort Claims Act. Cf. Project Underground, 8 DRILLBITS & TAILINGS 2 (Apr. 11, 2003), at [http://www.moles.org/ProjectUnderground/drillbits/8\\_03/index.html](http://www.moles.org/ProjectUnderground/drillbits/8_03/index.html) (last visited Sept. 20, 2004). Also, in September 1999, Oxy was granted a license to drill an exploratory well on U'wa ancestral territory in Colombia, despite the opposition of the local tribe. See Martin Wagner, *The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study*, 24 HASTINGS INT'L & COMP. L. REV. 491, 492-93 (2001). Occidental Petroleum's activities were conducted with the support of military and police repression in the background. See *id.* at 502.

67. See Amazon Watch, *Challenging U.S. Military Aid to Colombia* (July 2003), at [http://www.amazonwatch.org/amazon/CO/plancol/index.php?page\\_number=99](http://www.amazonwatch.org/amazon/CO/plancol/index.php?page_number=99) (last visited Sept. 20, 2004).

68. For discussions of the legal issues raised by the activities of private security firms, see *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Comm'n on Hum. Rts., 54th Sess., Prov. Agenda Item 7, ¶¶ 50, 55, U.N. Doc. E/CN.4/1998/31 (1998); CHALOKA BEYANI & DAMIAN LILLY, INT'L ALERT, REGULATING PRIVATE MILITARY COMPANIES 21-27 (2001) available at [http://www.international-alert.org/pdf/pubsec/reg\\_pmc.PDF](http://www.international-alert.org/pdf/pubsec/reg_pmc.PDF).

69. See O'Brien, *supra* note 65, at 62.

70. See *id.* at 68.

C. *The Oil Exploitation-Organized Violence Nexus: Between Plurality and Unicity*

The above survey of instances in which oil exploitation cohabits with violence can be thought to capture a plural phenomenon. From the standpoint of users of violence, oil exploitation can simply be an additional dimension to an otherwise unrelated pre-existing conflict or it can be more centrally constitutive of the conflict. Beyond variations in modalities and manifestations, oil-related violence can be approached as a more unitary phenomenon involving a common underlying mechanism.<sup>71</sup> That is, oil corporations do not simply find themselves in various situations of internal violence that are entirely external to their activities and to their impact on domestic polities. They become a means for the pursuit of local political objectives and a significant, if not central, stake in conflicts, and they are participants in the web of local interactions. From their point of view, violence appears to constitute a means—likely not fully wished for, yet a concrete condition nonetheless—for the conduct of oil exploration, extraction, and transportation activities.

Generally speaking, oil corporations do not enter into contracts or alliances with rebels controlling the area containing the oil deposits. Rather, they make sure that their exploitation is conducted with the approval of the recognized government of the country.<sup>72</sup> The extent of the investment and the technical equipment required for oil exploitation

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71. See CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 18 (2003) (making a structurally similar argument over a wider array of manifestations of organized violence).

72. In the 1990s' new paradigm of civil wars, the income generated by the exploitation of natural resources—mostly mines but also timber—either was an igniting factor in conflicts or quickly became a primary stake in them. See GREG CAMPBELL, *BLOOD DIAMONDS* 89-90 (2002); DAVID KEEN, *THE ECONOMIC FUNCTIONS OF VIOLENCE IN CIVIL WARS* 40-43 (Int'l Inst. for Strategic Studies, Adelphi Paper No. 320, 1998); see also Mats Berdal & David M. Malone, *Introduction to GREED AND GRIEVANCE: ECONOMIC AGENDAS IN CIVIL WARS* (Mats Berdal & David M. Malone eds., 2000). In those conflicts, once rebels take control over a resource-rich area, they manage to find mining or timber companies willing to exploit the mines or forest under the protection of the rebels. The oil industry is linked to civil wars in a way that differs from the mining industry. See Ross, *supra* note 15, at 350 (noting that oil exports are positively and significantly correlated with military spending, whereas mineral exports are negatively correlated to it).

makes it a long-term endeavor that would not be well served by the instability of exploiting oil in a rebel-controlled region. Moreover, the structure of the oil industry, with its limited number of key players under increasing scrutiny and its need to sell directly to the public, is less conducive to discrete collaboration with rebels than are those of the logging or extractive sectors.<sup>73</sup>

In a sense, this is a positive point. The downside is that this desire to operate with the consent of the recognized government might mean that oil corporations are prepared to tolerate a higher threshold of violence in order to maintain in place a government that is friendly to it. An oil corporation close to a repressive government risks losing its exploitation prerogatives if the government is overthrown, as a form of sanction for its support of the government. For oil corporations, the value of keeping the government in place is *ipso facto* enhanced. Moreover, although competition among oil corporations is ferocious, it does not appear generally to reach the point where rival corporations back rebels in countries where they have no or comparatively little oil interests.<sup>74</sup> There might be there a tacit code of conduct or line not to be crossed, and the contemporary practice of governments simultaneously conducting business with diverse important oil corporations might create an industry interest for stability.

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73. There has, however, been a significant diversification of the oil corporations since the 1950s domination of the Seven Sisters (Exxon, BP, Shell, Gulf, SoCal, Texaco, and Mobil). See GILL & LAW, *supra* note 2, at 256-57; see also TURNER, *supra* note 3, at 1. Unocal's decision to sell most of its domestic refineries and gas stations in 1997, although meant to free up funds for investment projects, might also indirectly constitute a way to shield the corporation from consumer pressure. See Eric Marcks, *Avoiding Liability for Human Rights Violations in Project Finance*, 22 ENERGY L.J. 301, 316 (2001).

74. There is an example where rebels and oil corporations collaborated. It can be classified neither as violence in a situation of civil war, nor as repressive violence in the sense of violence exercised by the government to contain social dissensions. The only actual instance of assistance to opposition in the violent takeover of government that I am aware of involves Elf Aquitaine. In 1997, it financially bolstered Denis Sassou-Nguesso, who headed a military dictatorship from 1979-1991 in Congo-Brazzaville, and his militia against Pascal Lissouba, the actual elected president of the country. Lissouba had entered into talks with Occidental, a rival of Elf-Aquitaine. See *Elf est poursuivie pour son soutien au président congolais Sassou Nguesso* [*Elf is Pursued for Its Support of Congo President Sassou Nguesso*], LE MONDE, Oct. 19, 2001, at 21.

More important, if enrichment opportunities are concentrated in the hands of governmental authorities, they, in turn, have a strong incentive to cling to power and to use violence to reduce all actual and potential threats to their authority (and/or main source of income). In fact, their incentive is probably stronger than that of oil corporations, which can manage to do business with another government and which benefit from the legal doctrine according to which acts of a government on behalf of the state bind future governments of that state. In response to the pursuit of these incentives, local groups that are victims of governmental violence or that recognize no legitimacy to their government will seek to protect themselves from such violence and, possibly, to use counter-violence as political or economic nuisance or as a means to overthrow the authorities in place and to capture the benefits associated with holding public office. Oil exploitation thus enhances the value of governmental office, which works as a structural incentive to resort to increasing levels of violence.

I recognize that the entanglement of the activities of oil corporations in patterns of organized violence varies in form, extent, and intensity. Yet, for the purpose of this Article, I will overlook the decidedly important question of the modalities of such involvement—whether direct use of force, employing armed forces contractually, or contracting out security to a private firm, and the extent of the resort to force in intensity and length—because they all pertain to the question of the extent and sanction of responsibility of oil corporations. I want to focus on a preliminary question, which is to understand and deconstruct the shield of unaccountability that protects oil corporations from the imposition of various sorts of responsibility, whether direct or vicarious.

### III. INTERNATIONAL LAW AND THE DIACHRONIC DOCTRINAL CONSTRUCTION OF EMBEDDEDNESS (RIGHT FORMATION) AND DISEMBEDDEDNESS (RESPONSIBILITY AVOIDANCE) OF OIL CORPORATIONS IN FOREIGN LOCALES

The schemes of oil exploitation described in the first section entail the violent enforcement of rights created or transferred conventionally by TNCs and governments on behalf of states. In this section, I examine some of the structural and doctrinal features of international law that are used to render

acceptable or defensible the enforcement of those schemes. In order to understand how international law participates in their justification, one must undertake a functional analysis of those doctrines and of the argumentative structure of which they are a part. International law is relevant in the sustenance of schemes of violent oil exploitation both as a form of justification for the means used by governments and oil corporations to carry out their desires and as a discourse that helps shape the very creation of the pursued objectives. By considering the structural impact of the international and transnational legal systems, instances of internal violence become at least partly “a function of the *opportunity structure*” in which the main actors evolve.<sup>75</sup> This indicates that one ought to consider the empowering, constraining, and constitutive impact of transnational and international law on the behavior of local groups despite the local and limited theater of violence.

Within the triad of TNC-people-government, the justification for the violence used to sustain oil exploitation is obtained by resorting to an argumentative technique whereby oil corporations position themselves as embedded in and disembedded from the same realm as the people-government dyad. The argument proceeds diachronically. With respect to contractual formation and to the rights created therein, oil corporations’ position suggests that they belong to a realm in which both the host government and its population, vicariously through it, are present. This allows oil corporations to derive automatically an entitlement to full enforcement of the rights validly created under petroleum agreements. However, when the actual enforcement of contractual rights and its modalities are at stake, oil corporations immediately take some distance and portray themselves as uninvolved or neutrally caught in a domestic political struggle. This combination allows them to claim that the rights that they hold are valid *erga omnes* and enforceable, while remaining separate from and unaccountable for the violence involved as part of the concrete conditions of their enforcement. The next two sections focus sequentially on the two prongs of this argumentative technique.

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75. See THOMAS F. HOMER-DIXON, ENVIRONMENT, SCARCITY, AND VIOLENCE 137 (1999) (using the notion of opportunity structure in the context of a study on violence caused by resource scarcities).

A. *The Instrumental Value of Sovereignty over Natural Resources in Consolidating Entitlements to Enforcement of Petroleum Agreements*

1. *The Contextual Value of Sovereignty over Natural Resources*

Prior to the actual constitution of a contractual relationship over oil exploitation, TNCs are merely holders of a freedom that does not yet translate into positive claims on oil deposits.<sup>76</sup> It is only when that freedom is exercised by contracting with the state or with a state enterprise, that the freedom is turned into actual rights.<sup>77</sup> As for state authorities, questions relative to their outward contracting capacity over oil and other natural resources fall today under the principle of permanent sovereignty over natural resources.<sup>78</sup> Given the

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76. The authority or competence of oil corporations to contract for exploration and exploitation of oil in foreign countries is rooted in the principle of freedom of contract, which is expressed transnationally as the freedom to trade. In its decision of December 12, 1996, on preliminary objections in the *Case Concerning Oil Platforms*, the International Court of Justice quoted with approval a decision of its predecessor interpreting freedom of trade as:

the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries.

Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 819 (Dec. 12). This definition was originally drafted in the case of Oscar Chinn, 1934 P.C.I.J. (ser. A/B) No. 63, at 84 (Dec. 12). Note that the French version of that quote reads *faculté*, not *droit*. *Id.* at 84.

77. To the same extent, when a TNC enters into an internationalized contract—which petroleum agreements are generally recognized to be—they thereby acquire a derivative international legal personality, characterized by its relative and functional nature. See NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW]* 648-49 (7th ed., 2002).

78. See MANNARASWAMIGHALA SREERANGA RAJAN, *SOVEREIGNTY OVER NATURAL RESOURCES* 14-38, 117-34 (1978); DOMINIQUE ROSENBERG, *LE PRINCIPE DE SOUVERAINETÉ DES ÉTATS SUR LEURS RESSOURCES NATURELLES [THE PRINCIPLE OF STATE SOVEREIGNTY OVER NATURAL RESOURCES]* 182-83 (1983); Mohamed Bennouna, *Le Droit International Relatif aux Matières Premières [International Law Relating to Raw Materials]*, 177 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW]* [R.C.A.D.I.] 103, 127-30 (1982); Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162

principle of permanent sovereignty over natural resources, Petroleum Agreements (PAs) always involve the state in which the resources are located.<sup>79</sup>

The principle of permanent sovereignty over natural resources is the outcome of a process of gestation taking place mostly in U.N. circles.<sup>80</sup> Its main expression is found in Resolution 1803 (December 14, 1962) of the U.N. General Assembly, and, although arising in the context of decolonization, it is rooted in the principle of self-determination.<sup>81</sup> The first three paragraphs of the resolution provide:

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R.C.A.D.I. 245, 269-271 (1980); George Elian, *Le Principe de la Souveraineté sur les Ressources Nationales et ses Incidences Juridiques sur le Commerce International* [*The Principle of Sovereignty over Natural Resources and Their Legal Effects on International Commerce*], 149 R.C.A.D.I. 1, 8-17 (1976). See generally PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW (Kamal Hosain & Subrata Roy Chowdhury eds., 1984); NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997). Prior to the formation of the notion of sovereignty over natural resources, there was no umbrella or unifying principle under international law. According to Professor Brownlie:

In classical international law natural resources had no place. The disposition of resources was assumed to follow the delimitation of sovereignty in spatial terms between the States. Access to resources was a question managed within the legal categories of acquisition of territory, the making of agreements, the concept of freedom of the seas, and the doctrines of intervention, so far as the last were comprehensible.

Brownlie, *supra*, at 253.

79. Even when the oil corporation is not conducting business directly with the state, the latter is present as an occult party through a state-owned enterprise. I will not venture to distinguish for the purposes of this article between the various types of Petroleum Agreements, such as concession, participation (joint ventures, production sharing agreements), and association (joint-operating company) agreements. See A.Z. El Chiati, *Protection of Investment in the Context of Petroleum Agreements*, 204 R.C.A.D.I. 9, 50-57 (1987).

80. See G.A. Res. 1515, U.N. GAOR, 15th Sess., Supp. No. 16, 948th plen. mtg., at 9, U.N. Doc. A/4684 (1960); G.A. Res. 1314, U.N. GAOR, 13th Sess., Supp. No. 18, 788th plen. mtg., at 27, U.N. Doc. A/4090 (1958); G.A. Res. 626, U.N. GAOR, 7th Sess., Supp. No. 20, 411th plen. mtg., at 18, U.N. Doc. A/2361 (1952); G.A. Res. 523, U.N. GAOR, 6th Sess., Supp. No. 20, 360th plen. mtg., at 20, U.N. Doc. A/2119 (1952).

81. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, 1194th plen. mtg., at 15, U.N. Doc. A/5217 (1962). The principle of permanent sovereignty over natural resources came to be associated with the movement for a New International Economic Order. See G.A. Res. 2158, U.N. GAOR, 21st Sess., Supp. No. 16, 1478th plen. mtg., at 29, U.N. Doc. A/6316 (1966).

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.<sup>82</sup>

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82. G.A. Res. 1803, *supra* note 81. Subsequently to resolution 1803, the *Charter of Economic Rights and Duties of States* was adopted in 1974. G.A. Res. 3281, U.N. GAOR, 29th Sess., 2315th plen mtg., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974). In that document, permanent sovereignty over natural resources is clearly enshrined in the wider concept of economic sovereignty. Chapter II, Article 2 reads:

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:
  - (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
  - (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate

Other statements of the principle can be found in the International Covenant on Civil and Political Rights,<sup>83</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>84</sup> and the African Charter on Human and Peoples' Rights.<sup>85</sup> Despite much controversy over practical questions and the difficulty of identifying clear corollaries to the principle of perma-

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with other States in the exercise of the right set forth in this subparagraph;

- (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

*Id.* ch. II, art. 2.

83. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, Part I, Art. 1, ¶¶ 1-3, U.N. Doc. A/6316 (1966).

84. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Part I, Art. 1, ¶ 2, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976). Article 1, paragraph 2 of both Covenants reads:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

*Id.*

85. *African (Banjul) Charter on Human and Peoples' Rights* art. 21, ¶¶ 1-3 (June 27, 1981), available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf).

Article 21 of the African Charter provides:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interests of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.

*Id.*

nent sovereignty over natural resources, it is no longer tenable to deny the principle legal character.<sup>86</sup> Questions regarding the fate of pre-existing contracts in instances of state succession, the power to nationalize, what constitutes the legal standard of compensation (fair and adequate or full), and the governing law originally attracted by far the most attention.<sup>87</sup>

It is clear that the treatment of legal issues concerning natural resources through the prism of permanent sovereignty is a legacy of the decolonization era. It translates the assertive discourse of decolonized states that tried to rectify or counter pre-existing vectors of economic domination into legal con-

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86. See Brownlie, *supra* note 78, at 270; see also ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 141-42 (1994) (making a similar point to that of Brownlie, but identifying broad streams of the concept of the permanent sovereignty over national resources that "settled down" regarding unfair agreements, expropriation, and compensation); ROSENBERG, *supra* note 78, at 373; Mohammed Bedjaoui, *Rémanences de Théories sur la "Souveraineté Limitée" sur les Ressources Naturelles* [*Residual Theories on Limited Sovereignty over Natural Resources*], in NEW DIRECTIONS IN INTERNATIONAL LAW 63, 65 (Rafael Gutiérrez et al. eds., 1982) (writing on the right of peoples to dispose of their natural resources as an imperative principle of international law). Yet, there were, earlier on, opposite opinions in this regard. See Jean Lamodière, *Les Dahirs Marocains du 2 Mars 1973 Portant Reprise des Terres et Marocanisation de Certaines Activités Économiques et le Droit International* [*The Moroccan Dahirs of March 2, 1973, Marking the Repossession of Lands and the Moroccanization of Some Economic Activities and International Law*], 101 JOURNAL DE DROIT INTERNATIONAL [J.D.I.] 323, 326 (1974) (arguing that it is impossible to assert firmly that people's rights over their natural resources have legal character).

87. It is beyond the scope of this article to enter into the marrow of those disputes. On the impact of state succession and the theory of acquired rights, see generally D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (1967); Maurice Flory, *Décolonisation et Succession d'Etats* [*Decolonization and the State Succession*], 12 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] 577 (1966); D.P. O'Connell, *Recent Problems of State Succession in Relation to New States*, 130 R.C.A.D.I. 95 (1970). On nationalization/expropriation and the standard of compensation, the literature is very abundant. See, e.g., THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (Richard B. Lillich ed., 1972); Rosalyn Higgins, *The Taking of Property by the State: Recent Development in International Law*, 176 R.C.A.D.I. 259 (1982); S. Petrén, *La Confiscation des Biens Étrangers et les Réclamations Internationales Auxquelles Elle Peut Donner Lieu* [*The Seizure of Foreign Goods and the Resulting International Claims*], 109 R.C.A.D.I. 492 *passim* (1963). On the governing law applicable to petroleum agreements, see Ahmed Sadek El-Kosheri, *Le Régime Juridique Créé par les Accords de Participation dans le Domaine Pétrolier* [*The Legal Regime Created by Joint Agreements in the Petroleum Sphere*], 147 R.C.A.D.I. 219, 299-307 (1975).

cepts.<sup>88</sup> Judge Rosalyn Higgins writes that the concept of permanent sovereignty over natural resources has “settled down” and overcome its original controversy over time, and she appraises it in terms of its contextual functionality:<sup>89</sup>

It now stands for norms that command a significant common consensus, which I would summarize thus: states have a very special position in regard to their own resources. If, in their infancy as independent states, they assumed obligations out of all line with commercial realities, and if such arrangements were made for very long periods of time, tribunals look sympathetically at ways to liberate the state from the disadvantageous contract . . . .

At the same time, nationalizations do require compensation, and will only be lawful if they are not discriminatory and serve a public purpose. The concept of permanent sovereignty over natural resources does not leave a state free to ignore contracts it has voluntarily entered into.<sup>90</sup>

If we push this analysis further, we can identify a threefold function undertaken by states under the umbrella of their sovereign prerogatives over oil, the first two of which are internal to the contractual relationship between states and oil corporations. First, states act as public authorities regulating the conditions under which agreements of that sort are concluded and carried out. Second, states are partners in a commercial endeavor and, as such, beneficiaries of it.<sup>91</sup> This dual role is fundamental in understanding the concrete usefulness of some legal developments related to PAs, as they address given

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88. For a good overview of the early assertive takings of Western property, such as the nationalization of the Anglo-Iranian Oil Company by the Mossadegh government in Iran and the agrarian reform in Guatemala nationalizing unexploited land of the United Fruit Co., see ROSENBERG, *supra* note 78, at 100-16. In the case of Latin American states, the prior realization of statehood did not translate into the local acquisition of the economic means of development. Assertive actions in that respect were therefore taken at the same time as in more recently decolonized states.

89. HIGGINS, *supra* note 86, at 141.

90. *Id.* at 141-42.

91. Following decolonization, the importance of the regulatory part of the role of the state has generated a debate on the nature of Petroleum Agreements and on the nature of the rights thereby created to the benefit of oil corporations. See El Chiati, *supra* note 79, at 36-38.

sets of interests. In its regulatory role, the state seeks to ensure the protection of public goods, whereas its position as party to a business venture creates an interest to make the oil exploitation as financially successful and rewarding as possible. The third function is indirect and externally oriented: It consists in the conferral of a valid and opposable title to the oil extracted to whomever the state contracts with (i.e., a sort of *erga omnes* property title). The scenarios exposed in Part II convey the impression of a dominance of the second and third functions to the detriment of the regulatory role of the state.

2. *Operating in a Representational Gap: Turning Peoples' Sovereignty into the Government's Privilege*

The statist approach to the principle of sovereignty over natural resources neglects a nuance that appears crucial in the light of contemporary problems: This prerogative belongs to the people, not to the state, nor to its governmental authorities.<sup>92</sup> Resolution 1803 and subsequent texts are consistent and clear in making such attribution. Part of the problem that we have with unmasking the violence involved in oil exploitation schemes arises out of the over-focus on permanent sovereignty and of the customary non-insistence on the peoples prong of the legal institution. The full thrust of the dynamic underlying PAs and their enforcement should not be confined to the invocation of the principle of sovereignty over natural resources, but must take account of who is to exercise it.

As public prerogatives are always exercised through a form of representative body, there is a structural representational gap between peoples, who are the nominal and residual holders of the prerogatives over natural resources, and governmental representatives, who actually exercise the prerogatives. In international law, the gap between government and people is rarely given operative value. For obvious and defensible reasons, governments are presumed to act on behalf of their state, which is the politico-legal form meant to provide its population with a vast array of social goods. Yet, there is no doubt that this structural feature of representation can be exploited: Between the ideal or public use of the prerogatives attached to sovereignty over natural resources and the actual use of those

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92. See James Crawford, *The Rights of Peoples: "Peoples" or "Governments"?*, in *THE RIGHTS OF PEOPLES* 55 (James Crawford ed., 1988).

prerogatives by the governing elite, there is always a possibility of *détournement* taking place in the gap inherent in structures of representation.<sup>93</sup>

In order to understand better the violent schemes of oil exploitation, one must, therefore, take into account not only the statist concept of sovereignty, but also the prerogatives and interests of more fragmentary groups operating in the interstices of the concept. In that sense, international prerogatives over natural resources recognized under international law do not impact strictly on a state's dealing with aliens, but provide a form of empowerment within the state. What operates as a state prerogative to be exercised vis-à-vis other actors in the international society can be recast simultaneously as an empowering privilege held vis-à-vis other groups within that state.<sup>94</sup>

In other words, the principle of sovereignty over natural resources bears a double orientation. In that vein, the philosopher Thomas W. Pogge writes of the "international resource privilege,"<sup>95</sup> which we could define as the *recognition enjoyed by a group in power in a state to freely dispose of that state's natural resources on its behalf and to create a valid and opposable title thereto in the hands of the purchaser*. This more functional analysis of the sovereign prerogatives over natural resources illustrates better how the legal power that it gives contributes to the perpetuation of cycles of violence. Pogge cleverly unwraps the

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93. See Moisés Naím, *The Corruption Eruption*, in 1 THE POLITICS OF CORRUPTION 248 (Robert Williams ed., 2000) (arguing that corruption can only exist when an agent is given authority to allocate the resources of a principal).

94. See CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM 19 (Cambridge Studies in Int'l Relations No. 50, 1996).

The effect of these provisions was to enhance the power of those individuals who gained the right to 'represent' states in the international community. Those who formed the government of an internationally recognised state were able to make alliances with other states, and to use their own domestic statehood as a bargaining counter with which to attract resources, such as weapons or development aid, which could enhance their ability to retain domestic control.

*Id.*

95. In Pogge's words, "[t]he international resource privilege, then, is the power to confer globally valid ownership rights in the country's resources." Thomas Pogge, *Priorities of Global Justice*, 32 METAPHILOSOPHY 6, 21 (2001).

pernicious logic of the international resource privilege in poor states:

Whoever can take power in such a country by whatever means can maintain his rule, even against widespread popular opposition, by buying the arms and soldiers he needs with revenues from the export of natural resources (and funds borrowed abroad in the country's name). This fact in turn provides a strong incentive toward the undemocratic acquisition and unresponsive exercise of political power in these countries. The international resource privilege also gives foreigners strong incentives to corrupt the officials of such countries, who, no matter how badly they rule, continue to have resources to sell and money to spend. We see here how the local causal chain—persistent poverty caused by corrupt government caused by natural-resource wealth—can itself be traced back to the international resource privilege. Because of that privilege, resource-rich developing countries are more likely to experience coup attempts and civil wars and more likely also to be ruled by corrupt elites, so that—despite considerable natural wealth—poverty in these countries tends to decline only slowly, if at all.<sup>96</sup>

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96. *Id.* The complete functionality of the international resource privilege must also take account of how it permits its holder to behave vis-à-vis its contractual partners. The privilege attached to state office regarding natural resources allows it to play TNCs and the host state's population against each other. At the stage of negotiations or contract formation, state authorities still have an interest in representing themselves as the guardians of the public good of their country and in pitching themselves in opposition to TNCs. That is a way to make the negotiations as fruitful as possible and to increase potential income from the petroleum agreements. Once the contract is formed however, governmental authorities can disregard the public good of its population or part of it and join TNCs in taking action to ensure that oil exploitation from which they benefit is shielded from social pressures of all sorts. At this stage, and still through the notion of sovereignty over natural resources, mutually beneficial partnerships between the state or a state-owned corporation—under the control of high governmental officials—and a TNC are formed. Sovereignty can be used as power vis-à-vis TNCs during a first phase and be turned into sovereignty-as-discretion vis-à-vis its internal constituency to protect and enforce the result of the contractual arrangement that was made with such TNCs. The possibility to use and disregard those prerogatives is a form of what Stephen Krasner has called "organized

### 3. *The Functional Value of Sovereignty over Natural Resources for Oil Corporations*

Issues regarding the validity and enforceability of pre-existing concession agreements following the independence of colonies left a deep imprint on the fabric of international law and on the main preoccupations of jurists with respect to petroleum contracts. It is from the perspective of its contextual functionality that the value of the principle of sovereignty over natural resources should be appraised. In the decolonization frenzy, governments of newly born states were deemed inherently representative (or more representative at least) of their population without the need to gain the claimed legitimacy.<sup>97</sup> It was then possible and justifiable to neglect the peoples/government divide on the ground that the main clash of interests and location of injustices was between that dyad (taken as an entity) and foreign entities, governmental or corporate. Under this conceptual framework, sovereignty over natural resources was portrayed and predominantly functioned as an outwardly oriented legal institution.

But, progressively, it became clear that it also entailed an internal dynamic of empowerment, which remained obfuscated by an over-insistence on a fictional government/people unity. The alliance opportunities linked to the exercise of sovereignty over natural resources provide important means capable of satiating greediness and of consolidating power internally. It thus sheds light on the realignment of interest between oil corporations and government authorities.<sup>98</sup>

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hypocrisy." STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 24 (1999). On forms of cooperation (associative or contractual) between governments and oil corporations, see generally Charles Leben, *Les Modes de Coopération entre pays en Développement et Entreprises Multinationales dans le Secteur de la Production des Matières Premières Minérales* [*Modes of Cooperation Between Developing Nations and Multinational Corporations in the Production of Raw Mineral Materials*], 107 J.D.I. 539 (1980). In the oil industry, Leben notes that cooperation mostly took one of two contractual forms: petroleum operation contracts or industrial cooperation contracts. *Id.* at 577.

97. See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 17-18 (1990); see also CLAPHAM, *supra* note 94, at 19.

98. In that respect, we have thus moved away from the paradigm of hostile dealings between Third World governments and TNCs. Leben, *supra* note 96, at 541-42. On international law's dearth of tools to deal with antagonistic coercive relations between those governments and TNCs, see Detlev

In this context, sovereignty over natural resources loses its function as an instrument of contractual adaptation. Whereas sovereignty over natural resources was the foundation of the *response* to the claims for integral respect of contractual rights granted to foreign corporations, it now seems to be instrumental in ensuring the intangibility of the contractual relationship. In the same vein, the target of the argument has changed. It is no longer aimed at countering claims by TNCs or their supporting host states, rather it is framed to rebut external attacks on the contract, such as those from groups unrepresented in governments. So, we have moved from a claim that contracts *can* be rewritten, cancelled, or modified according to the principle of sovereignty over natural resources, to a position where, because the contract is a manifestation of sovereignty, the contract *cannot* or *should not* be altered and must be acted upon.<sup>99</sup>

Originally, little attention was paid to the impact on groups structurally excluded from the power generated by contracts concluded as the exercise of the sovereign prerogative of a state over its natural resources.<sup>100</sup> It was simply assumed that indigenous governments would act in the interest of their population on issues opposing them to foreign investors. Two consequences of operating under the principle of sovereignty over natural resources—so trivial during the first decades of the decolonization period that they were hardly ex-

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F. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L. L. 17, 22-29 (1978).

99. To use El Chiati's analytical lexicon, whereas the sovereignty of the state was previously opposed to the autonomy of the will to ensure contractual evolution and adaptation over stability, both institutions now intermingle to obtain contractual stability—if not rigidity—over adaptations called for by groups *de facto* suffering from the oil exploitation. See El Chiati, *supra* note 79, at 77-167.

100. Judge Higgins hinted at the necessity of looking at perspectives other than those of the immediate parties to the contract when she asked:

Further, how can one ensure that, notwithstanding the contractual arrangements with the foreign investor, the proper sovereign concerns of a government are met—that is to say, concern for health, safety, and regulatory standards; for ensuring that the local population do not suffer shortages on the one hand, and secure proper economic benefits from their natural resources on the other?

HIGGINS, *supra* note 86, at 139.

plicity articulated—are now given disproportionate importance.

First, through formal governmental exercise of sovereignty over natural resources, TNCs are able to acquire rights that are opposable to all, including to the local population affected by the exploitation of resources. During the decolonization era, the argumentation on the validity of pre-existing oil exploitation schemes was framed on both sides in terms of consent or free will.<sup>101</sup> One of the disregarded consequences of this structure of argumentation was that, whenever the host state and the foreign corporation were in agreement, the contract was deemed valid and fully enforceable, not only externally, but also domestically. The location of the battle of interest was primarily intracontractual. In that context, formal state consent was regarded as a guarantee that the polity was protected or treated justly by alien businessmen (or it was at least a better guarantee than present under colonial rule). It was not even necessary to resort to the notion of permanent sovereignty over natural resources to uphold those deals, but doing so could only buttress their validity and enforceability.

When oil corporations and governments argue that they hold rights or bear responsibility for the enforcement of rights under a validly formed petroleum agreement, they benefit from this unarticulated corollary of sovereignty over natural resources, even in spite of a situation of clear exploitation of the representational gap. The fact that the contract is not only a convention among signatories, but also an exercise of sovereign prerogatives by a competent state enhances its solidity. Given the past resistance of TNCs and their home states to solid assertions of the principle of sovereignty over natural resources by developing countries, invoking it in this different context almost appears as a concession. By resorting to undeveloped yet implicit argument that PAs are valid and enforceable because they constitute a proper and opposable act of sovereignty, TNCs make enforcement of their own contractual

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101. Whereas TNCs and home states relied on theories of implied or constructed consent—based on pre-existing consent or on consent to the succession to obligations based on the willful entry into the international society—newly independent states argued in terms of actual consent and their ability to override or disregard that given on their behalf during the colonial administration.

rights seem obligatory. In other words, the argument is endowed with the strength and authority of a party conceding the righteousness of an argument originally framed against itself.<sup>102</sup> The ghosts of imperialism and colonialism also favor deference to formal exercises of sovereignty over natural resources. Given the abuses of the past, externally-made claims questioning the appropriateness or savvy of a recognized government's use of the prerogatives of statehood run the risk of being radicalized and, therefore, immediately dismissed as a plea for neo-colonialism.

The second way in which the principle of sovereignty over natural resources participates in the maintenance and justification of violent oil exploitation schemes is by supporting automatic enforceability of rights under validly created PAs. The same argument of contextual functionality applies here as well: Sovereignty over natural resources was originally meant to counter claims of automatic enforcement rather than to justify or to strengthen those claims. When there was actual agreement between the host government and the oil corporation, the rights, validly created, automatically and unconditionally translated into enforceability because the domestic aspect of enforcement was subsumed into its external dimension. The operation was synchronic. Oil corporations could claim that they were entitled to have the authorities in place taking enforcement measures—which in practice might involve resorting to force and military protection—to ensure that their contractual rights were respected.

By relying on this formal validity of violence-fueling exploitation schemes, sovereignty over natural resources leads us to uphold principles regardless of their consequences when projected onto a radically different set of circumstances. When we factor in the representational gap transforming people's sovereignty into governmental privilege, the automatic enforcement corollary endorses one of two possible expressions of sovereignty over natural resources: It endorses that of the government, through the PA, rather than that of the people, through their manifested opposition or resistance to the

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102. This step can be seen as the last step in the erosion of opposition to the principle, thereby enhancing its obligatory nature. Georges Abi-Saab uses the notion of *degré d'obligatorité* [degree of obligatoriness]. ROSENBERG, *supra* note 78, at 146.

oil exploitation project (or to its conditions). In other words, the international resource privilege of the governmental authorities structurally eclipses the people's sovereignty over natural resources.<sup>103</sup>

In that context, blind reliance on the sanctity of the principle of sovereignty over natural resources can protect patterns of abuses parading under the costume of state autonomy. Absent a close look at the display of interests, the ethos of sovereignty over natural resources consolidates the displacement or externalization of coercion from among the immediate contractual parties—TNCs and governmental authorities—to parties external to the so-conceived contractual relationship.

### B. *Structural Divides of International Law and the Construction of Responsibility Avoidance for Enforcement Activities*

Once the case is made for by-the-book, formal obtainment of rights under PAs, with the two important consequences of opposability to all, including local peoples, and automatic enforceability, oil corporations rely on the structural divides of international law to counter demands for accountability and for the recognition of responsibility for abuses in the strict enforcement of such rights. Commercial neutrality is invoked to detach oil corporations from the violence of the rights that they enjoy. This section 1) examines the shielding arguments raised by oil corporations; 2) dissects the obfuscating role of neutrality; and 3) discusses the positive impact defense to which oil corporations resort in order to justify their decision not to withdraw from particular problematic situations.

#### 1. *Oil Corporations' Self-Proclaimed Neutrality*

The discourse of oil corporations regarding the violence-fueling character of their activities is premised on a general position of neutrality. Underlying this position are positive and normative assertions of their aloofness, encapsulated in statements emphasizing their political neutrality.<sup>104</sup> However,

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103. If sovereignty over natural resources qualifies as a right of peoples, the *people* side of the qualification should be given greater legal operative value. See Crawford, *supra* note 92, at 64.

104. See, e.g., TOTALFINAELF, SHARING OUR ENERGIES: CORPORATE SOCIAL RESPONSIBILITY REPORT, 2002, at 85, available at [http://www.totalfinaelf.com/ho/en/csr/pdf/CSR2002\\_en.pdf](http://www.totalfinaelf.com/ho/en/csr/pdf/CSR2002_en.pdf); Unocal, *Business and Human Rights*, at

there are two modifying caveats dealing with the specific question of use of force.

The first caveat is built on a distinction between oil corporations and governments and is meant to sever their activities and the ensuing responsibility. Oil corporations deny resorting to force themselves and they seek to distance themselves from the enforcing authorities.<sup>105</sup> They promptly deflect criticisms regarding their role in the use of violence by identifying governments as the ultimate authority responsible for maintaining order and security. Total's statement exemplifies this approach:

The oil and natural gas contracts signed by TotalFinaElf, in compliance with host country legislation, are consistent with law and order measures that assign responsibility for the security of people and property to the host country.

In all cases, TotalFinaElf is directly responsible for the security of people and property within the perimeter assigned to us. For this, we hire security firms that respect the principles set out in the Code of Conduct. Outside this perimeter, the local forces of order are responsible for security.

Although the responsibilities are clearly defined, implementation entails dialogue between TotalFinaElf and the local authorities, if only to prevent misunderstandings or incidents and to better ensure the protection of people and property.<sup>106</sup>

Strategies whereby such distance is asserted involve invoking absence of contractual arrangement with the government

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<http://www.unocal.com/responsibility/humanrights/hr4.htm> (last visited Apr. 2, 2004).

105. See, e.g., Shell, *Human Rights*, at [http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/issues\\_dilemmas/human\\_rights/zzz\\_lhn.html&FC3=/Nigeria/html/iwgen/issues\\_dilemmas/human\\_rights/dir\\_huminnig\\_2703\\_0951.html](http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/issues_dilemmas/human_rights/zzz_lhn.html&FC3=/Nigeria/html/iwgen/issues_dilemmas/human_rights/dir_huminnig_2703_0951.html) ("We will neither use force, nor request its use to suppress demonstrations by peacefully protesting communities, even if production is disrupted. Dialogue to resolve the underlying problems—not force—is the answer in such situations.") (last visited Sept. 21, 2004).

106. Total, *Challenging Environments: Political Non-Interference and Neutrality*, at <http://www.total.com/ho/en/csr/communautes/index.htm> (last visited Apr. 2, 2004).

on the provision of security,<sup>107</sup> compliance with legal procedures in effect in the country,<sup>108</sup> or, more generally, autonomy of the government to deal with security issues and, consequently, incapacity to control the security policy.<sup>109</sup>

The second caveat to the initial position is oil corporations' reliance on the distinction between legitimate, or defensive, forms of violence and proactive forms. Oil corporations distinguish peaceful and lawful protest from local criminality, lawlessness, sabotage, and violence and invoke the legitimacy of policing the latter. For Shell:

[T]here is a difference between peaceful protest by a community (where a large number of people in that community support the non-violent action) and criminality (or lawlessness) by groups of individuals. As in any other part of the world, the government has a duty and an obligation to uphold the rule of law—whilst at the same time respecting the human rights of its people. In areas where armed crime and lawlessness are widespread, appropriate policing is required.<sup>110</sup>

## 2. *The Functionality of Neutrality*

At the time of enforcement, neutrality plays two roles. First, it works as a conceptual matrix that blurs the factual connection between the oil extraction and transportation activities and the use of violence. Second, as a consequence of the first role, it empowers corporations through a process of re-

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107. See, e.g., BP, *Commitment to Voluntary Principles in Algeria* (2002), at [http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/global\\_assets/downloads/A/Algeria\\_Applying\\_voluntary\\_principles\\_2002.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/A/Algeria_Applying_voluntary_principles_2002.pdf) (last visited Apr. 2, 2004).

108. See, e.g., TOTALFINAELF, *supra* note 104, at 86.

109. See, e.g., TALISMAN ENERGY, 2002 CORPORATE RESPONSIBILITY REPORT 8 (2002), available at <http://www.talisman-energy.com/pdfs/TLM02CR.pdf>.

110. See Shell, *Security in Nigeria*, at [http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz\\_lhn7\\_1\\_0.html&FC3=/Nigeria/html/iwgen/issues\\_dilemmas/security/dir\\_securenig\\_2703\\_1034.html](http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz_lhn7_1_0.html&FC3=/Nigeria/html/iwgen/issues_dilemmas/security/dir_securenig_2703_1034.html) (last visited Apr. 2, 2004). Shell has even started to take legal action against people involved in sabotage. See Shell, *Shell's Stand Against Corruption*, at [http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz\\_lhn7\\_6\\_2.html&FC3=/Nigeria/html/iwgen/issues\\_dilemmas/security/corruption/dir\\_agacorru\\_2703\\_1040.html](http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz_lhn7_6_2.html&FC3=/Nigeria/html/iwgen/issues_dilemmas/security/corruption/dir_agacorru_2703_1040.html) (last visited Sept. 20, 2004).

sponsibility avoidance, permitting the upholding of unaltered rights.

a. *Neutrality as a Conceptual Impediment to the Appraisal of the Connectedness of Oil Exploitation and Systemic Violence*

Neutrality is a way to insist on the separation of oil corporations and governments as quasi-self-sufficient entities, the former concerned with trade, the latter with political order. While there is no denying that each enjoys a sphere of autonomy and a distinct existence, neutrality can be thought to impede our capacity to assess the concrete entanglement of both forms of activities and of their mutual instrumentality.

Let us start from the perspective of the local parties involved in acts of coercion and violence: The government and the army, or, increasingly, private security firms acting as a *de facto* army, and opposition groups, armed or not. For the former group, oil corporations and the commercial relations that they entertain afford concentrated enrichment possibilities and the means to maintain their economic and political positions. To the extent that states offer patrimonial opportunities that find no equivalent in the private sector, the value of the acquisition and preservation of governmental office is enhanced. The combination of concentrated enrichment opportunities in the hands of the ruler's network and the absence of alternative channels of enrichment (notably for rival leaders)<sup>111</sup> means that elites will often feel insecure and, consequently, hasten to enrich themselves once in power.<sup>112</sup> It also explains the equation of governmental interests with corporate ones, which can translate into the instrumentalization of governmental powers for the promotion of corporate ends.<sup>113</sup>

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111. Chabal and Daloz make this point clearly when they write: "It is, therefore, comprehensively useless to be an opposition politician if the opposition has no access to the means which its members need and expect." PATRICK CHABAL & JEAN-PASCAL DALOZ, *AFRICA WORKS* 56 (1999).

112. Béatrice Hibou, *The "Social Capital" of the State as an Agent of Deception*, in *THE CRIMINALIZATION OF THE STATE IN AFRICA* 69, 91 (Jean-François Bayart et al. eds., Stephen Ellis trans., 1999).

113. Also telling of the close link between military action and the setting of exploitability conditions for Shell is the following leaked note from a local high army officer of the Nigerian Army: "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence . . . . Recommendations: Wasting operations during

For people excluded from the circles of power, oil corporations are either the direct source of dissatisfaction or complicit with the government. The strategy against oil corporations can be either nuisance or the formation of an alliance with those corporations, which generally entails taking power and the economic benefits associated with it. From this perspective, oil-violence paradigms mostly revolve around the behavior of factions of a domestic polity instrumentally reaching out to non-domestic actors to further their ambitions.

While this is undeniably partially descriptive of current manifestations of internal violence, the reversed vectorial perspective must also be taken into account: Oil corporations seek out the assistance of domestic actors for the conduct of their main activity. The territorial anchorage of oil, like other natural resources, gives its exploitation a particular dimension. TNCs must obtain and maintain physical access to a given region—which almost sounds anachronistic in an era in which the relevance of the territorial dimension of conducting business and other forms of socio-economic exchanges is eroding. If access is contested, or if their territorial presence generates opposition, the capacity of oil corporations to exploit petroleum deposits depends on the coercive imposition of access.

From the conjunction of these two perspectives, we can understand that the violence and trade dimensions are both essential to the system *as is*, and are integrated symbiotically. Of course, within this system, there is a division of tasks among various actors, but it would be misleading to confine each actor to its individual task or activity and to neglect its place in the overall scheme. In order to seize the complexity of the interactions, one must resist the temptation of drawing a clear distinction between businessmen, involved in international trade, and belligerents, involved in the use of domestic violence. A more nuanced appreciation of the various actors involved and of the role that they play in militarized oil exploitation necessitates taking into account their position as simultaneous introverted and extroverted actors. This nuanced appreciation is obscured by oil companies' reliance on neu-

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MOSOP and other gatherings making constant military presence justifiable. Wasting targets cutting across communities and leadership cadres especially vocal individuals of various groups." NAOMI KLEIN, *NO LOGO* 383 (2000) (internal quotations omitted).

trality, whether neutrality is conceived as an *a priori* or as a doctrine constitutive of the identity of oil corporations as being involved *internationally* and in *trade* activities.

Yet, the examples provided in the first section establish a link between the commercial activities of TNCs and the perpetration of violence. First, the business of the resources exploited is of paramount economic importance for the actual user of violence, be it the government or insurgents. Second, violence is targeted to ensure the continuance of the commercial endeavor in which the TNCs are major stakeholders. Third, the coincidence of the theater of repeated use of violence with the very regions where exploitation of resources takes place expresses, geographically, the intimacy of the connection between trade and violence. Fourth, that connection also stems undoubtedly out of the close involvement of TNCs—directly, through sub-contracted security services, or through social connections with governmental forces—in police and military operations aimed at protecting their concession.

Moreover, reliance on self defense or on the illegitimacy of the violence used against oil corporations plays a similarly obfuscating role. The militarization of oil exploitation is, in many respects, not an exceptional state of affairs, but an undesirable state of normalcy. The current levels and forms of violence appear to be a price that TNCs and governments are willing to pay in order to maintain the terms of the business and to silence social requests and pressures. In this sense, the discourse of political neutrality or aloofness vis-à-vis local conflicts becomes an intrinsically political position that accepts or normalizes TNCs' instrumentalization in the conflict (on the side of the government), in exchange for an instrumentalization of the activities of local stakeholders for the sake of conducting business under such conditions.

Finally, it seems unduly formalistic to label forms of opposition to the presence and activities of oil corporations as illegitimate, while entitling/legitimizing a violent response, without taking into account the concrete conditions in which this presence and those activities take place. Qualifying the violence beneficial to oil corporations as a mere response to illegitimate and illegal initial violence neglects its entanglement in a dialectic of violence that blurs the legitimacy normally associated with governmental action. When human rights viola-

tions associated with major oil exploitation projects—forced displacement, use of physical violence, starvation, environmental degradation, poor labor conditions—and the triggering of violent opposition are integrated in the picture, what is presented as the defense of property rights against such opposition or as the policing of criminals can easily be recast as a state- and corporate-backed attempt to suppress human rights claims.

b. *Neutrality and the Atrophy of the Sphere of Responsibility*

What underpins the position of oil corporations is a very instrumental use of the international/domestic, public/private, and war/trade divides that structure international law, so as to shape differently the spheres of rights and responsibilities.<sup>114</sup> International law's conceptual structures thus work as an impediment to the appraisal of the connection between violence and trade by intuitively locating the former in a domestic, public, and political sphere and the latter in a transnational, private (or quasi-private), and economic realm. International economic law empowers oil corporations vis-à-vis foreign governments and their internal polity by justifying the validity and enforceability of contractual and property rights in foreign locales. Public international law imposes limits on the use of force, but it mostly deals with states or non-statal military groups.<sup>115</sup> By portraying themselves as merely conducting trade—understood as an inherently peaceful activity—in a location which is simultaneously a theater of violence, oil corporations are, in a way, re-enacting the claim of neutral maritime traders, who carved out and exploited a sphere of autonomy between war and peace.<sup>116</sup>

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114. On the public/private distinction in international law, see A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L. POL. ECON. 261 (1997); David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1 (1994); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952); B.A. Wortley, *The Interaction of Public and Private International Law Today*, 85 R.C.A.D.I. 245 (1954).

115. See IAN BROWNLIE, INTERNATIONAL LAW AND USE OF FORCE BY STATES 424-26 (1963).

116. On the idea that the law of the sea and the regime governing merchants' trade thereon played a constitutive role regarding the creation of a private sphere, see CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM 99 (G.L. Ulmen, trans.,

One can dispute the very value of commercial neutrality and depict the new violent expression of the collaboration between oil corporations and governments as a modified form of economic warfare. The structure of the law of neutrality, which imposes negative obligations on states to assist belligerents but no obligation to prevent its merchants from doing so, has been harshly criticized as creating a realm of opportunistic empowerment resting on a war fought by others.<sup>117</sup> Those criticisms are relevant to today's new paradigms. But, even if one accepts that commercial neutrality can be a generally useful institution—containing temptations to expand instrumentally the theater of violence<sup>118</sup>—it is an extra step to interpret it as shielding the activities of TNCs from scrutiny. Although merchants were freed from the tendency of belligerent states to take a totalizing vision of their war thanks to the regime of classical maritime neutrality, there remained an internal logic to neutrality that limited some abuses and the extent to which one could instrumentalize the war of others for personal profit.<sup>119</sup> For instance, it is noteworthy that the law of maritime neutrality encompasses doctrines meant to sanction abuses of neutral status, thus limiting the scope of what can be considered normal trade when such trade impacts on the capacity of belligerents.<sup>120</sup> The fact that the activities of merchants conducting neutral trade could be sanctioned by either belligerent, endowed with equal legitimacy and recognition and with more power than individual merchants, worked as a structural check against abuses. Given the different posi-

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2003) (noting a “historical and structural relation between such spatial concepts of free sea, free trade, and free world economy, and the idea of a free space in which to pursue free competition and free exploitation”). On neutrality, see generally 4 PHILLIP C. JESSUP, *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW* (1936).

117. See JESSUP, *supra* note 116, at 20-23; see also JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 451-54 (2d ed., 1959) (providing a history of this law).

118. See JESSUP, *supra* note 116, at 212-13.

119. See 9 J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 121 (1992).

120. Examples include the law on limitations of general maritime commerce and on contraband, blockade, and unneutral services. See 1 PHILIP C. JESSUP & FRANCIS DEÁK, *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW* 50-123 (1935); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 457-521 (1954).

tioning and empowerment of governments and local groups, such mechanisms cannot be immediately replicated to temper abuses accompanying the activities of oil corporations. Under such circumstances, neutrality becomes an overly empowering doctrine that institutionalizes responsibility avoidance.

All of this suggests that oil corporations unduly benefit from the conception of trade as an inherently peaceful activity. The political neutrality of trade and traders acts as a shield against the perception that oil exploitation is intertwined with patterns of organized violence. Its resilience is such that it imposes upon the victims of such violence, who are structurally voiceless in international affairs,<sup>121</sup> a heavy burden in fighting against more resourceful and better institutionally accepted parties, as well as a legal discourse that remains *a priori* oblivious to their plight.

### 3. *The Positive Impact Argument*

Another argumentative technique of oil corporations is to co-opt the human rights discourse in response to naming and shaming campaigns. Oil corporations not only consider themselves uninvolved in acts or patterns of local violence and, consequently, not responsible for human rights violations thereby committed, but also portray the general impact of their activities on human rights as positive. For instance, Total used the positive impact argument, in rather general terms, to justify its continued commercial activity in Myanmar:

But over and above the imperatives of a long-term industry, TotalFinaElf feels that it is preferable to stay, insofar as our presence contributes to a positive change in social practices in the country, for four main reasons. First, our presence has a direct, tangible impact on employees and local communities. Second, we can set an example. For instance, the introduction of new practices in regions that are often isolated from the world offers new points of comparison and benchmarks and can facilitate dialogue promoting a degree of opening. Third, through our operations, we are an influential stakeholder in local life.

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121. For a discussion of the inadequacy of international structures to deal with groups claims, see Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992).

As a result, we can share points of view when fundamental ethical criteria are at issue, without becoming involved in internal politics. Lastly, our presence also offers an option for appeal or mediation to people in difficulty who would not otherwise have the means to make their voices heard.<sup>122</sup>

Oil corporations increasingly invoke public statements or private interventions on specific political problems in their host countries as a proof of their good corporate citizen status and as a way to distance themselves from unsavory regimes. TNCs thus claim to be embedded enough into the local dynamics to derive some credit from positive interventions in the government/people confrontations but to remain aloof enough to bear no responsibility for the excesses engendered by such confrontations.<sup>123</sup>

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122. Total, *Challenging Environments: Should We Stay or Go?*, at <http://www.total.com/ho/en/csr/communautes> (last accessed Apr. 2, 2004); see also TOTALFINAELF, YADANA: AN INDUSTRIAL INVESTMENT PROJECT IN MYANMAR 3 (2002) (claiming that the “socio-economic program accompanying the [Yadana] project has brought appreciable economic and social benefits to those communities”), available at [http://www.total.com/ho/en/library/finance/pdf/da/2002/myanmar/myanmar\\_GB.pdf](http://www.total.com/ho/en/library/finance/pdf/da/2002/myanmar/myanmar_GB.pdf); Unocal, *Human Rights and Economic Engagement* (qualifying the Yadana project as a “model of corporate responsibility in a developing country”), at <http://www.unocal.com/responsibility/humanrights/hr5.htm> (last visited Apr. 2, 2004).

123. The careful drafting of major oil corporations’ internal codes of conduct provide telling illustrations of the dichotomous approach to their portrayal of oil corporations as embedded locally in terms of positive impacts and their capacity to intervene on domestic human rights questions and, simultaneously, disembedded in terms of their responsibility.

BP states:

We accept that in the places where we operate *we must work to ensure* that our actions do not negatively impact human rights. However, we also believe that our business activity makes a contribution to provide the means for governments to meet *their responsibilities*—the payment of taxes and the monetization of oil and gas resources can provide the financial opportunity to better enable governments to meet *their human rights responsibilities*.

See BP, *Human Rights: Overview* (emphasis added), at <http://www.bp.com/genericarticle.do?categoryId=78&contentId=2000325> (last visited Feb. 16, 2004).

Shell states:

Shell companies do not make payments to political parties, organisations or their representatives or take any part in party politics. However, when dealing with governments, Shell companies

The case of Shell in Ogoniland after the Saro-Wiwa affair is particularly illustrative.<sup>124</sup> Shell claims to have voiced human rights concerns in the Saro-Wiwa affair and its chairman allegedly wrote to the Nigerian President for his clemency on humanitarian grounds;<sup>125</sup> in 1998, Shell appealed to

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have the *right and the responsibility* to make their position known on any matter which affects themselves, their employees, their customers, or their shareholders. They also have the *right* to make their position known on matters affecting the community, where they have a contribution to make.

Shell, *Statement of General Business Principles* (1997) (emphasis added), available at <http://www.shell.com/static/media-en/downloads/sgbp.pdf> (last visited September 7, 2004).

Total states:

TotalFinaElf participates in the economic development of host countries, respecting their cultures and without interfering in politics. We have no legitimate authority to recognize or condemn a specific regime or government.

This political neutrality does not mean that we do not express our point of view to national or local authorities on all issues, particularly human rights, of concern to us, our employees, our stakeholders and, where applicable, our neighbors. Nor does it preclude humanitarian initiatives.

Total, *supra* note 106.

Unocal states:

Unocal believes that we have a responsibility to society, especially in relation to the impact of our operations. *All employees* must respect the human rights and dignity of others. Managers are responsible for ensuring that any security arrangements developed for a Unocal-operated location *consider* the US/UK Voluntary Principles on Security and Human Rights.

. . . All Unocal employees and contractors personnel must maintain a stance of strict neutrality in the internal political affairs of a host country. Participation in any international energy development project should be based on resource potential, business economics and technical expertise—not political motivations.

. . . [T]he company nevertheless maintains its *right* to speak out about issues through lawful public or private channels *in circumstances where our business interests of the commercial environment dictate*.

Unocal, *Human Rights, Labor and Community Issues* (emphasis added), available at [http://www.unocal.com/ucl\\_code\\_of\\_conduct/ethics/labor.htm](http://www.unocal.com/ucl_code_of_conduct/ethics/labor.htm) (last modified Mar. 2003).

124. See Shell, *The Ogoni Issue: Ken Saro-Wiwa*, at [http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz\\_lhn7\\_2\\_1.html&FC3=/Nigeria/html/iwgen/issues\\_dilemmas/ogoni/ken/dir\\_kensaro\\_2703\\_0956.html](http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/leftnavs/zzz_lhn7_2_1.html&FC3=/Nigeria/html/iwgen/issues_dilemmas/ogoni/ken/dir_kensaro_2703_0956.html) (last visited Apr. 2, 2004).

125. Shell maintains:

ensure respect for human rights in the trial of another group of Ogonis, and they were eventually released.<sup>126</sup> Building on its past experience, Shell successfully asked the Nigerian Government to withdraw the Ogoniland-based Internal Security Task Force.<sup>127</sup> Finally, it claims to have contributed to debates aimed at enhancing the local share in oil-revenues.<sup>128</sup> Similar claims were made by BP for its activities in Colombia<sup>129</sup> and by Talisman Energy in Sudan,<sup>130</sup> and oil corporations increasingly take a market-oriented approach and boast about their community engagement initiatives.<sup>131</sup>

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In November 1995, leading Ogoni activist Ken Saro-Wiwa, MOSOP's leader, and eight others, were convicted and later executed on charges of incitement to murder. Some have said that SPDC did nothing to stop this.

On the contrary, the facts are that, despite Ken Saro-Wiwa's criticisms of Shell in general and SPDC in particular, we said that he had a right to freely hold and air his views. During the trial, we consistently and publicly stated that all the accused had a right to a fair legal process. After the trial verdict was announced, Cor Herkstroter, the former chairman of Royal Dutch/Shell Group, also sent a personal letter appealing to the Nigerian Head of State to show clemency on humanitarian grounds. Regrettably, despite our appeal and those of others, the executions went ahead.

We also made our position clear on the Ogoni 20, who were detained in 1994 for the same murders as Ken Saro-Wiwa. They were released in September 1998.

*Id.*

126. *See id.*; Shell, *Human Rights*, *supra* note 105.

127. *See* Shell, *Human Rights*, *supra* note 105.

128. *See* Shell, *Stakeholder Engagement*, at [http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/our\\_community/stakeholder/zzz\\_lhn.html&FC3=/Nigeria/html/iwgen/our\\_community/stakeholder/dir\\_indexstake\\_1505\\_1233.html](http://www.shell.com/home/Framework?siteId=Nigeria&FC2=/Nigeria/html/iwgen/our_community/stakeholder/zzz_lhn.html&FC3=/Nigeria/html/iwgen/our_community/stakeholder/dir_indexstake_1505_1233.html) (last visited May 20, 2004).

129. *See* BP, ENVIRONMENTAL AND SOCIAL REVIEW 2002, at 10-13 (2003), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/global\\_assets/downloads/E/Environmental\\_and\\_social\\_report\\_2002.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/E/Environmental_and_social_report_2002.pdf).

130. TALISMAN ENERGY, *supra* note 109, at 9.

131. *See, e.g.*, CHEVRONTEXACO, CASE STUDIES IN INTERNATIONAL COMMUNITY ENGAGEMENT (2003), available at, [http://www.chevrontexaco.com/social\\_responsibility/community/docs/intl\\_case\\_studies.pdf](http://www.chevrontexaco.com/social_responsibility/community/docs/intl_case_studies.pdf); TOTALFINAELF, *supra* note 104, at 77-103. These reports are separate from the financial reports produced by those corporations, which might prevent a genuine integration of those concerns into their economic activities (or display an actual desire not to integrate).

In many respects, ignorance, indifference, and clumsiness, more than bad faith, are the mental attitudes of decision-makers working for those power-wielding corporate giants.<sup>132</sup> It should be acknowledged that some efforts were made by oil corporations to adopt a more responsive attitude and to impact positively on local populations, which amounts to a display of minimal awareness of the complex local entanglements in which they participate. Yet, there is something odd about the fact that, while corporations avoid taking any responsibility for the violence used to ensure uninterrupted oil exploitation, they claim credit for their local improvement initiatives. It is disturbing in two regards. First, it is at least questionable whether the sums thus invested in the various communities affected by oil exploitation activities amount to either fair economic translation of local communities' legal entitlement over natural resources, or to fair compensation for the impact of oil exploitation on their lives. Second, even if oil corporations' various local community programs were adequate and sufficient, conceptualizing those disbursements as benevolence rather than as responsibility still falls short of recognizing the legal entitlements of those communities. Cynics might see in this preference for benevolence rather than genuine responsibility a form of moral elevation at a discount.

In the end, it is disingenuous to alter the discourse of general non-involvement in internal politics, premised on resilient theoretical constructions, by combining it with defensive statements on positive instances of involvement contributing to the enhancement or protection of the lifestyle and conditions of the local population. It suggests that, despite using the broad divides of international law to lay down a general position, oil corporations respond to social pressure in a way that negates or at least blurs the strict rigidity of such divides.<sup>133</sup> They simultaneously speak the languages of political neutrality and of political (meaning positive) implication. Their actions suggest that the simultaneous blurring of the public/private, political/

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132. See DANIEL LITVIN, *EMPIRES OF PROFIT*, at xii (2003).

133. For a general discussion on the blurring and decline of the private/public, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1981-1982) (discussing how the development of intermediate terms and the collapse of the distinction are, respectively, the second and third stages of the decline of the public/private distinction).

economic, war/peace, and international/domestic divisions is as much a part of a reconfiguration of practices by oil corporations themselves as the theorist's effort to re-describe old practices.

The first of the two previous sub-sections dealt with how prerogatives of the international legal system can be used to endow TNCs simultaneously with rights vis-à-vis other actors in the international society and transnational economy, as well as vis-à-vis local groups within the host state. In terms of right formation, oil corporations can claim a form of legal embeddedness that enables them to interact with the local polity and that forces other local actors to respect those rights and to adapt. Regarding the construction of responsibilities, the second sub-section argued that oil corporations also use the international/internal divide in the opposite direction, depicting the issue as a domestic one in which they are not entangled. The struggle is cast as both political and internal. So, when violence is involved as part of the conditions of enforcement of the rights recognized under international law, it is evacuated as an internal concern, neither grasped by international law nor, more importantly, altering or affecting the substance of the rights obtained under petroleum agreements. Here, the structure of international law constitutes a form of empowerment through avoidance.<sup>134</sup>

This diachronic approach to the involvement/invocation of international law by oil corporations regarding a common set of interactions—present as a form of empowerment at the time of prerogative formation and as a form of avoidance at the time of enforcement—is the legal argumentative technique that masks the instrumentality of violence to *their* activities. However, neither branch of the argument rests on legal doctrines specifically meant to govern the problem addressed in this Article, so their resilience can be thought to be grounded in instrumentality and in a crystallized sense of the identity of business actors more than in reasoned application to a new context.

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134. On the move from a conception of power as responsibility or competence to power as avoidance, see ZAKI LAÏDI, *UN MONDE PRIVÉ DE SENS* [A WORLD DEPRIVED OF MEANING] 33 (1994).

#### IV. INTERNATIONAL FINANCIAL INSTITUTIONS, ENFORCEMENT PRESSURES, AND THE MANAGEMENT OF POLITICAL RISKS

In the above sections, the functional analysis of the structure and doctrines of international law contributing to sustaining oil-related paradigms of violence and to obfuscating the role of oil corporations therein focused on the government-local groups-TNCs triad. I turn here to the contribution of institutional actors to sustaining those paradigms, through an examination of: (1) the World Bank loan approval policies linked to oil exploitation projects; and (2) the impact of political risk insurance. The involvement of these powerful actors as holders of a financial stake in oil exploitation projects can create externalized or internalized enforcement pressures, indirectly contributing to overcoming resistance to the use of violence to ensure uninterrupted oil exploitation. While these mechanisms are less closely determinative and supportive of the violence associated with oil exploitation, nevertheless they do encourage the enforcement of PAs.

##### A. *Ex ante Mitigation of the Risk of Violence-Fueling Oil Exploitation*

International Financial Institutions (IFIs) often pressure developing states to pursue colliding policies: Enabling economic actors to operate smoothly in a delocalized economy and mitigating the socio-economic impact of globalization on their polity.<sup>135</sup> In other words, they simultaneously encourage lesser and greater state involvement, with the former policy linked to increased levels of insecurity and institutional failures.<sup>136</sup> Those paradoxical pulls underpin the assessment process of investment projects at the World Bank. The role of the

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135. See Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L. L. & POL. 243, 255-57 (2000); see also Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. HUM. RTS. J. 227, 240 (2002) (identifying this tension in the World Bank as that between a self-interested bureaucracy and an instrumentality of its most powerful donors).

136. See Anne Órford & Jennifer Beard, *Making the State Safe for the Market: The World Bank's World Development Report 1997*, 22 MELB. U.L. REV. 195, 199 (1998). Voices are now heard that argue for the institutional empowerment of poor states in order to counter the adverse effects of globalization. See DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

World Bank has so far remained relatively modest in regard to oil exploration and exploitation projects, but its presence in that field is expanding.<sup>137</sup>

The World Bank has been strongly criticized for its funding of projects in countries in which human rights were blatantly and repeatedly violated, and it long resisted calls for a policy reorientation of its agenda integrating respect for human rights.<sup>138</sup> It is mostly through the notion of good governance, by conditioning its participation in projects to certain human rights standards, and by monitoring on-going projects that the World Bank has attempted to pay heed to criticisms of its leniency regarding human rights violations.<sup>139</sup> It has also made the standards adopted more binding,<sup>140</sup> notably by incorporating project guidelines into its lending contracts. Major oil investments fall in Category A,<sup>141</sup> which present the most demanding modalities in terms of pre-approval local consultation, environmental assessment, and study of alternatives to the project.<sup>142</sup> Borrowers for Category A projects also have

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137. See Genoveva Hernández Uriz, *The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?*, 28 BROOKLYN J. INT'L L. 77, 98-99 (2002) [hereinafter Uriz, *Oil Industry*]. Oil projects represent 15% of IFC's portfolio. *Id.* at 98 n.136. The Multilateral Investment Guarantee Agency (MIGA) is significantly less involved in oil exploitation projects, but the proportion of its portfolio grew from 2% to 5% between 2000 and 2001, while the total value of the portfolio grew from \$4.4 to \$5.2 billion. MULTILATERAL INV. GUAR. AGENCY [MIGA], ANNUAL REPORT 2001, at 20-21 (2001), available at <http://www.miga.org/screens/pubs/anrep01/Page19-31.pdf>.

138. See Horta, *supra* note 135, at 229-31. For a statement of the view that the World Bank's apolitical mandate prevents it from being a vehicle for the promotion of civil and political rights but allows it to promote socio-economic rights, see Ibrahim F.I. Shihata, *The World Bank and Human Rights, in THE WORLD BANK IN A CHANGING WORLD* 97, 97 (Franziska Tschofen & Antonio R. Parra eds., 1991).

139. See Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 204 (2001) [hereinafter Uriz, *To Lend or Not to Lend*].

140. See Uriz, *Oil Industry*, *supra* note 137, at 83-84.

141. INT'L FIN. CORP., PROCEDURE FOR ENVIRONMENTAL AND SOCIAL REVIEW OF PROJECTS 20 (1998) available at [http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/ESRP/\\$FILE/Env&SocReviewProc.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/ESRP/$FILE/Env&SocReviewProc.pdf) (presenting a list of examples of Category A Projects in "Annex B: Project Categorizations and Examples").

142. See THE WORLD BANK GROUP, WORLD BANK OPERATIONAL MANUAL: OPERATIONAL POLICIES [OP] § 4.01 (Environmental Assessment) (Jan. 1999),

an obligation to report on measure compliance and implementation while the project is under way.<sup>143</sup>

Despite those welcome improvements, low standards, or absence thereof, remain problematic. For instance, the non-recognition for loan approval purposes of land rights for which no formal title exists<sup>144</sup>—a core issue for indigenous peoples—will likely obfuscate existing conflicts and contribute to the simmering of injustices and the creation of resentment. More directly related to the question of violence, the World Bank's loan approval procedure sets no standard for the use of force or for the involvement of private security forces, despite the salience of these issues.<sup>145</sup>

The absence of explicit standards for the use of violence can, however, no longer be equated with a disregard for the issue or with a constitutional inability to tackle it. The case of the Chad-Cameroon Oil Pipeline project, a substantial private sector investment in sub-Saharan Africa, illustrates the World Bank's adaptive capacity in that regard. It is particularly instructive for the purposes of this Article given that Chad is experiencing an intermittent civil war.<sup>146</sup> The World Bank is involved in the project through the IBRD and the IFC, a participation crucial to ExxonMobil which made its own involvement conditional upon the World Bank's.<sup>147</sup> The approval of the project by the Bank was subjected to the above-stated approval

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OP § 4.02 (Environmental Action Plan) (Feb. 2000), OP § 4.12 (Involuntary Resettlement) (Dec. 2001), Operational Directives [OD] § 4.20 (Indigenous Peoples) (Sept. 1991), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf> (last visited Apr. 2, 2004).

143. See THE WORLD BANK GROUP, *supra* note 142, at OP § 4.01, OP § 4.12, ¶ 23, OD § 4.20 ¶ 19.

144. Under the World Bank's policies, people not holding recognized/formal legal title to lands and assets will not be fully consulted nor be entitled to full compensation for loss of land when relocated as part of a project sponsored by the World Bank. See Horta, *supra* note 135, at 237; Uriz, *Oil Industry*, *supra* note 137, at 114.

145. See Uriz, *Oil Industry*, *supra* note 137, at 115. IFC granted a loan to Harken de Colombia Ltd., a subsidiary of Harken Energy Corp. based in Texas, to develop oil fields in Colombia where it is frequent to resort to such services. *Id.* at 115-16.

146. This section draws heavily from Genoveva Hernández Uriz's two articles on the issue. See Uriz, *Oil Industry*, *supra* note 137, at 90-98; Uriz, *To Lend or Not to Lend*, *supra* note 139, at 219-220.

147. See Uriz, *Oil Industry*, *supra* note 137, at 90, 93.

formalities.<sup>148</sup> But, in order to lessen risks associated with governmental capture of the resource wealth of Chad, a supervisory mechanism was set up to ensure proper revenue management.<sup>149</sup> Internally, the Revenue Management Law governs the distribution of proceeds and puts in place a monitoring committee, whose composition however seems to favor the government.<sup>150</sup> Externally, supervision is exercised through the International Advisory Group, whose role is to report to the Bank and to the governments of Chad and Cameroon.<sup>151</sup>

No doubt, all condemnable uses of violence are not thereby prevented. During the inception of the project, the oil-producing regions have allegedly been the theater of repressive campaigns entailing the killing of approximately two hundred people.<sup>152</sup> But the World Bank is becoming more aware of its capacity to use its economic leverage as a pull to lessen systemic violence, even if it does so timidly. For instance, after part of Chad's \$25 million signature bonus was spent on the purchase of arms, the World Bank threatened to freeze the country's debt relief program.<sup>153</sup>

In the end, one can always question whether, by espousing the language of human rights, the World Bank is truly trying to lessen the negative impact of the projects that it backs and to filter those that overly disregard basic human rights, or simply trying to co-opt its critics.<sup>154</sup> Beyond *procès d'intention*, the enhanced attention given to the violence-fueling potential

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148. For an analysis of the shortcomings of compliance with the pre-approval formalities, see Uriz, *To Lend or Not to Lend*, *supra* note 139, at 220-25.

149. *See id.*

150. *See Uriz, Oil Industry*, *supra* note 137, at 95-97.

151. *See id.* at 95-96.

152. *See id.* at 92 n.103; Uriz, *To Lend or Not to Lend*, *supra* note 139, at 220 n.178.

153. Uriz, *To Lend or Not to Lend*, *supra* note 139, at 225.

154. Anghie expresses that concern:

Complex and troubling issues arise as to whether the fundamental goals of human rights law are being furthered or distorted by the Bank's activities. More broadly, the principal danger is that important economic actors who are primarily concerned with profit and promotion of a problematic form of economic development are increasingly appropriating and distorting the language of rights to justify and legitimize their own actions. These actions often produce results completely contrary to the human rights goals of preserving and protecting human dignity. Consequently, any alliance between human rights and globalization could result in the assimi-

of development projects is noteworthy. Yet, such attention is embryonic and the gaps remain numerous: low standards, lack of sanctions during the performance of the contract, and absence of obligations on oil corporations involved in World Bank-financed projects. The adequacy of the norms adopted and the regulatory silences constitute central issues, as they simultaneously set a threshold in terms of ensuring minimization of systemic human rights abuse risks and serve to consolidate and validate schemes that pass such threshold. Moreover, those policies can be thought to have a normative reach within the Bank itself, for the actors dealing with it, and, potentially, as a model for similar lending institutions.<sup>155</sup> In the end, the involvement of international financial actors may modify the scope or terms of the entitlements obtained by oil corporations, but, in the course of the exploitation of concessions, they do little to prevent abusive forms of enforcement of those entitlements. Thus, they do not compromise the effectiveness of the diachronic approach highlighted above.

#### B. *Insurance and Guarantee Schemes or the Externalization of Political Risks*

There are two forms of guarantees relevant to the consolidation of oil exploitation schemes that are associated with repressive or insurrectional violence. An institution whose mere involvement in the project creates an incentive for the host government to fully and promptly enforce the rights of oil corporations as provided in petroleum agreements can be thought to provide a form of guarantee in the loose sense of the word. Such would be the case, for instance, with the participation of the International Finance Corporation (IFC), an agency affiliated with the World Bank, which provides loans for and takes equity in privately financed projects in develop-

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lation of human rights and its ideals by the formidable forces of globalization.

Anghie, *supra* note 135, at 254.

155. See Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE 281, 281-282, 289 (Dinah Shelton ed., 2000); Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323, 323 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

ing countries.<sup>156</sup> The IFC has a specialized unit dealing with petroleum projects.<sup>157</sup>

By assuming commercial risks, the IFC is also thought to reduce the likelihood of certain political risks, such as expropriation or breach of contract, but not the risks of war or civil disturbance.<sup>158</sup> However, the possibility remains that, in order not to upset its relation with the IFC or the World Bank Group, a host government will be prepared to act more promptly or with more violence than it would otherwise like to use, so as to crush civil dissensions around oil wells or pipelines. As a result of the involvement of the IFC, it is quite possible that there is not a decreased risk that the rights of oil corporations will be impaired by war or civil violence, but an increased risk that governments will be willing to resort to petty violence in order to be seen as a safe investment location. To the extent that this is the result, IFC involvement reallocates the risks by transforming the consequences of local opposition to the conditions of oil exploitation from destruction of assets and loss of business opportunities or profits into violent displacement, repression, and deaths. It also displaces the location of the assumption of risks from oil corporations to local populations. A similar added enforcement incentive may be found when a governmental lending agency from a powerful country is involved in a project's financing.<sup>159</sup>

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156. For more detailed information on the IFC, see Int'l Fin. Corp., *Basic Facts About IFC*, at <http://www.ifc.org/about> (last visited May 10, 2004).

157. See Int'l Fin. Corp., *About OGMC*, at <http://www.worldbank.org/ogmc/aboutogmc.htm> (last visited May 10, 2004).

158. However, Michael Darden asserts:

On the other hand, IFC participation in a project is generally considered to reduce certain political risks associated with foreign investment. This stems from IFC's affiliation with the World Bank. Most governments are reluctant to harm their relationship with IFC because of the potential impact on their relationship with the World Bank, which can be a government's most important source of financing. Those political risks which IFC participation is considered to reduce are (i) currency transfer restrictions, (ii) expropriation, and (iii) breach of contract. IFC participation does not reduce the political risk of war and civil disturbance.

MICHAEL P. DARDEN, LEGAL RESEARCH CHECKLIST FOR INTERNATIONAL PETROLEUM OPERATIONS 15 (ABA Section of Natural Res., Energy, and Envtl. Law, Monograph Series No. 20, 1994).

159. The U.S. Export-Import Bank provides guarantees against commercial and political risks, among which are war or civil disturbance. See David

The stricter form of guarantee is political risk insurance, which can be provided by private companies or by national or intergovernmental insurance programs.<sup>160</sup> Governmental or institutional insurance schemes are thought to be more advantageous for their longer term, cheaper costs, and less stringent disputes over claims.<sup>161</sup> Political risks generally involve currency-related risks (inconvertibility, transfer, and devaluation) nationalization/expropriation, governmental default on payment guarantees, changes in the legal regime, sharp taxation increases, and political violence.<sup>162</sup> The latter category includes war, revolution, terrorism, civil strife and sabotage, and political risk insurance generally covers loss of assets and losses caused by resulting interruptions of business activities.<sup>163</sup>

The Multilateral Investment Guarantee Agency (MIGA), an agency of the World Bank Group, issues guarantees of investments in developing countries to cover non-commercial risks, notably war and civil disturbances.<sup>164</sup> The issuance of a guarantee by MIGA is conditional upon approval of the invest-

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Blumental, *Sources of Funds and Risk Management for International Energy Projects*, 19 BERKELEY J. INT'L L. 267, 282 (1998). It set up a project finance division in 1994 to assist U.S. companies in energy and infrastructure projects, which had approved \$2.6 billion worth of projects by 1998. *Id.*

160. See generally THEODOR MERON, *INVESTMENT INSURANCE IN INTERNATIONAL LAW* (1976).

161. See Alan D. Berlin, *Managing Political Risk* (Aug. 29, 2002), at [http://www.gasandoil.com/goc/speeches/polrisk\\_rev\\_8-29-02.htm](http://www.gasandoil.com/goc/speeches/polrisk_rev_8-29-02.htm) (last visited Feb. 21, 2004). For a comparison between OPIC and private insurance covering political risks, see Maura B. Perry, *A Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation*, 36 VA. J. INT'L L. 511, 534-36 (1996).

162. See PAUL E. COMEAUX & N. STEPHAN KINSELLA, *PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW* 2-3 (1997). Some now write of the risk of economic sanctions as an emerging form of political risk. See Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response to Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. 183, 185 (2001); see also Marcks, *supra* note 73 (treating actions against corporations for indirect involvement in human rights violations as a form of risk to be minimized and carefully allocated).

163. See COMEAUX & KINSELLA, *supra* note 162, at 16.

164. Convention Establishing the Multilateral Investment Guarantee Agency, art. 2 (Feb. 27, 2004), available at <http://www.miga.org/screens/about/convent/convent.htm> [hereinafter MIGA Convention]. On this see DARDEN, *supra* note 158, at 13. Article 11(a)(iv) defines such risk as "any military action or civil disturbance" on the territory of the host state. MIGA Convention, *supra*, art. 11(a)(iv). Note that MIGA and IFC are the fastest

ment by MIGA subsequent approval by the host country.<sup>165</sup> Until recently, MIGA did not consider the insured projects' human rights repercussions before granting coverage,<sup>166</sup> but this changed in 2001 when MIGA set up a Policy and Evaluation Office examining *a priori* the environmental impact of projects and *a posteriori* their developmental impacts.<sup>167</sup> MIGAs' coverage obligation engages when an asset is damaged or destroyed or when the investment is considered a total loss due to a one year business interruption caused by war or civil disturbance.<sup>168</sup> If MIGA honors the guarantee so contracted, it becomes subrogated to the rights of the investor against the host state.<sup>169</sup> It then successively tries to reach a settlement with the host government under a procedure set up by special agreement, or through negotiation, conciliation, or, eventually, ICSID-type arbitration.<sup>170</sup>

In addition to MIGA, national governmental insurance programs cover political risks,<sup>171</sup> such as the U.S. Overseas Private Investment Corporation (OPIC), Japan's Export-Import Insurance Division of the Ministry of International Trade and Industry, Germany's G&L, etc.<sup>172</sup> Although the modalities differ from MIGA's in terms of risks covered, eligibility, duration,

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growing agencies of the World Bank. See Uriz, *Oil Industry*, *supra* note 137, at 98.

165. MIGA Convention, *supra* note 164, arts. 15-16. For a discussion of the types of investments, investors, and host states admissible for coverage, see Jean Touscoz, *Les Opérations de Garantie de l'Agence Multilatérale de Garantie des Investissements (A.M.G.I.)* [*Guarantee Transactions of the Multilateral Investment Guarantee Agency (MIGA)*], 114 J.D.I. 901, 907-12 (1987).

166. See COMEAUX & KINSELLA, *supra* note 162, at 173.

167. See MIGA, ANNUAL REPORT 2001, at 87, available at <http://www.miga.org/screens/pubs/annrep01/policy.htm>.

168. MIGA, INVESTMENT GUARANTEE GUIDE 5, available at <http://www.miga.org/screens/pubs/guides/iggpdfs/IGGen.pdf> (last accessed Apr. 7, 2004).

169. MIGA Convention, *supra* note 164, art. 18.

170. See MIGA Convention, *supra* note 164, arts. 56-57; Touscoz, *supra* note 165, at 923-24.

171. See DARDEN, *supra* note 158, at 13-14.

172. See COMEAUX & KINSELLA, *supra* note 162, at 177-81. Shihata, writing in 1985, reckoned the existence of 23 national programs. Shihata, *The Role of Multilateral Investment Guarantee Agency (MIGA)*, *supra* note 138, at 271, 279. There is also a regional scheme, the Inter-Arab Investment Guarantee Corporation. See Inter-Arab Investment Guarantee Corporation, *About IAIGC*, at [http://www.iaigc.org/index\\_e.html](http://www.iaigc.org/index_e.html) (last visited May 20, 2004).

and costs,<sup>173</sup> OPIC and other such programs fulfill similar functions as MIGA.<sup>174</sup> OPIC recently provided political risk insurance for the construction and operation of a 350-mile natural gas pipeline in Colombia and for the construction of offshore oil-extracting equipment in the Republic of the Congo's waters.<sup>175</sup>

Subrogation and arbitration mechanisms, provided under an intergovernmental agreement between the U.S. and the host states,<sup>176</sup> govern the settlement of the claim if political risks materialize and OPIC is called to pay the investor. Whereas coverage for asset losses is straightforward, interruption of operations must last at least six months in order to trigger an indemnity, and such indemnity must be reimbursed to OPIC if resumption of operations is possible within five years.<sup>177</sup> Most Bilateral Investment Treaties signed by the United States, which set out the OPIC's terms of operation, seem not to provide for a right of total compensation in case of war, rather they function under the national treatment principle.<sup>178</sup>

In theory, the existence of insurance schemes should indirectly favor a diminution of violence, by reducing the economic necessity for TNCs to obtain enforcement of their prerogatives at all cost. However, since the threshold set to trig-

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173. See COMEAUX & KINSELLA, *supra* note 162, at 154-63.

174. OPIC insures U.S. private investment in developing countries against political risks, including political violence, in addition to contracting for loans and loan guarantees. However, OPIC previously did not contract loans for oil, gas, and mineral investment projects. See Michael W. Gordon, *The Overseas Private Investment Corporation: Risk Management Principles*, 48 TUL. L. REV. 480, 502 (1974). OPIC's political violence coverage includes war, revolution, insurrection, and civil strife; however, violence linked to labor or student movements is not covered. See 22 U.S.C. § 2194(a)(1)(C) (1990); COMEAUX & KINSELLA, *supra* note 162, at 156; OVERSEAS PRIVATE INV. CORP., PROGRAM HANDBOOK 9 (2004), available at [http://www.opic.gov/pdf/publications/03\\_ProgramHandbook.pdf](http://www.opic.gov/pdf/publications/03_ProgramHandbook.pdf).

175. See COMEAUX & KINSELLA, *supra* note 162, at 154.

176. Those provisions are usually contained in Bilateral Investment Treaties (BITs). For an account of the phenomenal thickening of the web of BITs between developed and developing countries, see Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990).

177. See COMEAUX & KINSELLA, *supra* note 162, at 159.

178. See Salacuse, *supra* note 176, at 671-72.

ger the right to an indemnity is high,<sup>179</sup> it does not significantly affect the financial advantage of resorting to petty violence when the situation falls short of the required threshold.<sup>180</sup> Paradoxically, the vicarious presence of powerful economic interests behind those insurance schemes can amount to an incentive for the host government to respond to growing civil disturbances with repressive violence, so as to remain in good grace vis-à-vis those interests.<sup>181</sup> In this regard, pressure can arise both out of subsequent discretionary economic decision—the disciplining effect of which can be internalized—and out of the possibility of claims from insurers.<sup>182</sup>

States are not legally bound to reimburse the subrogated insurer for losses due to acts of war or civil disturbance, since those risks are usually not under the control of the host government.<sup>183</sup> In most cases, *force majeure* clauses are likely to relieve the parties from their performance obligations.<sup>184</sup> But not all situations of internal troubles or violence fall under the general exculpatory principle, so the subrogation mechanism can be effective and permit the enforcement of a legal claim. One problematic doctrine provides for state responsibility where state authorities abstain from using reasonable means to restore order when confronted with civil disturbances.<sup>185</sup> In situations where oil production activities are constitutive of the conflict, this creates a dilemma for state authorities: Continue to ensure the undisturbed oil exploitation, at the cost of social peace, or pay heed to the resentment of affected people, at the cost of being sanctioned for violating their duty to protect the assets and property interests of oil corporations.

This problem is not specific to the activities of insurers, but it is an important aspect of their involvement. Involving

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179. See COMEAUX & KINSELLA, *supra* note 162, at 171.

180. Touscoz argues that civil disturbance must be provoked by groups pursuing broad political objectives and that it would not cover narrower worker or student uprising, a position that does not seem to follow from Article 11(a)(iv). See Touscoz, *supra* note 165, at 916

181. *Id.* at 906 (emphasizing the complex and mutually reinforcing web of relationships between the host government and insurers).

182. See Perry, *supra* note 161, at 554.

183. See IBRAHIM F.I. SHIHATA, *MIGA AND FOREIGN INVESTMENT* 134 (1988).

184. See LEON E. TRAKMAN, *THE LAW MERCHANT* 48-49 (1983).

185. See U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32 (May 24).

insurers that are powerful institutional actors enhances the strength of the responsibility mechanism. The process of subrogation of the rights of investors for the reimbursement of insurance indemnity masks who is imposing the cost of failure to enforce the contractual rights on the local population.<sup>186</sup> By being part of an international or intergovernmental process, it endows the claim with a higher degree of legitimacy than if private foreign corporations were formulating it, and it attaches treaty-like enforcement. It endows the claim with the legitimacy of international or intergovernmental institutions and attaches treaty-like enforcement to it.<sup>187</sup>

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186. The private sector is also taking part in the growing market of political risk insurance. See COMEAUX & KINSELLA, *supra* note 162, at 181. Until very recently, the coverage offered by private insurers regarding political violence was narrower than that provided by public or semi-public insurance schemes, as it generally did not include war losses to land-based assets. See *id.* at 182. The much shorter term of private policies, renewable one to three year contracts, and the higher premiums were less interesting for investors. See *id.* But those modalities are changing and a renewed dynamism animates major private actors of the insurance and reinsurance industry. See generally Douglas A. Paul, *New Developments in Private Political Risk Insurance and Trade Finance*, 21 INT'L LAW. 709 (1987) (providing background on the private insurers and emphasizing the changes in the private insurance industry). At the heart of such dynamism is a pattern of collaboration between private insurers and MIGA, the latter being authorized under its constitutive document to make reinsurance arrangements. MIGA Convention, *supra* note 164, arts. 20-21; Annex I, art. 5. In 1997, it signed a treaty reinsurance agreement with ACE Limited, and two years later, it did the same with two Bermuda-based private companies, XL Insurance Company Ltd. and ACE Bermuda Insurance Limited. See MIGA, *MIGA Signs Treaty Reinsurance Agreement with XL and Ace* (Feb. 22, 1999), at <http://www.miga.org/screens/news/archives/022299.htm> (last accessed Apr. 7, 2004). This is a significant development that bridges the gap between public and private actors and locks them into a common endeavor. Considering that ACE was created in 1985 by a consortium of thirty-four Fortune 500 companies, there is ground to wonder whether MIGA will turn into a convenient *prête-nom* for big businesses desiring to secure the enforcement of their investments abroad. MIGA's Cooperative Underwriting Program follows a similar logic, whereby MIGA acts as the insurer-of-record and issues a guarantee for the entire amount requested but retains only a portion of the exposure and underwrites the balance to private insurers. See MIGA, ANNUAL REPORT, *supra* note 137, at 25.

187. Arundhati Roy explains this working mechanism in more colorful language:

So the private company covers itself with an export credit guarantee. The ECA [Export Credit Agency], in turn, has an agreement with the government of its own country. The government of its

The impact is to shield TNCs from the constraints of local life, while externalizing the risks linked to oil exploitation. For TNCs, the overall scheme in which they operate is relatively safe: In times of turmoil, they can enforce their contractual right through state collaboration or receive an indemnity.<sup>188</sup> While risks are minimized for foreign investors, the cost of the guarantee of their rights is assumed by the local population, either in physical terms (violence, forced displacement, etc.) or materially, through the imposition of a financial burden on the central government of the state.

It would make little sense to place institutional lenders and guarantors in oil exploitation projects on par with oil corporations, repressive governments, security firms, and predatory guerillas for their contribution to sustaining the militarization of the oil industry. First, the extent of their financial involvement in oil projects has remained proportionately modest.<sup>189</sup> Second, the exercise of actual and overt pressure for enforcement of petroleum agreements by agencies of the World Bank Group has not been demonstrated. Moreover, in all fairness, it is probable that MIGA and other political risk insurance schemes adequately fulfill their role of producing greater returns on investments and, thus, of encouraging direct foreign investment in and economic growth of developing countries.

Yet, examining the role and scrutinizing the activities of institutional lenders and guarantors remains important. First, even if still relatively modest, the involvement of those actors in oil exploration and exploitation projects has nonetheless in-

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country has an agreement with the government of the importing country. The upshot of this fine imbrication is that if a situation does arise in which the ECA has to pay its client, its own government pays the ECA and recovers its money by adding it to the bilateral debt owed by the importing country. (So the real guarantors are actually, once again, the poorest people in the poorest countries.) Complicated but cool. And foolproof.

Roy, *supra* note 11, at 61; *see also* Orford and Beard, *supra* note 136, at 216.

188. Some believe that we should go even further in this process of evacuation of associative or indirect corporate responsibility for human rights violations by requesting that host states provide adequate compensation to a corporation found liable for such violations. *See* Marcks, *supra* note 73, at 325-26.

189. *See* MIGA, THE FIRST TEN YEARS, 1988-1998, fig. 3 (1998), available at <http://www.miga.org/screens/pubs/tenyrs/figure3.htm>.

creased over the past years.<sup>190</sup> While foreign direct investment generally stalled and decreased in the 1980s, in the 1990s, there was a resumption of investments in developing countries, and financial mechanisms were set in place to ensure continuity and stability of those investments.<sup>191</sup> Second, there is no need for much direct coercive action to be taken by the World Bank or foreign governments to create an effective pull for enforcement of contested oil exploitation-related prerogatives. Instilling self-discipline in governmental actors might be the most effective way to obtain enforcement of oil corporations' petroleum agreement rights. While there seems to be little escape to the process of internalization of norms, the question of which norms are internalized and become self-disciplining is significant. There is little doubt that IFIs and other financial actors are key players in the elaboration and promotion of those norms. The policies and institutional linkages highlighted in this section, while not contributing directly to the attribution of responsibility, nonetheless provides a better understanding of the pattern of incentives to enforce oil-related prerogatives, even violently.

## V. CONCLUSION

In 1979, Professor Brownlie wrote about the existence of a "moral duty placed upon producers and possessors of important commodities and raw materials to make these available to those States whose economies are significantly dependent upon such items."<sup>192</sup> The actual conditions of oil exploitation—characterized by a symbiotic collaboration between host governments and oil corporations, and the externalization of costs or burdens onto the local people—raise a complementary set of moral issues pertaining to the existence of correlative duties on those who benefit from such oil exploitation.

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190. For instance, from 1999 to 2003, the oil and gas sector grew from 3% to 6% of MIGA's portfolio, which went from \$3.7 billion to \$5.1 billion. MIGA, ANNUAL REPORT 2003, at 20 fig. 4, 22 tbl. 6 (2003), available at <http://www.miga.org/screens/pubs/annrep03/pdf/2003>.

191. While official development resources going from developed to developing countries diminished from 1990 to 1997, long-term private flows went from \$41.9 billion to \$256 billion. MIGA, THE FIRST TEN YEARS, 1988-1998, tbl. 1 (1998), available at <http://www.miga.org/screens/pubs/tenyrs/table1.htm>.

192. Brownlie, *supra* note 78, at 273.

There is an actual enrichment of developing countries through oil exploitation, but this enrichment is clearly not shared evenly and is generated under conditions of violence, environmental degradation, population displacement, and other forms of human rights violations. In this context, it is legitimate to ask whether there is a duty on those carrying out oil exploitation to ensure that people living in an oil-rich region derive a genuine benefit from it. Should the affectedness of the local people transform their participation and provide them with more stringent abuse-deterrence and sanction mechanisms? Are there certain burdens that cannot and should not be imposed on the population affected by the oil exploitation and transportation activities?

As a way to address those issues, increased scrutiny of the behavior of actors at the heart of those practices is needed. Many repressive and corrupt regimes have been blamed for the current state of affairs, not without merit.<sup>193</sup> But the focus on the behavior of foreign leaders should not obfuscate the fact that oil corporations—mostly from the North but also from a few other important regional powers—generate high profits under those conditions. Conversely, it is unsatisfactory to take the opposite approach, declaring oil corporations to be inherently detrimental and, thus, equally or primarily responsible for a whole range of human rights abuses concretely committed by governmental agents. In the various instances examined in this Article, the truly problematic question is not the monopoly of the state on the use of force or even the economic preponderance of foreign economic actors. The problematic issue is the symbiotic convergence of both forms of monopolies or quasi-monopolies, amounting to dominance of two of the most central distributive spheres by various *sui generis* government-TNC conglomerates.<sup>194</sup> In a sense, close collaboration between governments of developing countries and oil corporations seems to present the ambivalent record of globalization: The production of more aggregated wealth, but a wealth that is problematically distributed, along with the

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193. See, e.g., GLOBAL CORRUPTION REPORT (Transparency Int'l ed., 2002), available at [http://www.globalcorruptionreport.org/download/gcr2003/01\\_Table\\_of\\_contents\\_etc.pdf](http://www.globalcorruptionreport.org/download/gcr2003/01_Table_of_contents_etc.pdf).

194. See MICHAEL WALZER, SPHERES OF JUSTICE 10-20 (1983).

coterminous creation of important socio-economic dislocations.

What is needed to tackle the problem of oil-fueled violence is to develop legal institutions operating within the nodal point formed by the interactions of state authorities, oil corporations, and local groups. Reliance on the public/private and international/domestic divides to settle appropriately conflicts that are located at the juncture of those divides proves unsatisfactory. It seems necessary to go beyond a principle of responsibility that only acknowledges the direct commission of human rights abuses and start to examine more intricate forms of participation and involvement that are obfuscated by those structural divides.<sup>195</sup> The erosion of these divides announces the entry into a period of continuumization in which the package of legal responses to previously clear cut situations is disaggregated in the face of the impossibility to concretely maintain the distinction.<sup>196</sup> Some have already started to undertake the task of constructing a theory of responsibility,<sup>197</sup> and a few court cases alleging the involvement of human rights abuses by oil corporations are currently pending.<sup>198</sup> Norms from various streams of international law are currently invoked to secure a form of check against human rights violations including human rights law, international labor law, humanitarian law, law on the use of force, international environmental law, law of indigenous peoples, etc.

While the construction of limits on and responsibility for benefiting from systemic or repeated violence is a necessary and laudable endeavor, we must bear in mind that it comports the danger of putting a price on fundamental human rights.

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195. For a view that suggests how a corporation can avoid the "gray areas" successfully and avoid litigation, see Marcks, *supra* note 73, at 313.

196. See Kennedy, *supra* note 133, at 1353.

197. See the various contributions in *Symposium: Holding Multinational Corporations Responsible under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 285-506 (2001). See generally Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law: An Introduction*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Kamminga & Zia-Zarifi eds., 2000) (explaining that because multinational corporations now fall "within the ambit of international law . . . liability of MNCs under international law is necessary, is possible, and is inevitable").

198. See Jennifer Green & Paul Hoffman, *US Litigation Update*, in Kamminga & Zia-Zarifi, *supra* note 197, at 231.

Those working on the edification of such theories of responsibility face a serious dilemma in that regard. The more severe they are vis-à-vis the behavior of oil corporations and other TNCs, and the broader they frame their theory of corporate responsibility, the less likely judges are to be receptive to those theories instead of the business-as-usual approach. However, theories of responsibility that are too lenient might have little deterrent effect and simply lead to processing human rights violation linked to oil exploitation through a purely commercial or economic matrix, i.e., computing human rights litigation as an additional cost of doing business.<sup>199</sup> One solution might be to aim at putting a very high cost, through the use of private law and criminal law mechanisms, on relatively precise forms of conduct so as to gain judicial acceptability and to hope for a chilling effect and subsequent analogical legal developments to curb similar practices.

Another avenue is to close the diachronic gap between the valid creation of property or exploitation rights and the conditions in which those rights are exercised. It is possible to achieve that through the principle of sovereignty over natural resources. First, a temporal prolonging of the principle would permit it to cover not only the rights creation moment, but also the on-going exercise of those rights. Such can easily be read in the permanent dimension of the principle. Second, considering the interests of the population directly affected by the oil exploitation would permit it to reduce the opportunities to exploit the representational gap. Such a reading can be accommodated by operationalizing the people prong of the principle of sovereignty over natural resources.<sup>200</sup> This would incorporate the clash of interests into the contractual rights obtained by oil corporations, as was the case when the principle of sovereignty over natural resources was first crafted. Without affecting the government's positive ability to attribute rights to foreign investors, this reinvigorated reading of the principle could sanction abusive corporate behavior by negating the ability of oil corporations to exercise their rights in certain conditions. It could allow affected groups, for in-

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199. See Marcks, *supra* note 73, at 317-18, 332-33 (reporting the calculus-based approach of Unocal's leaders to the question of human rights violation in Burma and advancing an economics-based approach).

200. See *supra* note 103.

stance, to challenge that title to the extracted oil has validly passed to oil corporations, thus endowing them with a negative or suspensive prerogative. To limit opportunistic behavior by local groups, a clean hands doctrine could be used as a filter.

In any case, these are food for thought and need further articulation. This Article undertook a task that precedes the edification of theories of responsibility: Examining the unsatisfactory nature of the current arsenal of legal justifications used to eschew calls for the assumption of responsibility by oil corporations for the violence associated with their activities. It is inappropriate because it rests on the invocation of abstract doctrines meant to address other problems, because it rests on an un-consequentialist application of those doctrines, and because it does not pay heed to changes in the display of the main material forces at stake. It rests on an asymmetrical construction of the interactional realms of rights and of obligations of TNCs, which allows them to exercise a form of power as avoidance. When the violence used by vastly more powerful actors to counter local opposition is condoned by the inertia of a legal system—i.e., not openly embraced or tolerated as necessary for the common good, but rather disregarded for the sake of enforcing particularist prerogatives—the appropriateness of the doctrines used should be closely scrutinized. With Hersch Lauterpacht, we can note the inadequacy of the idea that “the necessary consequence of the presumed silence of the law is a rigidly negative attitude towards interests claiming legal protection.”<sup>201</sup>

The patterns of oil exploitation described in this Article clearly attest to the banalization and instrumentalization of violence. Enough instances of such violence have been reported since the dismantling of the Berlin Wall—not to mention that, behind the wall of overt violence, more subtle forms of dissuasion or *proto-violent* pressures likely embrace a similar dynamic<sup>202</sup>—so as to question the contribution of systemic factors, including the international legal system. While this Article focused on a critical examination of the contribution of international law to the problem, the open-ended character of

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201. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 86 (1933).

202. TILLY, *supra* note 71, at 36.

the discipline should also permit us to find, within it, adequate solutions to this problem. If we are to assume the best out of international law's tradition, civilizing the practices of the oil industry so as to contain its excesses is a task that we should not neglect.<sup>203</sup>

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203. *See* MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 4-5 (2002) (describing the identity of international lawyers as “civilizer” of international or transnational interactions).